Kluwer Arbitration Blog

Paris Arbitration Week: Harmonization through Arbitration – the Arbitrators' Role and Function

Jérémy Faivre (Linklaters) · Wednesday, September 22nd, 2021

The 2021 Paris Arbitration Week (PAW), which kicked off on Monday 20 September 2021, brings the arbitration community together in a hybrid format with participants and speakers attending in person and online from all over the globe, following a fully virtual edition in 2020.

One of Monday's sessions involved a series of Oxford-style debates on harmonization through arbitration and focused on the arbitrators' role and function in that regard. The session was hosted by Sciences Po Law School, Queen Mary University of London, the Sciences Po Arbitration Society and Latham & Watkins LLP.

The first half of the session was moderated by Dr Constance Castres Saint-Martin of Sciences Po Law School and addressed the topic from the perspective of commercial arbitration.

The first topic of debate related to the question of whether the arbitration community is witnessing a harmonization of arbitrators' profiles.

In support of the motion, Audley Sheppard QC of Clifford Chance argued that there is overwhelming evidence that arbitrators' profiles are undergoing a process of harmonization. He highlighted 10 contributing factors to that effect:

1. the majority of arbitrators are lawyers;
2. these lawyers are arbitration specialists;
3. prominent arbitrators are involved in the same organizations and attend the same events discussing similar themes;
4. the trend currently gaining momentum is for arbitrators to have studied arbitration during their undergraduate or LLM studies;
5. most arbitrators work as practitioners, while fewer of them are academics;
6. only a few former in-house counsel become arbitrators;
7. there is regrettably slow progression on the topics of regional and ethnic diversity among arbitrators (at least in Europe);
8. while gender diversity has improved, this has mainly been driven by arbitral institutions rather than by clients, who tend to act more conservatively;
9. the harmonization of arbitral proceedings leads arbitrators to approach cases and conduct proceedings in a similar manner;
10. by its very nature, arbitration nudges members of the arbitral tribunal to compromise with one

> another when drafting awards and does not reward those arbitrators who endorse uncompromising legal reasoning.

Mr Sheppard concluded that arbitrators' profiles undergo harmonization and that this is desirable as it answers the parties' need for predictability.

Against the motion, Marina Matousekova of CastaldiPartners argued that arbitrators' profiles are not homogeneous and that competition in the market now requires arbitrators to stand out from the crowd. She described how, over the past 20 years, a very concentrated club of white male individuals acting only occasionally as arbitrators evolved into a large and global pool of diverse professional and specialized candidates. Ms Matousekova suggested that the increased diversity driven by arbitral institutions, advocacy groups and mentorship programs by law firms and law schools creates a moral imperative for parties when selecting their arbitrator. In that regard, she added that clients now select their arbitrators according to a range of criteria, including prior experience as arbitrator, specialist knowledge of the relevant sector, familiarity with the cultural context and language as well as an understanding of applicable law. According to Ms Matousekova, technological innovation allows sophisticated parties to assess candidates against these criteria by analyzing available online data when prospecting for arbitrators. She concluded by advising aspiring arbitrators to be proactive in controlling their public profile when participating in conferences, building their network and acquiring visibility in specific sectors.

The second topic under debate concerned the issue of whether the arbitration community is witnessing a harmonization of arbitral awards.

For the motion, Jose Ricardo Feris of Squire Patton Boggs argued that harmonization of arbitral awards is desirable because it creates legal certainty, a key client concern. According to him, it is due to this need that the arbitration community has put great effort to devise institutional rules and soft law guidelines for arbitrators to follow during the proceedings leading to the issuance of the award.

Against the motion, Eleonora Coelho of Eleonora Coelho Advogados, argued that, on the contrary, parties choose arbitration because of party-autonomy and flexibility, which allows them to design tailor-made proceedings culminating in an award.

Mr Feris suggested that the rule of precedent was virtually already a reality in arbitration, in light of widespread reliance by counsel and arbitrators alike on earlier published arbitral awards. Ms Coelho countered that the arbitrator's mandate is distinct from that of a judge: arbitrators are not part of a single legal system in which the law needs to be applied homogeneously under the control of a supreme court, but owe a duty only to the parties that appointed them. She also underlined that confidentiality hindered any rule of precedent from efficiently taking hold in arbitration.

Finally, Mr Feris endorsed the practice of some arbitral institutions (such as the ICC) to scrutinize awards, thus improving their overall quality. According to him, a third party with less granular knowledge of the case could impartially advise arbitrators to detail the reasons of their award, thus ensuring the parties are satisfied that their case had been heard, whatever its outcome, and reducing the risk of a challenge being brought against the award. Ms Coelho disagreed: she first reminded the audience that the process of scrutinising awards delays the proceedings and increases their cost, and concluded that grounds for annulment often relate to substantive issues, which is why

institutional scrutiny is of little help to prevent the annulment of awards.

The second half of the session, chaired by Dr Diego P. Fernandez Arroyo of Sciences Po Law School, dealt with the question of whether arbitrators could contribute to the harmonization of international investment law.

In support of the motion, Ina Popova of Debevoise & Plimpton distinguished the rule of precedent from harmonization. According to Ms Popova, harmonization is the process of achieving consistent and complementary decisions by investment arbitral tribunals, which requires deliberate and conscious participation of arbitrators. She argued that harmonization in this area is possible as arbitral tribunals derive their authority from treaties, interpreted and applied according to the same principles of international law. Arbitral tribunals participate in an iterative process of harmonization together with other international adjudicators such as the Court of Justice of the European Union and the International Court of Justice that nowadays sometimes refer to or even review investment arbitral awards. Ms Popova was joined by Andres Jana of BMAJ, who described how harmonization safeguards the legitimacy of investor-state dispute settlement (ISDS) because it provides legal certainty and predictability, easing business planning for foreign investors and ensuring host states remain safe for FDI. According to Mr Jana, those who rely on ISDS expect a harmonious application of concepts of investment law and arbitrators should strive to meet this expectation. He concluded that, in any event, the practice of parties and arbitral tribunals makes the harmonization of investment law unavoidable, as the demands for transparency lead to more and more awards being publicly available which are, in turn, quoted and debated in subsequent proceedings or by state representatives negotiating treaty revisions.

Against the motion, Fernando Mantilla-Serrano of Latham & Watkins submitted that the arbitral tribunals' primary mandate is to resolve the parties' dispute rather than to contribute to the creation or development of investment law, and that their duty is to the parties that appointed them rather than the legal community. He argued that there is no justification to distinguish investment arbitration from commercial arbitration in that regard: commercial arbitration tribunals regularly interpret standard construction or oil and gas contracts, just as investment arbitration tribunals routinely interpret investment treaties offering similar protections to foreign investments or investors.

Mr Mantilla-Serrano then turned to the typical practice of investment arbitration tribunals quoting and discussing prior awards in their own decisions. He argued that the large number of inconsistent awards on a given issue allows arbitral tribunals to find comfort or support for any proposition and concluded this shows there has been no successful harmonization on the interpretation of the substantive protections provided under investment law.

Giuditta Cordero-Moss of the University of Oslo reached a similar conclusion regarding the procedural aspects of investment arbitration. According to her, arbitral practice on procedural issues is fragmented even within the self-contained ICSID regime. Ms Cordero-Moss then reminded the audience that approximately 35% of investment arbitrations were not conducted within the ICSID regime and were subject to other arbitration rules (e.g. the UNCITRAL, SCC or ICC rules) and to the mandatory procedural principles of the seat. Non-ICSID tribunals have to bear such principles in mind or risk having their award annulled at the seat or its enforcement refused under the principles set out in the New York Convention. She provided three examples where that risk arose:

1. national laws diverge on the principle *iura novit curia*, and an arbitral tribunal that applies a legal principle without hearing the parties on it could risk having its award annulled for excess of power or breach of due process in some jurisdictions;
2. the power of an arbitral tribunal to impose a virtual hearing on the parties is not recognized in all legal systems, and an award issued following a contested virtual hearing could be challenged for breach of due process;
3. national laws do not impose identical formal requirements for arbitration agreements to be valid, and an award upholding jurisdiction in breach of these requirements is likely to be challenged.

Ms Cordero-Moss concluded that there is an irreducible core of procedural issues in investment arbitration for which harmonization is structurally impossible.

This entry was posted on Wednesday, September 22nd, 2021 at 8:28 am and is filed under Arbitration Institutions and Rules, Arbitrators, Paris Arbitration Week
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.