Kluwer Arbitration Blog

Let Us Settle the Liability Issue: Can Civil Liability Restore the Legitimacy of Arbitration?

Barbara Warwas (The Hague University) · Wednesday, November 2nd, 2016

Liability in international arbitration is a recurrent yet unsettled issue. Occasionally, we hear of a fearless party that dares to sue an arbitrator and/or an arbitral institution based on allegations of a conflict of interest, procedural irregularity, error of law, or a failure to oversee the good conduct of the arbitration proceedings. The discussions prompted by such cases, although praiseworthy, are often emotive and hardly ever generate concrete proposals regarding the accurate scope of arbitral liability. Moreover, the debates abate as the emotions regarding the liability claim fade away.

Concurrently, and increasingly often, we also hear of problems concerning legitimacy in international arbitration itself. These problems regard both international commercial arbitration and investor-State arbitration. For example, consider the emerging dissatisfaction of commercial arbitration users with the costs and speed of arbitration. Or, consider the recent wave of criticism of investor-State arbitration (especially in the context of the Transatlantic Trade and Investment Partnership or Comprehensive Economic and Trade Agreement) as evading public norms of justice, lacking procedural safeguards, and favoring big businesses.

Are the incidental discussions on civil liability and the legitimacy of arbitration—a subject receiving increasingly broad review—interrelated in any way? I believe they are, especially as arbitral institutions are concerned.

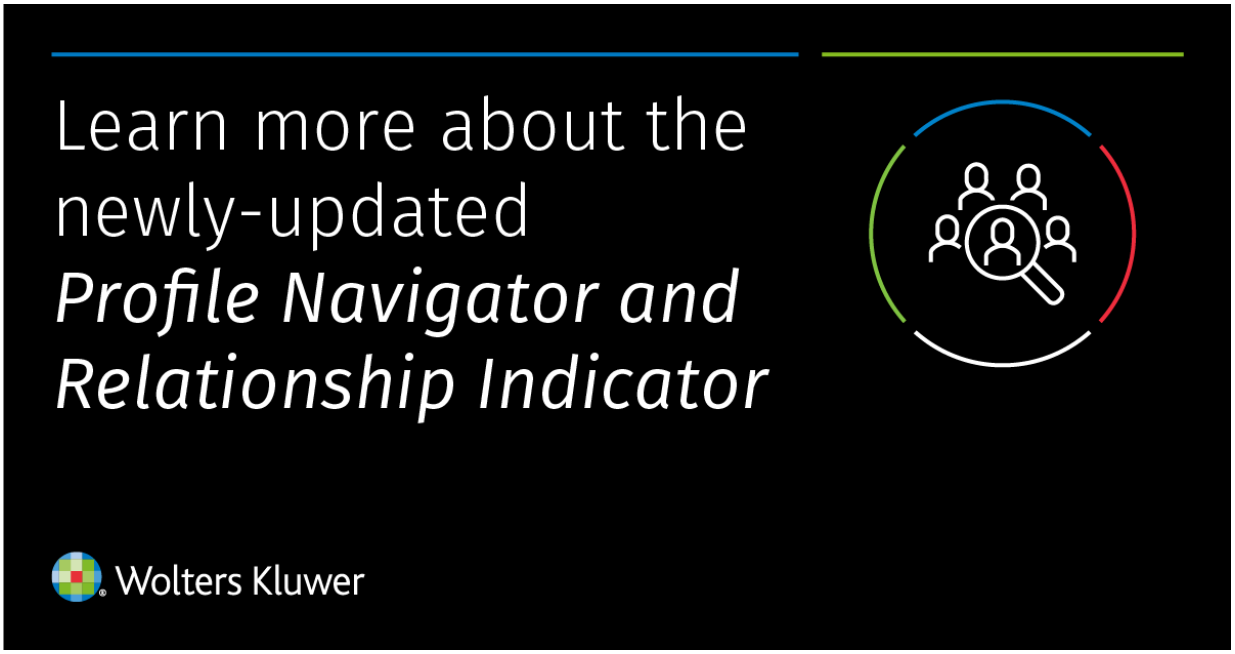
Arbitral institutions have recently emerged as powerful actors with new functions. Historically, private arbitral institutions served mostly **commercial functions**. Increasingly, private arbitral institutions have not only been restricting the principle of party autonomy in commercial arbitration proceedings, but they have also been actively involved in processes that can be characterized as the privatization of civil justice. This emerging **public function** of arbitral institutions has been aided by public officials (most recently the European Commission) who are pushing for arbitration in the context of investment disputes as well as in regulatory disputes in the consumer, energy, or telecommunications sectors within the European Union's internal market. This increasing public function demonstrates that officials presume that arbitration (particularly in its institutional variant) is legitimate and efficient, regardless of the public criticism of arbitration. Paradoxically, at the same time, commercial arbitration users are beginning to openly argue that (institutional) arbitration lacks the legitimacy, efficiency and flexibility.

In my recent book on The Liability of Arbitral Institutions: Legitimacy Challenges and Functional Responses, I address the problem of legitimacy and arbitral liability. The world of arbitration is

transforming rapidly. The basic premise behind my book is that the arbitration community has to deal with these challenges quickly and forthrightly before other (public) actors impose changes upon them. I argue that civil liability could be used as a private, contract law tool to increase the legitimacy of international arbitration. I propose to shift the focus of the debate regarding liability from arbitrators into arbitral institutions. Arbitral institutions could, and should, eventually become proactive and reform the scope of their liability from the bottom, by means of the changes to arbitration rules under which **civil liability should be a norm**. The intention is to formulate a proactive approach for responding to the emerging problems facing international arbitration with the aim of eventually increasing the legitimacy of the process.

How could civil liability address the abovementioned legitimacy concerns which appear to be only increasing in intensity and scope? Because of the formalization of (institutional) arbitration and the growing popularity of other alternative (yet non-binding and more flexible) dispute resolution means such as mediation, I argue in my book that the introduction of civil liability into institutional arbitration rules may in fact be the only device left to restore the legitimacy of arbitration. From the perspective of traditional, commercial arbitration users and contract law, the inclusion of liability clauses into institutional contracts could signal the willingness of arbitral institutions to finally assume liability for their essential contractual obligations (just as all other sophisticated contractors do). From the perspective of publicly oriented disputes, arbitral institutions could eventually silence the opponents of investor-State arbitration as civil liability for negligent performance of institutional contracts could be seen as increasing the accountability of arbitral institutions to parties and the public.

“What time is it when an elephant sits on a fence? It’s time to fix the fence!” The time has come for arbitral institutions to take proactive decisions to fix their own regulations of liability. This could minimize the current confusion by arbitration users regarding the scope and nature of institutional arbitral liability, restore the societal aspect of arbitration proceedings by rebuilding the confidence of arbitration users in arbitration, and finally, increase the public accountability of institutional arbitration. For a more detailed discussion, including concrete institutional rules and recommendations, I kindly refer you to my recent book.



This entry was posted on Wednesday, November 2nd, 2016 at 5:49 am and is filed under Arbitration, Arbitration institution, Liability
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.