

Kluwer Arbitration Blog

Corporate Counsel Discuss Arbitration Cost and Delay

Roger Alford (General Editor) (Notre Dame Law School) · Thursday, July 8th, 2010

“With over 20,000 contracts executed each year, it is simply impossible to address the problems of cost and delay in arbitration through artful drafting.” That was the gist of comments made by a general counsel of a major corporation at last month’s [ITA workshop](#). To which another general counsel on the panel replied, “No, we have developed language in our contracts that deals with the issue quite effectively.”

There is no end to the discussion of arbitration as the new litigation, with all the attendant costs and delays. But the ITA workshop helpfully presented a slightly different question: who is to blame for the problem? If the clients care so much about cost and delay why don’t they police it better? And if they were to police it, how would they go about doing so? They can either: (1) fix the problem before it happens through careful drafting; (2) minimize the problem by settling early; or (3) police the problem through scrupulous oversight of outside counsel.

The panel discussion included (1) Eric Liebeler, Associate General Counsel of Siemens; (2) Pedro Alberto Costa Braga de Oliveira, General Counsel of Enel Brasil; (3) Alan Crain, General Counsel for Baker Hughes; and (4) Carla Powers Herron, Group Counsel—Litigation for Shell.

The corporate counsel panel discussed all three options at some length, but reached no consensus. Drafting to avoid cost and delay requires foreknowledge about the nature of a future dispute. Certain disputes are so important that cost and delay are minor issues relative to the goal of winning. Settlement assumes that the transaction costs of arbitration will drive parties toward an early solution, which may or may not be cost effective. Policing outside counsel means careful monitoring of their behavior, including the quantum of hours invested in the case and the quality of their litigation tactics. It also assumes a lack of trust in outside counsel to act in the best interest of the client.

At the end of the discussion, the panel members were asked whether they still believe that international arbitration is preferable over the alternatives. Only one corporate counsel said he would go with litigation over arbitration every time, but then he qualified that statement by saying this assumed he could choose his home jurisdiction. The Brazilian corporate counsel said, “Compared with litigation in my country, which can take decades, I will choose international arbitration every time. No question.”

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