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SYMPOSIUM

INTERNATIONAL COMMERCIAL ARBITRATION: FIFTY YEARS AFTER THE NEW YORK CONVENTION

INTRODUCTION: THE CONSTITUTIONAL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION

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An exceptional feature of international arbitration is the extensive and meaningful dialogue that takes places between scholars and practitioners in the field. Unlike some other disciplines where the camps appear to talk past each other, international arbitration enjoys a rich relationship between the two. Practitioners have written some of the most important scholarly works in the field, while scholars have worked on some of the most important cases. In January 2009, the University of Georgia Law School and its Dean Rusk Center were pleased to bring together an elite group of scholars and practitioners for a day-long conference on the topic of international arbitration. The conference, entitled "International Commercial Arbitration: Fifty Years After the New York Convention," celebrated both the achievements in the field of the past half-century and also highlighted the release of *International Commercial Arbitration*, a path-breaking two-volume treatise by Gary Born, one of the titans in the field whose professional accomplishments are matched by his scholarly productivity.

Born, who provided the keynote address reproduced in this volume, offered a fitting headline for the event, especially one organized by the *Georgia Journal of International and Comparative Law*. Born worked in the academy before returning to full-time practice. He published his first article, the well known *Reflections on Judicial Jurisdiction*, in this very journal over twenty

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years ago.[1] While he has built his reputation as one of the world's leading arbitrators and lawyers in the field, he has never abandoned his scholarly roots. Over the years, he has published no fewer than four books and countless articles, making him perhaps the paradigmatic example of someone who straddles the scholarly and practical aspects of international arbitration.[2]

Born's keynote address explores the synergies between arbitration law and constitutional law. His historical survey stresses the importance of arbitration as an expression of freedom—namely the freedom to decide, by contract, how one's disputes will be resolved. He explains in rich historical detail how famously repressive regimes banned the right to arbitrate while regimes bathed in liberty enshrined the right to arbitrate among their most important freedoms. In the second part of his talk, Born argues convincingly how the New York Convention of 1958 can be conceptualized as a type of constitutional law of arbitration. Much like the United States Constitution, the document is short, contains general language amenable to interpretation, and has undergone evolution in its meaning through decades of judicial (and arbitral) determination, while the text remained unchanged. This central notion—of the relation between arbitration and the Constitution—provides a unifying thread for the other papers appearing in this symposium volume.

Linda Silberman, like Born, has been at the forefront of both scholarly developments and professional activities in the field. Thus, she is especially well placed to opine on some of the modern problems perhaps not foreseen by the "Founders" of the constitutional law of international arbitration. While the New York Convention, the seminal document in this field of constitutional law, has proven remarkably resilient, several salient problems have emerged. One is the issue of floating awards, that is the enforceability of awards vacated in the seat of arbitration, the subject of a famous scholarly debate. The second is the impact of procedural rules on the enforceability of awards due to doctrines such as personal jurisdiction and forum nonconveniens. The third is a nagging choice-of-law question over the law governing the enforceability of agreements under Article II of the New York Convention. On all three topics, Silberman

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[1] Gary Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1 (1987).

[2] A select sample of Mr. Born's publications on the topic of international arbitration include: INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS (3d ed. 2008), INTERNATIONAL ARBITRATION AND FORUM SELECTION AGREEMENTS: PLANNING, DRAFTING AND ENFORCING (2d ed. 2006), INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS (4th ed. 2006), *The Principle of Judicial Non-Interference in International Arbitral Proceedings*, 30 U. PA. J. INT'L L. 999 (2009), and *Critical Observations on the Drafts Transnational Rules of Civil Procedure*, 33 TEX. INT'L L.J. 387 (1998).

offers insightful analysis into how the constitutional law of arbitration can be adapted to overcome these challenges.

Whereas Silberman offers a forward-looking perspective on arbitration, Andreas Lowenfeld, Silberman's longtime collaborator and another titan in the field, offers an incredible historical one. Lowenfeld, one of the architects of the ICSID Convention, the seminal convention on international investment arbitration, provides a "Founder's" view on that document, much like Madison's notes on the constitutional convention. Lowenfeld was one of the drafters of the document and teaches us some of the bumps along the road to developing one of the most important pieces of the constitutional architecture in international arbitration.

Complementing Lowenfeld's paper, Chris Ryan's paper also addresses an area of investment arbitration, and offers an important example of how different areas of arbitration can learn from each other. Ryan's paper explores the curious question of why states comply with international investment law. Ryan hypothesizes that the decision turns on a critical mix of factors including, the liability risks, domestic expectations, the investment climate, the scope of the obligation, and the reputational effects. This hypothesis has important implications for the broader field of international commercial arbitration. It is often asserted that parties to international arbitrations voluntarily comply with awards more than 90% of the time. While oft-repeated, this assertion has rarely been tested with any empirical rigor. Ryan's thesis suggests an important avenue for further empirical research in the commercial field on why voluntary compliance might occur.

Just like Ryan's paper teaches us what commercial arbitration can learn from investment arbitration, Maureen Weston's paper offers lessons from the mysterious world of sports arbitration. Weston, one of the rising scholars in the field, teaches us how sports arbitration can literally destroy an athlete's career—it is the equivalent of the "bet the company" case for the athlete. In Weston's article, we learn about the importance of the American Arbitration Association (AAA) to the system of sports arbitration, which shows how the AAA, a critical player in the international arbitration scene as well, provides a critical linkage between the fields. Weston's article also explores the importance of appellate arbitral review in the sports arena. This idea of appellate arbitral review periodically arises in the literature on international commercial arbitration but remains an underexplored topic. Weston's careful dissection of the current system of de novo review deserves close study by those who would seek to import the appellate model into the broader commercial setting.

While these five papers provide an intellectual feast for those interested in the field, modern technology has made even more resources available. In addition to these five authors, several other prominent speakers spoke at and attended the conference including, among others, George Bermann[3] (Chief Reporter for the ALI Restatement on International Commercial Arbitration Law) and the present or former heads of three of the major international arbitration organizations in the world—the International Chamber of Commerce,[4] the American Arbitration Association,[5] and JAMS.[6] Their comments, along with a podcast of all conference proceedings, can be found at the website of the Dean Rusk Center, http://www.uga.edu/ruskcenter/conference.html#conferences.

A successful conference such as this one would not have been possible without the support and contributions of many people. Though the entire list is too numerous to mention in this essay, certain people deserve special thanks including Dean Rebecca White,[7] Ambassador Don Johnson[8] and the entire staff

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[3] George Bermann is the Jean Monnet Professor of European Union Law and Walter Gelhorn Professor of Law at Columbia University Law School in New York, NY. Professor Bermann also serves as the Director of the European Legal Studies Center. In addition to his academic duties, Professor Bermann is the current President of the *Académie Internationale de Droit Comparé*.

[4] Anne Marie Whitesell is Of Counsel at Dechert, LLP. From 2001–2007, Ms. Whitesell served as the Secretary General of the ICC International Court of Arbitration. As Secretary General of the ICC, Ms. Whitesell supervised approximately 1,100 international arbitration cases each year involving parties from over 120 countries.

[5] William K. Slate, II is the President and Chief Executive Office of the American Arbitration Association. Previously, Mr. Slate practiced and taught law, and has lectured widely on law, arbitration, and medication before numerous state and federal bar organizations. Mr. Slate holds an M.B.A. degree from the Wharton School of the University of Pennsylvania, a Juris Doctor degree from the University of Richmond Law School, and a B.A. degree from Wake Forest University.

[6] Robert Davidson has been the Executive Director of JAMS Arbitration Practice since October 2003. Mr. Davidson is a retired senior litigation partner at a major international law firm and a highly respected mediator and arbitrator with significant complex commercial and international claims experience. He is the immediate past Chair of the Committee on Arbitration of the New York City Bar Association and sits regularly as a sole arbitrator, chairman, or member of tripartite panels in the numerous domestic and international arbitrations.

[7] Rebecca Hanner White is the Dean and J. Alton Hosch Professor of Law at the University of Georgia School of Law. Before becoming the permanent dean of the School of Law in October 2004, Dean White previously served as associate provost and associate vice president of academic affairs for the University of Georgia. Dean White teaches in the areas of employment discrimination, employment law, labor law, and labor arbitration.

[8] C. Donald Johnson is the Director of the Dean Rusk Center at the University of Georgia School of Law. Before joining the Dean Rusk Center in June 2004, Ambassador Johnson served as a U.S. Ambassador and congressman, practiced law in Washington, D.C., and served as chief

of the Dean Rusk Center and, especially, Mercedes Ball[9] and Gabe Allen[10] of the *International Journal*, both of whom shouldered the lion's share of the work.

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textile negotiator in the office of the U.S. Trade Representative.

[9] Mercedes Ball was the Executive Conference Editor for the thirty-seventh volume of the GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW.

[10] Gabriel Allen was the Editor in Chief of the thirty-seventh volume of the GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW.