Kluwer Arbitration Blog

Experience, Transparency and Diversity in the Formation of Arbitral Tribunals: How to Effectively Implement it?

Amanda Bueno Dantas (Nanni Advogados) · Saturday, December 22nd, 2018 · Young ITA

The Young ITA, Arbitrator Intelligence and Pinheiro Neto Advogados joined forces to promote an edition of #YOUNGITATALKS São Paulo during the São Paulo Arbitration Week ("SPAW") on October 24, 2018 at Pinheiro Neto Advogados' head office.

Júlio Bueno, of Pinheiro Neto Advogados, Thiago Zanelato, of Pinheiro Neto Advogados and ambassador of Arbitrator intelligence – Latam Campaign, and Pedro Guilhardi, of Nanni Advogados in São Paulo and Young ITA Regional Chair for Brazil, were in charge of the opening remarks. Júlio Bueno started by drawing attention to one of the key issues of the event: diversity, while Thiago Zanelato introduced Arbitrator Intelligence's role in Latin America and Pedro Guilhardi explained the context of the event and Young ITA's goal to spread the study arbitration and networking among young practitioners around the globe. Marcela Kolbach, of Leste, Maurício Pestilla Fabbri, of Cescon, Barrieu, Flesch & Barreto Advogados; and Gabriella Bianchini, of Sanders Phillips Grossman UK, were invited to discuss the challenges in the choices of arbitrators and how to balance experience, transparency and diversity in the nomination process and formation of the arbitral tribunal. Rafael Villar Gagliardi, of Demarest Advogados, was the moderator of the evening.

The panel did not take long to reach its first conclusions on the importance and benefits of diversity in arbitration. It was overall agreed that a diverse arbitral tribunal:

- tends to make better decisions on the merits because the combination of varied cultures and life experiences can give them different perspectives on the same issues;
- may provide different procedural solutions as to how to organise and optimize the conduction of the procedure, enhancing arbitration's flexibility by pushing aside an already existing common-sense as to how the proceedings should develop.

One of the highlighted issues of the debate on diversity was the role of counsels to present to their clients different and more diverse alternatives of potential party-appointed arbitrators.

Júlio raised a discussion as to whether it is a challenge for counsels to explain to their clients the advantages of having a newcomer to serve as party-appointed arbitrator. He also agreed that the lack of diversity can affect the decision on the merits since arbitrators who are already used to working together and are acquainted with each other's views in a set of similar issues, generate a sense of predictability. A more diverse approach could create, in his view, a market where people can innovate in the awards.

It was said that law firms are often faced with clients that come up with an already set up mind as to who they want to be their party-appointed arbitrator when a dispute arises: be it either because of the reputation and/or experience of the arbitrator in the still very restrict arbitration market or because they have had a previous positive experience with a certain arbitrator that they wish to repeat (*in every single arbitration they engage*).

In such occasions, it seemed that all participants agreed that it is the counsel's duty to advise their clients that every dispute is different and has its own particularities. Marcela pointed out that the parties should take advantage of one of the main features of arbitration, which is the possibility of having the dispute resolved by a specialist.

Rafael suggested that perhaps persuading the client to appoint a different arbitrator on the grounds of promoting diversity may not be the best approach: a good alternative would be enlightening the client of another qualified professionals on the market, explaining that sometimes the most renowned arbitrator – without any disregard to his or hers credentials – may not be an expert on the merits nor have the best profile to the case the client wants to argue in that specific dispute.

Sometimes when lawyers approach clients with new names to serve as party-appointed arbitrators on the argument of diversity they lose an opportunity to promote diversity because parties do not always have that mindset. Gabriella agreed and reminded that usually clients are not specialists in arbitration, and that is exactly where counsels' duty to educate them that diversity can be an important feature to the arbitral panel comes in. Rafael questioned Marcela if the third-party funder has any kind of influence in the appointment of arbitrators by the funded party. Marcela explained that usually the funder does not intervene in this aspect of the case, even though parties frequently ask the funder's opinion before appointing an arbitrator given its experience with the most demanded professionals in the field and potential risks of conflicts of interest.

The audience stepped in again to inquire the panellists weather including diversity criteria for appointing arbitrators in the arbitration clause rather than leaving the decision for the moment of the constitution of the arbitral tribunal could aid promoting diversity. Marcela responded that such cause would need to be carefully drafted not to be too restrictive and potentially backfire by

affecting parties' right to appoint the most adequate arbitrator to each dispute. Maurício pointed out that drafting such clause could be a challenge since parties more frequently than not resort to midnight clauses, meaning that issues such as diversity are not taken into consideration at the moment of execution of the arbitration agreement.

The audience pointed out that there are arbitration chambers in the United States of America, such as JAMS (Judicial Arbitration and Mediation Services), that provide standard clauses to help parties keep in mind the need for diversity in appointing arbitrators without setting a very strict criterion. The JAMS Diversity and Inclusion Arbitration Clause, as it is called, provides that, whenever possible, the parties will consider a diverse panel considering gender, ethnicity and sexual orientation.

Other important topics were raised on diversity such a current problem of law firms in progressing women's career – affecting diversity in arbitration since law firms are the main source of arbitrators – and weather in-house diversity and inclusion policies of the clients can reflect in the appointment criteria to be considered.

Maurício concluded the discussion on diversity with a thought that could be taken as advice: law firms should set the example by allowing more women in positions of partnership. The same applies to other minorities. It is harder to explain to your client that there are diverse people that have the qualities to serve as an arbitrator if you do not have any example of that in your own team.

The discussion on experience was set by Marcela and Pedro, who pointed out two paradoxical aspects regarding arbitrator's experience:

- clients want (*and need*) to have a varied range of arbitrators with experience but are not willing to give a chance to new professionals to acquire the needed experience;
- younger arbitrators with less experiences are usually nominated as sole arbitrators, which prevents the exchange of experiences provided by a three-member tribunal where the arbitrators have the opportunity to learn from one another.

The debate then shifted to finding solutions to the issues at hand: how to bring younger arbitrators to the game? Meaning: how to make more experienced arbitrators aware of the younger generation since they are not frequently in their networking? Gabriella stated that events are often a good platform. The audience suggested that trainings or guidelines to be drafted by institutions could be a solution. Rafael mentioned initiatives such as ICDR Y&I, an organisation for international dispute resolution practitioners under 40 years-old. There are other important projects to promote arbitration among younger practitioners such as the Young ITA itself. It seemed that, although there are currently a few attempts to engage less experienced professionals in the arbitration

community, there is not a pre-set magical formula for making it happen.

The last topic of the event was transparency. The discussion was conducted under two different perspectives: commercial and investment arbitration. It was overall agreed that different standards were required depending upon the type of dispute. The panel concluded that transparency regarding appointment and formation of tribunals could be mitigated for purposes of assessing, to some extent, arbitrators' availability, keeping in mind that the number of cases alone is often not enough to determine if a professional is available to conduct another dispute. Publishing the awards requires extra-caution to prevent the case from being recognised and that there should be a limit to mitigate confidentiality.

The discussions held during #YOUNGITATALKS navigated through delicate but important topics for the development of arbitration, turning the event into a very welcome contribution to the SPAW.

This entry was posted on Saturday, December 22nd, 2018 at 6:10 am and is filed under Arbitrator Intelligence, Arbitrators, Counsel, Diversity
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