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General Course, Arbitration Academy
Paris, July 2012

The Role and Rule of Law in Arbitration

General Readings:

William W. Park, Arbitration in Autumn, 2 J. Int'l Dispute Settlement 5 (2011). Adapted as Maturity in Arbitration, 26 ICSID Review/Foreign Investment Law Journal 1 (2011)

William W. Park, Arbitrators and Accuracy, 1 J. Int'l Dispute Settlement 25 (2010); adapted with Epilogue as Truth-Seeking in International Arbitration, in The Search for Truth in Arbitration 1 (M. Wirth, C. Rouvinez & J. Knoll, eds., 2011), Association Suisse de l'Arbitrage, Special Series No. 35

William W. Park, Procedural Evolution in Business Arbitration: Three Studies in Change, Chapter 1 of Arbitration of International Business Disputes, (Oxford 2006)

William W. Park, Rectitude in International Arbitration, 27 Arb. Int'l 473 (2011), adapted from Arbitrator Integrity, 46 San Diego Law Review 629 (2009). Included as Chapter 9 in The Backlash Against Investor Arbitration: Perceptions and Reality at 189 (M. Waibel, A. Kaushal, K. Chung & C. Balchin, eds., Kluwer, 2010)

William W. Park, The Arbitrator's Jurisdiction to Determine Jurisdiction, 13 ICCA Congress Series 55 (2006)

Specific cases and articles, included with topic descriptions below.

I. The Nature of Arbitration Law

A. The Bargain to Arbitrate: Waiver of Otherwise Competent Courts

1. Holding Parties to their Agreement
2. Procedural Fairness in Award Enforcement

B. Beyond Contract: Specificity in Treaties and Statutes

C. Two Levels of Law

1. Procedural Architecture (State Support of Commitments to Arbitrate)
2. Norms for Resolving Particular Disputes: Party Expectations
Commercial Purpose, *Rainy Sky v Kookmin Bank* [2011] UKSC 50

D. Arbitration without Law

1. Amiable Composition
2. Reputation Bonds
Amsterdam Diamond Dealers vs. Heterogeneous Commercial Actors
Lisa Bernstein, *Opting Out of The Legal System*, 21 J. Legal Studies 115 (1992); Jerold S. Auerbach, *Justice Without Law?* (Oxford 1983)

3. Arbitration in early New England
Plymouth v. Bay Colony, Cohasset Marshlands Arbitration, 9 June 1640
William Bradford, Of Plymouth Plantation (1993 Edition, A.A. Knopf)
4. State Support for Agreements and Associations
Reverse analogies: Disestablishment in Massachusetts
Baker v. Fales, 16 Mass. 488 (1820); Amendment Article XI, Massachusetts
Constitution, 1833

II. Arbitration's Protean Nature

- A. Multiple Goals, Divergent Mechanics
 1. Industry Practice: Insurance, Construction, Oil & Gas
 2. The QWERTY Keyboard
 3. Special Dimension of International Arbitration
 4. Consumers and Employees
- B. A Preliminary Word on Investor State Cases: All That Exceptional?
 1. BIT's and Free Trade Agreements
 2. UNCITRAL, Article V(2)(b), New York Convention
 3. ICSID, Article 52, Washington Convention
 4. Public Interest: Commercial Analogues

III. The Award

- A. Elements of Basic Procedural Fairness
 1. Natural Justice/Due Process
 2. Independence & Impartiality
 3. Jurisdictional Limits & Public Policy
- B. Common Tensions
 1. Efficiency: Time & Cost Perceived as the Enemy
 2. Enforceability: Cost Allocation in England (1996 Act, §§ 60 & 61)
 3. Public Policy: Substantive & Procedural
- C. Caribbean Niquel: A Case Study
La Société Commercial Caribbean Niquel c. La Société Overseas Mining
Investments Ltd, Paris Court of Appeals, 1st Chamber, 08/23901, 25 March 2010.
French Cour de cassation, Arrêt No. 785, 29 juin 2011 (10-23.321), Première
chambre civile, rejette le pourvoi à l'arrêt de la Cour d'appel de Paris, ch. 1, 25 Mars
2010, No. 08/23901: La Semaine Juridique Ed. G., No. 23, 7 juin 2010, pp. 1202-03,
obs. Seraglini

IV. Classic Approaches to Risk Management

A. Paradigms for Arbitration Law

1. Certainty vs. Laissez Faire at the Arbitral Situs

- England Before 1979: Case Stated
- Manifest Disregard: United States. Footnote 3, Stolt-Nielsen (2010)
- Arbitrariness in Swiss Domestic law

2. Waiver:

- Swiss LCIA Article 192
- New French Civil Code: Décret n° 2011-48 du 13 janvier 2011 Article 1522, waiving challenge under Article 1520
- Hall Street Assocs. LLC v. Mattel Inc., 552 U.S. 576 (2008)
- Expanded Levels of Review in Light of Hall Street. Jack Coe, Proceedings of Annual Meeting (ASIL Vol. 105, March 2011), at 33-36

3. Philosophical, Historical & Social Perspectives

- Emmanuel Gaillard, Aspects philosophiques du droit de l'arbitrage international, Hague Academy of International Law, 2008
- Thomas Schultz, Concept of Law in Transnational Arbitral Legal Orders and Some of Its Consequences, 2 J. Int'l Dispute Settlement 59 (2011).
- Derek Roebuck & Bruno de Loynes de Fumichon, Roman Arbitration (2004); Derek Roebuck, Bricks Without Straw, Arbitration in Roman Britain, 23 Arb Int'l 143 (2007)
- Thomas Schultz & Robert Kovacs, The Rise of a Third Generation of Arbitrators? Fifteen Years after Dezalay & Garth, 28 Arb. Int'l 161 (2012)

B. Annulled Awards & Delocalization: New York Convention Article V(1)(e)

Hilmarton Ltd v OTV (Cour de cassation, 23 March 1994) YB Comm. Arb, Vol. XX (1995) 663 at 665; TermoRio S.A. v. Electranta S.P., 487 F.3d 928 (D.C. Cir. 2007)

C. Investor-State Analogies: ICSID Article 52 (Cf. UNCITRAL proceedings)

V. Comparative Approaches to Universal Problems

A. Non-Signatories

Dallah v. Pakistan [2010] UKSC 46; Paris Cour d'appel, 17 February 2011)

Third Party Beneficiaries: Arthur Andersen v. Carlisle, 129 S.Ct. 1896 (2009)

B. Bias

1. More than one way to sabotage an arbitration

- a) Pernicious and Precarious Arbitrators
- b) The "Soft Law" of the IBA Rules
- c) Independence vs. Impartiality: The Esrog Case

2. Public Policy Meets Surrogates for Impartiality (Controversy over Jivraj)
 - C. Kompetenz-Kompetenz : A Jurisdictional Chameleon
 1. Timing of Judicial Intervention
 2. Finality of the Arbitrator's Decision
 3. Different Issues: Parties, Scope, Procedure, Policy
 4. Models, Hybrids and Misconceptions
 - The French Approach
 - The U.S Tradition: *Sandvik v. Advent*, 220 F.3d 99 (3d Cir. 2000)
 - Variants: England, Switzerland, UNCITRAL
 5. Interaction of Courts and Arbitrators
 - Allocation of Functions: Merits vs. Jurisdiction
 - The Arbitrator's Procedural Prerogatives
 - D. Public Policy and Arbitrability
 1. Front End Issues: Subject Matter Arbitrability
 - *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)
Prospective Waiver Doctrine: *Mitsubishi* footnote 19
 - *Jivraj v Hashwani*, [2011] UKSC 40
 2. The Back Side of Policy: Article V(2)(b)
 - The Second Look Doctrine, *Mitsubishi*, *supra* (1985)
 - *Soleimany v. Soleimany*, [1998] 3 W.L.R 811, [1998] APP.L.R. 02/19
- VI. National Dilemmas: Class Action as a Case Study
- A. Collective Action: Legitimacy and Consent
 1. *Stolt-Nielsen SA v. AnimalFeeds Int'l*, 130 S.Ct. 1758 (2009)
 2. *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2010)
 - B. Lower Court Push-Back
 - In re Am. Exp. Merchants*, 634 F.3d 187 (2d Cir. 2011)
 - Sutter v. Oxford Health Plans*, 2012 WL 1088887 (3d Cir. 2012)
 - C. The Political Context
 - D. Investor State Cases: *Abaclat, et al. v. Argentina* (ICSID Case No. ARB /07/5)
- VII. Bifurcation (or Trifurcation?) of Annulment Standards
- A. Separate Statutes
 1. The French Model: Code de procedure, Article 1520
 2. ALI Restatement, Sections 4-3 & 4-11: Interpreting FAA §§ 207 & 208

3. American “Exceptionalism” – Consumers & Employees
The “Fairness Act” S.987 – Arbitration Fairness Act of 2011

- B. Business to Business
- C. International
- D. Consumer/Employment
- E. Special American Creatures
 - Collective Bargaining
 - Interest Arbitration (Municipal Employees)

VIII. Freedom of Contract Revisited

- A. Basic Principles: E. Allan Farnsworth, *Change Your Mind: The Law of Regretted Decisions* (Yale University Press, 2000)
 1. Beyond Contract: Treaties & Statutes
 2. Did You Really Mean It?
 - Is There a “Writing”? Need a Signature?
 - Article II, New York Convention
 - The Importance of Punctuation: *Kahn-Lucas Lancaster Inc. v. Lark Int’l*, 186 F.3d 210 (2d Cir. 1999)
 3. An “Effective” Arbitration Agreement
ABA Working Group on Legal Opinions: Domestic vs. International
Staying out of court, but without award enforcement.
Bechtel v. Dubai, 360 F. Supp. 2d 136 (D.D.C. 2005).
 4. Understanding What We Sign
Bonnant, v. Merrill Lynch, 2012 WL 739363 (2d Cir. 2012)
- B. Procedural Lex Mercatoria: International Standards for Agreement to be Bound?
 - *Dalico (Populaire de la Muncipalité de El Mergeb c. Dalico)*, Cour de Cassation, 1993, 1994 Rev. Arb. 117: "C'est d'après une règle matérielle du droit international de l'arbitrage que la clause compromissoire est indépendante et que son existence et son efficacité s'apprécient d'après la commune volonté des parties."
 - U.S. Analogue: *Rhône Méditerranée v. Achille Lauro*, 712 F.2d 50 (3d Cir. 1983)

- IX. Lenses for observing the role of arbitration law
- A. The Scholar
 - 1. Fidelity to case law: *Lex lata* vs. Proposals de lege ferenda
 - 2. Do scholars make good arbitrators? Ideology and prejudice.
 - B. Industry Groups
 - 1. Bermuda Form Insurance
 - 2. LNG Price Adjustments
- X. Revisiting Investor-State Cases
- A. Jurisdiction: *Argentina v. BG Group*, 665 F.3d 1363 (D.C. Cir. 2012)
 - B. Calvo Clauses. Charter of Economic Rights and Duties of States
- XI. Conducting the Proceedings: Interaction of Soft Law and Hard Law
- A. Document Production
 - IBA Rules
 - AAA Protocols on Information Exchange
 - B. Conflicts of Interest
 - IBA Code
 - Ex Parte Payments & Commitment Fees
 - Duty to Investigate: *Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132 (2d Cir. 2007)
- XII. Odds and Ends
- A. Federalism: Contrasting USA and Switzerland
 - New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1 (1st Cir. 1988).
 - B. Forum Non Conveniens & Personal Jurisdiction
 - Article III, New York Convention: *Monégasque de Reassurances v. Naftogaz*, 311 F.3d 488 (2d Cir. 2002)
 - William W. Park & Alex Yanos*, *Treaty Obligations and National Law*, 58 *Hastings Law Rev.* 251 (2006)