

# Q&A with Daniel Schimmel, Arbitrator and Chair

**DANIEL SCHIMMEL** has served as chair, sole arbitrator, co-arbitrator, emergency arbitrator, and counsel in international arbitrations arising from a broad range of contracts and transactions. He is a board member of the New York International Arbitration Center, and a member of the CPR Panels of Distinguished Neutrals, ICDR Panel of Arbitrators and Mediators, ICC Commission on Arbitration, and International Arbitration Club of New York.

**Education:** 1997: J.D., Columbia Law School; 1994: LL.M., Columbia Law School; 1993: Maîtrise in Law, Université Panthéon-Assas (Paris II); 1991: B.A. (Business Administration), École Supérieure des Sciences Économiques et Commerciales.

**Career in Brief:** 2015–present: Foley Hoag LLP, Partner leading the International Litigation & Arbitration Practice of the New York office; 2008–2015: Kelley Drye & Warren LLP, Partner and Co-Head of the International Arbitration Practice; 1997–2007: Shearman & Sterling LLP (2005–2007: Counsel, 1997–2004: Associate); 1996: US District Court for the Southern District of New York, first Law Clerk to the Hon. Jed S. Rakoff; 1992–1993: Tribunal de Grande Instance de Bobigny, worked with the Chief Judge.

**What do you enjoy most about serving as an arbitrator?** One of the most satisfying aspects of an arbitration occurs when the tribunal and the parties can agree on a process that not only is fair, but also takes advantage of the flexibility that arbitration offers. Not every arbitration requires a vast amount of document production, multiple witness statements, or a hearing with live witnesses.

I also greatly enjoy deliberating with fellow arbitrators. In a large arbitration I recently chaired, we carefully reviewed the issues after each day of the hearing. We worked together to reach a just result based on the applicable law.

I have also served as a sole arbitrator and an emergency arbitrator. Although the work is more solitary, the intensity and intellectual challenge are stimulating.

**What are the greatest challenges of chairing an arbitration tribunal?** One of the greatest challenges is encouraging a dialogue with the parties to agree on an efficient, flexible process. I have had extremely different experiences in arbitrations where the parties look to replicate litigation versus where they focus on taking an expeditious, cost-effective approach.

For example, I recently chaired an arbitration in New York in which the parties sought to essentially mirror the US litigation process. Both sides wanted to engage in broad electronic discovery and conduct depositions of witnesses, some of whom were located abroad. The tribunal respected the parties' wishes, but also imposed strict time limits to achieve efficiency. The hearing on the merits took place within six months of the preliminary conference. While the parties spent millions of dollars in preparing and presenting their cases, they would likely have spent much more without these time limits.

By contrast, I recently served as an arbitrator in an equally complex matter in which the parties designated Geneva as the seat of the arbitration. The tribunal and the parties limited the scope of document production, and each side spent less than 300,000 euros in preparing and presenting its case. These two vastly different experiences illustrate the cost implications of replicating a domestic litigation system.

**What have been the most significant developments in commercial arbitration during your time as an arbitrator?** I have seen several significant developments in the last few years. One of the most important is that, because of the high costs of arbitration, an increasing number of companies have turned to other dispute resolution mechanisms. Parties are increasingly pursuing mediation as a more flexible alternative. Few business people have the patience to relive the facts of a matter two or three years down the line. Their priority is to resolve disputes early and efficiently. While mediation does not always succeed at the beginning of a case, the growing trend is to try to mediate as early as possible.

In addition, the global enforcement of anti-corruption laws has given rise to more international commercial arbitrations in recent years. Regulators around the world have sharpened their focus on investigating and prosecuting corporate corruption, and many nations have recently adopted or enhanced their domestic anti-corruption laws, including the United Kingdom, Germany, Spain, Brazil, Canada, China, and Mexico.

As a result, many international commercial arbitrations have arisen, for example, from a moratorium on payments to agents or consultants. Companies have imposed these moratoriums as part of their efforts to cooperate with regulators. A company under investigation then faces a difficult situation. If it meets the expectations of regulators (especially US regulators) and halts all payments to possibly corrupt consultants, it exposes itself to arbitrations brought by those consultants. If the company continues paying its consultants, it exposes itself to further criminal liability, especially in the US. The interplay between regulatory investigations and international commercial arbitration has raised many complex issues, and highlights the cultural differences in the perspectives of arbitrators. Depending on their legal culture and background, arbitrators might have very different perspectives on the company's and the consultant's duty to cooperate with law enforcement.

Further, an increasing number of international commercial arbitrations involve States and State-owned enterprises, which raises specific issues. For instance, in a recent Second Circuit decision, *Corporación Mexicana de Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, the Court of Appeals affirmed the enforcement of an award in the US even though it had been vacated in Mexico, the place of arbitration (832 F.3d 92 (2d Cir. 2016)). The Second Circuit concluded that the enforcement of Mexican law in favor of a State-owned enterprise was akin to an unconstitutional taking of private property. These are fascinating developments, and the legal framework is different in the US and certain other countries.

**What do you wish attorneys explained to their clients about arbitration?** Attorneys should have a conversation with their clients about the critical differences between arbitration and other forms of dispute resolution, such as litigation and mediation.

**What advice would you give to counsel appearing before you?** Focus on the key dispositive issues in the case. Many parties submit lengthy memorials and hundreds of exhibits, but a targeted approach is often a better investment. I also recommend building a relationship of trust with the tribunal from day one.

**Do you require preliminary conferences and, if so, do you hold them in person or by telephone?** My experience is that a preliminary conference is useful for two main reasons. First, it presents an initial opportunity for the parties to meet the arbitrators and establish a reciprocal relationship of trust. The parties must be confident and satisfied with the arbitration process. They will likely ask themselves whether the arbitrators listened to their concerns, understood the issues, and appeared fair and engaged rather than isolated. Second, a number of topics are addressed at the preliminary conference that will help frame the arbitration.

Whether the preliminary conference is held in person or telephonically primarily depends on the parties' convenience. A telephone conference often works well and is efficient.

**How can counsel best prepare for a preliminary conference?** The parties have the opportunity to agree on a framework and schedule for the arbitration at the preliminary conference. Counsel should be ready to discuss 15 to 20 topics ranging from jurisdictional issues to the form of the award. The key is to be prepared for a constructive discussion with the tribunal.

**How does the use of expert witnesses in arbitration differ from litigation?** The parties should expect the arbitrators to scrutinize expert reports, including all exhibits. I recently chaired an arbitration in which damages were a critical issue, and the arbitrators were prepared to ask the experts pointed questions.

I also have been involved in arbitrations involving expert witness conferencing, or "hot tubbing," where opposing experts appear together to provide testimony and are questioned concurrently by the arbitrators. This method can be especially useful in cases where certain issues are not clear. Arbitration makes this flexibility possible.