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More on Corporate Criticism of International Arbitration

Lucy Reed (International Council for Commercial Arbitration) · Friday, July 16th, 2010 · Freshfields Bruckhaus Deringer

I recently spoke at a conference co-sponsored by the Milan Chamber of Arbitration and the ICC on the occasion of the publication of the new Italian arbitration treatise entitled Commentario Breve al Diritto Dell'Arbitrato Nazionale ed Internazionale (CEDAM 2010) by my colleague Massimo Benedettelli, along with co-authors Claudio Consolo and Luca Radicati di Brozolo. The topic of my panel was general trends in international arbitration.

Although I would have liked to have spoken on a substantive trend in international arbitration, I decided I could not ignore a much bigger, procedural trend that has been the topic of conferences in both the United States and Latin America – that is the growing discontent of corporate users with international arbitration.

The criticisms regarding international arbitration center around cost and efficiency. A recent study of the Corporate Counsel International Arbitration Group (CCIAG) found that 100% of the corporate counsel participants believe that international arbitration "takes too long" (with 56% of those surveyed strongly agreeing) and "costs too much" (with 69% strongly agreeing).

Three main questions arise from these criticisms. The first is whether these criticisms are justified? The second is, if so, then what (or who) is to blame? The third and final question is what can the arbitration community do about these critiques? The answers to the first two questions depend on where one sits. But I am increasingly impatient with our responses to the third, as I think there are relatively simple solutions if we are willing to be creative and proactive.

First, much of the criticism regarding cost and efficiency in international arbitration is targeted at investor-state arbitration. These by their nature involve a more transparent and political process than international commercial arbitration, and the problems and solutions are, in part, different in each.

Second, there is plenty of blame to go around. Many blame complaints on outside counsel – especially those from the United States – for requesting too many documents, making too many motions, and generally filing too many pages. Others blame in-house counsel for not using their authority to rein in practices they criticize as inefficient or wasteful. And some blame the arbitral institutions themselves for not constructing a system that reins in everyone.

My most negative experiences recently, however, have been with arbitrators – and especially chairs – who are oftentimes overscheduled, unprepared, disorganized, reactive, timid and slow.

Without suggesting I am blameless as a chair, there is no way to defend arbitrators who cannot schedule hearings for months or produce awards for years. But don't take it from me. The CCIAG survey lists the following factors as contributing to the rising inefficiency of international arbitration: (i) 100% of those surveyed identified arbitrator availability and excessive document disclosure; (ii) 95% identified the "failure of tribunals to narrow issues, evidence and argument leading parties/counsel to feel need to cover all bases" and (iii) 90% identified excessive concern for due process over efficiency, leading to a free-for-all on timing.

So, then, what are the solutions? Fortunately several have already been identified and implemented. The CEDR and ICC have published rules and techniques for controlling time and costs. The ICC has revised its Arbitrator Statement of Independence to include information on availability, in the form of data about other cases in which an arbitrator candidate is serving. Despite the many complaints regarding the "Americanization" of document discovery, it is the AAA that has issued international guidelines calling for arbitrators to manage document disclosure strictly, using cost assessment as a control mechanism.

We can go farther. Institutions should require more than the ICC's disclosure on availability. Why not require a simple calendar with black-out dates for scheduled hearings and deliberations as arbitrator, teaching commitments, hearings and major filings as counsel? No disclosure of details, of course, but just calendar dates – based on then-available information – on when an arbitrator is and is not available for hearings.
As for efficiency in issuing awards, why not require arbitrator candidates to disclose not just how many prior cases they have handled as arbitrator, but also, for each case, how much time passed between the close of the record and the issuance of the award? Provided there is a field for an explanation, i.e., delay caused by suspension, or illness, this is simply objective 'data' helpful to the parties.

How about building into the procedural calendar a one or two day private (and paid) meeting of the tribunal to allow (and in some cases, force), the arbitrators to study the record together, prepare focused hearing directions, and (ideally) issue (neutral) questions to parties to prioritize use of witnesses and hearing time. (This is the "Reed Schedule" I mentioned in prior talks and blogs.)

Finally, if these proposals seem radical, consider that the CCIAG has proposed a far more radical solution: linking arbitrator remuneration to achieving milestones in the procedural calendar.

Whether or not concerns about international arbitral efficiency are exaggerated, the international arbitration community must face this discontent and, more importantly, take steps to fix these problems if it is to maintain legitimacy with its users.

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