**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**Miami Division**

**CASE NO. 20-CIV-24867-SCOLA/GOODMAN**

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GRUPO UNIDOS POR EL CANAL, S.A.,
SACYR, S.A.,
WEBUILD S.p.A. and
JAN DE NUL N.V.

Movants/Counter-Respondents,

v.

AUTORIDAD DEL CANAL DE PANAMA,

Respondent/Counter-Movant.

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# EXPERT REPORT OF JUDGE STEPHEN M. SCHWEBEL

**TABLE OF CONTENTS**


I. CREDENTIALS ........................................................ 1

II. AUTHORITIES REVIEWED ........................................................ 3

III. TWO QUESTIONS ADDRESSED ........................................................ 4

IV. OPINION ........................................................ 4

V. CONCLUSION ........................................................ 12

## I. CREDENTIALS

1. I was graduated in 1950 from Harvard College with highest honors in Government. Harvard awarded me the Frank Knox Fellowship for study at a British university, in pursuance of which I was admitted to Trinity College, Cambridge, and studied international law in the academic year 1950–51 under Professor H. Lauterpacht, whose stature as a scholar in the field was unexcelled.

2. My Harvard senior thesis on *The Secretary-General of the United Nations: His Political Powers and Practice*, was published in 1952 by the Harvard University Press. Thereafter I was graduated from Yale Law School in 1954 with an LL.B. I joined the legal staff of the firm of White & Case, which in 1954 had an office only in New York City. I was admitted to the Bar of the State of New York, of the District of Columbia and of the Supreme Court of the United States. In 1954, White & Case was engaged by the Arabian American Oil Company (Aramco) as its counsel in an arbitration brought against Aramco by the Royal Government of Saudi Arabia because it declined to implement a Royal Decree providing that all petroleum extracted in Saudi Arabia must be exported in ships of the Saudi Arab Transport Company, a company established for that purpose by the shipping magnate, Aristotle Socrates Onassis. I was installed in an office at Aramco's headquarters in Manhattan and for the next three years acted as the principal research and drafting associate in the case at the bottom of a tower of legal talent assembled by Aramco. Aramco won the award which Saudi Arabia implemented.

3. In 1959, I was invited by Harvard Law School to join its faculty as an assistant professor of law. I taught commercial law, contracts, international law, and international protection of foreign investment.

4. In 1961, with the election of John F. Kennedy as President of the United States, I joined an influx of Harvard faculty into his administration in the position of Assistant Legal Adviser for United Nations Affairs at the U.S. Department of State. In that capacity, I was the legal adviser of the U.S. Mission to the United Nations in New York and the U.S. representative in the 6th (Legal) Committee of the UN General Assembly. I negotiated the seminal General Assembly resolution on Permanent Sovereignty over Natural Resources and took part in advisory proceedings of the International Court of Justice on *Certain Expenses of the United Nations*.

5. In 1967, I accepted a joint appointment as Burling Professor of International Law at the School of Advanced International Studies of The John Hopkins University and Executive Director of the American Society of International Law.

6. In 1973, I returned to the U.S. Department of State as Counselor in International Law and in 1974 was appointed as a Deputy Legal Adviser. In that capacity, I chaired the U.S. delegation in the negotiation of the U.N. Charter of Economic Rights and Duties of States.

7. In 1978, I was elected a member of the United Nations International Law Commission. In 1981, I was elected a judge of the International Court of Justice, serving 1981–2000, and as Court President 1997–2000. I served as President of the Administrative Tribunal of the International Monetary Fund 1994–2010, and as a member and President of the Administrative Tribunal of the World Bank 2001–2017. I have been a member of the Permanent Court of Arbitration since 2006. I am an Honorary Bencher of Gray's Inn, London, and an Honorary Fellow of Trinity College, Cambridge.

8. I have been appointed as arbitrator or tribunal chairman in some sixty international arbitration cases, inter-State, investor-state and commercial, including under the ICC Rules. I was appointed to the Chairman's list of arbitrators of the International Centre for Settlement of

Investment Disputes (ICSID) and received the Lifetime Achievement Award of the Global Arbitration Review. In two cases, I have been the subject of disqualification challenges as arbitrator. Both were unsuccessful, but they enhanced my sensitivity to the importance of searching and timely disclosure.

9. I am the author or editor of seven books and more than 120 legal articles and book reviews, some of which deal with international arbitration. My book, *International Arbitration: Three Salient Problems* (1987), received the Certificate of Merit of the American Society of International Law. A second edition, co-authored by Luke Sobota and Ryan Manton, was published by the Cambridge University Press in 2020.

## II. AUTHORITIES REVIEWED

10. In preparing this opinion, I have read the expert opinion of Gary Born, the expert opinions of Professors Coe and Giorgetti, Movants' Consolidated Motion to Vacate Partial Award and Final Award, the accompanying Declaration of Nicolas Bouchardie, the Statement of Reasons of the ICC Court in ICC Case No. 20910/ASM/JPA, as well as the provisions of the Federal Arbitration Act and the Guidelines on Conflicts of Interest in International Arbitration of the International Bar Association.

11. In respect of the expert opinion of Mr. Born, with whose conclusions I differ, I wish to make clear that I have the highest regard for the attainments and integrity of Mr. Born. He appointed me years ago in three inter-State arbitrations in which issues of public international law were salient: Eritrea/Yemen (1997–2000); Eritrea/Ethiopia (2001–2009); and Sudan/South Sudan (2008–2009). His Washington, D.C. partners later appointed me in an investment arbitration between Merck and Ecuador, in which a final award was rendered in favor of Merck in 2020. I have cordial relations with some of his firm's partners and associates.

## III. TWO QUESTIONS ADDRESSED

12. "In my experience, would parties in international arbitration be comfortable with, and not expect disclosure of, relationships not disclosed here?"

(i) Answer: "No."

13. "In my experience, would an objective observer doubt the independence and impartiality of the arbitrators based on the relationships not disclosed here, including the combined effect of the various non-disclosures or late disclosures?"

(i) Answer: "Yes."

## IV. OPINION

14. I understand Mr. Born's expert opinion to proceed in five steps:

(i) "Both commercial parties and international arbitration counsel desire, and ordinarily insist upon, arbitrators who have substantial experience sitting on international commercial arbitration tribunals (in particular, under the applicable institutional arbitration rules) and substantial expertise in the subject matter of the parties' underlying dispute (in particular, here, in major infrastructure construction projects)."[1]

(ii) "Worldwide, there are only several dozen arbitrators" who possess both the necessary experience and expertise for the Panama 1 matter,[2] and thus

[1] Expert Opinion of Gary B. Born ("Born Opinion") ¶ 21 (D.E. 57-92); *see also id.* ¶ 77 ("Commercial parties and their counsel understand this, and nonetheless choose to resolve their disputes by international arbitration, where they know that arbitrators will have professional dealings with one another and where expertise in specific industries is a sought-after asset for the resolution of the parties' disputes.").

[2] Born Opinion ¶ 21 (D.E. 57-92); *see also id.* ¶ 77 ("Commercial parties and their counsel understand this, and nonetheless choose to resolve their disputes by international arbitration, where they know that arbitrators will have professional dealings with one another and where

"extensive professional contacts" among them are "very common" and "inevitable."[3]

(iii) Mr. Born has "never heard criticisms or accusations of impropriety with respect to any" of the arbitrators involved, and is "well aware" of their "very positive reputations."[4]

(iv) Therefore, Mr. Born "do[es] not believe that commercial parties or their counsel in international commercial arbitrations would expect disclosure by arbitrators of overlapping appointments on other, unrelated arbitral tribunals with the members of their tribunal."[5]

(v) "*[A] fortiori,* if the arbitrators had no disclosure obligation, then there also would be no conceivable basis for vacatur of the Tribunal's award."[6]

15. Let me take each of these steps in turn, before adding concluding observations.

16. *First*, parties in fact choose international arbitration primarily for *neutrality*, not for expertise. In domestic arbitration, the alternative to arbitration is litigation in the domestic courts of both parties, and arbitration is therefore chosen for reasons additional to neutrality (such as efficiency, lower costs, and arbitrator expertise and experience). However, the alternative to arbitration in an international transaction is litigation in the domestic courts of only one of the parties, and typically neither party will agree to go to the other's "home" jurisdiction.[7] The parties

expertise in specific industries is a sought-after asset for the resolution of the parties' disputes.").

3 Born Opinion ¶ 22 (D.E. 57-92).

4 Born Opinion ¶ 22 (D.E. 57-92).

5 Born Opinion ¶ 78 (D.E. 57-92).

6 Born Opinion¶ 124 (D.E. 57-92).

7 In a recent survey, arbitration users were asked to identify the characteristics of international arbitration that they found most valuable. "The two most frequently selected options were

therefore choose international arbitration because it provides a level playing field: "Th[e] unique criterion is neutrality."[8]

17. *Second*, while the parties also naturally seek expertise and experience, the substantial growth of international arbitration means that there are today far more than a few dozen arbitrators who have the experience and expertise to resolve a large construction dispute.[9] In any event, Mr. Born creates a questionable choice by seemingly presenting experience and impartiality as an either-or proposition. Even if the parties also prize expertise, that does not mean that they qualify their right to a neutral and independent panel. Expertise is no basis for impunity.

18. *Third*, the notion that the parties have implicitly accepted arbitrator relationships that may create an appearance of bias because of the purported high standing of the arbitrators is antiquated and flawed. The days in which "practitioners saw themselves as belonging to a small,

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'enforceability of awards' (64%) and 'avoiding specific legal systems/national courts' (60%)." By contrast, only 39% of the respondents selected the "ability of parties to select arbitrators." **Exhibit 1:** White & Case LLP & Queen Mary Univ. of London Sch. of Int'l Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* 7 (2018), *available at* https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf.

8 **Exhibit 2:** Jan Paulsson, *International Arbitration Is Not Arbitration*, 2 Stockholm Int'l Arb. Rev. 1, 2 (2008).

9 In the early 1960s, an average of just 64 arbitrations were submitted annually to the ICC. **Exhibit 3:** Yves Derains, *International Chamber of Commerce Arbitration*, 5 Pace L. Rev. 591, 591 (1985). By comparison, in 2019 alone, 869 new cases were submitted to the ICC. **Exhibit 4:** *ICC Celebrates Case Milestone, Announces Record Figures for 2019*, International Chamber of Commerce (Jan. 9, 2020), https://iccwbo.org/media-wall/news-speeches/icc-celebrates-25000th-case-milestone-and-announces-record-figures-for-2019/. And in 2018, the total caseload of the top 14 leading international commercial arbitration institutions was more than 9,000. **Exhibit 5:** Gary Born, *International Commercial Arbitration* 92 (3d ed. 2021). Additionally, searches of arbitrator rosters reveal significant numbers of international arbitrators with expertise in construction disputes, specifically, Arbitral Women: 104; College of Commercial Arbitrators: 89; Juris Arbitration Law: 72. The results are appended as Exhibits 6–8 to this report.

select group governed by implied norms and shared albeit unwritten values" are past.[10] Already by 2013, the growth of arbitration was such that it could "incentivise departures from old but treasured ethical norms. This may be reflected in the results of a recent survey which reported that 68% of respondents had experienced ethical misconduct . . . ."[11] As such, reputation and standing cannot constitute an objective basis to determine the appearance of independence and impartiality—that is to be assessed on the basis of timely and complete disclosure.

19. This is reflected in the recent judgment of the European Court of Human Rights in *BEG v. Italy*, where the Court repeatedly emphasized the importance of the appearance of impartiality and independence, as reflected in the adage "justice must not only be done, it must also be seen to be done."[12] In this regard, the Court applied the same reasoning that it had applied in prior cases to court proceedings: "What is at stake is the confidence which the courts in a democratic society must inspire in the public."[13] The Court specifically referred to the ICC Arbitration Rules and other international materials, including the IBA Guidelines, as part of the "relevant legal framework" reflecting "the best current international practice" in this regard.[14] In assessing whether, "seen from the point of view of an external observer, [appearances] could legitimately give rise to doubts as to [the arbitrator's] impartiality," the Court considered, among other factors, "the importance and the economic stakes of the business project" at stake in the

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[10] **Exhibit 9:** Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity*, 79 Int'l J. Arb., Mediation & Disp. Mgmt. 393, 394 (2013) (giving the keynote address at the Aug. 22, 2013 Chartered Institute of Arbitrators International Arbitration Conference).

[11] *Id*.

[12] **Exhibit 10:** *BEG S.p.a. v. Italy*, App. No. 5312/11, Eur. Ct. H.R. ¶¶ 132, 149, 153 (May 20, 2021).

[13] *Id*. ¶ 132.

[14] *Id*. ¶¶ 38–48 (referencing also the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules, the Stockholm Chamber of Commerce ("SCC") Rules, and the International Centre for Settlement of Investment Disputes ("ICSID") Arbitration Rules).

underlying dispute.[15] The Court also rejected as immaterial in this regard Italy's argument that the arbitrator's ties to the respondent in the arbitration were a matter of publicly available information, such that the claimant could be presumed to have been aware of them (and, therefore, apparently under Mr. Born's view, have accepted them implicitly).[16] The Court found that BEG did not waive "its right to have its dispute . . . settled by an independent and impartial tribunal" by failing to challenge the arbitrator "based on a presumption of knowledge which does not rest on any concrete evidence" of BEG's knowledge, let alone by voluntarily agreeing to arbitration in the first place.[17] Ultimately, the Court held that Italy violated Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (guaranteeing the right "to a fair and public hearing within a reasonable time by an independent and impartial tribunal") on the basis that the Italian courts had failed to set aside the underlying arbitral award given that "[the arbitrator's] impartiality was capable of being, or at least appearing, open to doubt and that [BEG's] fears in this respect can be considered reasonable and objectively justified."[18] Here, as set out below, the failure to disclose was even more significant because, as I understand from the documents that I reviewed, it involved all three arbitrators, the underlying undisclosed relationships were significant and many overlapped in time with important phases of the arbitration including appointments, hearings and deliberations, and, even once disclosure was requested, it was made only in a piecemeal fashion.

20. *Fourth*, to ensure that the parties obtain the neutral forum that they contracted for, timely disclosure is of paramount importance. What was undisclosed here—most notably that Dr.

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15 *Id.* ¶ 149.

16 *Id.* ¶¶ 140, 147.

17 *Id.* ¶¶ 136–40.

18 *Id.* ¶¶ 153–54. In view of the fact that the proceedings before the Italian courts could not be re-opened in order to give effect to its judgment, the Court also ordered Italy to pay compensation. *Id.* ¶¶ 163–65.

Gaitskell agreed to join in appointing Mr. Gunter to the well compensated position of tribunal president in another arbitration—creates the appearance of a lack of impartiality and independence. A reasonable observer could conclude that this valuable appointment, likely resulting in hundreds of thousands of dollars (if not more) in income for Mr. Gunter, could, consciously or subconsciously, affect Mr. Gunter's relationship with Dr. Gaitskell and his neutrality in this arbitration.[19]

21. Disclosure is of paramount importance to the integrity of international arbitration. Arbitrators make critical decisions in important cases where large amounts are at stake (here, hundreds of millions of dollars). But—unlike judges—arbitrators have not been vetted by the process established under Article III of the United States Constitution (or any similar process), and their decisions are not subject to *de novo* appellate review. Disclosure of potentially relevant information is therefore essential for the parties to have confidence in the independence and impartiality of the arbitrators. The non-disclosure here deprived the Movants of the opportunity to raise their challenge at the time that Mr. Gunter became the president of another arbitral tribunal with Dr. Gaitskell's help. Mr. Born's indulgent interpretation of the arbitrators' obligation to disclose discounts these realities. The notion that the arbitrators' "positive reputations" should lead objective observers to discount indications of their possible partiality smacks of the "hubris" that the late V.V. Veeder QC—one of the most distinguished international arbitrators of his generation—observed in the "often narcissistic circle" of international arbitrators.[20]

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[19] Rules of Arbitration of the International Chamber of Commerce, app. III, art. 3(4) (D.E. 55-10) (setting out the fees for ICC arbitrators).

[20] **Exhibit 11:** *London: Veeder Backs Paulsson's Call to Self-Regulate*, Global Arbitration Review (Mar. 27, 2014).

22. *Fifth*, the belated disclosure of the relationships not timely disclosed here creates the objective appearance of a lack of independence and impartiality. Contrary to Mr. Born's reading,[21] the IBA Guidelines provide that "an arbitrator should assess on a case-by-case basis whether the fact of having frequently served as counsel with, or as an arbitrator on, Arbitral Tribunals with another member of the tribunal may create a perceived imbalance within the tribunal. If the conclusion is 'yes', the arbitrator should consider a disclosure."[22] Here, the situation is graver than merely serving on the same tribunal—Dr. Gaitskell agreed to join in appointing Mr. Gunter, thereby ensuring Mr. Gunter of hundreds of thousands of dollars (if not more) of eventual remuneration. *A fortiori*, this appointment should have been disclosed, and failure to do so creates the objective appearance of a lack of impartiality and independence.[23] In addition, *every* member of the Tribunal failed to disclose facts that should have been disclosed, such as cross-appointments and relationships among themselves as well as with others involved in the dispute. The cumulative effect of such failures to disclose only strengthens the objective appearance of a lack of independence and impartiality.[24]

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[21] Born Opinion ¶ 124 (D.E. 57-92) ("[T]he IBA Guidelines expressly state that they 'do not require disclosure of the fact that an arbitrator concurrently serves, or has in the past served, on the same Arbitral Tribunal with another member of the tribunal . . . .'").

[22] International Bar Association Guidelines on Conflicts of Interest in International Arbitration, Part II ¶ 6 (D.E. 57-111).

[23] Mr. Born's claims that this appointment required the consent of another arbitrator does not change the fact that Dr. Gaitskell's role in the appointment of Mr. Gunter was essential, and the concurrence of the other arbitrator in no way mitigates the appreciation that Mr. Gunter would naturally have for Dr. Gaitskill.

[24] The specific facts that were not disclosed are detailed in Movants' Consol. Mot. to Vacate, at 5 (D.E. 55) ("every member of the Tribunal failed to disclose cross-appointments and/or inter-relationships among themselves and others involved in this dispute, including: (1) that one Tribunal member [Dr. Gaitskell] participated in empowering Tribunal President Gunter to secure an exceedingly valuable appointment in a separate arbitration, (2) multiple undisclosed cross-appointments and relationships with others associated with this dispute [between Mr. Gunter and Prof. Hanotiau, who together with Mr. Gunter and Dr. Gaitskell authored the award in the closely related "Cofferdam" Arbitration, and (3) that Tribunal members served on

23. *Finally*, it ultimately falls to courts to ensure that arbitral independence and impartiality—and the appearance thereof—are preserved. This indeed what the New York Convention contemplates: "Article V is the heart of the Convention. It sets forth the grounds for refusal."[25] Or, in the words of the UN Secretary-General when the New York Convention was being drafted: "[C]ourts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party."[26]

24. In doing so, courts should rely on pertinent national law, not, as Mr. Born appears to suggest, international law, guidelines, and the decisions of arbitral institution such as the ICC.[27] In his classic work on *Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration*, Professor H. Lauterpacht early recognized that private (domestic) law is essential to the development of international law—specifically including in international arbitration—and that international law should and does draw on principles of domestic law.[28] Rules of ethics in international arbitration should comport with national standards.

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tribunals in other cases where ACP's counsel served as co-arbitrator or counsel [specifically between Dr. Gaitskell and ACP's counsel Manus McMullan as well as Mr. von Wobeser and ACP's counsel Andres Jana]."); Declaration of Nicolas Bouchardie ¶¶ 49–76 (D.E. 55-3). *See also* Movants' Consol. Mot. to Vacate, at 18 (D.E. 55) (showing Timeline of Undisclosed Appointments During the Pendency of the Panama 1 Arbitration).

[25] **Exhibit 12:** Marike Paulsson, The 1958 New York Convention in Action, Kluwer Law International (2016), p. 157 (quoting Piet Sanders, "The New York Convention: The First Two Decades").

[26] **Exhibit 13:** Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Note by the Secretary General, at 5, U.N. Doc. E/Conf.26/2 (Mar. 6, 1958).

[27] Born Opinion ¶ 146 (D.E. 57-92) ("I also believe that the ICC Court's decision should, at a minimum, be accorded substantial weight in considering whether the challenged arbitrators were properly subject to removal for a lack of impartiality and independence.").

[28] **Exhibit 14:** H. Lauterpacht, Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration, Longmans, Green, and Co. (1927), p. 215 ("While the positivist theory was engaged in banishing from international law all that threatened its postulated independence of other sources of law, British and American practice

Where, as here, they run afoul of such national standards, national standards should correct the course of international arbitration.

## V. CONCLUSION

25. "Justice must be seen to be done" but in this case, where the financial stakes are so very high, what was unseen because of a failure to timely disclose is too significant to be discounted or overlooked. It is not contended that these leading arbitrators in fact were biased. What is contended is that the failures to disclose deprived a party of the opportunity to consider, weigh and make timely challenge or even refuse to appoint, and the material that was not disclosed created the appearance of bias from an objective standpoint. The appearance of bias is reinforced by the cumulative nature of the undisclosed conflicts in this case and by the timing of those conflicts overlapping during the important procedural periods of the arbitration, namely the constitution of the Tribunal, merits hearing, closings, and deliberations as described in the documents that I reviewed. Moreover, the arbitrators only disclosed these extensive inter-relationships *after* they issued the Interim Award and *after* the parties *repeatedly* requested disclosure: neither counsel nor parties could have known of these inter-relationships earlier in the proceedings when they could have timely objected.

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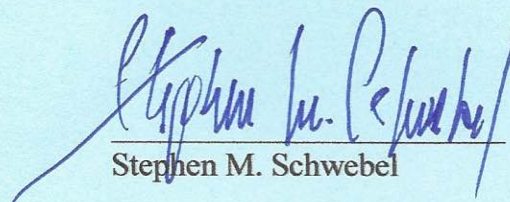
was laying strong foundations for the building of modern arbitration, which, in the long run, was bound to prove the futility of that widespread iconoclasm. The five great British-American arbitrations—the *Alabama*, Behring Sea, British Guiana, Alaskan Boundary, and North Atlantic Fisheries arbitrations . . . shatter the fiction of an international law totally independent of conceptions and rules of private law.").

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this September 10, 2021, in South Woodstock, Vermont 05071.



Stephen M. Schwebel

**INDEX OF EXHIBITS TO EXPERT REPORT OF STEPHEN SCHWEBEL**

| No. | Description | Date |
|---|---|---|
| 1. | White & Case LLP & Queen Mary Univ. of London Sch. of Int'l Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* | 2018 |
| 2. | Jan Paulsson, *International Arbitration Is Not Arbitration* | 2008 |
| 3. | Yves Derains, *International Chamber of Commerce Arbitration* | 1985 |
| 4. | *ICC Celebrates Case Milestone, Announces Record Figures for 2019*, International Chamber of Commerce | 2020 |
| 5. | Gary Born, *International Commercial Arbitration* (3d ed.) | 2021 |
| 6. | ArbitralWomen, Directory of ArbitralWomen, Search Result (Term: "Construction, Engineering") | 2021 |
| 7. | College of Commercial Arbitrators, Find an Arbitrator, Search Result (Term: "Construction") | 2021 |
| 8. | Arbitration Law, Roster of International Arbitrators, Search Result (Term: "Construction Contracts") | 2021 |
| 9. | Sundaresh Menon, *Some Cautionary Notes for an Age of Opportunity* | 2013 |
| 10. | *BEG S.p.a. v. Italy*, App. No. 5312/11, Eur. Ct. H.R. | 2021 |
| 11. | *London: Veeder Backs Paulsson's Call to Self-Regulate*, Global Arbitration Review | 2014 |
| 12. | Marike Paulsson, The 1958 New York Convention in Action | 2016 |
| 13. | Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires – Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Note by the Secretary General, U.N. Doc. E/Conf.26/2 | 1958 |
| 14. | H. Lauterpacht, Private Law Sources and Analogies of International Law: With Special Reference to International Arbitration | 1927 |