

International Arbitration 2006: Back to Basics?

Wednesday, May 31st, 2006

17:00 - 18:00 **Opening Ceremony** *Location:* Quebec Court of Appeal *Address:* 100 Notre-Dame Street East

DAY ONE - Thursday, June 1st, 2006

09:00 - 09:15 **Opening Address****Working Group A:***Re-Examining the Arbitration Agreement***Working Group B:***Contemporary Practice in the Conduct of the Proceedings*

09:15 - 10:45

1. The arbitration agreement: still autonomous?

The autonomy of the arbitration agreement is a well established doctrine under many legal systems. But doctrinal differences remain, and the widespread acceptance of the doctrine may mask important differences in scope and application.

Moderator: Werner Melis
Baier Lambert
Vienna

Reporter: Philippe Leboulanger
Leboulanger & Associés
Paris

Commentators: Joseph E. Neuhaus
Sullivan & Cromwell
New York

J. Brian Casey
Baker & McKenzie LLP
Toronto

Gilberto Giusti
Pinheiro Neto Avogados
São Paulo

1. Document production

After the 1999 IBA Rules, there appears to be broader acceptance of document production in international arbitration. Yet there also remains vigorous disagreement about the appropriate scope and general utility of document production, with some arguing that it threatens the efficiency of the arbitral process and others that it is essential to a fair and just resolution of factual disputes. Is it possible to take a systematic approach to the question of document production, or are the issues necessarily case-specific and hence the debate incapable of resolution?

Moderator: Arthur Marriott
LeBoeuf Lamb Greene & McRae
London

Participants: James H. Carter **Dominique Brown-Berset**
Sullivan & Cromwell Lalive & Partners
New York Geneva

Wang Sheng Chang **Hans van Houtte**
China International Institute for
Economic and Trade International Trade Law
Arbitration Leuven
Commission (CIETAC)
Beijing

Guillermo Aguilar Alvarez
SAI Law & Economics
Mexico City

10:45 - 11:15

Break

11:15 - 12:45

2. Jurisdiction to determine jurisdiction: the effect of arbitral authority and the timing of judicial review

Arbitrators' authority to determine their own jurisdiction is also widely accepted. Beyond the starting point of arbitral authority in the first instance, however, national law reflects an enormous range of approaches on critical issues, such as the timing of national court review and the effect to be accorded by a reviewing court to the arbitral determination.

2. Fact testimony

Oral hearings are devoted primarily to hearing witnesses. Live witness testimony is commonplace, and cross-examination well accepted. Yet important issues on the topic are debated every day in arbitral proceedings.

	Working Group A:	Working Group B:
11:15 - 12:45 (continued)	<p>2. Jurisdiction to determine jurisdiction: (cont'd)</p> <p><i>In the United States, the First Options decision has given rise to great confusion as to the allocation of judicial and arbitral authority. What are the current regimes found in national law? What is the optimal solution? Does the New York Convention contemplate, or make possible, a uniform approach?</i></p> <p>Moderator: Loukas Mistelis University of London London</p> <p>Reporter: William W. Park Boston University School of Law Boston</p> <p>Commentators: Paulo Aragao Barbosa, Mussnich & Aragao São Paulo</p> <p>Hiroyuki Tezuka Nishimura & Partners Tokyo</p> <p>Virginie Colaiuta Orrick, Herrington & Sutcliffe LLP Paris</p>	<p>2. Fact testimony (cont'd)</p> <p><i>Would it be useful to develop detailed guidelines on procedures (foundation, scope of cross), modes of questioning (leading questions, arguments through witnesses), and function of witness statements (do they preclude live summary or supplemental direct). As a matter of sheer advocacy, how are live witnesses most effectively presented?</i></p> <p>Moderator: The Honourable Marc Lalonde Stikeman Elliott Montréal</p> <p>Participants: Lucy Reed Freshfields Bruckhaus Deringer LLP New York</p> <p>Laurent Levy Schellenberg Wittmer Geneva</p> <p>Luiz Olavo Baptista L.O. Baptista Advogados Associados São Paulo</p> <p>Bernardo M. Cremades B Cremades y Asociados Madrid</p> <p>Michael Hwang Singapore</p>
12:45 - 14:15	Lunch	
14:15 - 15:30	<p>3. Control of jurisdiction by injunctions issued by national courts</p> <p><i>National courts appear increasingly willing to give effect to their determination of arbitral jurisdiction by enjoining proceedings before arbitral tribunals and other national courts. How severe a problem are these anti-arbitration and anti-suit injunctions? Under what circumstances, if any, is it appropriate for a court to enjoin the parties from pursuing an arbitration or, conversely, enjoin a judicial proceeding in violation of an agreement to arbitrate? How should an arbitral tribunal treat such an order?</i></p>	<p>3. Evidentiary privileges</p> <p><i>Evidentiary privileges yield complex choice of law questions in international arbitration and litigation. Is there an established framework for analysis of what privilege law applies? Is there a risk of procedural unfairness when parties are subject to regimes of privilege that differ in their restrictiveness? Is there a customary law of privilege in arbitral proceedings? What can parties do to protect themselves from being compelled to disclose privileged material?</i></p>

	Working Group A:	Working Group B:
14:15 - 15:30 (continued)	<p>3. Control of jurisdiction by injunctions issued by national courts (cont'd)</p> <p>Moderator: Carlos Nehring Netto Nehring e Associados Advocacia São Paulo</p> <p>Reporter: Julian D.M. Lew 20 Essex Court London</p> <p>Commentators: José I. Astigarraga Astigarraga Davis Miami</p> <p>Pierre A. Karrer Zurich</p>	<p>3. Evidentiary privileges (cont'd)</p> <p>Moderator: William K. Slate American Arbitration Association New York</p> <p>Reporter: Henri Alvarez Fasken Martineau DuMoulin LLP Vancouver</p> <p>Commentators: Eduardo Siqueiros Barrera, Siqueiros & Torres Landa, S.C. Mexico City</p> <p>Matthieu de Boisséson John Bowman Darrois Villey Fulbright & Jaworski LLP Maillot Brochier Houston Paris</p>
15:30 - 16:00	Break	
16:00 - 17:30	<p>4. Protection of jurisdiction by injunctions issued by arbitral tribunals</p> <p><i>In light of the issuance of anti-suit and anti-arbitration injunctions by national courts, when is it appropriate for an arbitral tribunal to enjoin a party from commencing parallel proceedings? What is the basis of its authority to do so?</i></p> <p>Moderator: Margrete Stevens International Centre for Settlement of Investment Disputes Washington, D.C.</p> <p>Reporter: Emmanuel Gaillard Shearman & Sterling LLP Paris</p> <p>Commentators: Paul Friedland White & Case LLP New York</p> <p>Toby Landau Essex Court Chambers London</p>	<p>4. Arbitral provisional measures: the actual practice</p> <p><i>UNCITRAL's work on model legislative texts governing tribunal-issued provisional measures, court-issued provisional measures in aid of arbitration, and court enforcement of tribunal-issued provisional measures reflects the increased importance of the topic. As UNCITRAL nears the completion of its work, it is time to turn the discussion away from the model text and back to actual practice. In what circumstances do parties actually ask an arbitral tribunal for provisional measures, and in what circumstances, and to what ends, do tribunals issue them?</i></p> <p>Moderator: Fali S. Nariman New Delhi</p> <p>Reporter: Kaj I. Hobér Mannheimer Swartling Stockholm</p> <p>Commentators: José Maria Abascal Aba Abogados Mexico City</p> <p>Neil Kaplan Essex Court Chambers London</p> <p>Marc Blessing Bar & Karrer Zurich</p>

DAY TWO - Friday, June 2nd, 2006

	Working Group A: <i>Re-Examining the Arbitration Agreement (cont'd)</i>	Working Group B: <i>Contemporary Practice in the Conduct of Proceedings (cont'd)</i>
09:00 - 10:30	<p>5. Applicable law: consensus or confusion?</p> <p><i>Notwithstanding the centrality of the issue, there remain differing approaches to determining the law governing the arbitration agreement. Does a contractual choice of law clause automatically control? What role is played by the law of the seat? Can parties denationalize their arbitration agreement? Are general principles of international arbitration law and practice relevant either directly or as tools of interpretation?</i></p> <p>Moderator: Ivan Szasz Squire, Sanders & Dempsey LLP Budapest</p> <p>Reporter: Klaus Peter Berger University of Cologne Cologne</p> <p>Commentators: Yasuhei Taniguchi Matsuo & Kosugi Tokyo</p> <p>Karyl Nairn Skadden, Arps, Slate, Meagher & Flom LLP London</p> <p>Carlos Alberto Carmona University of São Paulo São Paulo</p>	<p>5. Legal Experts</p> <p><i>There are many ways in which it is useful to speak of experts as a single class, but the best case for distinguishing among them may be in the case of legal experts. After all, though perhaps not trained in the law of the specific jurisdiction, all or most of the advocates and arbitrators in the proceeding will at least be lawyers. Does it then make sense to hear discussion of legal issues by way of "expertise" instead of simple advocacy? Indeed, as a practical matter, is it even possible to distinguish the two?</i></p> <p>Moderator: Karl-Heinz Bockstiegel Cologne</p> <p>Participants: Pierre Lalive Lalive & Partners Geneva</p> <p>Andrew John Rogers Sydney</p> <p>Kap-You (Kevin) Kim Bae, Kim & Lee Seoul</p> <p>Stephen R. Bond White & Case LLP Paris</p> <p>Arnoldo Wald Wald e Associados São Paulo</p>
10:30 - 11:00	Break	
11:00 - 12:30	<p>6. Jurisdiction over non-signatories: national contract law or international arbitral practice?</p> <p><i>The "group of companies" theory has been heavily criticized as lacking a basis in law, and it has been rejected in several jurisdictions. Is there anything left? Is the same result available via traditional contract doctrines, such as agency and estoppel? Is a comparative or transnational approach helpful, or are these questions solely a matter for the governing law?</i></p>	<p>6. Damages and technical experts</p> <p><i>Are there specific lessons that can be drawn with respect to other specific categories of experts? For example, do the broad parallels in damages principles under many national legal systems allow us to identify more specific guidelines in the elicitation of financial and economic testimony on those issues? For another example, does our experience in specific industries - for example, construction arbitration - allow us to draw lessons about the use of technical experts?</i></p>

	Working Group A:	Working Group B:
11:00 - 12:30 (continued)	<p>6. Jurisdiction over non-signatories: (cont'd)</p> <p>Moderator: Ulf Franke Stockholm Chamber of Commerce Stockholm</p> <p>Reporter: Bernard R. Hanotiau Hanotiau & van den Berg Brussels</p> <p>Commentators: John M. Townsend Hughes Hubbard & Reed LLP Washington, D.C.</p> <p>Anne-Marie Whitesell Int'l Chamber of Commerce Paris</p> <p>Babak Barin Woods & Partners Montréal</p>	<p>6. Damages and technical experts (cont'd)</p> <p>Moderator: John Beechey Clifford Chance London</p> <p>Participants: Michael E. Schneider Lalive & Partners Geneva</p> <p>Nael G. Bunni Dublin</p> <p>Wolfgang Kühn Heuking Kühn Lüer Wojtek Düsseldorf</p> <p>Gerald Aksen Thelen, Reid & Priest LLP New York</p> <p>J. William Rowley McMillan Binch Mendelsohn Toronto</p>
12:30 - 14:00	Lunch	
14:00 - 15:30	<p>7. Treaties as agreements to arbitrate</p> <p>Moderator: Gabrielle Kaufmann-Kohler Schellenberg Wittmer Geneva</p> <p>Commentator: Brigitte Stern Université de Paris I Paris</p> <p>a. International law as the governing law</p> <p><i>While private, commercial arbitration agreements are generally interpreted in light of the applicable national law, treaty arbitration agreements are interpreted in light of international law as set out in the Vienna Convention. How have arbitral tribunals applied these rules? How can a tribunal properly interpret a clause in light of its "object and purpose" when only one of the drafting parties is a party to the proceeding? Should the non-participating State party be invited to comment on issues of treaty interpretation?</i></p> <p>Reporter: Meg Kinnear Trade Law Bureau (JLT) Department of International Trade Canada Ottawa</p>	<p>7. Techniques for eliciting expert testimony</p> <p><i>The need for expert testimony in arbitral proceedings is generally unquestioned, but the proper way to bring it to bear is hotly contested. The use of tribunal-appointed experts may be on the upswing, but if so, so is the intensity of the debate over their proper role. Are they just another expert, whose views are subject to full disclosure and whose testimony is subject to full examination by the parties, or are they private advisors to the tribunal? How can party-designated experts be made most useful? When parties designate the experts, do prehearing expert conferences and inhearing expert confrontations enhance the clarity and reliability of their testimony? What other techniques may be brought to bear in the hearing of expert testimony?</i></p>

	Working Group A:	Working Group B:
14:00 - 15:30 (continued)	<p>7. Treaties as agreements to arbitrate (cont'd)</p> <p>b. Effect of related dispute resolution regimes (e.g. fork-in-the-road provisions, contractual agreements)</p> <p><i>The prevailing interpretation of most fork-in-the-road provisions is that they are implicated only when the same claim is made in local courts and then brought to an arbitral tribunal. Has the death knell sounded for these provisions? As more and more treaty claims are brought that are intertwined with contractual arrangements, the effect of contractual forum selection clauses on treaty arbitration agreements is of increasing importance. When determining arbitral jurisdictions, how do these regimes intersect?</i></p> <p>Reporter: Mark W. Friedman Debevoise & Plimpton LLP London</p>	<p>7. Techniques for eliciting expert testimony (cont'd)</p> <p>Moderator: Yves Derains Derains & Associés Paris</p> <p>Participants: David W. Rivkin Debevoise & Plimpton LLP New York</p> <p>Ahmed S. El-Kosheri Cairo</p> <p>Dushyant Dave New Delhi</p> <p>Martin Hunter Essex Court Chambers London</p> <p>Claus von Wobeser von Wobeser y Sierra, S.C. Mexico City</p>
15:30 - 16:00	Break	
16:00 - 17:30	<p>c. Issues of scope: subject matter (e.g. contract/treaty)</p> <p><i>Have BIT practice, arbitral decisions, and scholarship generated useful principles on issues of interpretation and substantive scope?</i></p> <p>Reporter: Guido S. Tawil M & M Bomchil Buenos Aires</p> <p>d. Issues of scope: parties (e.g. ownership and control criteria)</p> <p><i>Similarly, can we yet derive general guidance on the identity of parties encompassed by specific clauses?</i></p> <p>Reporter: Peter J. Turner Freshfields Bruckhaus Deringer Paris</p>	<p>8. Oral argument</p> <p><i>Oral argument is one of the great challenges and, it must be said, greatest satisfactions of the arbitration practitioner. But setting aside the stories and the tradition, what actually works, and what doesn't? Do sophisticated tribunals need argument, or just answers? And how does oral argument intersect with written submissions?</i></p> <p>Moderator: V. V. Veeder Essex Court Chambers London</p> <p>Participants: Robert Briner Lenz & Staehelin Geneva</p> <p>Albert Jan van den Berg Hanotiau & van den Berg Brussels</p> <p>L. Yves Fortier Ogilvy Renault Montréal</p> <p>Teresa Cheng Des Voeux Chambers Hong Kong</p> <p>David A.R. Williams Bankside Chambers Auckland</p>

DAY THREE - Saturday, June 3rd, 2006

Working Group C (Plenary):*International Arbitration and the Generation of Legal Norms***09:00 - 10:30**

Moderator: **Donald Francis Donovan**
Debevoise & Plimpton LLP
New York

a. Commercial arbitration and transnational public policy

There appears to be wide agreement that transnational public policy may provide the basis for an arbitrator's rulings as to particular issues - indeed, may compel a particular ruling in a particular case. But there is no such agreement, and in fact there has been little work, on the source of that authority or obligation. Further, if an arbitrator has the authority or obligation to apply transnational public policy, how does he or she determine its content?

Reporter: **Michael Reisman**
Yale Law School
New Haven

Commentators: **Catherine Kessedjian**
Université Panthéon-Assas Paris II
Paris

Alan Redfern
One Essex Court
London

10:30 - 11:00**Break****11:00 - 12:30****b. Treaty arbitration and international law**

With the Iran-United States Claims Tribunal, the sheer quantum of law generated by international arbitration tribunals on matters of international law exploded. In the era of BIT arbitration, the pace has not slackened. What effects have the awards of international arbitral tribunals had on the development of international law? Is arbitration involving private parties a reliable process for filling out and, in some cases, generating standards that govern sovereign states and their ability to pursue their national interest?

Reporter: **Jan Paulsson**
Freshfields Bruckhaus Deringer
Paris

Commentators: **Francisco Orrego Vicuña**
Universidad de Chile
Santiago

Rudolf Dolzer
University of Bonn
Bonn

12:30 - 13:00**Closing Ceremony**

Closing Remarks: **Gerold Herrmann**
President
International Council for Commercial Arbitration