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2019

3/27

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



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

Conference Co-Chairs

Mélida N. Hodgson
Jenner & Block LLP
New York City

Dr. Stephan W. Schill
Amsterdam Center for
International Law
University of Amsterdam
Amsterdam

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.

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8:00 Registration and Continental Breakfast

9:00 Welcome and Introductions

- **Joseph E. Neuhaus**, Chair, ITA Advisory Board, Sullivan & Cromwell LLP, New York City
- **Prof. Sean D. Murphy**, President, ASIL, The George Washington University Law School, Washington, D.C.

9:05 Keynote Address: State Parties in Contract-Based Arbitration: Origins, Problems, and Prospects of Private-Public Arbitration (25 minutes)

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 > Sponsored by: **COVINGTON** Dechert
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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.



Institute for
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**American Society
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Established in 1986 as part of The Center for American and International Law (CAIL), ITA provides advanced education for arbitrators, advocates, judges, business executives, government officials and other professionals concerned with transnational arbitration of commercial and investment disputes. Through its programs, scholarly publications and membership activities, led by many of the top global experts and supported by many of the world's most actively engaged corporations, law firms and individual practitioners, ITA has become an important global forum on contemporary issues in the field of transnational arbitration.

For more information, visit cailaw.org/ita.

ASIL is a nonprofit, nonpartisan, educational membership organization founded in 1906 and chartered by Congress in 1950. ASIL holds Category II Consultative Status to the Economic and Social Council of the United Nations and is a constituent society of the American Council of Learned Societies. Its mission is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice.

Learn more at asil.org.

REGISTRATION

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
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GENERAL INFORMATION

CANCELLATION POLICY: Tuition less a \$50 cancellation fee will be refunded upon receipt of written cancellation received by March 4, 2019. Email kjohnson@cailaw.org. After this date, no refunds, but substitution of attendees for this program will be permitted. Registrants not entitled to a refund will receive the course materials.

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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MCLE CREDIT: This program is approved by the State Bar of Texas for 2.75 hours, no ethics. Course ID Number: 174039409. Credit hours for other states will vary and are subject to each state's approval and credit rounding rules.

For this conference, ITA will directly apply (if requested) for course accreditation in the following states: California, Minnesota, New Mexico, Ohio, Oklahoma, Pennsylvania, Texas and Virginia. Some of these states may not approve a program for credit hours before the program occurs. Attorneys may be eligible to receive CLE credit through reciprocity or attorney self-submission in other states. ITA conferences are typically accredited by all mandatory CLE states.

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