

2015

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

Chiara Giorgetti

University of Richmond, cgorget@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/law-faculty-publications>



Part of the [Courts Commons](#), and the [International Law Commons](#)

Recommended Citation

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals (Chiara Giorgetti ed., Brill | Nijhoff 2015).

This Book is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

Edited By

Chiara Giorgetti



BRILL

LEIDEN | BOSTON

Challenges and recusals of judges and arbitrators in international courts and tribunals / edited By Chiara Giorgetti.

pages cm

Based on papers presented at the Annual Meeting of the American Society of International Law in April 2014.

Includes index.

ISBN 978-90-04-30211-2 (hardback : alk. paper) — ISBN 978-90-04-30212-9 (e-book) 1. International courts—Congresses. 2. Judges—Recusal—Congresses. 3. Arbitrators—Legal status, laws, etc.—Congresses. 4. Arbitration (International law)—Congresses. 5. International commercial arbitration—Congresses. 1. Giorgetti, Chiara, editor.

KZ6250.C475 2015

34L55—dc23

2015021719

This publication has been typeset in the multilingual 'Brill' typeface. With over 5,100 characters covering Latin, IPA, Greek, and Cyrillic, this typeface is especially suitable for use in the humanities.

For more information, please see brill.com/brill-typeface.

ISBN 978-90-04-30211-2 (hardback)

ISBN 978-90-04-30212-9 (e-book)

Copyright 2015 by Koninklijke Brill NV, Leiden, The Netherlands.

Koninklijke Brill NV incorporates the imprints Brill, Brill Hes & De Graaf, Brill Nijhoff, Brill Rodopi and Hotei Publishing.

All rights reserved. No part of this publication may be reproduced, translated, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior written permission from the publisher.

Authorization to photocopy items for internal or personal use is granted by Koninklijke Brill nv provided that the appropriate fees are paid directly to The Copyright Clearance Center, 222 Rosewood Drive, Suite 910, Danvers, MA 01923, USA. Fees are subject to change.

This book is printed on acid-free paper.

KZ
6250
,C475
2015

Per Charlotte e Alexander, semper



Contents

Preface IX

List of Abbreviations X

Contributors XI

Introduction 1

Chiara Giorgetti

- 1 The Challenge and Recusal of Judges at the International Court of Justice 3
Chiara Giorgetti
- 2 Disqualification of Arbitrators under the ICSID Convention and Rules 34
Meg Kinnear and Frauke Nitschke
- 3 The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration 80
Sarah Grimmer
- 4 Arbitrator Challenges at the Iran-United States Claims Tribunal 115
Lee M. Caplan
- 5 Challenges of Arbitrators, Lessons from the ICC 140
Loretta Malintoppi and Andrea Carlevaris
- 6 Selection and Recusal in the WTO Dispute Settlement System 164
Gregory J. Spak and Ron Kandler
- 7 Challenges of Judges in International Criminal Courts and Tribunals 183
Makane Moïse Mbengue
- 8 Issue Conflicts and the Reasonable Expectation of an Open Mind: The Challenge Decision in *Devas v. India* and Its Impact 227
Romain Zamour

- 9 **Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes** 247
Judith Levine
- 10 **Repeat Arbitrator Appointments in International Investment Disputes** 293
Luke A. Sobota
- 11 **Tall and Small Tales of a Challenged Arbitrator** 320
Charles N. Brower, Sarah Melikian and Michael P. Daly
- 12 **The Approach of Counsel to Challenges in International Disputes** 337
Andrew B. Loewenstein
- 13 **Challenges to Party Representatives and Counsel Before International Courts and Tribunals** 363
Hansel T. Pham and M. Imad Khan
- 14 **Challenges to Arbitrators in Asia: The Position Before the Singapore and Hong Kong Courts** 386
Lucy Reed, John Choong and Chan Yong Wei
- 15 **Arbitrators Challenges in Latin America** 407
Jonathan Hamilton, Francisco X. Jijon and Ernesto E. Corzo
- Index** 421

Preface

This book builds on a panel I organized and chaired at the Annual Meeting of the American Society of International Law in April 2014. The panel sparked an important conversation among participants and highlighted the importance of issues related to challenges and recusals of judges and arbitrators for international dispute resolution. After the panel, Marie Sheldon, Publishing Director of International Law at Brill/Nijhoff Publishers, suggested I collect the presentations made at the panel in a book. I was intrigued by the idea and—so, this book was born.

I asked the panelists and other experts to join the dialogue on this key issue and I was gratified by the positive response I received. This book now combines expertise from academia as well as from all realms of practice, from law firm practitioners, to former judicial clerks, arbitrators and members of several secretariats. I am grateful to all contributors to this book for their excellent work. Of course, their contributions are made on a personal note only and do not represent the positions of any of the institutions to which they are or may have been affiliated.

My deep gratitude also goes to Sheherezade Malik, a Juris Doctor student from Richmond University School of Law, for her impeccable research and editorial assistance. She has done a great job.

I am also sincerely and profoundly grateful to my family, Andre, Alex and Charlotte, without whom nothing has meaning.

C.G.

Washington D.C.

List of Abbreviations

ABA	American Bar Association
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
DSB	Dispute Settlement Body (WTO)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
EC	European Communities
ECCC	Extraordinary Chambers in the Court of Cambodia
EU	European Union
GATT	General Agreement on Tariffs and Trade
IBA	International Bar Association
ICC	International Chamber of Commerce (see also below)
ICC	International Criminal Court (see also above)
ICJ	International Court of Justice
ICSID	International Center for the Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
LCIA	London Court of International Arbitration
NAFTA	North American Free Trade Agreement
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
SCLS	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

Contributors

Charles N. Brower

has been a Judge of the Iran-United States Claims Tribunal for 30 years, has served as Judge ad hoc of the Inter-American Court of Human Rights, and currently serves also as Judge ad hoc of the International Court of Justice. He is also a member of 20 Essex Street Chambers in London. He has served as Acting Legal Adviser to the United States Department of State and as Deputy Special Counsellor to the President of the United States. Judge Brower in 2009 was awarded the American Society of International Law's Manley O. Hudson Medal for "pre-eminent scholarship and achievement in international law . . . without regard to nationality"; in 2010 received the Stefan A. Riesenfeld Award of the University of California Berkeley School of Law (Boalt Hall) in recognition of "outstanding achievements and contributions in the field of international law"; in 2013 received the American Bar Association's Section of International Law's Lifetime Achievement Award; and in 2013 received the Pat Murphy Award of the Institute for Transnational Arbitration of the Center for American and International Law "For Exceptional Civic Contributions and Extraordinary Professional Achievements in International Arbitration." In October 2014 he became the first inductee into the Legal Media Group Euromoney "Hall of Fame" for "significant contributions to commercial arbitration during his career."

Lee Caplan

is a partner at Arent Fox where his practice focuses on international arbitration, international investment law and policy, and public international law. He represents private and sovereign clients in a wide range of international dispute resolution matters. Prior to joining Arent Fox, Lee worked in the U.S. Department of State's Office of the Legal Adviser where he defended the United States in investment treaty arbitration and advised on U.S. investment treaty negotiations, including with China and the Trans-Pacific Partner (TPP) countries. He also represented the United States in numerous arbitrations before the Iran-U.S. Claims Tribunal. Lee served as a member of the U.S. delegation to the UN Commission on International Trade Law during the drafting of the Rules on Transparency in Treaty-Based Investor-State Arbitration and of the Mauritius Convention on Transparency. He is also an advisor to the U.S. Department of Commerce's Commercial Law Development Program. Lee is co-author of a leading treatise on international arbitration entitled *The UNCITRAL Arbitration Rules: A Commentary* and a leading commentary on the

U.S. Model Bilateral Investment Treaty in *Commentaries on Selected Model International Investment Agreements*. Lee served as a law clerk at the Iran-US Claims Tribunal for Judge Charles N. Brower. Lee has earned degrees from the University of California at Berkeley School of Law and The Fletcher School of Law & Diplomacy.

Andrea Carlevaris

is Secretary General of the ICC International Court of Arbitration and Director of the ICC Dispute Resolution Services since September 2012. Before joining ICC, Mr Carlevaris was a partner in the Rome office of Bonelli Erede Pappalardo. His practice covered international arbitration, judicial proceedings involving issues of public international law, conflicts of law and international civil procedure. Mr Carlevaris was a member of the ICC International Court of Arbitration and of the ICC Commission on Arbitration. Prior to Bonelli Erede Pappalardo, Mr Carlevaris was counsel at the Secretariat of the ICC International Court of Arbitration. Mr Carlevaris is a member of the Steering Committee of the International Arbitration Commission of the Union internationale des Avocats (UIA) and of the Board of Directors of the Italian Association for Arbitration (AIA). He is one of the founders of the Italian Forum on International Arbitration and ADR (ArbIt). Mr Carlevaris graduated *magna cum laude* from the University of Rome (La Sapienza), where he received a doctorate in international law in 1998. He is the author of numerous articles and of a monograph on conservatory and provisional measures in international arbitration.

John Choong

is a partner in the International Arbitration Group of Freshfields Bruckhaus Deringer. He specialises in international arbitration and cross-border disputes, having practised in this area in both Hong Kong and Singapore for over 10 years. He has advised clients on a wide range of international commercial and investment arbitrations under the major arbitration rules, with matters involving much of Asia (including Hong Kong, the PRC, Singapore, Indonesia, the Philippines, Brunei, Malaysia, Taiwan, Vietnam, Korea, Mongolia) and beyond. John's matters have touched on a wide range of industries, including infrastructure, finance, energy, transport, technology, hospitality, property, chemicals, life sciences and manufacturing. John is a Fellow of the Chartered Institute and Hong Kong and Singapore Institute of Arbitrators, and he is admitted in Hong Kong, England and Wales, and Singapore. John has spoken, lectured and written regularly on arbitration, and has contributed to a number of books from Oxford University Press, Kluwer and Juris. He is co-Editor of the *Hong Kong Arbitration Ordinance: Commentary and Annotations* and of the *Asia*

Arbitration Handbook, and is a General Arbitration Editor of the *Hong Kong White Book*.

Ernesto E. Corzo

is a member of the international arbitration group of the global law firm White & Case LLP, based in Washington, DC. Ernesto specializes in investment treaty arbitration, international commercial arbitration and public international law. He has particular experience in disputes relating to sovereign states and Latin America. His experience includes disputes before the International Court of Justice, the International Centre for Settlement of Investment Disputes, the panels of the World Trade Organization and US federal courts. Ernesto has represented and advised sovereign states, corporations, individuals and international organizations on various substantive areas, including land and maritime boundaries, sovereign immunity, State responsibility, environmental law, international human rights, treaty interpretation and investments in oil and gas, mining, customs valuation, construction and energy. His experience also includes working in Paris and in the Sovereign Guaranteed Operations Division of the Legal Department of the Inter-American Development Bank in Washington, DC. Ernesto holds an LLM from Georgetown University Law Center and has lectured on international dispute settlement and public international law in various universities and is a research fellow at the Center for International Economic Law.

Michael P. Daly

is the Legal Adviser to Judge Charles N. Brower at the Iran-United States Claims Tribunal. He served previously as an Associate for White & Case LLP and as Law Clerk for Judge Alan S. Gold at the U.S. District Court for the Southern District of Florida. He obtained a Bachelor of Science from Georgetown University and a Juris Doctor from the University of Miami School of Law.

Chiara Giorgetti

is Associate Professor of Law at Richmond University School of Law and serves as the Faculty Director of the School of Law's LL.M. Program. She teaches and writes in the areas of international law, international arbitration, and international dispute resolution. Professor Giorgetti has authored over a dozen publications on these topics, including the monography *A Principled Approach to State Failure*, and two edited volumes: *The Rules, Practice and Jurisprudence of International Courts and Tribunals* (Brill 2012) and *Litigating International Investment Disputes* (Brill, 2014). Prior to joining the Richmond Law faculty in 2012, Professor Giorgetti practiced international arbitration with White &

Case, LLP in Washington, D.C. and with Lalive in Geneva, Switzerland. Professor Giorgetti also worked extensively with the United Nations in New York and Somalia, served as a consultant for various international organizations and non-governmental organizations and taught advanced international courses at Georgetown Law Center and Bocconi University (Italy). Professor Giorgetti clerked at the International Court of Justice in The Hague in 2002. Professor Giorgetti co-chaired the 2011 annual meeting of the American Society of International Law, and founded and co-chaired its Interest Group on International Courts and Tribunals until 2014. Professor Giorgetti is a member of ITA's Academic Council and is the Director of Studies of the American Branch of the International Law Association. Professor Giorgetti is a graduate of Bologna University School of Law, of the London School of Economics and holds an LLM and JSD from Yale Law School.

Sarah Grimmer

is a Senior Legal Counsel at the Permanent Court of Arbitration. She regularly acts as tribunal secretary in investor-State arbitrations and arbitrations involving combinations of private parties, States, State-entities, or inter-governmental organizations. She advises the PCA Secretary-General on appointing authority matters, including challenges, under the UNCITRAL Arbitration Rules or other procedural rules. She is Registrar in *The Arctic Sunrise Arbitration* (Netherlands v. Russia) and *The Duzgit Integrity Arbitration* (Malta v. São Tomé e Príncipe) brought under the UN Convention on the Law of the Sea. She was Registrar in the *ARA Libertad Arbitration* (Argentina v. Ghana). Sarah acted as Secretary to the Review Panel established in 2013 under the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (involving Russia, Chile, Chinese Taipei, the EU, and New Zealand). She has represented the PCA at sessions of UNCITRAL Working Groups II and III. Prior to joining the PCA, Sarah served for three years as assistant counsel at the ICC International Court of Arbitration in Paris. She was also a member of the international arbitration group at Shearman & Sterling LLP in Paris, prior to which she worked in private practice in Auckland. Sarah is a member of the ICCA Publications Committee (2015), the IBA Investment Arbitration Subcommittee (2014), and the IBA Arb40 Steering Committee (2013). She has an LLM from Cambridge University, United Kingdom, and an LLB/BA (Criminology) from Victoria University of Wellington. She is admitted to practice law in New Zealand.

Jonathan Hamilton

is head of Latin American arbitration at White & Case, LLP in Washington DC. He has successfully advised on some of the most critical issues of the era in Latin America and beyond, such as the cultural patrimony of Machu Picchu, the new Ecuador international airport, the Argentine sovereign debt crisis, the development of the Peruvian energy sector and the Panama Canal expansion. Jonathan's practice is ranked at the top of its field by Chambers Global, Chambers USA and Chambers Latin America, which describes the practice as "a powerhouse at the forefront of Latin American international arbitration." Recognition of his specific recent matters includes, among others: 2013 OGE MID Most Influential Arbitration Award of the Decade and 2012 OGE MID Best Arbitration Award. Jonathan also has been recognized as one of the top lawyers in his field and was one of ten lawyers worldwide nominated for Global Arbitration Review Advocate of the Year. Jonathan is a recognised thought leader on both Latin American policy and international investment and arbitration. He teaches international contract negotiations at the University of Miami and lectures widely at leading universities. He is a graduate of the University of Virginia and is admitted to the District of Columbia and New York State Bars.

Francisco X. Jijón

is an associate in the Litigation and International Arbitration Practice Groups with the global law firm of White & Case. Mr. Jijón specializes in international dispute resolution and transnational disputes involving sovereign states and Latin America. His experience includes investment arbitrations before the International Centre for Settlement of Investment Disputes and under the UNCITRAL rules, as well as in commercial arbitration and litigation in various forums and arbitrations before U.S. courts. These cases have spanned various substantive areas, including infrastructure, energy, cultural heritage, sovereign debt, environment, construction, among others. He is a graduate of Yale University and holds a JD from Harvard Law School.

Ron Kendler

is an Associate in the Geneva office of the global law firm, White & Case LLP. His practice focuses on international trade law, primarily the law of the World Trade Organization (WTO). Mr. Kendler has worked on matters involving interpretation of the WTO agreements, bilateral free trade agreements, antidumping and countervailing duties, and customs matters. Mr. Kendler is a graduate of Boston College Law School (*cum laude*) and Brandeis University (*summa cum laude*).

Meg Kinnear

is currently the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID) at the World Bank. She was formerly the Senior General Counsel and Director General of the Trade Law Bureau of Canada, where she was responsible for the conduct of all international investment and trade litigation involving Canada, and participated in the negotiation of bilateral investment agreements. In November 2002, Ms. Kinnear was also named Chair of the Negotiating Group on Dispute Settlement for the Free Trade of the Americas Agreement. From October 1996 to April 1999, Ms. Kinnear was Executive Assistant to the Deputy Minister of Justice of Canada. Prior to this, Ms. Kinnear was Counsel at the Civil Litigation Section of the Canadian Department of Justice (from June 1984 to October 1996) where she appeared before federal and provincial courts as well as domestic arbitration panels. Ms. Kinnear was called to the Bar of Ontario in 1984 and the Bar of the District of Columbia in 1982. She received a Bachelor of Arts (B.A.) from Queen's University in 1978; a Bachelor of Laws (LL.B.) from McGill University in 1981; and a Master of Laws (LL.M.) from the University of Virginia in 1982. Ms. Kinnear has published numerous articles on international investment law and procedure and is a frequent speaker on these topics. She is a co-author of *Investment Disputes under NAFTA* (published in 2006 and updated in 2008 & 2009). She also co-authored texts on Canadian legal procedure including *Federal Court Practice* (1988–1990, 1991–1992, and 1993–2009 annually) and *1995 Crown Liability and Proceedings Act Annotated* (1994).

M. Imad Khan

is an associate in the Washington, D.C., office of White & Case LLP, where he is a member of the firm's International Arbitration and Litigation Groups. Mr. Khan represents clients in investment treaty arbitrations and international commercial arbitrations. He also serves as adjunct faculty at Washington University School of Law. Mr. Khan received his JD and MBA from Washington University in St. Louis, and his AB from Occidental College.

Judith Levine

is Senior Legal Counsel at the Permanent Court of Arbitration (PCA) in The Hague, an intergovernmental organization established in 1899 which provides services for the resolution of disputes involving various combinations of states, state entities, intergovernmental organizations and private parties. The PCA's current caseload encompasses 93 arbitrations. Judith has served as Registrar in the UNCLOS arbitration between Philippines and China; the Atlanto-Scandian

Herring arbitration between Denmark and the European Union; and the Abyei arbitration involving Sudan. She has assisted tribunals in investor-state and commercial cases including multi-billion dollar arbitrations under the Energy Charter Treaty between former shareholders of Yukos Oil Company and the Russian Federation. From 2011 to 2012, Judith served as the PCA Representative and Legal Officer in Mauritius. From 2003 to 2008 Judith was an attorney at White & Case in New York where she represented private and sovereign clients in international arbitrations; advised on dispute resolution clauses for contracts and on issues relating to boundary delimitations and oil concessions. Judith had an active *pro bono* practice before U.S. courts in asylum, torture convention and domestic violence cases. In 2002–2003 Judith served as law clerk to three judges at the International Court of Justice. Her experience in Australia includes work as an adviser to the Attorney-General, judge's associate at the High Court of Australia, and lecturer in contract law at UNSW. Judith has served as a member of Australia's delegation to UNCITRAL and is a director of the Australian Centre for International Commercial Arbitration. She holds a BA/LLB (with University Medal) from UNSW and an LLM from NYU School of Law where she studied on a Hauser Global Scholarship and Fulbright Award. She is admitted to practice law in New York and New South Wales (Australia).

Andrew Loewenstein

is a partner with the International Litigation and Arbitration Department of Foley Hoag LLP, where he focuses on public international law as well as investor-state and international commercial disputes. He advises governments, corporations, and non-governmental organizations regarding international legal matters, including with respect to international boundary disputes, investor-state disputes, environmental law, and international human rights and humanitarian law. Andrew frequently represents Sovereign States in cases before various fora, including the International Court of Justice, the World Bank's International Centre for Settlement of Investment Disputes, the Permanent Court of Arbitration, and in U.S. court litigation under the Foreign Sovereign Immunities Act. He holds a J.D. from the Georgetown University Law Center, a M.Sc. from the London School of Economics, and an A.B. from Brown University.

Loretta Malintoppi

is of Counsel in the Singapore Office of Eversheds LLP. She has a law degree from Rome University and holds an LLM in Common Law Studies from Georgetown University Law Centre. Ms Malintoppi is dually-qualified (Paris

and Rome Bars) and specializes in international arbitration, both commercial and investment arbitration, and in public international law. She has acted as counsel, advocate and arbitrator in a number of arbitrations regarding disputes arising out of international commercial contracts and has represented private companies, States and State entities in UNCITRAL, ICC and ICSID proceedings. Ms Malintoppi has appeared as counsel and advocate before the International Court of Justice and has also represented states in *ad hoc* public international law arbitrations. She was a Member of the ICC International Court of Arbitration from 2000 to 2009 and is currently a Vice-President of the ICC Court. Ms Malintoppi has written a number of articles on investment arbitration and State-to-State litigation and is one of the co-authors of *The ICSID Convention—A commentary* published by Cambridge University Press in 2009. She is also a member of the Editorial Board of *The Law and Practice of International Courts and Tribunals*, editor of the series *International Litigation in Practice Series*, and a member of the editorial advisory board of the *Journal of World Investment and Trade*. Ms Malintoppi is regarded by the legal directory *Chambers Global* as a leading individual in international arbitration.

Makane Moïse Mbengue

is Associate Professor of International Law at the Faculty of Law of the University of Geneva where he teaches International Environmental Law, International Investment Law and International Water Law. Prof. Mbengue is also a Visiting Professor at Sciences Po Paris (School of Law) where he teaches General International Law and WTO law. He holds a Ph.D. in Public International Law from the University of Geneva. He has acted and acts as expert for the African Union, the United Nations Environment Programme (UNEP), the World Health Organization (WHO), the International Labour Organization (ILO) and the International Institute for Sustainable Development (IISD) among others. He also acts as a Professor for courses in International Law organized by the United Nations Office of Legal Affairs (OLA) and by the United Nations Institute for Training and Research (UNITAR). Prof. Mbengue acts as counsel in disputes before international courts and tribunals. He is the author of several publications in the field of international dispute settlement.

Sarah Melikian

is an Associate Legal Officer, Office of the Prosecutor at the International Criminal Tribunal for the Former Yugoslavia in The Hague. She has previously served as Legal Adviser to Judge Charles N. Brower at the Iran-United States Claims Tribunal; Assistant Legal Counsel for the Permanent Court of Arbitration; and Associate for White & Case LLP. She obtained a Bachelor of

Science from Georgetown University and a Juris Doctor from American University's Washington College of Law. The views expressed herein are those of the author alone and do not necessarily reflect the views of the International Tribunal or the United Nations in general.

Frauke Nitschke

is a legal counsel at the International Centre for Settlement of Investment Disputes (ICSID), one of the five organizations of The World Bank Group. At ICSID, Frauke serves as Secretary of Tribunals in investor-State arbitrations conducted pursuant to the ICSID Convention and the ICSID Additional Facility Rules involving a variety of economic activities. She also provides assistance as Secretary to ad hoc Committees established under the ICSID Convention. Frauke leads the Centre's initiatives in data analysis and statistics, and prepares the bi-annual online publication of The ICSID Caseload—Statistics. She was a member of the International Bar Association's Working Group on Investor-State Mediation. Prior to joining ICSID in 2003, Frauke served in the World Bank's Legal Vice Presidency and the Inspection Panel. She interned, inter alia, at the Constitutional Council of France and at the International Constitutional Court of Bosnia and Herzegovina. Frauke is admitted to the New York State Bar and holds a law degree from the Freie Universität Berlin, an LLM from Georgetown University Law Center, and a Masters Degree in Psychology from the FernUniversität Hagen.

Hansel T. Pham

is a partner in the Washington, D.C., office of White & Case LLP, where he is a member of the firm's International Arbitration and Litigation Groups. Mr. Pham's practice focuses on helping clients avoid, assess, and resolve international disputes, in particular with respect to matters involving complex arbitration or litigation. He works with companies and multinational corporations to understand and develop their potential claims and defenses. He also advises sovereign States on best practices in drafting investment treaties and laws, and has substantial experience defending States in investment treaty arbitrations and international commercial arbitrations. Mr. Pham regularly speaks and writes on issues relating to international dispute resolution. Mr. Pham received his JD and AB from Harvard University.

Lucy Reed

the co-head of the pre-eminent Freshfields global international arbitration group, represents private and public clients and selectively sits as arbitrator in international arbitrations under the major institutional and ad hoc rules. Lucy

serves on the ICCA Governing Board, the ICC Governing Body and the LCIA Court, and is a past Chair of the Institute for Transnational Arbitration. She is a member of various institutional arbitrator panels, including those of ICSID (designated by ICSID), SIAC, HKIAC and KCAB. Lucy has served as an arbitrator on the Eritrea-Ethiopia Claims Commission, co-director of the Claims Resolution Tribunal for Dormant Accounts in Switzerland and, while with the US State Department, the US Agent to the Iran-United States Claims Tribunal. She served as President of the American Society of International Law (2008–2010) and is a member of the Council on Foreign Relations. Lucy was educated at the University of Chicago Law School and Brown University.

Luke A. Sobota

is a Founding Partner of Three Crowns LLP. He has been involved in numerous international disputes spanning a variety of common law, civil law, and arbitral fora and has provided legal and strategic counseling to clients in a range of industries, including energy, healthcare, and media. Luke served as clerk to the late Chief Justice of the US Supreme Court, William Rehnquist, and subsequently briefed and argued numerous cases in US federal courts. As a legal advisor in the Office of Legal Counsel at the US Department of Justice, he also advised executive branch officials on constitutional, international, and administrative law issues. He teaches a course on international arbitration and is writing a monograph on the general principles of international law. Luke attended Pomona College and received his law degree from the University of Chicago.

Gregory Spak

is a partner in the Washington office of the global law firm, White & Case LLP. Mr. Spak has specialized in international trade law throughout his career, and he has worked on international trade disputes in the GATT and WTO dispute resolution system. His WTO experience involves six disputes in which he served as lead counsel or advisor to one of the primary WTO Members involved in the dispute, and he has substantial “in room” experience in these cases at the Panel and Appellate Body levels. Mr. Spak received his J.D. with honors from Georgetown University in 1987.

Chan Yong Wei

is an advocate and solicitor of the Supreme Court of Singapore. He is a senior associate at Drew & Napier LLC, and specialises in commercial litigation and arbitration. He has also practiced in Hong Kong as a registered foreign lawyer

in Freshfields Bruckhaus Deringer's international arbitration group. Yong Wei was educated at the National University of Singapore.

Romain Zamour

is an associate in the international arbitration group in the New York office of White & Case LLP. Prior to joining White & Case LLP in 2014, he spent one year as Assistant Legal Counsel at the Permanent Court of Arbitration in The Hague, on a Yale Law School fellowship. He is a member of the New York bar. Romain is an *ancien élève* of the Ecole Normale Supérieure de Paris. He received his J.D. from the Yale Law School.

Introduction

Chiara Giorgetti

The possibility of challenging and recusing judges and arbitrators provides a fundamental control mechanism for parties engaged in international dispute resolution. Indeed, as international courts and tribunals have increasingly become the preferred choice to resolve international disputes, this control function has also become of paramount importance to the normative and sociological legitimacy of international courts and tribunals.

Yet, not much has been written in a systematic way about the mechanisms that parties—and tribunals and courts themselves—have to correct the composition of the bench when such a correction is needed. This book seeks to provide that systematic analysis and also to spark a dialogue on the important issue of challenges and recusals of arbitrators and judges, and specifically on reasons for such challenges, the procedures to raise them and the issue of who is tasked to finally decide on such requests.

The chapters of this book can be divided in four groups.

The first seven chapters provide a thorough analysis of challenges and recusal procedures in specific forums. In the first chapter, I start the discussion with an assessment of challenges and recusals at the International Court of Justice, the principal judicial organ of the United Nations, which rely mostly on self-recusal. Meg Kinnear and Frauke Nitschke explain, in the second chapter, disqualification of arbitrators under the ICSID Convention and Rules, and provide a unique insight and assessment of arbitrator challenges in international investment disputes. In the third chapter, Sarah Grimmer describes the determination of arbitrators challenges by the Secretary General of the Permanent Court of Arbitration, which uniquely includes both State to State and investor—State disputes. Lee Caplan explores, in chapter four, arbitrator challenges at the Iran-United States Claims Tribunal, and thus provides an important historical record still relevant today. Next, in chapter five, Loretta Malintoppi and Andrea Carlevaris discuss challenges of arbitrators under the rules of the International Chamber of Commerce and discuss lessons learnt there. In chapter six, Gregory Spak and Ron Kendler examine selections and recusals in the WTO Dispute Settlement System and ponder on reasons why recusals and challenges are rare under that regimen. Finally, Makane Mbengue considers, in chapter seven, challenges of judges in International Criminal Courts and Tribunals and provides some useful comparative analysis with other forum.

These initial chapters provide an essential foundation for the analysis of challenges and recusal of judges and arbitrators. As such, they assess several specific issues, including the available procedures, reasons asserted to initiate a challenge procedure, who decides the challenges and results of the challenge procedures. Importantly, they also allow for a comparison among different forums.

The following three chapters analyze challenges from a different perspective. Namely, they examine specific issues that are often reasons for parties to begin a challenge procedure. In chapter eight, Romain Zamour considers issue conflicts and the reasonable expectation of an open mind, specifically in the context of the challenge decision in *Devas v. India*. Judith Levine, in chapter nine, examines the important issues of late-in-the game challenges and spurious challenges and resignations within the context of tactical challenges. In chapter ten, Luke Sobota assesses repeat arbitrator appointments in international investment disputes, a oft-cited reason to challenge arbitrators.

In the next three chapters, the analysis shifts to personal perspectives. In chapter eleven, Charles Brower, Sarah Melikian and Michael Daly recount tall and small tales of a challenged arbitrator from a first-hand experience. Next, in chapter twelve, Andrew Loewenstein describes the approach and consideration of counsel to challenges in international disputes. Finally, in chapter thirteen, Hansel Pham and Imad Khan examine challenges to party representatives and counsel before international courts and tribunals a unique mechanism at times used as an alternative to challenge the decision-maker.

The final two chapters analyze challenges from a geographical perspective and seek to determine whether there is a regional variation to challenges. In chapter fourteen, Lucy Reed, John Choong and Chan Yong Wei explain challenges to arbitrators in Asia, and especially the position before the Singapore and Hong Kong Courts. Finally, in chapter fifteen, Jonathan Hamilton, Francisco Jijon and Ernesto Corzo consider arbitrators challenges in Latin America.