Kluwer Arbitration Blog

How Much (More) Transparency Does Commercial Arbitration Really Need?

Victoria Pernt (Schoenherr) · Saturday, March 4th, 2017 · Schoenherr

The tug-of-war between transparency and confidentiality was a subject of lively discussions at the ***2017 Vienna Arbitration Days***.

Vienna Arbitration Days is Austria's leading arbitration conference. Every year, it brings together arbitration practitioners and academics from around the world to discuss ADR developments. The presentations and panel discussions are followed by the "World Café", which offers the conference participants a forum to contribute their own views. The participants rotate between several tables; each table focused on a different topic. Table moderators and secretaries invite young practitioners and silverbacks alike to offer their opinions, covering a wide range of perspectives.

For its 10th anniversary, the 2017 Vienna Arbitration Days asked whether arbitration needed repositioning. This contentious question centers on transparency, as it also addresses the criticism that arbitral proceedings, hearings, and decisions should be made public so as not to jeopardize the integrity of the justice system.

A panel of arbitration practitioners and in-house counsels opened the transparency discussion by introducing three categories of transparency:
(i) "Organizational Transparency" asking arbitral institutions to be more transparent in their case management and decision-making;
(ii) "Legal Transparency" asking for publication of arbitral decisions; and
(iii) "Transparency of Proceedings" asking for public proceedings and hearings.

The panel discussion soon revealed that arbitration users want to have their cake and eat it too. The in-house counsels confirmed that they choose arbitration for its (perceived) confidentiality, and oppose more transparency. However, according to the 2015 Queen Mary survey, arbitration users' suggestions for improving arbitration all require more transparency. It appears that, despite acknowledging the benefits of transparency, parties remain reluctant to air their own dirty laundry in public.

I had the opportunity to follow up on that discussion with the World Café participants as secretary of the Transparency table, moderated by Iain Quirk.

Our table's discussion revealed that these two objectives – transparency and confidentiality – are not necessarily mutually exclusive. They could and should coexist. In our efforts to pin down just

how much (more) transparency commercial arbitration really needs, the final answer was: actually, not much (more).

How did we reach that conclusion? Analyzing organizational transparency, legal transparency, and transparency of proceedings individually, the World Café participants noted that promising efforts to render commercial arbitration more transparent are already underway. These would offer the desired benefits of transparency without sacrificing confidentiality.

For instance, the amended Article 11(4) of the ICC Rules now addresses the demand for **more Organizational Transparency**. It allows the ICC Court to provide reasons for its decisions in certain matters (e.g. appointment, removal, challenge, or replacement of an arbitrator). Since June 2016, the ICC has also been publishing the names of arbitrators serving in ICC administered cases.

Institutions have also sought to achieve **more Legal Transparency**. An important example is the opt-out provision of Article 41 of the Rules of Arbitration and Conciliation of VIAC (Vienna Rules), which permits the VIAC to publish anonymized summaries or extracts of awards, unless the parties object. The VIAC published a selection of 60 awards. In the VIAC's words, this was "one first step" in its endeavor to "draw back the curtains and thereby provide greater insight into the work of the institution as well as that of arbitral tribunals appointed under its auspices".

The World Café participants, regardless of their level of experience, identified Legal Transparency as crucial for the arbitration community. Students and young associates seek a comprehensive body of law to learn from. Experienced practitioners rely on case law to formulate arguments and discern trends in jurisprudence. Arbitrators appreciate guidance by an established body of law; which certainly also fosters legal certainty and predictability.

Thus, there already are efforts for more transparency in commercial arbitration, to the extent beneficial.

The World Café participants, however, recognized a **lesser need for Transparency of Proceedings** in commercial arbitration. This, because the benefits of transparency must be weighed against parties' legitimate interest in having their disputes heard in swift and confidential proceedings. A market need that commercial arbitration does and should fill.

In this context, the World Café participants considered an endeavor to transport the UNCITRAL Rules on Transparency to commercial arbitration to be overreaching.

The UNCITRAL Rules apply to treaty-based investor-state arbitrations. These arbitrations affect public funds and interests, such as environmental protection. The UNCITRAL Rules provide that the public should learn about such disputes already upon their initiation. This also permits third parties, such as NGOs, to contribute to the proceedings.

While a line may be hard to draw, commercial arbitrations typically do not involve public funds or interests that justify involving the public early on. Moreover, commercial parties opt for arbitration precisely because they wish to protect their business and trade secrets, and to conceal pending disputes from competitors.

Thus, taking into account the parties' legitimate choice to resolve their private disputes in confidential proceedings, most World Café participants opposed more Transparency of Proceedings. They found ex post publication and scrutiny to satisfy the request for transparency,

and to protect the public's legitimate interests.

Most World Café participants thus welcomed the efforts towards transparency that are underway, but denied the need for (much) more transparency in commercial arbitration.

It can therefore be concluded that transparency efforts in commercial arbitration, although welcome, should know their metes and bounds. If commercial arbitration introduces mandatory transparency of proceedings comparable to the UNCITRAL regime, parties may opt to resolve their disputes in mediation or State courts instead. Transparency concerns thus should be properly tended to, albeit without sacrificing one key selling point of commercial arbitration: confidential proceedings.

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, March 4th, 2017 at 6:29 am and is filed under Arbitration, Austria, Transparency
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.