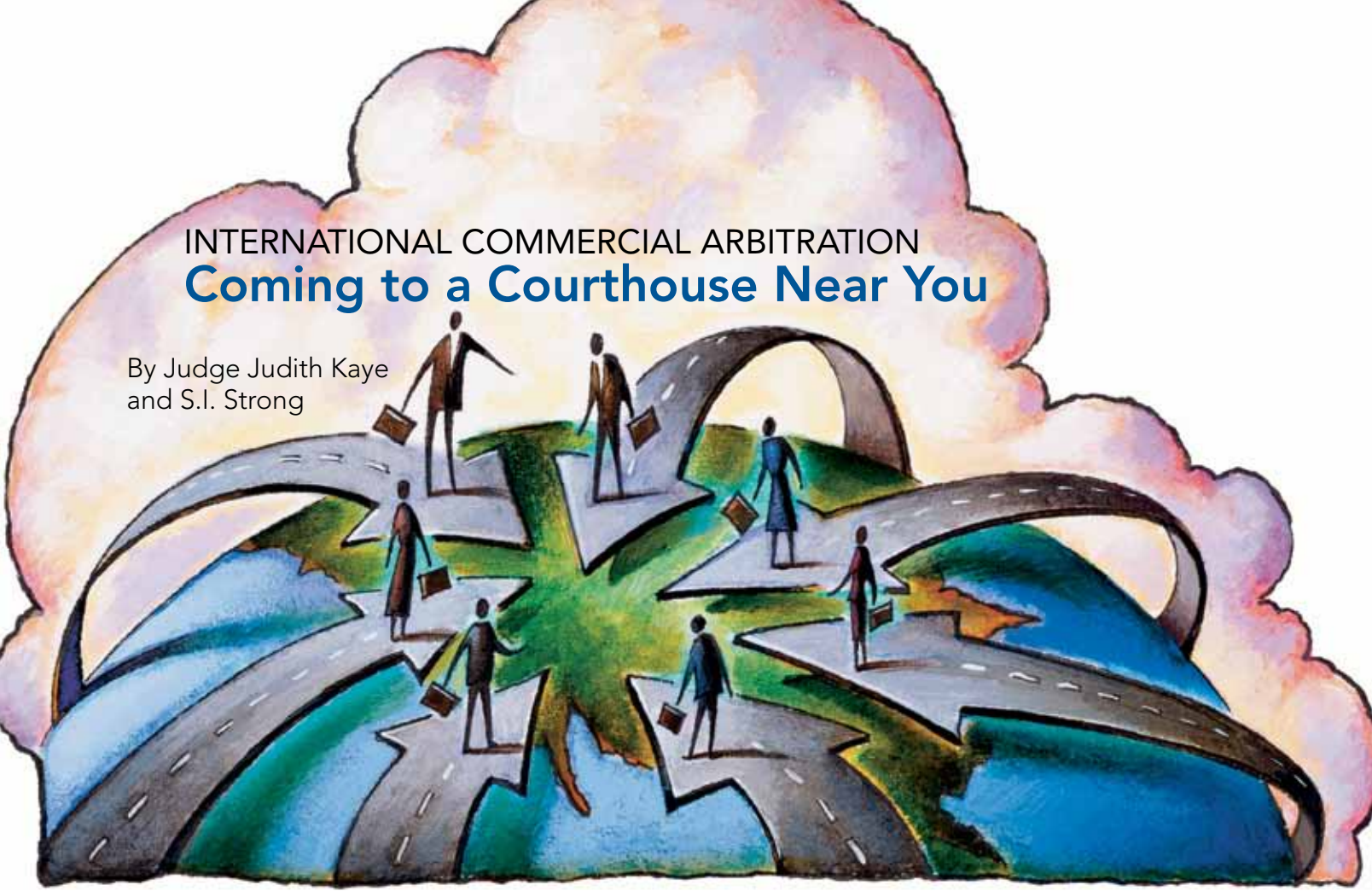


INTERNATIONAL COMMERCIAL ARBITRATION Coming to a Courthouse Near You

By Judge Judith Kaye
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Some people view international commercial arbitration as an exotic, private dispute resolution mechanism that is entirely separate from U.S. state and federal courts. However, the truth of the matter is that judges from around the country increasingly are being asked to handle disputes that are somehow related to international commercial arbitration. Indeed, as Judge Allyson Duncan of the U.S. Court of Appeals for the Fourth Circuit observed, “In an ever more interconnected marketplace, it becomes increasingly important for American judges to understand the rules and dynamics that govern the international commercial arbitration agreements we may be called upon to enforce. This is particularly true because many such agreements will arise under, and parties hail from, civil law traditions with which we have little experience.” Similar concerns arise with respect to the enforcement of arbitral awards and other types of judicial interventions.

Although many parties involved in international commercial arbitration seek

the assistance of U.S. federal courts, this is not an area of law that is required to be addressed in federal court. As a result, both state and federal judges need to be prepared to face these uniquely challenging cases.

International Commercial Arbitration and U.S. Courts

At one time, disputes involving international commercial arbitration were indeed an oddity in U.S. courts because international commercial arbitration traditionally operated as a largely self-contained dispute resolution mechanism. Any litigation that did arise in this area of law was largely limited to courts sitting in major financial centers such as London, Paris, or Geneva.

Over the last decade, the situation has shifted significantly and judges throughout the United States are now being asked to consider a variety of matters relating to international commercial arbitration. This increased emphasis on arbitration reaches to the very highest levels, with the U.S. Supreme Court having heard 11 arbitration cases in the last six years. One of these

matters involved an international commercial dispute (*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, although the case is better remembered as part of the series of decisions on class arbitration) and another involved an international investment proceeding (*B.G. Group, PLC v. Republic of Argentina*).

Although the highest incidence of cases arises in federal court, state court judges also increasingly are being drawn into international commercial arbitration matters. In fact, some states have adopted legislation specifically intended to make their jurisdiction more welcoming to parties in international commercial arbitration. Individual cities, including those not traditionally recognized as arbitral centers, have also undertaken efforts to raise their profiles in the international legal community so as to attract arbitration business.

The increased incidence of domestic litigation associated with international commercial arbitration can be attributed to several different factors. First, the forces

of globalization have increased the number of cross-border business transactions taking place every day across the United States. Because international commercial arbitration allows parties to avoid certain problems (such as those relating to jurisdiction, enforcement, and neutrality) that have traditionally been associated with international litigation, most contracts that arise in this context include an arbitration agreement. As the number of contracts calling for international commercial arbitration grows, so too does the number of judicial actions involving international commercial arbitration.

Although the rise in litigation can be tied directly to the increased incidence of international transactions, some issues also may arise as a result of the increasing complexity of international transactions. At one time, most cross-border contracts were bilateral, a form well suited to arbitration. By contrast, commercial transactions today often involve multiple parties as well as multiple contracts. Although international commercial arbitration accommodates these modern relationships, complexity often breeds litigation.

Globalization has also resulted in the geographic diversification of international commercial arbitration. Traditionally, the only companies that routinely engaged in international trade were large multinational corporations headquartered in a handful of large cities. Recent improvements in technology, communications, and transportation now make it cost-efficient for small- and medium-sized businesses to conduct business with foreign counterparts. Many of these companies see no advantage in seating an arbitration far from home. As a result, matters relating to international commercial arbitration are also being spread across the United States, mirroring the locations of the new international actors.

Types of Ancillary Litigation

Litigation ancillary to international commercial arbitration can be somewhat challenging for judges because the international arbitral regime constitutes its own unique legal system that is governed by a complex mix of public and private rules. Courts not only must contend with an

intricate web of national, international, and sometimes state law, they also must identify and respect the proper bounds of the parties' contractual autonomy.

Actions may be brought to court before, during, and after the arbitration itself. Some of these proceedings are analogous to actions relating to domestic arbitration, whereas others are unique to the international realm.

Actions brought before the arbitration typically involve the need to obtain the court's assistance in initiating the arbitral proceedings. Perhaps the best-known procedure in this category of cases involves a motion to compel arbitration. However, courts can be asked to help with other tasks, such as the selection of an arbitrator or an order for provisional relief.

Parties also can come to the court while the arbitration is pending. These types of actions are relatively rare because most matters can and should be handled by the arbitral tribunal while the procedure is ongoing. Nevertheless, there are times when the parties may properly seek judicial assistance during this interim stage.

Finally, courts can become involved after the arbitration is completed. Although international commercial arbitration has a high voluntary compliance rate (well over 90 percent of all awards need no form of judicial enforcement), invariably there are times when the losing party will want to either vacate an award made in the United States or object to enforcement of an arbitral award rendered in another country. Although these two procedures have the same result—nonenforcement of the award in the United States—they are very different as a matter of both substance and procedure. Other post-arbitration procedures include efforts by a party to recognize—but not enforce—a foreign award or use an award for preclusive purposes.

Special Challenges

International commercial arbitration is particularly challenging to judges for several reasons. First, the arbitral regime is largely self-contained, which means that judges who are used to seeing the entirety of a dispute hear only a portion of the facts

and issues facing the parties.

Second, the field involves a complex mix of state, federal, and international law that is completely unique to this field. Wading through the morass of authorities is difficult enough for counsel, who often have the benefit of lengthy briefing periods that allow time for extensive research into the finer points of law and practice. Judges with large, general dockets do not have that luxury and instead must get rapidly up to speed.

Third, international commercial arbitration involves a purposeful blend of common law and civil law elements that can seem alien to those who have spent their entire career working exclusively in the common law tradition. For example, parties in international commercial arbitration typically give up the right to extensive U.S.-style discovery but retain the ability to cross-examine witnesses. Inexperienced counsel sometimes do not appreciate the various ways in which international commercial arbitration differs from both litigation and domestic arbitration, which is why some matters end up in court. As a result, the court must act to protect the process originally agreed to by the parties, even if that process seems somewhat foreign at times.



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Help Is on the Way

With the increase in the amount and diversity of litigation ancillary to international commercial arbitration comes an increased need for judicial expertise in this area of law. Fortunately, a variety of resources are available for state and federal judges seeking to increase their understanding of court procedures relating to international commercial arbitration.

Restatement (Third) of the U.S. Law of International Commercial Arbitration

Nowhere are these special challenges better exemplified than by the work of the American Law Institute's Restatement (Third) of the U.S. Law of International Commercial Arbitration, perhaps the most eagerly anticipated tool in this area of law. The project began in December 2007 and two of the five chapters have been officially approved. A third chapter is ready for deliberation by the American Law Institute

Council and membership, which leaves only two chapters to go.

The Restatement will be particularly helpful to judges because the reporters are focusing primarily on matters that arise in the judicial context rather than on those that arise within the arbitration proceeding itself. Issues covered by the Restatement include the enforcement of arbitration agreements, judicial assistance in cases where an arbitration is seated in the United States and where it is seated abroad, recourse from and enforcement of international arbitral awards rendered in the United States, enforcement of international arbitral awards rendered outside the United States, and the preclusive effect of international arbitral awards.

As explained by Columbia Law School's Professor George Bermann, director of Columbia's Center for International Commercial and Investment Arbitration and the Restatement's chief reporter, "What's interesting today is that this rapidly growing field of international commercial arbitration is principally federal and principally codified, by statutes and treaties, and yet the state of the law is as much in need of coherence and clarification as the traditional, uncodified state common law issues that launched the whole notion of a Restatement in the first place." Professor Bermann posits the central dilemma that "while on the one hand we must be faithful to U.S. law—it's not for us to refute Congress or the Supreme Court—on the other hand it is desirable for the Restatement to reflect the emerging consensus on what is an intrinsically international subject." This phenomenon suggests the Restatement will certainly be an eagerly anticipated resource for judicial guidance as the commercial world increasingly globalizes, arbitrates, and litigates.

Publications Aimed at Judges

Another useful publication already available to state and federal judges is a monograph published in 2012 by the Federal Judicial Center (the research and education arm of the U.S. federal judiciary). Entitled *International Commercial Arbitration: A Guide for U.S. Judges*, this book is part of a larger series relating to

international dispute resolution.

"While the Center's judicial education conferences tend to focus on areas of law and judicial practice most likely to appear in federal litigation, many judges are interested in international law and litigation, and some have recently noted an increasing number of cases involving evidence located abroad, foreign law issues, and international treaties," says Mira Gur-Arie, director of International Judicial Relations at the Federal Judicial Center. This interest in international litigation as a field has led the Center to develop judicial guides on matters as diverse as the Hague Convention on the Civil Aspects of Child Abduction, the Foreign Sovereign Immunities Act, discovery in transnational civil litigation, international extradition, and mutual legal assistance treaties. All Federal Judicial Center publications, including *International Commercial Arbitration: A Guide for U.S. Judges*, are freely available on the Federal Judicial Center's website (<http://www.fjc.gov>).

Although the Federal Judicial Center focuses primarily on matters of interest to federal judges, the monograph on international commercial arbitration is equally relevant to state judges because litigation ancillary to international commercial arbitration can arise in both venues. The guide has already proven useful in practice, with two federal courts—the District Court for the Southern District of New York and the District Court for the Southern District of California—having already cited the publication as persuasive authority.

Judicial Colloquia and Coursework

Useful as written materials are, many judges prefer to meet with other judges to discuss relevant issues face to face. Perhaps the most intriguing model has been developed by the New York International Arbitration Center (NYIAC), which has planned an impressive program of judicial colloquia for state and federal judges, working with the Federal-State Judicial Council. Southern District of New York Chief Judge Loretta Preska and State Court of Appeals Judge Victoria Graffeo, who are co-hosting the program, expressed particular pleasure in together supporting this initiative. The

showcase session, entitled “International Arbitration: Why Should New York Judges Care?,” featured distinguished Yale Law School Professor and former Legal Adviser of the U.S. Department of State Harold H. Koh and ended with his message to the judicial audience: “The whole world is watching.” Indeed so.

The College of Commercial Arbitrators (CCA), a national organization of commercial arbitrators that promotes the highest standards of conduct and best practices, has also recognized the court’s critical role in arbitration. As a result, the CCA has launched a series of roundtables with judges from courts around the country to discuss the common issues on the horizon. “The initiative has been received with enthusiasm, with hundreds of judges across the U.S. joining in the conversation,” according to noted arbitrator and CCA Vice President Edna Sussman. “Without courts that understand and support the process, international commercial arbitration cannot function effectively” she added.

Outreach efforts are also being made by academic institutions. For example, the Center for Judicial Studies at Duke University School of Law offers a master’s degree program for judges seeking advanced educational opportunities. The program gives judicial participants the opportunity to attend seminars on rapidly developing issues or fields that require a high degree of specialized knowledge, including international arbitration.

International Efforts

Efforts to raise judicial consciousness regarding international commercial arbitration are also being made outside the United States, often with the participation of U.S. judges. For example, the Judicial Conference of the United States has a standing committee, the Committee on International Judicial Relations, that helps to develop judicial education programs for foreign judges and court personnel. As part of its work, the Committee often sends federal judges to other countries to give presentations on a variety of substantive and procedural issues, including international commercial arbitration.

Another federal organization that is

Further Reading

INTERNATIONAL COMMERCIAL ARBITRATION: A GUIDE FOR U.S. JUDGES (Federal Judicial Center, 2012), available for free download at <http://www.fjc.gov>.

RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION (in progress), drafts available at https://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=20.

involved in providing education on international commercial arbitration is the U.S. Department of Commerce, which has held regional and national judicial education programs in a variety of locales, including Iraq, Morocco, and the United Arab Emirates. These programs often feature U.S. federal judges as faculty members. For example, Judge Delissa Ridgway of the U.S. Court of International Trade recently traveled to Dubai to discuss with a high-level delegation of Iraqi judges various issues arising in international commercial and investment arbitration. The Department of Commerce also undertakes other educational initiatives, such as the development of benchbooks on international arbitration for foreign judges and the facilitation of programs to educate practitioners and law students about international commercial arbitration. These programs help ensure that future members of foreign judiciaries are well-prepared to consider matters ancillary to international commercial arbitration.

Nongovernmental organizations also have seen the benefit and need for judicial outreach efforts in this field. For example, the Organization of American States (OAS) has set up an ambitious program involving judges, magistrates, academics, and high-level government officials from various countries in the OAS. A number of meetings have already been successfully held in the United States, Chile, Costa Rica, and Uruguay.

The rationale behind the educational efforts is clear. “Arbitration proceedings have gained a great deal of importance in Latin America over the last fifteen or twenty years,” says Dante Negro, director of the OAS’s Department of International Law. “Without meaningful and efficient

involvement of judges at the different stages of the process, arbitration will be rendered ineffective. We think it is crucial to bring together members of the judiciary from all these countries to share best practices and clarify certain notions.”

Participants concur with this assessment. For example, Magistrate Margarita Romagoza, chair of the Second Civil Chamber in El Salvador, has said that “this kind of activity helps all members of the judiciary to get a better grasp of a highly technical and relevant subject, as well as to realize that we need to cooperate in order to contribute to the development of arbitration in the region as well as within each of our jurisdictions. This will in turn result in more trade development for our countries.”

Conclusion

Magaly McLean of the OAS has said that “arbitration is not static, but develops in a context of ever-changing standards and parameters.” As a result, she believes that “judges [must] pay close attention to its developments” so as to ensure that the international arbitral regime is operating properly and in accordance with its design, purpose, and parameters.

Certainly, the various initiatives that are forming in the United States and abroad bear out the wisdom of this approach. International commercial arbitration can no longer be considered as entirely insulated from the courts. Instead, judges need to be aware of how an arbitration-related matter may appear in court and how that issue may relate to larger proceedings in the dispute and in the world. Although this can be a complex analysis, judges are fortunately able to rely on an ever-increasing number of resources to assist in this essential endeavor. ■