TRANSCRIPTION OF GARY BORN SPEECH

JOB NO: 173521

(Beginning of audio recording)

SPEAKER: Okay. Good evening everyone and welcome to our program. We are delighted to have you, also for our holiday party, and so I will begin my thanks, first and foremost, to Gary for joining us in lecture along side Catherine, which we will get to after Gary's lecture. Hope you all reviewed the PowerPoint.

To you all, we just finished New York Arbitration Week, as many of you know, and we cannot do it without bodies in seats. We are delighted to always have a good crowd here NYAK and I thank you. You all help NYAK to thrive year after year, so my sincere thanks.

We also have many from our NYAK board in the room, so it's also a delight for our holiday party to have them and celebrate something they founded in 2013 with Judge Kaye.

With that, also I want to thank Wilmer Hale for sponsoring our holiday party. Thanks to Gary and to John and to Jim and many others that may work at Wilmer Hale.

Gary joined us for the first time I believe in 2017, and he warned us then that winter was coming, and so it has indeed come. So we are

going to find out a lot more about the past, present and future of international arbitration.

Gary? Please, if you would give him a round of applause.

(Applause)

MR. BORN: Thank you so much. You are supposed to begin these speeches with some thanks and a joke. I'm not very good at either of those things, so I'm going to go straight to the substance. Also because we have a lot of substance to address. We have got 5,000 years of past, plus infinite years in the future to address, so I really do have to skip the pleasantries.

It's often said you can't tell a book or lecture by its cover, but actually, here you can, and if we look at the slides, you will see the past, the present and the future, which is the topic I have been asked to address.

The past there is from a painting, it's a painting by a French artist, Alber Benard (phonetic) titled Arbitration and Peace. And for those of you with some creativity or classical knowledge, you will recognize Irene, the goddess of peace, with the olive branch at the bottom of the picture, and her son Plutus, the god of prosperity. Peace and

prosperity are enabled because of, as the title of the picture indicates, arbitration, which you can see taking place at the top of the picture. It's hard to tell whether that's a three-person tribunal, one chosen by each of the two warring parties who are leaving at the bottom of the picture, the award having been rendered, or perhaps a sole arbitrator with two counsel presenting their submissions. It doesn't really matter though. The painting was titled Arbitration and Peace, and the concept was arbitration allows disputes to be resolved peaceably instead of with the spears and swords that the disputants brought with them in the event that the arbitral process didn't function.

That's the past. And as you will see, it's worth talking about the past, because if we don't pay attention to the past, we are condemned to relive it, and also because the enduring themes from the past, both the past in Europe or classical times, as that picture suggests, but also the past in other places. As we will see, the past of arbitration, international arbitration, is universal. It's been something that has been used to produce peace and prosperity in cultures all around the world.

The present is in the middle part of the slide. It will be a little more familiar to you. No gods, as far as I can tell. I'm not sure quite who the presiding arbitrator is there. But it's an ICSID hearing, televised, transparent, and it, as we will see, reflects today. It reflects, as I will spend some time discussing, the present of international arbitration and the future -- and I struggled a little bit with this graphic. The future is -- well, we are not quite sure what it is, and I won't spoil that part of my speech. We will explore, by the end of my talk, where exactly international arbitration will be, where will it be next year, next decade, next century. Is winter coming or is something else coming.

Let's turn now to the past. International arbitration has a deep and storied history. The left-hand part of the graphic is the stele of the vultures in Kurdistan, a brave, young autonomous state in part of Iraq. In Kurdistan, there was a dispute between two what today we would call states, Umma and Lagash. Rather than go to war, they ultimately revolved their disputes over their border by submitting them to the king of the neighboring principality, Kelomesh (phonetic) who resolved that

dispute by arbitration. Two parties with that dispute submitted that dispute to the neutral decisionmaker and he decided that dispute and that stele, that stone, marked the border that he drew for the two parties.

Arbitration was used at that point, that was 2650 BC, probably the earliest arbitration known to humankind, not just for state to state disputes of that sort but also commercial disputes. The Cuneiform tablet on the right is from 2500 BC. It's probably the oldest arbitral award we have. It was a case which today we would call Heely versus Tupeniya (phonetic). Tupeniya won an award of ten silver shekels and an ox which decided the water rights dispute between them. But again, two parties, rather than taking matters into their own hands, submitted it to a decisionmaker, submitted their dispute to a decisionmaker of their own choice.

If I continue at this pace, we will be here until tomorrow, until the Starship Enterprise arrives, so let me fast forward a couple thousand years to 440 BC where a treaty recorded in Lucidities works between Sparta and Argos submitted a territory boundary dispute again to a neutral

town. That's the right-hand part of the slide. And on the left is Menander's play called The Arbitration, which recorded the arbitration unsurprisingly of a domestic relations dispute.

But again, arbitration being used for the most public of matters and also in that case the most private of the matters, the paternity of a child born in wedlock in that particular case.

So far I have focussed on commercial and state to state disputes. We here in this room then would wonder what's missing. What's missing, of course, is investment arbitration which plays a key role in today's arbitral landscape. This is a decree by Cleopatra from 40 BC -- we are gradually nearing the present -- in which she granted inalienable rights via a stabilization provision to a Roman trader accompanied by provisions for neutral dispute resolution.

Fast forwarding again almost another couple thousands years to 1516, a treaty between Francis of France and the Swiss Cantons in which they agreed, those two sets of states agreed to submit all future disputes to arbitration in the event those disputes would arise. An arbitral tribunal composed of five arbitrators, two chosen by

each side and then the four coarbitrators -- they didn't call them that but that's what they were -- the four coarbitrators selecting a presiding arbitrator, a familiar mechanism.

This is, you will be curious to know, the world's first arbitration law, the first arbitration statute. It comes from the annals of Rochester in 1112 AD, and it provided that parties that submitted their dispute to arbitration and then failed to honor the arbitral award would be fined 12 shillings, and that reflected the use, the use in commercial settings all around Europe, in England with the trade guilds and the (inaudible) league and in the low countries, in Switzerland, of arbitration and particularly international arbitration to resolve disputes between merchants, to resolve ordinary commercial disputes.

Why did they do this? Why did parties do this? Why did merchants submit their disputes to arbitration? Well, (inaudible) in his well known book on Lex Mercatoria from 1622 tells us why they do it. They did it because they wished of their own free will. When both parties do make choice of honest men and women to end their causes, which is voluntary and in their own power, and therefore

called arbitrium or free will, whence the name arbitrator is derived, and these men and women, by some called good men, give their judgments by awards, according to equity and conscience, observing the custom of merchants and ought to be void of all partiality and affection, more or less to the one than to the other, having only care their right may take place according to the truth and that the difference may be ended with brevity and expedition.

That was said four or five hundred years ago but it almost could have been said today. And we are going to come back to that as one of the enduring themes of arbitration. Parties, businessmen, businesswomen choosing arbitration as an expeditious way, brevity, to get an expert decision by arbitrators who are neutral, even-handed, as opposed to partial.

Thus far we focussed on Europe, and given this country's history, its origins, that's understandable, but arbitration was not just a European phenomena. In what is today Israel and Palestine, arbitration was used first before the Romans by Jewish inhabitants of the region to resolve their disputes. When the Romans came and

Jews were not welcome and didn't much want to be in Roman courts, they turned to arbitration, by its Hebrew name Zabla, meaning each one chooses one, reflecting the means of constituting a three-person tribunal. Each one chooses one, and then the two coarbitrators choose the presiding arbitrator.

But the Jewish inhabitants of the region used arbitration to resolve not just their commercial disputes but also their domestic relations disputes. It wasn't just the Jewish inhabitants of that part of the world that used arbitration, it was also the Arabs, and in the Muslim times, Muslims that used arbitration to resolve their disputes. The Koran in the Surah of the women refers to the prophet Muhammad resolving arbitrations both between Arab tribes on the one hand but also between Jewish and Arab tribes on the other hand.

The same Surah refers to arbitration again being used to resolve domestic disputes reflecting the universal character of arbitration.

It wasn't just Europe and the middle east but also Latin America, Africa, India, Asia where arbitration was used in traditional societies, whether the Georgias in India or traditional village

mechanisms in China and Africa, parties would turn to decisionmakers of their own choice to resolve their disputes.

I apologize for not doing America first, but we will come to America because in fact America plays -- the United States plays a key role in the growth of the international arbitration over the past century.

This goes back a bit longer than the past century, and we can take a moment to look at what this is, an article from the New York Weekly Post in 1751, where a frustrated litigant, disappointed by what he or she described as seven years of litigation in American courts urged its counterparty, urged the claimant in the case to submit their dispute to arbitration, and if they refused to do so, they would surely regret it.

We don't know how that particular dispute turned out, but we do know a lot about other uses of arbitration in this country. Building on the experience first of the Dutch but then subsequently the English colonists here in Manhattan but elsewhere in the 13 colonies, arbitration was firmly rooted before the revolution.

This is from the last will and testament

of George Washington. He, rather than having disputes submitted to U.S. Federal or other courts, decided that what should happen in the unfortunate event that his heirs would fall to dispute about his will, should have the dispute decided by three impartial and intelligent men known for their probity and good understanding; two to be chosen by the disputants, each having the choice of one, and the third by those two, which three men thus chosen shall, unfettered by law or legal constructions, declare their sense of the testator's intention; and such decision, to be as binding on the parties as if it had been given by the Supreme Court of the United States.

From the very origins of this country, the United States, arbitration played a critical role. Indeed it wouldn't be an exaggeration to say that arbitration was essential to this country becoming what it is. The confederation of the United States, the Articles of Confederation, which had other flaws, did have one redeeming quality. That quality was, in the event there should be disputes between the 13 states who had united in the confederation, in the event there should be those disputes, they would be resolved by arbitration.

A complicated list procedure -- I won't take you through the details, but a complicated list procedure that would make the AAA envious used to select the arbitrators both for disputes between states but also for disputes between land owners and states when they were disputing deeds of property given to different individuals.

When I say that, in a sense this country wouldn't exist but for arbitration, that's not an exaggeration. This is Jay's Treaty. An essential part of the peace treaty between the United States and United Kingdom was the resolution of claims by British creditors against American debtors. There were many of these. British capital had fueled the growth of this country's industry, and in the wake of the Revolutionary War, both state and also federal courts, notwithstanding the peace treaty being self executing, failed faithfully to give effect to the promises in the peace treaty that those creditors would be repaid.

Frustrated, the British and the Americans turned to other mechanisms. Those mechanisms were international arbitration. Jay's Treaty provided a mechanism for arbitral tribunals to resolve what ultimately turned out to be some 5,000 claims in

5,000 arbitrations with 5,000 arbitral awards by British creditors against American colonists which ultimately were paid by the United States, paving the way for peace between the United Kingdom and United States and ultimately the Constitution that replaced the Articles of Confederation.

Fast forwarding another hundred years, and again focusing on this country's role in the development of the international arbitration, the Alabama arbitration in the 1860s, early 1870s, when in the Civil War the British outfitted warships, advanced warships at the time which prayed on union shipping causing immense damage leading, in the wake of the union's victory in the Civil War, to U.S. claims against Britain for having violated the laws of neutrality.

Rather than go to war, which General President Grant threatened, the two countries agreed to resolve their disputes by arbitration. An arbitration agreement contained in a peace treaty -- effectively a peace treaty between the United Kingdom and the United States in which the United States claims against the United Kingdom were submitted to arbitration, five arbitrators, two chosen by each party, one by the two parties in

agreement, it seated in Geneva.

Six months of hearings ultimately produced an arbitral award which led to the British coarbitrator who, interestingly, had also been the foreign secretary's legal consultant responsible for dealing with the dispute when it had arisen between the UK and United States dissenting. But Britain, notwithstanding an award against it in favor of the United States for an amount equal to its annual budget, paid that award. And in the wake of that, the United States and other countries around the world increasingly turned to arbitration.

Indeed, Elihu Root, known for other things, received the Nobel Peace Prize because of his and the United States's advocacy of international arbitration as a means of resolving both state to state and other disputes. The so-called Taft bilateral arbitration treaties provided standing mechanisms for states to resolve their disputes by arbitration.

And you can see here the Nobel Peace Prize, which Root received specifically for his and the United States' role in advancing international arbitration as a means of peaceably resolving disputes between states.

Coming back to the title picture and turning from what I have painted as a somewhat inevitable unbroken march towards the ascendency of international arbitration there were cross currents.

This is the picture which you saw previously but a slightly different version of that picture. This picture is not called Arbitration and Peace. This picture is called Justice and Peace, and it hangs in the main hall of the Peace Palace, Peace Palace in the Hague, which started out life, thanks to Andrew Carnegie, as the seat of the permanent Court of Arbitration, not the seat of the thing else.

But in the intervening years, between the time when the picture I showed you at the very beginning of this talk was painted and the time that the painting was hung in the Peace Palace, the permanent Court of International Justice moved in, and the picture was retitled. It's not titled anymore Arbitration and Peace. Now it's called Justice and Peace, and it hangs there today. But if you ask me, it still looks like arbitrators and not like judges. At least not judges I have seen.

But it again reflects, notwithstanding a bit of a cross current, a bit of a tension between

judicial dispute resolution and arbitral dispute resolution. It does reflect the continuing and vital role of the United States in the development of international arbitration.

Speaking of cross currents though, back a century or so in the United States before the Peace Palace was decorated, this is an excerpt from Joseph Story, renowned both for his treatises on conflicts of laws and other things and for his judicial decisions. He had a dim view of arbitration. You can read it better than I since I don't have much of a view, but he described arbitration as an entirely second class type of justice. Rough justice, he said, because arbitrators couldn't subpoena witnesses or documents, they couldn't require witnesses to swear oaths and -- I won't read out the exact words, but most importantly, because arbitrators lack the capabilities, the capacity, the learning to resolve disputes the way that judges could do. And as a consequence, Story, followed by a number of other US courts held that, although valid, arbitration agreements weren't specifically enforceable. You couldn't direct, you couldn't order a party to arbitrate. Of course, you could give them monetary damages.

Footnote: What are the monetary damages for breaching an arbitration agreement? There are none because the party that wanted to arbitrate and was forced to litigate actually did something better, not worse, so there were effectively no penalties, no remedies or breach of an agreement to arbitrate.

That view, Story's view, was shared across the Atlantic. In fact, the Americans and French don't agree on much, but they pretty much agreed on this particular dim view of arbitration. This is the French Commercial Code from the Napoleonic era just after the French republic and French revolution. It provided in Article 1006 that an arbitration agreement would be valid if it both specifically identified the dispute and named who the arbitrators were. That provision, Article 1006, was interpreted in a case, Pritiya vs. Alliance, an insurance dispute, where many arbitration decisions come from, insurance industry, to effectively hold invalid all agreements to arbitrate future disputes because naturally parties can't describe a dispute that hasn't already arisen and because parties don't usually want to name arbitrators until they know what the dispute actually is.

The French court explained why these protections, these stringent limitations on the validity of arbitration agreements were necessary. It was necessary because you couldn't really trust people to resolve intelligently how their disputes should be decided in advance. You needed, in order to protect people from their own ignorance, from their own bad judgements, to ensure that arbitration agreements were only concluded after the dispute had arisen.

And then, in the first part of this quotation on the slide, the French court also revealed perhaps what was the true motivation of its decision. It said: And were we to uphold this agreement and an insurance policy to resolve future disputes by arbitration, why, then, businessmen would all put in their contract arbitration agreements and we wouldn't have anything left to do.

In a slightly darker note, some years later, moving from 1843, which is the date of both Story's decision in Toby versus Bristol and the decision in Pruniyay (phonetic) to the 1930s, these are the right's directives on arbitral tribunals, and the national socialists did two things in these directives: They said first that the national

socialist regime would not permit state entities to conclude arbitration agreements. And also it expressed serious doubts -- discouraged private parties from concluding arbitration agreements.

The view was that arbitration undermined the rule of law, the rule of national socialist law and was contradictory to the essential national socialist idea of the state; the state needed to have control over dispute resolution just as, of course, it wanted to have control over all other aspects of German's life at the time.

And so, on that dark note, let's turn to the present and hopefully something somewhat brighter. The somewhat brighter starts at 1923, the Geneval Protocol on Arbitral Clauses, a reaction to Joseph Story and the French Court of Concession. The Geneva Protocol made in Articles 1 and 2, agreements to arbitrate future disputes, international agreements to arbitrate future disputes, valid and enforceable, specifically enforceable.

Four years later in 1927, the Geneva Convention on Arbitral Awards did the same thing for international arbitral awards, made those awards valid and enforceable in all the states that

ratified the Geneva Convention.

In 1958, at the urgings of the ICC and the international business community generally, the New York conference here in this city negotiated and finalized the terms of the New York Convention. Forty-eight states negotiated for three weeks to put together, in a revolutionary new instrument, the United Nations Convention, on the recognition and enforcement of foreign arbitral award, better known as the New York Convention, to put together the Geneva protocol and Geneva Convention into one instrument, which, in Article 2, makes agreements to arbitrate international disputes valid and enforceable and requires that the parties to those disputes be referred to arbitration, and in Articles 3, 4 and 5 does the same thing for arbitral awards. Subject only to limited exceptions, those awards can be enforced in all the contracting states around the world.

You would think with that enthusiastic introduction the convention would have taken off like a rocket, a spaceship perhaps, but it didn't, actually. Out of the 48 states who negotiated the convention in New York, only about half of them signed the convention.

The United States delegation recommended against ratifying the convention, and it didn't do so for another dozen years, as many other states also refused to do. But over time, those states were remedied and today 161 states, thanks a few weeks ago to Papua New Guinea, have ratified the New York Convention. It is essentially global, a global constitution for international commercial arbitration providing a legal framework to allow the arbitral mechanism from the beginning of the process, arbitration agreements, to the end of the process, arbitral awards, to be given effect all around the world.

It wasn't just the New York Convention. Other conventions, regional conventions, the Inter-American convention in this hemisphere, the European convention in Europe, did the same thing for international arbitration agreements and arbitral awards.

It wasn't just commercial arbitration, like those instruments, but also investor state arbitration. The ICSID Convention with 154 contracting parties did the same thing for investment arbitration agreements and arbitral awards that the New York Convention did for

commercial arbitrations.

ICSID, a specialized center, established for investment arbitrations, headquartered in Washington, D.C. -- great location -- administers arbitration, and you can see the almost global character of the ICSID Convention on that slide.

In conjunction with the ICSID Convention, which like the New York Convention got off to a bit of a slow start, states began to conclude bilateral investment treaties. This is the first of those treaties or at least the first of the modern iteration of those treaties. The German Pakistan bilateral investment treaty, coincidentally from 1958, which includes within them both substantive protections for foreign investments but also procedural mechanisms, specifically international arbitration, to resolve disputes arising out of the treaty's substantive terms.

From a slow start, today there are more than 3,000 bilateral investment treaties, which have in them standing offers to arbitrate, arbitration selected by both the business community and states wanting foreign investment, foreign direct investment around the world as the means to resolve their dispute. Not only bilateral treaties

providing for investment arbitration but multi-lateral treaties, whether the Azion agreement, the Energy Charter Agreement or otherwise.

Nations faithfully implemented their obligations under both the New York Convention, the ICSID Convention and otherwise. (Inaudible) model law, which essentially codifies and implements the New York Convention as well as provides effective mechanism for administering and supervising the arbitral process has been adopted in some hundred jurisdictions around the world. And other states who haven't adopted the model law like this country, the United States, have adopted legislation that gives faithful effect to the convention.

National courts have done the same. This quotation from the U.S. Supreme Court in Mitsubishi which has been followed widely by jurisdictions around the world gives a sense to support the arbitral process: The court observed that, as international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade.

The controversies that international arbitral institutions are called upon to resolve

have increased in diversity as well as in complexity. Yet the potential of these tribunals for (inaudible) arising from commercial relations has not yet been fully tested.

If they had to take a central place in the international legal order, national courts will need to shake off the old judicial hostility to arbitration. And also their customary and understandable unwillingness to see jurisdiction of a claim arising under domestic law through a foreign or transnational tribunal. To this extent at least it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy and I should say binding obligation imposed by the New York Convention favoring commercial arbitration. And that reflected not just the approach of the United States Supreme Court but also courts around the world, English courts, Singaporean courts, courts in every part of the world.

That legal framework having been built, built on conventions, legislation, judicial decisions, the business community and others implemented the arbitral process within that framework. They developed arbitral institutions

here in this country the AAA, ICDR and JAMS providing expert professional mechanisms for the administration of arbitrations.

Elsewhere around the world, the Singapore International Arbitration Center, SIAC, the ICC and other institutions provide specialized mechanisms for administering arbitration. The case load of these institutions developed almost exponentially over the years. You can see the figures there rising from less than 2,000 in the 1990s to substantially -- five times more last year.

It's not just that arbitration was used to resolve typical sale of goods disputes of the sort you might imagine arising, but arbitration was used to resolve every type of dispute from energy disputes to intellectual property disputes to mining disputes and sports disputes.

Arbitration was used by the world's largest companies but also by ordinary citizens, ordinary merchants. And arbitration increasingly was used to resolve types of disputes which historically had been unknown.

The Court of Arbitration for Sport, for example, in Switzerland, administers sports arbitrations without which, quite literally, the

Olympics as we know them couldn't be conducted. Sports arbitrations have grown from a case load of essentially none to almost 10,000 a year.

Intellectual property disputes, historically treated as nonarbitrable, now have their own arbitral institution, WIPO, whose case load, although perhaps not as robust as CAS, the Court of Arbitration for Sports, nonetheless is developing.

ICSID, which went from a case load and bumped around in the 1907s at about half a case a year now looks at more than 50 cases a year and has administered almost 800 arbitrations thus far.

International arbitration has been used to resolve the most routine disputes that businesses and states have but also the most complicated, the most politically sensitive. It is quite literally in the headlines of major newspapers almost every day.

But as with the past, the present has cross currents. It has a darker side. This is Decision 24 of the Andean Commission from the 1970s, and it provided that states, parties to the Andean Union, would not use arbitration -- could not use arbitration to resolve disputes with foreign

investors, that the regulation of foreign investment was an inalienable national right, and with echoes of Calvo and Drago, states could not agree to resolve disputes either under foreign law or by international or foreign arbitration.

Law professors, of course, followed suit. This is the Osgood declaration from just a decade or so ago. It focussed on investment arbitration, and it complained about two things: It complained first, signed by a couple hundred law professors, that investment arbitration was inhibiting the exercise of national sovereignity, democratically elected governments, to regulate conduct within their territory and that the decisions of arbitral tribunals were inevitably invariably contrary to state interests; corporate interests always won.

And on a procedural level, the second aspect of the declaration was the arbitral process was defective; it wasn't sufficiently transparent; third parties didn't have sufficient opportunities to participate; the means of selecting arbitrators was unfair, tilted against the interests of states, and a variety of other procedural complaints.

Law professors had their audience. Hugo Chavez, in deciding that Venezuela would unratify

the ICSID convention and terminate its bilateral investment treaties, swore that ICSID would have no influence in Venezuela, Bolivia and Ecuador, followed suit as did people somewhat closer to home.

Campaign pledges, as you can see, undertook that the United States would either terminate or dramatically revise NAFTA, which although I didn't mention it before, as in any important investor state provisions and declined further participation in the Trans-Pacific partnership in part because of its investment arbitration provisions. I think we know from today's newspapers that NAFTA may well have had its wings substantially clipped as a consequence of that.

It's not just the Americans -- Venezuela, Bolivia, Ecuador, the United States -- that this current ran. Also, across the Atlantic, the European Court of Justice in the Acme (phonetic) decision reasoned that -- allegedly reasoned that arbitration provisions in intra EU bilateral investment treaties were invalid.

Parties and commentators dispute exactly what the European Court of Justice meant with its judgment. But some suggest that the ACJ held that

only it, only the European Court of Justice, could be relied upon to interpret the provisions of European law; that states could not agree to submit disputes, including with foreign investors, to resolution by arbitral tribunals if issues of European law would arise in those cases.

That rationale, like some of the other criticisms we have seen, applies not just to investment arbitration but also to international commercial arbitration. The skepticism about submitting important disputes to arbitral tribunals applies not just to investment arbitration subject to the ICSID convention but also commercial arbitrations involving states or state entities.

That is confirmed. The applicability of current doubts about the arbitral process for international commercial as well as investment arbitration is reflected in Ford Thomas' speech in the United Kingdom a couple years ago in which he urged that English courts play a much more substantial role in reviewing commercial arbitration awards.

He argued that the rule of law was undercut by arbitration and in particular international arbitration because it deprived the

courts of the fuel they needed to develop further the common law and that courts should therefore play a much more robust role in reviewing an annulment or vacatur applications, the substantive decisions of arbitral tribunals.

That same rationale is reflected in other places as well. In Russia, legislation required that arbitral institutions that would resolve a broad category of corporate disputes be resolved only by arbitral institutions that were registered and approved by the Russian Federation. Instead of having national courts review the decisions of arbitral tribunals, the Russian Federation would ensure that only safe arbitral institutions would resolve a large category of commercial disputes.

And so, the present, like the past, is fraught with conflicting currents. In some ways, it seemed like, since 1925 with the Federal Arbitration Act or 1923 with the Geneva Protocol, it's been a long golden summer, arbitration going from one success to the other. But equally, some have said that winter is coming, that these cross currents suggest that arbitration may have reached its sell by date.

What will the future bring? Where will we

go? So, I think the answer, for what it's worth, can be found in this decision by a Quebec Court of Appeal. It's got two sentences. Let's start with the second, not the first sentence. In there the Quebec Court of Appeals said -- this is the English translation -- arbitration should be perceived as a means of alternative dispute resolution that, depending on the circumstances, achieves certain goals pursued by the parties, e.g. speedy decision by peers, cost efficiency, et cetera.

Another way to describe that -- and this harkens back to things we have seen already in the past -- is the five E's. Arbitration will continue to enjoy its summer because of the five E's. Arbitration is more expeditious, more efficient, more expert, more even-handed and more enforceable than the alternatives. And it has those characteristics because of the essential nature of arbitration being a means of dispute resolution in which the parties choose the decisionmaker, the arbitrator or arbitrators, who will resolve their dispute when that dispute has arisen, and that means of dispute resolution, chosen freely by the parties based on consent, has inherent advantages.

Let's first talk just a little bit about

expedition and efficiency. Obviously, if the parties can decide in a tailor-made arbitral procedure after a dispute arises, and although they may occasionally misuse that autonomy, they can devise a means of dispute resolution that is more efficient, better tailored to their individual dispute than a one size fits all set of procedures that they take off the shelf.

Arbitral institutions, the ones we saw on the slide that we looked at a few moments ago -- these are the expedited procedure mechanisms in both the SIC, and in case I'm accused of being partisan, ICC rules, which provide for small value disputes, disputes of less than five or six million U.S. dollars, to be resolved in a period of no more than six months and occasionally less with summary procedures, expedited procedures, to ensure that the reasons that businessmen and women choose arbitration will be realized.

Arbitration is more expert, the obvious reason that the parties who know best what their dispute is get to choose the decisionmaker and they choose, if it's an insurance dispute, an insurance expert, if it's a construction dispute, construction experts, some other kind of dispute, intellectual

property experts.

And as a former judge on the French Supreme Court accurately described, what you do, we don't have to do. And moreover, you are better at doing this, resolving commercial disputes, than we are. And with all due respect to Lord Thomas, that is what other English judges with greater experience in commercial matters has said. You can see a good example from Lord Savlo (phonetic) on the current slide.

Arbitration is, perhaps even more importantly, even-handed. Even-handed in the sense that, if you have an arbitration between an American and a Chinese party, the Chinese party doesn't want to be here and the U.S. party certainly doesn't want to be in Shanghai or Beijing.

International arbitration provides a neutral means, an independent forum for resolving those disputes. That's particularly true, because although it's not polite to talk about it, these statistics from Transparency International reflect what the reality of justice is in many parts of the world: You get what you pay for, which, for American companies with the FCPA, is something they can't really participate in.

Apart from corruption and integrity issues, judicial independence in many parts of the world with state (inaudible) playing a major role in international commercial affairs is a critical aspect of dispute resolution. Do you really want disputes involving state entities resolved by courts in all those red countries which various NGOs have described as sorely lacking basic attributes of judicial independence.

And finally, the fifth E, in addition to expedition, efficiency, expertise and even-handedness, is enforceability. That legal framework, which I boringly took you through, the New York Convention, model law, Federal Arbitration Act, make international arbitration agreements more enforceable, more valid than forum selection agreements, make arbitral awards better subject to enforcement than (inaudible), which at the end of the day is what business people want, a final resolution of their dispute.

And for those reasons, those reasons which motivated the 161 countries to ratify the New York Convention, to give effect to a means of dispute resolution in International Congress, and thus to enable international commerce to prosper and grow,

it's no coincidence that, in that picture, Irene, the goddess of peace, was holding Plutus, the god of prosperity, because with effective dispute resolution you get better international trade, more international trade and more prosperity. And in that sense, those five E's are fundamental to our material well being.

The virtues of arbitration, the strength of arbitration, coming back to that first sentence, lie not so much in material matters as other matters. What the Quebec court said in the first part of this quotation is worth looking at: Arbitration is a fundamental right of citizens and an expression of their contractual freedom and should not be considered as an infringement upon the monopoly of state justice.

And if you think back to the quotation from the 17th century from Gerard Malign (phonetic) it's precisely that same perception, precisely that same intuition. What is arbitration, he asked. Arbitration is free will. Arbitrium. The free choice of free citizens choosing how they wish their disputes to be resolved.

And in that sense, arbitration isn't contrary to the rule of law. It lies at the

foundation of the rule of law. Our rights as free citizens -- we enjoy the right to choose who we associate with, how we speak, who we contract with, who we marry. Private autonomy, individual autonomy is at the cornerstone of civilized democratic societies. And just as the right to assemble, the right to marry, the right to contract are fundamental, so the right to fix the problems in those relationships which inevitably arise is also fundamental. The right to mend those relationships through decisionmakers, through a dispute resolution process of the parties' own choosing is fundamental to a free society, fundamental to the rule of law.

That's antithetical to what the national socialists said in the 1930s. Arbitration was a rightly perceived threat to a state that wanted to dominate every aspect of human existence which saw their vision of the rule of law undermined by citizens who freely chose how their disputes would be resolved.

And unsurprisingly, contemporary Germany, contemporary German courts take a vitally different view of arbitration. This is a decision from the German Federal Labor Court in the 1960s. It says post war, the decision to submit a matter to

arbitration is contained in the fundamental rights of freedom of contract under Article 2 of the German basic law. If submitting matters to arbitration causes a restriction of state jurisdiction, then this is the result of a voluntary agreement by the parties which by itself is protected by the right to free development of personality, and the court cited to the German (inaudible) the constitution in Germany which guaranteed in Article 2 private autonomy, a fundamentally different view of arbitration and private autonomy.

And precisely the same rationale can be seen in France. You will recall how Napoleon saw the world not that differently from national socialists where the parties' right to submit disputes to arbitration had to be severely constrained because they couldn't be trusted, as the French court said, to resolve matters as they wished.

That was completely contrary to how the French Revolution had understood arbitration, reacting to the acceptance of the monarchy before. The constitution provided in Article 86 that the right of the citizens, the right of the French citizens along with liberty, equality and fraternity

to resolve a dispute by arbitrators of their own choosing would not be infringed. A constitutional right in the constitution reflecting all those values that the German labor court, German constitution embraced and that we have already seen described. Fortunately, it was in contemporary era the former view, the view of the French revolutionary, the French republic, not Napoleon, that prevailed. The French courts had been at the forefront of developing international arbitration.

That same view, the importance of arbitration as a fundamental right, a right of people to mend their relationships when problems inevitably arise has been recognized in courts around the world. You can see some examples on the current slide.

So, where will the future take us? Winter isn't coming, but we can't be complacent. The complaints that you have heard from law professors, from people closer to home, are real and need to be contended with every day.

Complaints about the efficiency of the arbitral process are real, and in many ways it's in your hands -- especially the younger ones here -- your hands as to how arbitration will fair in the

future. I trust that you will take good care of it, and I look forward to how you will handle it.

Thank you.

(Applause)

SPEAKER: So, Gary, 4,000 years in roughly 40 minutes, well done.

I think what was most striking to me about the tour of history is how much the past themes and criticisms -- you called them rough justice, cross currents, the Osgood declaration, Lord Thomas, how those themes have been repeated through the years. And as you said, winter is coming, but you seem optimistic.

So I want to take all those themes and talk about the current conversation and in particular those watching very closely what the future of international arbitration will attest to.

There is a larger conversation going on with states, and right now the Uncitral Working Group III appears to be where the action is at. And at core, well, I think we like to think of arbitration as in the rights framework, as a normative framework and an organizing framework. It is at core a creature of consent, and in this instance we are talking about the consent of states,

that are conferred unusually in international law rights upon individuals, upon claimants, to bring claims against states, and it seems that in some fundamental respects that's being revisited.

The Uncitral Working Group III and the participating states are looking at it from the perspective of this resonance of the criticisms and are starting from what some might call a clean slate. I don't particularly agree with that. I think there's a lot on deck. But what do you think of that conversation between states? Is this something akin to going back to the drawing board and redrawing what the states think is appropriate in terms of this kind of fundamental justice?

MR. BORN: That's a great question, and part of the reason that I framed this discussion as past, present and future is I think it's essential for all of us, but for states in particular, to remember that we are not riding on a clean slate. We are riding on 5,000 years of history that express what I described as universal enduring human values.

I think that it's important, although there's a close relationship between the two areas, to distinguish between international investment and international commercial arbitration. They involve

somewhat different considerations, but many of the types of concerns about investment arbitration apply with equal force to commercial arbitration. Twenty percent of all commercial arbitrations involve states. Commercial arbitrations can involve a whole lot more money, a whole lot more public interests than many investment arbitrations. Concerns about infringement on regulatory space can be just as apt for commercial arbitration as investment arbitration.

So I think it's important to keep those two areas focussed in the debate. The criticism has been directed more but not entirely towards investment arbitration. But those criticisms, particularly if ultimately acted upon, can be brought to bear justice almost as fully on commercial arbitration.

I think it is unsurprising in some senses that states want to go back to take your pick of Drago or Calvo or what have you from earlier eras. History does repeat itself no matter how many times we give lectures about the past, present and future. But as part of that debate, I think it's essential that states have regard to the reasons and benefits that arbitration has arisen and has produced. And I

think in that regard, forcing states to articulate why exactly they have hesitations, reservations about international arbitration is important.

I think in many instances the real criticism of states -- and I alluded to this briefly in describing the Osgood declaration -- isn't about arbitration as a procedure, as a means of dispute resolution. Rather, it is about the underlying substantive rights that are at issue. States prefer minimum standard of treatment to fair and equitiable treatment. States prefer not to have umbrella clauses or other protections. And if that's what they want, they should fix, from their perspective, the substantive rules of international law which they wish to be bound by as opposed to breaking a means of dispute resolution which, when you take a look at their procedural criticisms, has in large part addressed them all.

SPEAKER: I think that's a very good distinction. I think one current of the discussion in the Working Group 3 and then we will leave this topic is the idea -- as you point out, there's substantive issues which, if you don't like fair and equitable treatment, put on the table what does make sense. But there is an under current also of a

notion of bias, an idea that the system is biased against states; that corporates win in some instances more than they should because it's all about the money that's flowing in at this stage. Trillions of dollars are flowing through international arbitration.

What do you say to that conversation, which appears to be immune from any empirical analysis where you actually show the history of these awards, what the actual rates of success are? What do you think about that conversation, and is that a reason for us to think that winter is perhaps coming, notwithstanding the optimism on that basis?

MR. BORN: I have faith in human intelligence.

It's rather extraordinary when you think about it that the system where the investor picks an arbitrator and the state picks an arbitrator and then an institution, ICSID or the PCA, funded and run by states, chooses the presiding arbitrator is biased, and a system where the states pick all the arbitrators from a list that they create isn't biased. I don't really get that.

It seems to me that, if one side chooses all the arbitrators, that's what's biased, not a

mechanism whereby the two disputing parties select jointly the arbitrators. And part of the reason that in my slides I talked about the historic means of choosing arbitrators from (inaudible) which chooses one, to the treaty between Francis and Swiss Cantons, one side chooses two, the other side chooses two, they choose the presiding arbitrator, is underscored precisely that element of even-handedness of arbitration.

A mechanism in investment arbitration where the state chooses all the arbitrators and dictates the entry terms for those that will be on those lists, gaining those entry terms through limitations on what the members of the court can do and what they will be paid, is fundamentally biased and unfair. And I think it gives line to the real motivation for those suggestions. Those suggestions are in fact -- those proposals are, in fact, not aimed at producing something that is fair or more independent or more neutral. They are aimed at producing something that lets states win more.

And as you alluded to, the empirical evidence is not that states lose disproportionately or excessively in arbitration. Susan Frank has done detailed studies of the outcomes of investment

arbitrations. The results are interesting. And to dumb them down in a sense, because that's the only way I understand all these statistics, they reveal that the world is broken -- the world of arbitral awards in investment arbitration is broken into three categories: In a third of all cases, plaintiffs win, although they usually get a lot less than they ask for. The next third of all cases states win. And in the final third of all cases parties settle amicably. It strikes me that that is not a system that is ganged against states but actually a system that produces consistently pretty reasonable results of the sort one would expect. One-third of all cases which settle amicably with claimants getting some money but not nearly what they would like suggests to me a system that really is working, just as arbitration has worked since 2650 BC.

SPEAKER: I want to pivot to two other issues, and then I want to make sure we have time for the audience.

So, one slide you had showed really a profound indicator of the success of international arbitration in that you had all the logos of the various arbitral institutions worldwide up on a

slide, and you might have even memorized where it's at, but it's certainly a suggestion of tremendous success of international arbitration, and one of the more significant changes in the field is the proliferation of these institutions. What do you think of that in terms of how that proliferation has occurred. Is it a positive trend? What's been the impact on the practice of international arbitration?

MR. BORN: So, that's a great question. I think it's one that has been, if I can put it this way, under explored. Arbitral institutions began life a little bit like arbitration in the 1920s in a sort of informal casual way. And to some extent you see residues of this in domestic arbitration. In some countries, arbitration wasn't really legal. Joseph Story describes it as rough justice. Arbitration was conducted on the seat of your pants in many ways.

As disputes have become more complicated, multi-party disputes, much larger disputes, related sets of contracts, huge construction projects that require substantial technical expertise and management, arbitral institutions have played, in my view, a critical role in professionalizing the arbitral process, and they do so in a variety of

ways.

Their rules provide predictability about how the arbitral process will be conducted. They don't take away the parties' autonomy. They don't take away the flexibility of the arbitral process, but they provide a more predictable and stable legal framework for arbitration. They define with greater specificity the arbitrators' powers. They require arbitrators to do things at particular times.

In addition to the rules, arbitral institutions play a critical role in making sure that arbitral tribunals actually do their job properly in accordance with the rules.

I have the honor, the privilege of being president of the Singapore International Arbitration Center's Court of Arbitration, and it would be nice, especially given my presentation, to say all arbitral tribunals always you do their job well. They don't. Unfortunately they don't. They take, just like any other lawyers, minding. They take an arbitral institution to make sure they are doing things on time, to make sure their compensation is geared to their performance, to make sure the parties are aware of the benefits and weaknesses of different arbitrators.

We at SIAC have a partnership with arbitrator intelligence whereby parties are encouraged to fill out questionnaires that rate arbitrators' performance during the arbitration so that, in the future, parties will choose arbitrators with full transparency, full knowledge of arbitrators' performance. And I think in those ways arbitral institutions play increasingly a critical role in the arbitral process.

Finally, the institution rules, in addition to providing a consensual framework for the arbitral process, most have pushed a little bit the limitations of consent. And by that I mean the following: Expedited procedure mechanisms can result in arbitrations being conducted in a six-month period, because that's what the rules say, even if the parties' agreement didn't have anything like that, and more importantly, in front of a sole arbitrator, even if the parties' agreement provides that, as a general matter, there will be three arbitrators. And there can be a debate. Is that intruding on the parties' autonomy? The parties said three arbitrators in their arbitration agreement and you go off, because it's a small value dispute, and appoint a sole arbitrator. Isn't that

overriding the parties' agreement? My answer to that is no, it's enhancing the parties' agreement.

The parties' agreement on three arbitrators remains in force for all disputes over the minimum threshold, but for an expedited procedure case, a sole arbitrator is the efficient way to resolve the parties' dispute, and thus far national courts have agreed.

But I think in that sense arbitral institutions have really played a key role in driving the arbitral process and responding to understandable criticisms from general counsel, from business men and women, about the costs and speed of the arbitral process.

SPEAKER: And with all that, is there a function that arbitral institutions currently are not doing that you think they should be including to address some of the legitimacy criticism that we have been going through?

MR. BORN: A couple points. One real challenge is transparency. I didn't have time to go into this, but one of the criticisms of investment arbitration is it's not transparent. Indeed, that's today largely wrong.

If you look at the middle panel and the

cover slides, you can see ICSID arbitrations a whole lot easier than you can see U.S. Supreme Court oral arguments. It's more transparent, not less transparent.

But commercial arbitrations differ, and I think a real question for arbitral institutions is should they force parties to be more transparent. There are suggestions in the United Kingdom that arbitration should presumptively be non-confidential. That means parties could disclose all of the internal workings of the arbitral process to the public, if they wish.

There have been some rules by arbitral institutions, the ICC, for example, to begin to publish a lot more about the existence of the arbitration, names of counsel, names of arbitrators, and I think the key question is whether, in an effort to preempt criticism of commercial arbitration, arbitral institutions should make arbitration less transparent.

The reason I say it's a question is because that's not really what businesses want. Businesses, for the most part, want confidentiality. Now, I say most part because we all nod and say yes, of course, businesses want confidentiality, but

that's not actually true in a lot of instances. Some businesses actually want publicity.

I sat in an investment arbitration where the claimant wanted the arbitral proceedings publicized, they wanted it transparent, and the state refused. And under the applicable arbitration rules, they therefore couldn't make the proceedings transparent. But our instinct that states want transparency and businesses want confidentiality is an overstatement. In fact, parties have different desires in different cases.

But I think the key question is to what extent should arbitral institutions try and drive that process, make arbitration transparent. I have serious doubts about that, but I think it is an important question to grapple with.

SPEAKER: On a purely commercial side, where you have commercial parties on both sides, confidentiality tends to be one of the key attractive aspects of international arbitration, so I agree it's complicated.

So, we have about eight minutes because we are running a little bit behind, so let me open it up for questions. It's a very familiar group, a very good group, I'm sure they have lots of

questions out there.

(Inaudible question from audience)

MR. BORN: That's a good question, and it sort of calls for another lecture, which I would be delighted to do but can't do tonight.

I alluded briefly to the fact that arbitrations started or at least at some point in its past had a more informal character, more seat of your pants character. And if you go further back, there are certainly instances where arbitration was conducted what we would call today (inaudible) and that means, in the eyes of many interpreters, that arbitration would be conducted without regard to legal rules; the arbitrator decides what's fair, or in your words, what's equitable or what accords with her conscience.

That is still possible today. Article 28, Subparagraph 3 provides that parties can agree to arbitration ex aequo et bono and (inaudible) but they need to do so expressly, because as disputes have become more complex, particularly in an international setting, the application of law, in order to give predictability and certainty to international trade, has become more important.

Another way to put it is what business

people want today, as reflected in the text of the model law, is the certainty and predictability that comes from the application of law, not from the exercise of good conscience and equity unless -- although the historic conception of arbitration, at least at some point, was more like what we would call ex aequo et bono.

Today is involved in a somewhat different direction while still permitting parties the freedom that they historically had.

I think the key element of arbitration, though, reflected both in the 17th century treatise which I quoted from and at other points in time was the mechanism of choosing the decisionmaker. The parties jointly choose the decisionmaker or alternatively Zabla, each party chooses one and the two coarbs choose the presiding arbitrator.

(Inaudible question from audience)

MR. BORN: That's a great question. And I think, as with some previous comments, it's important to distinguish between on the one hand commercial arbitration and the other hand investment arbitration. Jeffrey Commission (phonetic) who I saw -- and he probably left because I bored him -- had done a great study on the role of nonprecedent

in investment arbitration.

People like Gabriela (inaudible) say there's no precedent in arbitration and in particular investment arbitration. That's wrong. Obviously there's precedent. If you read Jeffrey's book, his article, you will see that's the case.

Every single investment arbitral award you will ever read cites lots of other investment arbitral awards. They don't cite it because they want to decorate the award with symbols of their learning. They cite it because even if you don't -- they cite these awards because even if you don't call them precedent, they have precedential value. They cite them to support their conclusions, to justify their conclusions, and the decisions of other tribunals in the investment context have a strong influence on how future decisions are rendered, how future cases are decided.

There's criticism in arbitration as being insufficiently consistent. There's no appellate mechanism and you get some cases that decide that a cooling off period is an issue of jurisdiction, others decide it's an issue of admissibility, oh, look at these inconsistencies. In fact, when you work through most of those issues, there is a high

degree of consistency and predictability, particularly given the fact that one deals with, as the slide showed us, 3300 different bilateral investment treaties that actually treat cooling off periods and other substantive or procedural provisions in very different ways, and it is appropriate, therefore, to have different decisions coming to different points of view on particular topics.

Commercial arbitration is somewhat different in part because unlike investment arbitrations commercial arbitration awards are often not published. That said, even in commercial arbitration, arbitral awards play an important precedential role. They do so because most arbitral institutions more than exercise their (inaudible) than anything else, publish redacted versions of their awards. You can look up, there are three volumes of ICC awards on a variety of issues arising under international arbitration statutes and rules and one volume of procedural decisions.

Commercial arbitration, the awards in those cases get cited in other awards and do have a useful precedential effect. One aspect of commercial arbitration, though, apart from the

confidential character of some awards I think contributes to the lesser degree of precedential value of or importance of precedent in commercial arbitration, and that is the diversity of commercial arbitrations is immense.

You have a commercial arbitration that resolves an issue about a Kuwaiti joint venture with Qatari law governing some aspect of force majeure. No surprise that that decision, that award, doesn't have a very big precedential effect because there aren't that many Kuwaiti joint ventures in which Qatari law plays a decisive role. And as a consequence, I think it's unsurprising that you would see arbitral awards being cited that frequently in a commercial context. But if you get recurrent issues, like how you interpret an arbitration clause, arbitral awards actually do play a pretty important role in a precedential sense.

SPEAKER: I think we have time for one more.

(Inaudible question from the audience)

MR. BORN: No.

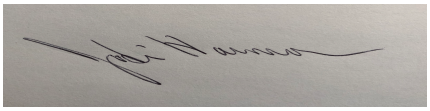
SPEAKER: End with that. On to the drinks. Thank you, everyone.

(End of audio recording)

C E R T I F I C A T E

I, Jodi Harmon, Registered Merit Reporter and Certified Realtime Reporter, do hereby certify that I was authorized to and did listen to and transcribe the foregoing recorded proceedings and that the transcript is a true record to the best of my ability.

Dated this 20th day of December, 2019.



JODI HARMON
Registered Merit Reporter
Certified Realtime Reporter