
Kluwer Arbitration Blog

Gary Born on the Role of Arbitrators

Bernardo M. Cremades Sanz-Pastor (B. Cremades y Asociados) · Tuesday, February 17th, 2009

This excellent treatise provides an in-depth analysis of virtually every aspect of international commercial arbitration. The book offers a comparative approach to arbitration examining the provisions of different nationals, arbitration rules and international conventions.

The present review is focused on chapters 11 and 12, which explore and explain respectively: (i) the selection, challenge and replacement of arbitrators; and (ii) the rights and duties of arbitrators. Generally, these chapters provide a thorough understanding of the diverse legal traditions that underlie these issues.

Chapter 11 comprehensively covers all issues which should be considered regarding the means of selecting the tribunal that will decide the parties' dispute, with a comparative approach. It explains all aspects which should be taken into account before and during the proceedings. While the author indicates that there is no "optimum number of arbitrators in an international arbitration" parties should always consider "cost, diversity, speed, expertise, consistency and decisiveness". The author explains the importance of the principle of party autonomy, as a basic pillar of arbitration, nevertheless limited by the applicable laws to safeguard the independence and impartiality of arbitrators. These limits are thoroughly described in Chapter 11, including restriction concerning nationality, qualifications, experience and independence or impartiality, while examining the different choice of law questions that may arise.

The next section moves on to describe the process of selecting an arbitral tribunal, a very important task of the parties and "among the most important decisions that a party will take". The author recalls and clearly explains how the process is sometimes delayed or frustrated, providing a clear and thorough description of the available mechanisms when a party fails to make the arbitrator's nomination.

In a like manner, the selection of a sole or presiding arbitrator is also dealt with. The duties of the presiding or sole arbitrator are substantial and the requirements of independence and impartiality are even more salient in these cases. Chapter 11 provides a comprehensive and practical analysis of how the presiding arbitrator may be selected in the arbitration agreement or after the dispute has arisen. Treaties,

national laws and arbitration rules deal with this question differently and the author provides a clear and well-structured overview.

The author also covers under Chapter 11 the question of judicial appointment of arbitrators by national courts, explaining the advantages and disadvantages of this method of appointment, including the risks of disregarding the parties' procedural agreement and of premature and/or conflicting actions by one or more national courts. This is a crucial question faced sometimes by many practitioners, and which is carefully considered by the author. Other forum selection and jurisdictional issues affecting the appointment of arbitrators are masterfully reviewed.

Chapter 11 is partly devoted to the procedures of challenging arbitrators in situations where a party becomes dissatisfied with the choice of an arbitrator, typically because of doubts as to the arbitrator's impartiality or independence. The author examines the different scenarios and available procedures under the most important institution rules and national laws. The next sections move on to discuss the most relevant issues in relation to the replacement of arbitrators. The last section of chapter 11 is devoted to the question of "truncated tribunals" - i.e., where the tribunal continues the arbitration with either only two members or with three members, one of whom does not participate in the tribunal's actions.

An essential aspect of the arbitration process concerns the status, rights and obligations of the arbitrators. Chapter 12 of the book covers the source and content of the individual arbitrator's obligations to the parties, and his or her rights and protections, in relation to the arbitral proceedings. This chapter clearly explains different approaches that national legislations have adopted in defining the status of arbitrators. Some legislations reveal remarkably little attention to the subject, while the most developed legal systems impose various legal obligations on arbitrators. These include the duty to resolve the parties' dispute in an adjudicatory manner, to conduct the arbitration in accordance with the parties' agreement, to maintain the confidentiality and to fulfill their mandate. These obligations are clearly set out and explained in Chapter 12, providing an excellent guidance for students, advocates and arbitrators.

The author moves on to explain the enforcement mechanisms of the arbitrators' obligations, including civil liability, loss of entitlement to remuneration, termination of the arbitrator's mandate, removal or prohibition against further appointments. The arbitrator's relationship with the parties amounts to a reciprocal contractual agreement, where both parties have certain rights and obligations. As to the arbitrator is concerned, he or she has among others, the right to remuneration and a right of cooperation from the parties in the proceedings. Furthermore, in order to carry out his task, arbitrators shall have certain immunities from civil liability, as clearly addressed in Chapter 12.

Generally, Chapter 12 provides a significant contribution in a field which gives cause for concern of every arbitration practitioner, as every issue in relation to the status of arbitrators and their liabilities continues to be controversial with little harmonization in different legal systems. The important merit of Gary Born's work on these questions is the extensive research and analysis of virtually all important domestic and

international sources.

This treatise - including the commented chapters - is in the first place an illustration of the remarkable intellectual vigor of the author. As expected from a treatise, the readers will find in chapters 11 and 12 a systematic statement and discussion of the entire subject: selection, challenge, replacement of arbitrators and their status, responsibilities liabilities and immunity. Written by a leading international arbitrator, these chapters review the legal situation and position on the abovementioned issues by different national laws, conferring the work a broad comparative feature.

The entire treatise benefits from an elegant and concise language, concentrating primarily on the exposition of the law and discussion of the different issues, without endeavoring to put a subjective approach or to add the author's rich practical experience, without distracting the rigor of the presentation. Gary Born's work will naturally find a leading position as an authoritative treatise and the updated counterpart of other previous important works.

Bernardo Cremades

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Kluwer Arbitration Practice Plus now offers an enhanced Arbitrator Tool with 4,100+ data-driven Arbitrator Profiles and a new Relationship Indicator exploring relationships of 12,500+ arbitration practitioners and experts.

Learn how **Kluwer Arbitration Practice Plus** can support you.

Kluwer Arbitration Practice Plus

Offers an enhanced **Arbitrator Tool** with 4,100+ data-driven Arbitrator Profiles and a new **Relationship Indicator** exploring relationships of 12,500+ arbitration practitioners and experts



The image shows a screenshot of the Kluwer Arbitration Practice Plus web application. The interface is displayed on a blue background. At the top right, there is a checkmark icon and the text "Explore Practice Plus". Below this, there are two overlapping screenshots of the application. The foreground screenshot shows a user profile for "Gary R. Egan" with a profile picture and a list of statistics: 22, 38, and 145. Below the profile, there are three donut charts labeled "Relationship Indicators" and "7 Results Based on cases within Kluwer". The background screenshot shows a similar view but with a different user profile. At the bottom of the image, there is a dark blue banner with the text "Kluwer Arbitration" on the left and the "Wolters Kluwer" logo on the right.

This entry was posted on Tuesday, February 17th, 2009 at 12:00 pm and is filed under [Book Review](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.