Kluwer Arbitration Blog

Innovative New Criteria for Appointment of Arbitrators at Commercial Arbitration Centre of Lisbon

Catherine A. Rogers (Arbitrator Intelligence) · Friday, July 10th, 2015 · Arbitrator Intelligence

Seemingly not a month goes by without a new arbitral institution springing up, from Turkey to Bulgaria, from Georgia to Jerusalem, and from Cambodia to Rwanda. Establishing a new arbitration center, however, is not simply a matter of finding office space or picking a name. In fact, picking a name can barely even be considered a task at all—it is almost pre-ordained that christening a new institution simply means deciding on how to combine the words "arbitration," "international," the name of the host city/state, and "center" (or "centre"), and possibly a term like "commercial" thrown in as something akin to literary flare in the realm of arbitral institution monikers.

The hard part, of course, comes after the office walls go up and the largely self-evident name has been pronounced. New centers (or "centres") must establish their legitimacy by signaling to potential parties that they can be trusted administrators of their disputes. While there are many means for establishing (or shoring up) legitimacy, institutions have often focused on the arbitrators who will preside over the cases they administer.

This focus has been especially true for newer and regional institutions. For example, several regional institutions, including centers in Milan, Singapore, Cairo, Poland, Slovenia and Latvia, have adopted codes of ethics for arbitrators. These codes are intended to be express guarantees of not only quality in arbitral decisionmaking, but also the institutions' commitment to integrity and ethical conduct.

Certain institutions have also made express commitments regarding enforcement of these codes. The Milan Chamber, for example, has a published rule for replacing arbitrators based on violations of its Code of Ethics, and the AAA touts a 'one-strike-you're-out' policy to boot from their panel arbitrators who fail to disclose a conflict.

Even long-established institutions are increasingly attentive to party concerns about how they appoint and monitor arbitrators. The ICC has revised its disclosure form to require information about the number of arbitrations in which a prospective arbitrator is sitting to ensure that the arbitrator has sufficient time to commit to the new case. Reportedly, dereliction or delay by arbitrators may be result in a reduction of fees by

the ICC.

In a more recent development (which will be the subject of a future blog post), an apparently increasing number of institutions are seeking survey feedback from parties after the close of an arbitration to assess their satisfaction with the process and the tribunal.

Against this backdrop of institutional innovation, recent strides by the Commercial Arbitration Centre of Lisbon – Portugal (CAC) are particularly noteworthy. Like other institutions' efforts, the CAC has focused on arbitrator selection and ethics. Rather than a minor adjustment aimed at keeping up with the neighbors, however, recent CAC reforms seem instead to unveil an ambition to extend the CAC's reach beyond the borders of Portugal, to become a truly international arbitration center (or "centre").

As previously noted in this blog, last year the CAC adopted a new set of ethical rules that effectively incorporate the IBA Guidelines on Conflicts of Interest in International Arbitration into the CAC's "Code of Ethics." Duarte G. Henriques, a Portuguese arbitration expert based in Lisbon, criticized this step, arguing that the IBA Guidelines were inapposite when imposed on the small, intimate arbitration community in Portugal, where relationships prohibited by the IBA Guidelines are common, and perhaps unavoidable (see blog here (31 Jan 2014)). Bringing to bear his extensive in-house experience, Michael McIlwrath challenged this analysis, arguing instead that by adopting familiar, reliable international standards, the CAC could position itself as the leading institution in the Portuguese-speaking world (see blog here (1 Feb 2014)). In McIlwrath's words, if the CAC could position itself as an internationally trusted institution, it could fill "an obvious gap" catering to the disputes that arise out of the "important commercial and legal ties [that] crisscross the Portuguese-speaking world."

Fast forward to today, the CAC has now implemented a new "Criteria for the appointment of arbitrators by the Centre approved by the Board of the Arbitration Centre of the Portuguese Chamber of Commerce and Industry" (Criteria). The Criteria (explained in detail below) are a new set of guidelines for appointment of arbitrators, the aim of which is to regulate arbitrator appointments made by the Chairman of the Centre (or his substitute), to increase party input into those decision, and to render the criteria for those decisions more transparent to the parties.

Under CAC Arbitration Rules, the institution may select and appoint arbitrators when the parties have agreed to a sole-arbitrator, when they cannot agree on a presiding arbitrator, or when a defaulting party fails to designate its party-appointed arbitrator. In those situations, users can now rely on clearer and more objective criteria that the CAC will use to select arbitrators. These newly established criteria are designed to reduce the potential for an arbitrary or unexpected choice by the CAC and to increase parties' participation and confidence in the CAC's selection processes. Following is a description of some of the highlights:

Maximizing Party Input: One of the most striking features of the new CAC Criteria is their effort to integrate party preferences into appointment of arbitrators, even when the CAC is charged with appointing the arbitrator. For example, the parties are

given the opportunity to contribute to the appointment process by submitting preferences about how to "best define the desired arbitrator profile." This procedure supplements the Criteria's internal guidelines to give preference to professionals with "scientific and/or professional experience in the branch of the law that is central to resolving the case."

Currently the Criteria provide that the parties' submissions regarding arbitrator's desired profile are to be made "by mutual agreement" of the parties. Given that parties often have conflicting ideas about optimal qualities for a sole or presiding arbitrator, and sometimes even about which "field of law" is implicated in the dispute, party input at this stage could aid the institution significantly in selecting an arbitrator that is regarded as truly neutral and well-suited to the dispute in the eyes of both parties.

In addition, in high-value cases (over €5M), the Criteria require the Chairman of the CAC to submit five names to the parties within five days after being informed by the parties of the arbitrator's desired characteristics. Parties can then either agree on an arbitrator from the list or reject the proposed arbitrators without any need to specify grounds for their objection. If the parties cannot agree and if all proposed arbitrators on the list have been objected to by one of the parties, the Chairperson will appoint someone from off the list. As an apparent mirror image of the opportunity to comment on the desired profile, the purpose of this procedure seems to be to allow the parties to preclude arbitrators whose backgrounds or professional orientations are regarded as disadvantageous to that party, even if they do not rise to the level of actual bias. The potential for appointment of an unlisted arbitrator, however, will presumably deter parties from wanton objections that exclude all arbitrators on the list.

Language and Nationality of the Arbitrator: In high-value disputes involving a foreign party, the new Criteria require the CAC to give the parties the opportunity to select a sole arbitrator or a presiding arbitrator who is a national of a country other than the ones of the disputant parties. It also provides that when the parties' working language or the language applicable to the proceedings is not Portuguese, the CAC will only appoint arbitrators with demonstrable aptitude in the other language. These provisions, like adoption of the IBA Guidelines, signal the CAC's expanding aspirations to administer more international arbitrations. They seek to assure foreign parties that the proceedings will not be provincial Portuguese proceedings with an outside "guest," but international proceedings that happen to be administered by a Portuguese institution.

"Creating" New Arbitrators: One significant obstacle to increasing the size and diversity in the pool of arbitrators is the high barrier to entry into the marketplace for arbitrator services. Experience as an arbitrator is considered the most important criteria in selecting an arbitrator, but how is a new arbitrator to get his or her first appointment? The new Criteria provide a possible solution. When a dispute involves a small claim, the CAC will aim to appoint an arbitrator who is an experienced advocate and who has agreed to be available for and to prioritize the arbitration. This provision will presumably allow experienced practitioners to obtain that all-important first appointment, which will allow them to begin building a profile as an arbitrator. While many institutions undertake specifically to increase diversity in the arbitrators they

appoint, to the best of our knowledge, this is the only expressly published set of institutional rules to indicate a willingness to "create" new arbitrators by making initial appointments.

Under this provision, the amount of a "small claim" is yet to be determined. However, a recent short article published by the Chairman of the CAC, which announced a soon-to-be established "fast track" procedure for claims below €200,000, may signal that a small claim may involve amounts below that sum.

Ensuring Competence: The Criteria establish that, as a prerequisite for appointment by the CAC, arbitrators must demonstrate proof of training and experience in arbitration. Each arbitrator on the CAC list is also required to provide a copy of his or her arbitral curriculum vitae on the CAC website in a standard format approved by the CAC. The list of arbitrators with standardized CVs follows the tradition of other institutions, like SIAC, that have established panels of arbitrators. The requirement for training, however, seems perhaps closer to the IMI requirement of standardized training for mediators as a measure of quality assurance.

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The enactment of the CAC's Criteria illustrate the latest among a growing lineup of institutional innovations in a fiercely competitive "flattening" market for arbitral institution services. From the CAC's (and a global) perspective, the new Criteria signal a positive move towards increasing party participation and confidence in arbitrator appointments by the CAC. As with other recent CAC changes, like the adoption of the IBA Guidelines, the Criteria indicate Portugal's aim to evolve from a respected domestic institution to a global competitor. In the coming years, the international arbitration community will be watching CAC to see if it can become the regional institutional dynamo for the Portuguese-speaking world that McIlwrath forecasts, despite its decision to leave the word "international" out of its name.

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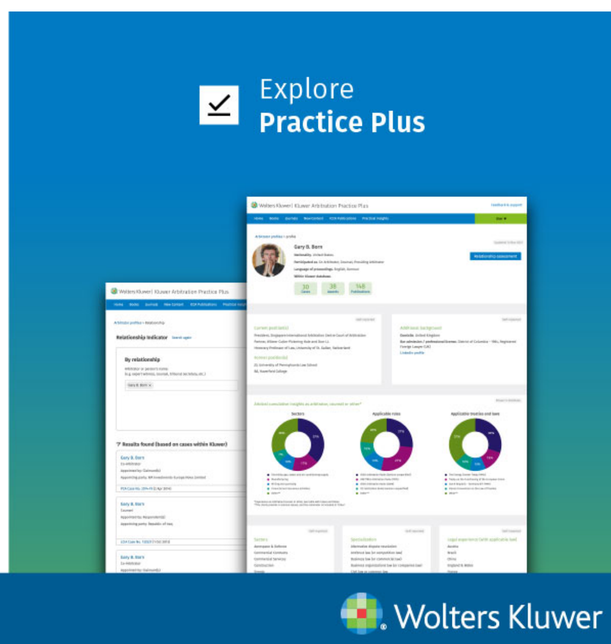

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