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An aerial photograph of New York City, showing a dense urban landscape with numerous skyscrapers. The Freedom Tower is prominent on the left. The Hudson River is visible on the far left, and the East River on the right. The city extends to the horizon under a clear blue sky.

The David D. Caron Praelium 2023

Thursday, November 16, 2023

THREE CROWNS



Founded in 2014, Three Crowns is an elite specialist firm dedicated to providing excellence in counselling and advocacy in international arbitration and international law. We are recognised by our clients and leading legal directories as “one of the premier arbitration practices in the world” and “the go-to firm for high-value and complex matters”.

Members of our firm have acted on some of the largest and most significant international disputes in recent years. Our clients—leading corporates and sovereign States—entrust us with their largest and most important disputes. On their behalf, we have an outstanding track record of securing positive awards and settlements, including obtaining many of the precedent setting awards in the history of international arbitration.

With offices in key arbitration centers, our “one firm, one team” approach ensures that our clients receive a seamless service and dedicated lawyers on every mandate. Successful representation in international dispute resolution calls upon a unique blend of experience, creativity, forensic skill, and advocacy. Our way of working drives efficiency.

The David D. Caron Praelium 2023

A Celebration of Advocacy

November 16 | New York City, New York

The Harmonie Club | 5:30 PM

The Distinguished Tribunal:

Carolyn B. Lamm

The Honorable Charles N. Brower

Professor George A. Bermann

The Advocates:

Caline Mouawad

Elliot Friedman

The Praelium is an annual celebration of advocacy, with two leading international advocates deploying their oratorical and advocacy skills in the service of important current legal issues before a distinguished three-member tribunal. The event has been renamed to honor the life and legacy of Praelium co-founder Professor David D. Caron, an individual of great humility and kindness whose distinguished career in international law will long serve as a source of guidance and inspiration.

*The opinions expressed are in the spirit of academic debate and do not necessarily reflect the advocates' or arbitrators' views.

CASE STUDY: FACTUAL BACKGROUND

1. Soprano Waste Management (“Soprano”) is a company incorporated in the Republic of Gandolfini. Soprano operates a waste management concession in the City of Carmela, the largest municipality of the Republic of Falco (“Falco”).
2. Falco and Gandolfini have a long history of economic cooperation and trade, and so wished to protect and encourage investments in one another’s territory but also to ensure that any investment disputes are minimized and are resolved in a cooperative spirit. They accordingly entered into a Treaty on the Reciprocal Protection and Promotion of Investment (“Falco-Gandolfini BIT”), Article VII of which provides as follows:

Any dispute between a Party and an investor of the other Party arising out of or relating to an Investment should be resolved in the first instance through consultation and negotiation. If the dispute cannot be settled amicably, the parties to the dispute may submit the dispute to the courts or administrative tribunals of the Party that is a party to the dispute, or to arbitration under any of:

- (i) the Arbitration Rules of the United Nations Commission on International Trade Law,*
- (ii) the Arbitration Rules of the International Centre for the Settlement of Investment Disputes (“Centre”) (provided that the Party is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) or the Additional Facility to the Centre, if the Centre is not available; or*
- (iii) the Rules of Arbitration of the International Court of Arbitration of the International Chamber of Commerce;*

as may be mutually agreed between them for the resolution of their dispute. Any such arbitration (other than an arbitration at the Centre) shall have its legal seat in New York City, New York, United States of America.

3. Article I of the Falco-Gandolfini BIT defines “Investment” to mean:

Every kind of asset, invested directly or indirectly by an investor of a Party in the Territory of the other Party in accordance with the laws and regulations of the other Party.

4. Soprano initially bid on the Carmela waste management concession pursuant to the Falconian “Municipal Concession Control Act” (“Act”). The Act sets out various formulae by which bids were to be assessed and application fees calculated. Under the Act’s formulae, which are complex, Soprano was obligated to pay a one-time bid application fee of \$1.1 million. Instead, however, Soprano paid a fee of \$1.3 million. Soprano won the concession and signed a concession contract with Carmela. Soprano then paid the same \$1.3 million fee every year that it operated the concession. Carmela accepted all of these \$1.3 million payments — seven in total.
5. Following a series of high-profile stories in the Falconian paper of record concerning organized crime’s influence in government contracting, Lupertazzi, the national opposition party, campaigning on a platform of anti-corruption, won a majority in the Falconian parliament and the mayoralty of Carmela. Shortly thereafter, the parliament passed the “Racketeering Risk in Waste Management Control Act,” an amendment to the Act that imposed various restrictions on government contracting in the waste management sector. One of these amendments was to prohibit municipalities from having waste concession contracts with entities where “the contractor is ultimately owned or controlled by a Foreign Person.” Soprano, as a Gandolfinian investor, falls within the definition of a Foreign Person under the amendment. Critics of the new government’s anti-corruption claims noted that the majority whip for Lupertazzi is the majority owner of Leotardo Waste Systems LLC (“Leotardo”), the largest Falconian firm in the waste management sector.
6. In October 2022, Carmela notified Soprano that, following the amendments to the Act, Carmela was now required to terminate the Concession Agreement. Following a period of protracted and tense negotiations, in which the new Carmelan mayor’s administration accused Soprano of securing the concession by corrupt means and Soprano claimed that the new administration was simply in the pocket of Leotardo, Carmela ultimately terminated the Concession and awarded it to Leotardo in accordance with the provisions of the amended Act. Carmelan police occupied the Soprano waste management processing facility and evicted all Soprano personnel. Further, the Carmelan police and Falconian Investigation Bureau have opened an investigation into Soprano’s payments to the previous Carmelan government, and have announced that should the investigation reveal any improper payments to the prior government, charges will be brought against all concerned.
7. In January 2023, Soprano filed an arbitration with the ICC under the ICC Rules against Falco claiming that the termination of the concession and seizure of the waste management treatment facility violated the Expropriation, National

Treatment, Umbrella Clause, and Fair and Equitable Treatment obligations of the Falco-Gandolfini BIT.

8. The 2021 ICC Rules of Arbitration provide, *inter alia*, that:

Article 6

(3) “. . . if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement . . . the arbitration shall proceed and any question of jurisdiction . . . shall be decided directly by the arbitral tribunal . . .”

9. In connection with the initial procedural hearing, Falco notified Soprano and the Tribunal that it objected to the jurisdiction of the Tribunal because, pursuant to Article VII of the Falco-Gandolfini BIT, there was no agreement between the parties on the applicable rules of arbitration, and hence, no agreement to arbitration. Further, Falco argued that the Tribunal lacks competence to hear this jurisdictional objection because under New York law, it is presumed that courts decide these types of jurisdictional issues unless there is “clear and unmistakable evidence” that the parties intended to delegate such issues to an arbitrator. Accordingly, Falco requested that the Tribunal stay the arbitration in order for Falco to bring its objection to the New York courts. The Parties agreed that Falco’s application is timely.
10. Additionally, Falco notified Soprano and the Tribunal that it objected to the Tribunal’s jurisdiction because Soprano obtained its concession by corrupt means and thus did not “invest[] . . . in accordance with the laws and regulations of” Falco within the meaning of Article I. Falco requests that the Tribunal, if it does not stay the proceedings, bifurcate the proceeding to hear this jurisdictional objection before any merits phase.

ISSUES FOR DETERMINATION

The Tribunal has asked the parties to address the following issues at the upcoming procedural hearing:

1. Whether the Tribunal should stay the arbitration to allow the New York courts to rule on Falco’s objections to jurisdiction pursuant to Article VII; and
2. Whether the Tribunal should bifurcate the proceedings to hear Falco’s objections to jurisdiction pursuant to Article I separately from the merits.

THE DISTINGUISHED TRIBUNAL



Carolyn B. Lamm

White & Case

Carolyn Lamm is Chair of International Arbitration of the Americas at White & Case. She serves as lead counsel in international arbitrations in ICSID, ICC, and other fora and in related litigation in U.S. Courts for foreign states, foreign state-owned companies, and foreign corporate entities. Carolyn is an arbitrator on the ICSID List, first nominated by the United States, then the Government of Uzbekistan, and has served as arbitrator in ICSID proceedings, ICC proceedings, SAIC proceedings, ICDR proceedings, and AAA proceedings. She is the Distinguished Faculty Chair for the White & Case LLM in International Arbitration at the University of Miami School of Law; immediate past President of the American Bar Endowment; member of the Advisory Council and previously the Governing Board of ICCA; Emeritus member of the Council of the American Law Institute (elected 1999); past President of the DC Bar and the American Bar Association; and a member of the Board of Trustees of the University of Miami.



The Honorable Charles N. Brower

Twenty Essex

Judge Brower has recently served as Judge ad hoc of the International Court of Justice in three active contentious cases, as a result of which he is the most-appointed of the only five Americans ever so appointed, has been a Judge of the Iran-United States Claims Tribunal since 1983, and has served as Judge ad hoc of the Inter-American Court of Human Rights. He is a member of Twenty Essex Chambers in London and has served as Distinguished Visiting Research Professor of Law at George Washington University Law School. Previously, Judge Brower served as Acting Legal Adviser of the United States Department of State, as Deputy Special Counsellor to the President of the United States, and as a partner at White & Case LLP, where he co-founded the firm's Washington, D.C. office. Judge Brower has been awarded the ASIL Manley O. Hudson Medal, U.C. Berkeley Law School's Stefan A. Riesenfeld Memorial Award, the ABA Section of International Law's Lifetime Achievement Award, the ITA-CAIL's Pat Murphy Award, GAR's Lifetime Achievement Award, and the inaugural Lifetime Achievement Award of the Center for American and International Law.



Professor George A. Bermann

Columbia Law School

Professor George A. Bermann is the Jean Monnet Professor of EU Law, Walter Gellhorn Professor of Law, and the director of the Center for International Commercial and Investment Arbitration (CICIA) at Columbia Law School. He principally teaches courses in transnational dispute resolution (international arbitration and litigation) and European Union law. George is an active international arbitrator in commercial and investment disputes; chief reporter of the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration; co-author of the UNCITRAL Guide to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; chair of the Global Advisory Board of the New York International Arbitration Center (NYIAC); co-editor-in-chief of the American Review of International Arbitration; founding member of the governing body of the ICC Court of Arbitration; chair of the advisory board of the Center for International Investor-State and Commercial Arbitration (CIICA) (Lahore, Pakistan), and the Thai Arbitration Center (Bangkok, Thailand); and member of the board of the Tehran Regional Arbitration Center (Tehran, Iran).

THE ADVOCATES



Caline Mouawad

Chaffetz Lindsey

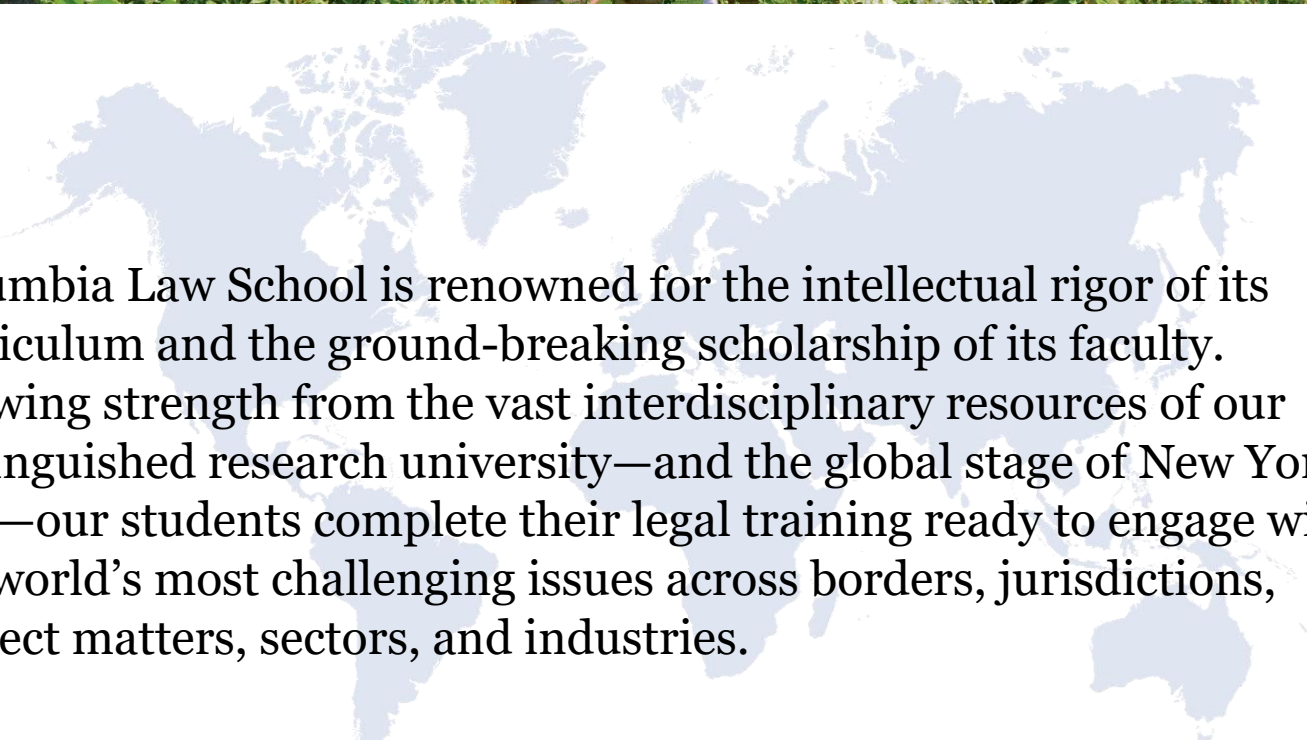
Caline Mouawad is a partner at Chaffetz Lindsey in New York. She has over 20 years of experience representing clients in international commercial arbitrations and in investment treaty disputes, as well as related litigation matters. She counsels clients in an array of multi-jurisdictional disputes that span from Europe to Latin America and from Africa to Asia, and concern such sectors as oil and gas, mining, consumer goods, and telecommunications. She accompanies her clients in arbitrations conducted in English and French before all major arbitral institutions, and regularly serves as an arbitrator. Among other leadership roles, Caline serves as Vice-Chair of the Steering Committee of the ICC Commission on Arbitration and ADR and the Steering Committee's liaison to the ICC Task Force on Addressing Corruption Issues. Caline also serves as Co-Chair of the IBA Investment Arbitration Subcommittee. She is a Director of the New York International Arbitration Center (NYIAC), as well as a Member of its Executive Committee. Caline was recently awarded the Twelfth Annual Smit-Lowenfeld Prize by the International Arbitration Club of New York for outstanding article published in the previous year on any aspect of international arbitration. The article, published by Arbitration International and titled "The Illegality Objection in Investor-State Arbitration," methodically reviews investment awards that involved an illegality objection.



Elliot Friedman

Freshfields Bruckhaus Deringer

Elliot Friedman is a partner in Freshfields' international arbitration group in New York and heads the firm's international arbitration practice in the Americas. His practice focuses on international arbitration (commercial and investor-state), and he has particular expertise in the tech, energy, financial services, and pharma sectors. Elliot has handled arbitration proceedings before virtually every major arbitral institution, and his experience includes disputes involving long-term energy contracts, bilateral and multilateral investment treaties, joint venture agreements, construction contracts, licensing and distribution agreements, and intellectual property. Elliot also represents companies in transnational litigation in U.S. courts, including the enforcement of arbitral awards, and was part of the team that successfully represented BG Group in its landmark international arbitration case before the U.S. Supreme Court. Elliot is a member of the Executive Board of the Institute for Transnational Arbitration (ITA) and of the Executive Committee of the New York International Arbitration Center (NYIAC).



Columbia Law School is renowned for the intellectual rigor of its curriculum and the ground-breaking scholarship of its faculty. Drawing strength from the vast interdisciplinary resources of our distinguished research university—and the global stage of New York City—our students complete their legal training ready to engage with the world’s most challenging issues across borders, jurisdictions, subject matters, sectors, and industries.





View from Bush House terrace,
Strand Campus

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MAKE A DIFFERENCE — *join* KING'S

The Dickson Poon School of Law, King's College London is one of the oldest law schools in England and recognised globally as one of the best law schools in the world. The School was established in 1831 and has played an integral role in the life of King's since the university was formed almost 200 years ago.

King's has been in service to society since its foundation and we're proud to continue that tradition to this day. Our research and teaching address some of the most pressing questions of our time relating to equality and human rights, the legal implications of climate change, globalisation, international relations, trade, competition and global finance, to name but a few. Members of The Dickson Poon School of Law advise governments, serve on commissions and public bodies and are seconded to national and international organisations, helping to shape policy and practice nationally and internationally.

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New York Arbitration Week

November 13-17, 2023

The New York International Arbitration Center (NYIAC) and the New York Branch of the Chartered Institute of Arbitrators (CIArbNY) are pleased to continue their joint leadership of New York Arbitration Week (NYAW) for the fifth consecutive year. This year, the event will take place in person from November 13-17, 2023 and center on the theme of “New York, New York: A Celebration of New York Law and Arbitration”. The theme aims to highlight the deep and multifaceted connection between international arbitration and New York City by including a variety of topics that focus on New York’s connection not only with the practice of international arbitration but also with numerous global jurisdictions.

The NYAW Organizing Committee is chaired by Gretta Walters and Damien Nyer and includes members Jessica Beess und Chrostin, Kate Brown de Vejar, Napoleão Casado Filho, Steph Cohen, Andrew Finn, Sanghoon Han, Benno Kimmelman, Annie Lespérance, Melissa Magliana, Carlos Ramos-Mrosovsky, Natalie Reid, Rekha Rangachari, Daniel Schimmel, Steven Skulnik, and Erin Thomas, as well as Committee Secretaries David Blackman, Surya Gopalan, Eric Lenier Ives, May Khoury, Su Rao, and Alicia Yeo.



NYIAC is a non-profit organization formed to advance, strengthen, and promote the conduct of international arbitration in New York. NYIAC presents thought leadership programs and hosts a range of educational and networking programs and events for the international arbitration and New York ADR community.

The Chartered Institute of Arbitrators is a learned society and charity headquartered in London. It provides worldwide scholarship and professional development for all areas of alternative dispute resolution, has approximately 17,000 members worldwide and is the only body to confer arbitrator credentials recognized around the world. CIArbNY represents the Institute in the States of New York, New Jersey and Connecticut; it offers training in international arbitration and other ADR programs in its territory.

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New York Branch

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