The Cambridge Companion to
International Arbitration

This Cambridge Companion explores the main senses of the term 'international arbitration', including the arbitration of private commercial disputes, disputes between a State and a foreign investor, between States, and also between a State and its parts. It treats these various forms as being inter-related, if not always conceptually, then as a matter of history, rather than as collective victims of imprecise language. The book touches on not only current debates but also more foundational aspects, such as the tension between party autonomy and State authority, and the pacifist roots of modern international arbitration. Thus, it aims to offer a concise survey of the history, the main issues as well as the latest developments in a single, handy volume. It will be an invaluable introduction to the subject for students studying international arbitration, commercial law and international law, and also lawyers and the general reader.

Chin Leng Lim is Choh-Ming Li Professor of Law at The Chinese University of Hong Kong, Honorary Senior Fellow at the British Institute of International and Comparative Law, and Visiting Professor at King's College, London. He is a barrister at Keating Chambers, London.

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Edited by

C. L. Lim
The Chinese University of Hong Kong
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To Lyn

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Contributors

Daniela Argüello, Legal Counsel, ICSID, Washington, DC, USA

Gary F. Bell, Associate Professor, Faculty of Law, National University of Singapore, Singapore

George A. Bermann, Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, Columbia Law School, New York City, NY, USA

Andrea K. Bjorklund, L. Yves Fortier Chair in International Arbitration and International Commercial Law, McGill University, Montreal, QC, Canada

Adrian Briggs, QC (honoris causa), Professor of Private International Law, University of Oxford and Sir Richard Gozney Fellow and Tutor at St. Edmund Hall, Oxford; Barrister, Blackstone Chambers, London, England

Giuditta Cordero-Moss, Professor, Department of Private Law, University of Oslo, Norway

Olufemi Elias, UN Assistant Secretary-General and Registrar of the United Nations International Residual Mechanism for Criminal Tribunals, The Hague, Netherlands; formerly Executive Secretary of the World Bank Administrative Tribunal, Washington, DC, USA

Bryant G. Garth, Distinguished Professor of Law, University of California, Irvine, CA, USA

Sir Christopher Greenwood, GBE, CMG, QC, Judge, Iran-US Claims Tribunal, The Hague, Netherlands; 24 Lincoln's Inn Fields, London; and Master, Magdalene College, Cambridge, England; formerly Judge at the International Court of Justice

Florian Haugeneder, Partner, KNOETZL, Vienna, Austria

Matthew Hodgson, Partner, Allen & Overy, Hong Kong

Meg Kinnear, Secretary-General, ICSID, Washington, DC, USA

Chin Leng Lim, Choh-Ming Li Professor of Law, The Chinese University of Hong Kong; Visiting Professor, King's College London; Hon Senior Fellow, British Institute of International & Comparative Law; Barrister, Keating Chambers, London, England

Siobhán McInerney-Lankford, Senior Counsel, World Bank, Washington, DC, USA

Maurice Mendelson, QC, Professor Emeritus of International Law, University College London; Barrister, Blackstone Chambers, London, England

Ralf Michaels, Director, Max Planck Institute for Comparative & International Private Law, Hamburg, Germany; Chair in Global Law, Queen Mary University of London, England

David Neuberger, The Right Honourable the Lord Neuberger of Abbotsbury, GBS, One Essex Court, London, England; Non-Permanent Judge of the Hong Kong Court of Final Appeal; formerly President of the Supreme Court of the United Kingdom

Jan Paulsson, Founding Partner, Three Crowns, Bahrain, London, Paris and Washington, DC; Michael Klein Distinguished Scholar Chair Emeritus, University of Miami Law School, FL, USA

Natalie L. Reid, Partner, Debevoise & Plimpton, New York City, NY, USA

Michael Reisman, Myres S. McDougal Professor of International Law, Yale Law School, New Haven, CT, USA

Garth Schofield, Senior Legal Counsel at the Permanent Court of Arbitration, The Hague, Netherlands

Muthucumaraswamy Sornarajah, Emeritus Professor, Faculty of Law, National University of Singapore, Singapore

Jae Hee Suh, Senior Associate, Allen & Overy, Singapore

Christopher K. Tahbaz, Partner, Debevoise & Plimpton, New York City, NY, USA

Lukas Vanhonnaeker, McGill University, Montreal, QC, Canada

Foreword

The Cambridge Companion to International Arbitration is an admirably ambitious and valuable book. Within the space of a single (if substantial) volume, it aims to cover and to discuss all aspects of the different forms of international arbitration, an expression which includes international commercial arbitration, foreign investor-State arbitration, inter-State arbitration and intra-State arbitration.

While the high quality of this book will be appreciated by anyone who has cause to consult the text, a quicker way to gauge its worth is to go through the contents page with names of the authors of the various chapters. It would be invidious to single out only some of those authors, and it would be rather tedious if I were to discuss every one of them. Suffice it to say that the list of the authors is almost a rollcall of honour of the academics and practitioners in the world of twenty-first-century international arbitration.

Between them, the authors not only cover the present practices and problems but also explain the historical background, which is not only interesting in itself but also helps in understanding the present state of play. All lawyers know that contractual interpretation requires words to be interpreted in their context and not *in abstracto*. Similarly, if one wants to understand and appreciate the current state of international arbitration, it is important to understand its origins and how and why it developed in the way that it did. Thus, most readers would be surprised to be told that international commercial arbitration grew out of American businessmen allying themselves with European and other public international lawyers. So, too, many readers will be unfamiliar with the French dream of delocalised international commercial arbitration, and they might regard the absence in public international law of a mechanism to supervise and set aside inter-State awards as a grave weakness.

The *Companion* also looks to the future, which is not only very stimulating but also very important. Anyone involved or interested in any enterprise should be interested in its future, and anyone with a stake in international

arbitration should be preparing for some very significant changes in what is, in so many respects, a very fast-changing world. Technology has already made an enormous difference in so many different areas to the way arbitration can be conducted, but so far, its effect has been largely procedural; it appears likely that the next phase of development, particularly with artificial intelligence, will not only be more revolutionary and more challenging but also be to more substantive aspects. Having said that, I think that at times we are at risk of being almost hypnotised by technological change. There are many other types of change, and it is impressive that the editor has ensured that there is more than one chapter on what the future may hold for the various different types of international arbitration.

The *Companion* casts its net both deeply and widely. Thus, there is a chapter on the important and interesting topic of arbitration and world peace – a very high-level topic. At the same time, the book quite rightly faces up to highly practical issues which more academic treatises avoid. I have in mind issues such as corruption, which anyone, whether or not involved with international arbitration, knows is a very serious and endemic problem in some parts of the world and is potentially present anywhere. Clearly, corruption can, at worst, undermine the reputation of arbitration at least in some parts of the world, and, less dramatically, it can pervert the course of an individual arbitration, just as it can pervert the course of justice in a particular case. The full treatment of the topic in this book is therefore to be particularly welcomed. Similarly, but on a much less sinister level, the great changes which have happened with two of the most significant financial aspects of arbitration, funding and costs, receive a very welcome treatment. Those issues, like so many issues which relate to arbitration, strike a strong chord with me, as a relatively recently retired judge, because they apply equally to litigation.

As a former judge who now practices as an international arbitrator, the differences and similarities between the role of a judge and the role of an arbitrator have intrigued me since I embarked on my arbitral career. Indeed, they had already been of some interest to me, not least because I had sat as an arbitrator a few times before I started out even as a deputy judge. The differences are perhaps more interesting than the similarities, but let me start with the similarities.

On the face of it, at least, the similarities are plain and anodyne. Both an arbitrator and a judge are obliged to conduct a fair, impartial and honest procedure, which must accord with the rules of the tribunal in which they are acting. Slightly more controversially, each must give a decision which

accords with the applicable law. I believe that that proposition may be potentially controversial in relation to arbitrators, because there is a view that arbitrators can – indeed, should – be more flexible than judges when it comes to legal issues. In my opinion, however, if a contract says that a case is to be decided according to the law of X, then an arbitrator would not be complying with his duty if he did not apply the law of X to the facts of the case, even if it produced a result which he did not like or did not consider reflected the moral or commercial merits of the case. So, in a common law context, if the case law of X indicates a certain result, an arbitrator must follow that case law in the same way as a judge in X would have to do.

Again, at least from my perspective as a common lawyer, neither a judge nor an arbitrator should get involved in trying to mediate or settle the dispute which she has been appointed to resolve. This statement, which would have appeared self-evident to a common lawyer forty years ago, now needs to be qualified even in respect of a judge. There is much to be said, at least in an appropriate case, for a judge encouraging settlement, even (at least sometimes) with herself as mediator, at an early stage in a case, in order to save the parties from the stress, time and expense of litigation, provided that she will not be the judge trying the case if it does not settle. The proviso is appropriate because a judge cannot try a case if she has already expressed views about the merits and because the parties are unlikely to be candid in settlement/mediation discussions with someone who may well be judging the dispute if it does not settle. An arbitrator would not be expected to be so ready to bow out of an appointment, and, at the risk of being seen to be reactionary, I can see real problems in an arbitrator also acting as mediator. However, there is no reason in principle why the terms of an arbitrator's appointment should not include the possibility of his also acting as mediator, and the notions of med-arb, arb-med, med-arb-med or even arb-med-arb are gaining traction in some quarters, if not in others.

Turning to differences between the two roles, after twenty-one years as a judge, the first thing that struck me as I started out as an arbitrator was that I had to be selected: this was the precise opposite of my experience as a judge, which was that neither of the parties should have the right to 'judge pick'. Even if the parties agreed that they did or did not want a particular judge, it was highly questionable whether they should have their way. The difference highlights a fundamental distinction. At least in a traditional arbitration, an arbitrator is simply one party to what is a multi-party private law contractual dispute-resolution system which involves a hearing which requires him to observe certain rules including impartiality

and applying the law. By contrast, while a judge also has to observe certain rules and to be impartial, the origin of that duty is exclusively in public law and indeed one of the two most fundamental aspects of constitutional principle, namely the rule of law. This private law/public law distinction is manifest in another way. A judge must, save in those exceptional cases where justice requires otherwise, carry out her role in public: open justice is a fundamental requirement of virtually all civilized legal systems. But one of the traditional attractions of arbitration is privacy.

The private law/public law distinction follows through into the conduct of proceedings. Because she is carrying out a public function, a judge has the right – indeed, the duty – to form her own judgment on all issues which come before her, even where the issues have been agreed between the parties. That is because she is carrying out a public function and has to take into account the public interest. An arbitrator is in a very different position: subject, of course, to the terms of his appointment (including the rules of any relevant institution), he cannot normally go behind what the parties agree. So, a judge, conscious of the need not to waste court time, to ensure there is no abuse of process and to avoid the law falling into disrepute, should not agree to time being taken up with what she believes to be pointless and time-consuming evidence or argument. By contrast, it is very hard for an arbitrator to take such a line against the parties' wishes, unless of course the contract under which he has been appointed permits it.

Another big difference arises in relation to rights of appeal. In many countries, a right of appeal against a judge's decision is automatic, and in virtually all countries where it is not, there is a right of appeal where there is an arguable point of law. By contrast, in the overwhelming majority of cases, an arbitrator's decision is either appealable only in very limited circumstances or simply unappealable. The fact that her decision is susceptible to an appeal can serve to reinforce a judge's consciousness that her duty is to apply the law, however unattractive the consequences in a particular case. By contrast, the temptation for an arbitrator to 'cheat' on the law in a case when he considers that its proper application would lead to an unjust result can be reinforced by the knowledge that his decision is unlikely to be appealed. As I have said, in my opinion, this is a temptation which should be resisted, but this is not only as a matter of principle. If arbitrators start to get a reputation for not applying the law, then confidence in arbitration will wither.

A more indirect and unanticipated consequence of severely curtailing appeals against arbitration awards is that there has been a significant

increase in challenges to awards on grounds of procedural unfairness. As a result, arbitrators have become very concerned with procedural issues, leading to so-called due process paranoia. While concern about this development may be overstated, it does appear to me that since I first became involved in arbitration as a junior barrister in the 1970s, there has been a real switch. Arbitration in the 1970s was considered to be quicker, cheaper and more informal than litigation; forty-five years on, arbitration has become more procedurally fixated than litigation, and I very much doubt that it is much quicker and would be surprised if it was cheaper.

Arbitration is moving more and more into public consciousness as it plays a more and more important part in the field of international affairs and increasingly resolves disputes which have international and domestic implications of both a political and an economic nature. That means that there is an increasing awareness of the need for higher and consistent standards and also for the need for greater openness. So long as awards are not published, there can be little hope of improving predictability and consistency, which are so important in all areas of life. Already many investor-state arbitration awards are published, and some hearings are even held in public, and even some commercial arbitration awards are published, on an appropriately redacted basis. There are moves afoot to ensure that arbitrators are made subject to greater regulation and to reconsider the professional responsibility of those involved – possibly on a more international basis than heretofore. The rules of the various arbitral institutions are also, at least as I see it, being amended in some respects to give arbitrators powers which more closely align them with judges in terms of flexibility.

So, international arbitration is an area of work which is interesting and increasingly important, but it is also continually changing in many of its practices and rules and continues to throw up many difficult new issues. The *Companion* will be an invaluable book for anyone seeking to navigate the treacherous seas of international arbitration, whether she is a practising lawyer, arbitrator, legal academic or anyone with an interest in the topic.

David Neuberger
Temple, London
10 November 2019

Preface

This book explores three principal senses of the term 'international arbitration' involving the arbitration, first, of private commercial disputes; secondly, of disputes between host countries and foreign investors; and thirdly, of disputes between – or even within – States. More than being victims of imprecise language use, these seemingly distinct forms are in various ways interrelated conceptually or as a matter of their history. The book's chapters address current debates and foundational aspects, such as the tension between party autonomy and State authority. They also touch on the modern history of the subject, from the pacifist roots of much of modern international arbitration to the contribution of twentieth-century transnational lawyers.

There are a number of major organising themes. A first involves debate over the 'delocalisation' of 'international' arbitration. Is that, however, not solely of interest in the limited sphere of commercial arbitration? Such scepticism may be too quick. Take, for example, the fact that delocalised arbitration was assumed in the Permanent Court of Arbitration's rules on inter-State disputes. Yet even in inter-State disputes, curial supervision may be highly relevant to arbitration's sovereign users. It could be that two States cannot agree on arbitration precisely because they cannot agree on having national curial supervision, where one considers the arbitration to be wholly domestic in nature while the other denies that. The delocalisation question may be to intra-State arbitration just as essential, and likewise in foreign investor-to-State disputes, delocalisation is a chief difference in choosing between ICSID and non-ICSID arbitration.

Yet other readers may say that a second theme, 'arbitrating for peace', is similarly only of special concern, namely only to public international lawyers. This is not so. Peace was an original aim both in the development of international commercial arbitration and to the architects of modern international investment arbitration. Arbitrating international commercial and investment disputes became, in the modern age, an extension of the

nineteenth-century public international lawyer's preoccupation with pacifism. There can be debate about whether this was not simply a case of merchantmen coveting the prestige enjoyed by Statesmen-lawyers. Yet, if we were to argue over this, then the book would have prompted reflection while, at the same time, offering those who embark upon the subject for the first time a joined-up perspective.

Finally, it may be important to appreciate the professional and intellectual contribution of a transnational legal sensibility – one which does not always draw a bright line between international law and domestic legal ideas. Our reader might say that 'commercial disputes are about contract whereas inter-State arbitration involves public international law disputes'. Yet States quarrel over contract while general contractual principles are themselves, potentially, a source of international law. Lord Asquith resorted to general contractual principles in reasoning that indigenous Abu Dhabi law could not have been up to the task of construing a modern deed of concession. He has been criticised by postcolonial scholars who, at the same time, accept René Dupuy's 'order of the international law of contracts', what Professor Gaillard calls a 'transnational justice system' or, to use a term popularised by Professor Daniel Cohen, 'the arbitral legal order'. Might it be that there is a sphere where contracts and treaties operate in conjunction? After all, the New York Convention's particular genius was to turn contractual promises to arbitrate into a treaty obligation of States to enforce such promises. In international investment treaties, umbrella clauses seek to convert a State's contractual breach into a treaty breach. There is a place where transnational lawyers live where the waters of treaty and contract may not intermingle but stream alongside each other.

There is, admittedly, in this book what is a resurrection of a rather old Anglo-French debate. F. A. Mann once wrote that 'England rejects the delocalisation of contracts and arbitration'. Gaillard called this view 'ridiculous'. Yet the delocalisation debate matters to what we do. Is it to be the choice of law rule of the seat, a free selection of choice of law approaches or something else? If an award has been set aside, is one bound by the courts of the seat in future enforcement proceedings elsewhere? A difference in theoretical assumptions cuts deep in the field, as Gaillard himself tried to show – even if, in practice at least, a tribunal is likely to be very mindful of the laws of the place of the seat. Still, the seat may be more important in one place and less so in another, to one arbitration community rather than to another.

If this *Companion* should stimulate a newcomer's appetite while finding a small place on the arbitrator's bed table, it will already have exceeded its aim. No book would have been possible, however, without the commitment of an exceptional cast of distinguished contributors. All have more pressing demands. I am deeply grateful to each and every one, not least to Lord Neuberger for his most kind, generous foreword. I would like also to thank Ms. Finola O'Sullivan at Cambridge University Press for giving such full-hearted encouragement and the very professional Ms. Marianne Nield, also of Cambridge. Professor Emmanuel Gaillard generously read an early draft while 'arbitromania' emerged in conversation with Mr. Arshad Ghaffar of the London Bar, whose wit is always appreciated. Ms. Alice Giovane was my early assistant, and upon her return to Paris, two others became indispensable, Ms. Yuanyuan Zhang and Ms. Xueji Su. I am grateful to one and all. My wife, Lyn, bore once again the usual, many sacrifices, and so I dedicate this book to her.

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