

TWILIGHT ISSUES IN INTERNATIONAL ARBITRATION

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This Project has as its aim to explore the question of the law applicable to procedural issues in international arbitration on which the arbitration agreement, the *lex arbitri* and the law out of which the cause of action arises are silent, but which arise regularly in international arbitration can be consequential. These include such issues as the arbitrability of a dispute, the applicability of an arbitration agreement to non-signatories, *res judicata*, arbitrator authority to sanction counsel, rules of evidence, issuance of anti-suit injunctions, use of tribunal secretaries and so many more.

The alternatives available to tribunals in identifying the applicable norm consist largely of the following: application of a national law, application of no norm but simply arbitrator good judgment, and application of an international standard. Among national laws, a tribunal may consider the law out of which the claim arises, the law of the seat, the law of the place of probable enforcement of an award (if known) and the law of the jurisdiction whose law the tribunal believes it most appropriate to apply.

Although the Project is not an empirical inquiry, it does have interest in knowing how tribunals, to the extent we can tell, approach these problems in terms of applicable norm. To that end, an extremely large number of awards addressing the “twilight issues” have been studied. And the Project gives some indication of where tribunals are in practice looking for these purposes. But while existing arbitral practice, as far as it can be ascertained from arbitral awards, is enlightening, the central purpose of the Project is a prescriptive one, seeking to provide tribunals and counsel with a means of identifying the normative source that has the best “fit” with any given twilight issue and is presumably then one that provides the most apt norm for deciding that issue.

The Project consist of three chapters, plus an Introduction and Conclusion. Chapter Two examines in succession each of the available normative sources, identifying their strengths and weaknesses for the stated purpose. So far as national law is concerned, the chapter surveys each of the candidate national laws: the law out of which the claim arises, the law of the seat, the law of the place of probable enforcement of an award (if known) and the law of the jurisdiction whose law the tribunal believes it most appropriate to apply. The aim is to acquaint tribunals and counsel as best we can with the features of each national law that commends it as a normative source.

In Chapter Two we do much the same for international standards as a normative source. Although arbitrator good judgment is not, strictly speaking, much of a normative source, it in fact what tribunals and counsel actually consult on a regular basis. Therefore it too calls for critical assessment

In Chapter Three we get highly specific about what we call, for want of a better term, the actual “matching” of twilight issues with the normative sources just examined. For some twilight issues, more than one normative source seems appropriate, and we indicate that, suggesting the factors that tribunals and counsel do well to take into account in prioritizing among them. Some twilight issues lend themselves to treatment under national law, and under a particular national law. Others seem ripe for an international standard. For still others, no actual normative source matches in a very convincing way, as a result of which continuing to deploy arbitrator good judgment seems the best course.

In principle, the national law that comes to the fore in connection with any given twilight issue can be ascertained through whatever means we customarily ascertain national law. It is no easier or harder than in any other context. AS for good judgment, there is not much more to say, especially as it is deployed by definition on a purely *ad hoc* basis, in light of the facts and circumstances of the case.

The same cannot be said of international standards. They are a wholly understudied phenomenon, at least in this context. Virtually no literature exists on international standards as a normative source, much less as a normative source for twilight issues in particular. International standards in law cannot be resorted to in the same fashion as the countless international standards that exist on manufacturing, engineering, or accounting, and other matters that lend themselves to standards that are highly specific and discrete, often even mathematical in character. The reality must be faced that international standards are simply not “self-executing.”

Chapter Four takes up the challenge of making sense of international; standards. What does an international standard actually mean? Where do they come from? In other words where does a normative source such as international standards find its own normative source? Where are they to be found? Among the multiple normative sources of international standards, how do they operate and what are their strengths and weaknesses. The aptness of an international standard as a normative source will vary from twilight issue to twilight issues.

Chapter Four begins with the most salient of sources of national standards for use by tribunals and counsel. It identifies “consensus” as a defining feature of an international standard, acknowledging the difficulty of gauging it. These are “soft law” instruments and arbitral jurisprudence. Chapter Four delves into both from all pertinent perspectives. Among the biggest challenges is to determine the moment at which a soft law instrument has gained sufficient resonance or arbitral case law has become sufficiently firm and solid as to be deemed an international standard. The even tougher question is the question of the readiness of a tribunal or counsel to cite and rely on a soft law instrument or arbitral case law before it has international standard status. Among other questions is whether a tribunal can completely innovate in the interest of building what may eventually become an international standard.

It remains to identify additional normative sources of international standards beyond soft law and arbitral jurisprudence. Chapter Four goes on to examine the utility of international law,

as such, for twilight issue purposes. Attention is given to the principal sources of international law identified in Article 38 of the Statute of the International Court of Justice: treaties and other international agreement, customary international law, and general principles law (coupled with the *lex mercatoria*). A source described by Article 38 as subsidiary – scholarly writings – is also considered as a normative source of international standards.

It must be borne in mind throughout that the object is not to identify or report the content of the prevailing international standard on any given twilight issue. That information can readily be found in any book or article on a specific twilight issue. Rather, the object is to come to some understanding of where tribunals and counsel best look for an international standard, assuming of course that an international standard, if one actually or potentially exists, is the best option.

There exist many more twilight issues than we examine. That there are so many is easy to understand. A twilight issue is, by definition, one that neither the parties' arbitration agreement, nor the *lex arbitri*, nor the institutional rules that the parties may have adopted actually addresses. A moment's reflection and any amount of experience will demonstrate that there are vastly more twilight issues than there are procedural issues addressed by any of these three sources. They truly abound. Moreover, twilight issues is an "open" category. AS international arbitration evolves, more and more will emerge. The hope that this Project, going forward, will be a continuing source of guidance to tribunals and counsel alike.

By way of tentative conclusion on normative sources as such, we maintain the view that (a) different twilight issues call for different normative sources, (b) there exist criteria by which the aptness of a particular normative source for a particular twilight issue may be determined, (c) depending on the twilight issue, a different national law is indicated, and (d) for certain twilight issues, no particular normative source is compelling and resort to arbitrator good judgment is the only option. So far as international standards as a normative source is concerned, we conclude that (a) they present very considerable advantages over other sources, (b) the most influential normative sources for international standards are soft law and arbitral jurisprudence, (c) the contribution of treaties, customary international law and general principles of law to the development of international standards addressing twilight issues is modest, and (d) scholarly writing carry a good deal of influence, but most often in support of norms that already have a basis in soft law or arbitral jurisprudence.

It remains to mention that the resulting book will contain two annexes: one providing a selective bibliography on each twilight issue and the other presenting something along the lines of a catalogue of soft law instruments.

The Project is now at the writing stage. In tandem with that selected literature on twilight issues is being consulted.