Kluwer Arbitration Blog

In Memoriam: How U.S. Supreme Court Justice Ruth Bader Ginsburg Influenced U.S. Perspectives on Arbitration and International Dispute Resolution

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U.S. Supreme Court Justice Ruth Bader Ginsburg (1933-2020), known only as "RBG" in many circles, was a native of Brooklyn, New York and only the second woman appointed to the U.S. Supreme Court bench. Her passing in September 2020, at the age of 87, left a gaping hole in the international community. She was widely renowned for her intellect and leadership as an attorney, advocate, and judge. As a legal trailblazer and cultural icon, she embodied and advanced ideals of gender equality. Perhaps most inspirationally, she worked tirelessly to ensure equality and justice under the law, including individual rights. In memory of her ideals and legacy, this post revisits a few of her lasting contributions to U.S. law and international dispute resolution.

Framing the Right to Due Process in the Face of an Application to Compel Arbitration

Early in her career with the Supreme Court, Justice Ginsburg wrote the decision in *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574 (1999). In this case, when a dispute arose concerning a gas production licensing agreement, plaintiffs sued in Texas state court alleging a variety of Texas law-based claims, including negligence and fraud. Defendant removed the case to federal district court on three bases: (1) diversity of citizenship between the parties, (2) presence of a federal question because of the alleged involvement of a foreign sovereign, and (3) involvement of an international arbitration agreement (one that compelled arbitration in Sweden) on the basis of 9 USC § 205.

Ruhrgas is well-known for addressing important concerns of due process, federalism, and "jurisdictional sequencing." The U.S. Constitution's Article III requires that federal courts have subject-matter jurisdiction over a dispute. This requirement runs parallel to the requirement that a court must also have personal jurisdiction over the parties. So which of the two requirements is to be considered and resolved first? The federal district court, determining that it did not have personal jurisdiction over the defendant, remanded the case to Texas state court. On appeal, the Fifth Circuit determined that the district court had erred by not considering first whether it had subject-matter jurisdiction.

Writing for a unanimous Supreme Court, Justice Ginsburg acknowledged the importance of non-waivable private rights, including the right to due process. She disagreed with the Fifth Circuit's

approach and determined that subject-matter jurisdiction is not "more fundamental" than personal jurisdiction. Federal courts therefore maintain the discretion to sequence their consideration of subject-matter jurisdiction and personal jurisdiction in the manner they deem appropriate, and their decisions may be driven by which of these questions is more easily decided. She wrote: "federal and state courts are complementary systems for administering justice in our Nation: Cooperation and comity, not competition and conflict are essential to the federal design." The same can likely be said about the complementary systems presented by arbitration and litigation.

Prioritizing Individual Rights in Consumer and Employee Arbitration Cases

During her tenure with the Supreme Court, Justice Ginsburg issued several important dissenting opinions that evidenced her interest in championing individual rights vis-à-vis employee-employer and customer-business arbitration agreements. Reviewed together, these dissents demonstrate Justice Ginsburg's interest in protecting individuals in David v. Goliath circumstances – an ideal that we should seek to emulate in our professional practice.

DIRECTV, Inc. v. Imburgia, 136 S.Ct. 463 (2015) involved a binding arbitration provision with a class-arbitration waiver. The arbitration provision specified that the entire arbitration agreement was unenforceable if the "law of your state" made class-arbitration waivers unenforceable. The arbitration provision was also governed by the Federal Arbitration Act ("FAA"). California law (the law of the consumer's state) rendered class-arbitration waivers unenforceable. However, the Supreme Court held the California Court of Appeal's interpretation of the arbitration provision was pre-empted by the FAA, which the Court further found enforces the arbitration agreement.

Justice Ginsburg disagreed with the Court's decision, opining that the California Court of Appeal's interpretation of the term "law of your state" was "not only reasonable, [but] entirely right." Justice Ginsburg opined that "[i]t has become routine, in a large part due to this Court's decisions, for powerful economic enterprises to write into their form contracts with consumers and employees no-class-arbitration clauses." Moreover, she opined that "[t]oday, the Court holds that consumers lack not only protection against unambiguous class-arbitration bans in adhesion contracts. They lack even the benefit of the doubt when anomalous terms in such contracts could be construed to protect their rights." And, warned: "[t]hese decisions have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful interests from liability for violations of consumer-protection laws."

In *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1633 (2018), employers and employees entered contracts providing for individualized arbitration proceedings to resolve employment disputes. However, when disputes arose, the employees instead sought litigation through class action in federal court. They argued that the arbitration agreements' requirement for individualized arbitrations violated the National Labor Relations Act ("NLRA") and therefore was void. The Court disagreed with the employees' position and held that "Congress has instructed in the [FAA] that arbitration agreements providing for individualized proceedings must be enforced, and neither the [FAA]'s saving clause nor the NLRA suggests otherwise."

Again, siding with individuals' rights, Justice Ginsburg disagreed. Her dissent traced the history of the U.S.' protection of employees' rights stemming from the early 1900s. She opined: "The Court today subordinates employee-protective labor legislation to the [FAA]. In so doing, the Court

forgets the labor market imbalance that gave rise to … the NLRA, and ignores the destructive consequences of diminishing the right of employees 'to band together in confronting an employer." In Justice Ginsburg's eyes, diminishing the rights of individual employees to band together was striking: "Forced to face their employers without company, employees ordinarily are no match for the enterprise that hires them. Employees gain strength, however, if they can deal with their employers in numbers. That is the very reason why the NLRA secures against employer interference employees' right to act in concert for their 'mutual aid or protection.'" The result of not protecting employees' rights, Justice Ginsburg warned, was evident: "Employers, aware that employees will be disinclined to pursue small-value claims [such as wage and hour claims] when confined to proceeding one-by-one, will no doubt perceive that the cost-benefit balance of underpaying workers tips heavily in favor of skirting legal obligations."

Similarly, in *Lamps Plus, Inc. v. VarelaI,* 139 S.Ct. 1407 (2019), an employee brought a class action against its employer after a hacker obtained around 1,300 employees' tax information. Relying upon precedent in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010), and reasoning that arbitration agreements must be enforced according to their terms, the Court explained "that a court may not compel classwide arbitration when an agreement is silent on the availability of such arbitration." In this case, the employee argued that the arbitration agreement was "ambiguous" about the availability of class arbitration. The Court did not find a difference between whether an arbitration agreement was ambiguous or silent, holding that "an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration."

Championing individual rights, Justice Ginsburg dissented "to emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion." Justice Ginsburg explained that the FAA was enacted "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes. The Act was not designed to govern contracts 'in which one of the parties characteristically has little bargaining power.'" She warned again that the Court's decisions have "[p]ropelled" employers to provide mandatory arbitration clauses in employment and consumer contracts. As such, she reasoned that "[e]mployees and consumers forced to arbitrate solo face severe impediments to the 'vindication of their rights'" and "[e]xpenses entailed in mounting individual claims will often outweigh potential recoveries."

The Availability of US-style Discovery in Private International Commercial Arbitration

In 2004, the U.S. Supreme Court, in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004), decided that Section 1782 of the U.S. Code (28 USC § 1782) gave U.S. District Court judges broad discretion to permit foreign litigants to obtain discovery in the U.S., subject to certain guidelines. However, the decision, like the statute itself, leaves ambiguous whether § 1782's reference to aiding "foreign or international tribunal" includes private international commercial arbitrations.

In authoring the *Intel* decision, Justice Ginsburg opened the door to private commercial arbitration discovery applications. In particular, the decision quotes an article written by the late Professor Hans Smit in 1965, which said that "tribunal" in § 1782 included "investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil,

commercial, criminal, and administrative courts." (H. Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026, n. 71 (1965).) Interestingly, Justice Ginsburg was said to have been working with Professor Smit at the time he wrote the article. (*See* G. Sassine, *There Should be an Answer to § 1782(a) – as to whether its scope includes private arbitral tribunals*, McGill J. Disp. Res., Vol. III, 1, p. 9, n. 61.) Professor Smit's later scholarship, in 2003, also took the position that § 1782 should be read to include private as well as public tribunals, such as investment arbitrations and foreign and international judicial tribunals.

Our readers will be well-familiar with *Intel*'s legacy, which spurred a dramatic Circuit split on this issue, which endures today. The Fourth and Sixth Circuits have ruled that parties to private, international commercial arbitration had access to US-style discovery under § 1782 (*see Abdul Latif Jameel Transportation Company v. FedEx Corporation*, 939 F.3d 710 (6th Cir. 2019)); diverging from the Second, Fifth, Seventh, and Eleventh Circuits (*see Consorcio Ecuatoriano de Telecomunicaciones S.A. v. JAS Forwarding (USA), Inc.*, 2014 WL 104132 (11th Cir. Jan. 10, 2014).)

This year alone, three U.S. Circuit Courts affirmed their diverging positions on this question:

- On 30 March 2020, in the context of a UK-seated tribunal operating under the CIArb rules regarding an aircraft fire, the Fourth Circuit decided that § 1782 discovery applied to private international commercial arbitration (*Servotronics, Inc. v. Boeing Co.*, No. 18-2454 (4th Cir. March 30, 2020)).
- On 9 July 2020, the Second Circuit once again affirmed its position that such discovery was not available to private international commercial arbitration (*In Re Application of Hanwei Guo*, No. 19-781 (2d Cir. July 8, 2020)).
- On 22 September 2020, the Seventh Circuit decided along similar lines as the Second and Fifth, that § 1782 was not available in to parties seeking discovery in aid of private commercial arbitration on the basis that the legislature could not have intended to provide foreign litigants with more expansive discovery than available to domestic arbitrations (*Servotronics Inc. v. Rolls-Royce PLC*, No. 19-1847 (7th Cir. Sept. 22, 2020)). Interestingly, Judge Amy Cohen Barrett, currently proposed to fill Justice Ginsburg's seat on the Supreme Court, is a judge on the Seventh Circuit, although she was not involved in this particular decision.
- On 14 September 2020, the Ninth Circuit heard oral arguments on the same issue and a decision will be issued in due course (*HRC-Hainan Holding Co., LLC v. Yihan Hu*, No. 20-15371).

Echoing sentiments expressed on the Blog in recent posts, it is increasingly important for the Supreme Court to resolve the Circuit split over whether parties involved in international arbitrations outside of the U.S. can rely on § 1782 to seek discovery from entities in the U.S.

The earliest opportunity for the Supreme Court to consider this question will likely be during its upcoming term. Unfortunately, the Supreme Court would now have to resolve this split without Justice Ginsburg. The Court's decision in this respect would have undoubtedly been richer if Justice Ginsburg remained with us.

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Although Justice Ginsburg is no longer with us, we draw strength and inspiration from the imprint she has left on the American and international legal landscapes.

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