

# Commercial Arbitration - A View from Investment Law

6th Baltic Arbitration Days - June 2017 - Riga

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## Setting the stage

- ❓ A bird's eye view on a complex relationship
- ❓ A popular theme: of friends & foes (Bernardi), dolphins & sharks (Blackaby), tigers & lions (van Houtte) and 'altogether different beasts' (Bantekas)
- ❓ A different vantage point: commercial arbitration and investment arbitration as siblings

## A family affair: commercial arbitration as a sibling

- ❑ Family resemblance: *arbitration* - defined & delineated
- ❑ Shared impulses; shared sites & rituals (Gaillard)
- ❑ Four illustrations:
  - ❑ acceptance of binding dispute resolution
  - ❑ emphasis on party autonomy
  - ❑ thin institutionalisation
  - ❑ quest for a relatively flexible arbitral process

## Looking up: commercial arbitration as the older brother

- ❑ Different levels of 'seniority': investment arbitral procedure borrows from the pre-existing "mature and fully functional system for resolving int'l commercial disputes" (Wälde)
- ❑ Benefiting from the older brother: a reservoir of experience waiting to be tapped into: international commercial arbitration
  - ❑ offers guidance on how to solve concrete legal/procedural problems
  - ❑ can supply the personnel required to 'run' the system: counsel, arbitrators, etc.

## Seeking distance: commercial arbitration as 'the other'

- ❑ Siblings as unique personalities: "in substance and function, investment arbitration is quite different from commercial arbitration" (Wälde)
- ❑ Two crucial differences reflected in arbitral frameworks
  - ❑ the State as party to the arbitration (by definition)
  - ❑ the potential for arbitration without privity (notably treaty-based) on the basis of generalised host State consent

## Moving out of the shadow: the fading influence of commercial arbitration

- ❑ The older sibling 'de-throned': investment arbitration emancipated
- ❑ Increasing influence of issues specific to investment arbitration:
  - ❑ statehood and its implications (immunity etc)
  - ❑ investment: definitional issues and mandate creep
- ❑ Moving further apart: 'treatification' as a centrifugal force

## Hubris: commercial arbitration left behind?

- ❓ Investment arbitration: towards new levels never reached by commercialists?
- ❓ Hubris illustrated:
  - ❓ 'No time for "pedestrian" commercial issues'? Nationality of awards, applicable law, recognition of awards, etc
  - ❓ 'Greater tasks await'? System-building, coherence, precedents, contributing to the progressive development of international law, etc.

## 'We are family': commercial arbitration re-appreciated

- ❓ The backlash: recalibrating investment arbitration under public pressure - a new perspective on commercial arbitration?
- ❓ Nostalgia for the pre-backlash days - commercial arbitration as the brother that managed not to get burned: transparency, third-party participation, publicness
- ❓ A role reversal: should commercial arbitration learn from investment arbitration?



## Beyond sibling rivalry: commercial arbitration as a companion for life

❑ 'Respecting difference, valuing commonality'

❑ Stepping back: a relationship

❑ that evolves over time

❑ that allows both sides to learn from each other

❑ that last for a lifetime

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