Arbitration Committee Meeting

Date: December 8, 2022
Time: 12:30 – 1:30 (ET)
Location: Online (Zoom)

Attendees:

Andrew Behrman
ANTON MAURER
Carl Ginsberg
Carlos Concepción
Charles Patrizia
Daniel González
Denton Nichols
Donald Rose
Douglas Harrison
Ellen Parker
Elliot Polebaum
Helena Erickson
Jennifer Glasser
John Buckley
John Pinney
John Townsend
Ken Reisenfeld
Kevin O'Gorman
Kim Landsman
Lio Bocorny
Marisa Marinelli
Michael Lampert
Michael Nolan
Nawi Ukabiala
Olivier André
Orlando Cabrera
Peter Pettibone
Rekha Rangachari
Richard Mattiaccio
Richard Ziegler
Rose Marie Wong
Sashe Dimitroff
Sherman Kahn
Shigeki Obi
Steven Bierman
Surya Gopalan

Minutes

1. Welcome Remarks from Committee Chair

Ms. Glasser opened the meeting with welcoming remarks. She explained that a theme of the meeting would be "the year in review" and set out an agenda for the meeting.

2. Supreme Court Arbitration Case Round Up

Ms. Glasser introduced Paige von Mehren and Christian Vandergeest, both from Freshfields, to provide a round-up of recent arbitration-related decisions from the U.S. Supreme Court.

Ms. von Mehren provided a summary of the facts and decision in *ZF Automative v. Luxshare*. The decision concerned the scope of 28 U.S.C.A. § 1782 ("Section 1782"). The Court considered two underlying arbitrations: one a DIS-administered commercial arbitration, the other an ad hoc arbitration brought under the Russia-Lithuania bilateral investment treaty. The Court focused on the requirement in Section 1782 that the requesting tribunal be "foreign or international" and determined that this applied only to tribunals that were imbued with governmental authority. The Court determined that neither a commercial arbitration tribunal nor a BIT tribunal qualified. With this decision, Ms. von Mehren explained, the Court foreclosed the possibility of using Section 1782 to obtain discovery for use in private commercial arbitrations abroad, resolving a longstanding circuit split. But the Court left open the door for investor-state tribunals that may be cloaked with governmental authority by the sovereigns that constituted them.

Ms. Vandergeest provided a summary of the facts and decision in *Morgan v. Sundance*. The case concerned an employee, of Sundance, Inc., a franchise of Taco Bell, who initiated a class action lawsuit against his employer, despite an arbitration clause in his employment contract. Sundance defended the dispute in court but moved to compel arbitration and stay the court proceedings. The employee claimed that Sundance had waived its right to compel arbitration. The case took place in the 8th Circuit, which provided that in order to prove waiver, the employee had to demonstrate prejudice. The Supreme Court rejected that requirement. It reasoned that, although the Federal Arbitration Act may favor arbitration as a policy matter, it provides no license for federal courts to invent procedural rules that favor arbitration over litigation.

Ms. von Mehren provided a summary of the facts and decision in *Badegrow v. Walters*. This case concerned the jurisdiction of federal courts in confirmation and vacatur actions. The underlying case concerned allegations of unlawful termination. The award debtor challenged an arbitral award in state court; the award creditor removed the case to federal court and succeeded in a cross-motion for confirmation. The federal court determined that it had jurisdiction on the basis of so-called "look through" jurisdiction, whereby it considered that the underlying controversy itself enlivened the court's subject matter jurisdiction. The Supreme Court disagreed and remanded the case for further proceedings. The Supreme Court held by majority that Sections 9 and 10 of the Federal Arbitration Act, which govern confirmation and vacatur proceedings, did not authorize jurisdiction on a look-through basis, and that federal courts must use usual jurisdictional rules to determine whether they have jurisdiction over applications to confirm or vacate arbitral awards.

Mr. Vandergeest discussed the case of *Southwest Airlines Co. v. Saxon*. The case concerned an employment claim by a Ramp Supervisor against Southwest Airlines

for alleged violations of the Fair Labor Standards Act. The employee initiated the claim in court. Southwest moved to stay the case in light of an arbitration agreement in the employment contract. The employee argued that he fell into an exception in 9 U.S.C. § 1 such that he did not have to arbitrate the dispute, namely that as a Ramp Supervisor, he was engaged in interstate commerce. The Supreme Court agreed that the role and duties of a Ramp Supervisor, involving loading and unloading planes, facilitates interstate commerce and therefore falls within a statutory exception to arbitration.

Mr. Vandergeest also discussed the case of *Viking River Cruises, Inc. v. Moriana*. In that case, the Supreme Court, by majority, invalidated a restriction established by the California Supreme Court (the Private Attorneys General Act) precluding the arbitration of employment disputes, on the basis that such a restriction was incompatible with the Federal Arbitration Act.

3. Discussion on Diversity in International Arbitration

Ms. Glasser introduced Ms. Rangachari, Executive Director of the New York International Arbitration Center. Ms. Rangachari explained that there has been an uptick in consideration of race in discussion of diversity, using a poll of attendees to illustrate her point. She discussed REAL – Racial Equality for Arbitration Lawyers – and its objectives. She explained that the group started in 2020 and is comprised of several committees working towards the goal of 30% diversity in arbitrator lists and appointments. Ms. Rangachari also discussed headway made at the arbitration bar to increase gender diversity. She discussed the Equal Representation Pledge from 2015, and ICCA Report No. 8 on gender in arbitral appointments and proceedings. She explained that there has been progress in advancing gender diversity but noted that there was still much work to be done.

4. Committee Business and Task Forces

Ms. Erickson introduced Mr. Behrman, to provide an update on CPR's Procedures and Challenges Task Force. Mr. Behrman explained that the Task Force had been running for 2-3 months and that its purpose is not to look to revise CPR's rules, but consider instances where CPR has discretion under the rules, and whether any protocols should be revised or introduced to increase transparency for end users. He explained that the focus of the Task Force has been on CPR's discretion relating to issues of consolidation, joinder, and challenges to arbitrators. He explained that the Task Force's Co-chairs are drafting proposals for consideration by other Task Force members.

5. CPR Announcements

Ms. Fucci explained that CPR will be launching a new website in early January, which will make it easier to access member benefits.

Ms. Parker discussed upcoming CPR events. She noted a regional meeting (in person) would take place on 18 January 2023 on the topic of how to structure an optimal arbitration. She also noted that CPR's annual meeting would take place in New Orleans in March. The annual meeting would focus on practical and innovative dispute management solutions. Ms. Parker explained that CPR was in the process of finalizing topics and that all programming would be taped and available for replay. Ms. Parker noted that further information could be found at CPRmeeting.org and asked those who are interested in speaking roles to reach out to her.

* * *