The Ontario Arbitrator

Charted Institute of Arbitrators, Toronto Chapter

In this issue

Activities & Events

Dear Members of the CIArb Toronto Chapter:

Last summer I wrote to you about the activities of the Toronto Chapter of the Chartered Institute of Arbitrators. This is the Fall 2013 Newsletter about our activities.

This fall, the Chapter organized two activities. The first was a joint CPD program organized by the Toronto Chapter with the ADR section of the Ontario Bar Association. The program was held on October 3, 2013 and was entitled: **Successfully Navigating an International Commercial Arbitration**. It was an introductory course to that subject. The Toronto Chapter believes that its members can effectively introduce the Toronto legal community to the unique features of international commercial arbitration, and the opportunities for Toronto lawyers in this area. The Toronto Chapter hopes to continue this sort of program in the future.

The second was the highly successful Symposium held by the Toronto Chapter on November 21, 2003 at Arbitration Place. The event was a sellout, and was followed by a dinner at the National Club. The report about the Symposium from Lisa Parliament and Gordon Kaiser, the co-chairs of the event, is included in this Newsletter. Bob Davidson's marvellous speech at the dinner is also included in this Newsletter. If you missed this event this year, it is not to be missed in the future.

Before the Symposium on November 21, 2013, we held the annual meeting of the Toronto Chapter. The following persons were elected as members of the Executive of the Chapter for the following year: Brian Casey, Ralph Cuervo-Lorens, Doug Cutbush, Igor Ellyn, Scott Fairley, Tom Heintzman, Gordon Kaiser, Kathleen Kelly, William Neville, Lisa Parliament and Janet Walker.

I hope that you will become involved in the Toronto Chapter in 2014. If you would like to do so, please email me at tgh@heintzmanadr.com.

Best wishes for a happy 2014.

Tom Heintzman

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On Monday 18 November 2013, the Chartered Institute of Arbitrators, North American Branch, Toronto Chapter hosted a **Symposium on Professionalism in International Arbitration.**

The program attracted considerable interest, and registration was full only a few days after the invitations were delivered. The event drew a very high-profile audience of arbitrators, judges, lawyers and academics from Canada, the U.S. and Europe.

Thomas Heintzman, President of the Toronto Chapter, opened the Symposium with a warm welcome to our distinguished panels and audience members.

Our first panel of the day, led by Professor Janet Walker, discussed confidentiality issues as they arise throughout the arbitral process.

The impressive panel of experts included former Supreme Court of Canada Justice Ian Binnie, and leading arbitration practitioners Robert Wisner, of McMillan LLP, and Michael Schafler, of Dentons. The panel addressed practical questions, as well as more complex concerns that may arise from differing expectations of confidentiality.

The Honourable J. Edgar Sexton chaired the next panel, guiding an interesting debate on complex conflict of interest issues that may arise in international arbitration.

Our panel of experts included leading international arbitrator Robert B. Davidson, the Executive Director of JAMS Arbitration Practice; Jacques S. Darche, litigator and arbitrator with Borden Ladner Gervais; and Ronald E. Dimock, litigator and arbitrator with Dimock Stratton. Our panel led a lively discussion regarding how these matters arise in practice, and how they are addressed by decision-makers.

Our final panel of the afternoon was led by Louise Barrington, and considered questions of counsel misconduct and professionalism in international arbitration. Our distinguished panel included Gordon Kaiser from JAMS Arbitration Practice, The Honourable Coulter Osborne, Q.C., from Arbitration Place, and Chris Milburn, Managing Director, Economic Consulting from FTI Consulting, Inc. The

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experiences and expertise shared by our panel members resulted in an interesting session and a successful close to our Symposium.

The Symposium was followed by a wonderful reception and dinner at *The National Club*, which proved to be a highlight of our event. Our celebrated dinner speaker was Robert B. Davidson, Esq., who had previously participated as part of one of our panels of experts. Mr. Davidson is one of the world's leading international arbitrators, and the Executive Director of JAMS Arbitration Practice. Mr. Davidson delivered a fascinating and engaging address regarding the evolution of the business – how international commercial arbitration and mediation came to importance and what the prospects are for the future. In his presentation, Mr. Davidson shared some of his personal experiences learned in over three decades of legal practice representing sovereigns and commercial clients, and his decade of experience as a full-time arbitrator and mediator. Mr. Davidson has kindly allowed to have a written copy of his address, to share with our fellow CIArb members.

The feedback from attendees has been very positive and we would like to thank them all for participating and contributing to the success of the event. We would also like to express our appreciation to the other members of our organizing committee and those that provided other assistance for the event, including Janet Walker, Thomas Heintzman, Franca Matsos, Lucy Greenwood, the marketing team at McMillan, and the team at Arbitration Place.

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Finally, on behalf of the CIArb, we would also like to thank the experts who gave their time to speak at the event, and to our sponsors Arbitration Place, Dentons, the Chartered Institute of Arbitrators – North American Branch, FTI Consulting, and JAMS for their generosity in supporting the facilities, refreshments, and the dinner following the event.

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We look forward to seeing you all at the next event.

Gordon E. Kaiser, FCIArb, JAMS
Lisa Parliament, Partner, McMillan LLP

Event Co-Chairs

Address by Robert B. Davidson to The Toronto Chapter of the Chartered Institute of Arbitrators - The Royal National Club, Toronto,
November 18, 2013

It is truly an honor to be invited to speak to such a distinguished audience in one of my favorite cities. I knew that New York and Toronto were cities with many close ties, but, with your Mayor making the news recently in New York, I knew that New York and Toronto were truly kindred spirits. Several of our recent mayoral candidates could easily compete for top billing.

All kidding aside, however, it is very nice to be here.

I was told to speak on any topic that might be of interest.

As you are all Fellows or Members of the Chartered Institute, I believe that an area of significant interest would be international neutral work, i.e. work as an arbitrator or mediator—how it developed historically and where is it going. I do know something about that, having grown up as a lawyer at Baker & McKenzie representing sovereigns and commercial clients for 30 years, and now sitting for the last 10 years in these cases as a full-time arbitrator and mediator. So, let's talk about the forest and not the trees- the evolution of the business – how international commercial arbitration and mediation came to importance and what the prospects are for the future.

Commercial arbitration as a method of dispute resolution is not new of course. In the modern era, its introduction on a large scale can be traced to the passage of the Federal Arbitration Act in the United States in 1925. At that time, arbitration was used most often to settle merchant disputes in various industries, such as the garment business or in the diamond district although the diamond merchants had a unique system all their own. A typical dispute in the garment business would consist of a sole arbitrator – a respected man in the business— sitting at the head of the table with a cigar in his mouth. At the very beginning of the case, he would cut off the first lawyer and say "Show me the goods". He would finger the bolt of cloth for a while and then point to the Respondent and shout, "Pay the man"!!

The arbitration took all of 30 minutes.

Arbitration, at least in the major cities, became popular because the alternative consisted of appearing before a judge several months after filing the case, who knew nothing about a bolt of cloth or the virtues of a diamond, and who would dictate a settlement to the lawyers, without the parties' participation and without regard to the merits just to clear his calendar. If the parties wouldn't settle, they could wait

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another year or two, then pick a civil jury, and toss the proverbial coin to see who prevailed.

So the popularity of arbitration grew, at least as regards domestic disputes between merchants. Then the world of commerce got a bit more complicated and much more international.

The business of international dispute resolution in modern times really traces its origins to 1958 when UNCITRAL promulgated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, otherwise known as the New York Convention. The United States ratified the Convention in 1970. Canada acceded to the Treaty in 1986 and the provinces followed suit. At that time, Canada also adopted the UNICTRAL Model Law.

So, by 1970 (1986 in Canada), a framework existed for the resolution of international commercial disputes through arbitration. There were, of course, demonstrable advantages to arbitrating under the New York Convention, the most important of which was the universal enforceability of awards in signatory countries.

But there was a lingering problem. There were very few international commercial disputes that actually went to arbitration. They usually ended up in national courts, or, if they involved sovereign entities—were resolved diplomatically or not at all. The issue of sovereign immunity was fairly effectively dealt with in the United States in the Foreign Sovereign Immunities Act, which became law in 1976.

The problem in the private commercial sector was that there was very little experience with arbitration and both in-house and outside counsel who advised private companies were afraid to use an untried system of dispute resolution that was subject to vague procedural rules and was frighteningly final.

Then something terrific happened for the international arbitration business. In 1979 the Iranian people overthrew the Shah of Iran.

When a senior associate at Baker & McKenzie, I became enmeshed in these cases. This is an interesting story about how being in the right place at the right time leads one on an unanticipated career path. In the Summer of 1979, the New York office had a partner, Henry deVries, who was also a Prof. of Comparative Law at Columbia Law School. I went to Columbia and joined the firm as a new associate in 1972. Henry took a liking to me and involved me in many of his cases. During the summers he would run a certificate program at the Parker School of Comparative Law at Columbia (Hans Smit took over the Parker School after Henry's death). At the Parker School, Henry would teach general counsel who would come to learn something about doing business abroad.

One of his students was Wayne Hillin the General Counsel at Reading & Bates Corporation. Reading & Bates was a drilling company out of Houston that was in the oil services business, which meant that the company would lease its rigs and personnel to oil companies or concession holders all over the world for a negotiated day rate. In

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August of 1979, R & B had two jack-up drilling rigs operating in the Persian Gulf for a company controlled by NIOC, the National Iranian Oil Company. When the Shah fled and the Ayatollah triumphantly returned, the country was in turmoil, and R & B was still taking oil out of the ground, but wasn't getting paid to do it. It finally decided that it was time to get its rigs out of Iranian waters. Now, it takes a couple of days to get a jack-up rig ready for towing. Reading & Bates was able to get one of its rigs out, but the Iranian Navy stopped it from moving the second rig.

What to do? Well, Wayne called his old professor and came into New York with the President of the company to meet with him. Henry called me into his office to attend the meeting. I was the associate in the corner with the yellow pad.

The drilling rig was worth $24 million. We decided to try to obtain an order of attachment against the National Iranian Oil Company in New York. NIOC was the responsible party under the leases for drilling services, and we thought that we could get their attention if we could find something to attach. The problem was that we had no idea whether or not NIOC had any attachable assets in New York. We doubted it, but it was worth a try.

I was charged with getting the Order of Attachment from the U.S. district court in New York. So I drew up the papers seeking an attachment order for $24 million and walked into federal court in New York the next day. The case was assigned to Judge Kevin Duffy. I went to his chambers with the papers and, after some discussion, walked out with a signed attachment order. Not knowing if or where NIOC might have assets in New York, we "papered the street", i.e., we served garnishment notices on every New York commercial bank.

Under New York procedural law, the holder an Order of Attachment obtained ex parte must confirm that Order pursuant to a Motion to Confirm at a court hearing scheduled several days after the Order was obtained. On the return day of the motion, we arrived to see the Judge's courtroom filled with every fancy banking lawyer in New York representing every major commercial bank—Citibank, Chase, Bankers Trust, etc. We had inadvertently succeeded in freezing over $2 billion in NIOC accounts at New York banks.

Well. Imagine the outrage. ("How dare you attach the assets of one of the major industrial companies in the world", etc.).

Three things resulted:

1. Platts Oil Gram publicized the attachment order. As a result, Baker & McKenzie received a stream of clients in the same situation most of them in either the oil service or construction business—Halliburton, Sedco (later acquired by Schlumberger), Tidewater, Brown & Root who had ongoing construction projects in Iran and many others.

2. We got calls from the CIA and from the U.S. State Department. A fellow from the CIA called me and wanted to know which banks held what money, which was something that I could not tell him. The State Dept. wanted us to vacate the attachment because it was

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an "irritant" in the fast deteriorating U.S.-Iran relationship.

3. Judge Duffy vacated the attachment order, but the funds were not released to Iran as the appeals were pursued.

This was in the Summer and early Fall of 1979. The hostages were taken in October and Jimmy Carter froze all Iranian assets consisting mainly of the funds that we had attached with that first attachment order.

In 1980, the crisis ended when Reagan gave back most of the money in return for freeing the hostages and for the Iranian's entry into the Algerian Accords that established the Iran-U.S. Claims Tribunal at The Hague. The Tribunal was established to resolve the claims of U.S. citizens against Iran or its controlled entities. It was funded with $1 billion out of the frozen funds. Nine arbitrators were appointed to hear individual claims in 3 chambers of 3 judges each—one from Iran one from the U.S. and one "neutral" arbitrator. The Tribunal, called the IUSCT, used the UNCITRAL Arbitration Rules and began to arbitrate these claims.

As a firm, we represented about 35-40 claimants. I myself handled over 11 cases at the IUSCT as lead counsel, more claims than any other lawyer. That gave me lots of international arbitration experience which was a rarity for any lawyer in those days.

More pertinent to our discussion, however, there were hundreds of claims filed at the Tribunal by numerous law firms. Many of the largest multinational firms had claims. By the time the Tribunal had functioned for several years, three things began to happen. First, an entire series of scholarly writings began to appear touting the advantages of arbitration. These included written arbitration awards of the IUSCT which were published. Second, it became apparent that the system of commercial arbitration under the UNCITRAL Rules was working. Awards were being rendered and paid. Third, many U.S. lawyers were becoming comfortable with the process and began to recommend to their international clients that they put arbitration clauses into their commercial contracts.

The process became more and more familiar and a significant number of companies began to settle their international disputes via arbitration.

My last case ended at the Tribunal in 1987, but by then there was a steady diet of international arbitration work, most of it out of the ICC in Paris. It didn't hurt that the cases were heard at the most desirable world capitals—Paris, London and The Hague.

Then, some macro-political events began to shape the world's economic future. I will name only a very few of them.

In November 1989, the Berlin Wall fell. On or about New Year's Day in 1992, the Order 3 that held the state structure of the Soviet Union and its 14 Republics in place, collapsed virtually overnight.

This – in one fell swoop—brought huge populations and substantial amounts of natural resources into the world economy. The collapse of the Soviet Union and its socialist structure created a kind of unbridled capitalism that called for a huge number of commercial agreements that generated a

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huge number of disputes, many of them energy related and many of them subject to arbitration.

Now enters the Giant Panda. Hong Kong was returned to China in 1997. In 1997 and 1998, the economic reforms which Deng Xiaoping began in 1978, began to accelerate with enormous consequence. Large scale privatizations of hitherto government-owned industries took place—many of them sold to private investors. From 1978 to 2010, China's economy grew at an annualized rate of 9.5% to the point where China is now the world's second largest economy. Most recently, huge markets for consumer and other goods have opened. Competitive pressures from Chinese industries, such as steel, remade the map in some sectors. Don't forget the numbers. One of every 4 ½ people on this planet live in China under one unified political system. It is a market that is now largely open (economically) with corporate legal structures that enable the making of contractual relationships that were never possible before. Laws were also enacted that enabled arbitration provider organizations, most notably CIETAC, to resolve business disputes.

The world entry of both Russia and China—and don't forget Brazil and India—changed the landscape fundamentally. The mature economies now had a large number of new markets into which they could see their goods, and a large number of new industries and ventures in which to invest.

The ICSID Convention and, to a lesser extent, NAFTA, provided a framework for the resolution of disputes arising out of such investments. ICSID's primary purpose is to provide facilities for the conciliation and arbitration of international investment disputes. The ICSID Convention now has over 140 member states. Canada, as you know I'm sure, ratified the ICSID Convention on November 1st of this year. Much of the obligations of member states are set forth in Bilateral Investment Treaties. There were over 2,800 BITS in force at the end of 2012. There are more today. These facilitate foreign investment. Foreign investments generate investment disputes. Virtually all are arbitrated.

I would be remiss if I didn't mention one other macro-event that leads us to where we, as international dispute resolvers, are today. This is the invention of the personal computer. The first usable machines really came out in the late 1970s. Windows was introduced in 1983. Now, as you can see from my own iPhone, today we carry all that computing power literally in our pockets. The technology enables merchants and investors to pounce on opportunities in minutes or hours, rather than in weeks or months.

The combination of more people and more markets forming the world economy and the technological ability to access opportunity has led—and will continue to lead to an increasingly greater flow of international commercial transactions, contracts and disputes. It's inevitable.

Look, for example, at the energy revolution that is being fueled by the extraction of oil and natural gas from shale rock. The United States may actually be energy independent in the foreseeable future. Imagine that, with all

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of its economic and geopolitical implications. The falling price of natural gas caused by the increased supply has led to an imbalance in the traditional oil vs. gas price equation. As a result, many energy users locked into long-term oil purchase agreements are trying to arbitrate or mediate their way out of their predicaments.

The worldwide proliferation of dispute resolution providers—as well as the growth of mediation and other alternatives to arbitration-- are testaments to the need for more capacity and more creativity in the market.

Just a few statistics will make the point. In 2011, JAMS opened JAMS International in London. That year our neutrals sat in 81 international arbitrations and conducted 60 international mediations for a total of 141 international matters. Our annualized 2013 figures reflect a total of 110 international arbitrations and 90 international mediations for a total of 200 cases, over a 40% increase. (There were 189 international matters handled by JAMS neutrals in 2012 for an increase of 34% over 2011).

The international figures published by the more mature provider organizations have also shown increases, albeit with less percentage growth. I am a bit apples and oranges here because the raw numbers are not readily available, but from 2003 through 2007 the ICC's arbitration caseload grew from 580 cases to 599 or only 3%. By 2011, the ICC reported 796 cases. These are domestic as well as international. The LCIA went from 99 to 224 in 2011, an increase of about 125%. The ICDR actually counted more cases in 2003 (646) than it did in 2007 (621) although its caseload, as reported, was close to 1,000 in 2011.

Asia, as one would expect, has also grown. HKIAC reported 275 arbitrations and 100 mediations in 2011. Its numbers are about that today. CIETAC had over 1,200 cases in 2011, about 400 of which being classified as foreign cases. As some of you might know, there is a bit of upheaval at CIETAC. The Shanghai branch has effectively declared itself independent and has formed its own arbitrator lists and rules. There are literally hundreds of arbitration provider organizations throughout China, although CIETAC is still dominant as the government sponsored institution.

CIETAC recently opened an office in Hong Kong. The Singapore International Arbitration Centre, known by the acronym SIAC, is also a big regional player. A couple of years ago, the Kuala Lumpur International Arbitration Centre opened its doors.

As for the kinds of cases that these institutions handle, I have the JAMS figures which are probably fairly representative. Of the 189 international matters handled by JAMS and JAMS International in 2012, 94, or 50%, were deemed to be "Business/Commercial" which means sales of goods, licensing or distributor-type disputes. 33, or 18%, were categorized as "IP"—a 50% increase over 2011. Maritime cases have jumped from 3 such cases in 2011 to 14 this year, although that might be a function of the London office gaining some traction.

Investment arbitration before ICSID panels has grown significantly as one would expect.

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ICSID reports a total number of registered cases at 419 as of 12/31/12. (Only 7, or 2%, were "conciliation" filings indicating a crying need for more mediated or conciliated settlements). As for new cases registered at ICSID, there were 36 in 2010, 38 in 2011 and 50, or a 32% increase, in 2012.

And don't forget all the ad hoc arbitrations that don't find their way into the reported numbers. I am sitting in two such cases now and most of my work has traditionally come from institutional providers.

If you count the growing worldwide mediation caseload, you might be surprised at the sheer number of disputes that require professional assistance. In 2012, JAMS as a whole, administered 8,846 mediations. In 2012, these numbers grew slightly to 8,906. These are mostly domestic, but there is enormous potential for the process as more countries and local bar associations mandate or encourage mediation.

Now, what does all this mean for all of us in this room? Will we prosper? Let me answer that with a big "YES". In this room, we represent serious players in this field. Most of us are Members or Fellows of the Chartered Institute, an organization that takes its mandate seriously and does not easily hand out its certifications. Most people here I venture to say are most often on the "short lists" for arbitrators or mediators. Most of us have significant legal experience as former judges or practitioners, and many of us have had substantial international legal experience as well.

Why will customers continue to want our services? We know from historical events that, first, there are more potential clients than there used to be. The demand for dispute resolution services has continued to grow and will do so in the foreseeable future, assuming of course, the world can manage to avoid large scale global conflicts, natural disasters or an economic meltdown.

Second, and I think the most important, is the need for predictability and certainty in international dispute resolution. International arbitration was initially born because contracting parties did not want to get stuck in the other side's local courts—and for good reason. Many national courts in many countries (especially at a local level)—some would say most national courts—are either outwardly corrupt, not very competent, or subject to local bias that not only creates an uneven playing field but—most importantly—creates uncertainty that leads to fewer business transactions or no transactions at all.

We, all of us in this room, have a quality that will keep our business active and growing, and that's honesty and personal integrity. That's why merchants rely on the process, not because they are going to win all the time, but because they know that they'll get a fair hearing with intelligent decision-makers who will call them like they see them; decision-makers who will do so in far less time than a local court—with far less expense— and with finality.

If we lose that reputation, because we are less than diligent, or corrupt, or because it takes inordinate lengths of time for us to decide cases, we will become just like the systems we were designed to bypass.

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In the criminal law, the only real deterrent is the threat of swift, sure and predictable consequences for antisocial behavior. In the business world—especially the international business world—the principle is no different. Business will continue to thrive across national borders if both sides know the rules of the game—that a breach of an agreement will have predicable consequences in a fairly predictable length of time and at the conclusion of a fair procedure.

We as arbitrators also have a special obligation and challenge. The element of finality in the process imposes an especially high burden. We have to be right the first time. There is no effective appeal in an international arbitration proceeding. The vast majority of awards will be granted recognition and enforcement if there is no corruption or major procedural error in the process. Our awards have to be correct. Very few national courts are going to save the losing party if we get it wrong.

Thus, only the brightest and the most diligent will ultimately survive. I like to think that all of us here fit that description.

So, there we are. Do not fret if your caseload is not as robust as you would like it, or if your cases settle all at once and you are wondering where the next one is coming from. It will invariably arrive. The work demands it.

I was trying to think of an apt metaphor for our work. We are a bit like kayakers in a swift river. The current is bringing us along and we can't do anything about that, but we can steer and keep the boat upright. That's really our job as dispute resolution professionals. Political world events and technological change will keep the kayak moving swiftly. A combination of our balance and skill will keep us afloat.

Many thanks for your attention. Again, it was a privilege to be here.

Activities and Events

Joint Program with New York Branch – February 28, 2014 Toronto and NYC

"Judicial Review of Jurisdictional Challenges in Investment Arbitration: What Should Judges Do?" will be the topic of a panel program to take place on Friday February 28th from Noon - 2:30 pm in Toronto at Arbitration Place and in New York at Debevoise & Plimpton (video-linked). A buffet luncheon will be served. The event is free. RSVP links are in the attached invitation.

An international panel will discuss the judicial role in reviewing awards of investor-state arbitration panels, with reflections on Canada's experience in the Cargill v. Mexico NAFTA case as we await the US Supreme Court decision in the BG Group v. Argentina case. Madame Justice Feldman of the OCA in Cargill will be one of the panelists.

The program is presented by Chartered Institute of Arbitrators, New York Branch, and Chartered Institute of Arbitrators, Toronto Chapter, in collaboration with ICC Canada and United States Council on International Business.

Co-Sponsors are The Committees on Foreign and Comparative Law, Arbitration, and International Commercial Disputes of the Association of the Bar of the City of New York and Arbitration Place.

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The panelists include:

- Hon. Kathryn N. Feldman, Justice of the Court of Appeal for Ontario, Toronto
- José Ricardo Feris, Deputy Secretary General, ICC International Court of Arbitration, Paris
- George Bermann, Walter Gellhorn Professor of Law and Jean Monnet Professor of European Union Law, Columbia University School of Law, New York
- Catherine M. Amirfar, Partner, Debevoise & Plimpton LLP, New York
- Robert J.C. Deane, Partner, Borden Ladner Gervais LLP, Vancouver
- Barry Leon, Partner and Head of the International Arbitration Group, Perley Robertson Hill & McDougall LLP, and Chair of ICC Canada, Ottawa
- Eric A. Schwartz, Partner, King & Spalding LLP, New York and Paris, and Vice President of the ICC International Court of Arbitration, Paris

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