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The Dual Challenge Facing International Arbitration in a Shifting Global Landscape: Increasingly Vital, yet under Unprecedented Threat

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Amidst tectonic shifts in the global political and economic landscape, international arbitration stands at a crossroads. It is increasingly vital as a neutral and fair mechanism for resolving cross-border disputes, yet it faces unprecedented scrutiny and challenges from both external and internal stakeholders. In her keynote speech, Ms. Santens provides insight into these pressing issues and explores strategies to safeguard and enhance the integrity and effectiveness of international arbitration in these turbulent times.

I. Introduction

Good evening, goedenavond, bonsoir. It is a special honor for me to deliver this keynote address at CEPANI's annual meeting. The timing is serendipitous: just as I have reached the personal milestone of 25 years of practice in international arbitration, and just as the President of my adopted home country is causing perhaps the most significant upheaval in my native country in that same time period. In the circumstances, I could not think of a better topic than the one I will address today: the increasingly vital importance of international arbitration, and the simultaneous unprecedented threats to it, in a shifting global landscape.

Many thanks to CEPANI for the invitation and thank you all for being here. I hope you will find my presentation thought-provoking.

II. Arbitration as a peaceful and effective method for resolving international disputes is increasingly vital in today's changing global landscape

Since the end of the Cold War, the US-EU alliance has been setting global standards, including respect for the rule of law. The American political scientist Francis Fukuyama famously suggested that this consensus represented "the end of history."

But the consensus is breaking down, and with it certain norms that we took for granted. At the risk of stating the obvious, the Second Trump administration has taken unprecedented steps, including starting a global trade war, undermining the sovereignty of various nations, and threatening to disregard court orders and more generally showing disregard for democratic institutions and the rule of law. These shifts are not confined to the other side of the pond. Even before President Trump entered the frame, an emergent China and an increasingly belligerent Russia have brought about a realignment of global alliances and change in global norms. Within the EU, Brexit has emboldened Eurosceptic movements, and Hungary has challenged the bloc's commitment to liberal democracy. The upshot of all this is that institutions we have taken for granted for decades are no longer secure: the trend of ever-liberalizing global trade has shuddered to a halt; the legitimacy of multilateral organizations, whether it be the EU, NATO, or the UN, is increasingly questioned; and, most pertinently for us, respect for the rule of law and legal institutions is declining.

These shifts will inevitably give rise to an increase in complex commercial and investment disputes. We have already seen the impact of Russia's invasion of Ukraine, with numerous commercial and investment treaty arbitrations commenced against Russian state entities. Tariffs will lead to supply chain disputes. And the US's adoption of practices that were traditionally within the realm of rogue nations will likely give rise to investment treaty claims. These may stem, for example, from tariffs or tax hikes, or from the reversal of clean energy project development, which has attracted significant foreign investment.

In principle, international arbitration should be an important part of the solution – helping resolve these disputes in a peaceful and effective manner. The hallmarks of international arbitration are well-known: choice of a neutral forum; choice of impartial, independent, and expert decisionmakers; procedural efficiency and flexibility; and final awards that are enforceable around the globe.

III. Arbitration faces its own crisis

But international arbitration is facing its own crisis of norms, partly driven by the same rogue actors.

When I started my career in 2000, the field was still relatively obscure. Investment arbitration, in particular, was only in its nascency. International arbitration was practiced by a small community of lawyers who abided by certain unwritten "norms." In a 2008 article, David Rivkin called it the "Town Elder Model,"[1] in which a trusted town elder would listen to both sides, ask for additional information only as necessary, and issue a decision. Indeed, international arbitration cases involved a relatively

[1] *See* D. W. RIVKIN, "Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited", 24(3) *Arbitration International* 375 (2008).

straightforward exchange of a limited set of pleadings and no or only limited document production; and when the award came down, it would usually be paid promptly.

With the arrival of more participants, those already in the know felt it important to educate newcomers, and these norms were explained in books on international arbitration and "codified" into soft law. The prime example is the IBA Rules on the Taking of Evidence in International Arbitration, which were first issued in 1999.

But today we see the limits of soft law, including its ability to deal with rogue actors. A notable example of this, and where we may be headed more frequently in the future, is the *Wintershall v. Russia* case.

In 2024, Wintershall – a German oil and gas producer – commenced two investment treaty arbitrations against Russia, one under the German-Russia bilateral investment treaty before an unknown venue and one under Energy Charter Treaty ("**ECT**") before the Permanent Court of Arbitration ("**PCA**") in The Hague, after it was ordered by a presidential decree to transfer its interest in a Russian oil field to the national oil company, Gazprom. Russia's stated reason for this forced transfer was that it needed to safeguard its national interests given the supposed illegal and unfriendly actions of the West towards Russian assets.

After the arbitral tribunals were constituted with the cooperation of Russia, the country's Prosecutor-General sought to enjoin the ECT arbitration in Russian courts, claiming (among other things) alleged hostility of the Netherlands (as the seat of the PCA) and lack of impartiality and independence of all three arbitrators, and also threatened Wintershall with a fine of 7.5 billion euros if it pursued the arbitration.

On 29 April of this year, a Moscow court granted the Prosecutor-General's request and enjoined Wintershall, its counsel, the PCA, and the arbitrators from continuing the ECT arbitration. The court found *inter alia* that the three arbitrators, who are British/Nigerian (Olufunke Adekoya), Swiss (Wintershall's appointee Charles Poncet), and French/Iranian (Russia's appointee Hamid Gharavi), all lacked independence and impartiality, as they are all – and I quote – "resident[s] of unfriendly states" with "close ties to those states," and are "susceptible to anti-Russian propaganda."

Within a few days of the judgment, Hamid Gharavi resigned as Russia's appointed arbitrator. In his resignation letter, he reportedly stated that he felt he was being sued for fulfilling the very mandate that Russia had entrusted to him, and that arbitrators, counsel and arbitral institutions "must stand firm against further slippage by western and emerging states in their compliance with fundamental principles of international law."[2]

[2] *See* A. ROSS, "Gharavi resigns as state appointee in treaty cases against Russia", *Global Arbitration Review*, 22 May 2025.

It remains to be seen what will happen next. What is certain is that Wintershall, its counsel, the arbitrators serving in the case, and the PCA are in a predicament.

The case sums up the dilemma that is my focus today: it showcases both the fundamental **need** for international arbitration in politically charged disputes, and its simultaneous **fragility** as it requires the parties' respect for principles and norms to be effective.

Even in less egregious cases, parties increasingly engage in a variety of tactics that undermine the arbitral process, and thereby make enforcing rights more difficult. Briefs are ever-longer and include unnecessary arguments, strawman arguments, and misstatements of the record. This not only drives up time and costs but also makes it difficult for arbitrators to discern what is relevant and meritorious, which in turn threatens the quality of the award. We are also seeing more challenges to arbitrators from parties that are dissatisfied with interim substantive or procedural decisions. As just one example, a few weeks ago, on 12 May 2025, in the *Heidelberg-Cement v. Egypt* case, ICSID dismissed the claimants' proposal to disqualify all three arbitrators, following a series of procedural orders issued by the tribunal.[3] Document production is often a lengthy and intense process, requiring multiple interventions from the arbitrators. And the default position of prompt compliance with the award has made way for a reflexive reaction to attack it.

This conduct has become particularly prevalent in investor-State arbitration on the part of States, including EU nations such as Italy and Spain. This lack of respect for the rule of law by the actors who should keep it in the highest regard is truly remarkable and deplorable in my view – it erodes the principle of rule of law.

IV. Possible solutions

So, the pressing question is: how do we ensure that arbitration remains credible and viable, and protect it from rogue actors and bad faith tactics, so that it can remain a tool for the effective peaceful resolution of disputes in an increasingly chaotic and contentious world?

I do not pretend to have the answers. But I have been thinking about this as I handle my cases and some themes have emerged.

There are two principal ways in which I think we need to strive to make arbitration more robust: first, we need to strengthen the system from within; and second, we need to try to make it less prone to collateral attack.

[3] L. BOHMER, "ICSID Chair Dismisses Challenge to All Three Arbitrators in Cement Dispute with Egypt", *IAReporter*, 14 May 2025.

A. Strengthening arbitration from within

Turning to the first area: how can we make arbitration more robust from within?

Here, based on my experience serving as both counsel and arbitrator, I am of the firm view that the system stands and falls with the arbitrator. Therefore, while there is no doubt that all participants in the process have a role to play, in view of the limited time I have today, I will focus on the role of the arbitrator.

There are two areas here that I will focus on: first, we need to ensure we have arbitrators that are and are perceived to be unbiased; and second, we need to encourage and empower arbitrators to make better use of their powers within the framework of the existing rules.

1. Trusted unbiased arbitrators

Turning to my first point, ensuring that arbitrators are and are perceived to be unbiased is critical for the legitimacy of the system. I think two matters are worthy of reflection here: (1) arbitrator selection and (2) conflicts of interest and disclosures.

(a) Arbitrator selection process

The arbitrator selection process in international arbitration is virtually uniform: each party appoints an arbitrator, and they then seek agreement on the third and presiding arbitrator. This system creates significant issues in investment-treaty arbitration, where arbitrators are selected based on being pro-investor or pro-State. While the system is less vexing in commercial arbitration, it also gives rise there to issues of bias, or the perception thereof. Now, this is unsurprising, as party appointment by definition creates incentives that are not entirely aligned with the principle that all arbitrators should be neutral. This is basic human nature. So, we have a party appointment system that by definition gives rise to concerns of legitimacy.

I am not the first to believe that party appointment poses a threat to the legitimacy of the system. Eminent international arbitration practitioners Professor Hans Smit and Jan Paulsson drew attention to this many years ago – in 2010. Both proposed then that arbitrators should be appointed by a neutral institution.[4]

But the "right" to appoint an arbitrator is considered critical by users of arbitration and a decisive reason for selecting arbitration. The data confirms this – in the 2012 White &Case Queen Mary Survey, 76 % of respondents said they were in favor of the

[4] *See* H. SMIT, "The pernicious institution of the party-appointed arbitrator", *Columbia FDI Perspectives*, No. 33 (2010); J. PAULSSON, "Moral Hazard in International Dispute Resolution", 25(2) *ICSID Review – Foreign Investment Law Journal* 339 (2010).

party appointment system.[5] So, neutral appointment is not the solution. Some form of party input is necessary for buy-in by the users and, therefore, the providers who are competing for them.

In my view, the solution lies in a list system with input from both parties and the institution. This system is already often used where there is a deadlock in the selection of the presiding arbitrator and works well in that context. And the ICDR's list system for the selection of all three arbitrators has worked very well for many years. In fact, the best three-member tribunal experience that I have had was in a case where all three of us were selected from a list in an ICDR case.

The precise form of the list needs to be considered further. But, in outline terms, the institution would circulate a list that would contain an equal number of names provided by each party and the institution, on a blind basis for the parties (i.e., the parties would not know which names were provided by the other party and which names were provided by the institution). The parties would then rank the individuals and have a limited number of vetoes.

Such a system would give each party input in the selection of all three arbitrators and therefore may be acceptable to most users. It would remove what Professor Smit called the "pernicious" incentives for the party-appointed arbitrator. It may also help address concerns regarding lack of gender and geographic diversity in the pool of arbitrators. And it may give rise to increased selection of arbitrators with special relevant expertise, for instance, an engineer in a construction dispute. While this is often touted as a benefit of arbitration, it is currently rare in practice, even if it would make sense, because neither party dares to appoint an engineer as "its" arbitrator and the presiding arbitrator role is best served by a lawyer.

(b) Conflicts and disclosures

I am now going to turn to arbitrator conflicts and disclosures. Rogue actors misuse supposed conflicts and lack of disclosure for collateral attacks during and after the arbitration. But we also need to recognize that there is at times a disconnect between the consensus within the system as to what is appropriate and what external observers and one-time users of arbitration think is appropriate. This is well illustrated by a recent decision of the Paris Court of Appeal in the case of *Port Autonome de Douala v Douala International Terminal*, which upheld an application to annul a partial award because one of the arbitrators had not disclosed a close relationship with the lead counsel for the successful party, and wrote a eulogy for him when he unexpectedly passed away.[6] The case illustrates that some of the relationships that we in the

5 P. FRIEDLAND & S. BREKOULAKIS, *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*, Queen Mary University of London, 5 (2012).

6 A. ROSS, "ICC award set aside over Gaillard eulogy", *Global Arbitration Review*, 13 January 2023.

community do not consider problematic may reasonably give the appearance of bias to non-repeat players. It is as basic as this: if two kids were vying for a cookie, neither would want a friend of the other to decide who is entitled to the cookie.

We need to continue to consider what constitutes a conflict and the appropriate level of disclosure. The work of the IBA in this area with the Conflict Guidelines has been critical. But for a future version, it may be a good idea to include some individuals from outside the community in the working group. While the views of international arbitration experts are obviously essential, some stress-testing with a "reasonable – truly third – party" would make the Guidelines more robust – both procedurally and in substance.

Also, institutions have resisted adopting the Guidelines as a standard, saying this is subject to their own rules. I'm not convinced this is the right approach. There is no good reason why an arbitration would be subject to different disclosure and conflict rules depending on whether it is administered by the LCIA or CEPANI. Conflicts are a matter of ethics; not an area where institutions should seek to compete by differentiation. It is critical for legitimacy that a common standard applies across the board.

2. Making the process more efficient and effective

The second area on which we need to work from within to make international arbitration more legitimate and robust is to reduce the time and cost, and disincentivize increasing obstructionist and bad faith tactics.

While arbitration counsel should act ethically and with restraint, the pressures from clients and realities of cases often override best practices. This is regrettable, but to a certain extent inevitable. In view of this, we should focus on the role of arbitrators as case managers.

The existing arbitration rules give arbitrators wide-ranging powers to manage and police the proceedings. But many arbitrators do not make effective use of these powers. The over-arching issue is the "compromise" or "consensus arbitrator," who is not willing to use these powers for fear of being perceived as partisan, prejudging issues, not providing due process, or – more cynically – because he or she hopes for repeat appointments. Just as appeasing rogue actors in the international sphere does not work, conceding ground to parties who do not play by the rules only encourages such behavior.

These powers fall into two broad areas: (1) procedural steps that tribunals can take to keep things on track; and (2) penalties they can apply to incentivize better behavior.

I will give just three examples of procedural tools that are available but not sufficiently deployed in practice because one party resists and arbitrators do not dare to impose them. First and foremost are reasonable page limits. This is perhaps the most critical tool to control time and costs. Yet it is rarely deployed in practice. A second

is a limit on the number of document production requests and on words used in Redfern Schedules to avoid these becoming mini-pleadings by themselves. A third is a midstream conference to take stock midway through the proceedings and steer the ship in the right direction toward a timely and qualitative decision, by providing actual, concrete and meaningful guidance to parties. Tribunals sometimes complain about long, convoluted, and misguided submissions in the final award.[7] But it would be more helpful for tribunals to raise this sooner and help shape the course of the arbitration before it is too late.[8]

Arbitrators also should more proactively disincentivize bad behavior. I think we've arrived at a juncture where a tribunal should make its expectations of party behavior clear at the outset of the arbitration. The IBA's Guidelines on Party Representation in International Arbitration have not gained wide adoption, but a new version is underway. Tribunals should consider asking parties to adopt those Guidelines early in the proceedings, to provide a clear standard of conduct.

In cases of plain party misbehavior, tribunals should also make more use of the power to award costs during the proceedings rather than only doing so at the end – when a cost award comes too late to steer the proceedings and may be unenforceable.[9] Few things are more likely to drive procedural behavior during the remainder of the case than a cost award after an early procedural stage. Relatedly, in appropriate circumstances, tribunals, particularly in the investor-State context, should be more willing to order adequate security for costs and follow through in the event of non-compliance by the claimant by suspending and terminating the proceedings if the security is not provided.

The challenge is that there are limited incentives – other than a sense of duty to do the right thing – for arbitrators to use the powers available to them in these ways. To the contrary, doing so may give rise to challenges, and, where compensation is based

7 *See, e.g., Generation Ukraine v. Ukraine*, ICSID Case No. ARB/00/9, Award dated 16 September 2003, 24.2 (in making its decision on allocation of costs, the tribunal considered the fact that the claimant's "written presentation of its case ha[d] been convoluted, repetitive, and legally incoherent," obliging both the respondent and the tribunal "to examine a myriad of factual issues which ha[d] ultimately been revealed as irrelevant to any conceivable legal theory of jurisdiction, liability or recovery," and that "[i]ts characterisation of evidence ha[d] been unacceptably slanted, and ha[d] required the Respondent and the Tribunal to verify every allegation with suspicion").

8 One important point of clarification is in order: while I believe arbitrators should use their powers more, they should do so after prior consultations with the parties. I've seen arbitrators who act out of the laudable desire to manage the proceedings more proactively doing so in a misguided way: by imposing rules that are not suitable for the case at hand and do not help with efficiency. Prior consultation with the parties, who know the case best, is critical.

9 ICSID specifically included this power in the 2022 Arbitration Rules. Article 39 of the CEPANI arbitration rules provides for cost allocation but CEPANI does not appear to have a rule expressly permitting cost awards for interim stages of the proceeding.

on time spent, there is a cynical incentive *not* to reign in the proceedings. We need to explore further how incentives can be better aligned.

The ICC has been a trailblazer in this area by reducing arbitrator compensation if the final award is not issued within three months of the last hearing or submission by a three-member tribunal (or two months in the case of a sole arbitrator). Other institutions should consider adopting a similar approach, including where arbitrators are compensated based on an hourly rate.

The most critical incentive of course is future appointments. Arbitral institutions have a major role to play here in view of their unique insight into the procedural conduct of arbitrators. For parties, the lack of public data has been a major constraint. But, although controversial, with the advent of artificial intelligence, there is likely to be increased transparency regarding the procedural approaches of arbitrators, which may drive more informed party selection of arbitrators on this basis. In fact, the mere fact of increased publicity may turn out to create a powerful incentive by itself.

Another important incentive is that arbitrators know that the arbitral institutions will "have their back." This incentive is already present for arbitrator challenges within the system: institutions routinely reject "sour grape" challenges that stem from annoyance at an arbitrator's ruling. The issue is more thorny when the challenge is brought in a national court, like in the *Wintershall* case where it led to the resignation of Mr. Gharavi. To respond to this issue, should institutions start taking out insurance for arbitrators, including to fund legal representation for such collateral attacks? Or would that make arbitration unaffordable? These are difficult questions that will require increased attention for parties like Wintershall to have their day in court.

B. Reducing risk and effectiveness of collateral attacks

This brings me to the last part of my presentation: how can we protect arbitration from becoming only the first chapter, followed by a saga of prolonged post-award challenges?

The obvious solution remains one already at our disposal: seating arbitration outside the home jurisdiction of one's counterpart in an arbitration-friendly jurisdiction. But this is not a panacea, for at least two reasons.

First, it does not prevent national courts in rogue jurisdictions from entertaining collateral attacks even when they are not the courts of the seat. In these scenarios, we need to ensure that national courts in other jurisdictions understand the New York Convention system and do not feel bound by the decision of the rogue court. Anti-suit injunctions may form part of the solution, as the court of the seat can reassert primacy over the validity of the award. While such injunctions are unlikely to prevent rogue jurisdictions from entertaining challenges to awards, they can prove useful in preventing the rogue actor from proceeding with the challenge and, if that fails, the

enforcement of the judgment from the rogue jurisdiction in third countries.[10] In fact, Wintershall is now reportedly seeking to move the seat of the ECT arbitration from the Dubai Financial Center to England for the purpose of seeking an ASI against Russia from the English courts.

Second, sometimes a party has no choice but to accept a local seat of arbitration, for instance in contracts with State entities. Here, courts in other jurisdictions should be prepared to depart from the general deference to the courts at the seat if the circumstances of the annulment are so clearly wrong that they violate public policy.

Finally, we should also think of ways in which to deter parties from bringing award challenges or at least from dragging them out. One possibility is for arbitral tribunals to consider more punitive rates of post-award interest, or an uptick in the rate after a certain period of time or in the event of an unmeritorious challenge. At the national court level, deterrence is best achieved through more severe cost consequences for challenges – by adopting the "loser pays" rule. Some US courts have already started doing this, despite the usual principle in US litigation that each side bears its own costs. Decreasing the time for challenges could be achieved by the more uniform adoption of the system already in place in certain jurisdictions of a one-shot approach before a specialized or high court, without a possibility for further appeal.

These solutions are challenging because they require engagement with national legislators and courts. Here, the involvement of organizations such as UNCITRAL, ICCA, and the IBA is critical. It seems an opportune time for one or more of these organizations to consider a concerted effort in this particularly vexing area, which we can expect to become even more prevalent in the fractured and changing global landscape in the years ahead.

V. Conclusion

To close, the problems are clear, but the solutions are inevitably more difficult. We must, however, continue to grapple with these issues and seek to address them. While I have focused today on the critical role that arbitrators play, it is incumbent on all members of the arbitration community to play their part if we want arbitration to fulfill its ever more critical role of resolving international disputes in a peaceful and effective manner in an ever more complex and conflictual global world.

[10] *See, e.g., Barclays Bank Plc v VEB.RF* [2024] EWHC 225 (Comm), in which the English High Court noted: "Generally speaking, an English court will not grant an injunction or make a mandatory order if to do so would be futile, because they would go unenforced and unobeyed. That is always a concern in an application of this sort. However, I am persuaded that it is appropriate to make the orders sought in the circumstances of this case, because the making of such orders will or at least may provide the bank with protection in the event that judgment is entered in Moscow, contrary to what should be the result of the orders that I have made, and attempts are made then by the respondents to enforce any judgment obtained from the Russian courts in third country jurisdictions."