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Perspective

An International Arbitration Perspective on Judging

BY JUDITH S. KAYE

Call it coincidence, call it destiny, but the first thing I encountered in my office last Friday morning, on returning from weeklong arbitration convenings in São Paulo, was Jeffrey Winn's Law Journal review of the new book by Judge Richard Posner, "Reflections on Judging." Immediately I spent my first "non-raies" (i.e., dollars) on the book, and am happily immersed in it. Good review.

The reviewer snared me in his opening paragraphs discussing Posner's description of today's challenge of "external complexities"—meaning systems external to the legal system that are unfamiliar to our overwhelmingly generalist federal judges, like modern scientific and technological complexities (facing, by the way, both state and federal courts).

While a far cry from the sort of complexities discussed by Posner, I had no better example of new and daunting dilemmas facing today's judiciary than the sessions I had just left in Brazil, which were multi-lingual in more ways than one. Translation devices of various proficiency do little to illuminate the complexity of issues that dominate the world of global dispute resolution, starting with political, legal and cultural differences and moving on to arcane issues such as kompetenz-kompetenz, BITs, anti-suit injunctions, and the enforceability of arbitral awards vacated by courts in faraway seats of arbitration. The political as well as justice implications are plainly huge, necessarily often involving our courts.

The complexity of issues that dominate the world of global dispute resolution are vast—starting with political, legal and cultural differences and moving on to arcane issues such as kompetenz-kompetenz BITs, anti-suit injunctions and enforceability of arbitral awards vacated by courts in faraway seats of arbitration.

Reading on in the book review, I see that Posner offers suggestions for effectively navigating modern-day complexities, internal as well as external. And his praise for my own hero, Benjamin Nathan Cardozo, assures me that I will find solace and pathways, if late for my judicial life, then perhaps useful in my "after-life" in this fascinating new world I have stepped into.

For the moment, however, I'd simply like to share a few of the complexities that were on the calendar at our convenings in Brazil and happen also to be on the calendars of nearby courthouses.

Take, for example, kompetenz-kompetenz, a familiar legal principle (to many) applied generally outside the United States, providing that the arbitral tribunal should have the ability to determine whether it has jurisdiction over a dispute submitted to it by the parties—meaning issues that are not determinative of the merits of the dispute but rather speak to the ability of the tribunal to hear the dispute in the first instance.

Although the application of the principle varies from country to country, the predominant view is that judicial review of jurisdictional judgments by the tribunal should occur only after the tribunal has rendered its judgment or, at the least, should not disturb pending arbitral decisions.

Our default principle is somewhat different, permitting parties to raise objections to arbitral jurisdiction in a court of law at any point in the proceedings subject to certain exceptions. Nearly two decades ago the U.S. Supreme Court pretty well defined the parameters, limiting deference to the arbitral tribunal's judgment on jurisdictional issues to

the existence of clear and unmistakable evidence that the parties had agreed to submit jurisdiction (as well as other) issues to the arbitrators.

Simple enough, but decades later debate still simmers over what is a "jurisdictional issue" subject to court determination, and what is a "procedural or administrative issue" for the tribunal.

Imagine my surprise as I prepared for Brazil to discover that this very question had only weeks before been considered by the Second Circuit in, of all things, a matter brought by a Brazilian company in the Southern District of New York to enforce an arbitration award obtained in Brazil and confirmed by a court there. The Second Circuit reversed the Southern District's refusal to grant enforcement of the award here, and returned the matter to the district court for consideration of whether the parties to the agreement had clearly expressed their intention to settle the dispute by arbitration.

That the respondent itself was not actually a signatory to the contract providing for arbitration, but signed only an "additivo," brought to mind a recent decision of the New York State Court of Appeals regarding potential contractual liability of non-signatories—another example of the far-reaching implications of our decisions, state and federal.

Staying with the theme of external complexities facing courts, the issue of what are jurisdictional versus procedural matters is central to a yet another significant pending matter involving not a commercial arbitration (such as the one just described) but a bi-lateral investment treaty (or BIT) arbitration, where the investor sought enforcement of its arbitral award against the nation of Argentina, conducted by a special tribunal pursuant to the provisions of a treaty between the United Kingdom and Argentina. The district court of the District of Columbia confirmed the arbitral award, concluding that Argentina's objections fell into the category of "procedural" rather than "jurisdictional" but the D.C. Circuit reversed, serving up an important international law issue for resolution by the U.S. Supreme Court. The case will be argued on Dec. 2.

Yet another example of external complexity just now at our courthouse doors concerns the enforcement of an arbitration award rendered in Mexico, but set aside by the courts of Mexico. When the claimant nonetheless sought enforcement of the award here, a Southern District judge only months ago concluded that a "wee small area of discretion" permitted him to allow enforcement of the award, concluding that the Mexican court's set-aside decision included a violation of due process. Surely not the last word there either—whether on the specific matter, or the broader proposition of whether awards that have been set aside by courts at the seat of arbitration may nonetheless be confirmed elsewhere in the world.

During one of the panels I attended in Brazil, a challenge was thrown on the table regarding the subject of "manifest disregard of the law," a doctrine that purportedly allows U.S. courts to vacate international arbitration awards on those very grounds, not spelled out in the relevant statute or treaty but rather simply mentioned by the U.S. Supreme Court many decades ago and otherwise not generally applied. My neighbor at the conference table whispered to me that the spectre of set-aside of an award by an American court on the ground of "manifest disregard" is exploited by those wishing to disparage arbitral proceedings in the United States.

I was heartened to hear the American panelist to whom the question was addressed vigorously deny the existence of such a basis for overturning awards, referring to it as a "boogeyman." I did not catch the Portuguese translation of the word "boogeyman" but I surely did catch the drift of the back and forth: that given the dubious origin of the doctrine in our law, given the fact that it is generally not applied to deny enforcement to foreign awards, and given the baseless fear it provokes in other parts of the world, our courts would do well to put this boogeyman to rest as basis for disparagement of international arbitration in the United States.

Posner not surprisingly offers a plethora of solutions for courts confronting these modern-day internal and external complexities, citing both specialized courts and educational programs. The Federal Judicial Center, thankfully, has issued an extensive compendium on international arbitration (authored by Professor Stacie Strong). For me, these pathways through the dense forest have special resonance, given the recent launch of our New York International Arbitration Center (NYIAC), as well as the appointment of a specialized Commercial Division judge (Justice Charles Ramos) to receive these matters in state court.

Here, among our many hopes for NYIAC, founded by 37 law firms and two state bar sections, is that we will foster opportunity for raising consciousness of the realities and complexities of today's world of global dispute resolution, working alongside and together with our extraordinary judiciary.

Now I return to the book.

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