

Kluwer Arbitration Blog

Negotiation in International Arbitration: Call for Papers

Michael McIlwrath (MDisputes) · Wednesday, May 7th, 2014



Praying you'll get a good tribunal?

Critical negotiation moments punctuate the entire timeline of an international arbitration, from before it starts to even after it is over. And when these moments arise, a practitioner's ability to negotiate effectively can sometimes be as important as their mastery of the subject matter.

After all, what use is technical skill if you cannot deploy it to obtain good results?

Instances where practitioners must draw on their negotiation skills in international arbitration include:

Counsel selection and fees: when a dispute first arises, parties may negotiate with counsel who might handle the arbitration, over fee arrangements or the strategy to be pursued.

Arbitral appointments: in getting an arbitration up and running, parties typically negotiate with each other and co-arbitrators over the nomination of a sole arbitrator or chair.

Timetable and procedure: the arbitral tribunal will usually prefer agreement with the parties on procedural orders, timetables, evidentiary matters, and so on.

Settlement: parties may attempt at various times during the arbitration to resolve their dispute, and in some arbitral cultures their efforts may be actively facilitated by the tribunal. And once proceedings are concluded, the parties may negotiate with each other in order avoid doubts about the quality of the arbitral award or uncertainties with the legal regime at the place of arbitration or enforcement.

Yet despite the practical importance of negotiation in international arbitration, it is rarely given much attention in the literature as a subject in its own right. This may be due to the fact that a party's negotiating ability (or lack thereof) is unlikely to be reflected in published court decisions or the few arbitral awards that are publicly available.

Fortunately, an upcoming special issue of Transnational Dispute Management (TDM) is dedicated

to this ambitious topic. It is titled *Commercial Dispute Resolution: The Field of Negotiation* (<https://www.transnational-dispute-management.com/news.asp?key=515>). The editors are Prof. Heba Hazzaa (Cairo University), my colleague here in Italy, Kai-Uwe Karl (GE Oil & Gas), Abhijit Mukhopadhyay (Hinduja Group in India), and Prof. Michael Wheeler (Harvard Business School). These co-editors know more than a little about their subject matter.

In his latest book, *The Art of Negotiation: How to Improvise Agreement in a Chaotic World* (Simon & Schuster 2013), Prof. Wheeler reveals much of what he has learned from observing some of the world's most successful negotiators over the past four decades. One thing that distinguishes them is that they are not afraid of uncertainty, as they have the agility to adapt to new circumstances as they arise.

It is not difficult to draw a connection with international arbitration.

Take, for example, the negotiation over the nomination of an arbitral chair. When parties initiate an international arbitration, the identity of this critical person may be the most significant uncertainty in the case. Parties will not know the country in which the prospective chair resides, their nationality, their familiarity with the subject matter, their experience in similar cases, etc.

One way to approach this appointment – perhaps the most common way – is to prioritise the avoidance of these uncertainties at any cost, even if it means accepting a candidate who is “least-worst” rather than how closely they match an ideal chair. This avoids any uncertainty over an appointment that is left instead to an arbitration institution or other designated authority under the applicable rules.

Such an approach may ensure against disaster in the selection process. But as a negotiation objective this is setting the bar at the lowest possible rung.

A more ambitious negotiator may view a chair's basic competency as merely the starting point in any discussion of nominees, not the overall objective. They may aim higher, for a chair who is also likely to conduct the arbitration in a manner consistent with their expectations, for example as to procedure, or they may seek someone particularly experienced in the subject matter of the dispute.

The same party may be less concerned about the consequences of failing to reach agreement with the other side if they view the appointment by the designated authority as a further process that can be optimised. They may expect that with an institutional appointment, they will have the chance to express their preferences, and that these will be at least partially satisfied in the appointment.

In other words, an ambitious negotiator may find that better results can be achieved – even in negotiations with the opposing party – if they are prepared to embrace uncertainty, in this case the possibility of an institutional appointment.

The upcoming issue of TDM presents an opportunity to shed light on the range of negotiation practices used in international arbitration, and their impact on both procedure and outcome.

To make sure you do not miss out on regular updates from the *Kluwer Arbitration Blog*, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

Profile Navigator and Relationship Indicator

Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*



 Wolters Kluwer

The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with a magnifying glass positioned over one of them, suggesting a search or analysis function. The text is arranged in a clean, modern layout, with the main title in a large, bold font and the company logo at the bottom left.

This entry was posted on Wednesday, May 7th, 2014 at 11:31 pm and is filed under [Appointment of arbitrators](#), [Arbitral Tribunal](#), [Arbitration Institutions and Rules](#), [Arbitration Proceedings](#), [Commercial Arbitration](#), [Corporate Counsel's view](#), [Counsel](#), [Uncategorized](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can skip to the end and leave a response. Pinging is currently not allowed.