

2009 Weighing the Facts: Information Exchange and Presentation of Evidence in International Commercial and Investment Arbitration

May 14-15, 2009 • • The Hague, The Netherlands,

Thursday Morning, May 14, 2009

Presiding Officer:

Brooks Daly, Permanent Court of Arbitration - The Hague, Netherlands

8:00 am	Registration Opens Includes continental breakfast.
8:45 am	Welcoming Remarks Theodore M. Frois, General Counsel, Exxon Mobil and President, Houston International Arbitration Club, Houston, TX Christiaan Kröner, Secretary-General, Permanent Court of Arbitration, The Hague, The Netherlands
9:00 am 0.50 hr	Cross-Cultural Problems Involving Exchange of Information The process of the exchange of information is a fertile source of cultural clash in international commercial arbitration. Why is this so, and how can it be avoided? Lucy F. Reed, Freshfields Bruckhaus Deringer LLP - New York, NY Albert Jan van den Berg, Hanotiau & van den Berg - Brussels, Belgium
9:30 am 1.25 hrs	Evolving Principles of Information Exchange: Consensus and Divergence To a remarkable degree, international arbitration has become a unique, harmonized blend of common law and civil law practices. There is widespread consensus on many practices, including many of those embodied in the IBA Rules on the Taking of Evidence in International Commercial Arbitration. However, the process is evolving and there remain areas on which a consensus has yet to emerge. Mark Appel, American Arbitration Association - Dublin, Ireland Moderator: William H. Knull III, Houston, TX Hans van Houtte, Institute for International Trade Law - Leuven, Belgium
10:45 am	Break

11:00 am 1.25 hrs	<p>The Present and Future of Electronic Disclosure in International Arbitration</p> <p>A discussion of recent institutional pronouncements on electronic disclosure in international arbitration with special emphasis on how a decision-maker should exercise discretion in deciding these issues.</p> <p>Hon. Nancy F. Atlas, United States District Court for the Southern District of Texas - Houston, TX C. Mark Baker, Fulbright & Jaworski L.L.P. - Houston, TX Moderator: Kevin M. O'Gorman, Fulbright & Jaworski L.L.P. - Houston, TX Michael E. Schneider, Lalive - Geneva , Switzerland Tomasz J. Sikora, El Paso Corporation - Houston, TX</p>
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Thursday Afternoon, May 14, 2009

Presiding Officer:

Timothy J. Tyler, Mayer Brown LLP - Houston, TX

12:15 pm	<p>LUNCHEON PRESENTATION</p> <p>Included in conference registration.</p>
12:30 pm 0.75 hr	<p>Keynote Luncheon Presentation</p> <p>Hon. Thomas Buergenthal, International Court of Justice - The Hague, Netherlands</p>
1:15 pm	<p>Break</p>
1:30 pm 1.50 hrs	<p>Evidence Issues in Arbitration with States</p> <p>States have different powers and justifications for the acquisition and protection of evidence. With the increase in arbitration with States, particularly under investment treaties, has come an increase in allegations of witness intimidation, illegally obtained evidence, and the invocation of political sensitivity privilege, which are rare or absent in arbitration between private parties. This panel will consider how these and other issues affect the standard and allocation of the burden of proof, and the use of presumptions and inferences by arbitral tribunals.</p> <p>Moderator: Brooks Daly, Permanent Court of Arbitration - The Hague, Netherlands Andrea Menaker, White & Case LLP - Washington, DC Jan Paulsson, Freshfields Bruckhaus Deringer - Paris, France Albert Jan van den Berg, Hanotiau & van den Berg - Brussels, Belgium</p>
3:00 pm	<p>Break</p>

3:15 pm
1.50 hrs ethics

Privilege and Ethical Obligations Involving Production and Protection of Evidence

The Akzo Nobel decision in the European Court of First Instance declared that documents held by in-house counsel, and correspondence between a business and its in-house lawyers were not protected by legal professional privilege in a European Commission competition-law investigation.

This panel will discuss the significance of the AKZO Nobel/Akcros decision in arbitrations where parties rely on different national-court practice on professional privilege and disclosure of documents produced by or exchanged with in-house counsel; the panel will also examine: gaps where current rules and choice of law principles in international arbitration fail to address these issues; recent institutional changes aimed at leveling the privilege playing field; and the effect of differing rules of professional ethics across jurisdictions.

Teresa Giovannini, Lalive Avocats - Geneva, Switzerland
Hilary Heilbron, Brick Court Chambers - London, United Kingdom
Kenneth B. Reisenfeld, King & Spalding - Washington, DC
Moderator:
Timothy J. Tyler, Mayer Brown LLP - Houston, TX

4:45 pm
1.25 hrs

Enforcement of Party Requests

What enforcement mechanisms are available for a party who wishes to obtain information from an opponent for use in a forthcoming arbitration? Are there any limits to a tribunal's ability to "draw adverse inferences," or to shift the burden of proof, and how should the tribunal go about taking these measures? To what extent are actions taken by tribunals subject to judicial review? Alternatively, in what circumstances can applications be made directly to a court rather than to the tribunal? And what are the differences between seeking disclosure from an adverse party, or from someone who is not a party to the arbitration at all—does the "contractual" nature of the arbitration process impose limits on seeking disclosure from non-signatories?

Louise Barrington, King's College - Center of Construction Law - London, United Kingdom
W. Laurence Craig, Orrick - Paris, France
William W. Park, Boston University School of Law - Boston, MA
Moderator:
Alan S. Rau, University of Texas School of Law - Austin, TX

Thursday Evening, May 14, 2009

6:00 pm

Adjourn to Reception and Tour

Enjoy networking, refreshments, and a short tour of the historic Peace Palace.

Friday Morning, May 15, 2009

Presiding Officer:

Ginger Menown, KPMG LLP - Houston, TX

8:00 am

Conference Room Opens

Includes continental breakfast.

8:30 am 1.25 hrs	<p>Expert Evidence in International Arbitration: Are Standards Needed?</p> <p>There remain widely diverse approaches to the retention, instruction and supervision of expert witnesses and the use (and abuse) of expert evidence in international arbitration. The panel will discuss these approaches and attempts to develop a standardized approach to the use of expert evidence, particularly the Chartered Institute's <i>Protocol for the Use of Party-Appointed Expert Witness in International Arbitration</i>.</p> <p>C. Mark Baker, Fulbright & Jaworski L.L.P. - Houston, TX Brooks Daly, Permanent Court of Arbitration - The Hague, Netherlands Moderator: James L. Loftis, Vinson & Elkins L.L.P. - London, United Kingdom Loukas Mistelis, Centre for Commercial Law Studies, Queen Mary, University of London - London, United Kingdom</p>
9:45 am 1.00 hr	<p>E-Discovery: A Look Behind the Curtain—Tools and Techniques</p> <p>A practical discussion of electronic disclosure issues likely to arise in an international commercial arbitration including the consideration of its unique problems and the technology tools, methods and costs of preservation, collection, processing, review and production of electronically stored information.</p> <p>Moderator: Tomasz J. Sikora, El Paso Corporation - Houston, TX Kevin M. O'Gorman, Fulbright & Jaworski L.L.P. - Houston, TX Mark S. Yacano, LeClairRyan - Richmond, VA</p>
10:45 am	Break
11:00 am 1.50 hrs	<p>General Counsel Panel</p> <p>General Counsel from a variety of global companies will discuss practicalities of preservation and production of evidence, especially electronic evidence, in arbitration proceedings. Discussions of cost, budgeting, maintaining privilege across jurisdictional boundaries, and drafting will be considered.</p> <p>Andrew Clarke, Exxon Mobil Corporation - Surrey, United Kingdom Alan R. Crain Jr., Baker Hughes, Inc. - Houston, TX Jan Eijsbouts, Akzo Nobel - Zeist, Netherlands Rene van Rooij, KPN - The Hague, Netherlands Moderator: Paul W. Wright, Exxon Mobil Corporation - Houston, TX</p>

Friday Afternoon, May 15, 2009

12:30 pm	Adjourn
12:35 pm 0.00 hr ethics	Appendix - Resources