

Kluwer Arbitration Blog

Conference report on Wendy Miles' keynote speech at the YAF/YAPP conference in Vienna (28 March 2015): "The Role of Young Arbitrators in the Rule of Law"

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This year, Wendy Miles delivered the keynote speech at the YAF/YAPP Annual Conference on the second day of the Vis Moot. Attuned to the audience, the speech began with a note of encouragement and ended on a counterpoint of responsibility: though the future belongs to the young arbitrators, they are entrusted with nothing less than the future of the rule of law.

Following a prelude that traced the origins of the rule of law, from the Magna Carta of 1215 to various human rights instruments adopted over the centuries, Miles explored how international arbitration has fostered and spread the rule of law.

Miles set the tone by quoting Lord Bingham's definition of the rule of law, which distinguishes between thin and thick understandings of the concept. According to Lord Bingham, the "thin" sense, refers to "*conduct that is in compliance with the letter of the law*". In this understanding, the rule of law is meant to lie at the heart of sustainable, long-term growth, protect private ownership, create an investment-friendly climate, and ultimately protect the orderly resolution of disputes. In this context, Miles cited Lord Bingham's observation that "*international arbitration, properly resorted to and fairly conducted has a supremely important contribution to make to the rule of law*". As such, through arbitration the rule of law can spread from the prominent arbitral seats like London, New York, Hong Kong, Singapore, Paris and Vienna to emerging markets in Africa, Asia, and Latin America, whose importance in international arbitration is currently increasing.

The limits of the "thin" sense of the rule of law can be seen in countries where irregularities are cloaked in an appearance of legality, and where the rule of law is observed superficially but not in substance. For these situations, Lord Bingham and Miles turn to the "thick" sense of the rule of law, that is the content of the rule of law as well as the machinery used to administer it.

Following and taking into account recently expressed views from two other distinguished legal minds of our time, Lord Neuberger, the President of the UK Supreme Court, and Geoffrey Ma, the Chief Justice of the Hong Kong Court of Final Appeal, Miles reiterated that international arbitration is an example of the "machinery" needed to implement the rule of law. However, she warned that in order for arbitration to serve as an effective mechanism for administering the rule of

law, the arbitration community must be aware of its effects and must constantly strive to improve. As Lord Neuberger puts it, “*with increased freedom and power to resolve disputes through arbitration comes an increased responsibility*”. Miles took Lord Neuberger’s call one step further by insisting that arbitration be treated as a trustworthy and effective system of administering the rule of law, which must be nurtured and maintained.

Preserving such an effective system requires embracing the eight strands through which Lord Bingham defined the rule of law. Weaving these strands together, Miles presented their importance for international arbitration.

First, law must be “accessible, intelligible, clear and predictable”. Miles observed that this standard, applicable to both the merits and the procedure alike, raises a number of concerns in international arbitration. In the investor-State context, it triggers the criticism that the dispute resolution system lacks transparency. In the commercial arbitration setting, the differing results that arbitrators sometimes reach by interpreting the same rules may lead to a lack of predictability. Though it can provide the often-praised and sought-after flexible nature of arbitration, practitioners must be aware that it can also be seen to undermine the rule of law. According to Miles, young arbitrators must rise to the challenge to explain the system to those who do not know it, preserve its integrity by abiding by the law, and to behave ethically at all times. Only in this manner can the rule of law be protected and fostered.

Second, “*questions of legal rights and liability should ordinarily be resolved by application of the law and not the exercise of discretion.*” Miles recalls that in some cases arbitrators have the authority to resolve disputes *ex aequo et bono* and as *amiable compositeurs*, which under the second strand may perhaps become questionable.

The third strand refers to the application of the law to all subjects alike, save where “*differences justify differentiation*”. Miles notes that the standard becomes questionable where foreign investors are given preferential treatment over local investors. While the difference of treatment and ISDS generally are currently on the agenda of public debates, if the system is not properly explained and understood, it may be wholly undermined, potentially affecting commercial arbitration as well.

Fourth, the law should protect human rights. Human rights issues arise not infrequently in arbitration, although they are not necessarily associated with this legal field. For example, the debate on climate change, in a broader human rights context, presents an opportunity for young arbitrators who can explain the role of, and “*clear the name*” of, ISDS where it has been damaged.

The fifth rule of law strand is that the law should provide means to resolve “*without prohibitive cost of inordinate delay*” bona fide disputes that the parties cannot themselves resolve. Miles referred in this context to the issue of costs, a delicate issue in international and frequently complex disputes. Noting the efforts that ICC made by issuing the “Report on Techniques for Controlling Time and Costs in Arbitration”, Miles concludes that the ultimate responsibility for costs rests on the counsel. Young lawyers are urged to focus on cost effective and efficient service to serve the purpose of the rule of law.

For the last three strands, which respectively concern the role of the State, the conduct of State officials, and the courts, Miles stressed that the rule of law depends on States complying with their international obligations. In consequence, public officials must exercise their powers within the bounds of their authority and for the purpose they were given. Finally, adjudication must be fair

and accessible to the public. These will be important values for today's young arbitrators to remember when they are eventually called on to advise States or perhaps become government officials themselves over the course of their careers.

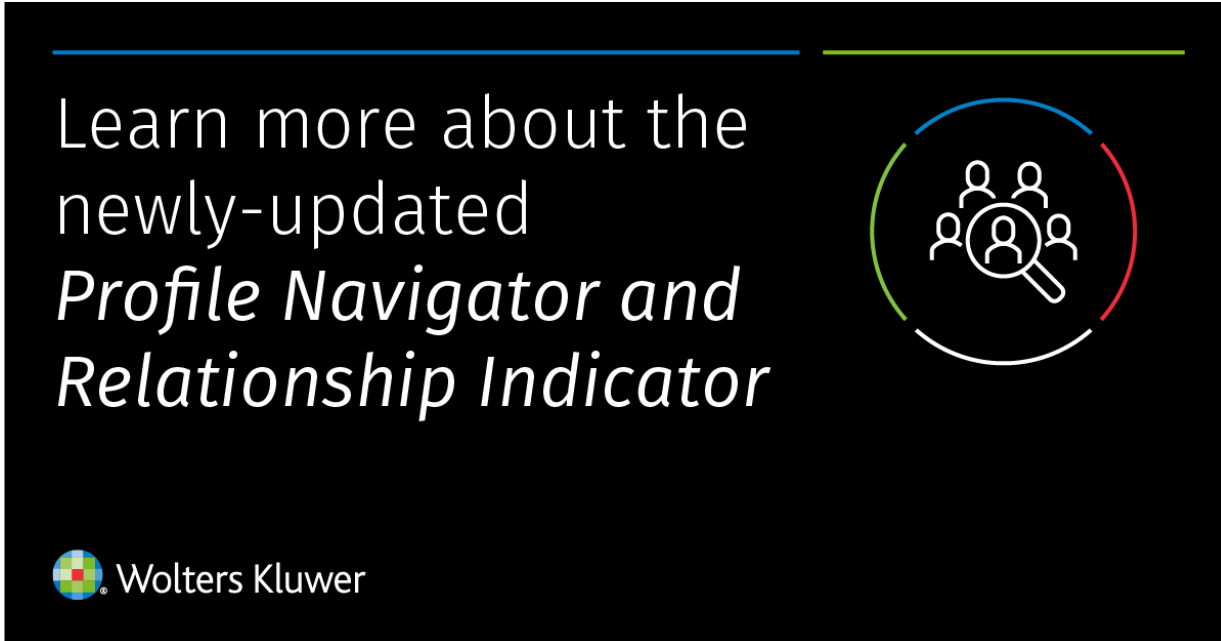
For the finale, Miles recalled the inspiring words of Lord Bingham, who insisted that we lawyers “*who, in any capacity, devote our professional lives to the service of law*” are not “*mere custodians*” of the legal order but are instead “*guardians of an all but sacred flame which animates and enlightens the society in which we live.*” Miles thus reminded us all – young and old – to serve our clients loyally while never forgetting that we are called to a greater purpose: serving the “Rule of Law”.

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