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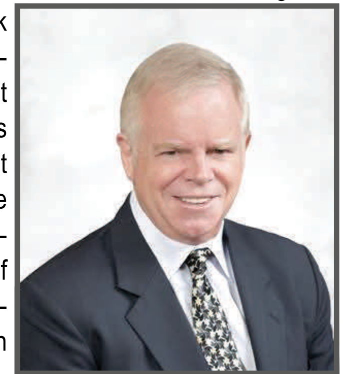
An Interview with Cam Mowatt

Cam ***Mowatt*** *has participated in over 30 investment treaty disputes, including as outside counsel to the Government of Mexico and the Canadian government. He is also a founder and editor of Investor-State Law Guide, a leading research database for investment treaty law. Mr. Mowatt visited robert wray and engaged in a refreshing discussion with Mariano Gomezperalta on practical issues relating to investment arbitration. The comments and views expressed are those of Mr. Mowatt and do not necessarily reflect the views of his clients or professional colleagues. His observations are the result of his cumulative experience and should not be attributed to the circumstances of any particular case.*

Mariano Gomezperalta (MGC): What are some of the principal reasons that investment disputes arise and what should sovereigns try to do to avoid them?

Cam Mowatt (CM): I was thinking about this the other day because, ironically, at the moment, the only NAFTA cases that are out there—there's one against Mexico and I think eight pending or existing cases against Canada and if there's one, maybe, against the US, what's the reason? So the Canadian ones, many of them are about environmental regulation



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Demystifying the PRI/TCI Marketplace

Investors accustomed to the property/casualty insurance market are likely to find the political risk and trade credit insurance markets a little strange. In this article, ***Ed Coppola*** *explains some these peculiarities and their origins. He is an experienced veteran of OPIC, MIGA, and Zurich Insurance Company, where he was Head of Special Lines, and is presently a consultant to the insurance industry.*

Many insurance and reinsurance companies have a separate unit to manage their specialty (or "special") lines, including products such as directors and officers (D&O), errors and omissions (E&O), employment practices liability (EPL), crime, cyber security, product recall, kidnap & ransom, surety, and other less traditional lines of insurance. There is a reason why these lines are considered "special": unlike traditional lines of insurance like auto and certain kinds of property insurance, they are generally high severity, low frequency, long-tail products. Among these specialty lines, single risk, structured trade credit insurance (TCI) and political risk insurance (PRI) are particularly unique and challenging to write profitably.

One of the most significant factors that differentiate TCI and PRI from some other lines of insurance is the risk horizon, or the "tail" to use the insurance jargon. First-party insurance products such as auto and property insurance cover losses that occur at a discrete point in time, typically during the course of a one-year policy period. With these products, the insurer/reinsurer will know relatively soon after the end of the one-year policy period about any covered losses that have occurred. The insurer can readily evaluate the profitability of all the policies issued in that year by comparing the amount of premium earned with the losses and loss expenses associated with those policies. Unlike these short-tail lines of business, PRI and TCI policies typically have multi-year policy periods (in some cases of PRI, as long as 15-20 years), and are non-cancellable unless the insured defaults on the policy's terms and conditions. Even PRI and TCI policies, with tenors closer to three to five years, have a much longer risk period. That longer risk horizon is a challenge to a business that relies heavily on its ability to gather detailed loss information and produce robust models for predicting and pricing the likelihood and severity of a loss within given levels of statistical confidence.

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Demystifying the PRI/TCI Marketplace (*cont'd*)

PRI also differs particularly from property insurance in the unique and variable nature of the events that can trigger an insured loss under the policy. Property policies cover well-known and well-defined events like fires, earthquakes and hurricanes, which have predictable consequences such as damage and loss of income that can usually be adjusted without much difficulty. In contrast, PRI policies cover broadly defined events that can be triggered by a virtually infinite sequence and number of events related to dynamic and complicated economic, political and social forces and the financial impact of such events on the insured can be difficult to predict and evaluate.

PRI also differs particularly from property insurance in the unique and variable nature of the events that can trigger an insured loss under the policy.

More favorably and unlike many other traditional and special lines of insurance, PRI and TCI policies have the potential for substantial recoveries following payment of a claim. Most underwriters of TCI and PRI, as subrogees to their insureds and working in close collaboration with them, place a premium on the potential for recovering claim amounts paid. The nature of the underlying causes of losses in a PRI and TCI policy can provide specific avenues for potential recovery. For example, an insured can assign to the insurer its right to currency that was blocked under a currency inconvertibility claim. The insurer can then seek to convert and remit the blocked funds once the event of currency inconvertibility event has ended. A TCI insurer can pursue the insured's right against the defaulted obligor, assuming the obligor remains a going concern. Experience of some PRI and TCI underwriters following the 2008-2009 credit crisis showed that a proactive recovery strategy can lead to restructuring agreements that result in significant recoveries for the insurer and, in some cases, the insured as well. Recovery potential does not exist for all insured PRI perils (e.g. damage caused by political violence), and the road to recovery for some losses (e.g. expropriation) can be arduous, time consuming and expensive. Nonetheless, the built-in potential for recoveries is critical to the long-term profitability of PRI and TCI.

Another distinguishing feature of PRI is the degree of flexibility underwriters have in manuscripting insurance policies tailored to a specific insured and risk, and the readiness with which the insurer can respond to an insured's request for unique coverage features. This flexibility comes largely from the fact that many special lines, including PRI, are often written on a "surplus lines basis" on non-admitted paper, meaning that the policies are not subject to much of the onerous state regulation and oversight that otherwise requires an insurer to have their policy forms and rating plans pre-approved by each of the states where it transacts business. This allows a PRI insurer to provide bespoke policies to address an insured's specific risk concerns and gives it the flexibility to modify its base forms as needed to address changes and trends in the market—a capability that aligns nicely with the variability of political risk in general, which lends itself to insurance solutions that reflect that variability.

Key to the long-term profitability of any line of insurance is the ability to price the risk adequately. PRI presents a particular challenge in this regard. The general absence of industry-wide, detailed, and actuarially robust loss experience makes pricing a PRI policy more difficult than it is for high frequency, low severity lines of business that can rely on well-documented loss experience and statistically sound pricing models. The same can be said to some extent for TCI, although the availability of historical credit default rates for publicly-traded borrowers gives TCI an edge over non-credit based PRI transactions. Providers of PRI and TCI can look to their own loss experience to establish a more robust technical price that will deliver the company's profitability targets, provided the insurer has a long and deep enough track record and loss experience. Many underwriters of these lines develop structured pricing models that provide a consistent and disciplined approach to pricing risks, while being mindful of the pricing level that the market will bear.

Recovery potential does not exist for all insured PRI perils […] and the road to recovery for some losses (e.g. expropriation) can be arduous, time consuming and expensive. Nonetheless, the built-in potential for recoveries is critical to the long-term profitability of PRI and TCI.

Pricing levels in PRI and TCI markets, like those in traditional and other specialty lines of insurance, reflect the level of competition and associated capacity in the market and loss experience that affects a broad swath of market participants. They may also be affected by an insurer's corporate-wide pricing goals. But generally speaking, rates in the PRI and TCI market do not always follow closely the cyclical rate changes observed in the broader insurance market. Events of the kind covered by property and liability insurance are not highly correlated with the kinds of events that can trigger a loss under PRI, although that is less the case for a TCI policy; pricing of, and risk appetite for, PRI and TCI can be driven as much by factors that are more specific to the risks they insure, such as events in specific countries or regions (e.g. the current confrontation between Russia and Ukraine), or when strong demand for coverage in a specific country or for a specific borrower has exhausted (or

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Demystifying the PRI/TCI Marketplace (*cont'd*)

nearly exhausted) the capacity available in the market, which insurers regard as a pricing opportunity.

Insurers allocate a portion of their capital to specific lines of business to support losses given an expected volume of premium (i.e. the capital intensity ratio). It should be no surprise that PRI and TCI insurers tend to have higher capital intensity ratios than insurers of non-special lines do. This has significant consequences primarily for the pricing of the business, as the greater the amount of capital allocated to a business, the greater the price that is needed to achieve the company's profitability targets.

A key concern for a property insurer is the potential for catastrophic losses that could have a systemic impact on their portfolio, such as Superstorm Sandy and Hurricane Katrina. Insurers use data and sophisticated models that can produce reliable assessments of the likelihood and magnitude of a loss (e.g. probable maximum loss or PML) within a certain degree of statistical confidence and then purchase reinsurance to provide protection against a catastrophic loss. The use of reinsurance to transfer risk and protect against systemic risk can be especially challenging for PRI/TCI insurers to manage because the variability of the types of events that can trigger a covered PRI or TCI loss carries an additional level of complexity. It is a challenge to evaluate the potential for a given PRI/TCI event to metastasize and create ripple effects across the insurer's portfolio and thus materially alter the PML. This so-called contagion risk can be seen in such situations as the 2008-2009 credit crisis and the conflict associated with the spread of the Islamic State and its surrogates in Iraq, Syria and Africa. Therefore, PRI and TCI insurers monitor specific characteristics of their books (e.g. exposure by geographic region) that will inform their views about the potential for contagion risk to have a severe impact on their books. This also explains why both insurers and reinsurers of PRI and TCI must have a global risk perspective and maintain a high degree of geographic coordination within their companies.

There are some challenges ahead that will continue to make the PRI and TCI markets dynamic businesses and underscore the factors that distinguish them from other lines of insurance. The spread of ISIS and other extremist organizations in the Middle East and North Africa has elevated the risk of terrorism and raised concerns about its impact outside of emerging markets where PRI and TCI underwriters have traditionally placed their focus. The evolving threat of nuclear capabilities on the Korean peninsula and in Iran could create significant changes in the balance of power in their respective regions. The growth of Russian nationalism and its more aggressive posture generally are reasons to reevaluate risk along Russia's periphery especially. The United States' changing relationship with Cuba may create new opportunities and new risks to go with them. And emerging risks that would not typically be associated with PRI and TCI, such as the risks to cyber security, may present new potential for PRI or TCI losses. ■

Marking Ten Years of PRI & Arbitration Coverage

With this edition, the *RW Political Risk Newsletter* marks its tenth year in publication. The newsletter's treatment of the field of political risk insurance answered a need for qualified yet approachable information on the complex issues and concerns facing this ever-evolving field. Over the years, our coverage has also evolved and expanded: from its beginnings as a forum for discussion of the PRI industry to shifting attention to the increasing intersections of PRI with other distinct areas of practice such as international arbitration and microfinance.

We have been committed to bringing our readers thoughtful articles by and interviews with industry leaders. Throughout the years, our coverage has spanned a broad range of topics relating to the fields of PRI and international arbitration—from policy wordings, claims, coverages, pricing and Basel to BITs, arbitral award defaults and investment disputes, to name a few. We've shared with you our conversations with heavy-hitters from the insurers, from organizations such as ICSID, MIGA and OPIC, as well as with government officials from Mexico and Colombia. The experiences and insights our contributors and interviewees have shared with us truly have been fascinating.

We would like to thank you, our readers, for your continued interest in the *RW Political Risk Newsletter*. As we have done for the past decade, we will continue to provide you with discerning, thought-provoking material focused on political risk and arbitration. And as always, we welcome your feedback and contributions: please send any suggestions or proposals to pri@robertwraypllc.com.

An Interview with Cam Mowatt (*cont'd*)

and other acts of government regulation which, for one reason or another, investors have decided to try to invoke the investor-state mechanism. You look at Venezuela and Ecuador and Bolivia, it's a different set of measures; it's a real taking: either they're expropriations or they're expropriatory taxes, that kind of stuff. So it really just depends on the state, and there's the socialism set on one side and then there's the environmentally conscious regulators on the other, whereas the United States seems to be—and I'm not going to say *immune* to claims, but the fact that there is protection against takings in the US Constitution may mean that US law is imposed a little differently than, say, Canadian or Mexican law is.

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MGC: Do you think it's odd that Canada, a fully developed country, has had so many investment arbitration claims?

CM: Yes, Canada has had the most. I haven't got a current tally, but it is a surprise, I think. If you were looking at it prospectively from January of 1994 when the NAFTA entered into force, you would think that Mexico would have most of the claims, a few in Canada. The US has faced quite a large number, but they've successfully defended them.

MGC: Why do you think the US has never lost an arbitration case?

CM: I would say firstly, that they've been ably defended by the State Department. Secondly—I think that the *Loewen* case is a good example. The *Loewen* case is one which easily could have gone against the United States and didn't for—what I would call legal reasons, but technical, legal reasons, right? I know that the view has been expressed that if the *Loewen* case had resulted in an award against the US, there would have been a great uproar and problems with the investment treaty regime going forward. Now, whether that figures into an arbitrator's thinking or not is hard to say; it's purely speculative. But I think that arbitrators may find it hard to make a finding against the United States government, or, harder than it is to do so, say, against Mexico or Canada. That's just my view.

MGC: What do you think is happening in the damages area? If you look at ICSID figures from the '90s, the awards were in the $10-20 million neighborhood. We have now seen amounts of hundreds of millions of dollars or Ecuador's case of $1.77 billion—are arbitrators now more willing to issue larger awards because awards over $100 million are not uncommon? What do you think is happening? What is the reason for the increase in the size of the awards?

CM: I know what you're saying. I haven't looked at it empirically and said, well, you know the average award is now so many tens of millions or anything. Certainly, all of our early cases were either single-digit millions or $10, $15 million, and when *Metalclad* came out for $15 million, that was a lot of money! Everybody thought that was a huge amount, even though the claimant wanted $90 million. And if you look at it like a line-item budget for education or healthcare, that is a lot of money. Where does the state come up with a billion, $1.5 billion, to pay? Those are staggering amounts of money. And I'm not saying they're not warranted. If there's been the taking of an oil field or something, maybe that's the case. Although, look what has happened in the last few months to the value of oil. It's fallen to half or less than half of what it was. So, I think that arbitrators need to be mindful, and this is where the game gets played, you know, with the experts and the forecasting and so on. And I think in the earlier days, like in *Metalclad*, they were expressly concerned about being overly speculative and basically awarded the claimant its money back, the amount that they'd invested after certain deductions. We're not seeing that as much anymore. We're seeing, you know, "Oh, the cash flow projection is 'x'," and what's happened to the price of oil is a classic example of why that can be terribly wrong. You could be *terribly wrong*, by being double, by basing it off the price of oil being double what it is today. And how long will that last? Maybe it will come back, maybe it will level off. So it's not a very precise exercise.

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MGC: When an award is issued, BITs require the state to pay the entire amount, a lump sum amount, on the day the award is issued, when the claim is often for the lost profits for the economic life of the investment. Wouldn't payment over time make more sense?

CM: The damages figure that the arbitrators arrive at, whether based on the discounted cash flow value or the net present value of a certain stream of earnings, is the value today. So in theory if you were to have sold the asset that's been expropriated or taken out of business, if you sold it the day before the expropriation, that would be the price payable in today's dollars now. I can see why you ask if it would make sense to make payments over time…although I look at it a little bit differently, and that is: when do you get to the point in terms of the amount the claimant is seeking, it would rather have the claim instead of the business? Because then you know that

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An Interview with Cam Mowatt (*cont'd*)

people aren't taking into account all appropriate negative contingencies. I think if something is missed, that's what it is—it's the negative contingencies. We've used a couple of different investment banking firms that buy and sell businesses and they say, "No, the discount rate is much higher than that in this industry," because there's many things that can go wrong in a particular industry or particular market. But, *los expertos*! [*laughter*] the ones who know, the all-knowing, they all want to drive that discount rate down to 10-12%, when maybe it should be 24-25% in reality, in truth. So this is where I find that the figures get bumped up. And the other thing is the "but for" scenario, damages for something other than expropriation claims, like breach of the minimum standard of treatment: "But for the egregious behavior of the state, here's what our business would have done. Never mind our track record, because here's what would have happened." It's the "hockey stick curve"—flat prior to the alleged treaty breach, then with a sharp increase in projected earnings after the breach. So there's a lot of artifice in the whole damages area. Some tribunals are very good at figuring out damages. I still think that the best damages award is *S.D. Myers v. Canada*, where the tribunal took the domain of possible contracts that could have been performed by the claimant and discounted a certain percentage because competitors would have gotten them and for certain other factors, which took a claim that was pitched at $20-30 million down to $6 or $7 million, which seemed realistic at the end. I think at times we're missing this sort of realism.

MGC: Do you see these types of discussions taking place at the settlement level? Are governments evaluating the different scenarios of how much they would need to pay if they lose, or what is the likelihood of losing? Is there a serious, analytical, methodical evaluation of the settlement scenario versus litigation, or do states tend to litigate all the time because there are legal or political constraints to negotiating?

CM: Well, I'll say this based on just what I think about the world at-large and not any particular state: I think in the cases of some states, it's so hard to face the fact that the claimant will succeed—or there's the high probability of succeeding, so we have to address how much to pay—that it's a difficult exercise to reach that conclusion and then agree on a number. Certainly, though, when a claim is received the lawyers take a close look at it and try to reach some early appraisal—and, let's be honest, all claims are presented for far more money than they're visibly worth or than the claimant expects to get, or even hopes to get. And so there is often a question of trying to determine just how inflated it is. I think that the best likelihood for settlements in many cases is to try to do something about the measure, to see if during that six month or three month cooling off period, whichever it is under the treaty involved, there's something that can be done to put the investor back in business. I think

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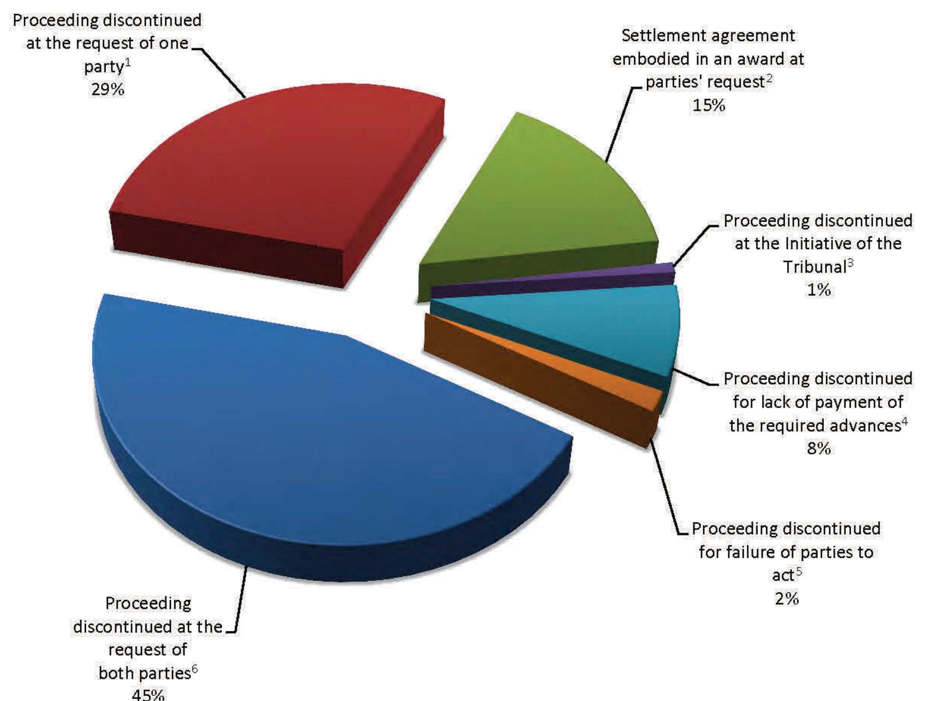
Disputes Settled or Proceedings Otherwise Discontinued under the ICSID Convention and Additional Facility Rules – Basis

ICSID Caseload – Statistics (2015-1)



[1] ICSID Arbitration Rule 44. No case concluded to date on the basis of Arbitration (Additional Facility) Rule 50.

[2] ICSID Arbitration Rule 43(2). No case concluded to date on the basis of Arbitration (Additional Facility) Rule 49(2).

[3] In accordance with Article 44 of the ICSID Convention.

[4] ICSID Administrative & Financial Regulation 14(3)(d).

[5] ICSID Arbitration Rule 45 and Arbitration (Additional Facility) Rule 51.

[6] ICSID Arbitration Rule 43(1) and Arbitration (Additional Facility) Rule 49(1).

An Interview with Cam Mowatt (*cont'd*)

that that's probably the more fruitful area for settlement. It's not very common to see cash settlements, although the most recent ICSID statistics are quite interesting, because they indicate that just over a third of all cases are either settled or discontinued. Of these, about 15% resulted in a settlement agreement that was embodied in an agreed arbitral award, and about 45% involved discontinuance at the request of both parties, but no revelation of the terms of the agreement to discontinue. So I think it can be fairly assumed that about 10 to 15% of all ICSID cases result in a settlement that is of some benefit to the claimant. It is also interesting to note that only 46% of all cases decided by tribunals in 2014 resulted in an award in favor of the claimant.

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MGC: Do you see structured mediation efforts between the parties, or is it something that just happens informally?

CM: Usually, my experience has been—and this is in cases I've been involved in—by the time the case gets to a notice of arbitration being issued or at least a notice of intent to start an arbitration, whatever efforts to resolve internally have already been undertaken. Could a mediation in the formal sense, where the parties say, "OK, never mind what's happened. Let's sit down and see if we can resolve this," work? I've never had one formally, so it's hard to say. There are some statistics in the ICSID about the outcome of conciliation proceedings. About 2% of all cases have been submitted under the conciliation rules. Of these, about 30% have been withdrawn—indicating that they might have resulted in a settlement—and only 20% of the remainder resulted in a conciliation report recording a settlement. So it can be assumed that the process assisted in the settlement of something more than 10% of all cases submitted for conciliation, but this represents a very small percentage of all cases submitted for resolution by the ICSID.

MGC: Can you think of anything that would make these kinds of mediation efforts during the "cooling off period" enhance the possibilities of reaching settlement?

CM: Yes, I think that if the system was that if you register a claim…actually, they tried this in *Metalclad*. Sir Elihu Lauterpacht presided; he was very experienced and very senior. He invited the parties to tell the tribunal a little bit about the case beforehand, and then said the tribunal would be available if at any time there was any prospect of resolving it. He sort of held out the olive branch early on. It didn't resolve, as history tells us. There are examples in domestic court systems where, if you're going to go to court, there's a case management judge who will call for admissions and certain things and bring the parties together in the same room. This may reduce the cost of proceedings just by simplifying it and may get the parties talking about what can be done to resolve it.

MGC: What if the arbitration attorneys were kept out of these settlement negotiations?

CM: Hmmmm…no lawyers? [*laughter*] You know, I've seen that in certain other contexts. I suppose the answer is that it depends on just how sophisticated the claimants and the respondents are. The respondents, if they're being asked to pay money, will need to be advised by people who know how much they're going to wind up paying, so they really need to be involved in the process, if not directly, then very closely. It's an interesting question. You see, the other thing, too, is that in many governments, somebody has to take a decision. This is a problem that I think exists in many countries, where the person who has to take the decision then bears responsibility for it. So they want to see solid opinions on what is going to happen. And often, as counsel, it's difficult at any given stage to give a solid opinion; it's always based on what we know at the moment.

MGC: We have seen cases that have been settled right before the hearing without outside counsel being involved in the negotiations.

CM: And, you know, when that can happen, it's a good thing, I think. If the parties can call each other up and say, "The lawyers aren't getting this resolved…" And sometimes there are cases where there's a continued relationship between the parties, where that's important—to say, "Let's bury the hatchet and move on."

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MGC: When a claimant elects to sue a government in arbitration, what is the typical respondent state's position? Would the respondent state expect the claimant to pack up its things and leave the country? Or do you think it's still possible for a claimant to operate in the country after having sued the government?

CM: Oh, we've certainly seen claimants who've continued to carry on business as usual. A good example is the "fructosa trilogy," as I call it, where the companies that brought claims continued to carry on business, and I don't think there've been any ill effects. And it might depend whether you're a business where your public profile mattered.

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An Interview with Cam Mowatt (*cont'd*)

In the case of Mexico, for example, there've been numerous notices of claims that were small, where somebody's got the idea that, you know, "I'm ticked about this so I'm going to put in a notice of arbitration or a notice of intent." They rarely—in fact, they never go ahead. I think those people decided to withdraw when they didn't get the reaction they wanted. The notices get assessed and some effort is made to assess the validity of the claim and what its value might be, but the would-be claimants usually find that it's way too expensive to pursue modest or small claims, so they don't.

MGC: Will there ever be, you think, a…

CM: Small claims court?

MGC: Yeah, or arbitration being less expensive and available for small investors? They may have legitimate claims.

...the ICSID and UNCITRAL rules try to merge civil and common law practice, so it has the best of both worlds and the worst of both worlds in the sense that there's a heavy reliance on written documentation as well as a full oral hearing.

CM: Well, part of the problem is that in court, there's one judge, not three, on a salary that the government pays. In the arbitration process, you have three well-qualified people who are all being paid a very high per diem—worth it, I'm sure [*laughter*]—by the parties. And then you pay for the facility. And then you've got a very labor-intensive process: the ICSID and UNCITRAL rules try to merge civil and common law practice, so it has the best of both worlds and the worst of both worlds in the sense that there's a heavy reliance on written documentation as well as a full oral hearing. There are many hours of work put into investor-state cases that wouldn't necessarily occur under either the common law system, where the trial or the hearing is everything, or the civil law system, where the written work is everything. Instead, you've got a kind of doubling-up. I've looked at the possibility of getting a sole arbitrator on a case to try to move it along faster, and maybe limiting the pleadings. I've looked at that on behalf of a claimant, but it only happens when a respondent will agree and if the respondent says no thanks, then it has to be a tribunal and you're going through the whole process and it's going to cost. I know of several cases where the claimant received an estimate and says, "I can't afford that," or "I don't want to throw good money after bad," and decided not to proceed.

MGC: Respondent states tend to take a pretty restrictive view towards arbitral tribunals having jurisdiction over investment claims. Their view is that investment arbitration is available for very defined, limited types of issues—but then when you talk to claimants or work with claimants, that is not how they are reading the treaty. They tend to take a more expansive view.

CM: That's not how some arbitrators are reading the treaty either…

MGC: Right. That is, I think, my point: do you see tribunals accepting this more "expansive" approach of arbitration? Cases such as *Abaclat* with multiple claimants, cases where the investors are making claims for issues that relate to trade measures: do you think that tribunals are being more flexible about jurisdiction?

CM: I think it depends entirely on who is on the tribunal. In some cases, you can predict very accurately who the claimant will appoint because you know there are people out there who take a particular view, for example, on the minimum standard of treatment or fair and equitable treatment. I think that part of it is getting the state's message across: "Look, it's not just us as respondent—not just this state, but states generally—that use this treaty language. That does not mean that it's expansive and it grows. It means that it's a minimum threshold that requires a very serious form of breach." But that's a continuing struggle. It is one particular area where the jurisprudence is all over the map. What would make a difference would be if there was some sort of appellate mechanism, where an appeal court says, "Sorry, that's not how you read that language." Under a system like the WTO's appellate body, the arbitrators' expectation would be that overly expansive treaty interpretations will be slapped down and the worries and concerns of state parties will be significantly reduced.

What would make a difference would be if there was some sort of appellate mechanism, where an appeal court says, "Sorry, that's not how you read that language."

MGC: What do you think of third-party funding for arbitration claims? Is it good? Is it bad? Is it working? Is it common?

CM: It seems to be more common. I suppose it's good in the sense that it accords a party that can't afford to pursue a claim an opportunity to at least see some of their money. I think one always has to be careful when there are third parties involved, you know, so that it's the "truth and justice prevail" kind of thing as opposed to economic interest. I don't, in principal, have a problem with it.

MGC: If tribunals learn that the claim is being funded by a third party, would it make a difference in their evaluation of the merits of the claim or the damages to be awarded?

CM: If anything, I suppose, it might make an arbitrator feel less sympathetic to the claimant. But in theory, it should be irrelevant. I

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mean, lawyers who do contingency fee cases for people who are injured in accidents are third-party funders because they cover the disbursements and carry the fees. That's a fact of life that we're all used to. It's a more sophisticated approach here. I don't necessarily have a problem with it. I think it's more of a question of just, OK, who's calling the shots? Are lawyers acting independently and providing the correct advice and doing what they should do and not embarking on actions in the case that are inappropriate? There's nothing that waves a red flag at me, but it's an area where you kind of want to wave a caution flag, take a look around.

I think one always has to be careful when there are third parties involved, you know, so that it's the "truth and justice prevail" kind of thing as opposed to economic interest. I don't, in principal, have a problem with it.

MGC: Talking about general trends in the arbitration world, do you see countries renegotiating BITs taking into account their experiences in arbitration proceedings?

CM: They clearly should. As BITs come up for renewal, there should be a new standard. The thing is, too, that we're on the verge of a whole new set of BITs. The TPP (the Trans-Pacific Partnership)—all the NAFTA parties will be agreeing to something quite a bit more detailed than currently exists under NAFTA Chapter Eleven. Plus it will also include Australia, New Zealand, Japan, Malaysia, Indonesia, Vietnam and the other participants. I think it would be worthwhile for the world to take a stab at a common investment treaty that has common principles. Certainly, what's going on now in the European community…it was fine when they were imposing these treaties on capital-importing states, but now that it's them and potentially the United States…and you know, a Swedish state entity giving notice to sue Germany over what would be the phase-out of its nuclear power plants—massive potential damages. So, everybody there is taking stock of this. It's going to be really interesting to see what happens in the next couple of years. If I was advising a state client, I'd say, "Now is the time to look at all of your treaties and see exactly what you've agreed to and what does your MFN [most favored nation] language say? What is it intended to do? Is it time now to create a new model? Do you want to harmonize it with the TPP?" Because the array of different treaties makes it very confusing. I think there could be a common treaty with individual contracting states making reservations and exceptions, just like the WTO agreements, where a state reserves a particular industry or a particular measure or whatever, and then that becomes the subject of further negotiation, but everybody knows what the language means and what it applies to. And my hopes would include the establishment of some sort of an appellate mechanism where wise men and women would say yes or no to the way arbitrators have interpreted and applied the treaty language. ■

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