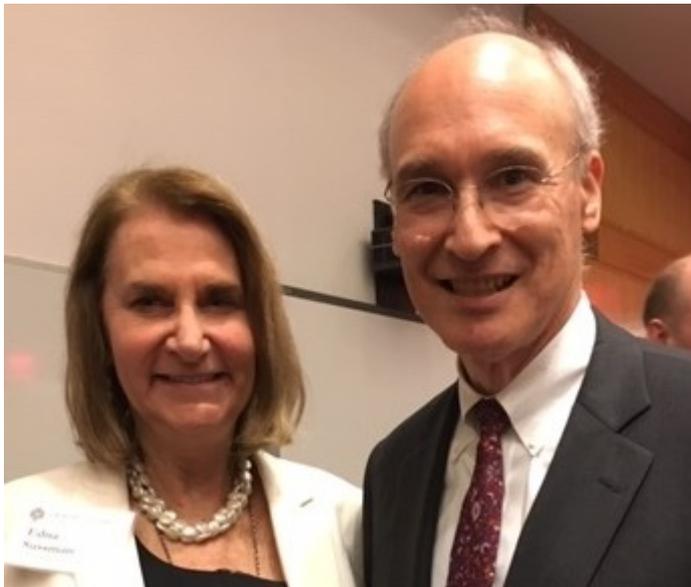


Kluwer Arbitration Blog

New York Arbitration Week 2021 Redux & Interviews with Our Editors: A Look into the State of Play of International Arbitration with Louis B. (Benno) Kimmelman and Edna Sussman

Kiran Nasir Gore (Associate Editor) (The George Washington University Law School) and Rekha Rangachari (New York International Arbitration Center) · Friday, December 10th, 2021



Benno Kimmelman is an independent arbitrator and active in the New York arbitration community. He teaches international arbitration and international litigation courses at Brooklyn Law School, Georgetown University Law Center, and American University's Washington College of Law. Edna Sussman is a New York-based arbitrator and mediator. She is the Distinguished ADR Practitioner in Residence at Fordham University School of Law and past President of the College of Commercial Arbitrators.

Benno is Chair of the New York International Arbitration Center (NYIAC), while Edna is a past Chair of NYIAC. Both are also Co-Chairs of the annual Fordham Conference on International Arbitration and Mediation, which takes place on the last day of New York Arbitration Week.

In this interview, Benno and Edna provide insights on their careers and their collaborative leadership and organizing efforts, as well their perspectives on the dispute resolution needs and interests of the New York community. For each of the questions, Benno and Edna have provided

joint answers, unless otherwise noted.

Thank you for taking the time to speak with us after another whirlwind New York Arbitration Week!

1. *The annual Fordham Conference on International Arbitration and Mediation has been an important event for the New York arbitration community for many years, and for the past five years has been organized under your joint leadership. How did you begin working together as a team? How do you continue to identify innovative ideas and topics to be addressed by the various panels and programs?*

Teaming up to co-chair the Fordham Conference in 2016 was an easy decision. We first met in 1981 at the [National Institute of Trial Advocacy](#) intensive training program in Boulder, Colorado. Like many other international arbitration practitioners in the U.S., our careers began as commercial litigators. Our respective law firms had decided that young litigators needed to have trial skills and so we spent three weeks learning to be trial lawyers.

Years later we both were advisers to the [ALI Project on the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration](#). On a train ride from New York to Philadelphia for one of the meetings, we happened to sit together. Somewhere during that one-hour trip we agreed to co-chair the Fordham Conference since [Art Rovine](#) was stepping down from that role. Art created the Fordham Conference and made it an important fixture in the world of international arbitration that is independent of the arbitral institutions. It always addressed important issues for arbitrators, counsel, and arbitration users. Art set a very high bar in terms of the quality of the programming. Our challenge has been to guide the conference forward and to uphold Art's standards. Each year we discuss many possible programming options; we seek input from colleagues and friends; and collaboratively, we agree upon the program. It is much work, but a lot of fun.

2. *New York Arbitration Week was established in 2019 and, since then, the Fordham Conference has been the closing event each year. Can you share with us a few highlights of this year's Fordham Conference and how they dovetail with emerging developments in arbitration and mediation?*

First, there was Neil Kaplan's keynote address. For many international arbitration practitioners around the world, Neil Kaplan is an important leader of our arbitration community. He is and has been a successful advocate, judge, arbitrator, teacher, and mentor to arbitration practitioners globally. He has a perspective on the arbitration process from his years of experience that few arbitrators or counsel have. Based on his unique vantage point and wealth of experience which few can replicate, Neil has challenged the arbitration community to improve the ways in which we conduct hearings. He introduced what has become known as the "[Kaplan Opening](#)" to help counsel and tribunals focus early on the key issues in the case and thereby streamline the arbitration process. In his keynote address, Neil did what he does so well – he shared some ideas on what can be done to get to the heart of disputes more quickly and resolve them more effectively, such as using mid-arbitration reviews and mediation pauses and encouraging arbitrators to produce more focused and shorter awards.

Second, there was the panel on mixed mode dispute resolution. The term “mixed mode” refers to combinations of different dispute resolution processes (e.g., adjudicative processes, such as litigation and arbitration, with non-adjudicative processes, such as conciliation or mediation). The [Mixed Mode Task Force](#) is a combined effort by the [International Mediation Institute \(IMI\)](#), [College of Commercial Arbitrators \(CCA\)](#) and the [Straus Institute for Dispute Resolution at Pepperdine School of Law](#). Following the introduction of its work at the Fordham Conference in 2020, at this year’s Conference, the Mixed Mode Task Force released the publication of the learning it has developed in crafting innovative processes tailored to user needs for both dispute avoidance and resolution. The panel discussing those developments was a highlight of the Conference because it offered practical guidance on subjects rarely discussed such as what steps an arbitrator can take to foster settlement and whether and how to organize communications between the mediator and the arbitrator. All work product of the Task Force is public, and its documents and reports are available [online](#).

Finally, the theme for this year’s NYAW was “Getting it Right.” Two panels addressed this issue from different perspectives. Panel 1 took on the questions of how the doctrine of *jura novit* applies in international arbitration and what the relationship is between arbitrators and the law to be applied in resolving parties’ disputes. This panel looked at how arbitrators determine the law that must be applied in a case, how far arbitrators can go beyond the legal analysis provided by the parties, and how much flexibility arbitrators have with respect to the remedy to be awarded. Panel 2 looked at how technology is impacting the arbitral process. The first session considered how technology is changing what we want and what we need from an international arbitral center. The next session looked at how technology can enable counsel to organize and process voluminous data to tell a compelling story to the tribunal.

3. *NYIAC, founded in 2013, is another convergence point for the New York dispute resolution community and it is an institution that both of you are involved with, Benno as current Chair and Edna as a past Chair. From your perspectives, what circumstances created the need for an organization like NYIAC and how does it address the present and future needs of the New York and global dispute resolution community?*

[Former Chief Judge Judith Kaye](#) of the New York Court of Appeals (New York’s highest state court) recognized that leading arbitral seats often have an arbitral center. New York, as a leading international arbitration venue, needed to have one too. With Judge Kaye’s vision and determination, NYIAC was born in 2013. Our understanding of what an “arbitral center” means has evolved over time, particularly because of the pandemic. The international arbitration community in New York has long recognized that there is a need for first-class hearing space in which international arbitrations and other arbitration events can be conducted. But since its inception, NYIAC has been more than just a place for holding hearings. It has become the epicenter of the international arbitration community for the greater New York area. It has provided programming that focuses on topical issues and showcases our talent and resources in New York. Going forward, NYIAC must address both aspects of being a center – a physical presence as well as an intellectual home for the community.

4. *Both of you are also involved with educating the next generation of New York lawyers. What’s*

your best piece of advice to students who wish to pursue careers in international dispute resolution?

Benno: I believe that a lawyer should have training and experience in representing clients and handling disputes in a national legal system before focusing on international dispute resolution. As advocates and arbitrators in international arbitration cases, we draw on the advocacy and substantive law skills and knowledge that we develop in a national legal system. I also think it is important to understand what it means to represent a client, to present claims and defenses, and to conduct a hearing. This is the background and skill set that a lawyer brings to the challenge of being an arbitrator and an international advocate. Skills are very important.

Edna: Of course, Benno is right about how one should go about developing substantive skill sets which are essential, but to succeed it is also important to become part of the international arbitration community. It is an embracing community and there are many opportunities for meaningful involvement. Local, national, international bar associations and the many other arbitral organizations provide numerous opportunities for identifying specific areas of interest, developing speaking and leadership skills, and meeting and learning from others in the field. So, my advice is to be an active volunteer, speak up at meetings, and identify and follow your passions. They will lead you to opportunities you will likely not have predicted.

5. From your perspective, what is the most interesting substantive development in U.S. or New York arbitration law from this year?

The most interesting development has actually been a non-development. We thought the U.S. Supreme Court would finally **resolve** the meaning of 28 USC Section 1782, a statute that facilitates U.S. discovery in foreign proceedings – whether it applies to international commercial arbitration – during the 2021-22 term of the Supreme Court. The Supreme Court had granted certiorari in a case that squarely presented this question. In fact, last year, one of the Fordham Conference panels was a mock Supreme Court argument on this issue. However, that case has been resolved by the parties and therefore will not be heard by the Court. That leaves us with a split in the Circuit Courts as to what Section 1782 means. Until the Court grants certiorari in another case that presents the same issue, and that case remains **live long enough** to reach a decision, the uncertainty on whether and how this statute applies to international arbitration will continue.

6. As discussed in our recent interview with Rekha Rangachari (Executive Director of NYIAC), for decades New York has been an established hub for international arbitration. Yet, new opportunities continue to emerge. New York continues to thrive on its nexus to arbitrations involving Latin American parties and issues. At the same time, it seems to be opening a gateway to disputes involving Asia, as demonstrated by the newly established SIAC Americas Representative Office in New York. How do each of you see the future of international arbitration in New York?

New York has a bright future in the world of international arbitration. First, New York has been and will continue to be the choice of law for many parties engaged in important transactions. New York law is one of two bodies of law that are regularly selected by parties to govern their contractual rights and obligations (the other being English law). Second, New York remains a

popular seat for international disputes because New York courts strongly support international arbitration. Third, some of the best international arbitration advocates, arbitrators, and experts are based in New York. All of this helps to explain why New York is one of the leading arbitral seats in the world and why it will continue to be so in the future.

More information about the Fordham Conference including the video replay is available [here](#). This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available [here](#).

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