



Fordham International Arbitration and Mediation Conference

Key Issues in International Dispute
Resolution: 2020

November 20, 2020

Conference Co-Chairs

Louis B. Kimmelman
Partner
Sidley Austin LLP

Edna Sussman
Independent Arbitrator and Mediator
Distinguished Practitioner in Residence,
Fordham Law School



FORDHAM UNIVERSITY
THE SCHOOL OF LAW

Fordham International Arbitration and Mediation Conference

November 20, 2020

9:45 – 10:00 a.m.

Welcome

10:00 – 11:30 a.m.

Combinations and Permutations: Creating a Solution-driven Dispute Resolution Process (1.5 Professional Practice CLE)

Moderator – Kathleen Paisley, Arbitrator, Ambos Lawyers, Brussels/New York and

Edna Sussman, Independent arbitrator, Fordham Law School ADR Practitioner in Residence

Kun Fan, Associate Professor of University of New South Wales Law, School, mediator, arbitrator

Jeremy Lack, Attorney-at-Law & ADR Neutral, Geneva, LAWTECH.CH,

Moti Mironi, Professor of Law at Haifa University, mediator and arbitrator

Prof. Thomas Stipanowich, William H. Webster Chair in Dispute Resolution, Pepperdine; JAMS neutral

This panel is made up of members of the Steering Committee of the CCA/IMI/Pepperdine International Task Force on Mixed Mode Dispute Resolution. The panel will use a discussion format to review the Task Force’s work through the use of practical scenarios.

The Task Force has worked on ways of combining different dispute resolution processes including litigation, arbitration, conciliation or mediation, whether in parallel, sequentially or as integrated processes and on the opportunities for incorporating tools that are effective in one process into another. The panelists will consider such questions as:

- What systems can parties put in place in advance to avoid disputes and to resolve them quickly if they do arise?
- In what ways may neutrals help parties tailor better dispute resolution processes, such as mediation “setting the stage” for arbitration and vice versa?
- Is it helpful for a mediator to stay in place during an arbitration so that s/he is available for further discussions? How can mediation windows be used effectively during an arbitration?
- Should arbitrators be more deliberate about the potential impact of their procedural decisions on potential settlement and if so how should they manage the process?
- In what ways, if any, might arbitrators and mediators appropriately communicate with each other on resolving a particular dispute?
- Under what circumstances, if any, might it be appropriate for a mediator to become an arbitrator or an arbitrator to become a mediator, during the course of resolving a dispute?
- What is the proper protocol for arbitrators or institutions to follow when parties ask them to convert a settlement agreement into an arbitration award?

11:30 a.m. – 11:45 p.m.

Break

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11:45 a.m. – 12:30 p.m.

Keynote

Professor George A. Bermann, Gelhorn Professor of Law and Monnet Professor in European Union Law, Columbia Law School

“International Arbitration and EU Law: What Next?”

12:30 – 1:00 p.m.

Break

1:00 – 2:30 p.m.

Does 28 U.S.C. § 1782 Apply to Private International Commercial Arbitrations? A Mock U.S. Supreme Court Argument (1.5 Professional Practice CLE)

Introduction:

Louis B. Kimmelman, Partner, Sidley Austin LLP

The Court:

Paul D. Clement, Partner, Kirkland & Ellis LLP, Former Solicitor General of the United States

Nicole A. Saharsky, Partner, Mayer Brown LLP, Former Assistant to the Solicitor General of the United States

Pamela Bookman, Associate Professor of Law, Fordham University Law School

Counsel:

Kwaku A. Akowuah, Partner, Sidley Austin LLP

Caline Mouawad, Partner, Chaffetz Lindsey LLP

Martine Cicconi, Deputy Solicitor General, Commonwealth of Virginia

Ari D. MacKinnon, Partner, Cleary, Gottlieb, Steen & Hamilton LLP

28 U.S.C. § 1782 permits federal courts to order discovery “for use in a proceeding in a foreign or international tribunal.” The question for international arbitration practitioners is whether discovery under this statute applies to private international commercial arbitrations. Three federal circuits – the Second, Fifth and Seventh Circuits – have held that the phrase “foreign or international tribunal” in section 1782 does not include arbitral bodies established by private parties. Two federal circuits -- the Fourth and Sixth Circuits – have interpreted section 1782 to apply to private commercial international arbitrations. This circuit split makes the issue ripe for U.S. Supreme Court consideration.

The Fordham International Arbitration and Mediation Conference will present a mock U.S. Supreme Court argument in which counsel and a panel of judges will consider the legal question of whether a private international commercial arbitration is “a foreign or international tribunal” within the meaning of section 1782. After the oral argument, we will invite the participants in the mock argument to comment of what arguments may be most persuasive before the U.S. Supreme Court as well as respond to audience questions.

2:30 – 3:00 p.m.

Reception