Kluwer Arbitration Blog

What if the Ghost of Christmas Present Visited the International Arbitration Community of 1995?

Catherine A. Rogers (Arbitrator Intelligence) · Saturday, December 26th, 2015 · Arbitrator Intelligence

As we settle in to enjoy the delights of the season and mark the end of another calendar year, we might ponder: What if Charles Dickins' Ghost of Christmas Present went back to visit the international arbitration practitioners of 1995? The specter's account of international arbitration today would certainly be unbelievable to our professional predecessors and our younger selves. Like Scrooge, they might give a "Bah, Humbug!" and dismiss the apparition as the result of too much eggnog.

For us here actually at Christmas 2015, the current state of international arbitration seems to be the result of a natural evolution in the system, nudged along by global social, economic, political and technological developments that we have lived through, and so also seem natural. Words like "transparency" and "accountability" today seem like obvious requirements for a process and important and delicate as arbitrator selection. In 1995, these terms were anathemas.

Back in 1995, the only controls that existed for arbitrator conduct were ethereal, value-laden terms like "justifiable doubts," "independence," and "impartiality." These terms existed more like beautiful apparitions than as clear indicators of the conduct expected of and undertaken by arbitrators. Everyone professed to know exactly what those terms meant, but that agreement evaporated of how they actually applied to particular facts. Like beauty, "impartiality" was in the eye of the beholder. And in 1995, as a practical matter, arbitrators were often the only beholders.

At the commencement of arbitral proceedings, arbitrators decided whether a particular matter needed to be disclosed, most often subject only to their own consciences and the very limited risk of detection. Meanwhile, arbitrators were asked to perform this exercise in discretion at exactly the moment when they had a personal incentive not to disclose a potential conflict lest it might disqualify them from that appointment. Arbitrator disclosure presented a conflict within a conflict.

At a more menacing level, obscure terms like "justifiable doubts" and "impartiality" were kissing cousins of another less appealing term – "plausible deniability." Wayward arbitrators who failed to make a required disclosure could chalk up even a seemingly embarrassing episode to differing understandings about exactly how those nebulous phrases translated into requirements for disclosure of specific facts.

True, arbitral institutions and later national courts are supposed to oversee arbitrators' decisions regarding their own impartiality. But their ability to provide meaningful oversight was limited and

could only be exercised when arbitrators voluntarily disclosed or, in the unlikely event that undisclosed information became known. Because arbitration cases are confidential and information about arbitrators was treated as proprietary, this oversight translated into only rare second guessing of arbitrators' decisions on these delicate issues.

Meanwhile, if arbitrators were unprepared for hearings, too partisan in their case management, or took too long to render an award, their transgressions would be known only to those few participants in that particular case. Some lucky friends or colleagues might also benefit from that information in response to pre-appointment inquiries about those arbitrators in future cases. But otherwise, the specifics of an arbitrator's track record were largely obscured from all who were not lucky friends and colleagues.

Now fast-forward from that scene in 1995 to December 2015. In the intervening years, the arbitration community has developed an entirely new set of expectations about arbitrator conduct. These new expectations are identified in a number of sources, most notably in the recent Queen Mary-White & Case Surveys. For example, in 2010, 75% of responding corporate users indicated a desire to give feedback at the end of cases, and 76% indicated an interest in clearer information about arbitrators' availability. By 2015, signals of an increasing appetite for more information about arbitrators had turned ravenous. When the 2015 Survey asked respondents what institutions could do to improve international arbitration, the prevailing theme was "provide more information about arbitrator performance and increase transparency about institutional decisionmaking in relation to arbitrator appointments and challenges."

These new expectations have already ushered in a whole slew of reforms. Back in 2004, the IBA unveiled the first set of IBA Guidelines, which recalibrated arbitrator disclosure obligations to decrease arbitrator discretion and increase transparency in the disclosure and challenge process. They accomplished this aim by converting the *qualitative* eye-of-the-beholder categories, like "impartiality" and "justifiable doubts" into *quantitative* fact-based categories, such as the number of prior appointments made by a party or law firm in the last two years.

Like a snowball racing down a steep hill, after the IBA Guidelines started rolling, momentum for transparency and accountability gained increased speed, size, and ambition. In 2010, the ICC expanded its Statement of Independence for arbitrators, requiring both greater detail about potential conflicts and their availability. Also in 2010, the Centre for Sports Arbitration revised its rules to preclude arbitrators from also serving as counsel. Then, in 2011 the LCIA published abstracts of LCIA decisions on arbitrator challenges. These abstracts provided greater guidance about which types of challenges were successful, and prompted some other institutions to do the same.

More recently, 2015 witnessed a number of regional jurisdictions and institutions adding to the seeming avalanche of reforms. In Europe, the Commercial Arbitration Centre of Lisbon – Portugal (CAC) published its newly implemented "Criteria for the appointment of arbitrators by the Centre." The ICC announced that it would finally provide parties with reasons for its challenge decisions. In Asia, the HKIAC introduced feedback forms, which ask participants to evaluate both the institution's performance in various categories and several aspects of the arbitral tribunal's management of the case. Also in Asia, India's new Arbitration and Conciliation Ordinance imposes a 12-month deadline after the arbitrators' appointment for rendering an award, failing which a court may replace an arbitrator or order a reduction in fees. The Ordinance not only provides for additional fees if arbitrators render the award within six months of appointment but

also lists circumstances likely to give rise to “justifiable doubts.”

Meanwhile, these same topics have gone from being an occasional curiosity to a constant theme in social media, regular media, the seemingly limitless number of international arbitration conferences, and even academic research. For instance, innumerable OGEMID listserve emails include subject headings such as “Getting arbitrators to render timely awards.” LinkedIn discussions now feature animated memes that focus on arbitrator conduct and timeliness. In a much lauded keynote at a Hong Kong conference, IBA President David Rivkin made headlines by calling for a “new contract” to clarify arbitrator duties, and at the IBA annual conference in Vienna its Arbitration Committee proposed creation of a “name and shame” initiative to publish data about how long arbitrators take to render their final decisions.

While our 1995 predecessors would be dazed if these developments were recounted to them by our 2015 Ghost of Christmas Present, international arbitration practitioners in the Present would not be – or at least should not be – similarly dazed if a Ghost of Christmas Yet to Come were to visit us from 2035 to tell us about developments ahead in our future.

We already know about the snowballing reforms to arbitrator selection described above. We also know that data analytics are increasingly helping attorneys refine their case strategies, and machine learning technology is redefining how legal research is conducted and applied to legal briefing. We know, still further, that the number and diversity of parties and counsel are climbing at a seemingly inexorable pace – just look at the nationalities of parties from outside of North America and Europe that rank among most populous in ICC and other institutions’ cases (think Brazil, Korea). Punctuating the increased presence of newcomers, an astonishing array of jurisdictions are opening new arbitration centers and hosting an unending flurry of arbitration conferences, symposia, and “Arbitration Days.” Finally, we know that the arrival of third-party funders is putting an increased focus on timing and costs, as well as predictability, in arbitrator decision-making.

We don’t need an oracle to tell us that these developments portend changes in international arbitration’s future. To survive and thrive, international arbitration will simply have to facilitate more systematic access to precious, but today largely proprietary, information about arbitrators and their track records. This information is needed to transform arbitrator selection from an intuition-based guessing game (in which insiders hold privileged starting positions) into a more predictable game played on a more level field. Systematically accessible information about arbitrators is also needed to facilitate market-based arbitrator accountability and to provide opportunities for newer arbitrators to establish themselves.

To address these needs, one character that will hopefully be taking a place more center stage in the future of international arbitration is that still-fledgling start-up known as Arbitrator Intelligence. By creating an international clearinghouse of information about arbitrators that employs the latest informational tools and technologies, *Arbitrator Intelligence* aspires to address the new expectations and contribute to a prosperous future for international arbitration in the years to come. And so in closing, to paraphrase the final words of the enlightened Scrooge at the end of Dickins’ novel, “A merry Christmas to every-body in the international arbitration community! A happy New Year to all the world! Hallo here! Whoop! Hallo!”

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.

This entry was posted on Saturday, December 26th, 2015 at 12:05 am and is filed under Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.