



CI Arb New York News

Welcome



Welcome to the third edition of *CI Arb New York News*, the newsletter of the Chartered Institute of Arbitrators' New York Branch. Continue reading to learn about Branch activities and noteworthy arbitration and ADR developments.

CONTENTS



Chair's Message

2



Article: Application of the IBA Guidelines in U.S. and Canadian Courts

1



What You Missed

3



New Branch Officers

5

Upcoming Events



Annual General Meeting
September 27, 2016

9



Fourth Annual Branch
Reception and Book Launch
September 27, 2016

11



The *In Camera* Breakfast Series
Oct. 26, Nov. 22, Dec. 14

12

The Application of the IBA Guidelines by U.S. and Canadian Courts

by Stephen Wah and Peter A. Halprin, MCI Arb / Anderson Kill*

The IBA Guidelines on Conflicts of Interest in International Arbitration (the "Guidelines") were designed with the aim of finding "general acceptance and adherence within the international community." Over twelve years, and one revision later, the

Guidelines are widely used and respected in the arbitration community. Although the Guidelines have such acceptance in the arbitration community, courts have taken various approaches to the Guidelines.¹ This article highlights the

Continued on pg. 6

Chair's Message



During the past winter, I decided to step down at the end of this year as your Branch Chair. After what will be, by then, nearly four years in office, I felt that the time for new leadership had arrived. New leadership brings fresh ideas, new faces and new

perspectives -- all of which are healthy for any organization. My successor and current Vice Chair, Tom Halket, will take the reins effective January 1, 2017. He will be joined by Richard Mattiaccio as Vice Chair, Stephanie Cohen as Treasurer and Cara Roughan as Secretary -- an excellent team.

The Branch, from its establishment back in May 2013 to now, has made substantial and astonishing strides. It has become an active, vibrant, prominent and highly respected component of the international arbitration community and of the Chartered Institute both in NY and globally. The Branch has progressed well beyond its organizational phase and evolved to its present state far faster than anyone had realistically expected back in 2013 -- including me. Its membership nearly doubled. It has a strong financial footing. It has a committed and dedicated staff of very capable and talented volunteers, and a highly energized and eager membership.

This year alone, we organized a program for international LL.M. students currently enrolled in New York law schools, a panel discussion about whether the arbitration community is paying adequate attention to data security in arbitration, our second week-long annual course on international commercial arbitration with Columbia Law School and an Accelerated Route to CIArb Fellowship course.

This month, we will hold a general meeting and celebrate the fourth year of the Branch's establishment while launching the book *DEFINING*

Continued on pg. 4



Branch Executive Committee

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Vice Chair
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CIArb New York News

Editor and designer
Nancy M. Thevenin

CIArb New York News is the CIArb New York Branch's newsletter. This newsletter aims to inform members about Branch activities, provide practical advice and discuss noteworthy arbitration and ADR developments.

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DISCLAIMER: The contents of this publication are not intended to be a substitute for either general or specific legal advice on individual matters, and readers are strongly encouraged to seek competent legal advice.

New York Branch Raises Data Security Alert

by Stephanie Cohen, FCI Arb

It could happen to you.

Shortly after hackers breached a Panamanian law firm, exposing the financial secrets of the world’s rich and famous, news broke of unrelated cyber attacks on the computer networks of two of Wall Street’s top-tier law firms. Such events have put law firms—and the public—on notice that lawyers are prime targets for cybercriminals given the sensitive client information with which they are entrusted. Law firm data breaches also raise questions about data security in arbitration proceedings.

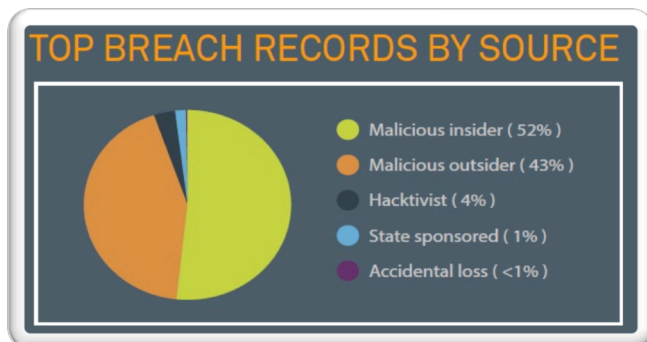
To explore these questions, on May 3, 2016, New York Branch members and Fellows of the CI Arb, Stephanie Cohen, Mark Morril and Edna Sussman, along with Debevoise & Plimpton cyber security lawyers Jim Pastore and Jeewon Kim Serrato, organized and presented a seminar entitled, “Red Flag Alert: Data Security in Arbitration.”

After recounting known examples of data breaches in arbitration proceedings, the panelists shared insight on:

Law firms and major companies are increasingly targets of cyber attacks

- 2015: 2,122 Breaches, 79,790 Security incidents, 61 Countries
- 2016: 3141 Breaches, 100,000 Security incidents, 82 Countries

Source: 2015 and 2016 Verizon Data Breach Investigations Reports



Source: SafeNet Breach Level Index, Q1 2014

- why all participants in the arbitral process should share active responsibility for protecting data security;
- the major threats to maintaining data security in day-to-day arbitration practice;
- sources of potential legal and ethical obligations for lawyers, arbitrators, and arbitration providers relating to data security;
- how inadequate attention to data security may threaten the integrity of the arbitral process;
- practical approaches to avoiding and handling data breaches (including tips for basic cyber hygiene);
- balancing risk mitigation and convenience; and
- ways to stay informed about evolving data security risks and safeguards.

The seminar was hosted at Debevoise & Plimpton, LLP’s New York office and co-sponsored by the New York International Arbitration Center.

Chair’s Message

Continued from pg. 2

ISSUES IN INTERNATIONAL ARBITRATION: CELEBRATING 100 YEARS OF THE CHARTERED INSTITUTE OF ARBITRATORS. Finally, the Branch also continues to foster a strong presence in the New York international arbitration community by working with and co-sponsoring or supporting events by other local arbitral organizations and institutions.

While my efforts over these past few years have been, by any measure, substantial and unrelenting -- just ask my wife, the immense satisfaction and keen sense of accomplishment I gain whenever I reflect on what my colleagues in Branch leadership and I and all our branch members have jointly built over these past few years more than offset all my hard work. Having worked closely with Tom these past few years, I have every confidence that Tom will be an outstanding Chair and he and his team will surely build on the foundation all of us created to allow the Branch to achieve even more than it already has.

As for my own future, I am running for a position on the Institute's Board of Trustees: Trustee for the Americas -- a position I held for a short time prior to the launch of our Branch. Should I be elected as your Trustee, I will work in obscurity, just as a corporate director does, so you will see much less of me. Nevertheless, I will be committed to serving the Institute and benefitting all its members -- whether in our Branch (as I have as Chair), anywhere in the Americas or wherever else the Institute reaches in the world. Yet, I will still remain just an e-mail or phone call away from any of you to handle a problem or discuss a concern you have about the Institute.

Thank you for allowing me to serve as your Chair. It was an honor and a privilege -- one that will remain with me for as long as I live.

**Pete Michaelson, FCI Arb, C. Arb
Chair, NY Branch CI Arb**

**International Arbitration
Opportunities in New York City for
LL.M. Graduates**



On April 1, 2016, the Branch held its first event of the year on “International Arbitration Opportunities in New York City for LL.M. Graduates,” at the New York International Arbitration Centre. Organized by Branch Program Chair, Richard L. Mattiaccio of Squire Patton Boggs, this was the first of an annual program designed for international LL.M. students currently enrolled in New York law schools. Panelists included Ank Santens of White & Case, Caroline Richard of Freshfields and Andreas Frischknecht of Chaffetz Lindsey who discussed careers in international dispute resolution.

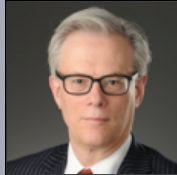
The panel discussion, which was only open to students, was followed by a reception attended by prominent members of the New York international dispute resolution community who shared their insight into the practice of international arbitration in New York.



Richard L. Mattiaccio at reception with students and members of New York’s international arbitration community

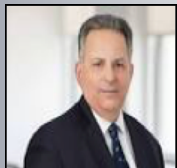
New Branch Officers starting on January 1, 2017

Chair



Thomas D. Halket

Vice- Chair



Richard L. Mattiaccio

Treasurer



Stephanie Cohen

Secretary



Cara Roughan

Chair, Education
Committee

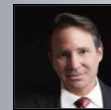


Eugene I. Farber

Co-Chairs,
Programming
Committee

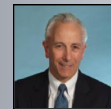


Steven Reisberg



Stephen Strick

Chair, Membership
Committee



Marc A. Goldstein

Chair,
Communications
Committee



Suzanne Ulicny

Advisor



Professor George A.
Bermann

Advisor



Lawrence W. Newman

The Application of the IBA Guidelines in U.S. and Canadian Courts

Continued from pg. 1

approaches taken by U.S. and Canadian courts in the few cases in which the Guidelines were raised.²

United States

In the United States, there are very few reported instances of the Guidelines referenced in court decisions. The seminal U.S. case therefore appears to be *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*³

In *Applied Indus. Materials*, a federal district court looked to the Guidelines when faced with a dispute regarding the alleged partiality of the chair of a tribunal. The underlying dispute involved a fight between joint venturers regarding their respective rights to the profits of the joint venture. The arbitration provided that, “No person shall serve as an arbitrator who has or who has had a financial or personal interest in the outcome of the arbitration or who has acquired from an interested source detailed prior knowledge of the matter in dispute.”

During the dispute, a third company, OxBow was working to acquire one of the parties to the arbitration. SCF, the chair’s company, conducted business with OxBow. Thus, the crux of the dispute centered around the alleged omissions that the Chair made in his disclosures because he did not mention the relationship between SCF and OxBow.

The court focused on the Guidelines and the AAA’s Code of Ethics, both of which provided that “any doubt as to whether or not to disclose should be resolved in favor of disclosure.” Although the amount of business conducted between SCF and OxBow may have been minimal, the court held that the chair had a duty to disclose that which may have created the appearance of partiality.

The Guidelines further provide that the “failure to disclose a potential conflict is not excused by

lack of knowledge if the arbitrator makes no reasonable attempt to investigate.” The court used this provision to support the conclusion that that chair’s failure to investigate the relationship between SCF and OxBow did not excuse his lack of disclosure. On those grounds, the award was vacated.

The court’s reliance upon the Guidelines appeared rooted in the notions that

[I]t is important that courts enforce rules of ethics for arbitrators in order to encourage businesses to have confidence in the integrity of the arbitration process, and be secure in the knowledge that arbitrators will adhere to these standards. . . . Because of the increase in international transactions and the corresponding increase in disputes it is crucial that there exist a requirement of an appearance of impartiality in arbitrations conducted in this jurisdiction, and that courts take actions designed to assure foreign entities that arbitrations in the United States are free from the suggestion of partiality.

Canada

While it has been reported that in Canada, parties frequently consult the Guidelines in selecting party-appointed arbitrators, it was also suggested that, at least as of 2007, there were not many reported references to the Guidelines in court cases.⁴ Since then, however, it appears that there are at least two decisions from Ontario involving the Guidelines.

In *Telesat Canada v. Boeing Satellite Systems Int’l Inc.*, a party challenged a chairperson on the grounds that her partner, in a three-person law firm, was engaged as an arbitrator in a related arbitration, with overlapping evidence and issues between the arbitrations, involving one of the parties to the dispute.⁵

The court looked to the Guidelines, holding that

although they were not incorporated by reference in the arbitration, “the issue of potential apprehension of bias[] is not particular to international arbitrations...and sheds light directly on the issue of this chairperson through the lens of the arbitration community.” After analyzing the General Standards 2 and 6 of the Guidelines, and the applicable situations set forth in the lists, the court determined that the chairperson’s firm’s involvement in the case required the express consent of both parties, which was not received, in accepting the appointment of the chairperson. The court determined that the impartiality of the panel and the integrity of the process would be enhanced by replacement of the chairperson and ordered the replacement of the arbitrator.

In *Jacobs Securities Inc. v. Typhoon Capital B.V.*, the claimant challenged an adverse award on the grounds that the circumstances gave rise to justifiable doubts as to the sole arbitrator’s independence and impartiality.⁶ At the urging of the claimant, the court looked to the Guidelines. Describing the Guidelines as being “widely recognised as an authoritative source of information as to how the international arbitration community may regard particular fact situations in reasonable apprehension of bias cases” the court rejected the notion that the arbitrator was biased. The fact that his former firm, and not his current firm, had acted for a third party that was involved in the arbitration was found not to violate the Guidelines. Critically for current arbitrators, particularly those that have left a former firm due to conflicts, the court explained that it was “exceedingly rare” that a former attorney would check with a former firm regarding a conflict and that it was, indeed, unreasonable for an arbitrator to perform such a check with their *former* firm.

Conclusion

Although there is little case law from which to derive conclusions, the existing case law suggests that courts in the U.S. and Canada will look to the Guidelines in disputes involving

international arbitration and that they may view them as a potentially persuasive authority.

***Stephen Wah** is a J.D. Candidate at the Benjamin N. Cardozo School of Law. Mr. Wah is the Editor-in-Chief of the ADR Competition Honor Society and a Staff Editor on the Cardozo Journal of Law and Gender. **Peter A. Halprin**, Esq., MCI Arb is an attorney in Anderson Kill P.C.’s New York office. Mr. Halprin’s practice concentrates on commercial litigation and insurance recovery, exclusively on behalf of policyholders. Mr. Halprin also acts as counsel for U.S. and foreign companies in domestic and international arbitrations.

[1] Peter Halprin & Stephen Wah, “Recent English Decision Questions the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration,” *Arbitration Committee Newsletter* (ABA Section on Dispute Resolution) June 2016; PETER HALPRIN & STEPHEN WAH, ETHICS IN INTERNATIONAL ARBITRATION (forthcoming 2016).

[2] At present, the authors are unaware of any Mexican court decisions regarding the Guidelines. The authors are in the process of confirming that no such decisions exist and will prepare a supplemental article if such decisions are located.

[3] 2006 WL 1816383 (S.D.N.Y. 2006); *see also* HALPRIN & WAH *supra* note 1 (“In *New Regency Productions v. Nippon Herald Films*, [501 F.3d 1101 (9th Cir. 2006)] the United States Court of Appeals for the Ninth Circuit referenced the Guidelines in rendering a decision on, among other things, an arbitrator’s duty to investigate and disclose conflicts...[T]he court referenced General Standard 7(c) which provides that an arbitrator is under a duty to investigate potential conflicts and that the failure to disclose is not excused by a lack of knowledge if there is no reasonable attempt to investigate.”).

[4] Judith Gill, “The IBA Conflicts Guidelines – Who’s Using Them and How?”, 1 *Disp. Resol. Int’l* 58, 61 (2007) (survey regarding use of the Guidelines)

[5] [2010] O.J. No. 5938, 2010 ONSC 4023 (CanLII).

[6] [2016] O.J. No. 415, 2016 ONSC 604 (CanLII).



Another Successful Joint Columbia Law School and New York Branch Course on International Commercial Arbitration

This course, which took place from June 6-10, 2016, offered a week-long systematic and comprehensive examination of the law and practice of international arbitration, and was delivered through lecture, interactive segments and simulations using the materials in BORN, *INTERNATIONAL ARBITRATION: LAW AND PRACTICE*. Designed for arbitrators, advocates, in-house counsel, members of the judiciary and others interested in international arbitration, all attendees received a certificate of completion from both Columbia Law School and the Chartered Institute. The course instructors included pre-eminent international arbitrators and counsel, law professors and representatives of the ICDR and ICC:

- Christian P. Alberti, Director, International Centre for Dispute Resolution, New York
- Prof. George Bermann, F.C.IArb, Course Co-director, Director - Center for International Commercial and Investment Arbitration (CICIA), Columbia Univ. School of Law, New York
- James H. Carter, Wilmer Hale, LLP, New York
- Rocio Digon, Managing Director and Counsel, ICC International Court of Arbitration, SICANA, New York
- Eugene Farber, Course Co-director, Farber, Pappalardo & Carbonari Adjunct Professor of Law, Pace Univ. School of Law, New York
- Thomas D. Halket, FCIArb, CArb, Course Co-director, Vice Chair - New York Branch, Halket Weitz LLP, New York, Adjunct Professor, Fordham Univ., School of Law
- Edward G. Kehoe, King & Spalding, New York
- Louis B. Kimmelman, Sidley Austin and Adjunct Professor of Law, Brooklyn Law School, New York
- Luis M. Martinez, International Centre for Dispute Resolution, New York
- Andrea Menaker, White & Case LLP, New York
- Peter L. Michaelson, FCIArb, CIArb, Course Co-director, Chair - New York Branch, Michaelson ADR Chambers, LLC, New York
- Richard Naimark, Senior Vice President of American Arbitration Association in charge of International of the International Center for Dispute Resolution, New York
- Sophie Nappert, 3VB -- Three Verulam Buildings, London
- Timothy G. Nelson, Skadden Arps, Slate, Meagher & Flom, LLP, New York
- Lawrence W. Newman, Baker & McKenzie, New York
- Natalie L. Reid, Debevoise & Plimpton, New York
- Laurence Shore, Herbert, Smith, Freehills LLP, New York
- Robert Smit, Co-Chair of the international Arbitration Practice, Simpson Thacher &

Continued on pg. 8

Joint Columbia Law School and New York Branch Course on International Commercial Arbitration

Continued from pg. 7

Bartlett, LLP, Adjunct Professor of Law, Columbia Law School, New York

- Claudia T. Salomon, Co-Chair, International Arbitration Practice, Latham & Watkins, New York
- John M. Townsend, Hughes Hubbard & Reed LLP, Washington, DC

This was yet another successful program and we thank our main sponsor, Boies, Schiller & Flexner, LLP, and co-sponsors, the AAA/ICDR, the ICC International Court of Arbitration and SICANA, NYIAC, Columbia University in the City of New York, Columbia Law School, CPR, GAR Live, KLRCA and the College of Commercial Arbitrators.



Left: Course organizer and instructor, Professor George Bermann, addressing the participants



Right: Course instructor, Louis B. Kimmelman, addressing the participants



Mock arbitration panel: Timothy Nelson, Sophie Nappert and Eugene Farber



Participants at course sessions, which were held at NYIAC



Participants at course dinner held at the University Club of New York

CIArb Accelerated Route to Fellowship

The Branch held its first ever Accelerated Route to CIArb Fellowship Course from June 13-15, 2016. Organized by Branch Chair, Pete Michealson, and Branch Vice-Chair, Thomas Halket, the course took place at the American Arbitration Association’s New York offices. The course culminated in an award writing examination, which assessed whether candidates had the requisite knowledge required to analyze submissions, arrive at a conclusion and write a final, reasoned and enforceable arbitration award in compliance with the UNCITRAL Model Law and Arbitration Rules. Over twenty-four participants from the U.S., Turkey, Singapore, Nigeria and Japan participated in the program.



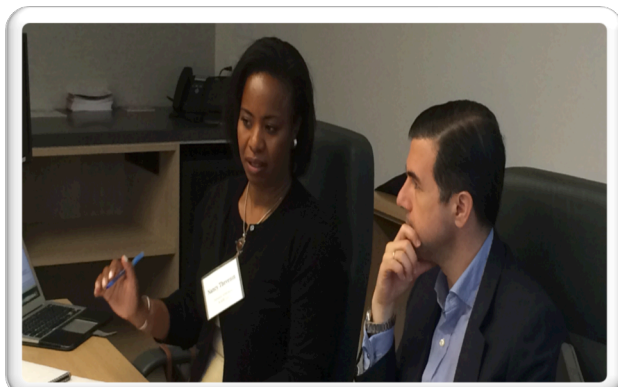
Course co-organizer and Branch Vice-Chair, Thomas Halket, also served as a tutor with Jay Safer above



Course participants worked in small groups with rotating tutors who led discussions on different aspects of the arbitral process


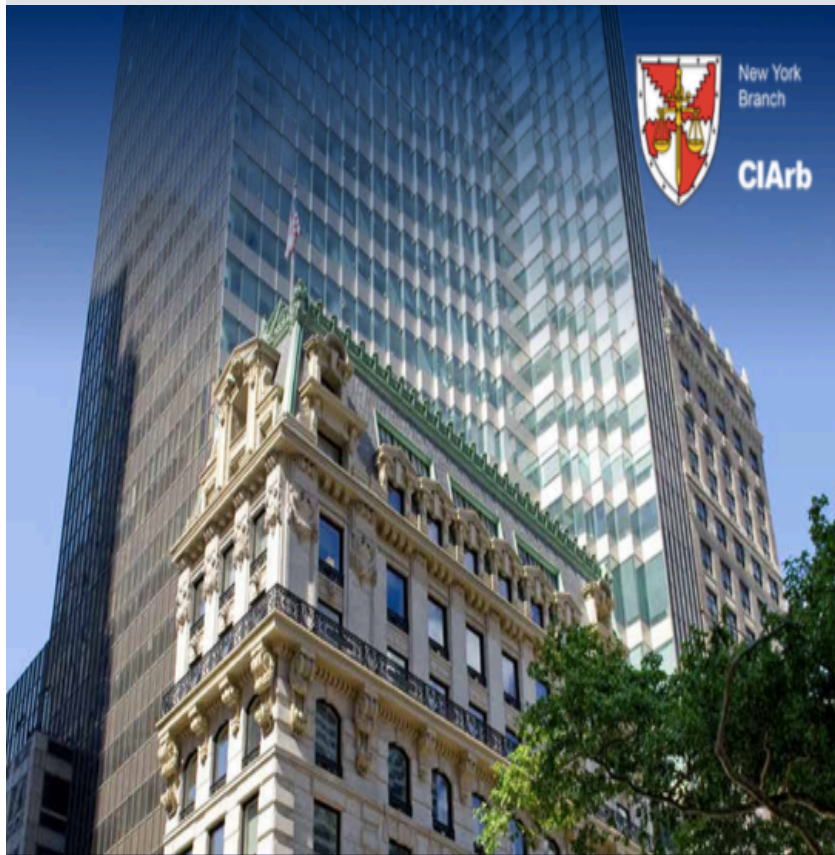


Working group drafted answers to problems, debated topical issues and shared their experiences



Over 8 tutors, all Fellows of CIArb and most members of the Branch, facilitated discussions among the working groups, including Nancy M. Thevenin and Anibal Sabater above

New York Branch Annual General Meeting



**CHARTERED INSTITUTE OF ARBITRATORS
NEW YORK BRANCH
ANNUAL GENERAL MEETING**

Tuesday, September 27, 2016 - 4:30-5:30pm

Baker & McKenzie
452 Fifth Ave, 18th Floor, New York, NY

R.S.V.P.
to Richard LaRoche at (212) 891-3848
or Richard.LaRoche@bakermckenzie.com

Sponsored Events

AIJA 8th Annual Arbitration Conference

Oct 6-8, 2016

NYCBA
36th West 44th
Street

To register, please
visit [here](#)

11th Annual Fordham International Arbitration and Mediation Conference

Full-day
October 14, 2016

Fordham Law
School
150 W 62nd Street
New York City

To register, please
visit [here](#)



New York
Branch

CI Arb

CHARTERED INSTITUTE OF ARBITRATORS NEW YORK BRANCH ANNUAL FALL RECEPTION & BOOK LAUNCH

Tuesday, September 27, 2016 - 5:30 - 7:30pm

Baker & McKenzie

452 Fifth Ave, 18th Floor, New York, NY

A social event for CI Arb members and friends active in international arbitration to kick-off the fourth year of the CI Arb New York Branch and to launch a new book.

R.S.V.P.

to Richard LaRoche at (212) 891-3848 or
Richard.LaRoche@bakermckenzie.com

This reception is free of charge.
Timely responses are appreciated

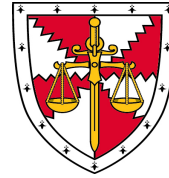
BOOK LAUNCH

We will also be celebrating the publication of *Defining Issues in International Arbitration: Celebrating 100 Years of the Chartered Institute of Arbitrators*. The book brings together world-renowned arbitration specialists – both practitioners and academics – who have never before appeared in the same volume. The book contains an invaluable collection of essays that provide expert guidance on some of the most recent developments and defining issues in the area of international arbitration. It is edited by Julio Cesar Betancourt, who will be present at the reception. Contributors of chapters include, from the United States, William (Rusty) Park, John J. Barceló, III, Grant Hanessian, Margaret Moses, Alexander A. Yanos, S. I. (Stacie) Strong, Thomas J. Stipanowich, and Lawrence W. Newman, some of whom will be present at the reception. Books will be available for purchase at a discount at the reception.





NEW YORK STATE BAR ASSOCIATION
DISPUTE RESOLUTION SECTION
International Dispute Resolution Committee



New York
Branch

CIArb



**The *In Camera* Breakfast Series:
Exploring Intra-Tribunal Dynamics and Decision-Making**

Part I: Deliberations

October 26, 2016, 8:30-10:00 a.m., at NYIAC, 150 E. 42 St.

Speakers: Alexandra Dosman, NYIAC Executive Director (moderator) • Caline Mouawad, King & Spalding
• Arthur Rovine, Fordham Law School • Larry Shore, Herbert Smith Freehills

REGISTER for PART I by e-mail to rsvp@nyiac.org

Part II: Delegation

November 22, 2016, 8:30-10:00 a.m., at White & Case LLP, 1155 Ave of the Americas

Speakers: Tina Cicchetti, Fasken Martineau • Larry Newman, Baker & McKenzie • Ank Santens, White & Case (moderator); TBD

Part III: Ethical Issues & Misconduct

December 14, 2016, 8:30-10:00 a.m., at Dorsey & Whitney LPP, 51 W 52 St.

Panelists: Christian Alberti and/or Luis Martinez, ICDR • Jennifer Kirby, Kirby Arbitration • Anibal Sabater, Chaffetz Lindsey • David Singer, Dorsey & Whitney (moderator)

Join NYSBA’s International Dispute Resolution Committee, in cooperation with NYIAC and the Chartered Institute of Arbitrators’ New York Branch, for a three-part series on the inner workings of arbitral tribunals. We will explore different approaches to building tribunal cohesion and collegiality, organizing deliberations, delegating responsibilities among tribunal members and to tribunal assistants, and dealing with arbitrator misconduct. This series offers a unique opportunity for counsel to better understand how tribunals make decisions and for arbitrators to consider how they might be more effective as co-arbitrators or chairs. **Registration Details for Parts II and III to follow.**

Organized by

Branch members and IDRC Co-Chairs, Stephanie Cohen and Marc Goldstein



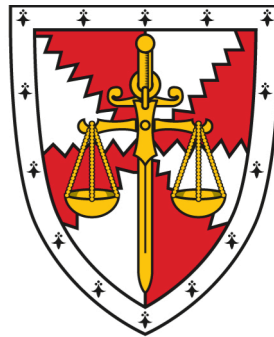
New York
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Issue #3, Sept. 2016

CI Arb New York News

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CI Arb
evolving to resolve