Kluwer Arbitration Blog

The Rise and Rise of the Arbitration Institution

Guy Pendell (CMS Cameron McKenna LLP) · Wednesday, November 30th, 2011 · YIAG

As I write this blog, a team from CMS has been working hard on the next edition of the CMS Guide to Arbitration. As with the previous edition, the Guide will include chapters on arbitration written by practitioners from across Europe and beyond. It will also identify, as with many arbitration texts, resource material, including details of most of the well known arbitration institutions, plus some less well known institutions.

Compiling a list of the 'main' institutions has been an interesting and somewhat political task. There are the undisputed 'global' institutions which have almost universal recognition (which I shall not name for fear of missing any out), yet there are many more smaller local institutions competing in this space. Most practitioners will probably have their favourites, likely to be based on prior experience, familiarity with their rules and procedures and, quite probably, geographic convenience to their office.

Exactly how many arbitration institutions exist and how many arbitrations they actually administer is unclear. We know the statistics of the major institutions (see for example Arbitration Online), but what of all the others? As a first step, I have started to compile a list of organisations that claim to administer arbitration or claim to be a part of the arbitral process. It is a long list, and growing, with 118 organisations identified to date and the list is certainly not complete (I am certain that we have only captured a fraction of the institutions that exist in the People's Republic of China for example).

In addition to the sheer number of institutions, there are some very old and very young members. Of those where their date of creation is identified, the earliest was formed in 1853, comfortably beating the LCIA by 39 years. Since then, growth of the number of institutions has been exponential. Before 1940 only ten percent of the institutions around today existed. Seventy percent of the institutions have been created in the last thirty years; fifty percent in the last twenty and twenty percent in the last ten years. Although the rate of growth is now slowing, at least two new institutions have been created in each of the last three years (although for some reason no institution was formed in 2008).

A good number of the institutions have their own rules but a great deal more do not; unsurprisingly the UNCITRAL Rules make the most appearances as the preferred rules of institutions.

I cannot tell you how many arbitrations each institution has each year since most do not appear to publish such statistics. From Queen Mary's School of International Arbitration statistics (see the link above), of the twenty-two institutions listed as reporting their number of arbitrations, there

were on average 3,050 arbitrations in total each year between 2003 and 2007. That works out at an average of 139 per institution per year (in 2007 the number of arbitrations per year per institution actually ranged from one (ACICA) to 621 (AAA/ICDR)). If one assumes institutions publish statistics on the basis that it shows they are busy and the less busy institutions tend to choose not to publish, this suggests that there are many institutions that are not terribly busy.

One has to accept that there is a slow start for any institution setting up in this apparently crowded market. First you need to exist, you need an infrastructure, an office, staff (although this might be just one person), and possibly some rules, along with your constitutional documents you might want to have a conference to mark your launch followed by a drinks reception, and only then can you invite parties to include your 'standard' arbitration clause into their contracts or submit their disputes to arbitration under your rules. You might then have to wait years before a party actually has a dispute, during which time the 'president' and other representatives will have to do the rounds of conferences plugging their new institution.

Do we need this many institutions? I have mixed views about this. Diversity is generally a good thing and increasing the number of institutions should bring with it competition, innovation and a general advancement of standards. More choice might encourage more parties to choose arbitration and good institutions should thrive, assuming users will show preference for those institutions. Many of the newer institutions are from developing economies (Africa has at least 19 institutions, with most of the sub-saharan institutions being formed after 1990), which might also have the effect of encouraging more stable and predictable legal systems. More regional institutions should generally encourage the use of international arbitration, allowing disputes to be dealt with (and administered) locally and encourage more local lawyers to undertake international arbitration work. What is of concern is the risk that harm could be done to the profile of international arbitration by institutions that have neither the expertise nor resources to administer arbitrations properly. This probably justifies some self-policing. Growth of institutions that are well managed, adequately resourced and largely transparent in their operations is a positive development for international arbitration generally.

There is help at hand. In 1985 an organisation was formed called the International Federation of Commercial Arbitration Institutions (IFCAI). This organisation's purpose is establishing and maintaining relations between commercial arbitration institutions while seeking to promote greater understanding of arbitration and ADR. It is open to not-for-profit commercial and investment arbitration bodies (and other organisations working to promote international arbitration and ADR). Its website needs some work and it should promote itself more widely, but judging by the quality of its board of directors, it has very good prospects.

For arbitration lawyers thinking of recommending arbitration institutions to their clients, the following list of considerations might be a useful starting point:

(1) Is the institution not-for-profit?
(2) Does it publish its annual case load and average case duration?
(3) Does it appoint arbitrators from an open list?
(4) Does it have a transparent arbitrator challenge procedure?
(5) Does it operate within an established set of arbitral rules?
(6) Does it operate within a model law or similar jurisdiction?
(7) Is it a member of IFCAI?

Based on reported numbers it looks unlikely that the major players will lose significant ground any time soon, but the growth of new institutions should keep them all on their toes, striving to deliver a first class service to users (and their lawyers). Should they fail to do so, you know where to go.

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