Kluwer Arbitration Blog

ICCA Sydney: Arbitration Challenged II – Party Autonomy in Choosing Decision-Makers: Advantages and Drawbacks – Should it be Revisited?

Jonathan Mackojc (Corrs Chambers Westgarth) · Tuesday, April 17th, 2018 · Young ICCA

The afternoon session at ICCA Sydney Conference 2018 on "Party Autonomy in Choosing Decision-Makers" was moderated by Prof. Dr. Gabrielle Kaufmann-Kohler and had the insightful contributions of Alfonso Gómez-Acebo, Audley Sheppard QC, Natalie Y. Morris-Sharma and Ruth Stackpool-Moore.

The session commenced with Prof. Dr. Kaufmann-Kohler underscoring the importance of maintaining party autonomy in international arbitration. Prof. Dr. Kaufmann-Kohler argued that the ability to choose an arbitrator is more than a hallmark of international arbitration; it is the keystone.

Prof. Dr. Kaufmann-Kohler also noted that investment arbitration has recently faced significant scrutiny, forcing the international arbitration community to consider certain reforms to ensure that it continues to be seen as a legitimate form of dispute resolution for investor-state disputes.

Role of party-appointed arbitrator

Alfonso Gómez-Acebo asked whether the expectations of a party-appointed arbitrator are the same as that of a presiding arbitrator. Alfonso Gómez-Acebo also highlighted the existing debate with respect to the unilateral appointment of arbitrators, and whether this tried-and-tested mechanism should remain as a default, or whether it ought to be entirely abolished. Alfonso Gómez-Acebo argued that this necessarily depends on the 'role' or 'job description' of party-appointed arbitrators. It was noted that there is currently no understanding, or set of written rules, which address what that particular role may be.

Alfonso Gómez-Acebo also noted that it is disconcerting to contemplate that one should presume that a specific role exists, as this in itself brings about confusion regarding independence and impartiality, an imbalance in the arbitral process, and the introduction of bias.

Overall, it was argued that there is a need for clarity regarding the role of party-appointed arbitrators and that there may be value in exploring special roles for certain party-appointed arbitrators, provided that both parties agree to do so. The most important action is to facilitate increased dialogue between parties, to ensure that their views regarding special roles are considered.

Audley Sheppard replied by stating that there should not be a positive obligation on party appointed arbitrators to adhere to specific roles. However, this should not discourage party-appointed arbitrators from better articulating their parties' case in the event that their arguments have been poorly presented by counsel, or simply to ensure that the other members of the tribunal 'get it'. It seems natural that a party would expect such support from its appointed arbitrator, and such initiative would not compromise expectations of independence and impartiality. After all, international arbitration is underpinned by the notion that parties strive to select the best arbitrators in the first place.

Quality of institutional appointments

Ruth Stackpool-Moore agreed with Audley Sheppard that an understanding of the role of party-appointed arbitrators is not enough, and proposed that it may be time to submit to a full-scale evolution of the arbitrator appointment process – by firstly assessing the status quo regarding institutional appointment, and then proposing specific improvements to the process.

Ruth Stackpool-Moore noted that there seems to be a general hesitation to accept that institutions play a pivotal role. Statistics from the QM Arbitration Survey, BLP Arbitration Survey and from institutions such as HKIAC, SIAC, LCIA and ICC, cumulatively suggest that institutions do in fact play a significant role in the appointment of arbitrators. Ruth Stackpool-Moore proposed that institutions must immediately address transparency – an exercise that would necessarily involve clear and comprehensive information with respect to the appointment process. This may include details as to who is responsible for such decisions and their experience, how such decision-makers are selected, and even the criteria used to inform the final appointment.

Natalie Y. Morris-Sharma welcomed Ruth Stackpool-Moore's call to action and contributed the following points:

• trust stems from more than the quality of appointments – institutions must have a good reputation;
• institutions must strike the right balance regarding the type and extent of transparency; and
• institutions must carefully consider the quality of their appointments, and ensure that their criteria are aligned to party criteria– a consultation process would be an ideal solution.

Prof. Dr. Kaufmann-Kohler then remarked – if we are to pursue greater appointment from institutions, what standard are we to adopt?

Reforming ISDS

Natalie Y. Morris-Sharma acknowledged that investor-state dispute settlement is facing a legitimacy crisis, irrespective of whether this is real or imagined. Three possible solutions with respect to the arbitrator appointment process were proposed:

1. 'Arbitrators ad hoc' – following the approach of certain courts which have a 'Judges ad hoc' system, increasing the tribunal from three to five members. This may assist parties with real or perceived concerns regarding arbitrator bias. This should remain an option rather than an obligation.
2. 'Circumscribed appointments' – rely on pre-established lists which would require parties to internally rationalise their appointments, as they would need to balance considerations of both an investor and host state.

3. 'Agreed appointments' – parties to agree at an early stage, empowered by an investment treaty. Though difficult, it is viable as long as parties have options and timelines.

Panellists also discussed the possibility of a permanent multilateral investment court, discussing issues such as Groupthink, homogenous decision makers, the role of dissents and other psychological pressures.

Takeaway

The arbitrator selection process is one of the most important aspects of an arbitration proceeding, and a key reason why parties choose arbitration over litigation. All panellists agreed that it now deserves significantly more attention in both commercial and investment arbitration, as it impacts a variety of stakeholders. Active participation in the arbitrator selection process by all concerned parties is imperative; it will ensure that the best possible arbitrators are appointed to meet the specific needs of a case.

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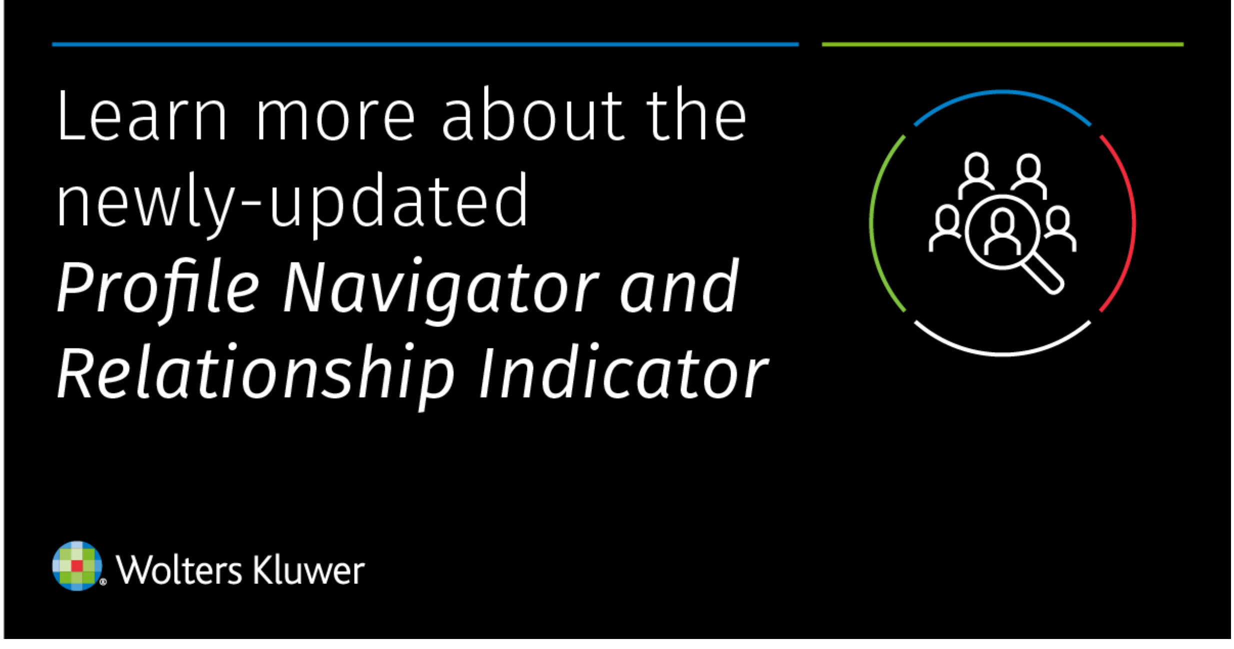

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