# “Investment Arbitration Is Now On Broadway, And The Critics Are Not Being Kind”

**Kluwer Arbitration Blog**
January 23, 2015

Vernon Cassin (Baker Botts LLP)

*Please refer to this post as: Vernon Cassin, ‘“Investment Arbitration Is Now On Broadway, And The Critics Are Not Being Kind”’, Kluwer Arbitration Blog, January 23 2015, http://arbitrationblog.kluwerarbitration.com/2015/01/23/investment-arbitration-is-now-on-broadway-and-the-critics-are-not-being-kind/*

---

That was the assessment of Constantine Partasides QC, founding partner of Three Crowns, during his keynote address to the joint ITA-IEL conference. According to Mr. Partasides, there is a developing consensus among states that it is acceptable, and even virtuous, to challenge investor-state arbitration as an infringement on the rights of the public to pass laws through their democratically-elected representatives. Thus it has become *de rigueur* for a sovereign to challenge and obstruct the arbitral process, through challenges to the appointed arbitrators, jurisdictional objections, and post-award challenges to awards and their enforcement. Resistance to investor-state arbitration is increasing even in the developed world, with voices in France, Germany and England now questioning whether to include an arbitration provision in the EU-US Transatlantic Trade and Investment Partnership (“TTIP”).

Adopting the Churchillian approach to prognostication—that “it is much better to prophesy after the event has already taken place”— Mr. Partasides predicted that “the ever-increasing precariousness of sovereign respondent participation in investor-state arbitration will only get worse.”

Mr. Partasides drew a sharp contrast between these developments and early

arbitrations like the 1977 dispute of *Aminoil v. the Government of Kuwait*. There, despite an arbitration clause in the concession agreement that required appointment of arbitrators by the British Political Resident—a position that no longer existed—Kuwait did not seek to obstruct the arbitration and instead worked with Aminoil to negotiate a fresh arbitration agreement and appoint a tribunal. In the proceeding that followed, both parties participated in good faith to maximize the efficiency of the process and the quality of its outcome. For its part, the tribunal gave early directions to the parties as to the precise issues on which it wanted to hear, and even as to the order in which they should address those points, helping the parties avoid a scorched earth litigation on every possible issue and argument. When the tribunal issued its award, Kuwait paid it promptly—in the words of Professor Martin Hunter, by a "check in the post." Disputes like *Aminoil* promised a future of investor-state arbitration in which parties and tribunals would tailor the proceedings to the dispute and achieve a fair, and reasonably-costed, approach.

How can investor-state arbitration fulfill its original promise? Mr. Partasides made three proposals. First, greater transparency in investor-state arbitration will help blunt the criticism that confidential arbitration is not well-suited for the resolution of public disputes. Initiatives like the recent UNCITRAL Rules on Transparency in Treaty-based Investment Arbitration and the brand new UN Convention on Transparency in Treaty-based Investment Arbitration are making great strides towards this goal.

Second, business must do more to defend the investor-state dispute settlement process to the public. Criticism continues to mount that investor-state dispute settlement has become a tool of multinational corporations that use arbitration panels to circumvent, or even alter, national laws at their whim. In Germany, a public consensus appears to have formed that investor-state dispute settlement should be dropped entirely from the TTIP. And the English House of Lords' European Union Committee referred in a May 2014 report to a "growing consensus of concern" about the inclusion of investor-state dispute settlement because of its propensity to interfere with the process of appropriate law-making. A recent editorial in the Economist is emblematic of this growing suspicion of investment arbitration, using phrases such as "foreign firms," "special rights," secretive tribunals," and "highly paid corporate lawyers." Arbitration practitioners—while staunch defenders of the process—are always susceptible to claims of self-interest.

Business needs to take a leadership role in the battle over the existence of investor-state dispute resolution through dialogue with governments and opinion makers.

Finally, arbitration practitioners must work harder to make the arbitral process worthy of such defense. In particular, Mr. Partasides recommended that arbitrators conduct a “Substantive Case Review Conference” after the first substantive exchange of briefs. During that conference, the tribunal could hear argument from the parties, provide guidance on the issues truly in dispute, and then set a procedural direction for the remainder of the arbitration, including setting contours for any document production, and the necessary focus of further written and oral submissions. Dividing the proceeding into two separate “acts” would allow tribunals to guide the parties to a more efficient resolution of their dispute and help avoid the “scorched earth” approach on every issue currently weighing down the investor-state process.