Kluwer Arbitration Blog

The LCIA Arbitrator Challenge digests: An Interview with William (Rusty) Park

Annalise Nelson (Associate Editor) · Wednesday, November 23rd, 2011

Arbitration practitioners have traditionally had very little illumination into the outcomes, let alone the reasoning, of arbitrator challenge decisions. Few arbitral institutions set out in writing to the parties the reasons for their challenge decisions, and even fewer institutions have made these decisions available to the larger arbitration community. Past posts on this blog have lamented this situation, arguing that a greater transparency in this area could enhance the predictability of decisions, provide greater guidance to arbitrators concerning the scope of their disclosures, and lead to a reduction in the number of frivolous challenges.

All of this makes *Arbitration International's* recent Special Edition on Arbitrator Challenges at the LCIA a very welcome edition. The Special Edition represents the first time that a major arbitral institution has made a digest of arbitrator challenge decisions. As one of only a scant handful of arbitral institutions to issue written reasoned challenge decisions to parties, the LCIA is particularly well-suited to this treatment. While the LCIA Rules do not actually require a written reasoned decision for challenges, and provide only limited instruction on challenge submissions or procedures, it has become a consistent practice within the Court to issue reasoned decisions to the parties.

I had a chance to speak with LCIA President William (Rusty) Park and ask him a few questions about the making of the digests and the implications of making these decisions available publicly.

Q: What prompted the LCIA decide to publish these decisions now?

Park: Back in 2006, the decision was made to proceed with publication. The LCIA was in a unique position because we actually give written decisions on arbitrator challenges. On taking over as President, my sense was that the project needed to be moved up the list of priorities, given the critical importance of specific cases to evaluations of arbitral ethics.

People tend to talk in generalities about impartiality and independence. However, the devil lurks in the details. In each challenge one must walk the tightrope between keeping arbitrators free from taint and avoiding disruptive manoeuvres designed to sabotage proceedings. With complicated facts and subtle standards, finding the right counterpoise can be tricky.

The digests illustrate the highly fact-dependent nature of challenges, which can be quite time-consuming to hear. In one challenge the LCIA received a total of nine binders from the parties, and

held a day-long hearing which led to a twenty-page opinion explaining our decision.

Q: Were there any major difficulties or points of resistance in getting these decisions summarized and published?

Park: Although we found no institutional resistance, the project remained difficult because drafting the digests was such a delicate process. If one says too much, confidentiality is jeopardized. Saying too little, however, risks creating texts that are bland and boring reading, which fail to deliver the intended assistance to future arbitral tribunals. Among those who contributed invaluable assistance to the process, special thanks are due to Ruth Teitelbaum and Tom Walsh, key members of the *Arbitration International* Editorial Board, and Adrian Winstanley, LCIA Director General.

Q: I understand that all of these decisions involved challenges that were seated in England, so the decisions reference the 1996 Arbitration Act and/or the European Convention on Human Rights. But did you notice, nonetheless, any cross-references to the jurisprudence or guidelines of other institutions? And do you anticipate that the publication of these decisions will encourage greater cross-pollination across institutions?

Park: As to sources of authority, the Court looks to the LCIA Rules and the applicable law at the arbitral situs. However, cross-fertilization exists in the appreciation of the context for each case, which remains critical to reaching the right decision. In turn, evaluating any given context depends on an appreciation of the parties' legitimate expectations and sensitivities with respect to analogous fact patterns in other disputes, which leads to looking at how other institutions have handled similar problems.

One example of cross-fertilization can be found in the Second Circuit's decision in *Aimcor*, where the issue was whether to vacate because the chairman had dealings with one of the parties. In applying the Federal Arbitration Act, the appellate opinion noted how the lower court had considered both the AAA/ABA Code of Ethics and the IBA Conflicts Guidelines to provide enlightenment on what litigants expect from arbitrators.

Of course, that doesn't mean that all guidelines are identical. However, a common core of understanding does exist across institutions. On some matters everyone agrees. But on other questions many shades of gray provide contrasting approaches.

Q: Were there any particularly unusual or tricky issues raised in any challenges that might be new or surprising to the arbitration community? I understand that there was one particularly heated challenge involving the theft of grapes from an arbitrator's conference room.

Park: The digests should not be taken simply as entertaining war stories. They represent a set of decisions to assist the arbitral community in evaluating permissible conduct in light of various controverted elements.

In one case—No. 1303—it was the arbitrator's *reaction* in the face of a challenge that led to his disqualification. The original basis of the challenge, membership in a trade association, became less important than the arbitrator's angry and inappropriate reaction to the disqualification motion, which led to accusations that Claimant was "malevolent" and "false". Under the circumstances, such an attitude did create legitimate concerns about impartiality.

In another case—No. 3488—the challenging party thought that a specific procedural order showed the arbitrators' prejudgment. But in its decision the LCIA found it was not possible to look at simply one order in isolation. Considering all procedural orders together, it was clear that the arbitrators' tentative view expressed one set of directions did not demonstrate prejudgment.

Q: Do you think the LCIA's publication will foster a healthy competitiveness among other institutions to make changes in how they memorialize their challenge decisions, and also in their disclosure practices?

Park: Other institutions may not have the same passion for providing guidance on such ethical issues. However, my guess is that the digests will be read with thoughtful interest.

Q: Is it likely that much of the external impact, to the extent that there is one, will come from the arbitrators themselves, considering that many of them sit on LCIA tribunals as well as tribunals governed by different institutional rules?

Park: Possibly. Arbitrators remain a heterogeneous bunch. For example, many British take a more sanguine view than some Americans about the propriety of participation in a single case by arbitrators and counsel from the same set of barristers' chambers. If each group respects the other, dialogue can be helpful, given that international arbitrations in London implicate the sensibilities of non-British lawyers and parties.

Divergence also exists among different industries. For example, insurance arbitration seems to involve more repeat players than in other areas such as the pharmaceutical or hotel business. For some reason, insurance cases also seem to create a heightened sensitivity about the differences between American and English approaches to reading policy language, which can sometimes lead to long and problematic efforts to find someone acceptable to chair the tribunal. Cultural expectations matter.

The Special Edition of Arbitration International is available online at www.kluwerarbitration.com.

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