Kluwer Arbitration Blog

ICCA Sydney: The Increasing Participation of Public Entities in International Arbitration

Mitchell Dearness (Herbert Smith Freehills) · Thursday, April 19th, 2018 · Young ICCA

On the second day of the ICCA Sydney 2018 Congress, two separate panels considered 'Arbitrations Involving Public Bodies and Public Interest Salient Issues'. The first panel, moderated by *Professor Stavros Brekoulakis (Queen Mary University of London)* focused on 'the Increasing Participation of Public Entities in International Arbitration.' The panel comprised of *Marie Talašová (Government of the Czech Republic), Paolo Di Rosa (Arnold & Porter), Reza Mohtashami QC (Freshfields Bruckhaus Derringer)* and *Adriana Braghetta (L.O Baptista Advogados)*. Each panellist brought a different perspective to the table.

Experience of counsel engaged by states

Paolo Di Rosa considered the position of counsel engaged by states, noting some challenges often encountered. The expectations of states and more specifically individual representatives of states can differ to those of private clients. Often observed is an increased fear of decision-making scrutiny with regard to the conduct of a dispute and a greater reluctance to consider settlement options and the expectations of the public. Counsel might often face challenges in the context of document production and locating responsive documents – government agencies often change, merge or move to different locations. Di Rosa also raised some key considerations with respect to the type of fact witnesses engaged by states. Commonly these witnesses are former state officials who may have very little incentive or indeed might have a disincentive to participate in the arbitration. The experience of counsel may of course differ depending on the particular state and the nature of the entity being represented. For example, representing a State Owned Entity (SOE) is likely to be different from representing the state itself although, as noted by Di Rosa, this is likely to depend upon the degree of control the particular state has in the SOE's operations and decision-making within the SOE.

Expectations of the state

Marie Talašová shared the perspective of 'the State' drawing from a wealth of experience negotiating investment treaties on behalf of the Czech Republic. From the state's perspective the difference between private commercial arbitration and public investment arbitration may not be so great. This is because both types of arbitrations often involve the same economic transactions and could be related to the measures taken by states. Furthermore, the public interest implications (including expenditure of tax payer money) are usually central to both types of arbitration proceedings. Talašová's paper (which has been co-authored with Jaroslav Kudrna) will, once

formally published in the ICCA Congress Series No. 20 publication, provide an interesting case study on the ramifications of commercial and investment arbitrations on Central European states.

Issues encountered by private parties

Reza Mohtashami QC commented from the perspective of private parties engaged in arbitration proceedings against states. Mohtashami examined some key jurisdictional and practical challenges which arise uniquely in the public-private arbitration process. One such obstacle often encountered is jurisdictional challenges in the context of commercial arbitrations launched by states. Commonly these challenges are based on certain aspects of the state's internal domestic law. By way of example, Mohtashami refers to Article 139 of the Iranian Constitution, which makes the submission to arbitration of disputes involving state property conditional upon the approval of the Council of Ministers and notification to Parliament. Such objections rarely succeed often due to what is considered to be a 'substantive rule of arbitration' although it is always important for non-state parties to consider carefully the seat of the arbitration to limit the prospect of such a challenge succeeding.

Insights from Latin America

Adriana Braghetta provided an insight from Latin America, which is of particular relevance given forecasted infrastructure development and associated public-private partnerships in the impact the region. Braghetta noted that local arbitration laws with Latin American states can differ, some are more pro-arbitration than others. Nevertheless, it can be observed that some domestic laws do in some instances impose conditions on arbitration which impact the conduct of arbitrations between states and private parties. Some conditions which arise within Latin American states include the need for the relevant arbitration institution to be registered as a public entity in the jurisdiction, restrictions on the language, place and applicable law of the arbitration and the liability for costs incurred in the arbitration.

Key takeaway

There will almost always be a tension between the interests of states and private parties with regard to the manner in which public-private and investor-state arbitrations ought to be conducted. As the panel has noted there can however be some divergence between the expectations of different states. Not every state is the same. It is however necessary for counsel for both states and private-parties to be alive to these expectations and also the types of legal issues which have a proven track-record of materialising in these types of proceedings.

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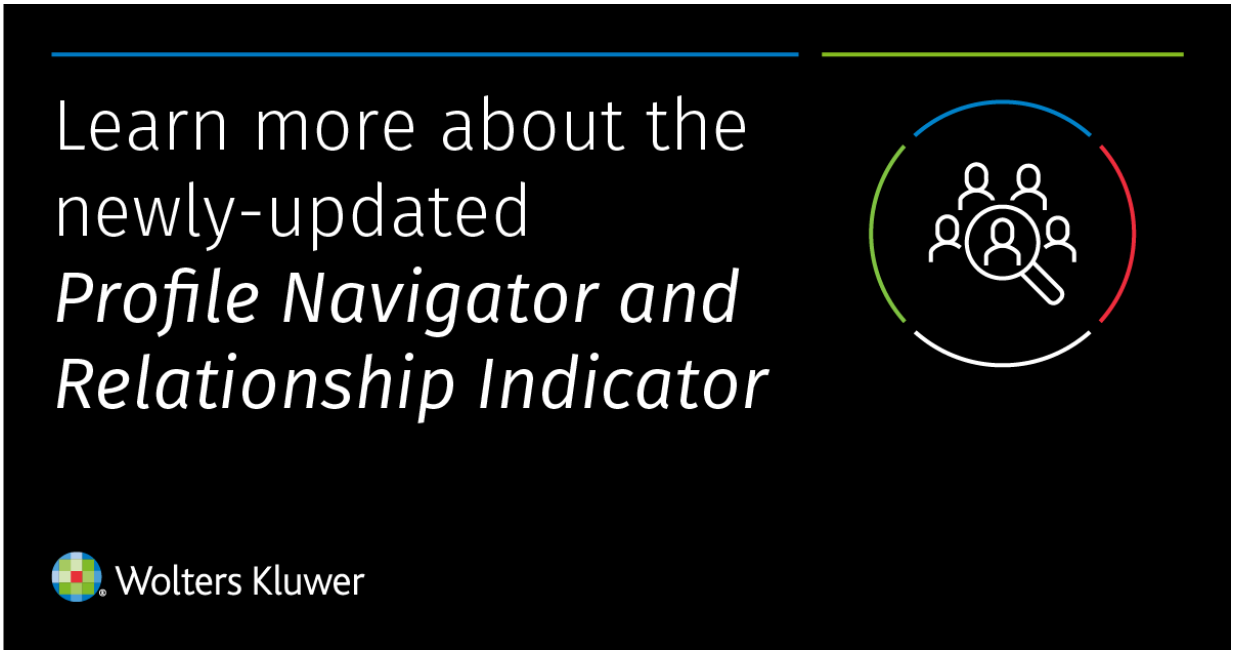

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