State Parties in Contract-Based Arbitration: The Theory and Practice of Private-Public Arbitration

WASHINGTON HILTON
WASHINGTON, D.C., USA

Keynote Address: The Hon. Charles N. Brower, Judge ad hoc, International Court of Justice; Arbitrator, 20 Essex Street Chambers

Highlights
The ½-day ITA-ASIL Conference is presented annually in Washington, D.C. by the ITA Academic Council with the American Society of International Law (ASIL).

The conference examines contract-based investment and commercial arbitration between private parties, on the one hand, and states, state instrumentalities and state-owned entities, on the other.

• Networking Luncheon
• Conference Co-Chairs: Mélida N. Hodgson (Jenner & Block LLP) and Dr. Stephan W. Schill (Amsterdam Center for International Law)

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The workshop examines contract-based investment and commercial arbitration between private parties, on the one hand, and states, state instrumentalities and state-owned entities, on the other. Whereas treaty-based investment arbitration has garnered significant (and often critical) attention over the past decades, the participation of public actors as parties in contract-based arbitration has largely escaped scrutiny. Yet, contract-based arbitrations with states are on the rise, driven by, among other things, concession agreements, privatization processes in infrastructure, public utility, security, and education, sovereign bond and debt restructuring processes, as well as by the conditions imposed by development finance and investment insurance providers. What is more, debates and backlash against treaty-based investment arbitration is likely to increasingly shift disputes into contract-based arbitration.

At the same time, contract-based private-public arbitration is often treated simply as another form of international commercial arbitration, even though the involvement of public actors raises a host of distinct issues, including problems of administrative and constitutional law, that affect arbitrability, arbitral procedure, court supervision, and enforcement. Furthermore, because of the participation of public actors, many of the legitimacy issues currently surrounding treaty-based arbitration arguably also arise in respect of contract-based private-public arbitration. The workshop examines the theoretical framework for, and challenges of, public actor participation in contract-based investment and commercial arbitration and addresses the characteristics of such arbitration as compared to private-private arbitration in both theoretical and practical terms.

The keynote introduces the kinds of contractual disputes involving public actors that are settled through arbitration, discuss the drivers for such arbitrations, and provide a conceptual framework to analyze these arbitrations. It will discuss in particular to which extent contract-based private-public arbitrations should be treated in the same manner as private-private commercial arbitration, or whether they should be related closer to the debates we have in the context of investment treaty arbitrations.

- The Hon. Charles N. Brower, Judge ad hoc, International Court of Justice; Arbitrator, 20 Essex Street Chambers, Washington, D.C.

Commentator:
- Abby Cohen Smutny, White & Case LLP, Washington, DC

9:35 The Legal Framework of Private-Public Arbitration: At the Crossroads Between Public Law, Commercial Arbitration, and International (Investment) Law (70 minutes)

This panel focuses on the legal issues surrounding private-public arbitration from a theoretical perspective. It addresses three sets of questions: (1) the position of contract-based private-public arbitration between private and public law (i.e. party autonomy and governance by contract v the role of constitutional law and constitutional courts); (2) the specificities of private-public arbitration as compared to private-private arbitration (e.g. arbitrability, arbitral procedure, court overview, enforcement); and (3) the overlap with investment treaty arbitration (e.g. parallel contract-based commercial arbitration and investment treaty-based proceedings; breach of contract as breach of treaty, etc.).

Introduction and Moderator:
- Prof. Dr. Stephan W. Schill, Amsterdam Center for International Law, University of Amsterdam, Amsterdam

Panelists:
- Catherine M. Amirfar, Debevoise & Plimpton LLP, New York
- Prof. Julian Arato, Brooklyn Law School, Brooklyn
- D. Brian King, Arbitrator, New York

Roundtable and Q&A

10:45 Break
11:05 The Practicalities of Public Actor Involvement in Contract-Based International Arbitration (70 minutes)

This rapid-fire Q&A-style panel examines the practical aspects of public actor participation in contract-based investment and commercial arbitration from the perspective of different actors. It includes assessment of the experience of, and concerns for: (1) counsel; (2) the arbitral institution; (3) the arbitrator; (4) civil society; and (5) the public actor involved.

Introduction and Moderator:

- Mélida N. Hodgson, Jenner & Block LLP, New York City

Panelists:

- Nathalie Bernasconi-Osterwalder, International Institute for Sustainable Development (IISD), Geneva
- Prof. Laurence Boisson de Chazournes, Law Faculty, University of Geneva, Geneva
- Bart Legum, Dentons, Paris
- Hugo Perezcano, Centre for International Governance Innovation, Waterloo, Ontario
- Martina Polasek, Deputy Secretary-General, International Centre for Settlement of Investment Disputes (ICSID), Washington, D.C.

Roundtable and Q&A

12:15 Concluding Remarks

- Prof. Chiara Giorgetti, Chair, ITA Academic Council, University of Richmond School of Law, Washington, D.C.

12:20 Lunch

For information and to register for the 113th ASIL Annual Meeting, March 27-30, 2019, also presented at the Washington Hilton, please visit: www.asil.org/annualmeeting.
STATE PARTIES IN CONTRACT-BASED ARBITRATION
March 27, 2019
Washington Hilton • Washington, D.C.
Registration includes the conference, the conference materials and the networking luncheon.

Check applicable box:  Received by 3/4/19  Received after 3/4/19

- Regular registration fee  □ $285  □ $315
- ITA Member  □ $260  □ $285
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HOTEL INFORMATION: The cost of housing is not included in tuition. However, rooms (in limited number) have been reserved at the Washington Hilton Hotel, 1919 Connecticut Ave NW, Washington, DC 20009. You may book, modify, or cancel hotel reservations online at https://book.passkey.com/go/asil2019annualmtg. The reduced conference room rate is $259 + applicable taxes/night. We anticipate the room block will sell out, so we encourage you to make your reservation early. The last day to obtain this special rate is March 6, 2019.

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