A MESSAGE FROM ALI PRESIDENT DAVID F. LEVI:

2020 Annual Meeting Cancelled

Dear Members of The American Law Institute:

I hope everyone is staying safe during this challenging time. It will not surprise you that in light of all of the uncertainties and circumstances, the Executive Committee has reached the conclusion that we must cancel the 2020 Annual Meeting, originally scheduled for May 18-20 in San Francisco. We recognize that many of you have already made plans to travel to San Francisco. Our Reporters and project participants also have spent countless hours preparing drafts for discussion and review. But we know you understand why we must take this action. Thank you for your patience and understanding.

You might be interested that this is only the second time in our long history that we have cancelled an Annual Meeting. The last and only other time this happened was in 1945 due to the demands of World War II. Director William Draper Lewis explained at that time, that “our war conditions and [government restrictions] rightly prohibit[] any large meeting not directly connected with the war effort.” We find ourselves in a somewhat similar situation this year. Yet it is a testament to the important work and interactions that occur at an Annual Meeting that we so rarely have canceled it despite the various crises and challenges that may have afflicted us over the past 97 years.

I do want you to know that we carefully examined virtual meeting alternatives. Many of you are now using these alternatives in your own organizations. We concluded that we could not hold the 2020 Annual Meeting on a virtual platform and expect the kind of thoughtful decision-making and discussion that is the hallmark of our process. In our judgment, abruptly shifting to an online format for a membership body of 4,500, whose deliberations require carefully constructed debate and voting procedures, was not possible. Over the next few months, we will consider the role of on-line platforms in our future. If there is a role, it would seem most promising for smaller project meetings. Perhaps we will decide to experiment with such platforms, and we will welcome your thoughts and feedback. But to start any such experimentation with the Annual Meeting seems imprudent, were it even possible.

We had a full plate of projects to discuss this year including the Law of American Indians, Student Sexual Misconduct, Property, Intentional Torts, Sexual Assault, Copyright, Data Economy, and Conflict of Laws. Since we are losing valuable time together this year, we are currently considering an expanded Annual Meeting next year that will cover the projects we are unable to take up this May as well as the work we accomplish in the year ahead.

When the ALI reconvened in 1946, ALI President George Wharton Pepper invoked “that sense of fellowship which is not unusual among those engaged in a worthy intellectual task.” I will miss that fellowship this year. We all will. But when I see you at our next Annual Meeting in 2021, I know we will return as determined as ever to produce the work that is pivotal to supporting the rule of law and that our camaraderie will be as strong as ever.

In the meantime, I wish you good health and peace of mind in this difficult moment. I am so thankful for all you have done and will do for the ALI and our legal system. May we all be together in 2021 with a renewed sense of purpose and gratitude for one another and our wonderful organization.

I send best wishes and personal regards,

ALI President David F. Levi

A Landmark in the Field of U.S. International Arbitration Law

In a recent column published in the New York Law Journal, Hughes Hubbard & Reed partner John Fellas describes the forthcoming Restatement of the Law, The U.S. Law of International Commercial and Investor–State Arbitration, as “a landmark in the field of U.S. international arbitration law that displays all the characteristics of the exemplary Restatement.” Fellas should know—he is co-chair of his firm’s International Arbitration practice as well as of its International practice, and has extensive experience both as counsel and as an arbitrator. He also was one of the many distinguished practitioners who participated on the Members Consultative Group for this project, complementing an equally distinguished group of Advisers.

The Restatement received final approval by the Institute at our 2019 Annual Meeting, and it currently is undergoing preparation for publication. As Fellas observes in his column,
“[i]t is a testament to the diligence of the Reporters who prepared the Restatement that they have produced such a clear, comprehensive and coherent work,” after more than a decade of labor.

The Restatement is a significant contribution to the field of U.S. international arbitration law and seems destined to be heavily cited for many years to come. As Fellas describes, the Restatement focuses on “the role of the U.S. courts with respect to arbitration proceedings,” dealing only “incidentally” with “the procedures that govern the conduct of arbitration proceedings” themselves. In other words, this Restatement—like all Restatements—is primarily addressed to an audience of American courts. Even when parties have entered into an agreement to arbitrate disputes, they also routinely seek court intervention at critical junctures. These points of intersection often raise difficult issues of interpretation, jurisdiction, and procedure, and, up to this point in time, the field has lacked a comprehensive roadmap to shepherd judges through this complex terrain. Going forward, the Restatement will serve this vital purpose. It also will be indispensable to practitioners of U.S. international arbitration law, both as an expert guide to the field, as well as a tool that can be cited to educate judges on issues with which they may be unfamiliar. In Fellas’s words, the Restatement “belongs on the shelf of everyone” who practices in the realm of international and investor–state arbitration.

The work is designed to be maximally useful to courts and practitioners. Chapter 1 introduces the reader to the “highly distinctive vocabulary” (as the Restatement puts it) of international commercial and investor–state arbitration through a comprehensive collection of definitions; lays out the basic principles of U.S. international arbitration law; and then outlines the framework for federal preemption of state law, a topic of foundational importance in this area. Chapters 2 through 4, in sequential order, the three phases of what one might call the life cycle of an arbitration, each of which presents particular opportunities for U.S. courts to become involved. Thus, Chapter 2 covers enforcement of the arbitration agreement; Chapter 3 addresses the role of courts in connection with ongoing arbitral proceedings; and Chapter 4 deals with post-award relief. Finally, Chapter 5 addresses the unique attributes of investor–state arbitration.

Key aspects of the organizational structure of the Restatement were settled upon in 2018, after each individual component of the project already had been approved by the Council and the ALI membership. Even though the project had not given rise to much controversy, we then took an additional year to fine-tune the work. In particular, Chapter 1 was reworked in an effort to provide a smooth introduction for readers unfamiliar with this complex field of law. The Reporters also made a number of other improvements, including some substantive changes spurred by rapidly evolving case law. This serves as a reminder of a point that I frequently make during Annual Meeting discussions—namely, that while we necessarily approve piecemeal the components of our projects, a project is never finally approved until a vote is taken on the project as a whole. In short, with a Restatement, as with baseball, it ain’t over ‘til it’s over.
The years of effort clearly paid off in this Restatement. As Fellas indicates in his column, the final product is “a majestic, comprehensive, and clear account of the U.S. law of international and investor–state arbitration.” And courts already are finding value in its scholarship. Both the Second Circuit and the D.C. Circuit have relied on Restatement definitions of international arbitration terminology. The Court of Appeals of Washington has trumpeted the “crisp summary of the development of federal law on evident partiality” provided by one of the Restatement’s numerous helpful Comments. I am confident that these judicial endorsements are harbingers of more to come once the Restatement has been published.

Most importantly, this Restatement arrives at a time when the field of U.S. international arbitration law has a significant need for the systematic and comprehensive treatment provided by a Restatement. There is a consensus among practitioners in this field that there is a great deal of uncertainty and incoherence in this body of law. Fellas, in his column, explains the driving source for this confusion—the legal framework for the U.S. law of international arbitration rests on an old and sparingly worded statute, the Federal Arbitration Act (FAA), and on two international conventions implemented through the FAA. Further, federal law does not entirely occupy the field, and thus state arbitration statutes also have some room for operation. Particularly because the FAA and convention texts leave so many important questions unanswered, “much U.S. arbitration law is judge-made, with the inevitable result that sometimes it is contradictory, contains gaps, and is unclear.” By contrast, Fellas explains, the statutory law of some countries, such as England, features more detailed treatment of key issues that frequently arise in commercial disputes. The comparative lack of predictability and coherence in American law has real business consequences, as ALI Council member and Debevoise & Plimpton partner David Rivkin explained in a 2018 column on this Restatement project, noting that: “[i]n an international context, this has long caused problems, as foreign parties considering contracts with American parties or contemplating placing an international arbitration in the United States have often had difficulty determining what U.S. law is.”

Section 3.5 of the Restatement presents a nice example of the clarifying effect the Restatement will have on an important issue on which judicial authority currently is not uniform. The Section—entitled Court-Ordered Production of Evidence in Aid of Arbitration—focuses on one statute, 28 U.S.C. § 1782, and the lines of cases interpreting it. The black letter identifies the statutory foundation of the legal issue, and then sets forth in clear, workable language the factors that courts consider in determining whether to grant or deny a request that a person give testimony or produce documents or other information for use in an arbitration. The Comments lucidly identify the division in case law regarding whether the statute applies when the arbitral tribunal has been established by party agreement, and then clearly lays out the Restatement’s position on the question (yes, the statute applies) and the analysis underlying that position, which is based both on the statute’s plain language as well as on instructive Supreme Court dictum. The exhaustive Reporters’ Notes cite case law going both ways on the question, and provide more extensive reasoning in support of the Restatement’s resolution of it. And the Section addresses a number of other points of practical interest to lawyers and courts dealing with matters under the statute.

Section 3.5’s treatment of 28 U.S.C. § 1782 not only will serve well the users of this Restatement; it also illustrates the role that Restatements can play in addressing areas of law governed by a federal statute. As I have explained in an earlier letter in The ALI Reporter, “[w]hat we seek to do in those areas is to provide guidance to the courts where the scope for judicial discretion is broad, which can be the case even for statutes that are very detailed.” Even though federal statutes ultimately are subject to authoritative interpretation by one Supreme Court, the practical reality is that the Court cannot and does not step in immediately to resolve every issue of federal law on which uncertainty exists. In the meantime, commercial actors need to make decisions, as informed by the best assessment of the law that their counsel can provide. And other courts, of course, can’t wait for the Supreme Court to resolve every tough issue. This Restatement offers a prime example of the assistance the Institute’s comprehensive, deliberative, and iterative drafting process can provide in areas where judge-made law overlays a federal statutory framework.

I fully agree with Fellas’s prediction that this Restatement will prove to be a landmark in the U.S. law of international commercial and investor–state arbitration. Its authority will derive from the evident quality of the work, and from readers’ knowledge that the Restatement represents the collaborative effort of the world’s experts in this field. Fellas concludes his piece by noting that, “[t]hose who practice in the field of international arbitration owe an enormous debt to the Reporters who worked diligently to prepare the Restatement.” I would add that he and other members who participated on the MCG, along with the stellar Advisers, as well as every ALI member who reviewed the various drafts and voted on them, deserve our sincere thanks too. And I greatly look forward to the imminent publication of this important work.

Editor’s Note: A version of this Director’s Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: www.ali.org/news.