Kluwer Arbitration Blog

Paris Arbitration Week: International Organizations as Users and Providers of International Arbitration

Bruno Savoie (Mayer Brown LLP) · Tuesday, November 2nd, 2021

During the Paris Arbitration Week, Savoie Laporte hosted a virtual panel discussion entitled "*International Organizations as Users and Providers of International Arbitration*". The webinar was moderated by Pierre-Olivier Laporte (Co-founder of the international law boutique Savoie Laporte) and featured four speakers from intergovernmental organizations (IOs).

OECD and WADA as Users of International Arbitration

Lucie Buxtorf, senior legal advisor at the Organisation for Economic Co-operation and Development (OECD), was the first representative of users of international arbitration. She noted that under OECD's policies, the organization does not accept submission to the jurisdiction of domestic courts in its contracts or Memoranda of Understanding (MOUs). Accordingly, OECD typically includes an arbitration clause in its contracts to protect its immunity from court jurisdiction. This serves the crucial goal of protecting its full independence. Depending on the outcome of a risk analysis, another possibility (which remains the exception) is for the contract to be silent on dispute resolution. OECD does, however, have more flexibility for MOUs which may include an amicable resolution clause.

Similarly, on the law applicable to the contract, Ms Buxtorf explained that a contract should be governed by its own terms, and not by any national law. When, in some limited cases, the contract refers to a national law, this is on a voluntary and subsidiary basis. Ms Buxtorf also reported that OECD has not arbitrated any claim in the past two decades.

Finally, OECD representatives usually explain the importance of the arbitration clause at the outset of contractual negotiations given the status of OECD as an independent IO and this is widely accepted by the counterparts. In the rare cases where negotiations are difficult, other options include the contract being silent on dispute resolution or signing a side letter recognizing the IO's privileges and immunities.

Julien Sieveking, director of legal affairs at the World Anti-Doping Agency (WADA), shared his experience at an organization that is not an IO, but a private foundation based on the Swiss Civil Code. The World Anti-Doping Code is a document akin to a contract and relies on acceptance and implementation by signatories, among which are the international sports federations and major

event organizers such as the International Olympic Committee.

Mr Sieveking discussed WADA's experience as a user of international arbitration in anti-doping disputes. He explained the reasons for and the mechanism underpinning the referral of doping cases to the Court of Arbitration for Sport (CAS), which hears appeals filed against decisions rendered by signatories to the World Anti-Doping Code. Mr Sieveking noted that CAS hears international cases free of charge. Anti-doping rules are also complex, technical and evolving. CAS is therefore an example of specialized arbitration. The benefits of such a system include expertise, but also consistency, in contrast to decisions coming out of national courts.

The experience of CAS also reflects the use of international arbitration in crafting a compliance system in sports and showcases its flexibility. For example, Mr Sieveking reported that CAS had an *ad hoc* division at the recent Tokyo Olympic Games where decisions could be made within 24 hours.

WIPO and PCA as Providers of International Arbitration

Heike Wollgast, head of the IP disputes section at the World Intellectual Property Organization (WIPO) Arbitration and Mediation Center (the WIPO Center), presented the work of the WIPO Center as a provider of arbitration services focused on the needs of the IP/IT community. The WIPO Center was established over 25 years ago as an additional service providing international neutrality and specialized knowledge. Moreover, the WIPO Center's services are provided on a not-for-profit basis, which is important having in mind how high the costs can be in IP litigation. Finally, the confidentiality framework it provides is a key distinguishing feature for its users given the nature of IP and technology disputes. Mr Laporte, as moderator, commented that the conversation revealed the importance of independence and neutrality, echoing Ms Buxtorf, as well as specialized expertise, echoing Mr Sieveking, for both users and providers of international arbitration.

Martin Doe Rodriguez, senior legal counsel at the Permanent Court of Arbitration (PCA), discussed PCA's experience with administering disputes involving IOs. He explained that PCA provides a forum for a variety of commercial and other disputes involving IOs, whether under the PCA rules or the UNCITRAL rules. Mr Doe shared his views on the following distinguishing features of IOs as users of international arbitration.

First, IOs tend to enter into contracts and settle disputes in a standardized manner. Arbitration clauses and terms and conditions are usually standard, and IOs aim to refer as much as possible to accepted international standards as a risk mitigation effort. IOs are generally even more cautions than governments.

IOs tend to be on the Respondent side, since they are more often the party with leverage to withhold payment or other performance under a contract. Mr Doe observed that not all IOs are large – the United Nations being a clear exception – and the scope or impact of their activities is often disproportionate to their actual size. This tends to reinforce a conservative approach to dispute resolution. Echoing the presentation by Ms Buxtorf, he noted that IOs are reluctant to submit to national laws, standards, and courts, given their status, privileges and immunities. Accordingly, the default is to resort to arbitration, and where justified, as shown by the presentations of Mr Sieveking and Ms Wollgast, even establish a specialized institution for such

arbitrations. Where specialized institutions are not warranted, the general aversion to national fora and standards has played well for the PCA, itself an independent inter-governmental organization, in attracting a large proportion of IO arbitrations.

Mr Doe observed that on the procedural side, the limited or non-existent role of the seat is likely to surprise the average arbitration practitioner. IOs often prefer to designate no seat at all, and even after a tribunal is constituted, IOs may request the tribunal not to designate a seat. By way of example, certain IOs hold themselves out as willing to pay adverse arbitral awards without any need for enforcement, bolstering their view that a seat is not necessary. They will likewise forego the protection of a seat where an unconscionable award might otherwise be subject to being set aside. Mr Doe noted the IOs' aversion to national courts runs so deep that they would rather forego the recovery of costs awarded by a tribunal than pursue enforcement in a national court.

IOs can have many small claims to resolve, leading to a desire for expedited proceedings. Mr Doe shared his experience that, given the interesting nature of the matters involved and the prestige of IOs, finding suitable arbitrators for these small claims has fortunately not been an issue.

Finally, IOs tend to be repeat players and generally have a certain level of sophistication, even where, as noted by Ms Buxtorf, they may not have significant experience with actual arbitration proceedings. Mr Doe concluded his presentation by suggesting that, in his view, there is untapped potential for expedited procedure in this sector, whether through designing specialized rules, model clauses, or simply continuing to refine best practices.

Mr Laporte asked whether the existing arbitration mechanisms are fit for purpose for IOs as users of international arbitration. The speakers observed that, to the extent that international arbitration allows IOs to protect their immunities, privileges, and independence, the existing mechanisms are broadly fit for purpose. The panelists also identified potential vulnerability arising from the lack of seat and the place of small claims in international arbitration as the areas of interest. The cost of a large dispute could also be a concern as IOs often have a tight budget.

Mr Laporte also raised the question of the impact of technology and its interaction with the existing mechanisms in international arbitration. The panel agreed that in the last two years, technology had enabled hearings to take place virtually and provided a great deal of convenience to users and providers alike. Ms Wollgast explained the online case administration tools provided to parties by the WIPO Center, including WIPO eADR. While the potential of technology was recognized, some panelists also observed that the conservative nature of some IOs is a reality and that they would likely take a cautious approach towards disruptive technology in the field of dispute resolution.

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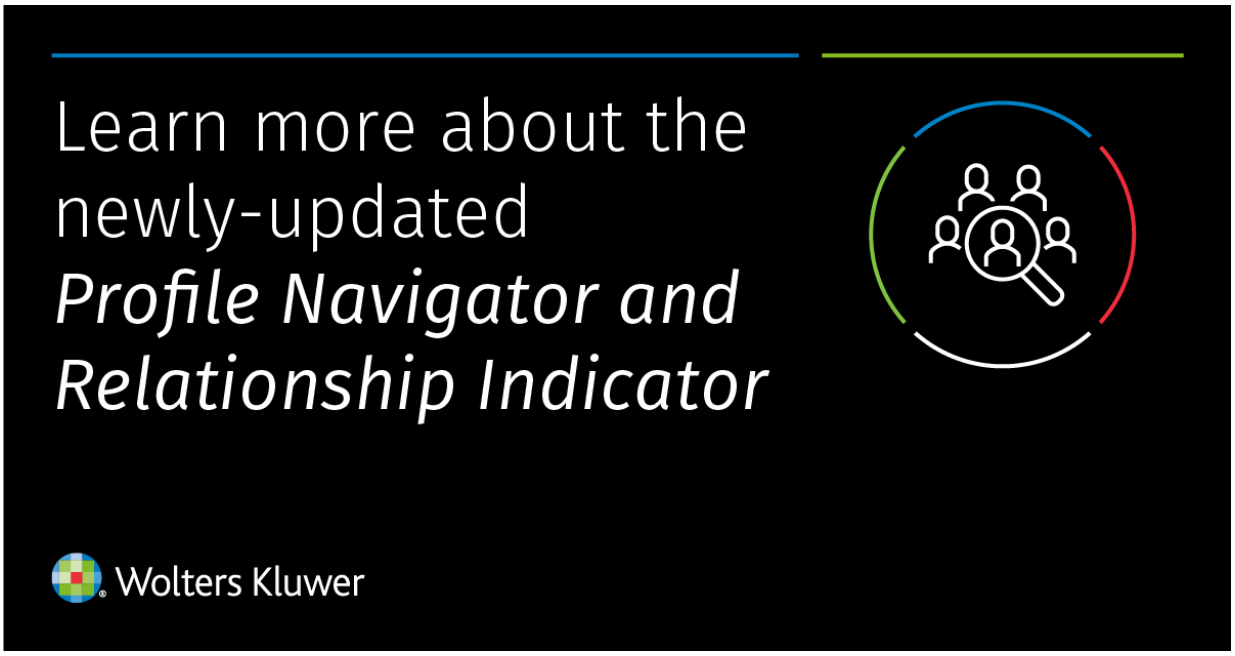

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