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## **Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012**

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# Commercial and Investment Arbitration: How Different are they Today?

The Lalive Lecture 2012\*

by KARL-HEINZ BÖCKSTIEGEL\*\*

## ABSTRACT

*This text of the Lalive Lecture 2012, as adapted for publication, examines the common denominators and differences regarding the major aspects of commercial and investment arbitration. It does so in identifying those issues and criticisms mostly discussed in recent years and provides the author's views based on his practical experiences as an arbitrator in many cases of both commercial and investment arbitration under rules such as the ICC, LCIA, SCC and others created for commercial arbitration and such as ICSID, the ECT, NAFTA and CAFTA created for investment arbitration. In particular, the following issues are discussed:*

*The Legal Culture, the Legal Framework and the Applicable Law, the Selection of Arbitrators, Jurisdiction, Case Management, Confidentiality or Transparency, Predictability and Consistency of Decisions, and Perspectives for the Future.*

## I. INTRODUCTION

*Commercial arbitration* has, of course, a tradition of many centuries, both at the domestic, but also at the international level. *Investment arbitrations* have also existed to some extent for quite some time as we know from older cases. But it became a widely used general field of international dispute settlement only when the first bilateral investment treaties (BITs) were concluded starting in 1959 and when the

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\* Given in Geneva on 23 May 2012 to an audience of 140 participants who had come from Switzerland, Austria, France, Germany and other countries.

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Chairman of the Board, German Institution of Arbitration (DIS) 1996–2012; The Patron, Chartered Institute of Arbitrators 2007–2010; President, International Law Association (ILA) 2004–2006; President, London Court of International Arbitration (LCIA) 1993–1997; Panel Chairman, United Nations Compensation Commission 1994–1996. President, Iran–United States Claims Tribunal, The Hague, 1984–1988. Chair, *Arbitration of the Century*, IBA Conference Amsterdam 2000.

World Bank initiated the ICID-Convention in 1965. And even then, I remember, Aaron Broches, as the 'father' of the ICSID Convention, was very disappointed when ICSID for quite some time only had about one case per year. Since then, the scenario has changed completely. Investment arbitration is by now chosen as the dispute settlement mechanism in thousands of treaties and investment contracts and leads to hundreds of cases per year in practice between states and foreign enterprises.

This development has obviously had its impact on the *practitioners of arbitration*. Many have stayed in commercial arbitration exclusively. Other colleagues have come from public international law as academics or diplomats and became active only in investment arbitration. But many of us find ourselves now practicing both in commercial and investment arbitration. In my observations today, I will try to highlight some legal issues and practical experiences that appear to me when comparing these two fields of arbitration.

*Distinguishing* between commercial and investment arbitration may sometimes already be difficult or misleading. Quite often disputes concern a contract between a corporation created by a foreign investor in a state on one side and on the other side a state enterprise. Such a contract will contain what one would consider a 'normal' arbitration clause referring to an institution of commercial arbitration. However, a closer look shows that it is really an investment dispute. A recent example from my own practice is our ICC award of last December between daughter companies of Exxon Mobil and PDVSA in Venezuela which was published immediately. I might add that in that case, we had a scenario which is also found frequently nowadays, namely that the investor starts additionally a parallel BIT arbitration to be on the safe side.

## II. THE LEGAL CULTURE

When observing a global system of dispute settlement, before even looking at the legal framework, one has to realize that the national and international environment as provided by the political system, the involved sections of society, the professional background of the entities and persons involved, has a strong impact on the legal framework and its implementation.

Those of us who have done arbitrations with parties and counsel and arbitrators from many regions outside Europe such as Asia, the Middle East or Latin America, will remember that quite often one encountered predispositions, evaluations, and solutions which one had not thought of before, were rather surprising, and forced one to rethink and change the approach to a problem. On the other hand, a divergence in ethical standards in international arbitration remains and does cause some difficulties.

In my own practice, I noticed that particularly during my time at the *Iran-United States Claims Tribunal* at The Hague involving some 4,000 cases from the two states that were and still are bitter enemies and had and have no diplomatic relations. The difficulties stemming from this political background appeared in these cases similarly both in those many that were commercial arbitrations and those that

were investment arbitrations. Perhaps this is due to the fact that they were all processed under the same adapted UNCITRAL Rules.

In the practice of today's arbitrations, the most obvious differentiation is that between the *common law* system and what is normally called the '*civil law*' system of continental Europe, both systems adopted by many other states throughout the world. In commercial arbitration at the national level, I see that the traditional particularities of both systems are widely maintained by counsel and arbitral tribunals. At the international level, I see less of a divide and more of a convergence between common law and civil law resulting from the recent years, though perhaps slightly more in investment arbitration.

In *commercial arbitration*, differences in the legal culture become particularly relevant, because most institutional arbitration rules provide – as Article 21.2 of the new ICC Rules – that the tribunal has to take into account the relevant trade usages which may turn out to be quite different between countries and regions of the world. On the other hand, major differences in the legal culture have an impact in *investment arbitration* due to the very different role that governments and other state institutions have, either due to the constitutional framework or due to their application in practice, in a range of states between what some might consider a democracy western style at one end or dictatorial systems at the other.

### III. LEGAL FRAMEWORK AND APPLICABLE LAW

An easily recognized difference between commercial and investment arbitration are the legal frameworks in which they function.

As far as *public international law* is concerned, for commercial arbitration, the only really relevant treaty is the New York Convention which 'only' deals with the recognition and enforcement of foreign arbitral awards, while the other traditional instruments play no major role today. On the other hand, for investment arbitration, treaties of public international law provide the fundamental framework, particularly bilateral instruments as the more than 2,000 BITs, and multilateral instruments as the ICSID Convention, the Energy Charter Treaty, and regional instruments such as NAFTA and CAFTA.

*European Law* may be relevant both in commercial and investment arbitration though in different ways. For commercial arbitrations, quite frequently the issue of mandatory rules such as antitrust law and their qualification as public policy becomes relevant. For investment arbitration, a wide range of issues and discussions has been initiated by the Lisbon Treaty regarding its conflicts with existing BITs and the future competence to conclude new BITs by EU Member States. Since I am presently an arbitrator in three respective cases, I cannot submit any personal views at this stage.

*National law* plays different roles. In *commercial arbitration*, procedurally its mandatory provisions rule the arbitrations at the place of arbitration, and a national substantive law is in the great majority of cases what the tribunal has to apply. Exceptions I have seen in practice were contracts excluding any national law and referring to the Unidroit Principles or to various combinations or common

denominators of two or several national laws. These latter choices of law clauses obviously do not make the work of the arbitrators easier, but are understandable where the parties come from very different legal cultures and cannot agree on one domestic law. Here in Geneva I should mention that, in such cases, Swiss law is often the compromise they can agree on.

In *investment arbitration*, national law plays a different role.

*Procedurally* its mandatory provisions are of relevance if the arbitration is not ruled by treaties such as ICSID or NAFTA, but chosen to be under rules of non-governmental institutions such as the ICC or the LCIA which, in turn, have to respect the mandatory law at the place of arbitration.

As a *substantive law*, national law may become applicable in several ways: In *investment contracts* between the state and the foreign investor one will mostly have an express reference that the substantive law of the host state is applicable. However, that is not necessarily the end of the story. Such a choice of law clause will generally have to be interpreted as also meaning that the investor has to accept later changes of the domestic law. But as we know from many cases, such a conclusion will often be rejected by the investor claiming that the state changed its law with the intention to improve its own position and delete or devalue contractual rights of the investor. This is rather obvious when a law expropriates, but less clear where a similar effect is reached by new tax or other economic laws. Similar difficulties appear in contracts with state enterprises when the state changes the law or issues administrative acts which either improve the contractual position of its state enterprise to the detriment of the investor or prevent the state enterprise from fulfilling certain contractual obligations which it then justifies by referring to the state's acts as force majeure. Some of you know that I have researched and published on this issue and I do not want to repeat that here.

However, in this context I may refer to a decision in a recent arbitration which I chaired. In an investment arbitration under the ICC rules, where our decision is not yet published and which I can only mention in the abstract, we accepted a later change of a telecommunication law which introduced a mandatory majority of nationals of that state in telecommunication companies depriving the investor of its majority, because the law affected all such companies and other states have similar laws for reasons of national security.

But also in *investment arbitrations under treaties*, national law may have its relevance. For ICSID arbitrations it may suffice to recall Article 42 of the Convention which expressly refers to the law of the host state in addition to the rules of international law. Similar, though varying, provisions are found in most BITs and also in the new Model BIT which the United States have just published in April of this year.

On this basis, the foreign investor will generally have to accept that its investment is ruled by the laws of the host state, and again this will include any later changes of the law. However this is subject to the limitations provided by the treaty. Applications or changes of the law may be breaches of the treaty under certain circumstances. The new *Trilateral Agreement between China, Japan, and Korea* seems to express a specific concern in this regard. It provides in its Article 3 on

national treatment that ‘*treatment granted to an investment once admitted shall in no case be less favorable than that granted at the time when the original investment was made.*’

From arbitration practice, let me again give an example from one of my recent cases. In a BIT-case under the SCC rules, our decisions in the *Rosinvest Case* have been published. Our Award on the merits is the first one in the well known YUKOS-cases. We came to the conclusion that, while recognizing the Russian State’s prerogative to issue, change and implement laws on taxation and insolvency, the cumulative effect of the various measures taken against YUKOS, compared to the treatment afforded to its competitors, could only be interpreted as an expropriation. I should add that we went on to only grant a rather small amount of damages because we considered the purchase of the shares by the hedge fund owning Rosinvest as a speculative investment. Rosinvest then decided not to defend the award before the Swedish courts.

Now, within the legal framework, turning to the *arbitration rules* chosen by the parties, if such rules are contained in treaties, they are only applicable to investment arbitration. However, the rules of non-governmental institutions originally created and used only for commercial arbitration are today also chosen by the respective parties, states as well as investors, for investment arbitration. For some time, only the UNCITRAL Rules were frequently included as an alternative in treaties. But now we find investment arbitrations under the rules of the ICC, the LCIA, the SCC and other national arbitration institutions originally created and intended only for commercial arbitrations. And indeed, if states turn away from ICSID, as Venezuela has done by its denunciation of the ICSID Convention on 24 January 2012, they will have to select other arbitration rules for their disputes with foreign investors. In fact, Venezuela had already done so earlier. A recent example is our ICC Award of last December in the Exxon Mobil case which was published immediately and granted damages against Venezuela based on a choice of the ICC Rules in 1997. As you will know, traditionally about 10% of all ICC cases involve state parties. The new ICC Rules of 2012 take this into account. And, in the last two years an *ICC Task Force on Arbitration Involving States and State Enterprises* has examined the respective specific issues in detail and a Report is just being published.

#### IV. SELECTION OF ARBITRATORS

I now turn to the selection of arbitrators. The parties consider that as one of the most important decisions in their arbitration cases, and it is certainly one of the most discussed topics.

One of the generally mentioned major reasons for choosing *commercial arbitration* over the national court system is indeed that, in arbitration, the parties can select judges of their own choice and confidence. In view of the very wide variety of fields of commerce such as trade, manufacturing, construction, service, finance, insurance or transport, it is obviously important for the parties to be able to select arbitrators well acquainted with such fields.

In *investment arbitration*, the situation is somewhat different. The usual issues in such disputes are more limited, since the bilateral as well as multilateral investment protection treaties contain very similar protective provisions dealing with expropriation, fair and equitable treatment, discrimination and sometimes contracts by umbrella clauses. In view of this, the typical expertise required from arbitrators is one of public international law and particularly its application to such protection.

In practice, the result is that many arbitrators of commercial arbitration do not feel comfortable or are not chosen by the parties in investment arbitrations, and vice versa, many experts of international law selected for investment arbitration are not active in commercial arbitration. Generally, the number of arbitrators active in investment arbitration is much smaller than that in commercial arbitration. However, as you know, there is quite a group of arbitrators who do both kinds of arbitration.

One word on *conflicts of interest and challenges* of arbitrators. Both in commercial and in investment arbitration, their number has grown considerably. The IBA Conflict Guidelines, which are presently under study for an updating, are helpful for both areas of arbitration. The typical conflict and challenge in commercial arbitration will be based on former or present contacts of the arbitrator's law firm with one of the enterprises participating as a party. While such reasons may also play a role in investment arbitration, there more often the challenge will be based on former arbitral appointments. In this context, it must be noticed that in recent years some parties or their counsel seem to have focused on candidates who have been appointed frequently by the same party, be it private or state, or more generally either by investors or by states, and whom they consider as having developed a profile favorable to one side. As far as I can see, challenges based on such multiple appointments have so far not been accepted.

Some have *suggested* that, in view of such difficulties, *all three arbitrators should be appointed by an institution*. I do not agree with that proposal. One of the major reasons for the parties to agree on arbitration is that they have an influence to select judges of their own confidence. This cannot be replaced by an institution which cannot have the same detailed knowledge of all relevant circumstances of the particular case at hand at the beginning of the procedure.

If the parties or the party-appointed arbitrators cannot agree on the *choice of a chairperson* of the tribunal, this appointment is the task of the arbitral institutions. Both in commercial and investment arbitration, the respective procedures differ per institution. There is no need to describe them in our context. Normally in commercial arbitration, the pool from which the chairperson can be selected is not limited by any specific list and is wide in practice. In investment arbitration, for reasons already discussed, the pool of realistic candidates to chair is smaller. Within that more limited number, specific difficulties have come up in recent years for ICSID to appoint chairpersons for its growing number of cases, because they have to be appointed from the ICSID list of arbitrators. The Member States often fill their slots for this list on the basis of political considerations rather than qualification for that function. The result is that ICSID considers that many of the

persons on its list cannot be considered to have the experience to be entrusted the difficult and responsible function of chairing an arbitral procedure. I can personally appreciate this approach from my own involvements in appointing chairpersons in my functions as president of the LCIA and of DIS and as appointing authority for the PCA where we always felt we owe the parties an appointment of a person with sufficient proven experience. In practice this means that ICSID has frequently difficulties to find suitable candidates to chair who can still accept another case beyond their already existing case load.

## V. JURISDICTION

Jurisdiction is an issue which plays quite different roles in commercial and investment arbitration.

In *commercial arbitration*, jurisdictional disputes are less frequent. They mostly concern the scope of the contractual arbitration clause, particularly whether it covers also non-signatories within a group of companies or behind a general contractor or after an assignment of the contract.

In *investment arbitration*, there is a much wider scope of jurisdictional issues and we have much more frequently jurisdictional objections which may result in a bifurcation of the procedure.

There, the *consent of the parties* to arbitration is mostly expressed in a treaty of public international law such as a BIT or the ICSID Convention. Thereby, general principles of treaty interpretation, particularly the Vienna Convention, will become relevant in much detail. The state's consent to arbitration may depend on the interpretation of:

- whether an 'investment' existed;
- or whether the Claimant is a national of the alleged home state, often as a company which has been created there by the mother company for the only reason that this new home state has a BIT with the respondent state;
- or whether a national of that home state really owns and/or controls the allegedly expropriated company.

A particular and much discussed question is whether a *MFN-clause* in a BIT can provide jurisdiction, if the BIT between the home state and the host state contains no or no sufficient express consent to arbitration, but contains an MFN clause. If that link leads to another BIT which does contain a wider consent to arbitration, could that provide jurisdiction for the dispute at hand? While we have no time to go into detail in this regard, let me at least say that in my view there is no generally valid answer. As we have elaborated in our first Rosinvest Award on Jurisdiction, one has to take into account the particular circumstances of the two relevant BITs. In our case, this examination leads us to accept that the MFN clause could indeed be a basis for our jurisdiction.

Let me also mention a rather unusual dispute in which we had to examine jurisdiction under a *BIT versus the New York Convention*. This was the ICC arbitration in the Kaliningrad Case that became public through the challenge procedure before the French courts which resulted in the court confirming our award and dismissing the challenge. The investor had argued that, by recognizing and enforcing an LCIA award, the courts of the respondent state in our case had expropriated property of the investor for which it claimed damages under the BIT. Again I cannot go into the details of this interesting and complex case. But we concluded that it was the clear intention and result of the New York Convention that no further appeals should be available against court decisions recognizing and enforcing a foreign arbitral award other than those expressly mentioned in the Convention itself. Accepting such court decisions as possible expropriations under a BIT would be in conflict with that intention and result and even an examination on the merits would open *Pandora's Box* for such a further and unwarranted appeal mechanism against such court decisions. In so far as thereby a conflict arises between the BIT and the Convention, by using the tools of interpretation of public international law on conflicts between treaties, we came to the conclusion that the New York Convention must prevail over the BIT. Therefore, we refused to accept our jurisdiction under the BIT.

## VI. CASE MANAGEMENT

Case management has, for good reason, received great attention in recent years in publications and conferences, but also in practical implementation by rules as can be seen in the revision of the ICC Rules effective from 1 January 2012.

The practical conduct of arbitral proceedings is of course first of all subject to any *mandatory provisions in the applicable arbitration law*, be it a national law at the seat of arbitration for commercial arbitration, or applicable treaties for investment arbitrations. However, these normally contain very few and only rather fundamental rules regarding the procedure such as the due process principle.

More details are provided in the applicable *arbitration rules*. These differ in the depth they address regarding the conduct of the proceeding irrespective of whether used for commercial or investment arbitration. All provide shortly for the necessary procedural steps. But some provide further details such as Article 22 of the LCIA Rules defining a list of additional powers of the tribunal. Recent revisions seem to go into further details such as the 2010 version of the UNCITRAL Rules which are the product of an UNCITRAL Working Group efficiently chaired by Michael Schneider.

But both the applicable law and arbitration rules leave a wide discretion to the tribunal on how to conduct the proceeding. And indeed this is where arbitration can play to its specific advantages giving the tribunal the opportunity, and also the task, to shape the procedure in a specific way best fit to the dispute at hand.

Looking at the practice in commercial and investment arbitration in recent years, I notice a strong trend of harmonization. Using this discretion for case management, arbitrators seem to take into account the wide experience gathered

in international commercial arbitrations over many years and use them to manage both new commercial and investment arbitration proceedings in rather similar fashion. However, some differences can be noticed in practice:

- It is not surprising that arbitrators coming from commercial arbitration tend to involve the parties and their counsel more in a less formal dialogue before deciding on various questions of case management.
- On the other hand, arbitrators in investment arbitration who have no experience in commercial arbitration may sometimes not be aware of certain procedural options not used at the International Court of Justice, but well established in commercial arbitration.
- The involvement of states, even if represented not only by a ministry but also by a law firm, tend to make the proceeding more formal.
- State parties will often request longer periods for submitting their memorials and evidence, because the decision process between counsel and the various state agencies involved may be more complex and time consuming.
- For the same reason, longer periods may also have to be granted for comments on procedural questions raised by the tribunal.
- Lack of familiarity with the usual conduct of international arbitration proceedings may raise difficulties. For a private party in commercial arbitration this may occur if it chooses not to hire outside counsel but be represented by its in-house counsel. In investment arbitration, this may occur if the state party decides to be represented only by relevant ministries and not by a law firm. In both situations, if I chair, I normally try to find a way to tell the parties that saving the expenses for an experienced law firm may not be a good idea in their own interest.
- There are exceptions: When I was at the Iran-US Claims Tribunal, Iran was mostly represented by the Bureau it had set up at The Hague. As our almost 4,000 cases were processed over time, the members of that Bureau gathered a wider experience in the process than many of the American law firms for whom, at that time in the 1980s, international arbitration was by no means a familiar process. And more recently, I have noticed that Argentina, due to its many investment arbitration cases, has gathered an impressive expertise in its ministerial team in the process.
- Collection and production of evidence may also show some differences between commercial and investment arbitration. For commercial arbitration, the well known IBA Evidence Rules, particularly their revised edition of 2010, provide help for most upcoming questions. In investment arbitration, though here as well a reference to the IBA Rules is commendable, and in fact is often found in the procedural order no. 1 at the beginning on the conduct of the proceedings, specific difficulties may arise. The reference in IBA Rule 9(f) to ‘*evidence that has been classified as secret by a government*’ does not always solve the problem. As an example from practice, documents or other evidence is sometimes seized by the

government in what it declares as criminal investigations and which the investor calls an intimidation and manipulation of the evidence.

This list may be sufficient to show that, while case management tasks and options are rather similar between commercial and investment arbitration, many differences remain.

## VII. CONFIDENTIALITY OR TRANSPARENCY

A traditional reason often mentioned for the choice of *commercial arbitration* over court procedures is that arbitration is confidential. And this seems still to be an important consideration for many private enterprises today.

For *investment arbitration*, we have a mixed picture in that context. The traditional instruments such as the ICSID Convention and most BITs say little or nothing on whether the proceedings and awards shall be treated as confidential. But in practice, today, little confidentiality is left in investment arbitration.

While ICSID still needs and regularly asks for the agreement of the parties for a publication of the award in a case, irrespective of the answer of the parties, almost all awards are published. The same is true for awards in investment arbitrations under the other rules I have mentioned such as those of the ICC, the LCIA or national arbitral institutions. They are published in one of the many sources of information we now have on the internet mostly without an identification of the source. One can only speculate that parties, law firms or persons provide the information, because they consider that this serves their interests in some way. And, of course, I admit personally that I do not refrain from looking at these publications.

Irrespective of the legal situation, good reasons can be and have been submitted for a greater transparency in investment arbitration, because it concerns interests of a state who in turn represents a people and society. The claims of their constituency and non-governmental groups to be informed and be able to provide an input is thus understandable.

For these reasons, many of the modern instruments either expressly provide for much greater transparency or the parties agree at the beginning of the proceeding in this regard. I remember when I chaired the very first NAFTA arbitration many years ago, it was still conducted in a rather confidential manner though the media reported on the case and later on our award. In my most recent NAFTA procedure, the Canadian Cattlemen Case, the hearing in Washington was open to the public and indeed transmitted live to Canada.

Later instruments such as the CAFTA Treaty provide expressly on such transparency. And, even beyond investment arbitration proper, the Softwood Lumber Treaty between Canada and the US which deals with one of the largest trade product between these two states and under which I chaired three cases between the two governments under the LCIA Rules, provides expressly that all memorials, the hearings, and procedural orders and awards of the tribunal shall be

open to the public. The most recent step in this direction is the new US Model BIT just published in April of this year. While it gives the parties of the arbitration the choice between ICSID, its Additional Facility Rules, and the UNCITRAL Rules or the rules of any other arbitral institution on which the parties agree, for all of these it provides in its Article 29 that all memorials, minutes, orders, hearings, and awards of the tribunal shall be open to the public.

Thus, regarding confidentiality and transparency, we have what is probably the most striking difference between commercial and investment arbitration. Permit me one personal comment in this context: While I do understand the good reasons for the increased transparency, in my experience it does not make the procedure more efficient. If they are open to the public, the parties' written submissions, and perhaps even more their oral presentations in the hearing, tend to be less focused on the professional exchange with the tribunal, but rather tend to become public statements. And also as an arbitrator in such public hearings, I noticed that my remarks would go beyond what I would normally say in addressing counsel, just to make sure that those in the audience less familiar with the details of the case and the media would not misunderstand.

### VIII. PREDICTABILITY AND CONSISTENCY OF DECISIONS

Closely connected with the issue of transparency are the issues of predictability and consistency of arbitral decisions.

In *commercial arbitration*, the traditional confidentiality of not only proceedings, but also of awards, has often resulted in the complaint that no real knowledge of jurisprudence can be established by the legal community on how arbitral tribunals have decided on issues appearing in disputes. Indeed, it is obvious that parties and their lawyers, before starting a dispute, would like to have some idea how the disputed issues may be decided and thus how their chances are to prevail. In domestic court procedures, the legal community has a long tradition in collecting judgments and organizing the relevant information. This is so though their relevance may be different in the common law system with its precedents and in the civil law system where earlier judgments are considered but normally without any binding effect.

Institutions of commercial arbitration like the ICC have tried to improve the situation by publishing or permitting publications on procedural decisions and on awards without identifying the parties and identifiable details of the case. And the LCIA has recently even enabled a publication on its decisions on conflicts and challenges of arbitrators. But beyond that, publications on concrete cases and awards in commercial arbitration remain the exception and some kind of insider knowledge.

In *investment arbitration*, the situation is quite different. The practice I described of having almost all awards published either with or without authorization of the parties and the institution provides a vast volume of jurisprudence available to the

parties and their lawyers on which they can rely in preparing and evaluating their chances in new cases. Memorials of the parties will regularly refer the tribunal in the new case to earlier decisions of other tribunals on similar factual and legal issues.

And the arbitrators themselves will take up such references with great care and, if appropriate, look for further decisions of relevance. In this context there have been a number of publications on the question whether a system of *precedent* has by now developed in international arbitration. In fact, Gilbert Guillaume's Lalive Lecture in 2010 addressed that issue. My own view is that, though arbitral tribunals should and do take into account earlier decisions on similar issues, there is clearly no system of precedent, not even within the ICSID system. But as a practical matter, I would feel that, if a tribunal finds out that an earlier tribunal or perhaps even several earlier tribunals have come to a certain conclusion, the new tribunal should only come to a different conclusion after very careful consideration of the earlier arguments and by explaining why it considers these as not convincing.

In this context, let me also recall the wide discussion we had at last year's ICCA Conference here in Geneva on the question how investment arbitration should and does contribute to the further *development of international law*. Some will remember that esteemed colleagues like Emanuel Gaillard feel strongly that arbitral tribunals should make efforts in this regard when writing their awards. But some may also remember that I expressed the opinion, which I still hold today, that we should be very much aware that arbitral tribunals receive their authority and mandate from the parties and institutions which appoint them for the case at hand. And that mandate is to decide on the relief sought, and to consider all factual and legal issues relevant for that decision, no less, but also no more. When I ventured to simplify this approach by saying: 'There are too many professors in arbitration', I did not make friends with everybody in the audience. And I must admit that this simplification was not quite accurate, because I see not only arbitrators who are professors as I am, but also eminent partners of law firms falling for the temptation to write treatises on international law into their awards though their relevance for the decision reached is hard to understand.

To avoid misunderstanding: Of course, I accept that arbitral awards contribute to the further development of the law by being considered by the parties, their lawyers and later tribunals. And I would hope that my own awards are persuasive enough to convince later tribunals to go on a similar path. But that effect should come from arguments which the tribunal had to consider for its decision on the relief sought in its specific case, and not by *obiter dicta* for which it had no mandate.

Finally, a short note on the suggestions sometimes seen in publications, that more predictability and consistency of the jurisprudence could be reached, at least in the field of investment arbitration, by establishing either *permanent tribunals* or a *second instance for appeal*. Both ideas were floated, when some years ago, ICID had a general consultation with its Member States on possible improvements of its system. There, the vast majority of states were not in favor of either one of these ideas. I share that opinion.

In international arbitration, the parties, their counsel, and the institutions make many efforts to find the best candidates for their selection of arbitrators. It is hard to see, how a *permanent tribunal* could be composed of even better judges. Probably those who would find it attractive to accept to spend all their work time on such a permanent appointment would be those who are not in the first row of candidates considered by the parties and institutions.

The institution of an *appeal mechanism* has for good reason not been accepted either in practice. First of all, for the same reasons mentioned above, after the parties' and the institutions' efforts to select the very best arbitrators, it is hard to see how better persons could be found for such an appeal body. And second, one of the reasons to choose arbitration is that it leads to a decision as fast as possible contrary to the domestic court procedures with their two or three instances resulting in delaying a decision for years. This consideration is still valid, though today's arbitration proceedings often do last too long for reasons we cannot discuss here. To avoid really major faults of a tribunal in procedure or substance, for commercial arbitration, national arbitration laws and the New York Convention provide options for corrective action. In investment arbitration we have similar options such as the Annulment Procedures in the ICSID Convention. But, though there may be room for improvement in detail, that very limited approach with very few grounds for revision is all we need and should have. And even there, as we know, many feel the scope of review has been widened too much in practice by some Annulment Committees.

## IX. PERSPECTIVES FOR THE FUTURE

If we look forward from today's situation as I have tried to describe it, the dynamic development of both commercial and investment arbitration in the recent past makes any prediction speculative.

Regarding *commercial arbitration*, I would think that domestic arbitration *laws* in many countries, be they industrial, emerging and third world countries, still offer much room for improvement. This may particularly be so for those countries which only in recent years have become major players in international trade. Developing the law, however, is not enough. As we see from the practice in many jurisdictions, the much more difficult task will be to make the *national court systems* fit for implementing the New York Convention and dealing with modern arbitration. The institutional *rules* used for commercial arbitration have, in regular intervals, been re-examined and revised in order to take into account new experiences from their practical implementation. This process will and will have to continue. Finally, I would expect that also in commercial arbitration, whether we like it or not, we will have more transparency by the modern online media.

Regarding *investment arbitration*, I expect that some of the criticism in recent years will continue and change the scenario. Presently, one of the forums in this regard is the OECD *Roundtable on Freedom of Investment* with a specific focus on investor-state dispute settlement. This field is much more exposed to the national and international political environment which changes frequently. *Changes of government*

*or of the political structures* in states will, for understandable reasons, lead to conflicts with foreign investors and then to disputes and arbitrations. States will *continue to need and try to attract foreign investment*. They will only be successful in such efforts if they provide some legal security for such investments including the option for the settlement of disputes. But, on the other hand, as in commercial arbitration, parties who have been on the losing side in a number of arbitrations will see the fault in the system rather than in their own conduct. Nevertheless, as a result of the continuing growth of world-wide investments, I would expect investment arbitration to grow as well, but perhaps going to a greater variety of arbitration rules and institutions.

Finally, one safe expectation is that law firms and arbitrators will be kept rather busy in the future as well both in commercial and investment arbitration.