Kluwer Arbitration Blog

Anti-Arbitration: Would You Prefer a Harmonized Approach or a Just a Better One?

Michael McIlwrath (MDisputes) · Thursday, December 22nd, 2011

Conventional wisdom holds that one of the virtues of international arbitration is the ability to blend divergent procedures, generally referring to civil and common law traditions. The IBA Rules of Evidence, for example, seek to strike a balance among different legal cultures. “Harmonization” and “flexibility” are the terms commonly used to refer to this mixing of practices.

But if one particular approach can be shown to be superior for certain types of disputes, is employing a different or compromise approach actually sub-optimal?

I confess that I am as guilty as the next person when it comes to promoting the value of harmonization and flexibility when discussing international arbitration. But I am ready to admit to being wrong. Practices that do not lead to an overall better procedure may be more vice than a virtue.

So in today’s post I wish to challenge conventional wisdom by positing that for international commercial arbitration, the civil law approach to fact evidence is generally better than the common law’s. This rests on two underlying assumptions: (a) greater decisional weight placed on documentary evidence than witness testimony in civil law practice, and (b) parties in civil law proceedings are expected to meet their burdens by relying on documents within their control, not what they can obtain from the other side.

To be clear, my hypothesis is narrowly drawn. I would not extend it, for example, to the treatment of expert evidence, especially the practice in many (but not all) civil law jurisdictions in which a tribunal will appoint its own expert to report on contested technical issues. It would be a stretch to claim this is usually better than directly vetting the parties’ experts, as typically occurs in the common law.

With respect to fact evidence, however, the civil law practice can bring greater predictability of outcome in commercial disputes, and less time and expense of the resolution process. Here are some of the reasons why this is so:

1. Documents are how parties themselves record their commercial dealings. Few sophisticated parties today would rely solely on the memory of employees to recall past commercial events. If parties are doing their jobs right, they will create and retain contemporaneous records that accurately reflect how and when key events unfolded. Good record keeping should render the need

for witness testimony largely superfluous, at best. Since documents are how parties themselves wish to record events, why shouldn't they be considered the best possible evidence of what transpired between them?

2. Fact witness availability can be unpredictable. The ability to secure the testimony of key employees in an international commercial dispute is too often an unrequited hope. There is often no way to secure the testimony of a key employee/witness who retires or goes to work for a competitor after a dispute arises, and as a result does not wish to cooperate. The unavailability of a witness will often have nothing to do with the issues in dispute, yet it can have considerable impact on a party's ability to present its side of events where fact witness testimony is considered important. This risk is largely avoided where documentary evidence is afforded greater value than fact witnesses.

3. The unreliability of fact witness testimony. There has been an impressive quantity and quality of research in recent years about how the brain processes information. Filters in perception, called cognitive biases, alter our ability to recall past events accurately, which is a scientific way of explaining why you can never win an argument with your mother over something you did or didn't do in childhood. One very effective cognitive bias, and this is just one example, is self-deception. A witness can present an inaccurate history of events with incredible sincerity if they have deceived themselves into believing that what they say is true. The eminent evolutionary biologist Robert Trivers developed a theory of why we would deceive ourselves in a seminal essay published in the 1970s, Self-Deception in the Service of Deceit. As the title implies, the theory is that we self-deceive in order to better deceive others. He recently expanded his theory into a book which I commend to anyone who believes that witnesses are better at recalling past events than documents, *The Folly of Fools: The Logic of Deceit and Self-Deception in Human Life* (Basic Books 2011). And even when a witness is capable of presenting an unfiltered representation of past events, that does not mean that arbitrators will recognize it as such. Just like everyone else, they perceive the world through their own cognitive biases. A self-deceived witness will appear truthful, even as they are lying to themselves and the tribunal.

4. The time and cost of fact testimony can be disproportionate to the value added. There are evidentiary hearings that take place because at least one of the parties insists on the right for its witnesses to be heard. While tribunals may feel they necessarily have to grant hearing time in order to avoid a later due process challenge, that does not mean the time and cost of a hearing will be justified, especially if the hearing time is spent on witness testimony that may be of marginal value at best. Even where witnesses will testify, however, the economy of the civil law is usually more attractive than the common law. My informal rule of thumb for estimating hearing time in domestic arbitrations is that one day of testimony in a civil law arbitration translates into five days in purely common law proceedings. In other words, if two days are required to get through each side's witnesses in a domestic arbitration in Germany or Italy, it will take at least two weeks to complete the testimony of the same witnesses in a domestic arbitration in the United States.

5. The vagaries of document retention practices across cultures. International business disputes present a special problem with the broad and expensive requests for documents that may occur in common law practice (often permitted under the IBA Rules of Evidence). Parties from different legal cultures will have different legal or ethical obligations for retaining documents, and different duties whether to make them available when requested by an adverse party. Parties with robust document retention programs, usually found in common law legal cultures, are likely to have the ability (and ethical obligation) to locate and produce potentially adverse documents. This is not

always the case for parties that hail from legal cultures, often the civil law, where documents are not routinely produced. This disparity can lead to an unfair balance in access to evidence, and does not exactly lend itself to greater predictability of outcome. The civil law approach, in which each side produces the documents they intend to rely upon, is less expensive, less burdensome, and is more likely to lead to a result that a business can predict at the inception of a dispute (point 1 above).

The value of harmonizing practices from diverse legal systems is that it keeps the door open to parties and practitioners from different countries, making the practice of international arbitration accessible and non-threatening. That is certainly good. But as international arbitration continues to grow and mature, there will also be value (and virture) in adopting practices that are just, well, *better*.

This entry was posted on Thursday, December 22nd, 2011 at 3:33 am and is filed under Arbitration Proceedings, Discovery, Evidence, IBA Rules of Evidence, International arbitration

You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.