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Introduction to the Restatement of the U.S. Law of International Commercial and Investor-State Arbitration at New York Arbitration Week

By Benjamin F. Heidlage | November 25, 2019

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Last Wednesday was the first day of the inaugural New York Arbitration Week. The day's headliner was a half-day program on the new American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration, the final draft of which was approved earlier this year. The program was led by the Restatement Reporter Columbia Law School Prof. George A. Bermann, and featured an introduction by White & Case partner Carolyn B. Lamm, remarks on the importance of the Restatement by Ninth Circuit Judge Margaret McKeown, and two panel discussions on some of the thornier topics addressed in the Restatement. The panelists included the Restatement's Associate Reporters and key Advisers. The program was held at Sidley Austin and was sponsored and organized by the Chartered Institute of Arbitrators (CIArb) NY Branch.

The Restatement, a product of a 12-year effort, is the first-ever ALI Restatement on international commercial arbitration. Its completion marks an important step in the development of U.S. law on the topic. Although international commercial arbitration within the U.S. is a matter of federal law and governed by statute, primarily the Federal Arbitration Act, 9 U.S.C. §§1-16; §§201-208; §§301-307, the law in this field is largely judge-made. Accordingly, the Restatement sets out to present U.S. law on the subject in a systematic and coherent fashion. It covers a comprehensive spectrum of issues that confront U.S. courts in arbitration matters, including the enforcement of the arbitration agreement, the limited role of courts to intervene in arbitral proceedings and the enforcement of arbitration awards. The final chapter, not discussed Wednesday, addresses differences between investor-state arbitration and international commercial arbitration generally, an area of increasing salience. Judge McKeown opined that, given the "many unanswered questions" in the field of international arbitration, the Restatement promises to be a valuable resource for both judges and counsel in the years to come.

The bulk of the program was dedicated to presentations on select important issues that generated "substantial debate" during the drafting process. The topics illustrated the shifting sands in U.S. law governing international arbitration, as well as the value that the Restatement will bring in providing an overview for practitioners not steeped in the sometimes-esoteric questions.

The panel opened with the Restatement's position on whether parties in foreign arbitration can invoke 28 U.S. Code §1782 (assistance to foreign and international tribunals and to litigants before such tribunals) in order to obtain discovery in aid of foreign arbitration. The applicability of §1782 to arbitration, as to which there is a current circuit split, is an important practical consideration for parties who opt for arbitration as a way to avoid full U.S.-style discovery. The Restatement, consistent with the U.S. Supreme Court's 2004 decision in *Intel v. Advanced Micro Devices*, 542 U.S. 241 (2004), takes the position that §1782 discovery is available to parties in international commercial arbitration proceedings. Although Second Circuit prior pronouncements differ from the Restatement, the panel noted that some district courts have questioned whether the Second Circuit's position remains viable post-*Intel*. (For a recent decision discussing the matter, now on appeal, see *In re App. of Hanwei Guo*, 2019 WL 917076 (S.D.N.Y. 2019).)

Perhaps reflecting the concern that §1782 discovery may be used to blow the doors open to full discovery, there were audience questions about the scope of its potential use. Associate Reporter Professor Jack Coe Jr., responded by emphasizing that the availability of §1782 is in the court's discretion and he highlighted that the Restatement offers a special "pride of place" to the consideration of whether the arbitral tribunal will be receptive to discovery, which may lead courts to pay special attention to the particularities of the specific arbitral matter at issue.

Two of the topics considered the question of "who decides" the scope of the arbitration panel's jurisdiction—a court or the arbitral panel itself (a power referred to as "Kompetenz-

Kompetenz"). The Restatement takes the position that an arbitral tribunal has the authority to decide its own jurisdiction, but absent a "clear and unmistakable" agreement by the parties, such authority is not exclusive of a court's authority to consider the question upon a request for enforcement of an agreement to arbitrate. Sidley Austin's Benno Kimmelman, who led the discussion, noted that the Supreme Court has not yet weighed in on what "clear and unmistakable evidence means." On this question, there was considerable discussion regarding whether a reference to an institution's rules provides such "clear and unmistakable" delegation. While some courts have so held (see, e.g., *Petrofac v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012)), the Restatement takes the position that reference to an institution's rules is not an exclusive delegation. Professor Bermann noted that at least one arbitral institution is in the process of drafting a model arbitration clause intended to provide a "clear and unmistakable" delegation for use by contracting parties that prefer to exclude courts from the determination of an arbitral tribunal's jurisdiction.

The panel also highlighted the back and forth that occurred over the somewhat related question of class arbitration. The original drafts of the Restatement left the question of whether class arbitration was permitted by the arbitration agreement to the arbitral tribunal. However, in part in response to the U.S. Supreme Court's treatment of the question in its recent cases including 2019's *Lamps Plus v. Varela*, 139 S. Ct. 1407 (2019). Adviser Prof. Andrea K. Bjorklund explained that the Restatement final draft takes the position that a court decides the question unless authority is "clearly and unmistakably" delegated to the arbitral tribunal in the arbitration agreement.

The panelists also discussed other areas of disagreement between the Restatement and the decisional law of the Second Circuit. The Restatement effectively rejects "manifest disregard of the law" as an independent ground for vacatur of awards, confirming that the only such grounds are those expressly set forth in FAA §10. Adviser Donald Donovan of Debevoise & Plimpton expressed his view that the doctrine has generated a level of debate incommensurate with its importance, frequent frivolous requests for its application, and only the rare actual vacatur by a court. He expressed a preference, echoed by many in the room, that the Restatement bring about a definitive end to the doctrine altogether. The Restatement also rejects the use of the doctrine of forum non conveniens in enforcement proceedings as inconsistent with both the text of the New York Convention and, as Adviser Prof. Linda Silberman noted, the intended summary nature of enforcement proceedings. Whether the Restatement brings national uniformity on these issues remains to be seen.

The panelists also discussed areas where the Restatement differs in degree from the principles applied in most other jurisdictions. The first relates to the Restatement's affirmance of absolute civil immunity for arbitrators acting within the scope of their duties —a doctrine embodying an "American exceptionalism" as compared to the majority of other jurisdictions' qualified civil immunity norms. A second is the Restatement's position that interim measures are to be "presumptively treated" as awards subject to confirmation, vacatur or judicial enforcement, a position described by Adviser Jennifer Kirby as somewhat "avant-garde" and placing the United States in the vanguard of an international trend.

Finally, what Wednesday's discussion made clear is that the substantial value of the Restatement extends beyond statements of the law themselves to the Reporters' comments that follow and further elucidate them. The comments are detailed, express the various positions with neutral clarity, and provide a useful explanation of the current legal landscape and insight into directions the law may take over time—an invaluable complement, given the complexities of evolving law in this area.

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