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The Nuts And Bolts Of International Arbitration

The Editor interviews Philip D. Robben, Partner, Kelley Drye & Warren LLP.

Editor: Please tell our readers about your background and your practice.

Robben: My work covers a wide range of subject matters. For the past ten years, a large part of my practice has been representing clients in international arbitrations. I handle both commercial disputes between corporations and arbitrations against governments brought under bilateral investment treaties. The commercial disputes run the gamut from breach of contract to disputes over patent licenses and trade secrets. The treaty-based arbitrations typically involve claims by investors that invoke treaty protections such as those against unfair treatment and the expropriation of property.

Editor: What are the trends in international arbitration and in what respects is its scope expanding?

Robben: There is a lot more interest in international arbitration as a result of the globalization of trade and companies having business throughout the world. Arbitration is a means of attempting to deal with disputes in a politically, culturally and geographically neutral way. One trend I am seeing is a lot more emphasis on drafting bespoke arbitration clauses that reflect the particular needs of the parties to a transaction. At a prior point in time, simply using boilerplate was much more common. I am also seeing increased competition among the providers of dispute resolution services, giving parties more choices. ICC, for example, recently opened a New York office. Other providers have sprung up, and established providers have expanded to meet the needs of parties.

Editor: What services do these arbitral centers provide?

Robben: They typically provide the administrative structure and ground rules for the arbitration. They also can help the parties with the formation of the tribunal that will decide the dispute. But the parties have autonomy, so many dispute resolution providers will allow parties to deviate from the set rules by agreement.

Editor: You mentioned treaty-based arbitrations. Is there a specific provider for those?

Robben: Many, but not all, of the treaty-based arbitrations are brought before the International Centre for Settlement of Investment Disputes (ICSID) in Washington, DC. ICSID's existence and authority spring from a treaty between the member countries. Generally, the choice of forum and the applicable rules are set by the particular treaty under which the claim is brought.

Editor: Should arbitral institutions provide more control and oversight?

Robben: I find that the leading arbitration providers are very responsive to what parties want. The parties generally want a quick resolution, and arbitral institutions have tried to promote that. Where things sometimes break down is when parties try to use delay as a tool for achieving what they want. Because all of arbitration, at least on some level, is consensus or agreement based, a party can gum up the works if it refuses to take part in the process in good faith. There's prob-



Philip D.
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ably not much that the organizations can do about that because their authority springs only from agreement, and there is sometimes little they can do to force a recalcitrant party to comply.

Editor: Does having three arbitrators slow the process?

Robben: No, I don't think so. Particularly with respect to scheduling and logistical questions, my experience is that arbitrators typically work cooperatively and try to move the proceeding along.

Editor: What are some of the events that trigger international arbitration?

Robben: Many of the ICSID arbitrations have been driven by currency crises and disputes over oil and gas projects. Commercial cases relate to all manner of commercial issues.

Editor: Are arbitrators sufficiently versed in the unique issues affecting particular businesses?

Robben: I find that arbitrators at the international level tend to be among the most eminent legal practitioners. To the extent parties feel that an arbitrator needs additional knowledge or experience, such as a scientific background, the best way to deal with this is to specify the qualifications of the arbitrators in the arbitration agreement.

Editor: Should agreements relating to cross-border M&A and other international transactions specify that disputes will be settled by arbitration?

Robben: That depends somewhat on whom you represent.

If your client is a U.S. party to a transaction, litigating a dispute in a U.S. court

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may be fine for you. But, if your non-U.S. client wants to avoid the U.S. courts, or your U.S. client is wary of resolving disputes in a court abroad, arbitration is the way to go.

Editor: Based on your conversations with your clients, is international arbitration deemed to be quicker, cheaper, less complicated and more likely to be fair and equitable in result than conventional litigation in domestic courts?

Robben: I think the hope is that it will be quicker and less expensive. However, I'm not sure arbitration is always quicker or less expensive, and that's due to a number of factors. For one thing, some of the aspects of litigation that take time and cost a lot of money, like discovery, are increasingly being imported into arbitration, even international arbitration.

But, in terms of fairness, I think arbitration can help alleviate some concerns. Companies desire arbitration because they can tailor the proceeding to what they feel is necessary for it to be fair. It's not so much to save money or costs as it is to make sure they are comfortable with how disputes will be resolved.

So, for example, let's say your counterparty is a German company. In arbitration you can provide that the arbitration will be conducted in German (or German and another language) so that their witnesses can come and testify in their native language. You can limit or eliminate discovery. You can provide that the arbitration will take place in a certain country. Any other procedural or substantive protections can be agreed upon to customize the proceeding.

Editor: What are the key matters that should be specified in a contract clause relating to international arbitration?

Robben: A number of issues should be considered for inclusion in the arbitration clause. At a minimum, the clause should specify the number of arbitrators and how they will be selected, where the arbitration will be conducted, the language or languages of the arbitration, the choice of law, and deal with any discovery issues the parties have agreed on.

In deciding on a venue, certain countries give much more respect and deference to an arbitration agreement. You want to pick a legal venue that is a party to arbitration-enforcement treaties that

are going to be beneficial to you. For example, the New York Convention allows you to obtain enforcement of awards in a large number of countries. As for where the arbitration will take place, which can be different than the legal seat, it should be a place that's easy to travel to for your client and has the necessary support services. New York, London and Paris are popular venues.

Editor: What about e-discovery?

Robben: In drafting an arbitration clause, you should specify how much, if any, discovery you want. Given the potentially enormous scope (and cost) of e-discovery, I suggest parties carefully consider agreeing upon a limitation.

Editor: Is mediation becoming more popular as a prelude to international arbitration?

Robben: Formal mediation-arbitration arrangements, where you have a fixed mediation period and then an arbitration, have been much discussed. I have seen deals that incorporate that principle in the arbitration clause. But, in my experience, it's more ad hoc. Sometimes there's mediation, and sometimes it's just dealt with through settlement negotiations between the parties themselves. Sometimes you just go to arbitration straightaway.

If you are faced with a situation where the other side is trying to incorporate a med-arb provision into your agreement, think it through carefully. Think about the timing that's going to be written into the agreement, and carefully consider who is going to do the mediation as opposed to the arbitration. I don't think you ever want your arbitrator to be your mediator because mediation doesn't really work unless there is a frank discussion about the weaknesses in each party's case. Having your mediator move from a frank discussion of the weaknesses of each side's case to being your arbitrator is not advisable in my opinion.

Editor: How can language and cultural differences best be overcome?

Robben: There are various ways you can try to minimize the differences. There's never a way to fully bridge the cultural gap, but as you become more familiar with a given culture, you better understand where they're coming from. As to the language barrier, you can build into the arbitration clause provisions for translations, including simultaneous translation at hearings. This permits each side to speak its own language with an interpreter who interprets simultaneously.

With respect to translation of documents, typically I'll submit my papers in English and then provide a translation into another language within a week or two. If the other side does the same, that can help bridge the language difference. But, a downside of a translation protocol is that translations can be quite expensive and translation quality can vary.

Editor: Do you find that technology, such as video conferences or email, makes a difference?

Robben: It certainly helps. I don't know that I would ever want to have a hearing where I have witnesses appearing live but one or more of the arbitrators are on video, or, vice versa, where my witnesses are appearing on video. But video conferences can certainly help for resolving matters like scheduling and resolving procedural issues. Things as simple as email and PDFs have really helped because you can submit your papers in electronic form without the need for shipping boxes and boxes of hard-copy documents.

Editor: Would you speak to enforcement of arbitration decisions?

Robben: In the commercial context there's a fairly well-established body of law, particularly in New York Convention countries, that supports the enforceability of arbitration clauses. U.S. courts, for instance, will enforce arbitration awards as written. In some other countries, you do sometimes see resistance to enforcing arbitration awards and there's some second-guessing or re-litigating that goes on – although that's declining.

In the investment treaty context, there's almost an assumption that if a country loses an arbitration and has an award lodged against it, it will comply. Lately, that has not happened all the time. In these cases, the lack of payment is noticed by the capital markets (along with other governments), and the enforcement mechanism comes from the market and inter-governmental measures, but not from a court or arbitral body.