Kluwer Arbitration Blog

Reflections on the New International Arbitration Global Survey

Andrea Menaker (White & Case LLP) · Friday, October 22nd, 2010 · White & Case

A major new survey on international arbitration conducted by Queen Mary University London and sponsored by White & Case revealed several interesting findings on corporate choices concerning international arbitration.*

As already reported by Global Arbitration Review, the survey shows "the extent to which the governing law is a driver of choice among those framing arbitration agreements, and the dominance of established arbitral seats." Specific findings of the survey include:

• English law was used most frequently (by 40% of respondents), followed by New York law (17% of respondents);

• London was named as the preferred seat of arbitration (30%), followed by Geneva (9%), Paris, Tokyo and Singapore (each 7%) and New York (6%). Moscow and China were viewed negatively as seats of arbitration;

• The ICC International Court of Arbitration is the most preferred and widely used arbitration institution (50%), although there was a perception amongst a majority of interviewees that ICC arbitration is too expensive and that arbitration institutions in general are costly. Respondents had the most negative perceptions of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Dubai International Arbitration Centre (DIAC) and China International Economic and Trade Arbitration Commission (CIETAC).

As summed up by White & Case partner Paul Friedland, the survey revealed, perhaps unsurprisingly, that corporate parties' first choice for governing law is that of their home jurisdictions. When that was unattainable, parties gravitated towards well-established and well-known laws such as English, New York, and Swiss law. Although governing law was rated as one of the most critical factors for parties, 53% of survey respondents indicated that they believed that its impact could be limited to some extent with a carefully drafted contract.

The survey also provided interesting findings on other issues, including with respect to corporate choices concerning the appointment of arbitrators and confidentiality.

Arbitrators: Open-mindedness and fairness, prior arbitration experience, quality of awards, availability, knowledge of the applicable law, and reputation are the key factors that influence corporations' arbitrator choices. A full 50% of respondents indicated that they have been disappointed with arbitrator performance. Corporations indicated a desire for more information regarding arbitrator availability (including requiring arbitrators to publish information about their pending commitments), skills, and experience and, to some extent, greater autonomy in the selection of arbitrators. A large majority (75%) reported that they would like to assess arbitrators at the end of a dispute. Of these, 76% would like to report to the arbitration institution (if any), and 30% would like to be able to submit publicly available reviews.

Corporate respondents indicated a strong preference for a "pro-active case management style rather than a deferential or reactive style." Respondents also noted that "soft skills," including the ability to work with other members of the panel, can positively affect the efficiency and cost of the arbitration.

Confidentiality: The survey revealed that while confidentiality is important to users of arbitration (62% of respondents rated it as "very important"), it is not the essential reason for recourse to arbitration. In fact, several respondents noted that because commercial arbitration matters often "do not involve sensitive commercial information … in many cases confidentiality is not an extremely serious concern." In addition, while 35% of respondents said that they would not continue to use arbitration if it did not offer the potential for confidentiality, 38% said that this would not deter them (while 26% did not offer an opinion). Some interviewees expressed a desire for greater access to awards to better understand the arbitral process and to review previous decisions of potential arbitrators. These interviewees acknowledged that this "may be inconsistent with their desire for confidentiality of their own awards."

Finally, in a surprising finding, 50% of those interviewed erroneously believe that arbitration is confidential even where there is no specific clause to that effect in the arbitration agreement or governing arbitration rules, while 12% were uncertain whether the arbitration would be confidential under such circumstances.

The 67 interviews of survey participants will form the basis of a forthcoming more detailed report. For now, the above data suggest some interesting trends. These include demands by parties for greater involvement in arbitrator appointments, with an emphasis on practical (rather than legal) considerations, including the ability of arbitrators to work together to increase efficiencies and exert sufficient control over the process to avoid cost and delay. The survey also reveals competing concerns – such as the desire to assess arbitrator performance – that may lead to increased transparency, particularly among those respondents that acknowledge the already "porous" nature of arbitration and who are willing to utilize arbitration as a dispute resolution mechanism even in the absence of confidentiality.

By Andrea J. Menaker and Nicole Thornton

* The 2010 International Arbitration Survey: Choices in International Arbitration is one of the largest empirical studies ever undertaken of corporate attitudes and practices regarding international arbitration. The survey is the third in a series of high

profile surveys conducted by the School of International Arbitration at Queen Mary, University of London. White & Case is the first law firm to sponsor the survey.

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