Kluwer Arbitration Blog

Arbitration as a Market

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The Cambridge Arbitration Day (CAD), an annual arbitration conference organised by the Cambridge University Graduate Law Society, took place on the 3rd of March 2018, in Cambridge, United Kingdom. The event was preceded by the Young Practitioners' Event organised with ICC Young Arbitrators Forum on the 2nd of March 2018, which brought together students and young arbitration practitioners to discuss about how the younger generation can break into the arbitration market.

The overarching topic of the 5th Cambridge Arbitration Day was 'Arbitration as a Market'. Academics and arbitration practitioners discussed recent developments in the field of international arbitration. Professor Catherine Rogers (Penn State and Queen Mary University of London) delivered the keynote speech of the event, followed by two discussion panels and a debate panel. This post provides a brief synopsis of the ideas discussed in the event.

Competition in the International Arbitration Market: A Race to the Top?

Prof. Rogers' keynote speech was themed 'Competition in the International Arbitration Market: A Race to the Top?' and focused on the implications of competition between different actors in the marketplace of arbitration. Her special focus was on the phenomenon of regulatory competition between arbitral institutions and its impact on arbitration. Arbitral institutions, the primary regulators in the arbitration market, constantly compete against each other by adopting rules and establishing procedures for the effective adjudication of disputes. The question addressed by Prof. Rogers was whether such regulatory competition is a paradigm of 'race to the top' or 'race to the bottom'. She examined competitive forces and observed both a risk of race to the bottom, for instance arbitration for money laundering and abusive trading tactics of third-party funders, and evidence of race to the top, such as the recent transparency movement and the IBA Guidelines for Conflicts of Interest in International Arbitration. Nevertheless, she observed that the arbitration market continues to be opaque and, to a great extent, inaccessible to young practitioners.

Buying Justice: The Demand for Arbitration

The first panel of the conference, chaired by Prof. Stavros Brekoulakis (Queen Mary University of London), focused on demand for international arbitration, the parties' expectations, and on whether and how justice is bought by the parties. Mr. Hendrik Puschmann (Partner, Farrer & Co) discussed the cost of arbitration, expressing the view that arbitration remains an expensive and non cost-effective endeavour, and Mr. Timothy Smyth (Associate, Arnold & Porter Kaye Scholer) discussed

arbitration agreements, focusing on the key elements of a well-drafted arbitration agreement and on 'pathological' arbitration clauses. With regard to the cost of arbitration, the conclusion was that demand for arbitration has not decreased despite its very high cost and that the parties are fully aware of this reality. The opposite conclusion was reached about arbitration agreements. Apparently, the parties are often not diligent when signing arbitration agreements and, as a consequence, they do not always get what they want when a dispute arises. Prevention, awareness, and increased transparency were suggested as solutions to this problem, rather than focusing on *ex ante* cure mechanisms (such as the presumption of validity under the New York Convention).

Mr. Rupert Reece (Partner, Gide Loyrette Nouel) discussed the demand for publicity in international arbitration. He observed two opposite forces. On the one hand, surveys show that the parties perceive confidentiality as an advantage of arbitration and, on the other hand, they show demand for increased transparency, especially with regard to the performance of arbitrators and institutions. He also analysed different sources of the transparency obligation, its relation to public interest, and the balance of confidentiality and transparency in commercial and investment arbitration. Another demand-related subject is the appointment of experts by the parties. Mrs. Michela D'Avino (Associate, BonelliErede) talked about the reasons behind the decision to appoint an expert and expert suitability criteria. She warned on the importance of giving clear instructions to an expert and of ensuring that he/she has a deep understanding of the factual background of the case.

Selling Justice: The Supply of Arbitration

The second panel, themed 'Selling Justice: The Supply of Arbitration', was chaired by Dr. Patricia Shaughnessy (Vice-Chair of the Board of Directors, SCC) and the discussion evolved around competition between different actors in the arbitration market. Mr. Audley Sheppard QC (Partner, Clifford Chance) presented statistics showing the percentages of cases filed before different arbitral institutions and discussed the differentiating factors driving the parties' decision when choosing an arbitral institution (including fees, degree of supervision, confidence in their system of appointments, and perception of the industry). Mr. John McMillan (Senior Associate, Wilmer Hale) focused on the market of judges and, in particular, on how arbitrators market themselves. To achieve appointments, arbitrators market their decisions, their views and themselves, often jeopardising the quality of awards and their impartiality.

In his presentation, Mr. Alexander Uff (Partner, Shearman & Sterling) questioned whether the saying 'whatever client wants, client gets' applies in international arbitration. He argued that party autonomy is not absolutely boundless but limited by a number of rules deriving from different legal sources, having different purposes, and operating at different stages of the arbitration process. Mr. Graham Coop (Partner, Volterra Fietta) spoke about competition between places of arbitration and analysed the factors leading to the choice of seat and arbitration centre. Finally, Mrs. Marily Paralika (Associate, White & Case) discussed gender diversity in international arbitration. After reviewing relevant surveys, she argued that the lack of gender diversity is a market failure of the arbitration market. The so-called 'pipeline leak', the lack of visibility of potential arbitrators, and unconscious bias were identified as the main reasons behind this market failure. Recent initiatives have raised awareness about the issue, but there is still a long road ahead of us.

Debate: "This House believes that investment arbitration demands different rules and principles to that used in commercial arbitration."

The debate panel was moderated by Mrs. Wendy Miles QC (Partner, Debevoise & Plimpton) and was composed of Dr. Cameron Miles (Barrister, 3 Verulam Buildings), Mr. David Hunt (Associate, Boies Schiller Flexner), Mrs. Ema Vidak-Gojkovic (Senior Associate, Omnia Strategy), and Mr. Kartikey Mahajan (Associate, Kirkland & Ellis). The moto of the debate was 'this House believes that investment arbitration demands different rules and principles to that used in commercial arbitration.' Mr. Hunt and Mr. Miles argued in favour of the proposition whereas Mr. Mahajan and Mrs. Vidak-Gojkovic argued against it. The discussion evolved around the public/private character of international investment arbitration, party autonomy, flexibility, predictability, and consistency in decision-making, regulatory chill, transparency, accountability, and the recent reform proposals for the creation of a permanent investment court. In her closing remarks, Mrs. Wendy Miles QC argued that investment arbitration is a 'hybrid' creature, a complete fallacy, both alike and different from commercial arbitration. Investment arbitration is different from commercial arbitration mainly because it is a creature of public international law; it follows that rules of treaty interpretation apply and not private law principles. On the other hand, one should acknowledge that the system of arbitration is a whole organic system and that flexibility and party autonomy are the core characteristics of its success.

Conclusion

The conference provided a unique opportunity to reflect on the system of international arbitration as a whole. The speakers explored the market forces affecting supply and demand in the arbitration market and analysed the effects of competition between different actors, the expectations of parties, barriers to entry, and market failures. The overall impression was that the practitioners and academics that participated in the event positively evaluate the arbitration system, recognising at the same time the need for reform initiatives aiming at improving inefficient market outcomes.

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