Kluwer Arbitration Blog

Anti-Arbitration: A Modest Proposal for Standardized Performance Metrics

Michael McIlwrath (MDisputes) · Monday, October 18th, 2010

A recent discussion on the OGEMID list about “elite arbitrators” prompted one participant to humorously compare the discussion to the frequent flier programs of airlines. This led to some fanciful speculation by in-house counsel of arbitration institutions offering their own loyalty programs, awarding us with “Frequent Arbitrating” points. For example, would there be free “upgrades” of tribunals, use of institution conference rooms (complete with bad coffee and stale pastries), “premiere” case managers who play active roles in keeping the proceedings in line with party expectations, plus discounts at leading department stores and vacation destinations? Certainly, this seemed better than an alternative of discount coupons to be used at the next arbitration (buy two get one free).

Putting humor aside, however, many users (and perhaps even some arbitrators and practitioners) do desire a more consumer-oriented and transparent regime in which parties can more readily compare institutions and arbitrators through measurable elements of performance and reward those who best meet their expectations with more work. Recently, the two of us, both in-house counsel for GE, authored an article that will appear in the Fordham Papers in coming months, in which we called for institutions and arbitrators to provide more transparent performance metrics. The article is, Transparency in International Arbitration: What are Arbitrators and Institutions Afraid Of?

Our article makes our case for performance metrics. For this guest posting, we set out some of our specific proposals for information we suggest that institutions and arbitrators should each make available in a format that allows for easy comparison with others.

Arbitration Institutions – Data on Their Own Performance

We suggest that parties would benefit not only from access to information in a form that allows them to compare an institution’s performance with similar data reported by other institutions. We suggest the following as a starting point for standardized data.

• Domestic vs. international arbitration. Parties will want to be able to compare apples to apples, and the concept of “international arbitration” should be clearly defined by institutions as proceedings between parties from different countries. Not all institutions currently do this in their reported data.
• Average start to conclusion. Institutions should report data that would allow parties to assess the average resolution time of an institution’s cases, from initial request for arbitration to the issuance

(physical delivery to the parties) of the final award. To be truly useful, this data should be broken into detail based on claim amounts and type of disputes (e.g., construction, intellectual property, etc.)
• Length of each stage of proceedings. Similarly, institutions should provide data on how long each stage takes on average, for example the amount of time it takes to appoint a tribunal.
• Number of arbitrations referred to mediation and number of cases settled before an award was issued. Institutions should be mindful that parties want resolution. For example, if an institution reported that it successfully referred 80% of its cases to mediation and 50% of those settled, this would be attractive to many parties.
• Costs. Institutions should report objective data about how much parties paid for each proceeding, again broken down according to size and type of dispute.

Arbitrators – Data that Arbitrators Could Provide About Themselves

A lot of what parties wish to know about arbitrators could be acquired either by asking them or, even more simply, through statements that address how the arbitrators themselves view their performance. This approach has an immediate precedent: the International Mediation Institute, IMI, provides searchable profiles of over 300 of the world's leading mediators, www.IMImediation.org. These profiles contain extensive information about a mediator's experience, including a statement of the mediator's style and approach to dispute resolution and a digest of user feedback.

As with IM-certified mediators, arbitrators could assist parties by supplementing their bios with information about their preferences with respect to arbitral procedure. This would require some to avoid a Zelig-like character ("I'll be whatever the parties want me to be") and take more of a firm stand ("I manage proceedings with a firm hand" vs. "I defer to party autonomy").

• Domestic vs. international arbitration experience. Arbitrators should disclose whether their experience is not just in arbitration but whether it is domestic or international, by specifically stating where the parties and their counsel were from.
• Statement of case management philosophy. Arbitrators are properly expected to maintain flexibility in their approach, so that they can adapt to the particular circumstances of a case. Nonetheless, arbitrators could also disclose their approach or at least preferences, for example as to procedure with respect to how evidence should be gathered and shared, arguments should be presented, or if an attempt should generally be made for partial or even final awards disposing of threshold issues, etc.
• List of previous arbitrations in which the arbitrator has been appointed, without identifying parties, and as to each indicating whether the arbitrator acted as sole arbitrator, chair or party-nominated co-arbitrator, the country of origin of parties and their counsel, the amount in dispute, and general nature of claims (intellectual property, construction, etc.), whether the case settled before an award was rendered, time from constitution of tribunal to issuance of award by tribunal, andw hether the tribunal took steps to simplify the arbitration by shortening the time and cost, for example by bifurcating the proceedings or use of videoconference (or telepresence, a more recent and more reliable technology).
• Court challenges of any awards the arbitrator has authored. Parties would benefit from knowing the courts in which the challenge took place, and the result (if available).
• Number of dissenting opinion authored.
• References. A list of any in-house or external counsel in those arbitrations willing to serve as a reference.

Data that Institutions Could Provide About Arbitrators

Institutions certainly could and should enhance the information that they provide about their arbitrators, by requiring the type of increased disclosure from arbitrators described above, disclosing objective experiential data with arbitrators, and making this information available more transparently through on-line web access (like IMI). Information that arbitral institutions could provide includes:

• Role of the arbitrator. In reporting both individual case statistics and averages, institutions should distinguish among arbitrators acting as sole arbitrator, chair of three-member tribunals, and party-appointed arbitrators in three-member tribunals, and should also indicate whether it was the institution or the parties who made the selection.
• Resolution times for disputes heard by arbitrators. Institutions should systematically disclose the length of time arbitrators took to reach resolution in past proceedings from time of confirmation to close of hearings, and from close of hearings to the issuance of an award (or draft award in the case of the ICC).
• User feedback. No effective mechanisms currently exist to gather and report party feedback about the performance of institutions and arbitrators. A few years back, the late Thomas Walde led an effort to develop a standardized "arbitrator evaluation form" with the cooperation and input of in-house counsel, law firm counsel, academics, arbitrators, and institutional representatives. It is a good starting point for discussion. The proposal calls for a simple form to be submitted to parties and their counsel following the conclusion of proceedings, asking them to rate the performance of the tribunal and individual arbitrators on a scale of 1-5 in various areas pertaining to procedural performance (e.g., time of the proceeding, efficiency, availability). It is similar to the way many service providers seek performance ratings from their customers. Arbitrators understandably are concerned about the risk of receiving negative feedback that reflects dissatisfaction with the result of the proceedings rather than the tribunal's procedural performance, but there are ways to control for blatantly unfair comments.

We live in a world in which consumers expect and demand transparency and ready access to usable data and information regarding the products and services which they purchase. This demand will ultimately be met. The only question is whether arbitrators and institutions will take a leading role in defining what such an information regime will look like or whether they will allow others to define the framework in which they will be assessed.

Those are just some of our suggestions. We're interested in feedback from readers of this blog.

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