Kluwer Arbitration Blog

Lists, Checklists, Guidelines, Principles, Techniques, Protocols, Best Practices: Are They Useful?

Karen Mills (KarimSyah Law Firm) · Thursday, January 16th, 2014 · ArbitralWomen

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The views expressed are those of the authors alone and should not be regarded as representative of or binding upon the institution or the law firms they belong to.

In the last twenty years there has been a proliferation of books, publications and articles about arbitration. Since the last decade arbitration news exchanges on listserves and through newsletters have further added to this industry of arbitration documentation. The arbitration community has noticed this phenomenon and sees in this abundance of material the desire of practitioners to share their knowledge and experience. Newcomers in the field can also see that the best way to get on stage is to publish. The success of arbitration has also encouraged students who choose this field as their future practice area to participate in this publication fever as they learn how to become visible. In addition, many organizations and law firms have their own electronic newsletters.

The wealth of information available offers helpful and concise guidance and tools to assist practitioners in their daily practice. In an age where practitioners are short of time and are faced with a plethora of documentation to read, putting in place helpful guidance and tools may be of valuable assistance in ensuring that the basic issues for each stage of an arbitration are remembered. Lists, checklists, guidelines, principles, techniques, protocols, and best practices elaborated by organizations and working groups like UNCITRAL, IBA, ABA, ICC, or by law firms, facilitate the work of the parties in preparing and arguing their case, and help the arbitrators organize and conduct the proceedings.

Some practitioners tend to think that there are far too many tools and that experience and common sense should always prevail; others appreciate that these tools help establish a common playing field where practitioners from different generations, backgrounds and cultures attempt to speak one “language”. Moreover, it should be noted that some tools have only limited use because they are familiar in certain jurisdictions but unknown in others, for example Skeleton Arguments, used in some arbitrations in which English procedure applies.

Although this trove of guidance and tools have no binding effect, they can be extremely helpful in assisting not only less experienced practitioners but can serve as guides even to the most experienced users. The best practices offered may assist in avoiding pitfalls at all stages: before a dispute arises – by drafting an effective arbitration clause; after it has arisen – by correctly preparing a request for arbitration; and when the arbitration process has already commenced – by

conducting a procedure in the most appropriate way and by rendering an enforceable award.

Law firms have also their own best practices to promote efficiency in international arbitration and some of them choose to share them publicly. Published lists may prove to be helpful to users who have no lists or who wish to benefit from the experience of their peers.

The purpose of this discussion is to draw attention to the usefulness of such lists, checklists, guidelines, principles, techniques, protocols, and best practices. The authors have selected only a few (there exists dozens) which are among the most widely known in international arbitration or which, in the authors' opinion, deserve to be better known.

- **IBA Guidelines for Drafting International Arbitration Clauses** (2010): Arbitration clauses are the door to arbitration and determine the main procedural aspects of a case. Several checklists are available on the internet. The most widely-known, in addition to the IBA Guidelines, are probably Paul Friedland's 'Arbitration Clauses for International Contracts', Doak Bishop's 'Practical Guide to Drafting International Arbitration Clauses' (both were members of the Task Force which drafted the IBA Guidelines), and Arif Hyder Ali's 'Best Practices in Drafting Arbitration Clauses'. These instruments are indispensable, because experience demonstrates that more than half of arbitration clauses are either badly drafted or ambiguous. In the worst case scenario, a badly drafted (often called *pathological*) clause can even preclude arbitration. However experienced a drafter may be, it seems useful to refer to a list, at least to make sure that no basic principle has been forgotten and that complex situations have been correctly addressed as far as possible.
- **IBA Rules on the Taking of Evidence in International Arbitration** (1999 amended in 2010): These are probably the guidelines most widely used, together with the IBA Guidelines on Conflicts of Interest. Parties and arbitrators often adopt them as a part of the arbitral procedure, as can be seen in procedural orders, terms of reference and awards.
- **IBA Guidelines on Conflicts of Interest in International Arbitration** (2004): In a ten-year period this has become the industry standard reference, adopted by practitioners worldwide, including some arbitral institutions, in relation to disclosure of any matter which may give rise to doubts as to the arbitrators' impartiality or independence, and in relation to challenge of arbitrators. The reference to such Guidelines is reflected in case law related to objections to appointment of arbitrators or to their challenge.
- **UNCITRAL Notes on Organizing Arbitral Proceedings** (1996): The purpose of this is to assist arbitration practitioners by listing and briefly describing matters for possible consideration when organizing proceedings. They are meant for universal use rather than being designed as best practices. They address issues as diverse as the place of arbitration, the language of the procedure, confidentiality, evidence, witnesses and so on. They may be very useful especially for practitioners who have little experience in arbitration. The UNCITRAL Secretariat has carried out a survey on their use and indicated that practitioners find them useful. It was decided at UNCITRAL session of July 2013 that the Notes will be updated and that the work will be entrusted to a working group to ensure that the universal acceptability of those Notes would be preserved.
- **Redfern Schedule**: This schedule is used to track document production. It contains columns aimed at summarizing the documents requested, the requesting party's justifications, the requested party's objections and the arbitrators' ruling on each request. It appears to be used in many cases and can help reduce the time and cost involved in document production, where applicable.
- **Sachs Protocol** (2010): At the Rio de Janeiro ICCA Congress, Klaus Sachs presented a protocol

intended to be an alternative approach to expert evidence. In order to remedy potential disadvantages of party-appointed experts and address the concern of tribunal-appointed experts, he suggested a concept of "expert teaming" aimed at combining the advantages of both. The suggestion is that the parties provide a short list of potential experts and that the tribunal chooses one from each side's list, resulting in an expert team. As described by Martin Hunter in his blogpost 'Experts in International Arbitration', it is an "ingenious 'hybrid' system". It is likely to address the concerns of users and the cost-related process of appointing experts by tribunals in addition to experts appointed by parties. Such Protocol seems to offer a practical solution although it is not as yet universally known and thus it is too early to determine how often it is used.

- **ICC Techniques for Controlling Time and Costs in Arbitration** (2007, revised 2012): This document contains very practical recommendations aimed at reducing time and costs, which are one of the primary concerns expressed in the arbitration community in the last ten years. They have turned out to be so useful that some of the techniques have been incorporated into one of the Appendices to the revised ICC Arbitration Rules (2012) devoted to case management.
- **Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration** (2011): This report of the ICC Commission on Arbitration Task Force responds to the need for guidance in this field where production of electronic documents has become an increasing concern. (See also Jonathan Frank & Julie Bédard 'Electronic Discovery in International Arbitration').
- **Using Technology to resolve Business Disputes** (2004): The Task Force on IT in Arbitration of the ICC Commission on Arbitration has established unique and efficient lists on 'Issues to be Considered When Using IT in International Arbitration' and 'Operating Standards for Using IT in International Arbitration' (ICC Special Supplement 2004), aimed at assisting parties and arbitrators in addressing IT-related issues as diverse as organizing paperless files and videoconferencing (www.iccdrl.com, Commission Reports, 2004).

From the contributors' viewpoint, the lists, checklists, guidelines, principles, techniques, protocols, best practices and so on are essential. They offer a summary of issues to verify in order to make sure that all appropriate actions have been taken and hopefully none forgotten, and enable practitioners to keep up with the ever evolving practices and procedures in the field and to participate in and conduct the most efficient arbitration procedures. These tools are meant to facilitate the work of practitioners and spare them the effort of "reinventing the wheel", with the ultimate goal of saving time and costs. Using these instruments does not mean that practitioners lack knowledge or experience, but shows that recommendations by peers may be useful even if practitioners have their own way of doing things. Overall, they contribute to making arbitration universal.

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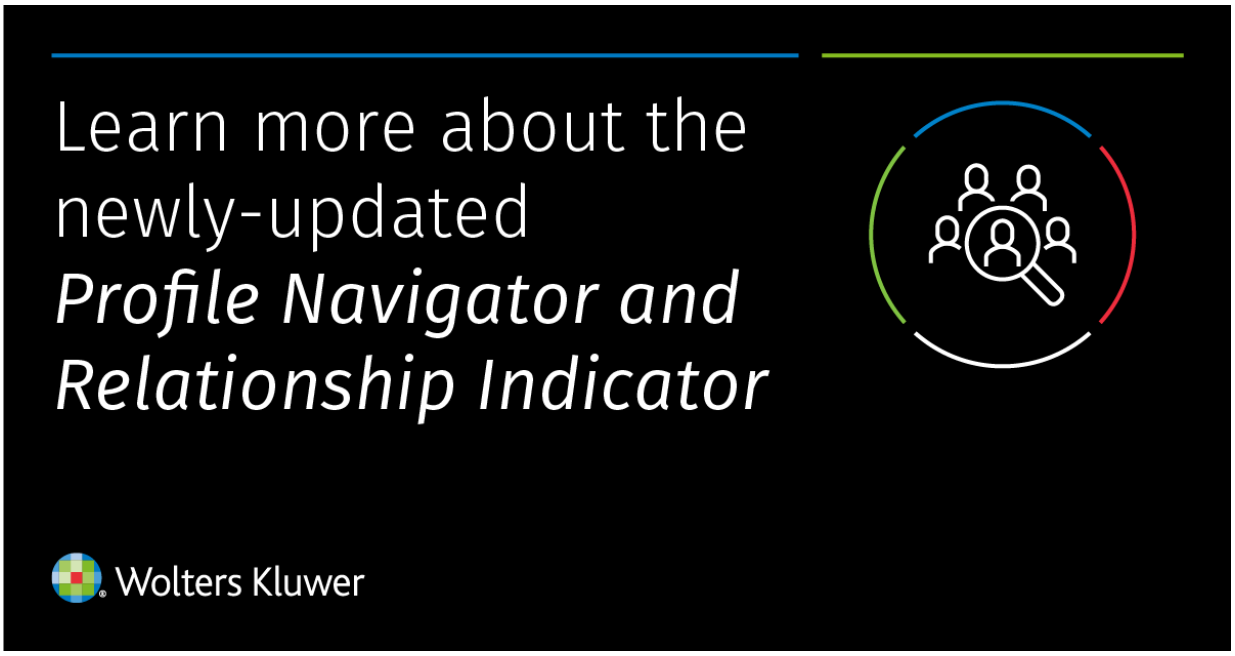

This entry was posted on Thursday, January 16th, 2014 at 11:53 am and is filed under Arbitration clause, Best practices, Conflicts of interest, Evidence, IBA Guidelines on Conflicts of Interest, IBA Rules of Evidence, ICC Arbitration, International arbitration
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