



NAPABA

Virtual Experience

[7 Nov. 2020]
11:00 AM – 12:00 PM

Session 702 | The View From Over There: Comparing International Arbitration & U.S. Litigation

This presentation offers different perspectives on international arbitration and cross-border litigation: how they look both from the United States and to the legal world outside the U.S. In an age of what has been called “inter-dependent” global economies, international dispute resolution is integral to the orderly conduct of cross-border trade throughout the developed world. An international arbitration is likely to bring together parties, lawyers and arbitrators from several different nations, all working to find a solution to an international dispute.

The panel will look at how international arbitration and cross-border litigation share a common goal of resolving international disputes, but take fundamentally different approaches. The panelists will compare common law and civil law legal traditions, as well as litigation versus international arbitration cultures and procedures. The panelists will review the differences in tribunals, procedures, rules of evidence, enforceability, culture and courtroom or hearing room dynamics. They will also address attempts to harmonize differences into a workable international dispute resolution system. Finally, the panel will provide an overview of the major arbitral bodies that administer international arbitration around the world, and touch on how those bodies change their own procedures and structures to meet the changing needs of international dispute resolution.

Moderator:

Phillip F. Shinn, *Partner, LimNexus LLP*

Speakers:

Steven K. Andersen, *Vice President for International Development, International Centre for Dispute Resolution/American Arbitration Association*

Arjun Agarwal, *Senior Counsel-International Litigation, Chevron Upstream, a division of Chevron U.S.A., Inc.*

Gary Born, *Chair of the International Arbitration Group at Wilmer Cutler Pickering Hale and Dorr LLP and President, Singapore International Arbitration Centre Court of Arbitration*

Noradèle Radjai, *Partner- International Arbitration Team, LALIVE*

THE VIEW FROM OVER THERE (Comparing International Arbitration & U.S. Litigation)

Phillip F. Shinn

LimNexus LLP



JURISDICTION

- Sovereignty and the rule of law
- Globalization and the need for international dispute resolution
- U.S. Jurisdiction: subject matter
- U.S. Jurisdiction: personal (general or specific)
- Arbitral jurisdiction? (by agreement of the parties)

FORUM SELECTION & VENUE

US COURTS

- Plaintiffs often have a choice of forum so long as there is jurisdiction, subject to *forum non conveniens*
- Venue within a state or judicial district is subject to court rules
- Forum state's choice of law rules apply

INTERNATIONAL ARBITRATION

- “Seat” of arbitration is a legal term
- Hearing site can be different
- Choice of law subject to agreement
- Neutral forum is the goal

JUDGE & JURY v. ARBITRATORS

- U.S. Court: No choice of judge except for peremptory challenge or objecting to a magistrate
- International Arbitration: (1 arbitrator selected by agreement)
- International Arbitration: (3 arbitrators: 2 party-appointed + 1 chair)
- List Method: Select from a list provided by arbitral body
- Conflict of interest rules apply to both

JUDGE & JURY v. ARBITRATORS(2)

Pros & Cons of Judge & Jury

- Pro: Taxpayers pay judge's salary
- Pro: Disinterested adjudicators
- Pro: Right of appeal
- Con: Juries can be unpredictable
- Con: Usually no subject matter expertise
- Con: Jury selection & trial are expensive and slow
- Con: Right of appeal

JUDGE & JURY v. ARBITRATORS(3)

PROS & CONS OF INTERNATIONAL ARBITRATORS

- Pro: More attention to the case
- Pro: Experience of 3 arbitrators
- Pro: Subject matter experts
- Pro: Generally faster, less costly
- Pro: No appeal. Finality.
- Con: Parties must pay arbitrators
- Con: Common Law v. Civil Law
- Con: Party appointed, therefore party affiliation
- Con: No appeal

CHOICE OF LAW

- US Courts: Generally apply US law, but can apply foreign law if parties so stipulate in their contract
- International Arbitration: Parties can agree in contract or during arbitration.
- If No Choice of Law Clause? - Arbitrators can decide applicable law
- Seat of Arbitration: Courts of seat can assist.

CHOICE OF LAW(2)

Civil Law v. Common Law

Civil Law Tradition

- Germany, France, Japan, Korea
- Statute-based
- Not based on judicial precedent
- Judge/inquisitors
- Trials based more on documents
- No US-style discovery
- No depositions
- No jury trials

Common Law Tradition

- UK, USA, Hong Kong
- Statutory & common law
- US v. UK differ
- US has depositions, more extensive discovery, more reliance on jury trials

DIFFERENCES IN CULTURE & LEGAL TRADITIONS

- Common Law Tradition: British common law influence in the US, Australia, Hong Kong, Singapore
- Civil Law Tradition: French civil law influence in Egypt and the Middle East. German civil law influence in Japan and Korea.
- Cultural Differences: Significant impact on choice of arbitrators, evaluation of witnesses, business practices and cultures.
- e.g. Hong Kong court: lawyers bow to judge when he enters the courtroom

PROCEDURAL DIFFERENCES BETWEEN US LITIGATION & INTERNATIONAL ARBITRATION

US Court Systems

- Federal Courts and 50 different state courts + territories
- Federal Rules of Civil Procedure
- Federal Rules of Evidence
- Federal Rules of Criminal Procedure
- Federal Rules of Appellate Procedure
- Local rules in each district, including special patent litigation rules
- Standing orders in each district
- Standing orders of individual judges

UNCITRAL MODEL LAW & ARBITRATION RULES (UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW)

- Country by country adoption of the model law (e.g. Korea, Hong Kong, Singapore)
- UNCITRAL Arbitration Rules offer a “Light touch” approach to procedures
- State by state adoption of versions in the U.S.
- Korea Arbitration Act adopted substantial portions of the UNCITRAL Model Law in 1999

HARMONIZATION AND CONSISTENCY IN INTERNATIONAL ARBITRATION

- Arbitration rules try to harmonize and blend civil law and common law systems
- In a 3-arbitrator tribunal, civil and common law arbitrators may serve together
- Goal is a workable and fair system that provides trust and consistency

ENFORCEABILITY OF FOREIGN ARBITRAL AWARDS

- International Arbitration Awards: New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). Signed by most major countries.
- Grounds not to enforce: **Article V(1)**: (a) party incapacity; (b) improper notice or denial of opportunity to present case; (c) award is outside the scope of the terms of submission to the arbitrators; (d) composition of tribunal not in accordance with the agreement or the law; (e) agreement not yet binding, or has been set aside.
- Grounds not to enforce: **Article V(2)**: (a) subject matter of the difference is not capable of settlement by arbitration under the law of the country; or (b) the recognition or enforcement of the award would be contrary to the public policy of the country
- *Federal Arbitration Act*: 9 U.S.C. sec. 207: “shall enforce” award unless subject to one of the grounds for non-enforcement under the NY Convention.

SOME NOTABLE DIFFERENCES

- Examples: Live direct testimony, jury trials, depositions, punitive damages
- Appellate review
- Depositions
- Expert witness presentations
- Preparation of witnesses
- Holistic v. 4-corners contract interpretation (UK v. FR)

ANALOGOUS IBA & US RULES ON THE TAKING OF EVIDENCE

IBA RULES

- Consultation on Evidentiary Issues: Panel “invites” parties to consult each other about process for taking evidence(Art.2(1))
- Request to Produce “*relevant & material*” documents(Art.3(3))
- “Negative inference” for failure to produce (Art. 9(5))
- Disregard statements for witness’s failure to appear (Art. 4(7))
- Expert witnesses (Art. 5)

US RULES

- Meet & confer among parties to discuss pretrial issues, including discovery (Federal Rules of Civil Procedure 26)
- Request to Produce (wider scope of discovery permitted)
- Negative inference jury instruction
- Exclude testimony for witness’s failure to appear at deposition.
- Expert witnesses

DIFFERENCES BETWEEN IBA & US RULES

IBA RULES

- “Affirmation” to tell truth (Art. 4(5)(d))
- Written witness statements (Art.4(4))
- No subpoena of non-party witnesses (Art.4(9))
- Scope of Discovery: “relevant and material” (Art. 3(3)(b))
- No Written Interrogatories
- Tribunal’s appointed expert (Art.6)
- Witness statements in lieu of live direct testimony (Art. 8(4))

US RULES

- Testimony “under penalty of perjury”
- Depositions & declarations/affidavits
- Subpoena power
- “Reasonably calculated” discovery standard
- Written Interrogatories
- Court-appointed experts are rare
- Live direct testimony is the norm

SIGNIFICANT CHOICES TO MAKE in ARBITRATION

- Seat: Where is the “seat” of the arbitration?
- Substantive Law: Which country’s law? Common or civil law?
- Hearing Venue: Not the same question as choice of the “seat.”
- Number of Arbitrators: Usually one or three
- Selection of Party-Appointed Arbitrator:
- Selection of Chair or Neutral Arbitrator

FUNDAMENTAL DIFFERENCES

- Adjudication by private tribunal instead of by a sovereign government. Enforceability is subject to New York Convention.
- Neutral forum and tribunal (theoretically no “home court” advantage)
- Negotiating the “seat,” choice of law, venue, and arbitral body in advance
- Parties’ prerogative to pick the members of the tribunal
- Limited discovery
- Limited procedural rules and maneuvers (i.e. no formal motions practice)

THANK YOU

