# Association for International Arbitration

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# Upcoming Events in International Arbitration

**6 August 2019 –** Inaugural IBA Asia Pacific Arbitration Conference (Singapore)

the global voice of
the legal profession

The Inaugural IBA Asia Pacific Arbitration Conference held in Singapore is a conference presented by the IBA Arbitration Committee and the Asia Pacific Arbitration Group. The three following topics will be discussed:

- The Rise of Asia Pacific: trends and developments - Tracking the landscape for international commercial and investment arbitration across the Asia Pacific region
- Innovation and change: going beyond boundaries - Novel arbitration practices specifically catered for disputes, with an Asian Pacific element
- What remains to be done: gazing into the future - Role of arbitration counsel, arbitrators, international organizations, arbitral institutions and judiciary in effecting changes in the practice of international arbitration

**You can register here: https://www.ibanet.org/Conferences/conf1024.aspx**

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**15-16 August 2019 –** Taipei International Conference on Arbitration and Mediation (Taipei)

Chinese Arbitration Association, Taipei
CAA Mediation Center

The 2019 Taipei International Conference on Arbitration and Mediation will address the following topic: A New Wave of Reflections and Reforms in International Arbitration and Mediation. It will be divided into 5 sessions:

- Session I: Reform Initiatives in International Commercial Arbitration
- Session II: New Development of Evidentiary Rules in International Commercial Arbitration
- Session III: The Implications of the Singapore Mediation Convention
- Session IV: Reforms of the ICSID Rules

- Session V: Some Specific Issues of International Investment Arbitration

**You can register here:** https://www.transnational-dispute-management.com/news/20190815.pdf

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**15-16 August 2019 –** Synergy and Security: The Keys to Sustainable Global Investment (Hong Kong)

The Asian Academy of International Law will convene its 2019 Colloquium under the theme Synergy and Security: The Keys to Sustainable Global Investment. It will discuss specific issues that are of utmost importance and great relevancy to global investment such as international trade and investment, dispute resolution, and cyber security. These issues are beyond doubt some of the most important legal issues, particularly in the light of the anticipated booming development of the Greater Bay Area.

**You can register here:** https://2019colloquium.aail.org

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**15 August 2019 –** Party Appointed Experts in International Arbitration: Asset or Liability (Brisbane)

As with domestic litigation, the use of party appointed experts in international arbitration is widespread. Their use comes at a significant cost and brings the challenge of the maintenance of their independence and their cost-effective deployment in the proceedings. Professor Doug Jones AO, one of Australia's leading independent international commercial and investor-state

arbitrators, will discuss developing international best practice regarding case management techniques designed to maximize the value of the parties and tribunals of party appointed

techniques designed to maximize the value of the parties and tribunals of party appointed experts.

**You can register here:** https://www.ciarb.net.au/?post_type=espresso_event&p=9839

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**22 August 2019 –** London Adjudication & Arbitration Conference (London)


The London Adjudication & Arbitration Conference will take place at the Chartered Institute of Arbitrators in London and will address domestic and international use of adjudication, dispute boards and arbitration particularly in relation to construction and engineering disputes. Dispute funding will also be discussed in relation to the three disputes types. This conference will welcome numerous and prominent speakers specialized in the field of international arbitration.

**You can register here:** https://www.eventbrite.com/e/2019-london-adjudication-arbitration-conference-tickets-58526172357

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**25-29 August 2019 –** The Cologne Academies Master Classes of Arbitration and Mediation (Cologne)

These Master Classes propose a highly interactive and practical teaching concept designed for both practitioners to deepen their understanding of arbitration and mediation, and for students to discover these notions. The participants get the opportunity to improve their legal knowledge as well as their advocacy skills.

**You can register here:** http://www.cologne-academies.com/frontend/index.php?target=application

**27 August 2019 –** The 5th Annual GAR Live (Singapore)

The 5th Annual GAR Live of Singapore will be divided into four sessions:

- Session I: Investment Arbitration in Asia - Where Are We and Where Next?
- Session II: The GAR Live Question Time
- Session III: Energy Disputes in Asia
- Session IV: The GAR Live Debate

**You can register here: http://gar.live/singapore2019**

# Latest News in International Arbitration

## Corruption and Money Laundering in International Arbitration: A Toolkit for Arbitrators Released (3 June 2019)

*by Isabela Coleto*

The Competence Centre Arbitration and Crime, part of the Institute on Governance of the University of Basel, published the toolkit *"Corruption and Money Laundering in International Arbitration"*, written by Mark Pieth and Kathrin Betz. The toolkit was discussed by specialists in the fields of white-collar crime and arbitration who participated in the event *"the International Arbitration and Corruption Conference"*, held in Basel, Switzerland, on the 10th and 11th of January 2019.

The Corruption and Money Laundering toolkit aims at helping arbitrators involved in both investment and commercial arbitrations in which the party alleges or the arbitrators suspect that

corruption has influenced the underlying dispute. In this regard, the toolkit answers the

questions: *"which laws are applicable?"*; *"what are the requirements for the proof of corruption in arbitration proceedings?"*; *"what are the legal consequences of corruption in arbitration?"*; and *"how can arbitrators become aware of corruption in the first place?"*.

The underlying dilemma arbitrators face in corruption and money laundering in international arbitration as identified by the authors is the following:

*"[i]t is understood that corruption cannot be condoned. However, parties should not be allowed to use the tribunal to free themselves from their obligations easily. Whilst corruption may render an international contract void, it may not be fair for the payment of a small bribe to invalidate an investment claim for hundreds of millions of dollars. Arbitrators have an obligation to deal with the issue since their awards should be enforceable*." (Arbitrator toolkit at page 5)

The toolkit is composed of 28 pages in total, divided in two chapters. Chapter 1 of the toolkit consists of tools in cases of suspected corruption in arbitration; assessing substantive aspects of corruption; evidence; and legal consequences if corruption is established in arbitration. Chapter 2 sets the same framework for tools in cases of suspected money laundering in arbitration.

The authors asserted that an arbitral award having been rendered by an arbitral tribunal using the toolkit should have a greater chance of enforcement. The toolkit is timely, in light of recent opposing decisions on the topic, such as in *World Duty Free v. Kenya.* In that case, the arbitral tribunal stated that due to bribery, Kenya *"was legally entitled to avoid and did avoid legally the Agreement"*. On the other hand, in *Vantage Deep Water Co. v. Petrobras Am., Inc*, the tribunal decided that a state actor or a state-owned entity should not use their own misconduct as a defense.

For further information please refer to the Basel Institute on Governance's website at https://www.baselgovernance.org/publications/corruption-and-money-laundering-international-arbitration-toolkit-arbitrators. The toolkit is available for download on this same webpage.

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## The Draft for the Arbitration Rules on Business and Human Rights: Second Consultation (21 June 2019)

*By Julien Rodsphon*

On the 21st of June 2019, the Center for International Legal Cooperation (CILC) opened a

second consultation on the draft arbitration rules on business and human rights. These rules aim to *"create an international private judicial dispute resolution avenue available to parties involved in business and human rights issues […], thereby contributing to filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights"*. They are to be launched in The Hague in December 2019.

The intent of the drafters for this second consultation is to collect relevant comments in order to improve their work. The first feature of the current draft is that it already includes commentaries from the drafters as to how the Hague Rules amend the original text of the 2013 UNCITRAL Arbitration Rules and what was the intention behind such amendments. The interest of doing so is twofold. First, it surely gives the reader a better understanding of these new rules and thus it allows him/her to provide better commentaries if he/she wants to. More importantly, as the intent of the drafters is contained within this first draft, it could be used later, after the adoption of the rules, as a tool of interpretation for the various clauses, alike the *"travaux préparatoires"* for the CISG for instance. The commentaries of the drafters also formulate certain specific questions on certain points and bracket-mark some sentences to invite the reader to comment these particular items

Here are some of the new elements the draft of the Hague Rules chose to implement compared to the UNCITRAL Rules:

- Article 5 on representation and assistance presents now a second paragraph that makes a duty for the tribunal to ensure that where a party is *"unrepresented and has limited financial resources and legal knowledge, [it] is given an effective opportunity to present its case in fair and efficient proceedings"*. This new paragraph aims to address the inequalities that can exist in a business and human rights arbitration dispute between for instance a large multinational company and a smaller supplier.

- Article 17(5) on joinder arbitration is followed in this draft of the Hague Rules by an article 17-*bis* which aims to be more complete and has been created to answer the likelihood of multiparty claims. The position of the drafters with this article 17-*bis*(1) seems to be that they are in favor of joinder arbitration when claims share *"significant common legal and factual issues"*. The second and third paragraph address two different situations. In the first situation (paragraph 2), the party that wants to join the arbitration or to be joined to it is either a party or a third-party beneficiary of the underlying legal instrument (the contract) of which the arbitration clause is from. In the second situation (paragraph 3), the party that wants to join

the arbitration or to be joined to it is either a party or a third-party beneficiary of the arbitration clause itself.

- Taking inspiration from the IBA Guidelines, the draft of the Hague Rules contains a Code of Conduct. It addresses for now the definitions of the words *"affiliate"* and *"close family member"*. Further definitions are to be inserted. It also addresses the general and specific duties of arbitrators such as the duty of disclosure or the necessity to be impartial and independent. The Code of Conduct concludes itself on the duty of confidentiality. Including a code of conduct in arbitration rules might be a good idea for, on one hand, a better understanding of specific notions and, on the other hand, a uniformization of the understanding of generic notions, as long as the different codes of conduct are coherent from one another.

For further information please refer to the CILC's website at https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration. The draft for the arbitration rules on business and human rights is available for download on this same webpage.

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## US Supreme Court to Rule on Non-Signatories to the Arbitration Agreement Under the New York Convention (2 July 2019)

*By Isabela Coleto*

The US Supreme Court has agreed to hear an appeal by a French subsidiary of General Electric (GE) over whether the New York Convention permits a non-signatory to an arbitration agreement to compel arbitration under the common-law doctrine of equitable estoppel.

The doctrine of equitable estoppel, among other uses, is claimed when a non-signatory to a contract with an arbitration clause seeks to compel a signatory to arbitrate. In such a case, the doctrine of equitable estoppel holds that when a dispute arises out of a contract containing an arbitration clause, a non-signatory to the contract may in some circumstances compel a signatory to the contract to arbitrate the dispute.

The US Supreme Court's decision came in the aftermath of an Eleventh Circuit decision from August 2018 which denied GE's French subsidiary the right of compelling an ICC arbitration of a dispute arising from a contract of purchase of goods between the Finnish stainless steel group Outokumpu and Fives, an equipment provider company to which GE was a subcontractor. The Eleventh Circuit had then found that the GE unit could not compel arbitration under that agreement because the New York Convention requires that such an agreement should be *"signed by the parties"*, whereas the GE unit was merely a subcontractor of Fives, the actual company that had entered into an agreement with Outokumpu.

The dispute relates to the construction of a steel plant in Calvert, Alabama, which the Outokumpu unit operates. GE Energy provided nine motors for cold rolling mills used in the construction that, according to Outokumpu, *"failed catastrophically"*.

Outukumpu and its insurers filed a lawsuit against GE Energy in 2016 in a state court in Alabama, but the case was removed to the federal courts. In the following year, the US District Court for the Southern District of Alabama granted GE's motion to compel arbitration, finding that there was an *"agreement in writing"* between Outokumpu and GE Energy, as Outokumpu had signed the contracts and GE Energy as subcontractor was not expressly excluded from the arbitration provision.

On appeal, the Eleventh Circuit overturned that decision, finding that private parties cannot bypass the New York Convention's requirement that an arbitration agreement needs to be *"signed by the parties"*.

That ruling has attracted criticism. For instance, in a blog post, US arbitrator Marc Goldstein said that the decision had created new *"uncertainty"* about non-signatories and was at odds with what was decided, or assumed, in the decisions of other federal appeals courts over the last 20 years.

GE Energy pleaded that if all parties to the dispute had been domestic US entities, there would have been no difficulty in compelling arbitration because chapter 1 of the Federal Arbitration Act of the United States, which governs domestic arbitration agreements, incorporates common-law contract doctrines such as equitable estoppel. With that, the company further argued that it should not have been worse off for a foreign corporation.

Outokumpu, on the other side, argued that there was no conflict between the appeals courts on the issue since the courts that have allowed non-signatories to enforce an arbitration agreement

using equitable estoppel did not analyse the language of the New York Convention, rather relying

on their appellate jurisdiction. Nonetheless, they maintained the issue was unimportant, affirming that if third parties such as GE Energy wanted foreign arbitration of their dispute they first had to sign, for their own, the arbitration agreement.

Whether the US Supreme Court will rule that non-signatories can enforce international arbitration agreements remains to be seen. If it does rule in favor of non-signatories, this decision could pave the way for subcontractors, not directly parties to arbitral disputes, to compel arbitration under the New York Convention in the future. This raises the important question of to what extent should consent to international arbitration be assumed or extended. For foreign entities, if the doctrine of equitable estoppel is upheld, this will mean more certainty that they will be able to arbitrate their disputes as a third-party to a contract in the future.

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**EU States Agree to a Renegotiation of the Energy Charter Treaty**
**(17 July 2019)**

*By Isabela Coleto*

The European Commission has now been given a mandate to begin negotiations to modernise the Energy Charter Treaty (ECT). The mandate is aligned with the EU Commission's recent position to reform international investment policies. This position is being promoted though recent signed trade and investment agreements, such as those with Canada, Singapore and Vietnam.

## Recommendations

Among others, the EU Commission's recommendations in amendments to the Treaty include: the inclusion of a right to regulate provision; an exhaustive list of what constitute a breach of fair and equitable treatment; and more clearly defined rules on expropriation, including a clarification on indirect expropriation. The Commission further suggests that the reformed ECT should have stronger provisions on sustainable development, including on climate change and the clean energy transition.

The Commission additionally seeks to update the definition of *"economic activity in the energy sector"* in that, under the ECT, for an investment to be covered, it must be associated with *"economic activity in the energy sector"*. According to the EU, the wording of this term only

affords for economic activity associated with products and materials that are largely fossil fuels-related. The Commission suggests that a new definition should cover new trends in investment, in particular with regard to renewable energy.

With these reforms, the EU is seeking to minimise the number of investor claims over what it calls *"legitimate public policy measures"*. The Commission claims that since its establishment in the 1990s, the ECT provisions have hardly been revised, even though the ECT is today the most litigated investment agreement in the world, with a total of at least 121 investment notified disputes.

The Commission further states that the current rules do not reflect the modern approach that the EU has been giving to investment agreements. As reflected in the EU-Canada Comprehensive Economic and Trade Agreement (CETA), EU-Vietnam Trade and Investment Agreement (2018), and the EU-Singapore Free Trade and Investment Protection Agreement (2019), EU's investment policy aims at attracting international investments while protecting the EU's essential interest: the right of home and host countries to regulate their economies in the public interest.

## Background on the Energy Charter Treaty

The Energy Charter Treaty is an instrument providing a multilateral framework for energy cooperation aimed at promoting energy security through the operation of more open and competitive energy markets, while respecting the principles of sustainable development and sovereignty over energy resources. Currently there are fifity-three signatories and Contracting Parties to the Treaty, including not only the European Union and Euratom, but also countries outside of the EU, such as, among others, Afghanistan, Turkey and Japan.

For the European Union, modernizing the ECT should be one more step towards promoting reforms to the international investment law regime that would ultimately uphold states' possibilities of regulating for the public interest.

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*By Julien Rodsphon & Isabela Coleto*

On the 26th of July 2019, a few members of the CREA Project presented their work and its progress at Studio EJC – Roberti & Associati (Brussels). CREA stands for Conflict Resolution with Equitative Algorithms. It is a project funded by the EU Justice Programme that aims to ease the settlement of cross-border and national civil disputes within the EU's states, by the utilization of algorithms. Due to the various national mandatory rules that differ from a state member to another, the CREA Project is one of the first of its kind within the EU. Its trial version is currently featuring 8 state members of the EU and it has four main objectives:

- To encourage cooperation between the parties that are in dispute in order to satisfy both sides.
- To propose a peaceful way of resolving disputes.
- To improve the efficiency of justice.
- To intensify the access to justice.


As of today, the CREA Project is trying its algorithms on family law and inheritance disputes and therefore, the members of the project are working on what they call *"European Common Ground"* of available rights (the rights a person may dispose). As of today, the CREA Project is trying its algorithms on family law and inheritance disputes and therefore, the members of the project are working on what they call *"European Common Ground"* of available rights. The CREA's objective is indeed *"to establish a 'European Common Ground' of available rights, different from standard legal principles, through creating a software in which the selected harmonized procedures, applicable in all EU states, will not infringe upon or run amok of national regulations."* Finding a

common ground between EU countries on a designated and very specific question of law, like

inheritance, or the separation of goods between spouses after the divorce, would improve the algorithms and improve in general the CREA Project and the service it proposes.

**How does the CREA Project currently work?** It currently relies on the Fair Division Theory. This theory aims to *fairly* divide an object between a defined number of persons. To do so, the project applies a mathematical equation that considers both the preference of the parties of an asset over another (the *"emotional"* value that the parties give to the items that are to be divided), and the market value of such items. As fairness is a subjective concept, it can be defined in many ways. The objective of the Fair Division Theory in the CREA Project is to reach an *envy-free* division, i.e. a division in which each person feels he/she received the best piece, according to his/her own estimation.

The CREA Project currently proposes two different algorithms to divide goods in an inheritance for instance. The first algorithm concerns parties that have not agreed upon a market value of the goods that are to be divided. The second algorithm concerns parties that have agreed upon a market value of the good that are to be divided. In each of these algorithms, the parties have to participate by *rating* how much they want to acquire the goods that are to be divided. The algorithm then finds how the goods should be separated in order to satisfy each party the best it can. **The overall idea behind CREA is to propose algorithms that will lead to a fair resolution of the dispute between the parties, based on the value they are attributing to things.**

The Final Conference is set to present the final results of the project and will be held in Brussels on the 27th of September 2019.

For more information on the CREA Project, please check the website: http://www.crea-project.eu. **You can also register to the CREA Final Conference (Brussels, the 27th of September 2019) at the following address:** https://www.xing.com/events/crea-final-conference-2110910**.**

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# Articles on Investment and AI Arbitration

## The New EU-Mercosur Free Trade Agreement: How Does Investment

# Dispute Settlement Stand?

*By Isabela Coleto, legal intern at Billiet & Co*

After 20 years of negotiations, Mercosur [1] and the European Union (EU) reached a comprehensive trade agreement that will cover a population of 780 million [2] and encompass 25% of the world's GDP [3]. Such an agreement is set to increase trade and investment flows to the State Parties [4]. This article sets out the key elements of the EU-Mercosur Free Trade Agreement (EU-Mercosur FTA) and will identify potential pitfalls for arbitrations arising from foreign direct investment in the Mercosur region.


*Source: The Rio Time*

## I. Executive Summary

The European Union and Mercosur reached on the 28th of June 2019 a comprehensive trade agreement, part of a wider Association Agreement between the two regions, which is set to consolidate a strategic political and economic partnership that aims for opportunities for sustainable growth on both sides.

Both Parties will now perform a legal revision of the agreed text [5] to launch the final version of the Association Agreement, including all its trade aspects. The Commission will then translate it into all official EU languages and submit the Association Agreement to EU Member States and the European Parliament for approval. A similar process will be performed within the Mercosur

bloc. Whilst the EU has taken, on average, 7 months to three years to sign similar trade agreements as this with Mercosur, the average time taken to do so among the Mercosur countries ranges from 2 to 4 years. There is no deadline for the approvals.

To the countries that are members of the Mercosur, the Agreement foresees a period of over a decade for tariffs reduction on products that are sensitive to the competition of the European industry. From the European side, most of the import duty will be zeroed as soon as the treaty enters into force.

The Agreement foresees an elimination of customs duties on 91% of goods that EU companies export to Mercosur, such as cars and car parts, machinery, chemicals, and pharmaceuticals. The Agreement will, additionally, progressively eliminate duties on EU food and drink exports, such as wine, whiskey, and soft drinks. Import duties from Mercosur products will be eliminated in 92% of the goods.

The Provisional Trade Agreement encompasses a dispute settlement chapter establishing a mechanism for the purposes of resolving any disputes between the Parties concerning the interpretation or application of the trade part of the agreement.

In terms of investment, the most recently released version of the FTA has no investment chapter. Therefore, European investors planning to place investments in the Mercosur region should be cautious regarding the differences in investment protection and in investment dispute settlement between European and Latin American practices in order to avoid unwanted surprises in arbitrations arising from their investments.

## II. General Overview

In the words of the European Commission, the EU-Mercosur Agreement on trade is *"a political agreement for an ambitious, balanced and comprehensive trade agreement"*. The new trade framework is set to consolidate a strategic political and economic partnership and create significant opportunities for sustainable growth on both sides while respecting the environment and preserving interests of EU consumers and sensitive economic sectors.

Apart from the elimination of customs duties mentioned in the previous section (which is already a big step for the countries of the Mercosur region, since their economies are mostly

characterized by closed markets with high tariff and non-tariff barriers up to the limit of protectionism conferred by the respective WTO agreements), the agreement foresees easier customs and compliance procedures, facilitation of trade in services and establishment, and access to public contracts in addition to safeguard Small and Medium-Sized Enterprises' interests.

All of the above could mean an acceleration of the economies involved in the agreement, which would certainly lead to an increase in Foreign Direct Investments (FDI). An investor investing in the Mercosur countries should be vigilant for the rules for settling disputes arising from an investment, as these might be different from the ones observed in the previous Free Trade Agreements signed by the EU, namely CETA and the EU-Vietnam Agreement that provide for a specific chapter on the settling of investment disputes.

## III. International Investment Dispute Settlement under scrutiny

The Investor-State Dispute Settlement (ISDS) system, the arbitration mechanism under the International Investment Law (IIL) regime, is constantly under scrutiny, as this is a much-criticized mechanism among countries.

Dissatisfaction towards the ISDS system encompasses a wide range of elements touching upon its own structure. First, states perceive the system as a biased one as classical safeguards regarding judicial independence applicable to courts are not incorporated in arbitral clauses. Second, there is the criticism towards procedural fairness. Investor-state dispute settlement is perceived unfair in that only the state responding to a foreign investor’s claim can access the system, that is to say, it does not allow a third party whose rights or interests are affected by the proceedings to have standing in the process. Third, states argue an unbalance between rights and responsibilities of investors, claiming that the system lacks actionable responsibilities for foreign investors. Finally, concerns have arisen regarding the lack of respect for state sovereignty. In ISDS, as opposed to a standard feature of international law, foreign investors are not required to seek a resolution in a country’s courts before bringing an international claim.

Aiming at solving the aforementioned issues, more recently, the United Nations Commission on International Trade Law (UNCITRAL) has established a Working Group [6] to discuss investor-state dispute settlement reforms. In this regard, EU's proposal of a Multilateral Investment Court

[7], built on its *"mega-regional"* practice [8] differs in a great amount from the Mercosur countries'

trend in reforms as observed in their recent investment agreement: the Mercosur Protocol (2017) [9]. These differences, which will be assessed in the next subsections, might impact investment arbitration under the EU-Mercosur Agreement.

A) EU's proposal: establishing a permanent multilateral investment court

The European Union's proposal for a permanent investment court in substitution to the ISDS system is based on the arguments that this would enhance the predictability and consistency of decisions and ensure their correctness, eliminate the ethical concerns of the current system, and effectively address the problems of excessive costs and duration.

Such a proposal is based on EU's practice under agreements such as the Comprehensive Economic and Trade Agreement (CETA), undertook with Canada in 2017. Under CETA, although in a more restrictive wording, investors are accorded with standards of treatment commonly found under Bilateral Investment Treaties (BITs), such as national treatment (NT), most-favoured-nation treatment (MFN), fair and equitable treatment (FET) and protection against direct and indirect expropriation.

In terms of dispute settlement, under the EU-Mercosur Agreement, investors have the possibility of claiming the aforementioned standards of treatment before a Tribunal composed of five members of a Member State of the European Union, five nationals of Canada and five nationals of third countries. The investors additionally have the possibility of appealing rendered awards to the Appellate Tribunal.

B) Mercosur's Practice: State-State Arbitration

The Mercosur countries, by turn, appear to have a different approach to ISDS reforms, as illustrated by the recent Mercosur Protocol on Investment Cooperation and Facilitation (2017).

Under the Mercosur Protocol, investors are afforded with rights such as non-discrimination (which is similar to MFN and NT treatment), and against direct expropriation. The most claimed right in Investor-State arbitrations, the FET, and protection against indirect expropriation are not afforded under the Protocol. Additionally, investors have obligations regarding domestic laws of the host country and corporate social responsibility. Thus, investors from the Member States of

the Mercosur are less protected than those under CETA, in addition to having more obligations

towards the host country.

In terms of dispute settlement, the Protocol only provides for State-State Dispute Settlement. Thus, an investor whose rights were violated will have to rely on his or her country to a make a claim on his behalf. This limits the possibility of investors to directly make claims in their interest. Additionally, the Mercosur Protocol does not provide investors with grounds of appeal.

Although the Mercosur Protocol only applies to investors from the Member States of the Mercosur, it reflects the practices of Argentina, Brazil, Paraguay and Uruguay towards reforms to the IIL regime and thus, it should be regarded by foreign investors as signalling how dispute settlements arising from foreign direct investments in the region might be in the future.

## IV. Investment Dispute Settlement under the EU-Mercosur Agreement

In contrast with the Comprehensive Economic and Trade Agreement, the released version of the EU-Mercosur Agreement does not come with a chapter on investment nor on investment and investors' protection. Therefore, under the EU-Mercosur Agreement, investors would have to rely on the FTA's state-state dispute settlement mechanism, which, as stated in the previous section, requires governments to represent the interests of their investors in cases of dispute. Furthermore, as the dispute settlement chapter is aimed at solving disputes arising out of trade, it does not include specific investment-protection standards, such as the right to fair and equitable treatment or the right not to be indirectly expropriated without compensation.

In this context it is important to consider the fact that the Bilateral Investment Treaties that have been concluded between Mercosur countries and EU Member States provide for investor-state dispute settlement (in this regard, Argentina has signed BITs with 21 EU Member States [10], Uruguay with 14 [11] and Paraguay with 14 [12]). Yet, most of these agreements were signed more than 10 years ago and thus, they do not reflect the recent trends in investment provisions exposed in section 3 for both Mercosur and EU countries. Consequently, investors should be vigilant for the case of amendments and adoptions of new BITs in the aftermath of the signing of the Agreement.

In the case of investments placed in Brazil, due regard shall be taken to the fact that the country has never ratified a BIT until very recently, when it ratified the Angola-Brazil CFIA (2015).

Additionally, the recent bilateral investment treaties being signed by Brazil are based on the

Brazil Model Cooperation and Facilitation Agreement (Brazil Model CFIA), which is characterized by promotion of investment cooperation and facilitation, rather than investment attraction. Importantly, the Brazil Model CFIA (2015) does not afford investors with FET and with the right of compensation pursuant to indirect expropriation. Furthermore, the agreement only provides for state-state arbitration and only in the event of exhaustion of the dispute prevention mechanism provided under the Model.

If Mercosur countries are to follow the trend established under the Mercosur Protocol (2017) in future international investment agreements with EU countries, foreign investors are not to be afforded important standards of treatment and might not even have the right to recourse themselves to arbitration in the case an investment dispute arises. Thus, until an investment chapter or an investment agreement between the two blocs is not released, the advice for investors is to be cautious before placing their investment in Mercosur countries.

## V. Conclusion

The EU-Mercosur Free Trade Agreement is set to be an Agreement that will boost the economies of all members to such an agreement. Thus, foreign direct investment will likely be promoted and, in this case, investors from the European Union should bear in mind the trends in investment protection (i.e. the suppression of FET clauses and of provisions for compensation for indirect expropriation), and in investment arbitration (State-State Arbitration) being undertaken in the Mercosur region before placing their investment there. **To EU investors wishing to place investments in the Mercosur region, we recommend to contact the Billiet & Co legal team of experts for assistance at:** https://www.billiet-co.be.

## REFERENCES

[1] The Southern Common Market (MERCOSUR) is an economic and political bloc composed by Argentina, Brazil, Paraguay, and Uruguay.

[2] https://ec.europa.eu/commission/presscorner/detail/en/ip_19_3396, last accessed 10/07/2019.

[3] https://www.reuters.com/article/us-eu-trade-mercosur/eu-mercosur-strike-trade-pact-defying-

protectionist-wave-idUSKCN1TT2KD, last accessed 10/07/2019.

[4] For instance, Brazil is expecting the agreement to add $130 bi to its GDP in ten years. http://agenciabrasil.ebc.com.br/en/economia/noticia/2019-07/mercosur- eu-deal-may-boost-brazil-gdp-130-bi-ten-years, last accessed 10/07/2019.

[5] EU-Mercosur, Agreement in principle. http://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157964.pdf, last accessed 10/07/0219.

[6] UNCITRAL, Working Group III. http://www.uncitral.org/uncitral/en/commission/working_groups/3Investor_State.html, last accessed 11/07/2019.

[7] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1972, last accessed 11/07/2019.

[8] A Permanent Investment Court was established in EU's trade treaties with Canada (CETA) and Vietnam (EU-Vietnam Investment Protection Agreement) and it was proposed under the now installed negotiations for the EU-USA Trade and Investment Agreement (TTIP).

[9] The Mercosur Protocol on Investment Cooperation and Facilitation (2017). http://www.mre.gov.py/tratados/public_web/DetallesTratado.aspx?id=6E8bE7_i%2FWyKPb1VlfV2uLw%3D%3D&em=lc4aLYHVB0dF+kNrtEvsmZ96BovjLlz0mcrZruYPcn8%3D, last accessed 11/07/2019.

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# From NAFTA to USMCA: How could the Elimination of the ISDS Mechanism Impact Canada?

*By Julien Faucheux, legal intern at Billiet & Co*

## I. Exclusive Summary

On 19 June 2019, Mexico became the first country to pass the United States-Mexico-Canada Agreement (USMCA) as a replacement to the existing North American Free Trade Agreement (NAFTA). While most of the attention has been devoted to changes to labor provisions and trade barriers in the dairy market, an overlooked aspect has been the elimination of the Investor-State Dispute Settlement (ISDS) mechanism between the US and Canada, and Mexico and Canada. This article will elaborate on how the elimination of ISDS could impact Canada's policy making and the inflow of Foreign Direct Investment (FDI), from other countries of NAFTA to Canada.

## II. General Overview of Chapter 11 of NAFTA and the Recent Changes in the USMCA

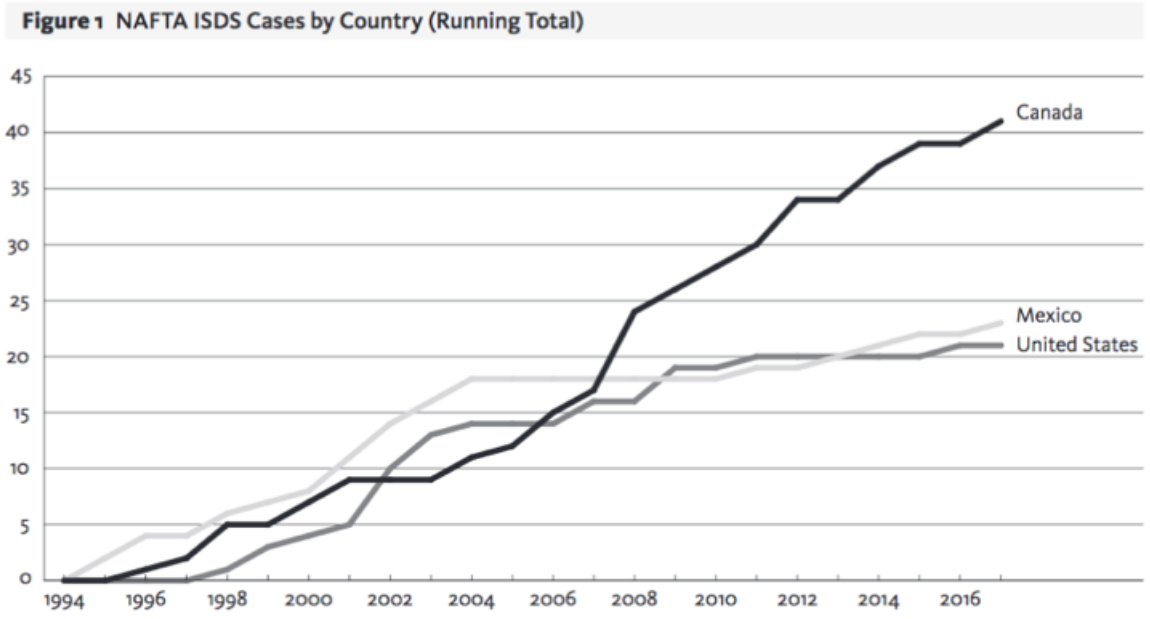
Under Chapter 11 of NAFTA, investment disputes between investors and states are to be settled in front of an international arbitral tribunal through the ISDS mechanism, which allows foreign investors to sue the host nations of their investment for alleged discriminatory practices. Now, under Chapter 14 of the USMCA, Article 14.2(4), *"an investor may only submit a claim to arbitration under this Chapter as provided under Annex 14-C (Legacy Investment Claims and Pending Claims), Annex 14-D (Mexico-United States Investment Disputes), or Annex 14-E (Mexico-United States Investment Disputes Related to Covered Government Contracts)"*. In other words, an investor can no longer submit a claim to arbitration against Canada. Instead, the investor will have to bring his/her claim before Canadian national courts.

The only exception to this new provision that excludes Canada from arbitration is contained within the Annex 14-C which concerns *"legacy investment claims and pending claims"*. According to Annex 14-C, Canada's consent to ISDS for legacy investment claims is still valid until three years after the date of termination of NAFTA (which has not been set as of today) [1].

## III. History of Dispute Settlements Between Foreign Investors and the Canadian

**Government under NAFTA Chapter 11**

Canada has been a frequent target of lawsuits brought by foreign investors before NAFTA's ISDS tribunals. According to a report done by the Canadian Centre for Policy Alternative, roughly 48% of the 85 known NAFTA claims (as of January the 1st 2018) have been filed by foreign investors against the Canadian government [2]. The Canadian government has been targeted in 43 ISDS cases compared to Mexico (23) and the USA (21) [3]. Canada has not only received the most investor-state claims but has also lost the most cases to foreign investors. Out of the concluded cases which resulted in either an award by the tribunal or in a negotiated settlement, Canada has won 9 cases and lost 8. Canada's record with concluded ISDS lawsuits stands in contrast with the USA which has won 11 cases and lost 0, and with Mexico which has won 7 and lost 5 concluded cases [4]. These investor-state disputes have cost the Canadian government nearly $314 million which includes $219 million toward settlements to investors and 95$ million for legal defense costs [5]. These are only the direct costs and do not include additional costs of non-legal government staff who vets government regulations/claims or interest payments.




It is not completely clear why Canada has a worse track record than other NAFTA countries when it comes to investor-state disputes. A possible explanation could be that Canada has more economic regulations than other NAFTA countries which makes the government prone to lawsuits from foreign investors. This is especially true for environmental regulations as energy and environmental policies are challenged the most by foreign investors in ISDS. In fact, they make up roughly 77% of ISDS cases involving the Canadian Government.

## IV. Impact on Canada's Domestic Sovereignty

Eliminating the ISDS mechanism could enhance the possibility for Canada to implement their policies. Much of the frustration with the ISDS mechanism stems from the belief that Chapter 11 has become a way for foreign companies and investors to successfully challenge government policies that are unfavorable to their business. Although NAFTA investor-state disputes cannot reverse government policies, it may award monetary damages for the investor under Chapter 11, article 1135 of NAFTA. For example, in 1997, the US chemical company *Ethyl* used the ISDS mechanism to challenge a Canadian ban on the import of methylcyclopentadienyl manganese tricarbonyl (MMT). Amongst other concerns, the Canadian Parliament was worried about public health risks. Despite these concerns, under the UNCITRAL arbitration rules and the terms and agreements of NAFTA, a NAFTA ISDS tribunal found in its award that the ban on the import of MMT violated NAFTA national treatment provision contained in article 1102 which resulted in *Ethyl* receiving $19.3 million from the Canadian government. Another example includes *Bilcon v. Canada*, where *Bilcon*, a US company, wanted to build a marine terminal in an environmentally sensitive region of Nova Scotia which prompted a federal environmental panel to recommend against the project. The ISDS tribunal ruled that the recommendation violated NAFTA's Minimum Standard of Treatment provision (article 1105) and awarded *Bilcon* $7 million.

The threat investors constituted for states before ISDS tribunals has led many experts to believe that the mechanism creates a *"chilling effect"* whereby governments won't act in the public's best interest due to the fear of investors' retaliation. It happens often that governments are not willing to enact certain policies or regulations because they fear these policies or regulations will create a lawsuit before an ISDS tribunal that would result in fines to pay and a negative image towards other future possible investors. The earliest and clearest example of this was in the mid-1990s, when a proposed regulation by the Canadian Parliament to require plain packaging cigarettes was never enacted due to threats from the tobacco industry to bring claims before an ISDS tribunal [6].

The ISDS mechanism has also been criticized for allowing too much lineage to corporations or investors wishing to file a lawsuit. Much of this criticism stems from the fact that many provisions and definitions in the NAFTA agreement are broad, which allows NAFTA ISDS tribunals to loosely interpret them, providing more protection to foreign investors. For example, under article 1139 of NAFTA, the term *"investment"* has been broadly defined to include debt and equity security, certain types of loans, interest on enterprises, real estate or property, and certain claims to money. Many of the obligation from host states listed in Part A of Chapter 11 have also been

criticized for being too loosely defined. One of the most controversial provisions is the Fair and

Equitable Treatment (FET) standard contained in article 1105. Article 1105 has been the obligation most frequently invoked by investors in NAFTA investor-state disputes (90% of them) [7].

Although article 1105 says that FET is *"in accordance with international law"*, many tribunals have expanded the scope of the FET provision to offer more protections to foreign investors [8]. For example, in *Merrill & Ring v. Canada*, the arbitral tribunal chose to adopt a lower threshold whereby the FET standard *"protects against all such acts or behavior that might infringe a sense of fairness, equity and reasonableness"* [9]. Two reasons could explain why NAFTA tribunals have been able to expand the interpretation of the FET provision. First, NAFTA tribunals are not required to follow precedent from previous NAFTA investor-state disputes. Second, there is not a strong mechanism that ensures that the FET provision is bound or restricted by international customary precedent.

## V. Impact on Future Foreign Direct Investment to Canada

One of the purposes for the creation of the ISDS mechanism was to ensure that foreign investors would be protected from possible volatile or unstable politics of the host state. Therefore, with the implementation of the ISDS mechanism, FDI would increase as there would be less uncertainty in terms of the administration of justice for foreign investors. With the elimination of the ISDS mechanism for Canada, one of the questions that arises is as follows: will FDI from other NAFTA countries to Canada decrease? The answer seems to be negative.

Indeed, FDI into Canada from Mexico and the US has increased substantially since the implementation of NAFTA, but it is difficult to determine whether ISDS were a significant factor in increasing FDI. However, empirical research shows that ISDS, in general, play a minor if not absent role on FDI [10]. For example, some of the largest cross border investments like between US and China, do not have a single treaty involving ISDS. Brazil also does not have any investment treaties with ISDS provisions with other countries even though it is one of the largest recipients of FDI. Other countries like India, Indonesia, and South Africa have made efforts to eliminate the ISDS mechanism from their International Investment Agreements which thus far, has not had any substantial effects on their economy. It is also worth noting that the ISDS mechanism is largely encouraged to developing countries where their economy or rule of law is more volatile. All of the countries of NAFTA to a certain extent have well-developed economies and democracies making the ISDS mechanism less necessary.

To sum it up, it can be presumed that the elimination of ISDS will not impact FDI into Canada from the US and Mexico. That will depend on more important factors related to Canada's economic environment.

## Conclusion

Only time will tell whether the change from NAFTA to USMCA will benefit Canada when it comes to investor-state disputes and whether FDI from NAFTA countries to Canada will decrease. However, by analyzing existing information it can be presumed that the elimination of the ISDS mechanism could provide the Canadian government with more political sovereignty and will not affect FDI into Canada from other NAFTA states. If this turns out to be true, it is possible that the elimination of ISDS from investment treaties will become more and more common for states. As a consequence thereof, investors might want to consider the fact that recourses may need to be sought before domestic courts. If investors wish to avoid public litigation, they should anticipate and include IDR clauses within their contracts. **For more information and guidance in this regard, please contact the Billiet & Co legal team of experts for assistance at:** https://www.billiet-co.be.

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[2] *Canada's Track Record Under NAFTA Chapter 11*, Scott Sinclair, North American Investor-State Disputes to January 2018, Canadian Centre for Policy Alternatives, p. 3.

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## Blockchain Technology & AI Arbitration: What May the Future Hold?

*By Julien Rodsphon, legal intern at Billiet & Co*

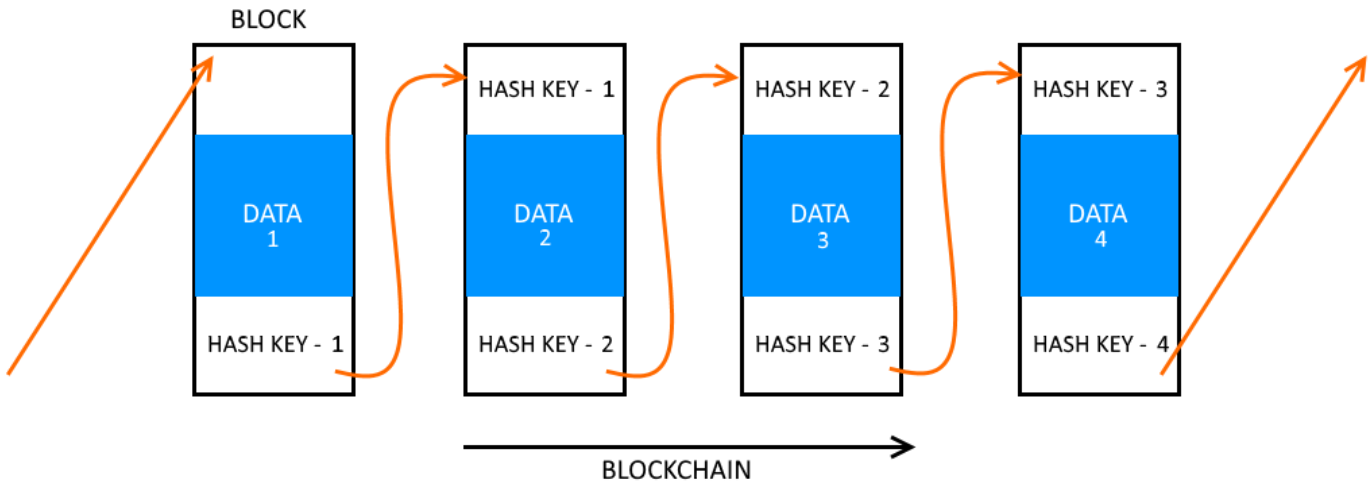
This article attempts to determine the possible future opportunities for arbitration when it comes to blockchain technology and smart contracts. It will be divided into three parts and a conclusion. In the first part the definitions of blockchain technology, smart contracts, and AI arbitration will be addressed and it will be explained how these three notions can be linked together in theory. The second part will present pilot projects on AI that serve the purpose of justice as well as their pitfalls. Eventually, the third part will address the opportunities that arise in the context of AI arbitration and blockchain technology.

## I. Defining and Interlinking Blockchain Technology, Smart Contracts, and AI Arbitration [1]

A) Blockchain Technology

A blockchain is a chain of blocks that contains information. It can be pictured as a huge accounting book where the records (the blocks) are interlinked and encrypted to protect the security and privacy of what is in the blocks. It is, in other words, a distributed and secured database, open to anyone (in the case of a public blockchain), and that can contain all types of transaction, not only economical ones.

To make it simple, each block contains three elements: **the data**, which depends on the type of block (for a transfer of bitcoins for instance it will be the sender, the receiver, and the number of bitcoins), **the hash**, which is a unique fingerprint-like that identifies the block and its content, and **the hash of the previous block** in order to create the chain.




*Source: techpiration.com*

The interest of a blockchain is twofold. First, the content of each block is validated by the users of the blockchain. To sabotage a blockchain, one would need to have control over 51% of the users of that blockchain, which is not possible. Second, once the content of a block (a transaction for instance) has been validated by the community of users, it cannot be changed anymore and will be forever part of the blockchain as long as the chain exists. This makes a blockchain not only an indestructible ledger of information of all kind but also a very useful tool of traceability as anyone can access all the blocks in the chain.

B) Smart Contracts and AI Arbitration

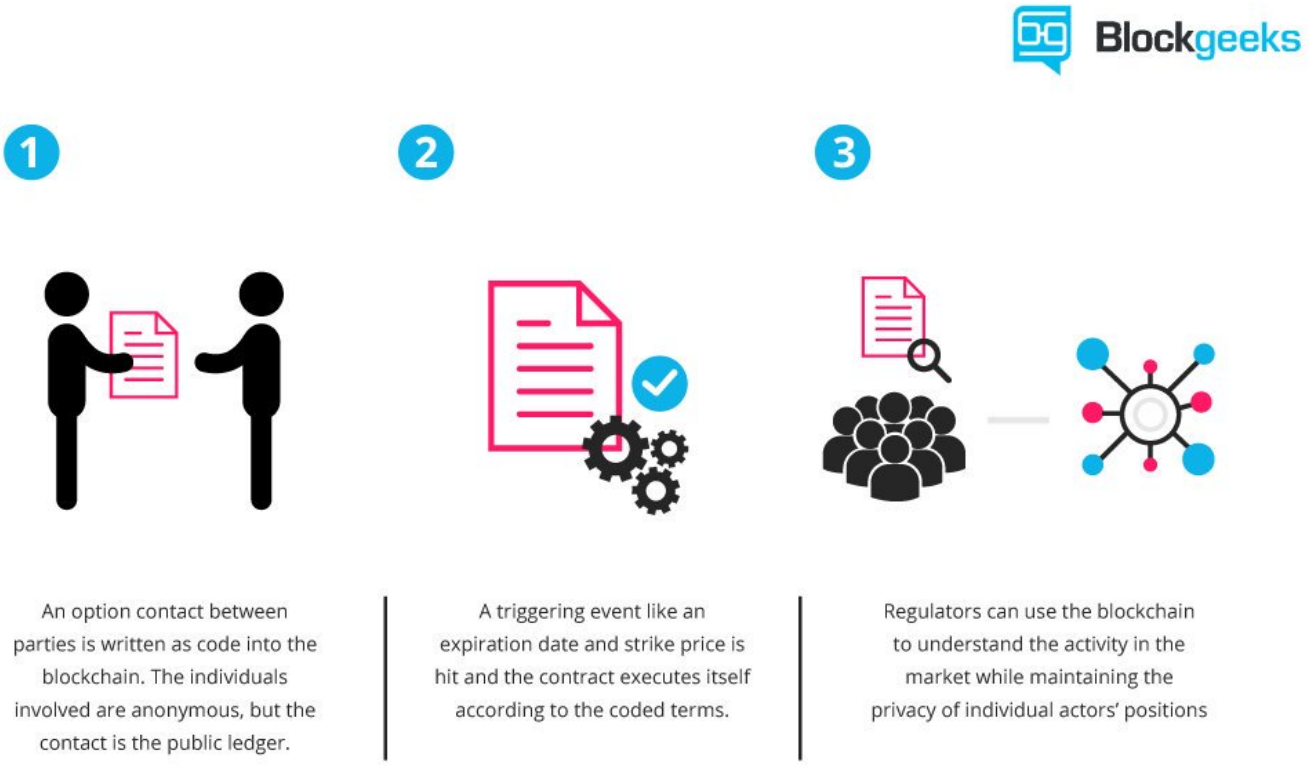
A smart contract is a self-executing set of electronic instructions written into lines of code. This

permits a computer to read the contract and to execute it if the conditions for the execution are

met. It is based on an *"if – then"* logic. For instance, a smart contract concerning the lease of an apartment could be divided into two phases. First, the lessee would have to pay the first month of rent through the smart contract. That would be the *"if"*. Then, once the payment has been made, the smart contract would give to the lessee the code of the locker situated next to the door of the rented apartment that contains the keys. That would be the *"then"*.

Smart contracts have already been used for decades [2], but the concept reached a whole new level with the blockchain technology. As explained before, a blockchain constitutes a secured and accurate platform of exchange of data, indestructible and always traceable. Such context is optimal to exploit smart contracts in their full potential. Indeed, when for instance two persons sign a smart contract, they can then insert it inside a block of a blockchain. The smart contract will then be validated by the users of the blockchains and once it is, it won't be possible to modify it anymore. This process presents advantages of transparency, efficiency and rapidity, amongst others. It also prevents attempts from one of the parties to rewrite the contract afterwards.

This is an illustration of how a smart contract may function within a blockchain (Source: blockchainglobal.be).




The interest of the present article is to discuss the utilization of an AI as an arbitrator, in order to settle a dispute that would arise out of a smart contract inserted in a blockchain. AI stands for

artificial intelligence and in the case of arbitration, it could be constituted of an algorithm within the smart contract that would resolve disputes by founding its reasoning on similar situations that happened before in other blockchains, for instance, since all information in a public blockchain is available for the users. The object of the second part of this article is to analyze pilot projects of AI intervening in the course of rendering justice in order to see how such AIs could be used for arbitration in smart contracts contained within a blockchain [3].

## II. Overview of Pilot Projects and Detected Pitfalls

In this part, the author will focus on AIs that already exist and that could be used in the course of arbitration. The first AI worth-mentioning is called Kira. As described by its creators, *"Kira is a powerful machine learning software that identifies, extracts, and analyzes text in your contracts and other documents"* [4]. In other words, Kira is an AI that can read a contract and underline the important terms, therefore enhancing one's visibility into his/her contract. Kira can operate the due diligence process in minutes and aims in the end to reduce the time lawyers spend on reading a contract [5]. Thus, Kira is not a tool that can give a decision over a dispute. However, it fulfills the first step of rendering a decision: reading and understanding the contract.

The second AI this article will address is the ROSS Intelligence [6]. As described by its creators, *"ROSS has been built from the ground up to deliver the most complete collections of relevant law in response to your natural language research queries"*. ROSS is in other words a research platform for laws and jurisprudences like Westlaw or LexisNexis but its creators revendicate that ROSS is way easier to use and way more intuitive. Where Kira is a tool that allows a quicker reading of contracts, ROSS allows a quicker finding of relevant laws, cases, and responses for a given issue. ROSS is indeed able to answer legal questions within a day and it provides with its answer a few paragraphs explaining it [7]. Again, as Kira, ROSS is not a tool that can settle a dispute. However, it presents the advantage of explaining its reasoning when giving an answer.

To a similar extent as ROSS, an AI has been created to predict future decisions of the Supreme Court of the United States in given cases [8]. Founding its reasoning on the analysis of previous cases, the creators of this AI argue in their conclusion that their model *"achieves 70,2% accuracy at the case outcome level and 71,9% at the justice vote level"*. Although there is no doctrine of precedent in arbitration like there is in the Common Law Tradition, such an AI could be used for the purpose of arbitration. For instance, after hearing the parties and before starting to draft the

awards, arbitrators could use this AI to analyze previous arbitral and judicial decisions and see

how the AI predicts the outcome of the current arbitration. Arbitrators would then have an idea as to the direction their award should take, as long as they trust the AI and the jurisprudences/previous awards relied on.

All these AIs present a major disadvantage: they cannot recreate the human perspective that exists in every case. For instance, even though Kira can read the clauses of a contract, it cannot determine the subjective intent of the parties behind the clauses. To a similar extent, ROSS cannot take into account the human factor when drafting the answer to a legal issue. Concerning the third AI mentioned, as it cannot consider the sensibility of each judge of the Supreme Court, it cannot determine with certainty an outcome.

## III. Identification of opportunities

There actually exists an AI arbitration: the Arbitration Engine, or *"[the] first online collective decision-making application based on the Influents Algorithm [which] is a proof-of-concept pilot, designed for a two-party conflict with an arbitrator/mediator"* [9]. However, this tool is actually more than seven years old and is therefore not really relevant for the purpose of the present article. Yet, it can give us insight as to how AI arbitration could be in the future. In the Arbitration Engine, visitors have two possibilities, the first one being to experiment with a pre-made scenario that is a simulation of a compulsory management-union mediation, as contemplated by section 55 of the British Columbia Labor Relations Code. The second possibility is to set up a whole new conflict scenario. In both cases, the visitor will explore the algorithm by taking on the role of the three parties (the union, the employer, and the mediator/arbitrator). **A more modern AI arbitration could have a similar structure where each party would enter their data into the system and then the AI would analyze these data little by little by asking questions to the parties to determine an outcome in the end.**

As to the 3 AIs previously mentioned, one possibility would be to merge them into one with first, Kira analyzing the contract and the potential issues raised by the parties when a dispute starts. Then ROSS could rely on previous jurisprudences/arbitral awards, but also on future decisions that would be predicted by the last AI, to draw a developed answer as to the legal issues detected by Kira. This answer could take the form of an award binding the parties as long as they agree to it. This whole process of AI arbitration could be included into a smart contract contained in a blockchain. All the users, but particularly the parties to the smart contract would have access to the conduct of the arbitration and could intervene by bringing details or by answering questions

spontaneously asked by the AI. Such solution would facilitate the access to an arbitral justice as

there won't be anymore need to constitute an arbitral tribunal for instance. Amongst other things, this would save time and costs. **An alternative solution, in order to limit the absolute objectivity of AIs, would be to subject the *"award"* rendered by the AI to a final check done by a human arbitrator. This could still be dematerialized as the smart contract inserted in the blockchain could already contain the name of the human arbitrator that will have to do the final check of the *"award"* given by the AI.**

However, as of today and to the knowledge of the author, there is no AI system fully used as an arbitrator and that can render binding decision to settle a dispute. It is therefore relevant, after the future possibilities previously mentioned, to discuss what are the current opportunities of AIs in arbitration and how it could be compatible with a smart contract within a blockchain.

First of all, AIs could make for good experts. According to the WIPO, *"[e]xpert determination is a procedure in which a dispute or a difference between the parties is submitted, by agreement of the parties, to one or more experts who decide on the matter referred to them. The determination is binding, unless the parties agreed otherwise"*. In that scenario, AIs could be used as experts to answer technical questions that, although they do not need human subjectivity to be answered, might require the analysis of numerous data (for instance determining the market value of the shares of a company at a given time). Using AIs as experts in arbitration could improve the speed of the proceedings, the preciseness of the results and prevent any discussion post expert determination as to the partiality of the expert, since it will be a robot.

Secondly, just like Kira which is an AI that analyses contracts, AIs could also be used to assess evidence, which consist in arbitration of determining the relevance and materiality of documents. AIs could present a summary of the pieces of evidence produced by the parties and in the context of e-discovery or the analysis of important quantity of documents, AIs could be more efficient than humans and less prone to mistakes. This would allow arbitrators and lawyers to spend their time on other issues, rather than looking for something into a pile of documents, thus saving time and costs in the overall arbitration process. However, where AIs could assess the relevance and materiality of evidence, determining the admissibility of evidence should be left over to the arbitrators. Indeed, the issue of the admissibility of evidence involves subjective consideration, especially in the context of illegally obtained evidence. In that case, human arbitrators should be the ones that decide whether or not document is admissible having regards to the particular circumstances of the case.

As explained in another article about AI and arbitration [10], AIs could ensure the equality of the parties in the arbitral proceedings by keeping a precise count of how much each party speaks,

how many pages parties use in their submission and so on. In that context, AIs would be used to help arbitrators making sure the proceedings are equal between the parties and the role of the arbitrator would be to bring some subjectivity and flexibility into all that, as flexibility is also a feature of arbitration that is important for the parties.

In other words, AIs currently present the main opportunity to reduce costs and improve speed by assisting arbitrators and lawyers. On the other hand, their main asset also constitutes their main flaw: their lack of subjectivity that implies necessarily a better objectivity. All these possible utilizations of AI in arbitration could be inserted within a smart contract contained in a blockchain in order to always reduce the human intervention in something already dematerialized.

## Conclusion

AIs today present opportunities not to settle disputes on their own already but to restore somehow what were the reasons parties used to choose arbitration: speed and minor costs if compared to litigation. AIs could thus be used as assistant for arbitrators and lawyers for the tedious tasks that tend to make proceedings last longer, such as the ones aforementioned. Smart contracts and blockchain technology make already an efficient and promising association aiming to dematerialize legal relationships and ease their creation. Adding an AI arbitration mechanism to a smart contract would follow the philosophy of smart contracts and blockchain technology as it would dematerialize and ease the settlement of disputes. Such a solution should be viable in the future but right now, AIs are not efficient enough to act as arbitrators and there are not enough rules to legally deal with them.

A solution could be to propose an international convention like the New York Convention but for AI arbitration. In such an AI arbitration convention, there would be rules and frames as to which situations can be arbitrable by a machine. Arbitral institutions could propose adapted rules for AI arbitration, from how to put it into place to the enforcement of an AI award. The author of this article is of the view that the use of AI is inevitable in the future and it will change how lawyers and arbitrators think, work, and apprehend a case. The international arbitration community should embrace such considerations in order to participate efficiently in the creation of always better AIs that will help arbitrators and lawyers and maybe one day completely settle disputes.

ICT pioneers who wish to develop or use AI arbitration should make sure that their technical evolution meet all existing legal requirements related to valid arbitration processes and outcomes. **For a view on insuring legal compliance with AI arbitration, please contact the**

**Billiet & Co legal team of experts for assistance at:** https://www.billiet-co.be.

## REFERENCE


[1] To write this part, the author of this article relied on different sources without specifically quoting them such as http://blockchain-technology.cf, https://blockchainfrance.net, https://www.blockchainexpert.uk, or the YouTube Channel "Simply Explained – Savjee".

[2] See *Smart Contracts Were Around Long Before Cryptocurrency*, Allan I. Mendelowitz and Willi Brammertz, americanbanker.com, 17 November 2016.

[3] AI arbitration has to be distinguished from ODR (online dispute resolution) as AI could happen online but not every arbitration that happens online is AI arbitration. For an insight on ODR projects, see *The Governance of Blockchain Dispute Resolution*, Darcy W. E. Allen, Aaron M. Lane and Marta Poblet, pp. 8-13.

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arbitration-adr.org

The Association for International Arbitration (AIA) is a non-profit organization open to all these interested in Alternative Dispute Resolution (ADR), irrespectively of nationality and level of experience. Since its creation in 2001, the AIA strives to promote ADR and to bring together the global community in this field. The AIA also regularly organizes conferences and seminars on the wide range of ADR issues in Belgium. The AIA also proposes tailored trainings on ADR topics. For more information about the AIA, please check our website.

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