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TRANSCRIPTION OF GARY BORN SPEECH

JOB NO: 173521

1 (Beginning of audio recording)

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

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

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

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

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

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

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

5 (Applause)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 This is, you will be curious to know, the
6 world's first arbitration law, the first arbitration
7 statute. It comes from the annals of Rochester in
8 1112 AD, and it provided that parties that submitted
9 their dispute to arbitration and then failed to
10 honor the arbitral award would be fined 12
11 shillings, and that reflected the use, the use in
12 commercial settings all around Europe, in England
13 with the trade guilds and the (inaudible) league and
14 in the low countries, in Switzerland, of arbitration
15 and particularly international arbitration to
16 resolve disputes between merchants, to resolve
17 ordinary commercial disputes.

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

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

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

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

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

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

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

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

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

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

9 This goes back a bit longer than the past
10 century, and we can take a moment to look at what
11 this is, an article from the New York Weekly Post in
12 1751, where a frustrated litigant, disappointed by
13 what he or she described as seven years of
14 litigation in American courts urged its
15 counterparty, urged the claimant in the case to
16 submit their dispute to arbitration, and if they
17 refused to do so, they would surely regret it.

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

25 This is from the last will and testament

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

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

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

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

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

1 5,000 arbitrations with 5,000 arbitral awards by
2 British creditors against American colonists which
3 ultimately were paid by the United States, paving
4 the way for peace between the United Kingdom and
5 United States and ultimately the Constitution that
6 replaced the Articles of Confederation.

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

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

1 agreement, it seated in Geneva.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 ratified the Geneva Convention.

2 In 1958, at the urgings of the ICC and the
3 international business community generally, the New
4 York conference here in this city negotiated and
5 finalized the terms of the New York Convention.
6 Forty-eight states negotiated for three weeks to put
7 together, in a revolutionary new instrument, the
8 United Nations Convention, on the recognition and
9 enforcement of foreign arbitral award, better known
10 as the New York Convention, to put together the
11 Geneva protocol and Geneva Convention into one
12 instrument, which, in Article 2, makes agreements to
13 arbitrate international disputes valid and
14 enforceable and requires that the parties to those
15 disputes be referred to arbitration, and in Articles
16 3, 4 and 5 does the same thing for arbitral awards.
17 Subject only to limited exceptions, those awards can
18 be enforced in all the contracting states around the
19 world.

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

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

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

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

1 commercial arbitrations.

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

7 In conjunction with the ICSID Convention,
8 which like the New York Convention got off to a bit
9 of a slow start, states began to conclude bilateral
10 investment treaties. This is the first of those
11 treaties or at least the first of the modern
12 iteration of those treaties. The German Pakistan
13 bilateral investment treaty, coincidentally from
14 1958, which includes within them both substantive
15 protections for foreign investments but also
16 procedural mechanisms, specifically international
17 arbitration, to resolve disputes arising out of the
18 treaty's substantive terms.

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

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

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

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

24 The controversies that international
25 arbitral institutions are called upon to resolve

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 What will the future bring? Where will we

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

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

25 Let's first talk just a little bit about

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

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

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

1 property experts.

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

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

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

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

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

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

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

8 The virtues of arbitration, the strength
9 of arbitration, coming back to that first sentence,
10 lie not so much in material matters as other
11 matters. What the Quebec court said in the first
12 part of this quotation is worth looking at:

13 Arbitration is a fundamental right of citizens and
14 an expression of their contractual freedom and
15 should not be considered as an infringement upon the
16 monopoly of state justice.

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Thank you.

4 (Applause)

5 SPEAKER: So, Gary, 4,000 years in roughly
6 40 minutes, well done.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 MR. BORN: I have faith in human
15 intelligence.

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

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

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

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

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

1 arbitrations. The results are interesting. And to
2 dumb them down in a sense, because that's the only
3 way I understand all these statistics, they reveal
4 that the world is broken -- the world of arbitral
5 awards in investment arbitration is broken into
6 three categories: In a third of all cases,
7 plaintiffs win, although they usually get a lot less
8 than they ask for. The next third of all cases
9 states win. And in the final third of all cases
10 parties settle amicably. It strikes me that that is
11 not a system that is ganged against states but
12 actually a system that produces consistently pretty
13 reasonable results of the sort one would expect.
14 One-third of all cases which settle amicably with
15 claimants getting some money but not nearly what
16 they would like suggests to me a system that really
17 is working, just as arbitration has worked since
18 2650 BC.

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

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

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

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

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

1 ways.

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

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

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

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

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

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

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

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

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

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

25 If you look at the middle panel and the

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

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

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

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

1 that's not actually true in a lot of instances.

2 Some businesses actually want publicity.

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

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

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

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

1 questions out there.

2 (Inaudible question from audience)

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

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

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

25 Another way to put it is what business

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

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

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

18 (Inaudible question from audience)

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

1 in investment arbitration.

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

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

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

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

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

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

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

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

19 SPEAKER: I think we have time for one
20 more.

21 (Inaudible question from the audience)

22 MR. BORN: No.

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

25 (End of audio recording)

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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