Does your arbitrator prefer puppies or kittens?

Douglas Thomson • Thursday, 14 April 2016 (21 hours ago)

A panel at the first GAR Live Stockholm including prominent tribunal chairs Kai Hobér, Jean Kalicki, Peter Leaver QC, Michael J Moser and Carita Wallgren-Lindholm discussed how you get to know arbitrators’ predilections and preferences so you can make effective appointments.

Part of the craft of international arbitration is knowing who to appoint as arbitrator. Of course, every arbitrator has idiosyncrasies and preferences, which become apparent to those who appear before them. For lawyers appointing a tribunal or arbitrators choosing a chair, getting to know these is key.

Hong Kong arbitrator Moser, chairing the session, said that there have been many calls for arbitrators to “pre-identify” their predilections through questionnaires, most recently in an article by Lucy Greenwood, Ema Vidak-Gojkovic and Michael McIwrath – of Norton Rose Fulbright, Baker & McKenzie and GE Oil & Gas, respectively – that was published this January in the Austrian Yearbook on International Arbitration. The article set out a "modest proposal" of a “puppies or kittens” test for potential arbitrators.

“The proposition is simple: that arbitrators themselves should state their [...] preferences – or their lack of a desire to state them – for very specific categories relevant to the conduct of proceedings. This is the equivalent of a "do you like puppies or kittens?" test,” wrote Greenwood, Vidak-Gojkovic and McIwrath.

“In responding, arbitrators are not given the opportunity to say 'it depends on the case', in order to make themselves appealing to as many different parties as possible, but have to take a position, even a neutral one, on the criteria.”
Parties are then able to appoint more appropriately – choosing (to continue the analogy) an arbitrator who likes puppies for a case that will feature puppies and avoiding an arbitrator who strongly prefers kittens.

If the arbitrator says they do not want to state a preference, they will of course seem more neutral but will preclude themselves from consideration for cases in which the party is actively seeking a puppy-lover.

The type of preferences the arbitrators might reveal include their attitude to procedural matters such as use of witness statements or post-hearing briefs or substantive matters, for example the scope of most favoured nation clauses.

The arbitrators on the panel were interested by the amusingly presented proposal but largely resistant to having to give their positions on such matters. Hobér, a Swedish arbitrator based at 3 Verulam Buildings in London, said the suggestion was ridiculous and that “no arbitrator worth their salt” would comply.

Wallgren-Lindholm said that while she is comfortable discussing procedural approaches openly, she would not want to commit to a position on other matters.

For Kalicki, who recently started practising as an independent arbitrator in New York and Washington, DC after many years at Arnold & Porter, the idea of getting arbitrators to state their preferences presupposes that they don’t learn and change their views over time.

“Once you are locked down in a public forum it becomes hard to adjust your approach based on experience,” she said.

And Leaver, an arbitrator at One Essex Court Chambers in London, said the suggestion was an example of “navel-gazing” in the arbitration world.

“It’s work creation for the sake of work creation. It’s utterly meaningless.”

Although against the idea of having to declare their preferences, the arbitrators remarked that party perceptions of them can often be mistaken.

“People are often surprised at how reluctant I am, as an English lawyer, to grant disclosure,” Leaver said. “English lawyers may traditionally have a black letter reputation, but the world has moved on – even in England.”

Kalicki agreed. “There is an assumption that common lawyers are pro-disclosure and civil lawyers are not. But I have seen civil lawyers grant
sweeping discovery which a common lawyer would immediately see as fishing. When you’ve grown up with discovery you learn to see that."

Appointing chairs

The arbitrators also considered whether the appointment of the tribunal chair by the party-appointed arbitrators is something the parties themselves should be able to advise on: a matter on which arbitrator Hilary Heilbron QC called for more clarity in her recent Clayton Utz International Arbitration Lecture in Sydney.

Leaver said it is “insane” for party-appointed arbitrators not to discuss the choice of chair with the parties. But Hobér disagreed that it is always necessary or even insisted on by the parties. “You have to treat different cases differently,” he said.

Some parties might be happy to put forward a list of names of arbitrators they would feel comfortable with and leave the rest to the party-appointed arbitrators, he suggested. Others might be happy simply to provide a list of attributes the chair should have.

For Kalicki, it is key that the party-appointed arbitrators manage party expectation in this regard. But she said that if the wing arbitrators rather than the parties have been assigned the task of appointing a chair, they should take control. Given the opportunity to consult on the choice of the chair, many parties want to dictate it, she warned.

Parties can also "poison the well" through mutually contradictory demands, she said. For instance, one side might absolutely insist upon having a civil lawyer as chair, while the other is equally adamant they should be from a common law background. "There can be an impasse unless the wing arbitrators reassert control."

Leaver said that when he is looking for a tribunal chair, the “synergy” of the tribunal is very important: "I need someone I can work with." He also thinks it important to proactively reinvigorate the pool of arbitrators through choosing newer and younger names, though he said parties are often reluctant to agree to a chair who has yet to make their reputation, even when recommended by the arbitrator they have nominated.

“Maybe counsel should have a bit more trust in the arbitrator they have appointed,” he said.

Advice for counsel

The panel went on to give advice about how counsel should handle
arbitrators once a hearing begins, ironically sharing some of the preferences that they had been so reluctant to state.

“Have some respect for the base intelligence of your arbitrator,” was the advice of Wallgren-Lindholm, who observed a tendency for counsel to underestimate foreign arbitrator’s understanding of substantive law.

She also advised counsel to candidly address weak or unpleasant aspects of their case, even if it seems difficult. It’s unfortunate if arbitrators figure out these aspects of a case before counsel has drawn attention to them, she suggested.

Kalicki agreed. “I am consistently amazed at counsel who believe it is good advocacy to only present the strong aspects of their case, and not address the perceived weaknesses, even if it means stretching arguments of fact. If you do that, you lose credibility with the tribunal and will find it hard to get it back. Don’t leave it to the tribunal to ask the obvious tough questions.”

The panel also advised that parties avoid foisting multiple, over-lengthy written submissions on the tribunal, which can obscure the issues in dispute.

Parties often want to know whether an arbitrator is amenable to giving his or her preliminary assessment of a case, a practice that was recommended by International Bar Association president David W Rivkin in a speech at Hong Kong Arbitration Week in October.

Kalicki said she personally is “not comfortable” with sharing her preliminary view, as “until the parties have completed their evidence, I may change my mind”.

On the other hand, she said she does advise counsel on organising their submissions in post-hearing briefs to avoid them becoming “ships passing in the night,” focusing on different issues that will not be decisive in the case.

Leaver was also hesitant about giving away his views early on, even though it might assist counsel with focusing their arguments. “You can say what is particularly interesting to the tribunal. But you can’t just jump on counsel at the beginning and tell them what you want to hear,” he said.

Another proposal of Rivkin’s, that tribunals be made to allocate time to deliberate after a hearing, also provoked some scepticism on the panel. “Do you hear me groaning?” Leaver asked. “It’s a fallacy to suggest the tribunal only begins to deliberate after a hearing. They’re talking with each other all the way through.”
Wallgren-Lindholm said that arbitrators should not need to be told to devote the requisite time to deliberation. “It should be part of an arbitrator’s DNA, something you take pride in.”

Kalicki, however, recognised that from a party or counsel perspective it is “incredibly frustrating” if an arbitrator runs straight to the airport following a hearing. She likes to build into the hearing schedule some reserve time for tribunal discussions.

The panel also considered the contentious use of tribunal secretaries and assistants and whether attitudes diverge in the common law and civil law worlds.

Moser said he was recently at a dinner with a Swiss arbitrator and an English QC. While the QC thought the use of tribunal secretaries is inappropriate, the Swiss arbitrator would not consider appointing a chairperson without a back office of assistants, taking the view that it is unrealistic for an arbitrator to handle multiple cases without support.

Civil law trained Wallgren-Lindholm agreed that it is sensible for an arbitrator to “outsource” some work that may distract him or her from the essentials – for example, monitoring how long a counsel has been speaking in arbitrations where time limits have been agreed. This is a task that can reasonably be done by the secretary.

Common law trained Leaver said tribunal secretaries can be helpful in organising proceedings and summarising the procedural details of cases: the “inside leg measurements”, as it were.

But he declared: “Every single word of the operative part of the award is written by me; I take pride in that.”

The panel also criticised the “growing practice” of over-coaching witnesses – “I need to hear the witness’s own words and I cannot do that if they are over-scripted,” said Kalicki – and off-the-point cross examination by counsel intended simply to undermine witnesses’ credibility.

A new tool

While there was resistance to the idea of making arbitrators state their preferences, GAR’s publisher David Samuels announced that the publication will soon be rolling out a new “Arbitrator Research Tool” that will help those wishing to find out such information for themselves.

The tool will take the form of an online database with biographical information
for each arbitrator and a list of co-arbitrators they have sat with, parties who
have appointed them and counsel who have appeared before them, who
could be contacted for feedback.

“We’re doing this because we are aware of how the world works, and
because we are sitting on this information anyway, so we might as well use
it,” Samuels said.

Kalicki said the project was a “great initiative” that will "level the playing field"
between experienced counsel, who can obtain this sort of information
independently, and newcomers to the field, who will now would have an
additional resource to research their tribunal.

But she warned that the exposure of arbitrators who have received many
repeat appointments from the same party or sat repeatedly with the same co-
arbitrators, could lead to “more criticism of our inbred universe.”

A time of change in Stockholm

GAR Live made its first visit to Stockholm on 8 April. The event was held at
the Stockholm Chamber of Commerce, and co-sponsored by Vinge and
Mannheimer Swartling, with Arbitral Women and Young Arbitrators Sweden
as supporting organisations. It was chaired by Jakob Ragnwald of Mannheimer
Swartling and James Hope of Vinge.

The event took place as the SCC Arbitration Institute embarks on the
process of renewing its arbitration rules, with a draft set to be released for
public consultation soon, and Sweden its arbitration statute.

Among the contemplated changes of law are that challenge proceedings in
the Swedish courts will be able to be conducted in English and that
arbitrators will have strengthened scope to determine their own jurisdiction.

The next GAR Lives will take place in Washington, DC, on 18 April (with a
focus on treaty arbitration), in London on 18 May and in Singapore on 26
May.