Puppies and Kittens and Developments in International Arbitration

An Interview with Lucy Greenwood and Michael Mcilwrath

Interview Conducted by Ava Borrasso[1]

In 2015, Lucy Greenwood, Michael Mcilwrath and Ema Vidak-Gojkovic coauthored *Puppies or Kittens? How to Better Match Arbitrators to Party Expectations*, addressing the lack of transparency regarding information on arbitrators and their soft skills. The article focuses on a critical benefit of arbitration—procedural flexibility—and how the absence of information about how arbitrators handle scheduling and related issues impairs arbitrator selection. The authors argue that the absence of such information results in the default selection from a well-known pool of arbitrators designed to meet the parties' expectations. The article explores these issues from the prism of efficiency, cost, and diversity, among other matters. In the intervening seven years, there has been a growth of organizations providing such insights, and some institutions have increased transparency as well. We caught up with two of the authors to discuss their thoughts on the impact of the article, how international arbitration has developed in the interim period, and their new undertakings.

Your joint article, Puppies or Kittens? How to Better Match Arbitrators to Party Expectations, *made quite a splash in arbitration circles when it was released, now seven years ago. Describe the central takeaway of the* Puppies or Kittens *article as you saw it at the time.*

Lucy Greenwood

Lucy Greenwood: I can't believe it has been seven years since *Puppies or Kittens* was published! Really what we were trying to address in the article was how to approach the selection of arbitrators in a more robust manner. You always seem to hear "the selection of the arbitrator is the most important part of the arbitration process," but we felt that that selection process was fundamentally flawed because it is carried out in something of an information vacuum. Additionally, I had always felt that soft skills were not appropriately valued by individuals in the arbitration process, and *Puppies* attempts to highlight the importance of these skills in arbitrators. *Puppies* also gave me a wonderful opportunity to work with Mike and with Ema Vidak-Gojkovic, our coauthor, and the three of us continue to collaborate all these years later.

Michael Mcilwrath

Michael Mcilwrath: I share Lucy's disbelief on the passage of time. The central takeaway emerged from a panel session at a Vienna International Arbitration Centre (VIAC) conference in 2015 about arbitrator soft skills. To get the ball rolling, we started with a playful question to the arbitrator panelists—Filip De Ly and David Rivkin—about whether they preferred puppies or kittens. From there we moved to questions about preferences in case management. Some of the audience members were aghast at the idea of arbitrators disclosing their preferences, while others were strongly in favor. One of the latter was Ema Vidak-Gojkovic, who, as Lucy says, would become our coauthor.

What was the key issue that you intended to address in the article, and how, if at all, have you seen that issue evolve in the intervening time period?

Lucy: To a certain extent we wanted to remove some of the guesswork from arbitrator selection and at the very least start an open dialogue about the lack of transparency in arbitrator selection. I honestly don't know if we succeeded in the first part. In the second, well we did start a conversation, that's for sure.

Mike: I agree. As for how the issue has evolved, I would like to think that *Puppies* has made it easier to discuss how arbitrators differ from each other in their preferences, and, to an extent, legitimized the right of parties to identify and consider these differences when making appointments.

There are providers, some of which are referenced in the article, and institutions that have increased transparency and provide a degree of information the article seems to invite. How have you assessed the real-world impact of these developments?

Mike: There appears to be an inexorable trend towards greater transparency, which I think is simply a consequence of the growth in popularity of international arbitration and important for its sustainability. Some institutions, including the ICC, are even making awards publicly available, including arbitrator names and all the procedural steps. *Puppies* is a pretty modest step by comparison, and one that allows the arbitrator to control their own message. In fact, some arbitrators have included their answers to the *Puppies* questionnaire, or their own version of it, on their personal websites.

Your practices have evolved somewhat since the article was written. Lucy, you were practicing mainly as counsel for an international law firm at the time the article was written. Has your practice as a full-time international arbitrator over the past more-than-five years impacted or changed any of your views on the central precepts of the article?

Lucy: Yes, after *Puppies* was published, I went through quite a change in my professional life. I had been in "big law" for over twenty years but finally decided to make the leap to become an independent arbitrator in 2017. Having practiced exclusively as an arbitrator for over five years now, I think I am more aware of the nuances in arbitrator selection than I was. As counsel, you are rightly only concerned with "your" choice of arbitrator. As an arbitrator, you see the broader picture, which can, of course, look very different. At the same time, I am also conscious of how little the arbitrators know at times. We are only aware of the information that crosses the table to us, and this can mean that we simply don't

appreciate the underlying complexities that may drive a particular choice of arbitrator. Appointing the chair is one of the most intense and challenging parts of sitting as a party-appointed arbitrator, and to be frank, it is still difficult to establish whether a chair will have those case management skills that I believe are really important.

Mike, at the time the article was written, you were the lead in-house litigation counsel for a well-known oil and gas company, but have recently gone into an exciting new venture consulting on a bespoke basis for companies facing international disputes to guide them through the process. In this new capacity, have you strengthened your views on this subject or receded from them?

Mike: Thanks, it is exciting! After twenty-two years of leading a corporate in-house team, the main objective of my new company is to help make international dispute resolution accessible to small and medium-sized companies. Arbitration is flexible enough to accommodate disputes of all sizes, as well as counsel from a range of backgrounds, but often there is a perception that it is only available to the largest companies and specialists at elite law firms. This is a pity. Information about arbitrators, about institutions, about the process … this all makes it easier for a broader audience. So to your question about my views, I've doubled down on them!

What challenges have emerged in implementing this greater call for transparency?

Mike: Rather than facing challenges, I've been fortunate to have played a small role with an institution that not only embraced transparency, but has been a global champion. Since 2017, I have been a member of the ICC's Governing Body for Dispute Resolution Services and its chair since 2019. Under the guidance of Alexis Mourre, the institution started providing reasons for certain decisions of the ICC Court, publishing the names of arbitrators sitting in ICC cases, and publishing anonymized versions of arbitral awards. In fact, the ICC even published the terms of reference and names of the committee members who selected Claudia Salomon as Alexis' replacement as president of the ICC Court. Claudia is a transformative leader, and one of her key objectives is to make dispute resolution more accessible for disputes and companies of all sizes. I'm sure transparency will play a role there, too.

In a separate matter, you both focus on reducing the environmental impact of certain practices related to international arbitration. Lucy, in 2019, before the impact of the worldwide COVID-19 pandemic, you founded the Campaign for Greener Arbitrations.[2] The Green Pledge sets forth guiding principles to minimize environmental impact within the arbitration community. Please describe what drove the Campaign for Greener Arbitrations and how the pandemic has impacted the protocols of the pledge. Also, do you see a greater need for transparency from arbitrators on these points as material in the selection process?

Lucy: The Campaign for Greener Arbitrations began, quite simply, because I realized that instead of having so-called "flight shame" as an industry, we had flight pride, and this had to stop.

For me, I woke up in 2018 when I was chairing a major energy arbitration. I looked at the wall of printed documents and binders behind me and realized that not a single binder had been opened during the course of the two-week hearing. Everything had been done on screen. In that case, although I had insisted on electronic bundles, we had also opted for a printed set of bundles "in case the technology failed." From then on, I realized that approach was not good enough.

I began to look at the available technology and ask why we were running arbitrations in such an

old-fashioned way. My arbitration in 2018 looked very similar to my first arbitration in 1998. We simply weren't taking advantage of the video conferencing/screen sharing platforms to deliberate remotely, and we weren't thinking critically about using video conferencing extensively for witnesses. The technology was there to help us run arbitrations more efficiently and more cost effectively. It was also there to help us reduce the carbon footprint of an arbitration. And, as far I could tell, we weren't using it for either purpose. I then committed to what I called my "green pledge," effectively a promise that, as far as possible, I would run my arbitrations in an environmentally friendly way. This then developed into the Campaign for Greener Arbitrations. We have established regional committees and launched our Green Protocols, which are how-to guides for each participant in the arbitration process who wants to take steps to reduce the carbon footprint of their practice.

And let me just tell you: international arbitrations have a significant carbon footprint.

Our research found that 20,000 trees would be needed to offset the carbon equivalent emissions from that one arbitration. To put that in context, that is pretty much all the trees in Central Park.

I would like to see us build on the new practices that have been forced upon us as a result of the pandemic, including increased use of "hybrid" hearings, where counsel discuss at an early stage taking certain witness evidence by video rather than in person. A couple of long haul flights can double an individual's annual carbon footprint, so the biggest change we can make is to question the need to fly at every stage of an arbitration.

Mike is a key member of the Campaign for Greener Arbitrations, having taken responsibility for securing corporate buy-in to the Campaign. In *Puppies*, we focused on the need for case management skills in arbitrators and transparency in relation to arbitrators' procedural preferences. Increasingly, I feel that we also need to focus on ensuring that arbitrators have the technical skills to run cases in a more efficient (and environmentally friendly) way. The pandemic has dragged international arbitration into this century. We need to make sure that we capitalize on the changes we have seen and provide the quality of service that the end users deserve.

Mike, you are the Corporate Director of the 2022-23 Global Steering Committee for the Campaign for Greener Arbitrations. How does this complement your work in your new venture, MDisputes? What do you foresee the lasting impacts from the pandemic to be with respect to remote practice?

Mike: While still a corporate in-house counsel, I conveniently "borrowed" key portions of the pledge for my company's outside-counsel guidelines. Baker Hughes had made its own pledge towards carbon reduction, and the in-house legal team was doing its part to contribute. Upon leaving the company, the first thing I did was to call Lucy to ask if I could do more for the Campaign, which she kindly obliged. As for the connection with MDisputes, I would hope our association with the Campaign and our own commitment to carbon reduction will carry over to our clients. Also, I can make a strong case that being greener is almost always the less expensive option in arbitration, and this is a positive for any company that MDisputes might assist.

The Campaign's Corporate Committee has some amazing company counsel whose ideas and initiatives you'll be hearing about later in 2022, such as Shell's internal pledge to require virtual hearings barring exceptional circumstances. To answer part of your question, Shell's initiative is a good indication that virtual hearings are here to stay. I expect their use will continue to evolve in ways we have yet to see.

Cost and efficiency in international arbitration are important factors for parties and counsel. How do you balance those considerations against the interest in obtaining a full and comprehensive hearing? While each matter faces distinct objectives and challenges, are there any concrete steps that parties should take to ensure they have a full opportunity to present their case while expediting resolution of the matter?

Lucy: There has been considerable attention focused on time and cost in arbitration over the past ten years, and this, I do believe, has led to changes in behavior and, as far as discernable, progress. However, in this area, as with so many other facets of international arbitration, we are hampered by the lack of empirical data. Only ICSID arbitration proceedings are fully transparent and published, and they represent a tiny number of cases compared with commercial arbitrations. Although some arbitral institutions publish analyses of the duration and cost of their commercial arbitrations, it is pretty limited.

Properly addressing time and costs in arbitration requires all the actors in the arbitration process to work together: the institutions, the tribunal, and the parties and counsel. And the interests of these three elements are not necessarily aligned. It is always in the institution's interests to respond promptly and efficiently, and to provide value for money. The tribunal should of course have the same approach, but may well be at the mercy of how the parties decide to present their cases, although I do feel that arbitrators can and should be more proactive in managing cases.

My view is that we should be tackling this issue from a notion of trying to eliminate waste rather than a time/cost obsession. Interestingly, when we looked at running an arbitration on a "greener' basis" (which is really just another way of saying in a less wasteful manner), we found that there was a forty percent reduction in disbursement costs.

Mike: Not surprisingly, I have a different perspective on this, and while I do not disagree with anything Lucy has said, I do think there are concrete steps that parties can take to ensure they have a fair opportunity to present their case, efficiently and without disproportionate costs.

First, there is the age-old wisdom, or even cliché, about appointing the right arbitrators in an international case. Just keeping the case international is often a positive step. Why? Because international arbitration typically offers more flexibility, i.e., the ability to adapt the procedure to the parties and their dispute. There can be a lost opportunity, and conformity around standard domestic procedure, when all counsel and arbitrators are from the same place.

Second, parties can push back on standard, one-size-fits-all procedural orders and timetables, and urge tribunals to consider what procedure and sequence would be most efficient. Fortunately, there are signs that international arbitration has become more user-friendly during the pandemic. Arbitrators have discovered how easy it is to convene counsel and parties online with relatively short notice. As a result, arbitration can be more *conversational*, an ongoing dialogue between the parties and the tribunal to adapt and modify the timetable to fit the dispute instead of fitting the dispute to a standard timetable established at the beginning of a case and leading to one big hearing at the end. I recently wrote a book chapter about the rise of "midstream" procedural conferences, where parties and tribunals can assess whether all issues really must travel along the same path—subjected to the same disclosure requirements, awaiting expert reports, etc. By planning for a second or midstream case management conference, tribunals and parties can assess whether certain issues material to the outcome could be decided sooner, or without the hearing of evidence, to better streamline the proceedings.

Third, parties can avoid a mindset where they see the arbitration award as the only possible end to their dispute. They can also engage in mediation, controlling their own destinies, and it is now relatively easy to find a mediator experienced in any type of dispute to assist them.

What do you see as the next frontier in international arbitration? What new types of disclosures would you like to add to the ones previously identified, if any?

Lucy: It's not really a next frontier, but we have to accept that climate change is going to pervade every part of our practices in the future.

Climate change disputes are already here in the investor-state dispute resolution sphere and are increasingly being seen in the commercial arbitration world. The ICC Task Force on climate change identified three potential categories of commercial arbitration disputes. First, climate change-related commercial arbitration could arise in relation to contracts relating to the reduction of greenhouse gas emissions and energy transition, and disputes

over renewable energy facilities, decommissioning of power plants, and the adaptation of infrastructure. Certainly, in relation to my energy practice, I am starting to see a significant number of disputes in the renewables field that I simply wasn't seeing even five years ago. Second, contracts without specific climate-related objectives could also generate disputes involving climate or environmental issues by being impacted by policy changes in response to climate change. Third, the task force envisaged the possibility of "submission agreements" to arbitrate climate-related issues where no agreement to arbitrate existed.

I broadly agree with these categories, however I would say that approaching climate change in a compartmentalized way means there is a risk that we are siloing climate change issues in a way that may not be helpful. I think the better approach is to view everything through an environmental impact lens and acknowledge that climate change can and will appear in every type of dispute imaginable. Every arbitration practitioner should have a core competency and understanding of climate change issues so that we are properly equipped to deal with the climate change disputes that are coming down the tracks at us. In terms of additional disclosures, to complement this, I think arbitrators should be able to show that they have a level of technological competency to run arbitrations on a more streamlined, environmentally friendly basis.

Mike: I agree with Lucy that for the foreseeable future, climate change will continue to be a prime driver of large, international arbitrations between major players in infrastructure and energy. But for the same reason as Lucy gives, I do not see this as a *new* frontier. International arbitration already plays an important role in projects of this type, and the current procedures, counsel, and arbitrators are all well equipped to face disputes that may arise.

In founding MDisputes, I took inspiration from one of the top priorities of the ICC in thinking about where dispute resolution needs to go. And if you look at the larger ICC's recent initiatives, you will see a lot about small and medium-sized businesses (SMEs). SMEs are the backbone of the global economy. According to the World Bank, they represent over ninety percent of all businesses and over fifty percent of all employment globally.

SMEs, and smaller-sized disputes, represent a true frontier to be conquered. Unfortunately, the current trend is not in the right direction. The easy multiplication of documents and information can already inject such high levels of complexity into small cases that even large corporations find them prohibitively expensive.

This problem is even more pronounced for SMEs, which often see international arbitration as a luxury they cannot afford instead of a tool to reduce risk and enable cross-border business. This needs to change. Dispute providers have much to gain by finding ways to include SMEs, and the lawyers who represent them, in international arbitration and/or in adjacent forms of dispute resolution that will emerge in the coming years. Most likely, technology will need to be part of this solution.

In terms of suggesting additional disclosures of arbitrators' preferences in meeting the challenges of the present and future, it was never our intention to provide a definitive list. On the contrary, what we proposed with *Puppies* were examples of the types of information arbitrators could provide about their preferences that parties would find helpful in making their appointment decisions. Rather than expanding on our own list, I've been pleased to see how others have developed the concept.

It's an exciting time in international arbitration. It's wonderful to imagine that our modest article—prompted by a panel discussion and fierce audience reaction in Vienna—may have contributed to the trend towards greater transparency. ■

Endnotes

1 This interview was conducted through a series of communications, including by Zoom, and has been edited.

2 *See* https://www.greenerarbitrations.com/.

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