Pepperdine Law Review

Volume 43
Issue 5 *Symposium: International Arbitration and the Courts*

Article 1

4-1-2016

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What role do national courts play in international arbitration? Is international arbitration an "autonomous dispute resolution process, governed primarily by non-national rules and accepted international commercial rules and practices" where the influence of national courts is merely secondary?[1] Or, in light of the fact that "international arbitration always operates in the shadow of national courts," is it not more accurate to say that national courts and international arbitration act in partnership?[2] On April 17, 2015, the *Pepperdine Law Review* convened a group of distinguished authorities from international practice and academia to discuss these and other related issues for a symposium on *International Arbitration and the Court*s.[3]

The Pepperdine University School of Law and the Straus Institute for Dispute Resolution were very pleased to host the following panelists (listed in order of appearance): Jan K. Schaefer, King & Spalding LLP (Frankfurt); Professor Christopher R. Drahozal, Kansas University School of Law;

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1. Julian D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, 22 ARB. INT'L 179, 181 (2006).

2. Vera Korzun & Thomas H. Lee, *An Empirical Survey of International Commercial Arbitration Cases in the US District Court for the Southern District of New York, 1970–2014*, 39 FORDHAM INT'L L.J. 307, 309 (2015).

3. *See* George Bermann & Alan Scott Rau, *Gateway-Schmateway: An Exchange Between George Bermann and Alan Rau*, 43 PEPP. L. REV. 469 (2016); Christopher R. Drahozal, *Innovation in Arbitration Law: The Case of Delaware*, 43 PEPP. L. REV. 493 (2016); Alan Scott Rau & Andrea K. Bjorklund, BG Group *and "Conditions" to Arbitral Jurisdiction*, 43 PEPP. L. REV. 577 (2016); Jan K. Schaefer, *Court Assistance in Arbitration—Some Observations on the Critical Stand-by Function of the Courts*, 43 PEPP. L. REV. 521 (2016); Maxi Scherer, *Effects of International Judgments Relating to Awards*, 43 PEPP. L. REV. 637 (2016); Abby Cohen Smutny, Anne D. Smith & McCoy Pitt, *Enforcement of ICSID Convention Arbitral Awards in U.S. Courts*, 43 PEPP. L. REV. 649 (2016); Jarrod Wong, BG Group v. Republic of Argentina*: A Supreme Misunderstanding of Investment Treaty Arbitration*, 43 PEPP. L. REV. 541 (2016).

Professor George A. Bermann, Columbia University School of Law; Professor Alan Scott Rau, University of Texas School of Law; Professor Jarrod Wong, McGeorge School of Law; Professor Andrea K. Bjorklund, McGill University; Abby Cohen Smutny, White & Case LLP (Washington, D.C.); Professor Aaron D. Simowitz, a fellow at New York University School of Law; and Professor Maxi Scherer, Queen Mary University of London. Professor Robert E. Lutz, Southwestern Law School, and Professors Thomas J. Stipanowich, Donald Earl Childress III, and Jack J. Coe, Jr., Pepperdine University School of Law, provided moderation. A special note of thanks is due to Dean Deanell Reece Tacha for her support and to then-law students Sarah Gerdes and Catherine Eschbach for their planning and logistical excellence. The current staff of the *Pepperdine Law Review* also deserve our thanks and praise for their excellent editing efforts. The following scholarly writings appear in this Symposium Issue.

The issue begins with a transcript of a moderated exchange between Professor Bermann, the Reporter for the American Law Institute's (ALI) ongoing *Restatement (Third) of the U.S. Law of International Arbitration* project, and Professor Rau, an ALI-appointed Advisor on the project. Professor Coe poses questions to both scholars that focus on selected issues that are characteristic of matters discussed during the ALI drafting and consultative process, especially so-called "gateway" matters like competence-competence.[4] This exchange revealed several questions on which Professors Bermann and Rau diverged—namely, arbitrability of scope issues, the concept of delegation, and whether an express remedy limitation in a contract should be treated as a limit on a tribunal's authority.[5] For those interested in the iterative process that creates an ALI *Restatement*, this is a must read.

Professor Drahozal's article examines Delaware's active adoption of innovative arbitration laws, concluding that such innovation was motivated, at least in part, by Delaware's desire to become more competitive in the market for international dispute resolution.[6] His article provides an important glimpse into how U.S. states and arbitration institutions may compete to be the arbitral forum. He analyzes the Delaware Rapid Arbitration Act (DRAA), Delaware's most recent innovation in arbitration law.[7] Among other lines of inquiry, Professor Drahozal distinguishes DRAA provisions that demand legislative

4. Bermann & Rau, *supra* note 3, at 469–70. The live recording can be accessed at livestream.com/pepperdinesol/lawreviewsymposium2015.

5. *Id.* at 475.

6. Drahozal, *supra* note 3, at 494.

7. DEL. CODE ANN. tit. 10, §§ 5801–12 (West 2015).

action—such as provisions permitting direct appeals to the Delaware Supreme Court and waiver of all court review of awards[8]—from provisions that parties can initiate themselves by contract. The latter include terms that sanction arbitrators who depart from prescribed time limits and others that delegate authority to arbitrators to decide substantive arbitrability issues.[9] Professor Drahozal identifies several potential difficulties or uncertainties caused by the DRAA and acknowledges that "only time will tell" whether Delaware's approach will be successful because little time has elapsed since the DRAA took effect.[10]

From the perspective of international practice, Jan Schaefer's article analyzes three key differences between arbitrators and judges—the absence of standing jurisdiction,[11] coercive powers,[12] and jurisdiction over third parties.[13] These three differences, he posits, indicate that that there is a continuing need for national court assistance in international arbitration.[14] Finally, Mr. Schaefer addresses the nature of the future relationship between the courts and arbitration in light of recent European debates about investment arbitration in the context of the Transatlantic Trade and Investment Partnership (TTIP), which shows that the public, lawmakers, and judges have reservations about the role of arbitration.[15]

Professor Wong's article explores the U.S. Supreme Court decision in *BG*

8. *See* Drahozal, *supra* note 3, at 512–15.

9. *See id.* at 507–12.

10. *Id.* at 518–19; *see id*. at 513–14 ("If the Supreme Court were to hold that manifest disregard of the law is a ground for vacating awards under FAA section 10, then it would be available under the DRAA as well. Given the uncertainty the ground has caused and the criticism directed towards it, I am surprised that the drafters of the DRAA did not make clear that manifest disregard was not available."); *id* at 514–15 ("If section 10 of the FAA applies in state court, as a number of courts have held, it may preempt the DRAA provision permitting waiver of any court review of awards.").

11. Schaefer, *supra* note 3, at 524–25 ("[I]n contrast to permanent national courts, private arbitral tribunals must be constituted for a specific dispute before they can exercise any juridical function.").

12. *Id.* at 527 (explaining that arbitrators' have no *imperium*—that is, power to coerce parties into complying with their orders or awards—which is reserved to the state and its institutions).

13. *Id.* at 530. Generally, civil procedural laws permit joining third parties in litigation. *Id.* Conversely, an arbitrator typically cannot join a third party unless all parties consent. *Id.*

14. *Id.*; *see id.* at 528–29 ("Considering court assistance through the prism of the limitations of the arbitrator's powers, as compared to those of national court judges, even the national court's review of an arbitrator's award can be considered court assistance to arbitration, since the court is ensuring the award's ultimate enforcement."); *id.* at 533 ("While arbitration is an alternative to the courts (and, as such, is a competing forum), it fundamentally relies on the availability of court assistance for its ultimate effectiveness.").

15. *Id.* at 523.

Group, PLC v. Republic of Argentina,[16] concluding that while the result may be correct, the Court's reasoning is not.[17] Professor Wong explains that in reaching its decision, the Court neglected to interpret the United Kingdom and Argentina Bilateral Investment Treaty (BIT) as a whole under the Vienna Convention.[18] Instead, he criticizes the Court for looking only to domestic case law on the Federal Arbitration Act (FAA).[19] Professor Wong proposes that national courts, including U.S. courts, should engage the Vienna Convention and accord international investment treaty awards deference consistent with the "ordinary meaning" of the relevant investment treaty.[20] He explains that this approach could minimize the possibility of subjecting investment treaty awards to varying standards of review—which results when national courts apply their domestic laws exclusively—and protects the sovereign will of the state parties to the treaty.[21]

Building on *BG Group* and the issues that Professor Wong raises, Professors Rau and Bjorklund present two different approaches to treaty interpretation after *BG Group* in a joint article entitled *BG Group and "Conditions" to Arbitral Jurisdiction*.[22] Professor Rau reminds us that the central question when choosing the proper default rule to determine the parties' scope of consent is the parties' presumed "intention to act efficiently in the interest of maximizing mutual gains."[23] After discussing the defects in Justice

16. BG Grp., PLC v. Republic of Argentina, 134 S. Ct. 1198, 1204 (2014).

17. Wong, *supra* note 3, at 542.

18. *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; *Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION [hereinafter *Vienna Convention Signatories*], https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf (last visited Mar. 1, 2016).

19. Wong, *supra* note 3, at 543; *see BG Grp.*, 134 S. Ct. at 1206; Wong, *supra* note 3, at 547 ("[T]he U.S. courts should have viewed the arbitration agreement between BG Group and Argentina through the prism of the U.K.-Argentina BIT and its provisions on investor-state dispute settlement and interpreted the BIT under international law in reviewing the *BG Group* award instead of relying exclusively on FAA case law.").

20. *See* Wong, *supra* note 3, at 573–74.

21. *Id.*

22. Rau & Bjorklund, *supra* note 3, at 577. The "initial goal had been to write jointly" in order "to find, if not common, at least neighboring, ground." *Id*. The result, however, was divergent views "of the proper way to interpret the condition precedent" in the *BG Group* BIT, and the article illustrates how two scholars could reach "dichotomous approaches to treaty interpretation." *Id.*

23. *Id.* at 580; *see id.* at 579–80 (citing Alan Scott Rau, *"Consent" to Arbitral Jurisdiction: Disputes with Non-Signatories*, *in* MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION 69, 96–97 (Permanent Court of Arbitration ed., 2009) (explaining that when ferreting out the parties' presumed intent with respect to the proper decision maker, there are two tactics: (1) to "align presumed intent with 'comparative competence,'" and (2) "'to presume intent on the basis of what will reduce overall costs'—

Breyer's opinion in *BG Group*, Professor Rau argues that "U.S. courts—whether by submitting to his default presumption governing arbitral competence or by misreading institutional rules—are likely in any event to wind up in the same place—the inevitable result, an exaggerated deference to arbitral decision making."[24] In the second half of this joint article, Professor Bjorklund further discusses the *BG Group* decision, examines the interpretive provisions of the Vienna Convention, and points out the differences between the Vienna Convention's interpretative provisions and contract interpretation.[25] Finally, she introduces the idea of interpretive communities and explains how the convergence of interpretive principles and communities affected the Court's decision-making process in *BG Group*.[26]

Professor Scherer's article turns our attention to the extraterritorial effects of arbitral awards that are rendered both in and outside of the seat of arbitration.[27] She then analyzes the extent to which an award entered in one jurisdiction has effects in other jurisdictions.[28] She addresses the English case of *Malicorp Ltd. v. Government of the Arab Republic of Egypt*[29] and the Hong Kong decision of *Astro Nusantara International BV v. PT Ayunda Prima Mitra*[30] in a broader context, discussing whether and to what extent these

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both transaction costs (e.g., in the interest of avoiding multiple proceedings) and error costs (e.g., in the interest of trying to identify comparative decision-making competence)—thereby 'maximizing a joint surplus that the parties can in bargaining divide among themselves'").

24. *Id.* at 614–15.

25. *Id.* at 617–18; *see id*. at 623–25 ("One of the key features of the [Vienna Convention] is that no one of the three principles"—first, that the interpretation be objective and focus on the "ordinary meaning"; second, that the interpretation occur in context; and third, that the interpretation occur in light of the "object and purpose" of the treaty—"has priority—they are supposed to be applied holistically. In contract interpretation, there is no overarching directive that each of those principles be applied in each case.").

26. *Id.* at 618; *see id.* at 625–26 (attributing the Court's indifference to the Vienna Convention to the "epistemic community" and noting "[a]n individual's membership in an epistemic community might affect the interpretive process he or she undertakes").

27. *See* Scherer, *supra* note 3, at 638–45.

28. *Id.* at 638. For example, "if the award has been set aside in country *A*, does the set-aside judgment have effects on enforcement proceedings in country *B*?" *Id.* Likewise, "if country *C* refuses to enforce an award on the basis that the tribunal has no jurisdiction, does this have a preclusive effect on enforcement proceedings pending in country *D*?" *Id.*

29. [2015] EWHC (Comm) 361 (Eng.); *see* Scherer, *supra* note 3, at 642 (explaining the court's approach in *Malicorp* was to apply principles of private international law, which Professor Scherer argues may lead to unsatisfactory results because under private international law principles, review of the merits of a foreign court's decision is generally not permitted).

30. [2015] H.K.E.C. 330 (C.F.I.) (H.K.). Professor Scherer points out two potential problems with the court's holding in *Astro*: First, "one might query whether it is opportune to let the procedural timetable decide which enforcement forum renders its decision first and thus influences, via the preclusive effect of the first judgment, the enforcement of the award in other jurisdictions." Scherer,

awards should have extraterritorial effects.[31]

Abby Cohen Smutny's article reviews the enforcement of ICSID awards in U.S. courts and concludes that a number of procedural questions remain unresolved.[32] She explains that the uncertainty arises because the U.S. implementing statute does not explicitly describe the procedure for ICSID award recognition when it is sought separately from enforcement.[33] Procedural peculiarities arising from the requirement that ICSID awards be considered final state court judgments to be enforced in federal courts also contribute to this uncertainty.[34]

In conclusion, we hope that this issue continues to enliven scholarship on international arbitration and the courts. We again offer our deepest thanks to the panelists, moderators, students, and supporters that made this event and Symposium Issue possible.

supra note 3, at 646. Professor Scherer cautions us that if the first judgment had preclusive effect on the enforcement elsewhere, "it would open the door for unwanted strategic positioning or forum-shopping." *Id.* Second, "one might query whether it is right to let a foreign court decide whether an award should be enforced in the forum," noting instead, "that this decision should only be in the hands of the forum's courts." *Id.*

31. Scherer, *supra* note 3, at 638.

32. *See* Smutny et al., *supra* note 3, at 678.

33. *Id.*

34. *Id.*

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