Note: This syllabus is subject to change as guest speakers' schedules may change and I may adjust readings to accommodate our discussion time. Updated versions of the syllabus will be published on Canvas.

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ARBITRATION: LAW, PRACTICE AND POLICY

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Syllabus

Winter 2020

Arbitration, once narrowly defined as a party-selected method for resolving contract-based disputes arising out of B-to-B commercial transactions, is now ubiquitous. In the U.S. in addition to resolving ordinary commercial disputes, arbitration may be used to resolve claims invoking anti-trust (competition), securities (shareholder), and civil rights law, and consumers, employees, patients and other claimants may be held to arbitration provisions included in form (adhesive) contracts. Economic globalization has created increased demand for international commercial arbitration, which offers binding resolution of trans-national business disputes, enforceable in virtually every court in the world. Moreover, the desires of countries with less developed economies to attract foreign direct investment has led to the creation of a specialized form of arbitration for disputes between foreign private investors and states. Beyond these there are many specialized arbitration forums and rules. The increasing use of arbitration reflects its perceived benefits to parties, by comparison to courts. It has also created new opportunities for lawyers interested in dispute resolution. But because many apparently private disputes have significant public implications, the growth of arbitration has also evoked considerable controversy.

In this seminar we will take a critical look at arbitration in three important domains: domestic arbitration in the United States, international commercial arbitration and investor-state arbitration ("investment arbitration"). We will learn about the public and private law that governs arbitration agreements and proceedings; discuss how arbitration "works" in actual disputes; and consider the controversies that have arisen in recent years over the use of arbitration in all three of these domains, and the "fixes" and alternatives to arbitration that have been proposed to address perceived problems.

There is no mandatory text for the course. The syllabus contains links to basic resources on arbitration, as well as chapters from texts, selected academic articles and practitioner commentary. Materials not available to you directly from URLs will be posted on Canvas. While many readings will reference key court decisions, for the most part we will not read court decisions in this seminar. And while there are a large number of readings, many of them are brief: for example blog posts listed as assigned reading are generally 1 or 2 pages long. I have also posted to Canvas a list of leading texts on arbitration that you

might want to consult for more information on the issues we will discuss. Most of these texts are available from our law library. Readings denoted as "supplementary" are optional. Required reading is heavy for the first few sessions as everyone gets up to speed. Later in the quarter I have tried to decrease the amount of reading to give you time to work on your papers.

The required project for the course is a research paper on a topic of your choice. I will post a list of possible topics on Canvas, but you may select a different topic. I am happy to meet with you in the first few weeks of the course to discuss your topic selection. **Papers are due on April 6, 2020.** Generally papers are expected to be 26 (double-spaced) pages long. However, if you perform significant original empirical research, paper length may be reduced in proportion to hours required for empirical data collection and analysis. *Before embarking on an empirically-based research paper, you must discuss your plans with me.*

The grade for the course will be based on the course paper and participation in the seminar discussions.

January 6 The Legal Framework of Arbitration

Arbitration, often portrayed as a quintessentially private proceeding and a creature of contract, is enabled and supported by public law, including domestic statutes and international conventions. In this first session of the seminar we will consider how and why this structure was built, focusing on the U.S. Federal Arbitration Act (FAA), the UN Convention on the Recognition and Enforcement of Arbitral Awards (commonly known as the "New York Convention") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (commonly known as the "ICSID Convention"). In the U.S. state arbitration statutes are generally consistent with the FAA although case law may differ. The signatories to the NY Convention, the ICSID convention and other conventions regarding arbitration (and now mediation) overlap, creating a public law structure to support international dispute resolution.

At our first session, we will discuss how arbitration differs from litigation and from various forms of alternative dispute resolution ("ADR"), and review the common features of arbitration within the domestic US domain, the international commercial arbitration domain and the international investment domain. International students should feel free to share in class information about how and why arbitration was adopted in their own jurisdictions. I will also discuss the structure of the course and the requirements for the course paper and answer questions you may have.

READ: Deborah Hensler & Damira Khatam, "Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication," 18 *Nevada Law Journal*: 381 (2018), available at https://scholars.law.unlv.edu/nlj/vol18/iss2/3/

This article sets the stage for this seminar; the research that Khatam & I conducted motivated the seminar design. Note that while parts of the article are critical, I expect that each of you will formulate and articulate your own perspective on the law and politics surrounding arbitration.

Supplementary Reading

If you would like to know more about the evolution of international law that produced the contemporary investment arbitration regime, read: O. Thomas Johnson & Jonathan Gimblett, "From Gunboats to BITS: The Evolution of Modern International Investment Law," in K. P. Sauvant, YEARBOOK ON INTERNATIONAL INVESTMENT LAW AND POLICY, 2010-2011, Oxford University Press, 2012, pp. 649-692. The author has provided a link to this chapter at https://www.cov.com/en/news-and-insights/insights/2011/12/from-gunboats-to-bits-the-evolution-of-modern-international-investment-law

For more on the history of and public policy debate over investment arbitration, see Susan Franck, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION, Oxford, 2019, pp. 10-22.

RESOURCES:

During the quarter we will refer to the following 4 documents that comprise the foundational law for arbitration in the three domains we will study.

Federal Arbitration Act (FAA), 9 USC §1-16, https://sccinstitute.com/media/37104/the-federal-arbitration-act-usa.pdf

New York Convention, http://www.newyorkconvention.org/english

ICSID Convention, https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf (Note: Pages 1-33 of the PDF contain the convention. Various reports follow.)

In 1985, to encourage states to adopt arbitration statutes that support international arbitration and to harmonize arbitration law among states, UNCITRAL adopted a Model Law for Commercial Arbitration, which was amended in 2006. The Model Law is incorporated or referenced in more than 70 countries' arbitration statutes and case law. The text of the Model Law, with additional commentary, is available from UNCITRAL, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

Although in class our example of domestic arbitration law will be the FAA, other countries (obviously) have also adopted arbitration statutes. For your information, I've included two links below, one an example of a national domestic arbitration statute, and the other that provides information about more than 50 other countries:

https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-04-international-and-domestic-arbitration-in-singapore A key difference between international and domestic arbitration under Singapore law is that in the latter there may be a greater degree of court intervention. Parties who choose to arbitrate in Singapore may opt-in to either regime if they mutually agree to do so, thereby choosing what arbitration law they wish to pertain.

ICLG.com (International Comparative Legal Guides) provides on-line overview of domestic and international arbitration law in more than 50 jurisdictions. Go to https://iclg.com/practice-areas/international-arbitration-laws-and-regulations

As we will discuss in class, there are a large number of non-profit organizations that have been established to facilitate arbitration. These may be referred to as "courts" although they are private. Disputants may select one of these to administer the arbitration process for them; usually selection of a particular organization entails selecting that organization's procedural rules although sometimes the parties specify a limited role for the organization, such as administering arbitrator selection. Many arbitration providers maintain rosters of potential arbitrators from which disputants can choose. The arbitrators chosen to decide cases are sometimes referred to as "tribunals" although they serve in a private capacity. Below are links to rules of leading arbitration organizations:

American Arbitration Association:

https://www.adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf

(Note: The AAA has promulgated rules for many different types of disputes. These commercial rules are probably the best known to US practitioners.) The AAA is the oldest non-profit arbitration organization in the U.S. and one of the best known to American business litigators. The International Centre for Dispute Resolution (ICDR) is the international division of AAA. https://www.icdr.org/about_icdr

JAMS (Judicial Arbitration and Mediation Services): https://www.jamsadr.com/rules-comprehensive-arbitration/ Founded in 1979 by a retired California state court judge, JAMS initially focused on recruiting other recently retired judges with outstanding local reputations to mediate disputes. Perhaps surprisingly, many parties asked these judges to arbitrate rather than mediate their disputes. Today, JAMS operates internationally through alliances with other ADR providers and claims to be the world's largest private ADR provider, with neutral rosters that include attorneys as well as retired judges. Unlike many other leading arbitration providers, JAMS is a for-profit organization. It is AAA's leading competitor in the United States. About one-third of JAMS' neutrals are shareholders in the company, meaning they share in the company's profits.

ICC (International Chamber of Commerce): https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/ Founded after World War I to promote international commerce and trade, the ICC founded the International Court of Arbitration (ICA) in 1923. Headquartered in Paris, the ICC operates globally. Like the AAA, it is a non-profit organization.

LCIA (London Court of International Arbitration): https://www.lcia.org//Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx As detailed in Hensler & Khatam (2018), the LCIA dates back to the 19th century.

Singapore International Arbitration Centre. http://www.siac.org.sg/our-rules/rules/siac-rules-2016 In recent years, Singapore has been vigorously promoting itself as an arbitration-friendly jurisdiction in, but not exclusively for, Asia.

ICSID (the International Centre for the Settlement of Investment Disputes), an organization within the World Bank Group, was established in 1966 by the ICSID Convention (see above) to facilitate the resolution of disputes between foreign investors and states through conciliation and arbitration. ICSID

decisions are enforceable in each of the 163 states that are signatories to the ICSID Convention. https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx

UNCITRAL (The United Nations Commission on International Trade Law) has promulgated arbitration rules that are often used by parties that do not wish to avail themselves of arbitration provided by the above or other organizations (often termed "ad hoc" arbitrations). Parties may also choose these rules for administered arbitrations. https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/uncitral-arbitration-rules-2013-e.pdf

The Permanent Court of Arbitration (PCA) is an inter-governmental organization, established in 1899 by an international treaty to resolve disputes between nations. More than 120 states are parties to its founding convention. Located in the Hague, the PCA provides administrative support for arbitration of disputes involving states and international organizations, including investor-state arbitration under bi-lateral investment treaties ("BITS"). https://pca-cpa.org/wp-content/uploads/sites/6/2015/11/PCA-Arbitration-Rules-2012.pdf. The PCA also serves as the arbitrator appointing authority for arbitration under UNCITRAL rules and for parties engaged in ad hoc arbitration.

(Note that there are many other important arbitration providers, some of which are leaders within particular geographic regions.)

January 13 Choosing to Arbitrate

The foundational principle of arbitration is that it is a creature of contract, meaning it is chosen by the parties rather than being imposed upon them by the state. Parties' decision to arbitrate disputes arising out of a contract is usually expressed in an arbitration clause (sometimes now termed a "dispute resolution clause") within the contract that specifies the other terms of their transaction. In other words, parties bind themselves to arbitrate (rather than litigate) disputes before disputes arise (and hope, of course, that an occasion to use arbitration will not arise). Sometimes, however, parties' whose contract did not include an arbitration clause agree to arbitrate after a dispute arises; also, parties who contracted only to arbitrate a select set of disputes might decide subsequently to arbitrate a different type of dispute. A frequent complaint about arbitration clauses incorporated in business contracts is that they are drafted by business lawyers who are relatively ignorant about arbitration procedures and the law governing arbitration and simply cut-and-paste an arbitration clause without thinking about its consequences. (This is the reason why "deals" lawyers should learn something about arbitration.)

In domestic and international commercial arbitration, the disputants are the contracting parties. In investor-state arbitration, by contrast, the contracting parties are the states that negotiated an investment treaty that includes a "dispute settlement clause"; the disputants are a private foreign investor or investors and the state in which the investment took place.

1. The key elements of an arbitration clause: scope; "seat"; arbitration forum and/or rules; choice of law; number of arbitrators; and for international arbitration, language.

READ:

American Arbitration Association, DRAFTING ADR CLAUSES: A PRACTICAL GUIDE, pp. **7-17**. Available at https://www.adr.org/sites/default/files/document_repository/Drafting%20Dispute%20Resolution%20Clauses%20A%20Practical%20Guide.pdf A concise presentation of the elements of general commercial arbitration contracts for domestic and international arbitration. A quick read to get you started.

"The Elements of an International Dispute Resolution Agreement," pp. **11-36** in Michael McIlwrath and John Savage, INTERNATIONAL ARBITRATION AND MEDIATION: A PRACTICAL GUIDE (Wolters Kluwer, 2010). A more extensive discussion of international commercial arbitration contract drafting, focusing on the most important components of the arbitration agreement, with practitioner commentary. We will discuss each of these key elements at this class session.

2012 Model U.S. Bilateral Investment Treaty, Section B, Articles 23 – 36, pp. **26 – 38**, available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf Drafted by the U.S. Trade Representative, the Model Bit includes a Dispute Resolution Clause that stipulates how disputes between private investors and host states will be resolved. Keep in mind that BITS (including their dispute resolution provisions) are negotiated between nations, not between disputants. Read pp. **26-38** to note similarities between this clause and the private arbitration clauses listed above.

2. Arbitration Clauses in Adhesive Contracts

The extension of arbitration beyond B-to-B contracts and disputes has raised questions about the "freedom of contract" principle as applied to arbitration. In the United States, the U.S. Supreme Court has held that arbitration clauses in form contracts must be enforced, even when arbitration arguably denies parties procedural rights they would have in court, such as the ability to proceed in collective form. As a result, arbitration clauses now govern a large fraction of consumer and employment disputes. Critics argue inter alia that these agreements are one-sided and that consumers and employees have little or no power to reject them. In the investor-state arena, somewhat similar concerns have been raised about the adoption of the U.S. Model Bit (including the dispute settlement clause) in contracts between the U.S. and less powerful nations. In subsequent sessions we will discuss aspects of arbitration that contribute to push-back against arbitration; in the last hour of this session we will consider questions that have been raised about the conditions in which parties contract to arbitrate, in domestic and international arenas. ***If you would like to share arbitration clauses that you have agreed to in consumer or employment contracts, email them to me and I will post them on Canvas.***

READ:

Katherine Stone & Alexander Colvin, " The Arbitration Epidemic," Economic Policy Institute (EPI) Briefing Paper, December 7, 2015, available at https://www.epi.org/files/2015/arbitration-epidemic.pdf. Read pp. **7-14**. Note that this is a one-sided analysis of the U.S. Supreme Court's arbitration jurisprudence, written by long-time critics. However, it offers a quick overview of the controversial doctrine that supports the enforceability of mandatory pre-dispute arbitration clauses in adhesive (form) contracts in the United States, including citations to the leading court opinions.

Jeongho Nam, "Model BIT: An Ideal Prototype or a Tool for Efficient Breach? 48 Georgetown J. Intl. Law, 1276 (2017), Read pp. **1286-1302**. A discussion of the effect of unequal power relations between countries that negotiate BITS that implicates some of the same issues as arise in domestic US mandatory pre-dispute arbitration contracts.

Supplementary Reading

https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51

California A.B. 51, signed by Gov. Gavin Newsom in October 2019, forbid enforcement of employment requirement requiring waiving of rights, including procedural rights, under the Fair Employment and Housing Act. The California Chamber of Commerce has already challenged the statute and federal judge Kimberly Mueller (E.D. Ca) issued a temporary restraining order on December 30.

3. Arbitrability: Are there limits on the types of disputes that parties may choose to arbitrate? *Should* there be?

As discussed in all arbitration texts, determining arbitrability can be complicated, implicating the black language of the arbitration clause, and arbitration-specific doctrines, such as "severability" and "competence-competence." But the question of arbitrability also raises a more fundamental question: Are there limits to the scope of arbitration. As discussed in Hensler & Khatam (see above, January 6) much of the controversy over arbitration in domestic, international commercial and investor-state arbitration regards the scope of arbitration. Should private arbitration contracts bind freely-contracting parties to arbitrating disputes that implicate statutory rights, such as civil rights? What about disputes where the law is primarily intended to protect the interests of parties (e.g consumers, competitors in anti-trust/competition claims) who did not contract to arbitrate the instant dispute? Should disputes arising out of government policy decisions, such as regulation of tobacco use or nuclear power development, be decided by privately-selected and privately-paid arbitration tribunals? Are there decisions that are so key to public law that only public courts should decide them? We'll close this session with this question, and return to it in the final session of the seminar.

Supplementary Reading

Investor-state arbitration: In 2018, in *Slovak Republic v. Achmea* ("*Achmea*"), the Court of Justice of the EU (CJEU), held that arbitration clauses in intra-EU BITS are unenforceable because they undermine the power of the courts of the EU's member states. Although there is continued controversy about the breadth of implications of *Achmea,* it is widely viewed as an additional factor contributing to movement away from ISDS in Europe and towards the adoption of a public international investment court. For analysis of the decision, see inter alia:

Geroge Bermann and John Gaffney, "Intra-EU Investment Protection in a Post-Achmea World," Columbia FDI Perspectives, December 2, 2019 (A quick review of the state of play post-Achmea) available on Canvas

Laurens Ankersmit and Layla Hughes, IMPLICATIONS OF ACHMEA: HOW THE ACHMEA JUDGMENT IMPACTS INVESTMENT AGREEMENTS WITH NON-EU COUNTRIES, Center for International Environmental Law, April 2018. (Introductory sections describe and analyze the Achmea decision; the Report also includes a few profiles of disputes with awards that the authors suggest might now be unenforceable.) Available on Canvas

January 20 Martin Luther King Day No Classes

January 27 Choosing the Arbitrators

A key difference between arbitration and court adjudication is that parties choose the decision-maker(s) – often lawyers with special expertise in the area of the dispute -- in the former whereas in the latter often their dispute is assigned to a generalist judge (and in the U.S. to a jury). As discussed in our previous session, in arbitration, parties are usually able to decide whether they want their case adjudicated by one or several arbitrators. In courts of first instance, there is usually only one adjudicator, although in many jurisdictions, at the appellate level, cases are decided by panels of judges. In this session we will first review the arbitrator selection process and the choice between 1 and several arbitrators and then move on to the vexing (and inter-related issues) of conflicts of interest and inclusion/diversity.

1. **How does arbitrator selection work?**

READ: *the rules regarding arbitrator selection for one or more of the ADR providers identified above (of another of your choice). Feel free in class to volunteer information about how different providers that you are familiar with manage arbitrator selection.*

2. **Why do parties choose several – usually 3 – arbitrators rather than one? What is the role of party-appointed arbitrators?**

Ben Giaretta & Akshay Kishore, "One Arbitrator or Three?" Ashurst, International Arbitration Update, September 1, 2015, available at https://www.ashurst.com/en/news-and-insights/legal-updates/one-arbitrator-or-three/ A practitioner perspective on the consequences of the number of arbitrators

Supplementary Reading

Naomi Gershoni, "Individual vs. Group Decision-Making: Evidence from a Natural Experiment in Arbitration Proceedings," Monaster Center for Economic Research, Ben-Gurion University of the Negev, November 2019, pp. 1-6 (available on Canvas) summarize the findings of a systematic empirical analysis of the outcomes of having panels of arbitrators vs. one arbitration.

Andreas Lowenfeld, LOWENFELD ON INTERNATIONAL ARBITRATION, "The Party-Appointed Arbitrator in International Controversies: Some Reflections, pp. 81-108 (available on Canvas). Prof. Lowenfeld was an eminent arbitrator. In this excerpt from his book, he shares stories of his experiences as a party-appointed arbitrator.

3. Conflicts of interest and disclosure

Unlike judges who devote themselves exclusively to judging while on the bench, private lawyers who arbitrate cases may have financial interests that are implicated in the cases before them. When parties fear that publicly-appointed judges are biased against them, they may file motions to recuse. Actual or perceived bias might arise if the arbitrators are "repeat players" (arbitrating multiple cases involving the same parties) or because of "double-hatting" (the practice of lawyers both arbitrating and representing parties in arbitration (obviously in different cases). What are the safeguards against arbitrators' conflicts of interest? What are the standards for determining arbitrator neutrality or lack thereof? As you read these materials, think about the following: If parties are freely choosing the arbitrators to decide cases in private forums, should the public be concerned about who the arbitrators are?

a. Under the U.S. Federal Arbitration Act (FAA) arbitrator decisions may only be set aside (i.e. vacated) on very limited grounds, including importantly "evident partiality" on the part of the arbitrator(s). (Sec. 10 (a) (2). A recent 9th Circuit decision in *Monster Energy v. City Beverage* considered whether a JAMS arbitrator's failure to disclose his potential financial interest deriving from JAMS providing arbitrators for cases involving a "repeat player" corporation constituted a potential partiality that required disclosure. In the absence of such disclosure, the 9th Circuit panel vacated the arbitrator's award in favor of *Monster*. **READ** a synopsis of the 9th Circuit decision by Mark Kantor, a leading American arbitrator (Available on Canvas and used with his permission). (Note: In late December the 9th Circuit denied *Monster's petition for rehearing by the same panel and for rehearing en banc.)*

b. In 2004, the International Bar Association (IBA) adopted Guidelines on Conflicts of Interest in International Arbitration. The Guidelines were revised in 2014 and deemed to apply both to international commercial arbitration and investor-state arbitration. **READ** the IBA Guidelines, "General Standards Regarding Impartiality, Independence and Disclosure," pp. **4-16** (available on Canvas)

c. Are repeat players and double-hatters common phenomena? This brief commentary on the issue includes empirical data. READ: Malcolm Langford, Daniel Behn & Runar Lie, "Ethics and Empirics of Double-Hatting," 6 ESIL Reflection (2017), available at https://esil-sedi.eu/post_name-118/

Supplementary Reading

Telekom Malaysia Berhad v. Republic of Ghana was an ICSID case (cited by Langford et al) in which the District Court of the Hague was asked to rule on a challenge to a double-hatting arbitrator. The Court's decision is available at: https://jusmundi.com/en/document/decision/en-telekom-malaysia-berhad-v-the-republic-of-ghana-decision-district-court-of-the-hague-monday-18th-october-2004#decision_1358

4. Diversity

Some critics argue that in addition to raising concerns about impartiality, the repeat player phenomenon has led to a lack of diversity, as younger lawyers, who in some jurisdictions are more diverse than their

elders, have difficulty breaking into the arbitrator "club." Other critics point out that even putting aside the issue of repeat players, arbitrator rosters are not diverse.

a. In 2018 rapper and entertainment entrepreneur Jay-Z (aka Shawn Carter) sought a stay of arbitration in New York state court on the grounds that because AAA's arbitrator roster for complex cases included only 3 African-Americans (one of whom had already been retained by opposing party) the arbitration clause constructively violated of NY state's anti-discrimination law and was unenforceable as a violation of public policy. Jay-Z's petition attracted widespread attention. **READ:** *Carter v. Iconix*, "Memorandum of Law," pp. **1-12** available at https://docs.google.com/viewerng/viewer?url=https://abovethelaw.com/wp-content/uploads/2018/11/Carter-v-Iconix-Memo-of-Law.pdf&hl=en_US
(A month after the judge granted the temporary stay, Jay-Z informed the court that AAA had produced a longer list of African-American arbitrator candidates for his case and had promised to expand their roster to be more inclusive, and withdrew his petition for a stay. The case that gave rise to the challenge regarding arbitration seems to have settled in 2019.)

b. The concentration of arbitrator appointments in a small number of arbitrators and its perceived correlation with a lack of diversity on arbitration tribunals has attracted increasing attention in the last several years. This brief blog post describes the problem and links to empirical research on concentration and diversity in investment arbitration. READ: Andrea Bjorkland, "The Diversity Deficit in Investment Arbitration," EJILTalk! , April 4, 2019, available at https://www.ejiltalk.org/the-diversity-deficit-in-investment-arbitration/

   Supplementary sources that may be of interest to those of you who want to write papers on diversity:

   In 2015, members of the arbitrator community initiated an effort to diversify arbitrator tribunals, primarily with regard to gender. To explore this effort, go to Equal Representation in Arbitration at http://www.arbitrationpledge.com/about-the-pledge.

   A somewhat similar initiative focused on expanding the inclusion of African lawyers in international arbitration is described here https://researcharbitrationafrica.com/the-african-promise/ Like the gender initiative, the African initiative relies on private pre-commitments.

February 3 The Search for Efficiency

Arbitration is often promoted as more efficient than litigation, both in terms of direct costs and time to dispute resolution. Yet frequent users of arbitration, particularly business decision-makers, often complain that it takes too long and costs too much and over time has become increasingly to resemble litigation. These complaints arise both in the domestic and international domain. What do we know about arbitration costs and time to resolution? If costs are increasing, is this traceable to procedural features, parties, counsel and/or arbitrators' behavior or to changes in case mix? Are rule changes introduced to increase efficiency working?

Guest Speaker: Prof. Jan Dalhuisen

Prof. Dalhuisen is professor of law at King's College in London, Miranda chair of Transnational Finance at Universidad Catolica Lisboa, and has been a regular visiting professor at Berkeley Law since 1998. He is the author of numerous texts and articles on international law, finance and arbitration. A long time international commercial and international investment arbitrator, Prof. Dalhuisen's extensive and varied experience has given him an unmatched opportunity to observe the evolution of international arbitration practice over the past several decades. He will join us in the last hour of our session to share his experiences and perspective.

READ:

Jan Dalhuisen, "Three Time Bombs Under International Arbitration: Where Is It Going?" May/October 2019, available on Canvas or SSRN, https://ssrn.com/abstract=3381720.

Norman Veasey, "The Conundrum of the Arbitration v. Litigation Decision," ABA Business Law Section, Dec. 15, 2015, available at https://www.americanbar.org/groups/business_law/publications/blt/2015/12/07_veasey/ Reflections on the benefits and costs of arbitration by a corporate counsel, distinguishing domestic and international commercial arbitration.

Thomas Stipanowich, "Arbitration: 'The New Litigation,'" 2010 U. Ill. L. Rev. 1 (2010), **READ 11-24. https://heinonline.org/HOL/P?h=hein.journals/unilllr2010&i=3**

Remy Gerbay, "Is the End Nigh Again? An Empirical Assessment of 'Judicialization' in International Arbitration," 25 Am R Intl Arb 223 (2014), available at http:ssrn.com/abstract=2656624. **READ pp. 230-245**

Many commentators point to the incorporation of litigation-like evidentiary rules and discovery in arbitration as a source of expense and delay.

READ: Janice Sperow, "Discovery in Arbitration: Agreement, Plans and Fairness," ABA Practice Points, April 10, 2019, available at **https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/discovery-in-arbitration-agreement-plans-and-fairness/**

Sperow lays out an approach to litigation-like discovery without many of the aspects that drive up costs and produce delay. But then there's this: **Read:** Mathew Kirtland and Katie Connolly, "Disclosure in International Arbitration: Using US courts to obtain discovery for non-US proceedings," 12 International Arbitration Report 20 (May 2019), Norton Rose Fulbright, pp. **20-22.** https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-report---issue-12.pdf?la=en-ca&revision=

Many arbitration providers include information on arbitration fees and expenses on their websites, and some include "cost calculators" so potential claimants can estimate their costs. For an example of the sorts of expenses associated with arbitration go to https://www.finra.org/arbitration-mediation/learn-about-arbitration/arbitration-fees FINRA is the private self-regulator of the brokerage industry, which succeeded NASD in 2017. It operates the largest arbitration program for investor-broker disputes in the U.S.

Supplementary Reading

For a data-dense analysis of costs and time to disposition in investment arbitration, including but not limited to ISDS, read Susan Franck, ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION, Oxford, 2019, pp. 120-140.

For a great deal of detail about the adoption of expedited arbitration proceedings in many jurisdictions, read RESPONSES TO THE UNCITRAL QUESTIONNAIRE ON EXPEDITED ARBITRATION (as of July 29, 2019). Lengthy report (available on Canvas).

February 10 Confidential or Transparent?

As made clear by many of the previous readings "confidentiality" is frequently cited as one of the most if not the most important benefits of arbitration to parties, in both domestic and international arenas. But granting protection against disclosure of proceedings and outcomes has increasingly been challenged in circumstances where public policy is implicated. Some of these circumstances, such as where law firm employees are bound to arbitrate sexual harassment claims by arbitration clauses in adhesive contracts and the decisions produced by the proceedings may not be publicized, have struck close to home. In this session we will debate the competing values of confidentiality and transparency in resolving different types of disputes.

READ:

Baiju Vasani & Benjamin Jones, "Confidentiality in International Arbitration in the United States," in Laurence Shore et al., INTERNATIONAL ARBITRATION IN THE UNITED STATES, Wolters-Kluwer, 2018, pp. **125-152.** As this chapter reveals, although its meaning may seem obvious, confidentiality is actually quite a complicated and multi-dimensional concept. Although this chapter focuses on the treatment in the U.S. of confidentiality in international arbitration, its review of U.S. law applies to domestic arbitrations as well.

Supplementary Reading

Stephanie Ward, "A Group of Harvard Law Students Is Trying to Get Rid of Mandatory Arbitration Clauses," ABA Journal, September 21, 2019 available at http://www.abajournal.com/magazine/article/parity-to-the-people Stanford students have been involved in this movement as well, although not mentioned in this article.

Jill Rosenberg, Lisa Lupion and Jen Argyle, "Confidentiality Optional : New Jersey Nixes NDAs and Arbitration for Discrimination and Harassment Claims," March 22, 2019, available at https://blogs.orrick.com/employment/2019/03/22/confidentiality-optional-new-jersey-nixes-ndas-and-arbitration-for-discrimination-and-harassment-claims/ Note that the NJ statute grants broad discretion for employees (but not employers) to violate confidentiality provisions even if they have accepted settlements contingent on non-disclosure. (What do you think are the chances of the NJ statute surviving challenge?)

Chris Lindahl, "Gretchen Carlson: It's Frustrating That I Couldn't Participate in 'Bombshell'," Indiewire, October 14, 2019, available at https://www.indiewire.com/2019/10/gretchen-carlson-bombshell-loudest-voice-1202181470/

While controversy has raged about confidentiality and NDAs, at least in mandatory arbitration of sexual harassment claims, there has been a parallel movement to mandate disclosure and transparency in investment arbitration. In 2014, the United Nations adopted the UN Convention on Transparency in Treaty-Based Investor-State Arbitration (commonly referred to as the "Mauritius Convention"). The Convention entered into force in 2017 but only 5 of the 23 current signatories have ratified it: Cameroon, Canada, Gambia, Mauritius, and Switzerland. The US is a signatory but has not ratified.

READ:

Stephen Schill, "The Mauritius Convention on Transparency: A Model for Investment Law Reform," EJIL Talk!, April 8, 2015 available at https://www.ejiltalk.org/the-mauritius-convention-on-transparency-a-model-for-investment-law-reform/

Junior Sirivar, Leah Ostler and Gregory Corosky, "The Mauritius Convention: Canada Opens the Door to Transparency in Investor-State Arbitrations," The International Arbitration Blog, July 25, 2018, available at https://www.mccarthy.ca/en/insights/blogs/international-arbitration-blog/mauritius-convention-canada-opens-door-transparency-investor-state-arbitrations

Fe**bruary 17 The Challenge of Mass Disputes**

Traditionally, arbitration (like litigation) was conceived of as a mechanism for resolving disputes between two parties, although sometimes there might have be a few parties with related claims on one or both sides. Domestic and international commercial arbitration were designed for B-to-B disputes and investment arbitration was designed for private investor-to-state disputes. But in an age of mass commerce, increasingly disputes involve multiple parties.

1. For a systematic consideration of the issues that arise when arbitrating cases that go beyond the 1 Claimant v 1 Respondent paradigm,

READ: Julian Lew, Loukas Mistelis and Stefan Kroll, "Chapter 16, "Multiparty and Multicontract Arbitration," in *Id*. COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, Kluwer, 2003, pp. **377-409.** Although the focus is international commercial arbitration the authors touch on arbitration in other contexts as well.

2. Resolving Mass Arbitration Claims in Investor-State Arbitration

A 2011 ICSID tribunal decision accepting jurisdiction over 180,000 bondholders' claims against Argentina has so far represented the extreme case of mass claims in investment arbitration. Ultimately many claims were withdrawn so that the total number of claims was about 60,000. Two of the three arbitrators ruled that the tribunal had jurisdiction over the claims and that they could proceed on a mass basis. Two other mass claim cases against Argentina arising out of the same factual circumstances were subsequently filed, although in both instances the number of claims was relatively small. Ultimately, all of the cases were withdrawn meaning there were no final decisions on the merits. The decision in ***Abaclat v. Argentina*** *remains highly controversial almost a decade later. But on February 7, 2020 another ICSID tribunal handed down a decision accepting jurisdiction/admissibility over a case of 1000 bondholders against Cyprus. The tribunal in* ***Adamakoupolos v. Cyprus*** *cited the 3 Argentinian cases in their reasoning.*

READ:

Ridhi Kabra, "Has *Abaclat v Argentina Left the ICSID with a Massive Problem?" 31* Arbitration International 425 (2015), available on Canvas, pp. **426-431; 440-450**.

Jennifer Permesly and Meredith Craven, "Where Are We Now? Investment Treaty Arbitration, Sovereign Debt and Mass Claims in the Post-Abaclat Era, Transnational Dispute Management, 2017, available on Canvas, **pp. 1-13 and "Conclusion" on p. 19.**

Caroline Simson, "Greek Investors Can Proceed With $300 Million Claim Against Cyprus," Law360, February 10, 2020, available at https://www.law360.com/articles/1242419.

Supplementary Reading

Adamakoupolos v. Cyprus, ICSID Case Arb/15/49, Decision on Jurisdiction, February 7, 2020, Paragraphs 188-259 (available at https://documentcloud.adobe.com/link/track?uri=urn%3Aaaid%3Ascds%3AUS%3A41a94fcb-8c8e-4b2f-bf1a-ffbe9534c062)

3. Can domestic class actions be arbitrated?

An increasing number of national jurisdictions permit class actions or other forms of collective proceedings in court. Can claimants bring class actions or proceed collectively in some other form in arbitration? The American Arbitration Association has long provided supplementary rules for class arbitration. But the US Supreme Court has tightly restricted claimants' ability to proceed collectively in arbitration and employers and financial, telecommunications and other service providers have incorporated class waivers in mandatory pre-dispute arbitration clauses. For a review of the legal status of class arbitration in the U.S.

READ: Gilbert Samberg, "Class Arbitration: The Current Law," Law 360, June 12, 2017, available at https://www.mintz.com/insights-center/viewpoints/2196/2017-06-class-arbitration-current-law

*In 2017, Samberg identified two contexts in which class arbitration might yet be possible, both of which have since been closed off by the Court. In **Epic Sys. Corp. v Lewis**, 138 S. Ct. 1612 (2018), the USSC held in a 5-4 decision that the National Labor Relation Act (NLRA)'s prohibition against limiting collective action by employees does not apply to arbitration (or litigation) and hence the saving clause in the Federal Arbitration Act [9 U.S.C. § 2] does not provide grounds for voiding a bar to class arbitration in an employment contract.* **READ** "Leading Case: Epic Systems Corp v Lewis," 132 Harv L Rev 427 (Nov. 9, 2018) at https://harvardlawreview.org/2018/11/epic-systems-corp-v-lewis/, **427-436.**

In ***Lamps Plus, Inc. v Varela,*** 139 S. Ct. 1407 (2019) the USSC held in a 5-4 decision that ambiguity in an arbitration contract regarding class proceedings cannot be construed to permit such proceedings. For a succinct and pretty even-handed synopsis of the decision, **READ** Pravin Patel, "Lamps Plus: Supreme Court Turns Out the Lights in Class Arbitration," American Bar Association Practice Points, April 30, 2019, at https://www.americanbar.org/groups/litigation/committees/mass-torts/practice/2019/lamps-plus-supreme-court-turns-out-the-lights-on-class-arbitration/

If consumers and employees cannot litigate or arbitrate collectively, lawyers might sign retainer agreements with masses of people with claims arising out of the same facts and law, and file large numbers of arbitration claims. Mass litigation involving large numbers of individual claims all arising out

of the same circumstances accounts for a substantial fraction of the federal caseload, where they are usually managed through the multi-district litigation ("MDL") process. Many of these are product defect claims where consumers were not bound by arbitration agreements, but mass litigation is possible wherever claimants are not barred from proceeding in court by arbitration agreement. Recently we have seen the first evidence of mass claiming in arbitration:

READ: https://www.law360.com/classaction/articles/1242667/alsup-blasts-doordash-s-hypocrisy-orders-5k-arbitrations?nl_pk=fbbe25e6-5a4e-48f6-a063-3e46de097576&utm_source=newsletter&utm_medium=email&utm_campaign=classaction&read_more=1&attachments=true

(Note that there appears also to be an issue relating to sealing of communications between DoorDash's lawyers and an ADR provider – the International Institute of Conflict Prevention and Resolution (CPR).)

The US Supreme Court's key decision precluding class arbitration where it is not expressly chosen by the parties remains *ATT v. Concepcion* although other decisions on the subject have followed, as described by Samberg and me above. **READ** the excerpted decision, available on Canvas.

Finally, if you have time: Go to the website for AAA or JAMS and check for class arbitration rules.

February 24 If Not Arbitration, How About Mediation?

Guest Speaker: Prof. Janet Martinez

Prof. Martinez is the director of the Stanford Law School's Gould Negotiation and Mediation Program. She focuses her research and consulting on the lawyer's role in negotiation, domestically and internationally; conflict resolution system design; facilitation of public disputes, particularly in the fields of international trade and the environment; negotiation and consensus-building training; and negotiation curriculum development for clients in the public, private, and nonprofit sectors.

In addition to her role as director of the law school's Gould Negotiation and Mediation Program, Professor Martinez is a senior consultant at the Consensus Building Institute in Cambridge, Mass., a nonprofit institution whose mission is to improve conflict resolution, and a consultant at Lax Sebenius, a negotiation consulting firm in Concord, Mass. Before joining the Stanford Law School faculty in 2002, she did research, writing, and teaching in various aspects of negotiation at Harvard University's graduate schools of business, law, and government and was senior counsel for the McKesson Corporation.

We will meet jointly for this session with Prof. Martinez' seminar on dispute systems design. Room and reading assignments TBD.

The UN Convention on the Enforcement of Settlement Agreements Resulting from Mediation ("The Singapore Convention on Mediation") was opened for signature in August 2019. To date, more than 50

countries including the US, have signed but so far there have been no ratifications. For an overview, text and status of the convention, go to https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements

March 2 Third-Party Funding in Arbitration

Third-party funding of litigation by hedge-funds, banks, insurance companies and specialized firms is a relatively recent phenomenon although in the U.S. and other jurisdictions that permit contingency fee representation law firms have long provided funding for lawsuits. In some jurisdictions, funding of litigation is prohibited under common law principles of champerty and maintenance, but funding of arbitration is allowed as a matter of private contracting. Most of the recent writing on third-party funding in arbitration deals with investor-state arbitration. But funding is also available to disputants in international commercial arbitration and in high-value complex disputes in domestic arbitration. As you read the following, consider whether the issues discussed apply broadly to funding in arbitration.

Guest Speaker: Christopher Bogart, CEO and co-founder Burford Capital.

Burford Capital is the leading international publicly traded dispute resolution funder. Before co-founding Burford, Mr. Bogart was Executive Vice President & General Counsel of Time Warner Inc., where he managed one of the largest legal functions in the world and played a significant role in major transactions and litigation matters including the $350 billion America Online merger; the acquisition of Turner Broadcasting, including CNN and other media properties; antitrust litigation with News Corporation; the attempted acquisition of EMI Music; a joint venture with Microsoft and Compaq; a constitutional challenge to the federal Cable Act; and a $550 million litigation matter involving the Six Flags theme park chain. He came to Time Warner from Cravath, where he was a litigator representing companies such as IBM, GE and Time Warner. He began his professional career as an investment banker with what is now JPMorgan Chase.

READ:

Brooke Guven and Lise Johnson, "The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement," Columbia Center on Sustainability and Investment, May 2019, available on Canvas.

UNCITRAL Working Group III, POSSIBLE REFORM OF ISDS, THIRD-PARTY FUNDING, POSSIBLE SOLUTIONS, Note by Secretariat. Available on Canvas.

ICCA-Queen Mary Task Force on Third-Party Funding in International Commercial Arbitration, April 2018, skim pp. 17-43. Available on Canvas.

<u>Supplementary Reading</u>

Third-party funding in arbitration raises interesting issues, many of which have yet to be resolved definitively. (This assertion applies equally to litigation.) For example, can amounts paid to funders be recovered when costs are awarded to the prevailing party?

READ: Daniel Pascucci, "Are Third-Party Funding Costs Recoverable in Arbitration?" National Law Review, July 23, 2018, at https://www.natlawreview.com/article/are-third-party-funding-costs-recoverable-arbitration

Daniel Pascucci, "Discoverability of Third-Party Agreements in Arbitration, Parts I & II, National Law Review, January 3, 2019 and March 21, 2019, at https://www.natlawreview.com/print/article/discoverability-third-party-funding-agreements-arbitration-part-i and https://www.natlawreview.com/article/discoverability-third-party-funding-documents-arbitration-part-ii

March 9 A Return to Litigation? Proposals for New Courts to Resolve Trans-National Disputes

The controversies over investor-state arbitration that we have discussed in this seminar have given rise to proposals to substitute an international court for ISDS. The readings below briefly describe the history of such proposals and summarize the features of the international court proposed by the EU (now incorporated in several EU BITS). As you read the second of these readings, consider whether it could also substitute for international commercial arbitration, and what the costs and benefits of such a development would be.

Guest Speaker: Prof. Maya Steinitz, University of Iowa Law School

Professor Maya Steinitz teaches civil procedure, business associations, international business transactions, and international arbitration. Her research focuses on a wide range of topics including the intersection of civil litigation and corporate law, public and business international law, transnational dispute resolution, and the global legal profession. Prior to joining the University of Iowa College of Law, Professor Steinitz taught courses in comparative law, international law, and international dispute resolution at Columbia Law School, Tel Aviv University, and the Hebrew University of Jerusalem, served as a litigator at Latham & Watkins, LLP (2003-2009) and clerked at the Israeli Supreme Court (1998-1999). She is the author of just published THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE, an excerpt of which is assigned below.

1. **Proposals for an international court for investor-state arbitration**

READ:

Anthea Roberts, "The Shifting Landscape of Investor-State Arbitration: Loyalists, Reformists, Revolutionaries and Undecideds," EJIL Talk, June 15, 2017 at https://www.ejiltalk.org/the-shifting-landscape-of-investor-state-arbitration-loyalists-reformists-revolutionaries-and-undecideds/

EU Commission, "The Multilateral Investment Court Project," Oct. 6, 2019, available at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608

1. **What about an international court for civil disputes?**

Our seminar has focused on disputes arising out of contractual relationships between private parties and between private investors and states. In THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE (2019), Prof. Maya Steinitz of U. Iowa Law School argues that the current international arbitration system is ill-suited to resolve mass disputes arising out of personal injuries and property damages –i.e. mass torts – in which disputants rarely are contracting parties. Her book review several prominent mass torts involving multinational corporations headquartered in the U.S. and disasters and victims outside the U.S. Her proposed solution for addressing the costs of these disputes – including lack of adequate access to justices for victims – is to establish an international civil court. To close the quarter, I think it will be useful to consider the challenges to creating such a court and debate whether ultimately, international arbitration has found better solutions to these problems.

READ:

Maya Steinitz, THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE, Cambridge University Press, 2019, pp. **141-178.**