Kluwer Arbitration Blog

Ten Ways to Avoid the Americanization of International Arbitration

Roger Alford (General Editor) (Notre Dame Law School) · Wednesday, April 21st, 2010

The ABA Journal has an interesting article on the Americanization of international arbitration. There's nothing particularly new to our readers in this article. It's a theme that my friend and colleague Tom Stipanowich has written about extensively. I've written a bit about the subject as well. But the fact that the story is being told in the largest legal publication in the United States is significant. The focus of the story is on transplanting American practices to the international arbitration arena, almost at the request of American counsel or arbitrators. Here's a few choice quotes:

"If arbitration is to commit suicide, it will do so of its own choosing, because the parties have chosen to make it more expensive, time-consuming and more like litigation," said Joe Profaizer of Paul, Hastings.

"The proliferation of electronically stored information is a major cost driver in U.S. litigation, and it's becoming a major cost driver in international arbitration," said Christopher Larus of Robins, Kaplan, Miller & Ciresi. "As more and more companies have to delve into their electronic records, it's becoming more and more expensive."

"The U.S. must recognize that international arbitration is international. The system must accommodate a wide variety of traditions and practices. It can't just accommodate the American model, or people will stop using it," says Glenn Hendrix of Arnall Golden Gregory.

So if the parties are so concerned about the Americanization of international arbitration, why don't they fix it? That might mean (1) embracing mediation; (2) avoiding U.S. arbitrators; (3) avoiding U.S. counsel; (4) building in pre-dispute discovery limits into the contract; (5) vesting the arbitrators with greater discretion to limit discovery; (6) imposing more serious deadlines for the different stages of arbitration; (7) adopting expedited arbitration rules; (8) embracing advanced technologies for e-discovery; (9) selecting arbitrators who are particularly adept at case management; and (10) establishing more creative fee structures for resolving disputes.

These are just a few ways that one could avoid the increased costs and delays of international arbitration. I doubt that such concerns are paramount when a billion dollars is in dispute. I don't accept the premise that the Americanization of international arbitration is always a bad thing. But for many disputes where cost and delay are significant priorities, there are ways to avoid the Americanization of international arbitration.

Roger Alford

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