Kluwer Arbitration Blog

New York Arbitration Week Revisited: Perspectives from the Annual Fordham International Arbitration and Mediation Conference

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The annual Fordham Conference on International Arbitration and Mediation took place virtually on 20 November 2020, the final day of the second annual New York Arbitration Week. Under the guidance of co-chairs Louis B. Kimmelman (Sidley Austin, New York) and Edna Sussman (Independent Arbitrator and Mediator and Distinguished Practitioner in Residence Fordham Law School), the conference examined a number of hot topics, including innovative dispute resolution mechanisms, the relationship between international arbitration and the European Union (EU) and the applicability of 28 U.S.C. § 1782 to private international commercial arbitrations.

Combinations and Permutations: Creating a Solution-Driven Dispute Resolution Process

The conference opened with a roundtable discussion on the effectiveness of so-called “mixed modes” of dispute resolution. The panel was moderated by Kathleen Paisley (Ambos Lawyers) and Edna Sussman (Independent Arbitrator), with Jeremy Lack (LAWTECH.CH), Thomas Stipanowich (Pepperdine Law School), Moti Mironi (Haifa University), and Kun Fan (University of New South Wales) sharing their perspectives. The moderators and panelists are members of the Mixed Mode Task Force, a combined effort between the International Mediation Institute, the College of Commercial Arbitrators, and the Straus Institute for Dispute Resolution from Pepperdine School of Law, that is examining combining different dispute resolution processes in parallel, sequentially or as integrated processes.

The panel discussed unexplored conflict management possibilities and presented the work of its Working Groups 1 and 2, which are focused on how mediators can utilize different tools to be more effective. The discussion considered how to educate parties on alternative modes of dispute resolution and how neutrals can facilitate tailored-made dispute resolution processes.

The panelists then examined the cultural challenges faced in cross-border dispute resolution. This discussion drew on the Task Force’s Working Group 3, which is studying when neutrals can “change hats” (from mediator to arbitrator and vice versa), a practice with varying levels of acceptance depending on the jurisdiction and legal background of the parties. More generally, the panelists encouraged practitioners to go beyond their understanding of terms like “mediator”,

"conciliator", and "neutral facilitator" – whose meanings differ from jurisdiction to jurisdiction – to instead focus on the tasks the parties wish a neutral to facilitate. The panelists suggested that a neutral's flexibility will be key in facing cultural challenges. For example, sometimes openly discussing proposals with the parties will be effective, whereas, at other times, a neutral will be more effective by remaining more distant.

The panel closed by considering how to persuade parties and practitioners to experiment with different modes of dispute resolution. The conclusion that stood out was that success stories are key to fostering use of new and mixed modes of dispute resolution. The panelists agreed that neutrals should encourage parties to try something new and should be prepared to propose alternative processes along the way that could lead to a more efficient solution.

The panel and the work of the Task Force reflect an innovative response to a demand from users of alternative dispute resolution processes. Many decades ago, arbitration was proposed as an alternative to litigation and praised for its flexibility and for providing parties with a tailor-made method to resolve their disputes. Users have recently complained, however, that arbitration is increasingly more rigid and has arguably lost some of its flexibility. The loss of creative procedural design to a more formalized structure that parties have come to expect in arbitration can result in a process that is less tailored to the parties' needs. The tools proposed by the Task Force therefore provide a means to get back those characteristics that critics say arbitration has lost. By combining different dispute resolution processes, parties have the opportunity to create a tailor-made process that is best suited to solve their particular dispute.

International Arbitration and EU Law: What Next?

During his keynote speech entitled "International Arbitration and EU Law: What Next?", Professor George A. Bermann (Gellhorn Professor of Law and Monnet Professor in European Union Law, Columbia Law School) shared an insightful perspective on the "challenging challenge" posed by the tense relationship between international arbitration and the EU. Professor Bermann described the international arbitration community's unique ability to self-govern, self-improve and meaningfully – but imperfectly – tackle challenges on its own. This is due, in part, to its transparency, attentiveness to users' interests, and constant self-examination. But, according to Professor Bermann, the EU presents a "stalemate" to international arbitration that it cannot solve with these go-to tools.

The EU and international arbitration's decades of peaceful coexistence began to change in 2018 with the *Achmea* decision, in which the European Court of Justice (ECJ) held that arbitration clauses in certain BITs are contrary to EU law (see blog posts here). Professor Bermann explained that the *Achmea* decision illustrates a shift in the EU's assertion of autonomy, which has created a conflict with international arbitration. Since the 1960s, the EU has asserted its autonomy vertically (with respect to Member States), but, more recently, it also does so horizontally (with respect to other international actors). For example, the European Commission consistently intervenes in arbitration and enforcement proceedings as *amicus* to ensure that awards issued under intra-EU BITs are set aside or not enforced. The international arbitration community has been persistent, however. Tribunals have not declined jurisdiction based on intra-EU objections, and, while intra-EU awards have been annulled and denied enforcement in the EU, they are being enforced in courts outside the EU. According to Professor Bermann, both sides have hardened their views and

it is uncertain how and when accommodation will be reached.

Professor Bermann closed by noting that the EU and the international arbitration community are not communicating well, as most discussions center on condemning the other rather than seeking compromise. He stressed, however, that reconciling the conflicting autonomies underlying the tension cannot lie in the international arbitration community's hands alone.

Answering Professor Bermann's question – "what's next?" – is no easy task given the number of moving pieces. For example, the EU member states continue to disagree on the impact of the *Achmea* decision on the Energy Charter Treaty (ECT). Hope was placed on resolving the disagreement in *Novenergia v. Spain*, but the Svea Court of Appeal twice denied Spain's request for a preliminary ruling from the ECJ on whether the arbitration clause in the ECT is compatible with EU law. Further, the EU has been exploring a new path outside of international arbitration. The European Commission is in negotiations to establish a multilateral investment court, a permanent body that could replace the traditional arbitration framework, and the ECJ has recently concluded that the investment court set up by the Canada-EU Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law. Additionally, Brexit could add complications to the already convoluted scene, with UK investors able to enforce awards against their EU counterparts at home and in the EU, while their EU counterparts are subject to more limited enforcement options. At present, it seems only time can tell us "what's next", but while we wait for it to do so, the well-being of international arbitration would benefit from discussions involving actors from both legal regimes to overcome the impasse.

Does 28 U.S.C. § 1782 Apply to Private International Commercial Arbitrations?

The Fordham Conference's third panel took the form of a mock US Supreme Court argument addressing the unresolved issue of the scope of 28 USC § 1782 (Section 1782). Section 1782 provides that a US district court may order a person within its jurisdiction to appear for testimony or to produce a document for use in a proceeding before "a foreign or international tribunal" upon application either by that tribunal or by "any interested person". Section 1782 certainly allows foreign courts to apply to a US district court for US-style discovery, but whether the provision allows parties and tribunals in private international arbitrations to do so has split US federal circuit courts and remains unanswered by the US Supreme Court. This issue is hotly debated in the arbitration community.

The bench for the mock argument possessed a wealth of US Supreme Court litigation experience, consisting of Paul Clement (Former US Solicitor General), Nicole Saharsky (Mayer Brown), and Professor Pamela Bookman (Fordham Law School). Kwaku Akowuah (Sidley Austin) argued for the Petitioner, with Caline Mouawad (Chaffetz Lindsey) arguing on behalf of *amici* professors supporting Petitioner's position. Martine Cicconi (Virginia Deputy Solicitor General) argued for Respondent, with Ari MacKinnon (Cleary Gottlieb) arguing on behalf of *amici* in support of Respondent.

Petitioner urged an expansive interpretation of the phrase "international tribunal" in Section 1782, explaining that it should include private international arbitral tribunals. As Mr. Akowuah and Ms. Mouawad argued, this position is consistent with the plain meaning of the words "international tribunal", which do not distinguish between a foreign court and a private arbitral tribunal. Further,

this reading also comports with Congress's long-stated pro-arbitration policy. As Petitioner's counsel stressed, there can be little doubt that private international tribunals are able to come to more informed factual determinations with access to US discovery that Section 1782 allows. The result of this, namely decisions rendered by tribunals with more complete factual records, can only enhance commercial confidence in the integrity and rigor of international arbitration.

Respondent's counsel argued in response that "international tribunal", when read in the provision's proper context, clearly intended to exclude tribunals created in private international arbitrations. References in Section 1782 to judicial mechanisms such as letters rogatory and a tribunal's "practices and procedures" lead to the conclusion, according to Respondent, that Congress contemplated "international tribunal" as meaning only a state-sanctioned body. Moreover, Respondent stressed that reading "international tribunal" as including private arbitral tribunals would grant an international arbitral tribunal greater discovery powers than a domestic arbitral tribunal possesses under the Federal Arbitration Act, an inconsistency in the statutory scheme that is difficult to reconcile.

What emerged from the bench's questions and the advocates' arguments was that, although an ordinary reading of Section 1782 may point to such discovery being available in private commercial international arbitrations, consideration of the statutory language in context and Congress's intent may in fact point in the other direction. While it might appear "pro-arbitration" to grant private international tribunals access to US testimony and documents, there are indications in the surrounding statutory scheme and drafting history that such a position might be more expansive than Congress intended. As several panelists noted, the apparent divergence between language and policy in the Section 1782 analysis makes it a truly "hard case". This ensures that the international arbitration community will watch with interest for what seems like an inevitable progression of Section 1782 issue to the US Supreme Court.

Recordings for all New York Arbitration Week 2020 events are available here, and Kluwer Arbitration Blog's full coverage is available here.

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