Kluwer Arbitration Blog

A Right of Appeal in International Arbitration: Second Bite of the Cherry: Sweet or Sour? BCLP international arbitration survey 2020

Carol Mulcahy (Bryan Cave Leighton Paisner LLP) · Tuesday, May 19th, 2020 · Bryan Cave Leighton Paisner LLP

Last week BCLP released the results of its annual International Arbitration survey on the topic of appeals against a tribunal's decision on the merits. Respondents to the survey comprised arbitrators, corporate counsel, external lawyers, litigation funders, academics and those working at arbitral institutions.

Procedures for court challenge of an award on the basis of procedural irregularity or jurisdictional error are widely available across jurisdictions. The ability to bring an appeal against a tribunal's decision on the substantive issues in dispute is not. The rules of major arbitral institutions generally exclude a right of appeal and, in most popular arbitration seats, national arbitration law provides no such recourse to the local courts.

The arguments for and against a right of appeal in international arbitration are well-rehearsed and have been the subject of much debate over the years. The time and costs involved in an appeal; the parties wish to 'opt-out' of national court jurisdiction and process; the precedent value of appellate court decisions; and the implications of a bad decision in 'bet the company cases' are just some of the factors that are thrown into the mix when the topic is discussed.

Despite these competing views, the traditional view in favour of finality has generally held sway with the exception of pockets of sector-based regimes such as GAFTA and FOSFA that have well-established and widely-used arbitration procedures providing or permitting appeals against an award.

However, there are signs that a more nuanced approach to the issue of appeals may be developing. For example, in Singapore the government is consulting on an amendment to the International Arbitration Act to allow for appeals on errors of law on an 'opt-in' basis. There also appears to be some appetite for internal appellate procedures such as those offered by CPR, JAMS, AAA and the SCA.

Against this background, our survey had two areas of focus. First, is a right of appeal against an arbitration award desirable? Secondly, is an internal right of appeal offered by an arbitral institution preferable to a right of appeal to a national court, and what features should such an internal appeal mechanism have?

The survey results were interesting. Half of all respondents had direct experience of what they regarded as being an 'obviously bad' decision. Despite this, the survey results confirm that many remain committed to finality. 71% of respondents said that a right of appeal would make international arbitration less attractive. 62% said that it would make the arbitration process too long, and 60% that it would make it too expensive.

However, on the other side of the debate, 51% felt that in some cases the consequences of an incorrect decision are so serious as to make the lack of an appeal mechanism unacceptable, and 47% felt that permitting appeals to national courts on the merits of a dispute may aid development of the law.

This range of views is consistent with traditional debate on the topic. What was perhaps more interesting in relation to possible future developments is that 48% of respondents said an internal right of appeal to a second tier tribunal organised by the arbitration institution would be preferable to a right of appeal to a national court. The survey asked questions about what are desirable characteristics of such an 'internal' appellate process – gateways to the right of appeal (for example a minimum value of award, or the award being produced by a sole arbitrator); the scope of the permitted appeal (law only or facts and law); deadlines for the appeal decision; and the extent of party input into the constitution of the tribunal. Respondents' answers to these questions reflected a wide range of views with the exception of that relating to the deadline for an appeal outcome. On that topic, respondents spoke with one voice. 88% said that the appeal decision should be made within six months from commencement of the appellate process.

Momentum for change in the appellate landscape is more likely to be driven through the introduction of internal appellate procedures into arbitration rules, than by reform of national arbitration laws. It will be interesting to see if more of the major arbitral institutions are prepared to introduce new measures in this direction. The availability of time-limited, well administered and carefully drafted appellate procedures may provide some middle ground for those on either side of the appeals debate.

The full report on the BCLP survey can be found at: https://www.bclplaw.com/images/content/1/8/v2/186066/BCLP-Annual-Arbitration-Survey-2020.pdf

---

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.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.

Learn more about the newly-updated *Profile Navigator and Relationship Indicator*

This entry was posted on Tuesday, May 19th, 2020 at 6:00 am and is filed under Appeal, Finality, International arbitration, Surveys
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.