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Michael F. Hoellering

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Is a New Practice Emerging from the Experience of the American Arbitration Association?

by
Michael F. Hoellering†

Over the years, international commercial arbitration has evolved to become the accepted forum for the resolution of transnational business disputes. This evolution is evident not only in the actual conduct of arbitral proceedings under the auspices of the American Arbitration Association (hereinafter AAA or Association), but also in the changed perspectives of the courts and legislatures of the United States and of practitioners both in the United States and abroad.

I. LEGAL ENVIRONMENT GOVERNING ARBITRATION

Arbitration in general, and international arbitration in particular, is flourishing in the United States due to the favorable climate supporting alternatives to litigation. The federal legislature, and an overwhelming majority of states, have enacted legislation designed to facilitate arbitration and alternative dispute resolution. The United States Arbitration Act, which governs transactions involving interstate and foreign commerce, and similar arbitration laws adopted by 45 states, are prime examples of this advanced legislation which makes enforcement of arbitration agreements and resultant awards orderly and predictable. Additionally, both the federal and state judiciary continue to render opinions strongly supportive of the arbitral process and the finality of arbitral awards.

A. *The Judicial Environment*

In the international sphere, since the United States' accession to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1970, the courts have liberally construed the Convention to allow the broadest possible application, even where its application will supersede contradictory federal or state law:

The parochial interests of . . . any state, cannot be the measure of how the "null and void" clause [of the Convention] is interpreted. Indeed, by acceding to and implementing the treaty, the federal government has insisted that not

† General Counsel, American Arbitration Association.

even the parochial interests of the nation may be the measure of interpretation. Rather, the clause must be interpreted to encompass only those situations — such as fraud, mistake, duress, and waiver — that can be applied neutrally on an international scale.¹

Even awards rendered in the United States, but between two foreign parties, are deemed “foreign” awards for purposes of application of the Convention:

[I]n [9 U.S.C. sec. 202] the Congress saw fit to exclude from the Convention only “an agreement or award” arising out of a commercial relationship “which is entirely between citizens of the United States,” unless significant foreign contacts are involved. Congress could have, under the Convention, enacted sec. 202 to define arbitral awards rendered in the United States between two foreign commercial disputants as “domestic” within the context of Article 1(1) of the Convention, and hence beyond the subject matter jurisdiction of this Court as conveyed by the implementing statute. Alternatively, Congress could have used the power of reservation contained in Article 1(3) of the Convention to limit enforcement in the United States under the Convention to awards rendered in other contracting states. Either provision would have branded the award at bar “domestic” and unenforceable in this forum. But Congress adopted neither of these alternatives. And by refraining from such limiting action, Congress manifested its intention “to extend as far as possible the variety of eligible awards” under the Convention, by means of supplying its own broad but legally permissible definitions.²

Thus, the Convention plays a major role in the evolution of international arbitration in the United States.

It is not merely the Convention, however, which has liberalized judicial attitudes toward international commercial arbitration. The “international” nature of a matter itself may be enough to raise it above normal domestic practices. In *Scherk v. Alberto Culver Co.*,³ the United States Supreme Court ruled that the international nature of the contract in question required arbitration of certain securities law disputes between the parties, despite an earlier decision, *Wilko v. Swan*,⁴ holding that domestic contract claims raised under the Securities Act were nonarbitrable:

A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. . . . A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. . . . [it would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.⁵

1. *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982).

2. *Bergesen v. Jos. Muller Corp.*, 548 F. Supp. 650 (S.D.N.Y. 1982), *aff'd*, 710 F.2d 928 (2d Cir. 1982).

3. 417 U.S. 506 (1974).

4. 342 U.S. 427 (1953).

5. 417 U.S. at 516-17.

Scherk was not decided under the U.N. Convention, yet the Court was mindful of the United States' recent accession, and of Congress' intent in doing so.⁶ The recent case of *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,⁷ however, was decided under the Convention. The Supreme Court held in that case that where a transnational agreement contains a broad arbitration clause, antitrust claims are arbitrable, despite a domestic public policy proscribing future agreements to arbitrate such claims. In making its decision, the Court relied heavily on its holding in *Scherk*:

[W]e conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.⁸

Arbitral institutions played a role in helping the Court reach its decision; both the American Arbitration Association and the International Chamber of Commerce (hereinafter ICC) Court of Arbitration filed briefs *amicus curiae* urging the result reached by the Court.

B. *The Legislative Environment*

While both *Scherk* and *Mitsubishi* have judicially broadened the range of arbitral international commercial disputes, there have been legislative efforts to broaden arbitrability, as well. The most noteworthy have been the amendments in recent years to the patent law,⁹ allowing disputes over patent validity, interference and infringement to be arbitrated. This has been a major development, as such subjects were formerly considered nonarbitrable, much the same as antitrust disputes. The importance of this to the international community is obvious, as many transnational agreements involving licensing and transfer of technology will of necessity involve patent issues.¹⁰

There also has been an increase in the treaty activity of the United States. It is anticipated that Congress will hold hearings this session on the ratification of the Inter-American Convention. There have been a number of bilateral investment treaties and other bilateral and multilateral treaties executed over the past several years, many of which expressly provide arbitration of any disputes which may arise.¹¹

6. 417 U.S. 520, fn. 15.

7. — U.S. —, 105 S. Ct. 3346 (1985).

8. 105 S. Ct. at 3355.

9. 35 U.S.C. § 1. The amendments may be found at 35 U.S.C. § 294 (1982), and 35 U.S.C. § 135(d) (1984).

10. See, e.g., Consent Decree between IBM and Hitachi, which provides for resolution of trade-secret disputes by a special three-arbitrator panel empowered to award a broad range of relief. The Consent Decree is reprinted in 1 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* (1983).

11. See generally Sachs, *The "New" U.S. Bilateral Investment Treaties*, 2 *INT'L TAX & BUS. LAW.* 192 (1984).

This executive, legislative and judicial activity in the United States evidences the recognition of arbitration's evolution and acceptance, especially in the international context. The United States is adopting a truly international position in accepting arbitration as an effective and preferred means for the resolution of transnational disputes, and is taking steps to promote international commercial arbitration for that purpose.

II. DEVELOPMENTS IN ADMINISTRATION AND CONDUCT OF ARBITRATION

Because of the statutory and public policy expansion of the scope of arbitration, there is a need for ever greater professionalism on the part of arbitrators and arbitral institutions. The response of the American Arbitration Association to this challenge is manifesting itself in a variety of ways.

A. *Supplementary Procedures for International Commercial Arbitration*

The Association has developed a set of Supplementary Procedures for International Commercial Arbitration, designed to standardize certain aspects of international arbitration. The Supplementary Procedures are not an independent set of rules, but rather are used in conjunction with the existing AAA Rules, to provide the necessary modifications for effective international dispute resolution.

Recognizing that arbitration cases involving parties of different nationalities often present unique procedural problems, the AAA has developed procedures to facilitate such cases. The Supplementary Procedures provide for non-national arbitrators; exchange of information; transmittal of materials in advance to the arbitrator; consecutive hearings; language of hearings; reasoned awards; and arbitrator compensation. The Procedures are chosen in virtually every international case, and parties have indicated a preference for their use.

B. *Prearbitration Conference*

An important development in arbitration practice is the expanded use of the prearbitration conference. These conferences have become a standard feature of international arbitration, especially in complex cases. Prearbitration conferences may be conducted by the arbitral institution, without the parties, in order to settle many administrative details, such as schedules for exchange of information, stipulations as to uncontested facts, hearing dates, transcripts, translators, arbitrator compensation, etc.¹² A second type of prehearing conference — one between the arbitrators and the parties — may also be held, to clarify claims and counterclaims, to arrange for and schedule exchanges of information and filing of briefs, to dispose of preliminary issues, to

12. See, e.g., Rule 10, AAA Commercial Arbitration Rules, reprinted *infra* in the Appendix to this issue of the International Tax & Business Lawyer.

schedule hearings and to stipulate the language of the proceedings, the form of award, etc.¹³ Prearbitration conferences are also a unique opportunity to iron out any difference in expectations that may exist between the parties and their lawyers.

Parties normally are apprised in advance of the topics to be discussed at the conference, so that they and their counsel can be ready to address the issues in an informed manner. Practitioners have expressed a preference for prehearing conferences, as their experience indicates that these conferences can be of great value in expediting complicated arbitration proceedings.¹⁴

C. Arbitrator Training

The American Arbitration Association, in an effort to streamline and professionalize the arbitration process, has increased the number and type of its educational seminars for arbitrators. Training of arbitrators is an important step in making the arbitration process as effective as possible. The scope of such educational programs is quite broad, and aimed primarily at supplementing the arbitrator's existing expertise with useful information about the arbitration process and how best to fulfill his role:

A typical training seminar brings together an experienced faculty of arbitrators and arbitration practitioners who, by means of lectures, workshops, mock arbitration films and role plays, cover a range of topics designed to provide new arbitrators with a basic understanding of arbitration law and procedure. Typically, an experienced attorney will discuss the state and federal arbitration law, and mandatory provisions applicable to arbitration proceedings. Thereafter, different arbitration rules and procedures, including those applicable to international cases, are reviewed by an AAA representative. These are followed by a discussion of the powers, duties and responsibilities of an arbitrator. Explored are the sources of an arbitrator's authority, his duty to fairly hear and decide the controversy, the importance of neutrality, of disclosing potentially disqualifying relationships, the special status and immunity of arbitrators, and the preparation of awards.¹⁵

A noteworthy recent development in United States arbitration practice is the growing emphasis placed on arbitrator control over the proceedings and management of evidence. There is a growing consensus among arbitration

13. See Rule 29 of the AAA Patent Arbitration Rules, which provides that "[u]nless the parties agree otherwise, a preliminary hearing with the parties will be scheduled by the arbitrator to specify the issues to be resolved and to stipulate uncontested facts. Consistent with the expedited nature of arbitration, the arbitrator shall, at the preliminary hearing, establish (i) the extent of and a schedule for the production of relevant documents and other information, the identification of any witnesses to be called and a schedule for any hearings to elicit facts solely within the knowledge of one party and (ii) a schedule for further hearings to resolve the dispute."

14. Coulson, *Survey of International Arbitration Procedures*, 1981 AMERICAN ARBITRATION ASSOCIATION, ARBITRATION & THE LAW 228. See also Coulson, *A New Look at International Commercial Arbitration*, 14 CASE W. RES. J. INT'L L. 359 (1982).

15. Hoellering, *Training and Development of Commercial Arbitrators*, 10 YEARBOOK COMMERCIAL ARBITRATION 551 (1985).

experts that, to encourage efficient and expeditious arbitration, it is the arbitrator's duty to aggressively manage arbitral proceedings, and that the arbitrator must be urged to do so: "[M]ore arbitrators in complex international cases should recognize that they have a responsibility for the pace of the proceedings. In my view, adopting an activist attitude is the most important contribution an arbitrator can make toward overcoming delay."¹⁶

D. *Alternative Dispute Resolution Options*

Consistent with its institutional mission and due to increased receptivity to dispute resolution methods other than arbitration, the Association has expanded its offerings in Alternative Dispute Resolution (hereinafter ADR) procedures. Mediation is one option which parties are choosing with increased frequency; thus mediation rules have been incorporated into several of the AAA's sets of rules.¹⁷ In several large and complex cases, mediation has been used successfully to resolve the dispute, bringing even greater attention to the process as an alternative to litigation and arbitration.

Another frequently requested ADR vehicle is the minitrial, for which the Association has developed a set of Minitrial Procedures. The minitrial is a structured dispute resolution procedure where senior executives of businesses involved in legal disputes meet in the presence of a neutral adviser. After hearing presentations of each side of the dispute, the executives attempt to reach a voluntary settlement. The Minitrial Procedures provide for initiation of the minitrial; representation of the parties by counsel; selection and qualifications of the neutral adviser; settlement offers at various stages of the proceedings; rendition of an advisory opinion by the neutral adviser if no settlement can be reached; and confidentiality of the process.

Recently, a successful minitrial of a multimillion-dollar construction dispute was completed by the Association as part of scheduled arbitration hearings. A retired federal judge served as the neutral adviser. Both the parties and the adviser praised the process, in that it streamlined resolution of their dispute, cut months of anticipated arbitration time to weeks, and quickly brought the parties closer to a satisfactory resolution of their controversy. The Association is involved in a very interesting project in which the federal court for the Southern District of New York refers parties to the AAA for a conference to explore the possibility of using arbitration or other ADR techniques. Although choice of a method of alternative dispute resolution is not mandatory, attendance at the conference is by order of the court. The parties are thus exposed to the alternatives to court resolution of their controversy

16. Holtzmann, *What An Arbitrator Can do to Overcome Delays in International Arbitration*, in JUSTICE FOR A GENERATION, papers presented in London, England, July 15-19, 1985, at the plenary sessions of a meeting between the American Bar Association, The Senate of the Inns of Court and the Bar, and the Law Society of England and Wales. See also Poppleton, *The Arbitrator's Role in Expediting the Large and Complex Commercial Case*, 36 ARB. J. 6 (1981).

17. See, e.g., Commercial Mediation Rules of the AAA; Construction Mediation Rules of the AAA; ADR Procedures of the AAA.

and have an opportunity to discuss and choose an alternative, or return their case to the court calendar.

Experience with this project has shown that most parties are willing to try ADR — usually arbitration or mediation — and that the results are usually successful. A variety of cases has been referred, as the judges have discretion to choose those cases they feel may be suitable to ADR as referral candidates. Because the project's success rate has been good, other courts and practitioners have expressed interest in expanding the project beyond the New York federal court.

E. World Arbitration Institute

In an effort to attract more international arbitration to the United States in general, and to New York in particular, the AAA formed the World Arbitration Institute in 1984. It is the Institute's mission to foster international commercial arbitration by highlighting its advantages to the business community, as well as promoting New York as a site for international arbitrations.

The Institute does not appoint arbitrators or administer arbitrations, but rather serves practitioners as a center for information, publications, and educational activities. It publishes a quarterly newsletter, *Forum New York*, which reports on current developments in international commercial arbitration. The Institute is cosponsored by the ICC Court of Arbitration; the Inter-American Commercial Arbitration Commission; the Society of Maritime Arbitrators; the Association of the Bar of the City of New York; the New York State Bar Association; and the Parker School of Foreign and Comparative Law at Columbia University. Its advisory committee is comprised of distinguished, internationally recognized experts from the United States and abroad.

III. CONCLUSION

A new practice in arbitration is emerging. In the United States, it centers around the fact that almost anything parties agree to arbitrate will be subject to arbitration, including those issues traditionally reserved to the judiciary for statutory or public policy reasons. This greatly expanded sphere of arbitrability places greater obligations on arbitrators and arbitral institutions in the performance of their responsibilities. Ever present is the need to fulfill the promise of arbitration — the expert adjudication of disputes — with due regard to expedition and economy. This awareness has led to greater emphasis on the arbitrators' role in "managing" the proceedings, to pre-arbitration conferences and preliminary hearings designed to facilitate the voluntary exchange of information before the hearing, and to overall expedition of the proceedings.

Finally, much greater awareness of the importance of international arbitration, and greater use of ADR techniques such as mediation and the mini-trial as supplements to the time-tested process of arbitration, facilitates the resolution of transnational commercial disputes and serves as a stimulus to increased international trade and investment.