

Partner, London

International Litigation and Arbitration



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## Education

LL.M., New York University School of Law (John F. Kennedy Memorial Scholar)

B.C.L., The National University of Ireland (First Class Honours, College Scholar)

## Bar Admissions

Solicitor Advocate, England & Wales

Ireland

New York

## Languages

French

Spanish

David Herlihy focuses on complex international commercial arbitration and investment treaty arbitration, as well as broader issues of public international law. Mr. Herlihy was named as a 2019 International Arbitration MVP by *Law360* (a ranking of its five most successful arbitration lawyers worldwide for that year). Additionally, *Chambers UK* and *The Legal 500* identify him as a leading individual in his field, describing him as a “fantastic arbitration lawyer,” “a powerful and eloquent advocate,” “amazingly skilled” and “frankly outstanding.” He has a broad range of experience in commercial and investment treaty disputes across multiple industries, including Spanish-language disputes in Europe and Latin America.

His representations include acting for:

### **Investment Treaty Arbitration/Public International Law**

- Vodafone International Holdings B.V. in its landmark victory against the Republic of India under the Netherlands-India bilateral investment treaty. In its September 2020 award, an UNCITRAL tribunal held that India’s attempt to impose a \$5.5 billion liability onto Vodafone and its Indian subsidiary — through retroactive withholding taxes, interest and penalties — was in breach of international law;
- the Republic of Cyprus in its successful defence of ICSID claims arising out of its regulatory treatment of the nation’s second-largest bank during the eurozone financial crisis. In a 2018 award rendered under the Cyprus-Greece bilateral investment treaty, an ICSID tribunal upheld Cyprus’ defences in full, rejected claims by the bank’s former shareholders that had sought more than €1 billion in damages, and awarded costs in favour of Skadden’s client;
- NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V. in the successful prosecution of claims against Spain under the Energy Charter Treaty. In a 2019 award, an ICSID tribunal awarded our clients damages of €292 million plus attorneys’ fees, making this the largest damages award against Spain in the renewable energy sector;
- the Slovak Republic in its successful defence of a bilateral investment treaty dispute involving claims in excess of €1 billion, a result named as one of *The American Lawyer’s* five Biggest Defense Wins in its global survey of international arbitration for 2011-13;
- Global Telecom in an investment treaty dispute against Algeria concerning the treatment of its subsidiary Djezzy resulting in a settlement and joint venture agreement under which Skadden’s client received net cash payments of US\$3.8 billion;
- the Republic of South Sudan in its oil sector negotiations and related international law issues following its secession from the Republic of Sudan, as well as in ICSID proceedings brought by Sudapet Co. Ltd. concerning the disputed ownership of significant oil field interests (disputed amount exceeding US\$1 billion). *Legal Business* named Skadden as its 2017 International Arbitration Team of the Year for the defence of this case;
- the Republic of South Sudan in the recovery of substantial sums representing the proceeds of shipments of crude oil misappropriated by the Republic of Sudan. For this work, Skadden was commended by the *Financial Times* in its 2013 Innovative Lawyers report for Europe and the firm also was named African Legal Awards’ Dispute Resolution Team of the Year in 2013;
- investors Ron Fuchs and Ioannis Kardassopoulos in ICSID arbitration proceedings against Georgia under the Energy Charter Treaty and two bilateral investment treaties, resulting in a damages award of US\$100 million and a landmark precedent concerning the provisional application of that treaty. This matter received a *Global Arbitration Review* award in 2012;

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- foreign investors overseeing enforcement of an ICSID award against a state's commercial assets worldwide;
  - a French investor in ICSID claims concerning the treatment of a foreign bank;
  - a Singaporean investor in ICSID proceedings against a Southeast Asian government involving claims valued at more than US\$300 million, commenced under an investment contract and the 1987 ASEAN Investment Agreement;
  - foreign investors in annulment proceedings under Article 52 of the ICSID Convention and revision proceedings under Article 51 of the ICSID Convention;
  - an EU member state in defence of infringement proceedings commenced by the European Commission under Article 258 of the Treaty on the Functioning of the European Union;
  - an applicant in proceedings before the European Court of Human Rights; and
  - a foreign investor facing threatened expropriation in Zimbabwe.

### **Commercial Arbitration and Litigation**

- a Dutch investor in LCIA arbitration proceedings concerning the impact of COVID-19 on the completion of a commercial real estate transaction valued at €300 million;
- a Spanish renewable energy company in ICC arbitration proceedings seated in Madrid and governed by Spanish law;
- a Brazilian multimedia company in an ICC arbitration arising out of a contractual dispute with a Venezuelan company;
- a Mexican telecommunications company in a shareholders' dispute under the AAA International Arbitration Rules;
- an English company in a U.K. High Court dispute concerning a European water concession;
- a leading Dutch internet technology company in an ICDR arbitration involving claims by a former licensee exceeding US\$4 billion;
- a joint venture partner in an LCIA dispute under a shareholders' agreement involving claims in excess of US\$1 billion;
- foreign investors in a shareholders' dispute involving a Russian company, litigated in the High Court of Justice of the British Virgin Islands;
- a U.S. company in an ICC arbitration defending claims of alleged monopolization and abuse of dominance under the Sherman Act and the EC Treaty;

- a Swiss company in an ICC arbitration dispute against an Egyptian distributor, involving claims of more than US\$1 billion;
- a U.S. energy company in an ICC arbitration arising out of a joint venture dispute with a Korean company; and
- a Trinidad liquefied natural gas provider in an arbitration under the AAA International Arbitration Rules arising out of a dispute with a Luxembourg company.

Mr. Herlihy also acts as counsel in court proceedings arising out of international arbitrations, including applications for interim injunctions under the Arbitration Act 1996 and anti-suit injunctions in the U.S. federal courts. He is also experienced in litigating high-value international disputes before the English High Court and the Courts of the British Virgin Islands, often involving novel issues of conflicts of laws and *forum non conveniens*. Examples of these cases include *Sibir Energy v. Roman Abramovich, Sibneft & Ors.* (High Court, BVI) and *Kolden Holdings Ltd v. Rodette Commerce Ltd and Another* (High Court, England & Wales). In addition, he has advised on a variety of dispute resolution issues in the U.S., England and internationally, including potential claims under the European Convention on Human Rights and the treaty establishing the Common Market for Eastern and Southern Africa. Prior to joining Skadden, Mr. Herlihy held a judicial clerkship at the Supreme Court of Ireland (1996-98).

Mr. Herlihy was named to *Best Lawyers in the UK 2021*, *The Legal 500's* International Arbitration Powerlist UK 2019 and among *Who's Who International's* Thought Leaders 2018. *Chambers UK* reports that Mr. Herlihy is "an outstanding talent," "nothing but exceptional" and "a strong practitioner with a great reputation" while *The Legal 500* reported that he "demonstrates great flair in his analysis of complex treaty law issues." *Global Arbitration Review* recognised Mr. Herlihy's successful representation of two foreign investors against Georgia as a "triumph," which won Skadden the title of Most Impressive Large Arbitration Practice of 2011. *The Financial Times* gave the same case a Standout ranking in its Innovative Lawyers Awards 2012. In 2016, *Legal Week* named Mr. Herlihy among its "rising stars" of litigation in the U.K. He has served on the ICC Commission on Commercial Law and Practice, the ICC Task Force on Arbitration Involving States or State Entities, and the Legal Advisory Task Force to the Energy Charter Secretariat. He also has served as a guest lecturer at the World Trade Institute and the London School of Economics on the subject of international investment law.

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## Selected Publications

“The United States-Mexico-Canada Agreement Significantly Curtails Foreign Investment Protection,” *Skadden, Arps, Slate, Meagher & Flom LLP*, October 2, 2018

“The Energy Charter Treaty,” *Arbitration World*, 2015

“The ‘Law 42’ Arbitrations Against Ecuador and the Importance of BIT Language,” *Skadden’s 2015 Insights — Global Litigation*, January 2015

“Litigants Continue to Use ‘Anti-Suit Injunctions’ to Protect Their Arbitration Rights,” *Skadden’s 2014 Insights — Global Litigation*, January 16, 2014

“The Increasing Appeal and Novel Use of Bilateral Investment Treaties,” *Skadden, Arps, Slate, Meagher & Flom LLP*, April 29, 2013

*Energy Dispute Resolution: Investment Protection, Transit and the Energy Charter Treaty*, 2011 (contributing author)

“New ICSID Annulment Decision Exposes Possible Gap in United States Investment Treaty Protection,” *Skadden, Arps, Slate, Meagher & Flom LLP*, July 19, 2010

“Arbitration Panel Holds That the 1994 Energy Charter Treaty Protects Foreign Energy Sector Investments in Former Soviet Union,” *Skadden, Arps, Slate, Meagher & Flom LLP*, February 5, 2010

“Most-Favored-Nation Treatment & Dispute Settlement in Investment Arbitration: Just How ‘Favored’ Is ‘Most Favored?’” 20(1) *ICSID Rev.-Fi.L.J.* 58, 2005

“Looking for Law in All the Wrong Places: The Second Circuit Decision in *Sarhank Group v. Oracle Corp.*,” *Mealey’s International Arbitration Report*, Vol. 20, #6, June 2005

## Presentations

“The 2009 ASEAN Investment Agreement,” Presentation to the British Institute for International and Comparative Law (2012)

“Remedies in Investor-State Dispute Settlement,” Presentation to the World Trade Institute (2011)

“Quantifying Loss in Investment Treaty Arbitration: Counsel’s Perspective,” Presentation to the British Institute for International and Comparative Law (2011)

“Third-Party Funding in Arbitration,” Presentation to the C-5 Investment Treaty Conference (2010)

“Resolving Disputes Under Bilateral Investment Treaties: How the New Face of Investor-State Arbitration Creates a New Generation of Jurisdictional Defenses,” Presented to the Canadian Bar Association’s Fourth Annual International Commercial Arbitration Conference (2004)