Kluwer Arbitration Blog

ICCA Sydney: Arbitration Challenged II: The Realities of Arbitration Economics: Who Gets to Play, and What are the Implications

Brecht Valcke (King & Wood Mallesons) · Tuesday, April 17th, 2018 · King & Wood Mallesons

The panel on Arbitration Challenged II: The Realities of Arbitration Economics: Who Gets to Play, and What are the Implications, at ICCA Sydney 2018 Conference, was moderated by *Susan Franck, American University, Washington College of Law (United States)* and had contributions from *Mohamed Abdel Wahab, Zulficar & Partners Law Firm (Egypt); John Beechey, BeechyArbitration Ltd (UK); Kate Brown de Vejar, Curtis, Mallett-Prevost, Colt & Mosle, S.C. (Australia); Victoria Shannon Sahani, Arizona State University,* and *Sandra Day O'Connor College of Law (United States).*

One of the key criticisms of the international arbitrations system is the high costs. Surprisingly however, stakeholders have generally not questioned costs to be high in international arbitration in deciding to proceed to arbitration or not. However, there is considerable uncertainty as to the law applicable to the question of costs (some States apply party-party costs, some apply a "loser pays" approach) as well as recoverability of costs (some States do not accept recoverability and the laws are not consistent between States).

More and more, third party funders are being used in international arbitrations and it is questioned what impact this may have on the concept of access to justice.

Third party funding may increase the access to justice by allowing parties who would not otherwise have been able to fund a dispute to bring a claim.

However, third party funders generally will not agree to fund parties that are unlikely to win, or pursue non-damages claims, or the respondent State in investment arbitrations. This is so because generally, third party funders are looking for a return on their investment. This approach arguably denies access to justice for the parties third party funders refuse to fund.

Other concerns raised by the panel were the allocation of costs (party-party or "loser pays") and security of costs. Considering third party funders are not a party to the arbitration agreement, a concern is that third party funders are beyond the reach of the tribunal in imposing an order for costs or for security for costs, where third party funders gain a benefit when costs are awarded in favour of the party they funded.

The panel further discussed the fact that third party funding is currently not regulated or

supervised. Because third party funding comes into play at the beginning of a dispute, it is a highly speculative business. The panel argued that third party funders may adapt a 'portfolio' funding approach where it invests in many high risk, high rewards disputes which may increase the number of unmeritorious claims to be brought. Potentially, third party funders may also have an interest in funding such claims that are about changing rules in favour of third party funders.

Whether or not third party funding fosters or hinders access to justice, the concept of third party funding is generally accepted throughout the common law (except for Ireland) and civil law jurisdictions. Most tribunals and legislations impose an obligation to disclose where third party funders are involved in a dispute.

As the use of third party funding in disputes will continue to grow, it remains to be seen whether it will be sufficient to rely on self-regulation and code of conduct rules or whether third party funding will need to be independently regulated and supervised.

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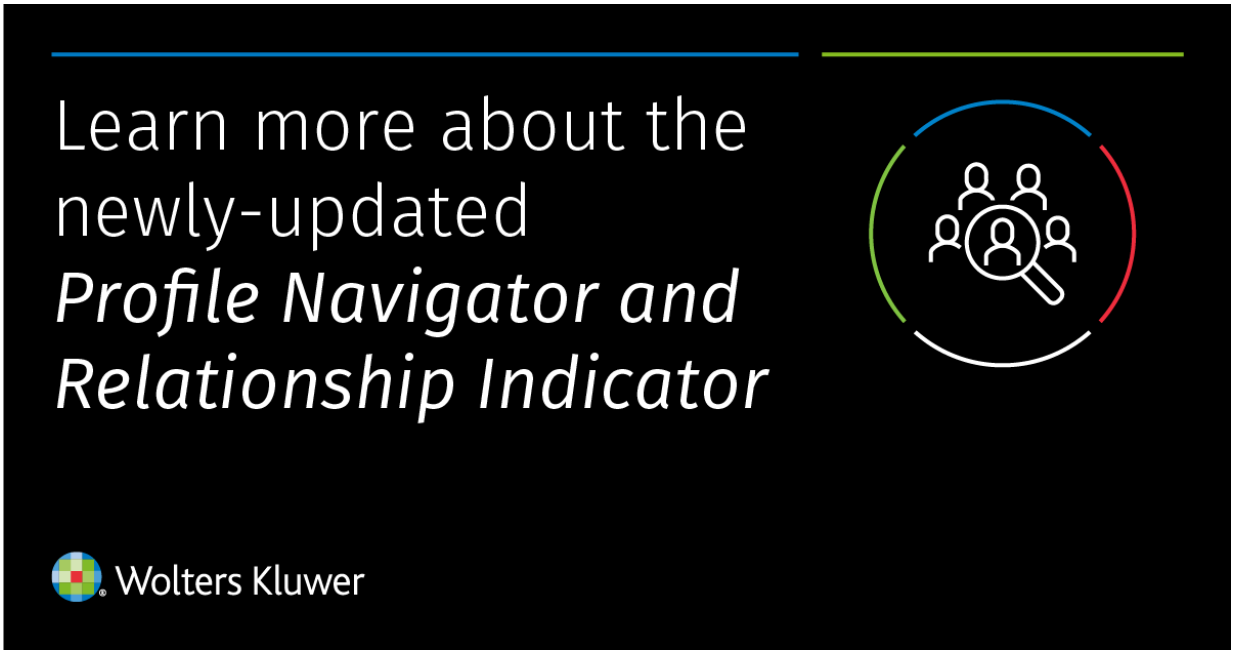

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