The U.S. Arbitration-Litigation Paradox

The U.S. Supreme Court is well-known for its liberal pro-arbitration policy. In *The Arbitration-Litigation Paradox*, forthcoming in the Vanderbilt Law Review, I argue that the U.S. Supreme Court's supposedly pro-arbitration stance isn't as pro-arbitration as it seems. This is because the Court's hostility to litigation gets in the way of courts' ability to support arbitration—especially international commercial arbitration.

This is the arbitration-litigation paradox in the United States: On one hand, the U.S. Supreme Court's hostility to litigation *seems* to complement its pro-arbitration policy. Rising barriers to U.S. court access in general, and in particular in transnational cases (as I have explored elsewhere), seems consistent with a U.S. Supreme Court that embraces arbitration as an efficient method for enforcing disputes. Often, enforcement of arbitration clauses in these cases leads to closing off access to courts, as Myriam Gilles and others have documented.

But there's a problem. As is perhaps obvious to experts, arbitration relies on courts—for enforcing arbitration agreements and awards, and for helping pending arbitration do what it needs to do. So closing off access to courts can close access to the litigation *that supports* arbitration. And indeed, recent Supreme Court cases narrowing U.S. courts' personal jurisdiction over foreign defendants have been applied to bar arbitral award enforcement actions. Courts have also relied on forum non conveniens to dismiss award-enforcement actions.

That's one way in which trends that limit litigation can have negative effects on the system of arbitration. But there's another way that the Court's hostility to litigation interacts with its pro-arbitration stance, and that's in the arbitration cases themselves.

The Supreme Court has a busy arbitration docket, but rarely hears international commercial arbitration cases. Instead, it hears domestic arbitration cases in which it often states that the "essence" of arbitration is that it is speedy, inexpensive, individualized, and efficient—everything that litigation is not.

(As an aside, this description of the stark distinction between arbitration and

litigation is widely stated, but it's a caricature. The increasingly judicialized example of international commercial arbitration shows this is demonstrably false. As practiced today, international commercial arbitration can be neither fast, nor cheap, nor informal.)

But in the United States, arbitration law is mostly trans-substantive. That means that decisions involving consumer or employment contracts often apply equally to the next case involving insurance contracts or international commercial contracts.

In the paper, I argue that the Court's tendency to focus on arbitration's "essential" characteristics, and to enforce these artificial distinctions between arbitration and litigation, can be harmful for the next case involving international commercial arbitration. It could undermine the likelihood of enforcement of arbitration awards where the arbitral procedure resembled litigation or deviated from the Court's vision of the "essential virtues" of arbitration.

To prevent this result, I argue that any revisions of the U.S. Federal Arbitration Act should pay special attention not only to fixing the rules about consumer and employment arbitration, but also to making sure that international commercial arbitration is properly supported. In the meantime, lower federal courts should pay no heed to the Supreme Court's seeming devotion to enforcing false distinctions between arbitration and litigation, particularly in the international commercial context.

Call for papers: The use of comparative law methodology in international arbitration

The International Academy of Comparative Law is launching a new journal in 2019 to foster scientific discussion about the use of comparative law. The *Ius Comparatum Journal* (ICJ) is dedicated to the methodological aspects of comparative law. It covers all fields of law where the methods and techniques of

comparative law are at stake.

The editorial board of the journal welcomes abstracts from scholars as well as practitioners, including staff of arbitral institutions. Papers will be published in French or English online before the publication in print of the first issue of the Journal at the end of summer 2019.

The deadline for submissions is 6 January 2019.

The full text of the call is available here.

New online service on International Arbitration

The publisher's blurb is as follows:

"The Chinese perspective on The South China Sea Arbitration, is just one of the 40+ texts searchable on the new online service, **International Arbitration**.

The service is made up of content from three respected publishing brands (Hart Publishing, CH Beck-Nomos and Bloomsbury Professional). It provides access to materials by over 60 respected author names with the speed and convenience of online research.

International coverage in depth and breadth

The content covers a broad range of jurisdictions from arbitration centres all over the world including:

- China
- New York
- Switzerland
- Germany
- The Middle East

Expert authors and contributors

Authors and contributors are drawn from leading firms and academic institutions, including:

- Allianz SE
- Gleiss Lutz
- PriceWaterhouseCoopers
- Herbert Smith Freehills LLP
- Freshfields Bruckaus Deringer
- Oxford University
- University College London

Regional experts include Kun Fan on Arbitration in China and Reinmar Wolff on the New York Convention.

You can only fully appreciate the quality of International Arbitration by trying it for yourself. For more information, or to sign up for a free trial please visit http://www.bloomsburylawonline.com/internationalarbitration/ ”

TDM Call for Papers: Special Issue on Cybersecurity in International Arbitration

We are pleased to announce a forthcoming Transnational Dispute Management (TDM, ISSN 1875-4120, www.transnational-dispute-management.com) Special Issue on “**Cybersecurity in International Arbitration.**”

International arbitration has the advantage over litigation of allowing parties to

resolve their disputes privately and confidentially if desired. In our increasingly digitized world, attention to cybersecurity in individual arbitration matters is required in order to maintain that advantage and the confidence of parties in the integrity of the arbitral process.

International arbitration typically involves multiple participants in multiple locations, the storage and transmission of significant amounts of confidential, sensitive and commercially valuable digital data and numerous electronic communications. Even where the proceeding is public or non-confidential in part, certain aspects, such as arbitrator deliberations and party internal communications and work product, almost always must remain confidential to protect the integrity of the process.

In a world where businesses, law firms, government entities, educational institutions and other large data custodians are under threat or already have been breached, international arbitration obviously is not immune. There are already a few documented instances where the process has been compromised and anecdotal evidence of attempted intrusion into proceedings and data held by various participants.

There is a manifest need for the international arbitration community to begin to develop a shared understanding of the scope of the threat and the appropriate response. There is an emerging consensus that cybersecurity is an important consideration that should be addressed early in the international arbitration process and that reasonable cybersecurity measures should be adopted. Nonetheless, questions abound, including, to cite just a few examples, the specific responsibilities of the various participants in the process, the scope of measures that should be adopted, the scope of party autonomy to determine such measures, the availability of resources and concerns that cybersecurity requirements may increase the expense of arbitration and create a resource gap that could disadvantage less-resourced participants.

It is hoped that papers submitted for the Special Issue will advance the conversation by addressing some of the questions described here and potentially identifying issues the international arbitration community will need to consider.

Suggestions for possible paper topics include:

- Commentary on the Draft ICCA-CPR-New York City Bar Association

Protocol for Cybersecurity in Arbitration (available here)

- Cybersecurity best practices for different participants in the arbitral process, including institutions, counsel, arbitrators, parties, and experts, and suggestions as to model language to be used in procedural orders, stipulations, expert engagement letters, etc. For example, what factors should parties considering using a third-party platform to share and store arbitration-related information take into account? An article on the arbitrator's responsibility to protect the integrity of the process is linked here and here.
- What can and should be done on a systemic basis to address cybersecurity in international arbitration? Should cybersecurity be the subject of soft law, for instance? If so, in what form and who should lead?
- How should tribunals resolve party conflicts about reasonable security measures, breach notification obligations, and related costs?
- How should cybersecurity breaches or failures to implement required cybersecurity measures in the arbitral process be addressed? For example, should there be a default presumption regarding the admissibility of evidence attained from a data breach? Should arbitrators entertain applications for damages and/or sanctions?
- Are there limits to party autonomy to determine the cybersecurity measures to be applied in individual matters? Are there institutional or tribunal interests that may in some circumstances override the parties' agreement? If so, how are these interests defined and where does the power derive to apply them?
- What is the correct liability standard for cybersecurity breaches? Should there be a safe harbor?
- What is the correct standard to test the adequacy of cybersecurity measures? Is a reasonableness standard adequate to protect the process?
- Comparative analysis of ethical rules and obligations governing the conduct of lawyers around the globe in relation to cybersecurity and conclusions as to implications for international arbitration proceedings and the existence of either transnational norms or conflicts
- How do considerations of fairness and equality relate to the implementation of cybersecurity measures in international arbitrations? For instance, how should differences in infrastructure and party resources be taken into account in assessing the appropriate level of cybersecurity measures in individual matters? Is there a minimum level of security

required to protect the integrity of arbitration process that should be implemented in all arbitrations?
- How do data privacy regimes relate to cybersecurity and what are the implications for international arbitration proceedings?
- Arbitration of business-to-business data breaches

This special issue will be edited by independent arbitrators **Stephanie Cohen** and **Mark Morril**.

This call for papers can also be found on the TDM website here https://www.transnational-dispute-management.com/news.asp?key=1707

Summer School on Transnational Commercial Agreements, Litigation, and Arbitration in Vicenza, Italy

Pitt Law's CILE will once more be co-sponsoring the Summer School in Transnational Commercial Agreements, Litigation, and Arbitration in Vicenza, Italy, beginning June 4 and ending June 8, 2018.

All classes will be in English, and as in prior years we expect to have the School approved for up to 24 hours of Pennsylvania Continuing Legal Education credit (22 substantive and 2 ethics). The instructors include Isabella Bdoian (Whirpool Corp.- EMEA), Massimo Benedettelli (Univ. of Bari), Ronald A. Brand (Univ. of Pittsburgh), Serena Corongiu (Lawyer, Representative, AIGA and AIJA), Francesco Cortesi (Judge, Italian Supreme Court), Charles De Monaco (Fox Rothschild, Italy-America Chamber of Commerce), Aldo Frignani (Univ. of Turin), Chiara Giovannucci Orlandi (Univ. of Bologna), Paul Herrup (Department of Justice, USA), David Hickton (Univ. of Pittsburgh), Federica Iovene (Public Prosecutor, Court of Bolzano) Luigi Pavanello (PLLC, ABA International Law

Commission), Fausto Pocar (Univ. of Milan, Judge at the International Court of Justice), Francesca Ragno (Univ. of Verona), Dawne Sepanski Hickton (Former CEO, RTI International Metals), Marco Torsello (Univ. of Verona), Matteo Winkler (Univ. HEC Paris).

The program is available here and here: Programma Summer School VI_2018_FINAL

International Conference: the New Hungarian Arbitration Act – Views from Hungary and Abroad

The Department of Legal Studies of the Central European University (CEU) in Budapest and Jeantet & Partners (Paris) are organising a conference on: "*The New Hungarian Arbitration Act – Views from Hungary and Abroad*" on 17 May, 2018, 12:30pm – 6:30pm.

The conference will be followed by a cocktail reception. This event will bring together arbitration experts from ten jurisdictions and seeks to provide a forum for discussion of the recently enacted new Hungarian Arbitration Act. It aims to inform participants of the most significant legislative changes and their practical implications. Particular emphasis will be put on a comparison of the new Hungarian Act with the arbitration laws of other jurisdictions. The organizing committee consists of *Markus Petsche*, Associate Professor, Department of Legal Studies, CEU; *Ioana Knoll-Tudor*, Partner, Jeantet & Partners, Paris; *Davor Babic*, Professor, Faculty of Law, University of Zagreb; and *Csongor István Nagy*, Professor, Faculty of Law, University of Szeged. For more detailed information regarding the conference program and registration, please click here.

Revisiting the ‘Content-of-Laws’ Enquiry in International Arbitration

Soterios Loizou at King’s College London has uploaded an interesting article on ssrn entitled “Revisiting the ‘Content-of-Laws’ Enquiry in International Arbitration”. The abstract is:

Establishing the content of the applicable law is one of the most important, albeit seldom examined, topics in the theory and practice of international arbitration. Setting as point of departure the regulatory vacuum in nearly all national laws on international arbitration, this study examines in depth this “content-of-laws” enquiry in an attempt to foster doctrinal integrity, legal certainty and predictability in arbitral proceedings. Specifically, this study encompasses a three level analysis of the topic. Firstly, it explores the theoretical underpinnings and the various approaches articulated in legal theory to the establishment of the content of the applicable law in international litigation and arbitration. Secondly, on the basis of an elaborate comparative review of the various legal regimes and jurisprudence in the most frequently selected venues of arbitration, namely England & Wales, France, Hong Kong, Singapore, Switzerland, the state of New York (USA), and Sweden, as well as in leading investment arbitration fora, it challenges conventional wisdom by showcasing the emerging trend towards the application of a “facultative” jura novit arbiter principle in international arbitral proceedings. Thirdly, it delineates a clear modus operandi for arbitral tribunals, and national courts reviewing arbitral awards in annulment proceedings, and offers model clauses, arbitration rules, and national law provisions on the content-of-laws enquiry. The study concludes with some final remarks and observations that amplify the importance of continuous governing law related consultations between the parties and the arbitrators throughout the arbitral proceedings, and, certainly, before the tribunal has rendered its final award.

The full article can be accessed here.

CJEU on the compatibility with EU law of an arbitration clause in an Intra-EU BIT – Case C-284/16 (Slovak Republic v Achmea BV)

Written by Stephan Walter, Research Fellow at the Research Center for Transnational Commercial Dispute Resolution (TCDR), EBS Law School, Wiesbaden, Germany

Today, the CJEU has rendered its judgement in Slovak Republic v Achmea BV (Case C-284/16). The case concerned the compatibility with EU law of a dispute clause in an Intra-EU Bilateral Investment Treaty (BIT) between the Netherlands and the Slovak Republic which grants an investor the right to bring proceedings against the host state (in casu: the Slovak Republic) before an arbitration tribunal. In concrete terms, the German Federal Court of Justice referred the following three questions to the CJEU (reported here):

> *Does Article 344 TFEU preclude the application of a provision in a bilateral investment protection agreement between Member States of the European Union (a so-called BIT internal to the European Union) under which an investor of a contracting State, in the event of a dispute concerning investments in the other contracting State, may bring proceedings against the latter State before an arbitration tribunal, where the investment protection agreement was concluded before one of the contracting States acceded to the European Union but the arbitration proceedings are not to be brought until after that date?*
>
> *If Question 1 is to be answered in the negative:*
>
> *Does Article 267 TFEU preclude the application of such a provision?*

> *If Questions 1 and 2 are to be answered in the negative:*
>
> *Does the first paragraph of Article 18 TFEU preclude the application of such a provision under the circumstances described in Question 1?*

In his Opinion, Advocate General Wathelet answered all three questions in the negative and therefore affirmed the EU law compatibility of such a provision. Most notably (and rather surprisingly for many legal commentators), he concluded that the BIT's arbitration system did not fall outside the scope of the preliminary ruling mechanism of Article 267 TFEU. Hence, an arbitral tribunal established under the BIT was in his opinion eligible to refer questions on the interpretation of EU law to the CJEU.

The CJEU did not follow the Opinion of the Advocate General and held:

> *Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept.*

The Court based this finding on a violation of Article 267 TFEU, Article 344 TFEU and Article 19 paragraph 1 subparagraph 2 TEU. An arbitral tribunal established under the BIT is in the Court's opinion an exception to the jurisdiction of the courts of the contracting states of the BIT. Thus, it does not form part of the judicial system of the Netherlands or Slovakia (para. 45) and cannot be classified as a court or tribunal "of a Member State" within the meaning of Article 267 TFEU (para. 46 et seq.). Consequently, it has no power to make a reference to the Court for a preliminary ruling (para. 49). A subsequent review of the award by a court of a Member State (which could refer questions on the interpretation of EU law to the CJEU) is not enough to safeguard the autonomy of EU law since such a review may be limited by the national law of the Member State concerned (para. 53). Unlike in commercial arbitration proceedings such a limited scope of review does not suffice in the case of investment arbitration proceedings because these

arbitration proceedings do not originate in the freely expressed wishes of the parties. They derive from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which Article 19 paragraph 1 subparagraph 2 TEU requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law (para. 55).

As the Court already found a violation of the provision with regard to the questions 1 and 2 it did not have to address the third question.

The judgement can be found here.

10/11 November 2017: Investment Protection, Arbitration and the Rule of Law in the EU

Investment arbitration forms a part of the international litigation arena. And it is a subject which is legally demanding and politically explosive. The 23rd Würzburg Days of European Law ("23. Würzburger Europarechtstage") at the Julius-Maximilians-Universität Würzburg in Germany aim at an academically sound, open and maybe controversial debate of this topical issue. They will take place on **10 and 11 November 2017** and are organized by Prof. Dr. Markus Ludwigs and Prof. Dr. Oliver Remien, both from the University of Würzburg. The organizers are delighted to have found distinguished speakers and chairs initiating the discussions.

The conference language will be German, but here is an English translation of the program. The conference flyer with the program in German is available here.

Friday November 10th, 2017

13.00 Welcome Addresses

- *Prof. Dr. Dr. h.c. Alfred Forchel*, President of the University of Würzburg
- *Prof. Dr. Eckhard Pache*, Dean of the Faculty of Law

13.15 Welcome and Introduction into the Subjects

- *Prof. Dr. Markus Ludwigs*, University of Würzburg
- *Prof. Dr. Oliver Remien*, University of Würzburg

13.30 Sovereignty and Investment Arbitration *Prof. Dr. Axel Flessner*, Humboldt University Berlin

TTIP, CETA & Co. – The Future of Free Trade Agreements in a Changed Political Environment, *MdB Prof. Dr. Heribert Hirte, LL.M.*, Member of the Bundestag, University of Hamburg

14.30 Statement and Discussion of the Papers, *Prof. Dr. Dr. Rainer Hofmann*, University of Frankfurt/Main

15.15 Coffee Break

15.45 A Multilateral Investment Court as a Progress for the Rule of Law?, *Prof. Dr. Isabel Feichtner, LL.M.*, University of Würzburg

16.15 Statement and Discussion of the Paper, *Prof. Dr. Markus Krajewski*, University of Erlangen-Nürnberg

16.45 Coffee Break

17.15 Compensation for Infringements and Takings of Property after the Judgment of the Bundesverfassungsgericht (German Federal Constitutional Court) concerning the Stop to Nuclear Power, Justice Fed. Const. Ct. *Prof. Dr. Andreas L. Paulus*, University of Göttingen

17.45 Investment Protection Arbitration and EU State Aid Law, *Prof. Dr. Marc Bungenberg, LL.M.*, Saarland University

18.15 Statement and Discussion of the Papers, *Prof. Dr. Christian Tietje, LL.M.*, University of Halle-Wittenberg

19.00 Reception in the Entrance Hall in front of the Neubaukirche

Saturday November 11th, 2017

9.00 "EU-only"? – The Division of Competences between the EU and the Member States for the Conclusion of Free Trade Agreements, *Prof. Dr. Michael J. Hahn, LL.M.,* University of Bern

Are Investment Protection Agreements between EU-Member States a Relict Contrary to EU-Law?, *Dr. Thomas Wiedmann,* European Commission, Brussels

10.00 Statement and Discussion of the Papers, *Prof. Dr. Armin Hatje*, University of Hamburg

10.45 Coffee Break

11.15 Enforcement According to ICSID Convention and Setting Aside, Recognition and Enforcement According to the New York Convention, *Prof. Dr. Christian Wolf,* University of Hannover

Transparency and Third Person Involvement by Way of an Amicus Curiae According to UNCITRAL and ICSID Rules and Arbitration Practice, *Dr. Sören Segger*, University of Würzburg

12.15 Statement and Discussion of the Papers, *Dr. Stephan Wilske, LL.M.*, GleissLutz Law Firm

13.00 Concluding Remarks by the Organizers

Everybody is cordially invited to participate. Participation is free of charge. Please register under http://www.europarechtstage.de.

Conflict of Laws in International

Commercial Arbitration – Call for Papers

In 2010, Professors Franco Ferrari and Stefan Kroell organized a seminar on "conflict of laws in international commercial arbitration", conscious of the fact that every arbitration raises a number of 'conflict of laws' problems both at the pre-award and post-award stage. Unlike state court judges, arbitrators have no *lex fori* in the proper sense, providing the relevant conflict rules to determine the applicable law. This raises the question of which conflict of laws rules apply and, consequently, the extent of the freedom arbitrators enjoy in dealing with this and related issues. The papers presented at that conference were later published in a book co-edited by the two organizers of said conference. Professors Ferrari and Kroell are now preparing a new edition of the book, which has attracted a lot of attention over the years. Apart from updated versions of the papers published in the first edition (with the following titles: "Conflicts of law in international arbitration: an overview" by Filip De Ly, "The law applicable to the validity of the arbitration agreement: a practioner's view" by Leonardo Graffi, "Applicable laws under the New York Convention" by Domenico Di Pietro, "Jurisdiction and applicable law in the case of so-called pathological arbitration clauses in view of the proposed reform of the Brussels I-Regulation" by Ruggiero Cafari Panico, "Arbitrability and conflict of jurisdictions: the (diminishing) relevance of lex fori and lex loci arbitri" by Stavros Brekoulakis, "Extension of arbitration agreements to third parties: a never ending legal quest through the spatial-temporal continuum" by Mohamed S. Abdel Wahab, "The effect of overriding manadatory rules on the arbitration agreement" by Karsten Thorn and Walter Grenz, "Arbitration and insolvency: selected conflict of laws problems" by Stefan Kröll, "Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong" by Franco Ferrari and Linda Silberman, "Manadatory rules of law in international arbitration" by George A. Bermann, "Conflict of overriding mandatory rules in arbitration" by Anne-Sophie Papeil, "The law applicable to the assignment of claims subject to an arbitration agreement" by Daniel Girsberger, "The laws governing interim measures in international arbitration" by Christopher Boog), the new edition seeks to include papers on new topics, such as the law governing arbitrators' liability, the law governing issues of characterization in commercial and investment arbitration,

the law governing limitation periods (including their characterization as procedural or substantive), the law governing the taking of evidence (including the characterization of evidence as procedural or substantive, its admissibility and weight), the law governing damages (including whether different laws govern *heads* of damages and *quantification*), the law governing issues fees and costs, the law governing res iudicata, the law governing privilege, the law governing ethical obligations (both of arbitrators and counsel), the role of the Hague Principles on Choice of Law in international arbitration).

The editors welcome the submission of papers on any of the aforementioned topics as well as other topics related to the relationship between conflict of laws and international commercial arbitration. If interested, please submit an abstract (2000 words) and a basic bibliography to Professors Ferrari (franco.ferrari@nyu.edu) and Kroell (stefan.kroell@law-school.de) for acceptance by 1 October 2017. If accepted, the paper will need to be submitted (in blue book format) by 1 February 2018.