Kluwer Arbitration Blog

Dealing with Public Policy Concerns and Due Process: The Rising Arbitrators Initiative Tackles a Thorny Issue

Rocío Digon (White & Case LLP), Ana Gerdau de Borja Mercereau (Derains & Gharavi), and Alexander G. Leventhal (Quinn Emanuel Urquhart & Sullivan, LLP) · Saturday, January 9th, 2021 · Rising Arbitrators Initiative (RAI)

On 1 October 2021, the Rising Arbitrators Initiative brought together an esteemed group of arbitration practitioners for the organization's inaugural event, which tackled due process concerns.

The event, which was divided into two sessions to allow participants to join from Asia, Australia, Europe, Africa, and the Americas, addressed substantive and procedural due process.

Substantive Due Process

The first session, which was kicked off with a keynote speech by Yves Derains, addressed substantive due process. In his keynote, **Yves Derains** started by distinguishing between three national concepts of public policy: (i) public policy within the applicable law (rules that the parties cannot contract out from); (ii) public policy as defined in private international law; and (iii) national mandatory rules defining their own scope of application. Parallel to the national concepts of public policy, Mr. Derains highlighted truly (transnational) international public policy rules, such as the prohibition of corruption, forced labour, etc. He then moved to the concept of applicable law in arbitration, which is more difficult because the arbitrator has no forum and thus no *lex fori*. Mr. Derains distinguished between situations where the parties have chosen the applicable law and those where, in the absence of choice by the parties, the arbitrator is free to determine the applicable law. According to Mr. Derains, the principle of *iura novit curia* is somewhat an "artificial concept" because it is not possible to say that a judge knows the law; rather, a judge has general knowledge of the law. Pursuant to this principle, when the parties do not prove the law, a judge can make his or her own inquiries about the law applying to the merits of the case. But an arbitrator is not in the same position as a national judge; hence, according to Mr. Derains, the principle of *iura novit curia* (*iura novit arbiter*) does not apply in arbitration in the same way it applies in national State court proceedings.

As a matter of principle, an arbitrator cannot refer to public policy rules not raised by the parties without submitting them first for comment by the parties, in light of the principle of due process. Where the parties have specified the applicable law but have contracted out of a certain public policy rule, arbitrators should think twice before raising this rule. This is because in arbitration the

parties are free to designate any law, including one that does not include this public policy rule. If the parties have not chosen the applicable law, Mr. Derains suggested that an arbitrator should not choose to apply a rule of public policy that would effectively nullify the parties' contract. Further, an arbitrator should only consider raising public policy rules other than those belonging to the applicable law, if the former could render the award unenforceable. Mr. Derains concluded that if an arbitrator wants to raise public policy rules *sua sponte*, he should seek comments from the parties on the same for due process reasons, bearing in mind that he is not the guardian of any legal system. According to him, arbitrators should raise public policy rules if there is a risk of non-enforcement of the award and if truly international public policy is at stake.

Paul Tan moderated a panel comprised of Dr Crina Baltag, Isabelle Michou, and Sara Koleilat-Aranjo. **Dr Crina Baltag** touched upon "due process paranoia". She cautioned against abuse of the rules of due process by a party to the detriment of the efficiency of proceedings, noting a decision of the Hong Kong Court of Appeal in *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd [2012] 4 HKLRD*, which found that the requirement that a party be granted a full opportunity to be heard does not mean that the party is entitled to present its case at any point in time for any length of time. **Sara Koleilat-Aranjo** explained that "due process paranoia" may also have regional considerations. She explained that, according to the UAE's Federal Supreme Court, notification of procedural correspondence and submissions is a matter of public policy (unlike in other jurisdictions). A defect in notification, which may be particularly relevant where one party seeks to avoid notification or refuses to participate, may lead to annulment of an award. **Isabelle Michou** addressed new emanations of "due process paranoia" created by the COVID-19 crisis, invoking the recent decision of an UNCITRAL tribunal in *The Estate of Julio Miguel Orlandini-Agreda and another v Bolivia* (PCA Case No. 2018-39) to refuse a request for suspension of proceedings due to the COVID-19 crisis while granting the parties extensions for further steps in the arbitration. She also noted that the issue of virtual hearings can give rise to disputes between the parties – with one party urging for suspension until an in-person hearing is possible and another urging a virtual hearing.

Procedural Due Process

The second session, which tackled procedural aspects of due process, began with a keynote by **Carolyn Lamm**. Noting that due process rests at the heart of the integrity of any arbitral proceeding (and the confidence that parties have in the process), she addressed a number of areas in which procedural due process issues may arise, for example:

- Waiver of due process challenges: While most all systems provide for an automatic waiver if due process issues are not properly raised, Ms. Lamm argued that, even if such a waiver occurs, an arbitrator or tribunal should consider whether its conduct is sufficiently balanced to avoid any challenge of the award.
- Bad Faith Tactics: Lamm also warned against bad faith tactics, which, she said, have become more prevalent in international arbitration. She urged arbitrators to be up front with the parties when they perceive bad faith tactics. She noted that arbitrators can use their powers (for example, interim cost awards or adverse inferences) where such tactics go unchecked (for example, where one party obstructs access to documents).
- Transparency: Lamm also urged arbitrators to be up front where they believe that there is a central issue that the parties have not addressed.

The panel that followed Ms. Lamm's keynote was moderated by **Andrea Carlevaris**. **Flavia Mange** argued that arbitrators should agree to consider transnational principles and other soft laws subject to the agreement of the parties. She noted that the principle of *iura novit curia* is such a procedural law principle, although, like Professor Derains, she cautioned that it is advisable to consult the parties before applying any such principles. **Montserrat Manzano** echoed the comments of the keynote speaker, noting that arbitrators should make the parties aware, for example, of how it expects evidence to be adduced. She explained, however, that arbitrators' discretion – even to ascertain the contents of the applicable law – is not absolute and must obey three limitations: (i) the confines of the mission granted by the parties (*ultra petita*), (ii) foreseeability (i.e. the idea that a party should not be taken by surprise with respect to issues that may influence decision-making, and (iii) due process. While all panellists agreed that parties should be given a fair chance to address the applicable law, **Tai-Heng Cheng** looked at "What is a fair chance?" and "How should that chance be given?" He explained that these questions should be resolved by the arbitrators as a matter of consensus from a position of knowledge. He added that, following the hearing, the arbitrators should assess whether any further points of law should require elaboration. He stressed that, even where such a point should arise in deliberation, it is important to canvas that issue with the parties.

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The Rising Arbitrators Initiative is a new organization founded by **Rocío Digón** (Legal Consultant, White & Case), **Ana Gerdau de Borja** (Senior Associate, Derains & Gharavi), and **Alexander G. Leventhal** (Of Counsel, Quinn Emanuel), which seeks to support arbitration practitioners under 45 who either have already received their first appointment as an arbitrator or have at least seven years of professional experience in the practice of international arbitration by inter alia creating a support network and encouraging best practices. Its Advisory Council, which is presided by **Yves Derains** (Derains & Gharavi) and **Carolyn Lamm** (White & Case), also includes **Andrea Carlevaris** (BonelliErede), **Chiann Bao** (Arbitration Chambers), **Essam Al Tamimi** (Al Tamimi & Company), **Gabriela Alvarez-Avila** (Curtis, Mallet-Prevost, Colt & Mosle), **Isabelle Michou** (Quinn Emanuel), **Mohamed Abdel Wahab** (Zulficar & Partners), **Renato Grion** (Pinheiro Neto), and **Tai-Heng Cheng** (Sidley Austin). The Executive Committee is comprised of **Dr Crina Baltag** (Stockholm University), **Flavia Mange** (Mange Gabbay), **Joanne La**u (Allen & Overy), **Kabir Duggal** (Arnold & Porter), **Montserrat Manzano** (Von Wobeser y Sierra), **Paul Tan** (Clifford Chance Asia), **Sara Koleilat-Aranjo** (Al Tamimi & Company), and **Shirin Gurdova**.

The Rising Arbitrators Initiative is currently organizing its next series of events on the promises and perils of first appointments, with events in North America, South America, Europe, Asia, and Africa. On 21 January 2021, the Rising Arbitrators Initiative's founders will interview incoming ICC Court of Arbitration President Claudia Salomon. To learn more, click here.

This entry was posted on Saturday, January 9th, 2021 at 4:10 am and is filed under Due process, Public Policy, Transparency
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