# Legitimacy: Myths, Challenges, Realities

Sunday, 6 April 2014

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>09:00 - 17:00</td>
<td><strong>Registration: InterContinental Hotel Miami</strong></td>
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<tr>
<td>17:00 - 18:30</td>
<td><strong>22nd ICCA Congress Miami Opening Ceremony</strong></td>
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<td><em>Venue: InterContinental Hotel Miami</em></td>
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<td><em>Speaker: Judge Stephen M. Schwebel</em> (former Judge and President of the International Court of Justice)*</td>
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<td>19:00 - 21:00</td>
<td><strong>Opening Cocktail Reception</strong></td>
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<td><em>Venue: Perez Art Museum Miami (PAMM)</em></td>
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<td><em>Sponsored by Centro de Arbitragem e Mediação da Câmara de Comércio Brasil</em></td>
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<td><em>Canadá CAM-CCBC</em></td>
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<td>20:30 - 23:00</td>
<td><strong>After Party</strong></td>
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<td><em>Venue: Pearl Miami Beach</em></td>
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<td><em>Sponsored by Hong Kong International Arbitration Centre (HKIAC)</em></td>
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**ICCA PROGRAM COMMITTEE**

Chair, Lucy Reed* (Hong Kong/Singapore)

John Barkett (Miami)
Adriana Braghetta (Sao Paulo)
Dushyant Dave (New Delhi)
Meg Kinnear (Washington, DC)
Salim Moollan (London)
Klaus Reichert SC (London)

* The Program Committee acknowledges the great support of Freshfields associates James Freda (New York), Nicholas Lingard (Tokyo) and Belinda McRae (Paris).

* Indicates a Young ICCA Member. ICCA is pleased to acknowledge the Program Committee's inclusion of Young ICCA Members in the program.
Setting the Scene: What Are the Myths? What Are the Realities? What Are the Challenges?

“International arbitration is at a crossroad.” So say some. “International arbitration has already achieved universal legitimacy.” So say others. International arbitration often may be the only choice available (is it?), but if its legitimacy is undermined its future is uncertain. Easily said, but what are the pillars of arbitral legitimacy? For one, arbitration must further justice, and be seen to be furthering justice, in both procedure and outcome. For another, process must have legal precision at every phase. In this opening plenary, we will identify propositions going to justice and precision aspects of arbitral legitimacy, and begin debates on whether those propositions are myths or realities. Greater scrutiny will follow in panel sessions. By the closing plenary, we will catalogue real legitimacy challenges facing the international arbitration community.

One reality about which there will be no debate is how richly deserving Eric Bergsten is to receive the ICCA Award for Lifelong Contribution to the Field of International Arbitration, as illustrated with a short video on his role in creating the game-changing Vis Moot.

Arbitration and Decision-Making: Live Empirical Study

The primary function of international arbitration is the adjudication of legal disputes, which requires arbitrators to process information, exercise their professional judgment and discretion, and ultimately make decisions. Having arbitrators who render quality decisions is a critical aspect of the overall legitimacy of international arbitration. Yet, there are inevitably challenges with being able to assess reliably and validly how adjudication actually functions. Little is currently understood about how arbitrators exercise their mandate and discretion to come to decisions.

In an effort to bridge the gap, and by taking advantage of so many arbitrators and arbitration practitioners in one room, leading empirical scholars – Professors Chris Guthrie, Susan Franck and Anne van Aaken – will gather data on how arbitration specialists, when sitting as arbitrators, make decisions and use their professional judgment. Their preliminary findings will be presented and discussed at the closing plenary.

Professor Guthrie will also present on his groundbreaking work in judicial decision-making.

CHAIRS
Meg Kinnear (Washington, DC)
Lucy Reed (Hong Kong/Singapore)

SPEAKERS
Prof. Susan Franck (Lexington, Virginia)
Prof. Chris Guthrie (Nashville, Tennessee)
Prof. Anne van Aaken (St. Gallen)

RAPPORTEURS
James Freda (New York)
Tobias Lehmann (St. Gallen)
The aims of the A-stream sessions, recognizing the importance of precision to legitimacy, are (1) to undertake a focused review of a small number of under-analyzed but critically important topics at the core of international arbitration practice, and (2) to produce a Congress book that will be a lasting reference work.

Precision Stream
A-1 Proof: A Plea for Precision

Proof is fundamental and can be maddeningly elusive. But must proof of fact and law so often be so imprecise? This session will explore the often fudged and occasionally ignored elements of burden of proof, the standard of proof, methods of proof to establish applicable law, and the importance of addressing these topics in a procedural order.

CHAIR
David Brynmor-Thomas (London)

SPEAKERS
Jennifer Smith (Houston)
Richard Kreindler (Frankfurt)
Anne-Véronique Schlaepfer (Geneva)

RAPPORTEUR
Timothy L. Foden* (London)

The aims of the B-stream sessions, tied together by the notion of justice, are (2) to undertake a critical review of issues that go to the heart of the legitimacy of international arbitration as the natural dispute settlement mechanism in the international arena, and (2) to produce a Congress book that will be a lasting reference work.

Justice Stream
B-1 Who Are the Arbitrators?

Is justice determined by arbitrator selection? This session will explore the conundrum of the “best” arbitrator selection protocols and diversity—why arbitrators appear to be primarily Western males drawn from a limited pool. It will explore the causes of elitism and non-inclusiveness as well as possible concrete solutions to these legitimacy concerns, including the role that codes of conduct may play to promote justice in the appointment of tribunals.

CHAIR
Adriana Braghetta (Sao Paulo)

SPEAKERS
Main Speaker:
Prof. Christophe Seraglini (Paris)

Commentators:
Jacomijn van Haersolte-van Hof (The Hague)
Darius Khambata (Mumbai)
V.V. Veeder QC (London)

RAPPORTEUR
Ricardo Dalmaso Marques* (New York / Sao Paulo)
Legitimacy: Myths, Challenges, Realities

Monday, 7 April 2014, continued

15:00 - 15:30  Refreshment Break and Exhibitions

15:30 - 17:00  Panels

**Precision Stream**

**A-2 Early Stages of the Arbitral Process: Interim Measures and Document Production**

Do tribunals rigorously apply the “recipe” of elements necessary for granting interim measures? And does proving those elements depend more on the views of the tribunal or a consistent set of rules? What about the inexact science of document production? Are there consistent standards applicable to preservation and production of documents? How can a requesting party know whether all relevant sources of documents are in fact searched? All relevant documents produced? This session will explore the variability in the early stages of an arbitration and ask whether arbitrator discretion is preferable to consistent treatment.

**CHAIR**
John Barkett (Miami)

**SPEAKERS**
Stephen L. Drymer (Montreal)
Francisco González de Cossío (Mexico City)
Hilary Heilbron QC (London)
Robert Sills (New York)
Murray Smith (Vancouver)
Nicolas Swerdloff (Miami)

**RAPPORTEUR**
Natalie Reid* (New York)

**Justice Stream**

**B-2 Premise: Arbitral Institutions Can Do More To Further Legitimacy. True or False?**

Have arbitral institutions been steady stewards of legitimacy in arbitration? Or, as more say, are they stagnant and protective of the status quo? In particular, can arbitration be legitimate if the arbitrator selection process is opaque, the quality of awards is variable, and the arbitral process lacks foreseeability? Particularly as the growth in regional institutions continues, are there consistent practices to be encouraged, and others to be eschewed, to promote and preserve legitimacy? This session will challenge whether institutions are doing enough to ensure the availability of diverse, well-trained arbitrators and to ensure first-rate, timely performance of their duties.

**CHAIR**
Salim Moollan (London)

**SPEAKERS**
John Beechey (Paris)
Brooks Daly (The Hague)
Meg Kinnear (Washington, DC)
Richard Naimark (New York)
Sundra Rajoo (Kuala Lumpur)
Mohamed Abdel Raouf (Cairo)
Frederico José Straube (Sao Paulo)
Adrian Winstanley (London)
Nassib Ziadé (Bahrain)

**RAPPORTEUR**
Belinda McRae* (Paris)

18:30 - 20:30  After Party

*Venue: Beachfront at The Ritz Carlton South Beach
Sponsored by Debevoise & Plimpton LLP*
### Legitimacy: Myths, Challenges, Realities

**Tuesday, 8 April 2014**

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<tr>
<td>07:00 - 08:30</td>
<td>Shook, Hardy &amp; Bacon Breakfast Seminar</td>
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<td>07:00 - 08:30</td>
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<td>08:45 - 10:00</td>
<td>Panels</td>
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#### Precision Stream

**A-3 Matters of Evidence: Witness and Experts**

Witness statements and expert reports tell the story, but whose story is it to be told? How rigorous are tribunals in “gating” witnesses? This session will explore the “do’s and don’ts” of drafting witness statements; whether the weight given to statements should vary and, if so, precisely why; and the impact of witness nonappearance on the admissibility and weight of testimony. It will also examine parallel questions for experts and expert reports.

**CHAIR**
Nathalie Voser (Zurich)

**SPEAKERS**
- Santiago Dellepiane* (New York)
- Judith Levine* (The Hague)
- Howard Rosen (Toronto)
- Laurence Shore (New York)

**RAPPORTEUR**
Nicholas Lingard* (Tokyo)

#### Justice Stream

**B-3 Treaty Arbitration: Is the Playing Field Level and Who Decides Whether It Is Anyway?**

Some states do not believe that investment treaty arbitration is just. They are voting with their feet to exit from the ICSID Convention and BITs. Is this a worrisome trend justified by problems underlying the treaty arbitration process? Or the product of claimants’ successes in vindicating their legitimate interests? This session will explore several recurring questions: Is international “ambulance chasing” a myth or a reality? What is the impact of third party funding? Can and should treaty arbitration be a dispute resolution model for large scale crises? How realistic is capacity building?

**CHAIR**
Anna Joubin-Bret (Paris)

**SPEAKERS**
- Catherine Amirfar (New York)
- David Caron (London)
- Alvaro Galindo (Washington, DC)

**RAPPORTEUR**
Neeti Sachdeva* (Mumbai)

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<td>Refreshment Break and Exhibition</td>
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Spotlight on International Arbitration in Miami and the United States

A mock argument of BG Group PLC v. Argentina—the first investment treaty arbitration case to be heard by the US Supreme Court—will be one of the stops on a tour of international arbitration in Miami and the United States. Other stops will include Miami’s favorable arbitration climate, enforcement of arbitral awards in the United States generally and Florida specifically, arbitration class actions in the US, and an update on the Restatement (Third), The U.S. Law of International Commercial Arbitration.

CHAIR
John Barkett (Miami)

SPEAKERS
1. BG Group PLC v. Argentina Mock
   - Nigel Blackaby (Washington, DC)
   - Matthew Slater (Washington, DC)

JUDGES
- Judge Kathleen M. Williams (Miami)
- Judge Rosemary Barkett (Miami / The Hague)
- Judge Vance E. Salter (Miami)

2. Miami Spotlight
   - Eduardo Palmer (Miami)

3. Class Actions in Arbitration / New York and Other U.S. Arbitration Venues
   - Rachael Kent (Washington, DC)

4. Enforcement of International Arbitral Awards in Florida and the United States: Judicial Consistency?
   - Daniel E. Gonzalez (Miami)

5. Restatement (Third), The U.S. Law of International Commercial Arbitration
   - Prof. George Bermann (New York)

RAPPORTEUR
Frank Cruz-Alvarez* (Miami)

12:00 - 13:30 Lunch Seminar - Power of Arbitration to Fill Gaps in the Arbitration Agreement and Underlying Contract

CHAIR
John H. Rooney, Jr. (Miami)

SPEAKERS
- Prof. Alan Scott Rau (Texas)
- Prof. Cristiano Zanetti (Sao Paulo)
- Prof. Charles H. Brower II (Detroit)

RAPPORTEUR
Elodie Dulac* (Singapore)
Legitimacy: Myths, Challenges, Realities

Tuesday, 8 April 2014, continued

13:45 - 15:00  Panels

Precision Stream
A-4 Treaty Arbitration: Pleading and Proof of Fraud and Comparable Forms of Abuse

This session will explore and catalogue standards that govern the presentation and resolution of issues of fraud, abuse of rights, and similarly serious allegations that may impugn either a claim or the investment in treaty arbitrations. How do these issues arise? And how do tribunals address them? Is there a common understanding of pleading and proof standards for fraud, abuse of rights, or the bona fides of an investment? These are easy questions to ask, but precise answers are vexing.

CHAIR
Klaus Reichert SC (London)

SPEAKERS
Main Speakers:
Dr. Aloysius Llamzon* (The Hague)
Anthony Sinclair (London)

Commentators:
Utku Cosar (Istanbul)
Carolyn B. Lamm (Washington, DC)

RAPPORTEUR
Elizabeth Karanja* (Nairobi)

Justice Stream
B-4 Universal Arbitration: An Aspiration Within Reach or a Sisyphean Goal?

The concept of “universal arbitration” reflects the nature of international arbitration in the modern world. As summarized in Jan Paulsson’s Alexander Lecture, the concept is “something that we might think of as sociological, namely the convergence of the way disputes are resolved, so that disputants and advocates and arbitrators of any nationality can be found everywhere, doing the same thing in the same way – with an ever-decreasing number of linguistic barriers.”

The focus of this panel will be on the challenges inherent in universal arbitration and, in specific, to dissect the very features or premises/principles of arbitration – and legal advocacy – that must be shared and perhaps even codified in institutional rules, to make universal arbitration work effectively.

CHAIR
Dushyant Dave (New Delhi)

SPEAKERS
Main Speakers:
Prof. Stephan Schill (Heidelberg)
Prof. Diane Desierto (Hawaii)

Commentators:
Veijo Heiskanen (Geneva)
Fei Ning (Beijing)

RAPPORTEUR
Kathleen Claussen* (The Hague)

15:00 - 15:30  Refreshment Break and Exhibitions
Arbitral Legitimacy: The Users’ and Judges’ Perspectives

In four parallel breakout sessions (more conducive to dialogue than a plenary), panels of corporate counsel and judges – armed with points collected in the earlier eight panels – will offer observations and pose questions for discussion on the challenges confronting arbitral legitimacy in terms of both justice and precision. Woven into the discussion will be the results of the October 2013 Corporate Counsel International Arbitration Group workshop, which will touch on the myths and realities of international arbitration. Expect both consensus and controversy.

CHAIRS
José Astigarraga (Miami)
Joseph Matthews (Coral Gables, FL & Washington, DC)
Edna Sussman (New York)
Melanie van Leeuwen (Paris)

SPEAKERS
Judges:
Judge Kathleen Williams (Miami)
Judge Rosemary Barkett (Miami / The Hague)
Judge Dominique Hascher (Paris)
Chief Justice Sundaresh Menon (Singapore)
Judge Ellen Gracie Northfleet (Rio de Janeiro)
Judge Vance Salter (Miami)
Former Chief Justice James Spigelman (Sydney)

Corporate Counsel:
Andrew T. Clarke (London)
Karl K. Hennessee (Houston)
Eugene J. Silva II (Houston)

RAPPORTEURS
Luis González Garcia (London)
Amanda Lees* (Singapore)
Ruth Mosch* (Cologne)
L Andrew S. Riccio* (Miami)

Venue: Sunset Lounge, Mondrian South Beach Hotel
Space is limited so please RSVP at the Freshfields booth to ensure you are on the guest list.
You may also RSVP by emailing: Diogo.Pereira@freshfields.com
Legitimacy: Myths, Challenges, Realities

Wednesday, 9 April 2014

07:30 - 08:45  Breakfast for ICCA Members
Congress attendees who are ICCA Members are invited to a breakfast with the ICCA Governing Board Members

07:30 - 08:45  Breakfast

09:00 - 12:00  Plenary Session
with Refreshment Breaks and Exhibitions

Legitimacy: Examined against Empirical Data

As promised, the preliminary findings from the opening plenary empirical study will be presented by Professors Franck and van Aaken. A distinguished panel will join to discuss the findings, particularly as they cast light – or not – on the precision and justice legitimacy topics driving the Congress.

CHAIR
Jan Paulsson (Miami)

PANELISTS
Donald Francis Donovan (New York)
Makhdoom Ali Khan (Karachi)
Wolfgang Peter (Geneva)
Prof. Catherine A. Rogers (Carlisle, PA)

RAPPOLEURS
James Freda (New York)
Tobias Lehmann (St. Gallen)

Where We Have Been, Where We Should Go

Consistent with ICCA’s mission to facilitate constructive debate about the theory and practice of international arbitration, the Panel Chairs will re-introduce their propositions and sort them as myth, reality or something-in-between. They will then lead the Congress in cataloguing challenges to arbitral legitimacy and concrete measures to address those challenges. The goal is to compile a list of best (or at least better) practices that promote just and precise and inclusive international arbitration. – to be the subject of the next “report card” at the 2016 ICCA Congress in Mauritius.

Chief Justice Menon of Singapore will give a short “report card” on progress on the challenges he posed in his “Golden Age” keynote at the 2012 ICCA Congress in Singapore

CHAIR
Albert Jan van den Berg (Brussels)

PANEL CHAIRS SPEAKER
Chief Justice Sundaresh Menon (Singapore)

12:00 - 12:30  Closing Ceremony of the 22nd ICCA Congress Miami

Burton Landy, Chair of the ICCA Miami 2014 Host Committee
Thank You to Guests and Participants
Jan Paulsson, Outgoing President of ICCA
Introduction of Incoming President of ICCA
Albert Jan van den Berg, President of ICCA
ICCA’s Past, Present and Future
Salim Moollan, Chair of the ICCA Mauritius 2016 Host Committee
Introduction ICCA Mauritius 2016

12:30 - 13:30  Lunch for ICCA Mentors and Young ICCA Mentees
Mentees in Young ICCA’s Mentoring Program are invited to lunch with ICCA Mentors to share experiences and network.

14:00 - 18:00  Special Event - Young Arbitration Practitioners (YAP)
1. Judicial Interest Group -
Activities of the Judicial Committee and Colloquia with Judges

**Members of ICCA Judicial Committee**
Albert Jan van den Berg (Brussels)
Silvia Borelli (The Hague)
Lise Bosman (The Hague)
Judge Dominique Hascher (Paris)
Neil Kaplan QC (Hong Kong)
Chief Justice Sundaresh Menon (Singapore)
Marike Paulsson* (Miami)

2. Practitioners’ Interest Group:
Committee Developing
“Drafting Sourcebook for Organizing International Arbitrations”

**Chair**
Kevin (Kap-You) Kim (Seoul)

**Members of Drafting Committee**
Catherine M. Amirfar (New York)
John Bang (Seoul)
Lisa Bingham* (The Hague)
Philippe Cavalieros* (Paris)
Utku Coşar (Istanbul)
Stephen L. Drymer (Montreal)
Noiana Marigo (New York)
Jim Morrison* (Brisbane)
Dirk Pulkowski* (The Hague)
Jan K. Schäfer* (Frankfurt)
Ben Sheppard (Houston)

3. Launch of ICCA’s Academic Interest Group

**Chair:**
Klaus Peter Berger

**Moderators:**
Manuel Gomez, Catherine Rogers, Hi-Taek Shin

Topics for discussion include teaching techniques, recent advances in theoretical analysis, and the role of academics in the field of dispute resolution.
ICCA Interest Groups and Task Force Lunch Meetings

Tuesday, 8 April 2014

12:00 - 13:30  Lunch

1. Joint ICCA-ASIL Task Force on Issue Conflicts

   Chairs
   Prof. Laurence Boisson de Chazournes (Geneva)
   Prof. John Crook (Washington, DC)

   Members of Task Force
   Stanimir Alexandrov (Washington, DC)
   Brooks Daly (The Hague)
   Judge Joan Donoghue (The Hague)
   Donald Francis Donovan (New York)
   Marcelo Ferro (Rio de Janeiro)
   Judge Dominique Hascher (Paris)
   Andrés Jana (Santiago)
   Jean Kalicki (Washington, DC)
   Gabrielle Kaufmann-Kohler (Geneva)
   Meg Kinnear (Washington, DC)
   Marc Lalonde (Montreal)
   Chief Justice Sundaresh Menon (Singapore)
   Jan Paulsson (Miami)
   Hi-Taek Shin (Seoul)

   Rapporteurs
   Christian Leathley (London)
   Ina Popova* (New York)
   Ruth Teitelbaum (New York)

2. Joint ICCA-Queen Mary Task Force on Third Party Funding

   Chairs
   Prof. William W. Park (Boston)
   Prof. Catherine A. Rogers (Carlisle, PA)

   Rapporteur
   Prof. Stavros Brekoulakis*(London)