Wednesday, 30 September 2015 – Luncheon 12:00-1:30

**Keynote Address**

**William W. Park, Professor of Law, Boston University and President, London Court of International Arbitration**

Rapporteur: Stefania Alessi, Emory University School of Law, Atlanta, Georgia

Professor Park discussed whether arbitrators and judges apply law differently, and if so, whether courts should consider the differences when reviewing arbitration awards. He further investigated how courts distinguish between an arbitrator’s mistakes of law and an arbitrator’s excess of authority, questions that remain significant for international trade and investment.

**Question 1: Do arbitrators decide cases differently from judges?**

Good arbitrators will likely decide similarly to judges when applying law as an interpretive tool, for example, to determine whether the parties’ post-dispute contract can be considered to construe a contested contract term such as “prompt delivery”—a matter on which English law diverges from the position in UCC Article 2 as applicable in many American jurisdictions. However, decision-making may differ with respect to contract provisions that contradict the applicable law governing the transaction, as when a ban on liability for negligence conflicts with an exculpatory clause invalid pursuant to applicable law.

Park provided a helpful scenario. Imagine Finnish and Turkish companies form a joint-venture, agreeing to arbitrate any disputes in London. They subject their contract to Swiss law. They also include two provisions on damages: (1) neither side will be liable for gross negligence; and (2) neither side will be liable for lost profits.

Later, the parties learn that the applicable law will not give effect to a provision excluding liability for gross negligence. Thus, claims for gross negligence may well give rise to
damages notwithstanding the exculpatory clause. This conflict should not be surprising, since the applicable law clause often gets drafted at the end of the negotiation, after key commercial terms have been agreed. When drafting an applicable law clause at 2:18 AM, parties might choose what they perceive as a “neutral” jurisdiction, and understandably so, but without much research into how its provisions might or might not affect contract terms.

What should an arbitrator do if asked to apply an exculpatory clause which conflicts with applicable law? Unlike a judge, whose authority derives from the forum which pays his or her salary, the starting point for an arbitrator’s authority lies in the parties’ agreement. These different underpinnings of adjudicatory authority helps explain some differences between the decision-making of judges and arbitrators.

**Question 2: Should the different approach matter on judicial review?**

Let us now imagine that in the Finnish-Turkish joint venture the arbitrator gives effect to the exclusion of liability for gross negligence, even though the provision runs counter to the chosen law. The dissatisfied party then goes to court to challenge the award, seeking *vacatur*.

In most legal systems, arbitral awards bind the parties with respect to the merits of the dispute. A judge would not normally second-guess the arbitrators’ substantive contract interpretation, although the court could well monitor the arbitrators’ respect for the limits imposed on their authority. Conceivably, a court may conclude that arbitrators exceed their authority by disregarding the applicable law chosen by the parties. This raises the much-vexed question of how courts distinguish between mistake of law and excess of authority.

Answers to that question often take the form of extremes. The late Lord Denning, a well-known English judge in his time, said that going wrong in the law implicates an excess of authority because no one authorized the arbitrator to make decisions contrary to law. The parties
gave the arbitrator a mission to decide correctly, making decisions contrary to law an excess of authority. Today, most thoughtful observers reject such a perspective.

Another extreme derives from misapplication of the chameleon-like principle called “competence-competence” which presumes the arbitrator competent to determine his or her competence. In its basic form, competence-competence means no more than that the arbitration need not necessarily stop just because one side has challenged the arbitrator’s jurisdiction. Proceedings can continue absent an order from an otherwise competent court. And, of course, a judge may later decide to vacate the award or refuse it recognition. For better or for worse, some scholars and commentators (particularly in Continental Europe) go further, urging that an arbitrator can decide anything in a binding way, including questions of jurisdiction. This idea has been generally rejected in the United States, absent some contract provisions that allocate to the arbitrator the decision on what has come to be called an “arbitrability question”—usually related to scope of agreement to arbitrate, although not with respect to the very existence of the arbitration clause.

With respect to limitations on remedies (such as the “no lost profits” clause), the American Law Institute (ALI) provides some assistance in its draft of the Restatement on International Arbitration. As a default rule, an arbitrator’s award of lost profit, notwithstanding limitation in the contract, should be considered a simple mistake, not an excess of jurisdiction. Thus, the court would not normally deem the arbitrator to have committed an excess of authority. However, the Restatement also says that particular facts and circumstances might well alter that result; for example, if the arbitration clause itself explicitly states that the arbitrator has no authority to award a particular remedy. Thus, a contract drafter who wants to ensure respect for the limitation of damages would do well to include such a provision in the arbitration clause.
This does not mean, of course, that an arbitrator would not respect a remedies clause which fell outside the arbitration provision.

**Question 3: How should courts handle mistakes?**

Park noted that, when evaluating an arbitrator’s application of law, two different perspectives come into play: (1) contract law applicable to the parties’ agreement and/or transaction, and (2) arbitration’s legal framework. The latter framework includes the ensemble of legislation, treaties, and jurisprudence that instructs judges on how to review arbitration awards. In most modern arbitration law, this framework has two limbs. The first instructs judges to enforce arbitration agreements and awards, thus giving effect to the parties’ bargain. The second entrusts to judges the role of monitoring the basic integrity of the arbitral process, often called “due process” in the United States, “natural justice” in Britain or “principe du contradictoire” in France. Questions about exclusion of liability and limitation of damages implicate principally the second limb, judicial monitoring arbitrators’ respect for their authority.

We must remember that arbitration law differs from other fields of law in a very significant aspect. Most areas of law tell judges how to decide. Arbitration law, by contrast, tells the judge when *not* to decide a case. The heart of arbitration law is an instruction on when judges defer to an arbitrator by reason of the parties’ agreement to arbitrate some particular dispute.

Having shed some light on these issues, Park highlighted two examples of how they may play out. First, he discussed the regulation of legal fees in the United Kingdom. Unlike in the United States, in Britain the losing party normally pays the other side’s legal fees. English arbitration law invalidates pre-dispute agreements to allocate costs in any event, which would include a provision deviating from the “loser pays” rule.
Parties may choose London as the arbitration venue but overlook this provision of the English Arbitration Act. What should the arbitrator do if the contract says that each party bears his legal expenses (even if one party is completely at fault), but also fixes London as the seat of the arbitral proceedings?

Second, Park discussed American class action arbitration. The Supreme Court appears divided along political lines. In the 2010 decision in *Stolt-Nielsen*, the arbitrators interpreted the parties’ contract as permitting class action arbitration. The arbitration agreement was silent on the matter. Moreover, counsel had stipulated that the parties had concluded “no agreement” on allowing class action arbitration. The majority of the Supreme Court found that the arbitrators’ partial award constituted an excess of authority.

According to Park, this may have been the right answer to the wrong question. The Supreme Court was not asked to interpret the contract, but simply to decide whether arbitrators had exceeded their authority. The arbitration clause provided for the American Arbitration Association supplementary rules on class arbitration, which clearly provide arbitrators with the authority to decide what the parties agreed on the matter of class arbitration.

In conclusion, Park stressed that the health of dispute resolution depends on a robust discussion of these matters among judges, arbitrators, counsel, parties, scholars and other stakeholders in the arbitration process.