

42 CPD points
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Investment law & Investor-State mediator

2019 TRAINING

28 OCT - 03 NOV

Venue Holiday Inn Express Soho
Sheung Wan, Hong Kong

Enquiries events@aail.org

organisers



Department of Justice
The Government of the Hong Kong
Special Administrative Region



ICSID

International Centre for
Settlement of Investment Disputes
WORLD BANK GROUP



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LAW

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Investor-State mediation has become an increasingly popular alternative to, if not substitute for, arbitration in resolving investment disputes. In certain new treaties, mediation has been introduced as a pre-condition to the commencement of investor-State arbitration. Building on the success of last year's training which was attended by over 50 participants from 18 jurisdictions, the Department of Justice of the Hong Kong SAR Government, the International Centre for Settlement of Investment Disputes (ICSID), and Asian Academy of International Law are jointly organising an investment law and investor-State mediator training course in Hong Kong in 2019. World-renowned trainers will be sharing their knowledge and expertise in international investment law and investor-State mediation.

The first part of the training course will focus on building up participants' knowledge in international investment law including the basic principles, topical issues raised in international investment disputes and dispute resolution process. This will be followed by the second part of the training course – a 3-day intensive training on international mediation which covers considerations specific to investor-State mediation, inter-cultural competency, process design and conduct of an effective investor-State mediation, and ethical challenges, among other topics. Interactive role-playing sessions will be included.

In respect of each part of the training course, should attendance rate be over 80%, "Certificate of Attendance" of the part will be issued. In addition, "Certificate of Completion" shall be issued upon the successful completion of the optional assessment of the part.

What participants of last year said:

"Top-notch instructors from well-known international institution shared their experience in investment law and investor-State mediation."

"Enabled me to keep pace with the latest trend of mediation convention."

"I did not have any knowledge pertaining to the course, now I am fully skilled and equipped."

Government officials and mediators who are interested in knowing more about investment law and investor-State mediation are invited to participate. Seats are very limited.



28 OCT - 03 NOV

Course Fee **HK\$20,000**

Online Registration <https://events.aail.org/en/event/IL-IM-2019-batch-II/>

The course will be conducted in English.

TENTATIVE PROGRAMME

<u>Investor-State Mediator Training (IM)</u>				
An Introduction of Investment Mediation				
28 Oct	09:00 – 10:30	Session I	Iu Ting Kwok	
	10:30 – 11:00	<i>Coffee Break</i>		
	11:00 – 12:30	Session II	Ada Chen	
	12:30 – 14:00	<i>Lunch Break</i>		
	14:00 – 15:30	Session III	Frauke Nitschke, Alejandro Carballo-Leyda	
	15:30 – 16:00	<i>Coffee Break</i>		
	16:00 – 17:30	Session IV		
<p>The session will provide an introduction of (i) general mediation (which is particularly suitable for those who have no experience in mediation and is optional for practicing mediators), (ii) investment mediation, and (iii) Mediation Mechanism for Investment Disputes established pursuant to the Investment Agreement concluded under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement.</p>				



Ting-kwok IU (“TK”) is a mediator and solicitor based in Hong Kong. In addition to his active mediation practice in Hong Kong, TK is also a panel mediator of Hong Kong International Arbitration Centre - Hong Kong Mediation Council and of Mainland - Hong Kong Joint Mediation Center both being designated mediation institutions under the Investment Agreement of Mainland and Hong Kong Closer Economic Partnership Agreement. Internationally, he is a panel mediator of the Singapore International Mediation Centre as well as the Japan International Mediation Center (JIMC–Kyoto). Between 2013 and 2017, he assisted and advised the Department of Justice on the enactment of the apology legislation. The Apology Ordinance came into effect on 1 December 2017. Since May 2017, TK has been a member of the Secretary for Justice’s steering committee and chairman of the special committee on evaluation mediation. TK is an adjunct professor in the School of Law at City University of Hong Kong, and in the department of law and business at Hong Kong Shue Yan University. He is the first Hong Kong based Visiting Professor of the University of Law, UK. In 2018, he was twice invited by the Hong Kong Judiciary to sit at the District Court as an External Mediation Master. In May 2019, TK demonstrated mediation skills at the “Mediate First – Unlocking Potential Forum” organized by the Department of Justice, Hong Kong. In August 2019, TK was invited to speak at the “Mediation: A New Era Forum” in Singapore. TK is the founder of Asia Conflict Resolution Institute Limited, which provides premier mediation training to mediators, mediators-to-be and mediation advocates. He remains as a consultant solicitor with Kwok, Ng & Chan, a Hong Kong law firm (www.kncsol.com).



Ada Chen is the Senior Assistant Law Officer (Civil Law) of the Mediation Team of the Department of Justice (DoJ). She joined DoJ after practising as a solicitor in one of the largest law firms in Hong Kong. She previously worked in the Commercial Unit of DoJ and has extensive experience in advising on major commercial initiatives of the Government. Ada was appointed to her present post in 2016. She leads the Mediation Team of DoJ to support the Steering Committee on Mediation chaired by the Secretary for Justice in implementing the long term policy to promote and develop mediation in Hong Kong. The Mediation Team has been taking forward a broad range of initiatives to promote the use of mediation to resolve disputes, including international commercial disputes. Ada has given talks in Hong Kong and overseas on dispute resolution topics. She has also assisted in the enactment of the Apology Ordinance and the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017. She advised on the establishment of a mediation mechanism under an Investment Agreement between the Mainland and Hong Kong under the Closer Economic Partnership Arrangement and drafted the relevant mediation rules adopted in Hong Kong.



Frauke Nitschke is a senior counsel at the International Centre for Settlement of Investment Disputes (ICSID). Frauke serves as the team lead for ICSID staff handling proceedings in English. Frauke also serves as Secretary of tribunals, conciliation commissions and *ad hoc* committees in investor-State proceedings conducted pursuant to the ICSID Convention and the ICSID Additional Facility Rules involving a variety of economic activities and legal instruments. Frauke further leads ICSID's investor-State mediation activities, including the drafting of the proposed Mediation Rules. Prior to joining ICSID, Frauke served in the World Bank's Legal Vice Presidency and the Inspection Panel. Frauke is an accredited mediator and admitted to the D.C. and New York State Bar. She holds a law degree from the Freie Universität Berlin, an LLM from Georgetown University Law Center, and a Master's Degree in Psychology from the FernUniversität Hagen.



Alejandro Carballo-Leyda (LLB with Economics, Certificate on international conflicts, LLM, PhD in international law, Harvard Program on Negotiation, CEDR accredited mediator) is the General Counsel of the International Energy Charter and head of its Conflict Resolution Centre, which provides good offices and mediation support to investors and governments. He coordinated the Guide on Investment Mediation (2016) and co-organised the first training for investment mediators. Currently, he supports several countries in developing their internal instrument on managing investment disputes. Previously, Alejandro advised States and private clients on a wide range of public and private international law issues. He edited the book *Asian Conflict of Laws* (Wolters Kluwer, 2015) and participated in the working groups of *UNIDROIT Principles of International Commercial Contracts* (2010 ed.) and *Hague Principles on Choice of Law for International Contracts*.

Investment Law Training (IL)

Umbrella Clauses and State Contracts in Contemporary Investment Law

29 Oct	09:00 – 10:30	Session I	Olga Boltenko
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV	

A significant majority of foreign direct investment in developing States flows through State contracts. ICSID reports that of all ICSID cases registered by the first quarter of 2019, 16% claims were brought under State Contracts. During the lecture, the candidates will receive an introduction to the notion of State Contracts, and explore the evolution of the umbrella clause concept. Finally, the lecture will conclude with an overview of the current state of law on interpretation and application of umbrella clauses in investor-State arbitration.



Olga Boltenko is a partner with Fangda Partners in Hong Kong. She is an investment and trade lawyer with over 10 years' experience representing investors and sovereign States in investor-State disputes and in investment advisory matters. She has acted as counsel in investor-State arbitration proceedings under the auspices of the World Bank, the Permanent Court of Arbitration, as well as under the LCIA, SCC, ICC auspices and in UNCITRAL and ad hoc proceedings. Olga advises Chinese and international clients on investment structuring from the international law protection point of view, as well as on investment recovery and dispute avoidance matters. Olga is qualified to practice law in the Russian Federation and is experienced in Russia-related contentious and non-contentious work. Olga is an adjunct lecturer at the University of Hong Kong where she teaches a post-graduate programme in arbitration and dispute resolution. She is listed as arbitrator on the HKIAC, SIAC, CIETAC, and AIAC panels, and she is registered as a foreign lawyer in Hong Kong.

Investment Law Training (IL)

The "New Generation" of Investment-Treaties

30 Oct	09:00 – 10:30	Session I	Antony Crockett
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV	

This session will review how the drafting of investment treaties has evolved from the 1960s to the present day. A "watershed" event in this context was the publication of the 2004 US Model Bilateral Investment Treaty, which introduced important changes to substantive and procedural provisions intended to address, among others, concerns that investment treaties unreasonably restricted States' right to regulate, particularly in the areas of environmental protection and public health. The 2004 US Model BIT also introduced important revisions in relation to arbitral procedure and transparency of proceedings. More recent developments in treaty drafting practice have sought to further limit the scope of protections provided to investors, to expand the range of dispute settlement methods available and, in at least one instance, to provide for mandatory mediation of disputes prior to arbitration proceedings being commenced.



Antony Crockett is an international dispute resolution specialist with particular expertise in international commercial arbitration, investment treaty arbitration and public international law. He is admitted to practice in Australia (Victoria), England & Wales and Hong Kong SAR. Antony has represented clients in ad-hoc arbitrations and arbitrations conducted under UNCITRAL, PCA and ICSID rules as well as institutional arbitrations conducted under GAFTA, HKIAC, ICC, LCIA, SIAC and Swiss Rules. Antony also has extensive experience advising on contentious and non-contentious public international law matters including in relation to diplomatic protection, sovereign immunity, sanctions and embargoes, recognition of States and government, human rights and international economic law. Antony holds LLB (Hons) and BSc (Environmental Science) from the University of Melbourne and an LLM (Dist.) from the London School of Economics and Political Science. Prior to joining Herbert Smith Freehills, Antony spent seven years working for a leading international law firm in London and Singapore. Antony has also worked as a legal intern with the United Nations Commission on International Trade Law (UNCITRAL).

Investment Law Training (IL)

Fair and Equitable Treatment

31 Oct	09:00 – 10:30	Session I: Introduction to the Notion of Fair and Equitable Treatment	Jane Willems
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II: Case-Law: Protection of the Investor and State Powers	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III: Mini-Moot on Fair and Equitable Treatment (Preparation)	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV: Mini-Moot on Fair and Equitable Treatment (Hearing)	

The presentation will be devoted to the examination of the standard of Fair and Equitable Treatment in investment arbitration. In the morning session, it will first examine the notion of Fair and Equitable Treatment as found in international investment agreements and its interpretation by arbitral tribunals. It will then turn to the application of the standard to the protection for foreign investors and investments in investment arbitral awards. The afternoon session will consist in an investment arbitration mini-moot over an alleged breach of the Fair and Equitable Treatment standard, to allow participants to apply principles and deepen their knowledge.



Jane Willems is an Associate Professor at Tsinghua University, School of Law. Her research interests are international investment law and international arbitration. Her publications include “Party Autonomy and the Selection of Non-State Norms in International Commercial Contracts”, *HKLJ* 2018 Vol. 48-3 951-991; “The Arbitrator’s Jurisdiction at Risk: The Case of Hybrid and Asymmetrical Arbitration Agreements” in *The Powers and Duties of an Arbitrator*, Kluwer (2017); “Investment Disputes Under China’s BITs: Jurisdiction with Chinese Characteristics?” in *Investment Law and Arbitration in the Asia-Pacific*, CUP (2019); “The

Settlement of Investor State Disputes and China: New Developments on ICSID Jurisdiction”, *SCJIL&B*, Vol. 8 (2011) 1-62; *Sino-Foreign Joint Ventures Contract Disputes Before International Arbitrators* [In French: Les contrats de joint ventures sino-étrangères devant l’arbitre international], Larcier (2015) etc. She is an expert in international investment and commercial arbitration, acting in a wealth of cases globally as the chair, counsel and arbitrator in commercial arbitrations, including ICC, HKIAC, CIETAC, BAC and UNCITRAL Rules. She also served as counsel for the State in *Sanum v Lao PDR* (PRC-Laos BIT); *Lao Holdings v Lao PDR* (Netherlands-Laos BIT). She is an accredited arbitrator of SIAC, HKIAC, CIETAC, Beijing Arbitration Commission, and CAA (Taipei).

Investor-State Mediator Training (IM)

1 Nov	09:00 – 10:30	Session I	Frauke Nitschke James South Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV	

It will first provide an overview of the context of Investor-State Disputes, following up on the “What is Mediation” session. Participants will then explore specific process considerations for Investor-State Mediation and process design options. Participants will work through a number of process considerations. Using a role play approach, participants will also engage as mediator with a party to design an appropriate mediation process. The principle of co-mediation and its application in the context of Investor-State Mediation will also be reviewed.

Investor-State Mediator Training (IM)

2 Nov	09:00 – 10:30	Session I	Frauke Nitschke James South Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV	

It will explore further aspects of Investor-State Mediation. The first part of the day will be devoted to stakeholder analysis and mapping. Participants will undertake a stakeholder mapping analysis for several case studies. Subsequently, intercultural competency will be explored, including culturally-shaped preferences and expectations. Participants will also review a cultural competency framework and the skills necessary to assist disputing parties in addressing cultural aspects arising between them. Participants will focus on core mediator skills and approaches to mediating Investor-State Disputes, such as managing the investor-State dynamic, exploring the range of possible interventions, facilitating the making of offers, addressing barriers to settlement and facilitating ‘breakthrough’. Ethical issues and mediator conduct in the context of Investor-State mediation will also be addressed. Participants will review conflict of interest situations and the role of the mediator in subsequent or parallel arbitration or court proceedings. The course will also explore approaches to addressing allegations of fraud or corruption and compliance with relevant national anti-bribery and corruption laws.

<u>Investor-State Mediator Training (IM)</u>			
3 Nov	09:00 – 10:30	Session I	Frauke Nitschke James South Alejandro Carballo-Leyda Wolf von Kumberg Danny McFadden
	10:30 – 11:00	<i>Coffee Break</i>	
	11:00 – 12:30	Session II	
	12:30 – 14:00	<i>Lunch Break</i>	
	14:00 – 15:30	Session III	
	15:30 – 16:00	<i>Coffee Break</i>	
	16:00 – 17:30	Session IV	
<p>It will provide participants with an opportunity to practice the skills and knowledge acquired during the previous days. Using a roleplay approach, each participant will act as mediator and receive customised feedback from experienced trainers. Participants will also have the chance to observe a variety of mediator styles.</p>			



James South is the Managing Director of the Centre for Effective Dispute Resolution (CEDR) and has been mediating public and private sector disputes for over 24 years, particularly commercial contracts and property disputes. James is known as an expert in resolving disputes between individuals and organisations or in disputes where there is a perceived or actual power imbalance and a difficult relationship between the parties. James is a fluent Spanish speaker and trains in cross-cultural issues in mediation. He is also experienced in mediating cross-border and cross-cultural disputes. In addition to his mediating experience, James combines his mediating,

training and consultancy skills to provide facilitation and neutral chairing services particularly for groups, which find themselves in conflict. As a world-leading dispute resolution professional he regularly acts as trainer and consultant expert in jurisdictions around the world and has worked in over 20 jurisdictions including Austria, Bosnia and Herzegovina, Belgium, Brazil, Botswana, China, Croatia, Egypt, Hong Kong, India, Ireland, Lebanon, Morocco, Pakistan, Spain, South Africa, Ukraine, USA. James is admitted as a Barrister and Solicitor of the High Court of New Zealand and holds a Master’s degree in Dispute Prevention and Resolution.



Wolf von Kumberg spent nearly 30 years in London, England, as European Legal Director and Assistant General Counsel to Northrop Grumman Corporation a global aerospace/security company. In that position he was responsible for its international legal affairs. Prior to that, he served 5 years as the Vice President – Legal Affairs for Litton Canada, after having spent several years in legal practice with a major Toronto Law Firm. He retired from Northrop Grumman in 2015 as its Assistant General Counsel and is now a member of ArbDB Chambers in London and the Managing Director of Global Resolution Services a provider of dispute resolution services. Wolf has received law degrees

from Canadian and European Universities and is qualified as a lawyer in both Canada and England. Wolf is a certified CEDR mediator and an arbitration Fellow of the Chartered Institute of Arbitrators. He has mediated numerous private and public sector disputes and been active in international commercial and ISDS arbitrations. He sits on the mediation panels of CEDR, AIAC, WIPO, SCCA and the AAA/ICDR. In addition, he is a member of arbitration panels at AAA/ICDR, AIAC, LCIA and the SCCA. In this context, he sits on the AAA/ICDR AANS Panel which specialises in aerospace, security and defence related disputes. He has also been a keen proponent for the broader use of dispute boards by Industry and Government as a conflict avoidance tool and instrumental in bringing mediation to Investor-State disputes through work with the ECT, IMI, CEDR and ICSID. Wolf was the first Chair of the International Mediation Institute (IMI), which has advocated international standards for mediators. He the former Chair of the CIArb Board of Management. He serves as a Director of the American Arbitration Association (AAA) and of CEDR in the UK. In addition, he has been widely involved in arbitration, mediation and conflict avoidance board training for the CIArb, AAA and CEDR.



Danny McFadden is CEDR Director and is dually qualified as a lawyer both in Australia and the United Kingdom. He has been involved in negotiation, conflict resolution training, mediation and international business for over 20 years. After completing his Masters in Commercial Law, he specialised in dispute resolution and international trade. Danny speaks Mandarin Chinese fluently and mediates regularly in Hong Kong and China using both English and Mandarin. He has worked with people of all nationalities and has a clear understanding of the dynamics of mediating and arbitrating across national boundaries.