

Fordham International Law Journal

Volume 41, Issue 4

2018

Article 1

2017 FORDHAM INTERNATIONAL ARBITRATION & MEDIATION
CONFERENCE ISSUE

Introduction

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INTRODUCTION

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On November 16-17, 2017 the twelfth annual Fordham International Arbitration and Mediation Conference was held at Fordham Law School in New York City. The conference began with a half-day devoted to mediation followed by a full day of panels that addressed international arbitration.

We are grateful for the contributions of our panelists and our keynote speaker who made each of the topics engaging. We are also grateful to our conference reporter, Gretta Walters of Chaffetz Lindsey LLP, for preparing the following summary of the conference.

SUMMARY OF CONFERENCE

This year's Fordham International Arbitration and Mediation Conference looked into a crystal ball at the future of arbitration, beginning with cautionary words from **Honorable Charles N. Brower** in a keynote speech on the proposed international investment court followed by five panels that explored how to rethink the ways practitioners work with consultants, funders and experts.

In his speech, Judge Brower critiqued the creation of an international investment court by the European Union, opining that the debate around the court's creation had become too political. He questioned why organizations and individuals that have been leaders in developing the investor-state dispute settlement regime were now seeking to bring about its demise. A full summary of Judge Brower's remarks can be found below.

International Commercial Mediation – The Impact of Culture and Regulation

The conference kicked off with a half-day session dedicated to international commercial mediation that explored how culture and domestic regulation impact the business and practice of mediation. **Nadja Alexander** of the Singapore Management University and

Singapore International Dispute Resolution Academy began the session with a keynote address that emphasized the importance of the interplay between culture and law in creating a supportive ecosystem for mediation.

The session then moved to a panel discussion moderated by **Jacqueline Nolan-Haley** of Fordham University in New York, with **Guido Carducci** of the Université Paris-Est, **Deborah Masucci** of the International Mediation Institute in New York, **Ilhyung Lee** of the University of Missouri and **Michael Young**, a mediator and arbitrator with JAMS in New York, providing their perspectives. Carducci considered the impact of court involvement and “mandatory” mediation under French, Italian and EU mediation laws in creating successful mediation climates. Masucci discussed that such laws reflect a common issue in mediation—that mediation regulations regulate parties but not mediators because of a perception that the market will regulate mediators. She advocated for more transparent methods to assess mediators’ competence and suitability.

Lee and Young closed the panel by offering their views on how different cultural backgrounds can impact the mediation process. As one example, Lee explained that Japanese parties typically expect less direct communication throughout mediation than American parties. Young added that cultural differences impact how he conducts a mediation session as a mediator, providing as an example that American parties request him to provide an evaluation of their claims much more frequently than non-American parties.

Gender in International Arbitration Advocacy – Does it Make a Difference?

Day two of the conference began with a breakfast seminar hosted by ArbitralWomen, in which panelists and audience members discussed how gender impacts advocacy in international arbitration and the challenges those impacts bring. **Dana MacGrath** of Sidley Austin LLP in New York moderated the discussion, with **Lorraine M. Brennan**, an independent arbitrator and mediator with JAMS in New York, **Miréze Philippe** of the ICC in Paris, and **Rashda Rana, SC**, then president of ArbitralWomen and a barrister at 39 Essex Chambers in London, providing their perspectives. Rana explained that studies show that gender impacts who one chooses to mentor and staff on a case team and that having fewer women in senior roles to

make those decisions results in fewer advocacy opportunities available to women.

Philippe, Rana and Brennan also shared anecdotes of situations where they or female colleagues had faced gender discrimination and provided their perspectives on how to deal with such situations. Philippe advised that dealing with such a situation “calmly but with determination” can be an effective approach. Brennan agreed that “handling it without losing control” is often most successful.

“Be yourself”, the panelists urged, emphasizing the importance for advocates—whether male or female—to develop their own styles. They agreed that women should rely on their own unique skill sets and experiences when leading a case or interacting with arbitrators and clients.

Emerging Expectations for Arbitrators

Susan Franck of American University Washington College of law in Washington, DC chaired a panel on the duties, accountability and transparency expectations emerging for arbitrators.

Stephanie Cohen, an independent arbitrator in New York, and **Teresa Giovannini** of Lalive in Geneva examined the legal liability that arbitrators can face if they fail to execute their duties. Cohen explained that such liability varies depending on the local law but is typically viewed as arising either from a contractual agreement between the arbitrator and parties (as is typical in civil law countries) or from the arbitrator’s quasi-judicial function (as is more common in common law countries). Giovannini agreed that local laws are key to understanding an arbitrator’s liability and explained that common law countries traditionally provide arbitrators with near absolute immunity from liability, while civil law countries typically only provide for qualified immunity.

Michael McIlwrath of General Electric in Florence and **Ina C. Popova** of Debevoise & Plimpton LLP in New York discussed transparency issues surrounding arbitrator appointments. McIlwrath explained that appointing the right arbitrator for a case is sometimes difficult because little public information is available regarding how an arbitrator will conduct the arbitration procedurally. Popova noted, however, that there has been increased transparency into arbitrators’ past cases in recent years, which has led to a number of challenges based on alleged issue conflicts. She posited that more practical

guidelines are needed for arbitrators to know when to disclose such potential conflicts.

Mock arbitrations – Optimizing Strategies and Maximizing Success

Edna Sussman, an independent arbitrator in New York, moderated a panel on the use of mock arbitrations in preparing for arbitration hearings. Sussman opened the panel by reporting on a recent survey that showed that many parties had never utilized mock arbitrations in their hearing preparations but were interested in learning more about the process. **James Lawrence** of the University of Houston explained that the survey revealed that the most common reason that parties gave for not using mock arbitrations was that they simply had never thought to do so. The second most common reason was concern over costs.

Doak Bishop of King & Spalding LLP in Houston, **Claudia Salomon** of Latham & Watkins LLP in New York, **Philip Anthony** of DecisionQuest in Los Angeles and **Dr. Mohamed Abdel Wahab** of Cairo University and Zulficar & Partners Law Firm debated the practicalities that parties and counsel should consider before deciding to conduct a mock arbitration. Bishop explained that a fundamental question will be whether to use the mock to test and refine counsel's presentation and arguments or to practice with experts and witnesses. Salomon added that issues like who participates and the timing of the mock will depend on what the parties expect to get out of the exercise. Wahab also emphasized the importance of choosing the right "arbitrators" for the mock and explained that parties may want to find mock arbitrators with legal backgrounds and procedural preferences that are similar to the actual arbitrators.

With these practical issues in mind, Anthony walked through what a mock arbitration may look like, discussing the selection of neutrals for the exercise and emphasizing the importance of post-mock feedback from the neutrals.

Third-party Funding – What are the Issues?

In a panel moderated by **Louis B. Kimmelman** of Sidley Austin LLP in New York, panelists debated emerging issues and misconceptions related to third-party funding.

Catherine A. Rogers of Penn State University Law School, **Andrea Carlevaris** of BonelliErede in Milan and **Maya Steinitz** of

the University of Iowa Law School explored how third-party funding adds an added level of analysis to issues such as arbitrator conflicts, security for costs and party disclosure obligations. They also discussed the potential standards that parties and arbitrators can look to in resolving these issues. **Nikolaus Pitkowitz** of Graf & Pitkowitz in Vienna shared his views on how third-party funding arrangements can be structured to include termination in case the funder and party want to “break up” before the case concludes.

Christopher P. Bogart of Burford Capital in New York observed that client demand for third-party funding in arbitration is not going away, so the arbitration community needs to stop the “hand wringing” over it and rethink how to structure funding to better serve the clients’ needs. Bogart and Rogers also debated whether the greater availability of third-party funding in litigation may make it a more attractive option than arbitration for some parties.

Determining Value in Arbitration – The Special Role of the Expert

Anne Marie Whitesell of the Georgetown Law Center moderated a discussion on the role that experts can and do play in arbitrations concerning valuation disputes, with **Boaz Moselle** of Cornerstone Research in London and **Jonathan D. Putnam** of Competition Dynamics, Inc. in Boston offering the experts’ view, **Marinn Carlson** of Sidley Austin LLP in Washington, DC offering the counsel’s view, and **William W. Park** of Boston University School of Law and **Eduardo Zuleta** of Zuleta Abogados Asociados S.A.S. in Bogota offering the arbitrators’ perspective.

Moselle, discussing price disputes in long-term gas contracts, and Putnam, discussing valuation in patent licensing disputes, agreed that experts are often asked to help define terms that have no clear legal definition, like “fair market value” and “reasonable”. Carlson added that it is sometimes difficult to draw a line between interpreting terms as a legal matter and as a matter of expert opinion. She posited that counsel and experts must work together up front to identify the assumptions and parameters that will underlie the experts’ work.

Park and Zuleta agreed that valuation disputes go beyond plain issues of law and economics. Because of the complexity of the issues, both arbitrators shared their views that valuation experts can be extremely helpful to a tribunal in narrowing and understanding the complicated issues.

Arbitrator Remedies

In a panel led by the **Honorable Claire R. Kelly** of the US Court of International Trade, participants discussed what remedies tribunals should grant and what drives their decisions in granting those remedies.

Clayton P. Gillette of the New York University School of Law and **John M. Townsend** of Hughes Hubbard & Reed LLP in Washington, DC provided their insights on what arbitrators may consider in deciding what remedies to award. Gillette posited that arbitrators will consider the practicalities of a remedy – for example, specific performance may not make sense where an aggrieved party is not able to find an adequate substitute transaction. Townsend added that arbitrators are conscious of the enforceability of their awards and therefore will consider what remedies are allowed under the applicable laws.

The panel also discussed how arbitrators determine—and should determine—pre-award and post-award interest. **Franco Ferrari** of the New York University School of Law explained that the law applicable to the contract will often direct the tribunal to the correct interest rate but opined that arbitrators frequently apply the wrong rate. **M. Alexis Maniatis** of The Brattle Group in Washington, DC explained that the proper interest rate is often an underdeveloped issue in both party submissions and arbitral awards. Maniatis and **Pablo T. Spiller** of Compass Lexecon in New York explored different ways that an interest rate can be calculated, including looking to the respondent's borrowing rate or the weighted average cost of capital for the claimant.

The 12th annual conference took place on November 16th and 17th in New York and was co-chaired by Kimmelman and Sussman. Next year's conference will take place on November 2, 2018.