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# Transnational Dispute Management

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## CONTEXT & CULTURE

### Sociology of International Arbitration

*Emmanuel Gaillard  
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#### Executive Summary

Since the first comprehensive work in sociology of international arbitration in 1996 by Dezalay and Garth, international arbitration has changed considerably. This article considers those changes, through the prism of sociology. Although the essential players (parties and arbitrators) remain the same, arbitration nowadays includes a host of new actors: the numerous service providers, including the "merchants of recognition" that distribute legitimacy within the field of international arbitration; and the value providers who provide guidance as to the way international arbitration should develop and how arbitral social actors should behave. This article also describes the main rituals in international arbitration that structure the manner in which social actors are expected to behave, as well as the manner in which actors interact in the field of international arbitration. In particular, it shows how international arbitration, as a social field, has evolved from a solidaristic to a polarized model in which a variety of actors share different sets of values and beliefs. After drawing a distinction between functions and roles and its impact on the assessment of conflicts of interest, the author explores how norms are generated in a polarized field.

*This article was originally presented as the 2014 School of International Arbitration - Freshfields Lecture in London on 26 November 2014.*

[↪ Full article here](#)

## COSTS OF ARBITRATION

### Where do we Stand? Where Should we go? An Assessment of Recent Costs Allocation Trends in International Commercial and Investment Arbitration

*Juan Pablo Hugues Arthur  
Ministry of Finance and Public Credit, Mexico*

#### Abstract

Normally, whereas presenting a commercial contract or investment treaty claim before an arbitral tribunal, two things

are for certain: the costs for this endeavor will be high, and there is no certainty on how such costs will be allocated.

Against the former statement, this article first suggests that investor-State case law on allocation of arbitration costs is evolving towards an endorsement of a "loser pays" approach, taking into account particular casuistic circumstances, whilst international commercial arbitration seems to be stuck shifting wholly or partially the procedural costs to a losing party, but no so much the parties' costs.

Based upon the fundamentals of each type of arbitration, and their literature on costs allocation, this article endeavors on an in-depth argumentation by virtue of which it is advanced that the evolution experienced in investor-State case law is legally sound and generally positive, but that international commercial arbitration enjoys room for improvement in terms of economic efficiency and legal certainty. Therefore, certain proposals are stressed in order for the evolutionary trend in investment arbitration to subsist and for the allocation of costs in commercial arbitration to improve, first, and second, for the general system of international arbitration to be consequently strengthened.

[Full article here](#)

## INVESTMENT TREATIES

### **The European Commission's Approach to the Transatlantic Trade and Investment Partnership (TTIP): Investment Standards and International Investment Court System - An overview of the European Commission's draft TTIP text of 16 September 2015**

*Catharine Titi  
University of Bourgogne, CREDIMI*

#### **Introduction**

On 16 September 2015, the European Commission unveiled an informal text proposal to the United States (US) for the negotiations on the investment chapter of the Transatlantic Trade and Investment Partnership (TTIP). This informal text will be followed through with consultations between the Commission and the EU member states in the Council and discussions with the European Parliament, before a formal proposal may be presented to the United States. The draft text is an addition to an earlier proposal on the TTIP Title on trade in services, investment and e-commerce, that was tabled for discussion with the US in the negotiating round of 12-17 July 2015 (hereinafter 'draft TTIP Title on trade in services, investment and e-commerce'). That earlier document contained section 1 of the investment chapter on Liberalisation of Investments, while the new draft contains section 2 on Investment Protection and section 3 on Resolution of

Investment Disputes and Investment Court System. A standalone unnumbered provision at the head of the new text contains the definition of investment.

[Full article here](#)

### **The Leaked TPP Investment Chapter Draft: Few Surprises . . . is that a Surprise?**

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#### **Introduction**

My primary "instant reaction" to the text of the leaked Trans-Pacific Partnership (TPP) Investment Chapter is surprise that the negotiations of the Chapter appear to have been close to closing as of late January. A quick comparison with the 2012 U.S. Model BIT reveals no major departures other than those one would have expected given the context of the negotiations (the negotiation of an Asian/western hemisphere agreement and the heightened concern with regulatory chill) - so we see, for example, the provision for a State's right to regulate to protect its economy, its public health and welfare and the/its environment. These kinds of provisions have been largely present since the 2004 U.S. Model BIT introduced concepts in the annexes on expropriation and customary international law aimed at protecting regulatory space, as well as in limitations on litigation related to balance of payments and public debt in free trade agreements (for example in CAFTA-DR).

[Full article here](#)

### **Elección Del Foro Arbitral Y Del Derecho Aplicable en El Incipiente Régimen Europeo de Protección de Las Inversiones Extranjeras**

*Dr. Francisco José Pascual Vives  
University of Alcalá*

#### **Resumen**

[Paper in Spanish] El trabajo examina la interacción entre el Derecho de la Unión Europea y el régimen internacional de protección de las inversiones exteriores. Mientras las instituciones de la Unión Europea y sus Estados miembros modelan el contenido de los futuros acuerdos europeos de inversión y definen el alcance de la política europea de inversiones, es importante analizar a la luz de la práctica más reciente, las posibles fórmulas de participación de la Unión Europea en el arbitraje de inversiones y la consideración del Derecho de la Unión Europea como derecho aplicable en el arbitraje de inversiones.

## Abstract

The paper examines the interplay between European Union Law and the international foreign investment protection regime. While the European institutions and its Member States shape the content of the future investment agreements and define the investment policy, it is worth analyzing in light of recent practice the eventual participation formulas of the European Union in investment arbitration, and the consideration of European Union Law as applicable Law in investment arbitration.

*This paper has been prepared within the research project entitled "The Definition of the European Foreign Investment Regime: An Analysis from Public International Law" (UAH-Ref. 2013/015). An English version version of this paper has been published as "SHAPING THE EU INVESTMENT REGIME: CHOICE OF FORUM AND APPLICABLE LAW IN INTERNATIONAL INVESTMENT AGREEMENTS" in Cuadernos de Derecho Transnacional (Marzo 2014), Vol. 6, N° 1, pp. 269-293 ISSN 1989-4570 - www.uc3m.es/cdt.*

[Full article here](#)

## INTERNATIONAL COMMERCIAL ARBITRATION

### International Commercial Arbitration - Procedural Approaches: Civil Law versus Common Law

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#### Introduction

Court procedures in Civil Law and Common Law countries can be markedly different. Typically, common law judges tend to leave it to the parties to present their respective cases and then form a judgment on the basis of what the parties have chosen to present to the court. In contrast, in the courts of most civil law countries, the judge has wider powers to take a more active role in the conduct of the proceedings (for instance, in the collection of evidence, including the examination of witnesses).

International arbitration is designed with the objective of avoiding the formalities and technicalities that are associated with many national litigation systems. The parties and the arbitration tribunal are largely free to shape the arbitration procedure, since most institutional rules, including the ICC rules, provide only a general framework for the arbitral procedure, while reserving the bulk of the issues relating to the arbitral process resolution by the arbitral tribunal, in the absence of the parties consent. This is not

surprising since international arbitration is chosen to provide commercially-sensible and practical solutions to cross-border commercial disputes. This requires dispensing with many domestic law procedures, and instead adopting procedures that will achieve the objectives of international arbitration.

[Full article here](#)

### Evaluating the Advantages and Drawbacks of Emergency Arbitrators

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#### Introduction

Commercial parties choose to resolve their disputes by international arbitration for many reasons, including greater confidentiality, a neutral forum, and increased control over the selection of decision-makers. Until recently, however, parties were required to go to national courts to request interim measures of protection-such as security, asset freezes, or orders for the protection of evidence-before the constitution of an arbitral tribunal.

In response to a perceived need for a mechanism for awarding interim relief within the arbitral system itself (rather than national courts), in 2006 the International Centre for Dispute Resolution (ICDR) incorporated emergency arbitrator proceedings into its rules. In the following nine years, almost every major international arbitration institution has followed suit. Emergency arbitrator provisions are now the norm, including for new entrants in the field. Were these amendments a response to a genuine need for emergency relief in international arbitration? Are emergency arbitrators being used, and are their decisions enforceable?

A review of information from the arbitral institutions reveals that parties are, in fact, using emergency arbitrator mechanisms, and that decisions of emergency arbitrators are generally rendered within very short time frames. The case law from U.S. courts-including the high-profile *Yahoo! v. Microsoft*-indicates decisions by emergency arbitrators are likely to be enforced. Given these factors, in certain circumstances the use of emergency mechanisms within the arbitral system will be preferable to going to a national court for interim relief.

*This article first appeared in the March 30, 2015 issue of the New York Law Journal, [www.newyorklawjournal.com](http://www.newyorklawjournal.com), a publication of ALM Media Properties. Republished with kind permission.*

[Full article here](#)

## INVESTOR-STATE DISPUTES - INTERNATIONAL INVESTMENT LAW

### Denunciations Plus: Evaluating ICSID Withdrawals Bearing Additional New ICSID Provisions

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#### Summary

Much ink has recently been spilled on the question of what a party's denunciation of ICSID entails. But what happens when a state makes another notification (like the announcing of a pro futuro 'exhaustion of local remedies' requirement) at the same time as the notice of denunciation? I argue that Ecuador's 2009 ICSID denunciation essentially has an Article 26 notification bundled within. Despite the frenzy of academic speculation on denunciation issues, this curious provision has received virtually no attention. I first give an overview of the three schools of thought on denunciation and consent -- Schreuer's "offer and acceptance" model, Manciaux's intermediate model, and the enduring BIT model -- outlining their mechanics, their adherents, and their objections. I then discuss Ecuador's notice of denunciation cum notice of local remedy exhaustion in relation to past awards and greater contextual treaty considerations. Then I run the Ecuador hybrid notification scenario through each of the three models, pointing up areas where application becomes thorny or admits of multiple readings. I conclude with an assessment of the most plausible reading and discuss final considerations of the topic's importance, including a call for greater transparency in ICSID summaries of unconventional communications from states.

[Full article here](#)

### Res Judicata in International Arbitration: To What Extent Does an Arbitral Award Prevent the Re-Litigation of Issues?

*Biset Sena Gunes  
Ankara Yildirim Beyazit University*

#### Abstract

The res judicata effect of an arbitral award is of paramount importance in international arbitration since parties to a dispute predominantly choose arbitration to obtain a final and binding resolution to their existing or potential disputes. Nevertheless, there is limited guidance for arbitrators on how to respond to such issues. Even though one might think to apply national res judicata provisions, they are not only divergent but also litigation-specific. Thus, they are not able to provide ideal solutions to the problems arising in international arbitration. One of the issues that

remains unclear in this respect is the scope of this effect. Therefore, this paper focuses on the applicability of issue preclusion to international arbitral awards. The central hypothesis outlined here is that arbitral awards should be given issue preclusive effects on an international basis subject to certain exceptions for the reasons of finality, procedural efficiency and consistency.

[Full article here](#)

### Compliance with the Laws of the Host Country in Bilateral Investment Treaties

*Dr. Panayotis M. Protopsaltis  
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#### Introduction

Most modern Bilateral Investment Treaties (BITs) contain the so-called 'in accordance with the law' or 'legality requirement' provisions, establishing a requirement of compliance of the investment with the laws of the host country. The said provisions are by no means uniform or, to quote an ICSID Tribunal, '[t]here are various forms by which States establish the 'in accordance with the law of the host State clause''. Some BITs contain a relevant reference in the preamble. Yet, most frequently, the provision is included in the definition of the term investment.

*This article is a pre-publication from the upcoming volume dedicated to the memory of the late Professor Elias Krispis, (Athens-Thessaloniki, Sakkoulas, 2015) containing studies by leading scholars in law and international relations.*

[Full article here](#)

### Comparing Political Risk Insurance and Investment Treaty Arbitration

*Mark Kantor  
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#### Introduction

One of the constants in Prof. Don Wallace's professional life has been the intertwining of political risk and arbitration. In honor of Prof. Wallace, this Essay addresses a question that arises in the public policy debate about investment treaty arbitration--does the availability of political risk insurance ("PRI") make investment treaty arbitration unnecessary?

The answer is: No.

We will be able to draw a few significant conclusions from the following comparison between PRI products and investment treaty arbitration:

- Investment treaty arbitration is a forum, not a guarantee.
- Investors lose more often than they win in treaty arbitration. When they win, they are awarded only a fraction of their claims.
- Obtaining an investment treaty award is just the beginning of the process of collecting the awarded sum. States increasingly resist payment of awards, thereby forcing an arduous and often unsuccessful collection process.
- Payment under a PRI policy does not extinguish the claim against the host State. Payment by the PRI provider merely shifts the claim from the investor to the PRI provider to pursue itself.
- PRI policies generally do not cover conduct that constitutes breach of the international Minimum Standard of Treatment/Fair & Equitable Treatment protections found in investment treaties.
- PRI policies generally do not cover discriminatory conduct in breach of the Most Favored Nation and National Treatment protections found in investment treaties.
- PRI policies contain ceilings and percentage risk-sharing provisions that result in a significant portion of the investor's loss being borne by the investor notwithstanding the existing of PRI cover. Many PRI policies reimburse only for book value losses - net invested capital - not market value.
- PRI policies contain numerous limits, exclusions, covenants and conditions that further restrict coverage.
- The annual premiums payable on PRI policies are substantial and are payable whether or not a dispute arises.
- The average costs of investment treaty arbitration appear lower than the costs of PRI policies, depending on the duration of the policy and the time when a covered event arises after issuance of the policy.

(c) Juris Publishing. This is chapter 34 from "A Revolution in the International Rule of Law: Essays in Honor of Professor Don Wallace Jr." (Sabahi, Birch, Laird, Rivas eds., Juris Publishing 2014) ISBN: 978-1-57823-347-2. Hardcover, 702 Pages, October 2014  
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## Preliminary Objections in ICSID Annulment Proceedings after *Elsamex*

*Marco Garofalo*

### Abstract

The recent *Elsamex* decision marks the first time an ad hoc committee has considered a preliminary objection in the context of ICSID annulment proceedings. Since 2006, preliminary objections, which strike a balance between efficiency and due process, have only been considered during main arbitral proceedings, not annulment applications. After briefly explaining the history of preliminary objections, which were brought into ICSID arbitrations through the 2006 amendments to the ICSID Arbitration Rules, the author argues that the *Elsamex* ad hoc committee generally struck the balance between efficiency and due process appropriately when considering the context of annulment applications. However, the author also argues that the ad hoc committee could have better protected the interests of efficiency without compromising due process by requiring more information in annulment applications. As a result, we can expect a very limited use of preliminary objections in annulment proceedings in the future. Therefore, the author proposes three solutions to compel more detail in annulment applications.

↪ [Full article here](#)

## Jurisdiction and Applicable Law in Investment Treaty Arbitration

*Professor Christoph H. Schreuer*

### Abstract

This article first discusses the law governing a tribunal's jurisdiction. Jurisdiction is governed primarily by the instrument(s) bestowing jurisdiction. In the case of treaty arbitration, this will be the treaty offering consent to arbitration. On certain points, like the legality of the investment and the investor's nationality, that treaty will refer to domestic law. A second part deals with the varying scope of jurisdiction exercised by investment treaty tribunals. It ranges from a wide jurisdiction over all disputes arising from investments to jurisdiction only over certain narrowly defined disputes. There is no clear correlation between these jurisdictional clauses and provisions on applicable law in the relevant treaties. A third part looks at situations in which the tribunal's jurisdiction and the applicable law derive from different sources. This is the case, in particular, where the tribunal applies substantive standards that existed before the entry into force of the treaty providing for jurisdiction. *Republished with permission - McGill Journal of Dispute Resolution (MJDR) Volume 1, Issue 1 (1:1-2014) mjdr-rrdm.ca*

↪ [Full article here](#)

## ROUNDUP OF ARTICLES

### The Predictability Paradox - Arbitrators and Applicable Law

*Professor William Park  
Boston University, School of Law*

#### Introduction

More than a half century ago, a Hungarian psychoanalyst suggested terms to distinguish between thrill seekers and those who cling to the predictable: the 'philobat' who enjoys departing from the safe and predictable, and the 'ocnophile' who clings to stability. The latter category includes the risk averse (or just plain prudent) individuals who accept the prospect of being up only one dollar (rather than two) in order to attenuate the possibility of having nothing at all.

Much of the impulse to arbitrate international disputes might be explained as a response to spectres of uncertainty, whether lying in the 'hometown justice' of another country's judicial system, or the perceived volatility of a civil jury in a faraway land. In the face of such hesitations, arbitration has been pressed into service to create more level litigation playing fields and to reduce the risk of random results. The inclination toward certainty and reliability might also explain differences in how arbitrators and judges approach application of national law. Although perceptions exist in some quarters that arbitrators may be less reliable than judges in applying the law, the opposite may be true.

*Previously published (Chapter 4) in The Application of Substantive, Law by International Arbitrators Dossier XI of the ICC Institute of World Business Law (ICC Publication No. 753E) Copyright William W. Park, 2014. Republished with permission.*

[Full article here](#)

### Going First Makes a Difference: Decision-Making Dynamics in Arbitration

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*Baker & Hostetler LLP*

#### Introduction

The chairman calls the hearing to order. Claimant's counsel stands, calls the first witness, and, instead of asking questions, sits down, looking apprehensive. His opponent rises with a glint in his eye and a slight smirk on his lips, and starts telling the respondent's story through his cross-examination of the claimant's chief executive officer.

This sophisticated executive becomes frustrated trying to explain his company's narrative. A skilled cross-examiner keeps him boxed in with short, direct questions. The tribunal listens intently. Although they are well prepared by written witness statements and legal briefs, the arbitrators are developing their first impression from the oral evidence. Respondent must be prepared to benefit from this procedural advantage, and claimant must develop strategies to thwart it.

Strategy in international arbitration requires adjustments for both civil law-trained and common law-trained lawyers. The common law system is principally built on oral presentations of evidence, whereas the civil law system is structured around written evidence. The international arbitration model is a hybrid. Prehearing memorials, including legal arguments and written witness statements, are followed by an abbreviated hearing in which opening statements and direct examination are often discouraged, cross-examination of the opponent's witnesses is the principal purpose, and final arguments can be dispensed with or limited to written post-hearing briefs. The compromise accommodates the participation of lawyers from multiple legal regimes and the goal of efficiency. However, this procedure changes the decision-making dynamics of international arbitrators from those of judges (or jurors) in either the civil law or common law systems.

This article focuses solely on the impact of the order in which the arbitrators hear evidence at an arbitration hearing. Does oral advocacy matter when sophisticated arbitrators read long pre-hearing memorials before the first word is spoken? Does respondent gain an advantage when hearings begin with the cross-examination of claimant's witnesses as many hearings do? If the procedural adjustments matter, how should arbitration counsel strategize for international arbitration proceedings?

Winning and losing in arbitration - like any other dispute resolution mechanism - is influenced by many factors. Our experience tells us that the order of evidence is one factor that many advocates overlook. We suggest more attention needs to be paid to this strategic dynamic.

*Footnotes omitted from this introduction.*

[Full article here](#)

## CASE COMMENTS & AWARDS

### Comments on the Reasons for Judgment of the Federal Court of Appeal in *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada*

*Benjamin R. Jones  
Jean-Michel Marcoux*

*Faculty of Law, University of Victoria*

#### Abstract

The Federal Court of Appeal of Canada has just released its reasons for judgment in the *Hupacasath First Nation v The Minister of Foreign Affairs Canada and the Attorney General of Canada* case. After the Federal Court dismissed an application by the Hupacasath First Nation for judicial review regarding the ratification of an international investment agreement between Canada and the People's Republic of China, the Federal Court of Appeal ultimately found no grounds to set aside the judgment of the lower court and dismissed the appeal with costs. This report first highlights events that occurred between the oral arguments heard by the Federal Court of Appeal and the release of the reasons for judgment. It then addresses conclusions reached by the Federal Court of Appeal with respect to the justifiability of the matter, the causal relationship between the ratification of the agreement and the potential adverse impact on asserted Aboriginal rights, as well as the "chilling effect" argument that was brought by the appellant.

[Full article here](#)

## PACIFIC RIM

### The Protection of Legitimate Expectations under Investor-State Dispute: Case Studies of Vietnam

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Law School of La Trobe University, Melbourne*

#### Introduction

The purpose of this article is to investigate to what extent Vietnam has protected foreign investors' legitimate expectations. It also finds out some limits on the protection of legitimate expectations under Vietnam's legal system that needs to be addressed. To this end, Part I of this article argues that the protection of legitimate expectations, frequently invoked by investors, has become a key element of the fair and equitable standard under international investment arbitration. This Part discusses the rise of legitimate expectations under fair and equitable treatment claims, including limits that prevent investors from invoking successfully the protection

of legitimate expectations and circumstances where they usually make claims, for example, contractual obligations, administrative representatives and stabilization of legal framework. Part II describes the legal system of Vietnam. Part III applies these circumstances to investigate how Vietnam in law and practice protects legitimate expectations of foreign investors. This Part also identifies some limits that Vietnam needs to improve for the purpose of protecting legitimate expectations as well as avoiding unnecessary investor-state disputes. Part III of this article examines some investment dispute case studies, including domestic court and administrative proceedings as well as investor-state dispute cases against Vietnam concerning the protection of legitimate expectations. Finally, Part VI of this article draws some concluding remarks and recommendations.

[Full article here](#)

## EU DEVELOPMENTS

### Legal Instruments and Practice of Arbitration in the EU (part 1)

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#### Introduction

Upon request by the JURI Committee, this study investigates the law and practice of arbitration across the European Union and Switzerland. It includes an in-depth examination of the practice and the laws relating to arbitration in each Member State of the European Union and Switzerland, as well as an examination of the involvement of Member States and the European Union in arbitration. While substantial harmony exists across the European Union at both the level of law and practice, the Study finds that arbitration in the European Union is predominantly regional, rather than transnational. It also concludes that investment arbitration is often a beneficial feature of investment agreements, although the terms of such agreements must be carefully designed.

*A study for the Directorate General for Internal Policies Policy Department C: Citizens' Rights and Constitutional Affairs. © European Union, Brussels, 2014. This document is available on the Internet at [www.europarl.europa.eu/studies](http://www.europarl.europa.eu/studies)*

Note: The data from the Survey is available here: [www.transnational-dispute-management.com/news.asp?key=568](http://www.transnational-dispute-management.com/news.asp?key=568)

[Full article here](#)

## Legal Instruments and Practice of Arbitration in the EU (part 2)

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### Introduction

Upon request by the JURI Committee, this study investigates the law and practice of arbitration across the European Union and Switzerland. It includes an in-depth examination of the practice and the laws relating to arbitration in each Member State of the European Union and Switzerland, as well as an examination of the involvement of Member States and the European Union in arbitration. While substantial harmony exists across the European Union at both the level of law and practice, the Study finds that arbitration in the European Union is predominantly regional, rather than transnational. It also concludes that investment arbitration is often a beneficial feature of investment agreements, although the terms of such agreements must be carefully designed.

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## COMPENSATION AND DAMAGES

### A Hermeneutical Perspective upon the 'Mitigation of Damages' Principle: The Metamorphosis of a Concept in International Law

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#### Abstract

The present study begins by reconsidering the conceptual genesis of the 'damage mitigation' principle in relation to its expansion beyond its initial common law boundaries. Thus, its transition to 'lex mercatoria' is depicted, emphasising the gradual manner in which the 'mitigation of damages' transformed into a fundamental principle of customary international law. Following this path, we further analyse the normative content of this principle in a number of interconnected and overlapping areas of international law.

More precisely, our initial 'cosmological' approach is supplemented with a detailed inquiry into the concept's applications in commercial legal instruments - such as the CISG, the UNIDROIT Principles and the PECL, and arbitral awards, along with an analysis of its functional avatars in customary international and investment law. In this regard, our study proposes - alongside the already mentioned objectives - to exhaustively treat the forms in which 'harm mitigation' occurs in public and investment-related litigation. For those purposes, we shall follow a hermeneutical pattern, analysing the typologies this standard evinces in various areas of international law and depicting how its normative content varies in dissimilar contexts that involve either trade or sovereign actors. *Originally published in "Nappert Prize in International Arbitration - Selected Papers from the 2014 competition" Edited by Andrea K. Bjorklund - ICC Publication No. 764E, 2015 Edition - see <http://store.iccwbo.org/nappert-prize-in-international-arbitration-for-details> - republished with kind permission.*

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## OIL & GAS ARBITRATION

### International Commercial Arbitration: Allocation of Competence between Municipal Courts and Arbitral Tribunals under Article II(3) of the 1958 NY Convention and Anti-Suit Injunctions under Brussels I (Recast) and Gazprom OAO

*Professor John JA Burke  
RISEBA University*

#### Abstract

This article addresses two related issues: (1) the gateway question of International Commercial Arbitration: who, national courts or arbitral tribunals, has primary competence to decide whether parties have entered into an internationally cognizable arbitration agreement, and (2) anti-suit injunctions under the revised European Union Regulation. The uncertainty, for the first issue, stems from the legal status accorded to Article II(3) of the New York Convention on the recognition and enforcement of foreign arbitral awards of 1958 [1958 NYC or Convention]. Article II(3) obliges Courts of a Contracting State to refer parties to arbitration provided conditions precedent are met thereby creating a potential conflict with the doctrine of "Kompetenz/Kompetenz" conferring upon arbitral tribunals the power to determine their jurisdiction. The potential resurrection of anti-suit injunctions in Europe stems from the decision in *Gazprom OAO v. Lietuvos Respublika* and the more explicit clarification of the arbitration exclusion found in *Brussels I Recast*. *Footnotes omitted from this introduction.*

[Full article here](#)

## ARBITRATOR BIAS

### Arbitrator Bias

*Professor William Park  
Boston University, School of Law*

#### Level Playing Fields

##### (a) Two Ways to Sabotage Arbitration

Seeking to bring arbitration into disrepute, an evil gremlin might contemplate two starkly different routes. One route would tolerate appointment of pernicious arbitrators, biased and unable to judge independently. An alternate route to shipwreck, also reducing confidence in the integrity of the arbitral process, would establish unrealistic ethical standards that render the arbitrator's position precarious and susceptible to destabilisation by litigants engaged in dilatory tactics or seeking to annul unfavourable awards.

To reduce the risk of having cases decided by either pernicious or precarious arbitrators, those who establish and apply ethical guidelines walk a tightrope between the rival poles of (i) keeping arbitrators free from taint, and (ii) avoiding manoeuvres that interrupt proceedings unduly. From the command post of bland generalities, the job of evaluating independence or impartiality may seem simple. In light of specific challenges, however, the task becomes one of nuance and complexity, often implicating subtle wrinkles to the comportment of otherwise honourable and experienced individuals.

The quest for balance in ethical standards entails a spectrum of situations in which mere perceptions of bias may be given weight equal to real bias. To promote the litigants' trust in the arbitral process, an arbitrator might sometimes step down just to alleviate one side's discomfort. Not always, however. In some instances it would be wrong to permit proceedings to be disrupted by unreasonable fears, whether real or feigned.

If arbitrators must be completely sanitised from all possible external influences on their decisions, only the most naive or incompetent would be available. Consequently, notions such as 'proximity' and 'intensity' will be invoked to evaluate allegedly disqualifying links or prejudgment. As we shall see, the search for balance in ethical standards compels a constant re-evaluation of the type of relationships and predispositions likely to trouble international arbitration.

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## MEDIATION & ADR

### A Path Forward: A Convention for the Enforcement of Mediated Settlement Agreements

*Edna Sussman  
SussmanADR*

#### Introduction

In 2002 the United Nations recognized that the use of conciliation and mediation "results in significant benefits, such as reducing the instances where a dispute leads to the termination of a commercial relationship, facilitating the administration of international transactions by commercial parties and producing savings in the administration of justice by States." The use of conciliation and mediation has increased over the ensuing years with the growing use of step clauses in contracts, the issuance of the EU Mediation Directive, increasing court mandated mediation and the influences of Far Eastern cultures with their emphasis on harmony and amicable resolution. However, notwithstanding the widespread recognition of the benefits of conciliation, it is generally viewed to be dramatically underutilized. Many reasons are offered to explain this reality but it has repeatedly been stated that one of the significant impediments to the expanded use of conciliation in international disputes is that settlement agreements reached through conciliation are more difficult to enforce across borders than arbitral awards. To further the goal of promoting international conciliation of international commercial disputes, the United States proposed that UNCITRAL Working Group II develop a multilateral convention for enforcement. The U.S. recommendation proposed a convention that would be applicable to commercial (not consumer) international settlement agreements reached through conciliation, that conformed to specified requirements, and was subject to limited exceptions. States would continue to provide their own legal systems for the enforcement of mediated settlement agreements without the need for harmonization just as under the New York Convention, they have their own procedures governing arbitration. The U.S. requested that this initiative be given high priority. The U.S. explained that 'solving this problem by way of a convention would provide a clear, uniform framework for facilitating enforcement in different jurisdictions. Additionally, the process of developing a convention would itself help to encourage the use of conciliation by reinforcing its status as a method of dispute resolution coequal to arbitration and litigation.' Thus the convention would serve dual purposes. It would both enable users of mediation to reap the benefits of their agreed solutions and would drive the increased use of mediation just as the New York Convention drove the increased use of arbitration. *Footnotes omitted from this introduction.*

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## ARBITRATION RULES & BEST PRACTICES

### A Fair Fight: Professional Guidelines in International Arbitration

*Professor William Park  
Boston University, School of Law*

#### Abstract

Depending on context and content, a regulatory framework can either help or hinder efforts to enhance aggregate social and economic welfare. Lively debate has arisen with respect to the net effects of two recent sets of directives for lawyer comportment in cross-border arbitration: Guidelines adopted by the International Bar Association and new arbitration rules promulgated by the London Court of International Arbitration. Each instrument aims to promote a more level playing field on matters where legal cultures differ, such as document production and counsel independence. Each has caused thoughtful commentators to question the need and the merits of such standards. For now, suspense surrounds the prospect that either set of provisions will find favor in the international community. Only time will tell.

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## BOOK REVIEWS & RELATED MATERIALS

### Global Order Beyond Law - How Information and Communication Technologies Facilitate Relational Contracting in International Trade by Thomas Dietz - Book review

*Paul H. Cohen  
Perkins Coie LLP*

#### Introduction

Thomas Dietz is Assistant Professor of Law and Politics at the University of Muenster (the town where the Treaty of Westphalia arguably ushered in the age of the Nation-State and international law as we know it). He steps into this palace of political-economic orthodoxy and patiently dismantles it in his new book, *Global Order Beyond Law: How information and communication technologies facilitate relational contracting in international trade* (Hart Publishing).

Professor Dietz's conclusions are unlikely to be universally welcome among the great and good of international arbitration, and they did not make a firm convert of this reader; but they are worth careful consideration for precisely that reason. If nothing else, the book is a cautionary corrective to the arbitration practitioners who place ourselves at the center of international contractual relations. Professor Dietz makes a compelling case that we are very much at the margins. Professor Dietz's book (like Caesar's Gaul) is divided into three parts: the first part addresses the theoretical framework in which he operates, and which in part he seeks to challenge; the second part consists of his empirical research (on which more below); the third part extrapolates from the second to draw conclusions and, as he puts it, "theoretical results."

*Global Order Beyond Law - How Information and Communication Technologies Facilitate Relational Contracting in International Trade - Thomas Dietz - Assistant Professor for Politics and Law at the University of Muenster. May 2014 270pp Hbk 9781849465403 - <http://www.hartpub.co.uk/BookDetails.aspx?ISBN=9781849465403>*

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### Opening the International Law's Black Box: Pedro J. Martinez-Fraga, C. Ryan Reetz: Public Purpose in International Law: Rethinking Regulatory Sovereignty in the Global Era - Review

*Josef Ostransky  
Graduate Institute of International and Development Studies, Geneva, Switzerland*

#### Introduction

Martinez-Fraga and Reetz bring us an extremely valuable contribution to the debate surrounding international investment law in the last couple of years; the debate which has been hopelessly revolving around the concept of State's regulatory space. The authors tackle the challenging question of how to reconcile the interests of Host States in preserving regulatory space with those of Home States in investment protection with a conceptually clear and methodologically sound approach. And they seem to hit the nail on the head. They identify the problem of this debate in the concept of public purpose; a concept that most policy-makers, practitioners and academics shy away from for the fear of touching upon the sensitive issues of sovereign concern. Martinez-Fraga and Reetz rolled up their sleeves and set off to demonstrate that as long as international law does not open the black box of public purpose, the debate will not move forward in any meaningful way. *Public Purpose in International Law - Rethinking Regulatory Sovereignty in the Global Era. Cambridge University Press, February 2015. Hardback, 470 pages. ISBN: 9781107081741*

[↪ Full article here](#)

## CONFERENCES

### CILS Symposium International Mediation and Alternative Dispute Resolution, Salzburg, Austria, 11-14 June 2015

*Hon. Kenneth L. Fields*

#### 2015 CILS Mediation Symposium - June 2015

Center for International Legal Studies  
Salzburg, Austria

The following articles were selected for publication from the Center for international Legal Studies (CILS) first symposium for alternative dispute resolution focusing on mediation. The symposium, co-chaired by Prof. Dr. Renate Dendorfer-Ditges (Germany) and The Honourable Ken Fields (Unites States), attracted members of the international dispute resolution community including legal practitioners, academics, mediators as well as users of mediation. The symposium was designed as an exchange of ideas among mediators and users of mediation.

The result was a lively exchange of ideas, techniques and theories regarding mediation as a dispute resolution approach. The exchange pointed out many similarities and differences between mediation in Europe, Israel, the United States, China and Australia. Common comments among the attendees were that the symposium was "exciting, informative and highly interactive".

The feedback from the first CILS mediation symposium calls for a second symposium which is now tentatively scheduled for 8-11 June 2017.

Papers:

- When a Competition forms Young Mediators; M. Rubino-Sammartano
- Practical and Cultural Aspects of International Mediation; E. Birch
- Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond; F. Antich
- Mediation in a Global Village; R. Dendorfer-Ditges, P. Wilhelm
- Ten Tips for Successful Mediation; P.D. Clote
- Mediation in Slovakia and the Czech Republic - Niceties of Legal Neighborhood; K. Chovancova
- Mediating Tort Cases; T. Fézer

### When a Competition forms Young Mediators

*Dr. Mauro Rubino-Sammartano  
LawFed - BRSA*

#### Executive Summary

Difficulties in Mediation are different but not less important than in arbitration. Mediation competitions form young mediators if they are duly coached and trained in helping the parties to identify their strengths and weaknesses, as well as those of the other side.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

[Full article here](#)

### Practical and Cultural Aspects of International Mediation

*Elizabeth Birch  
3 Verulam Buildings*

#### Executive summary

In this paper Elizabeth Birch shares her experience of international mediation. She considers some of the theories on cultural behavioural patterns as applicable to international commercial mediation and considers some of the practical aspects of dealing with these to reach a successful outcome. In particular, she advocates a flexible approach to the process in such mediations and the finding of a third way which weaves between the needs and desires of parties coming from very different cultural backgrounds, to find a process that all parties can accept.

Previously published in "Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2013" ISBN13: 9789004274938. © Brill | Nijhoff - republished with kind permission.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

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## Enforcing the Mediated Settlement and the Need for an Appropriate Legal Framework. Some Reflections from Within the EU and Beyond

Federico Antich  
Attorney at Law

### Abstract

The quest for the most appropriate way to solve disputes involving civil and commercial matters has gained much attention in recent times in Europe. Mediation as one of the most welcomed dispute resolution tools has been officially adopted by many EU Member States legislatures, and its fortune is broadly linked, among other important features and by-products, to its voluntary nature, a character which is specially highlighted when parties give spontaneous execution to the terms of their agreement reached through Mediation. However, things can - and sometimes do - go wrong: thus the issue of the enforcement of Mediation Settlement Agreements (MSA) comes to attention and must be addressed if mediation has to be widely employed. Moreover, with the progressive diffusion of Mediation and its derived settlements, there is a need, not only at the national level but also globally, to identify a clear, and reliable legal framework to deal with the enforcement of non performed duties under MSAs.

This paper will focus on the enforcement within the EU of cross-border mediated settlement agreements by first examining the EU Directive 2008/52 - especially its Article 6 - and possible alternatives already available at the Community level; then at its implementation at national level, by looking at two Member States, Italy and England, where the debate on Mediation as an ADR tool and the implementation of MSA has been more lively in recent years. A brief look will finally be given to the "travaux préparatoires" of UNCITRAL Draft Multilateral Convention on the enforcement of international MSA to better reflect on the importance this topic is gaining worldwide.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

[Full article here](#)

## Mediation in a Global Village

Prof. Dr. Renate Dendorfer-Ditges  
DITGES PartGmbH

Philipp Wilhelm  
Rechtsanwalt

### Abstract

In international mediation proceedings preliminary questions regarding the law applicable as well as questions concerning enforcement and jurisdiction in case of disputes may emerge. Necessarily, one must observe several legal systems and their interaction in "cross-border" mediation proceedings and take into consideration the best "forum" for the arrangement of agreements relevant to the mediation. This article is aimed to provide an overview on possible legal problems of cross-border mediation proceedings.

This paper is based on an article previously published by Prof. Dr. Renate Dendorfer-Ditges and Dr. Christian Grochowski in *KonfliktDynamik* 2014, p. 294 et seq.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

[Full article here](#)

## Ten Tips for Successful Mediation

Paul D. Clote  
Law Office of Paul D. Clote, PLLC

### Introduction

The following recommendations are intuitive, common sense suggestions that most attorneys already

follow. I am pleased to share with you my experience as a mediator, arbitrator, and advocate.

- If you can settle the case on terms that approximate what you are most likely to obtain at the courthouse (or arbitration), you have achieved a successful mediation. You will have saved the cost and expense of completing discovery and trying the case; you have eliminated the risk of loss (however you quantify it).

- Successful mediation requires effective advocacy and negotiating skills; anticipation of how the opposing party will react is important; a bit of chess playing and poker playing is involved. Preparation is the key.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

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## Mediation in Slovakia and the Czech Republic - Niceties of Legal Neighborhood

*Dr. Katarína Chovancová  
Faculty of Law; Pan European University*

### Introduction

This paper is going to analyse briefly the current legal regulation of mediation and the mediation practice in two countries - namely, the Slovak Republic and the neighbouring Czech Republic. Although being independent states for more than twenty years now, with the limping history of forming one 'Czechoslovak' state in socialism already faded away, the legal neighbourhood between these EU members has been still visible even in mediation area, which is perhaps not bad, after all.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

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## Mediating Tort Cases

*Dr. habil. Tamás Fézer  
University of Debrecen*

### Executive Summary

Tort cases reflect much tension between the injured party and the tortfeasor. Therefore, most aggrieved parties seek revenge in court instead of mediating tort cases under much more laid back and peaceful circumstances. At least, this is a common theory in jurisprudence, however it is not always the case. The essay focuses on the problems, obstacles, challenges, success and opportunities when mediating tort cases from a Central and Eastern European (CEE) perspective. While mediation in general is a relatively new and constantly developing area of settling disputes in Central and Eastern Europe, tort cases are still waiting for a breakthrough in the dissemination of all the advantages of mediation between individuals and companies. Torts are no business cases, therefore the private and non-public nature of mediation may be of less relevance. The study contains socio-legal analyzes on alternative dispute

resolution methods and tort cases in CEE countries and attempts to find tort claims with the best fit nature for mediation.

*Presented at the Center for International Legal Studies (CILS) Symposium "International Mediation and Alternative Dispute Resolution" which was held in Salzburg, Austria (11-14 June 2015). This event was organised in cooperation with the Chairman of the IBA Mediation Committee, Professor Mauro Rubino-Sammartano.*

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