Kluwer Arbitration Blog

Is the Arbitration Climate Becoming Tougher

Henrik Fieber (Roschier) · Friday, June 29th, 2012

Roschier's recent market survey of corporate users in the Nordic region indicates that users perceive the dispute resolution climate as tougher than before, although no major or dramatic changes have taken place since 2010.

We launched the second edition of the Roschier Disputes Index at the Roschier Arbitration Forum in Stockholm on 28 May 2012, uncovering facts and trends in international dispute resolution from a Nordic perspective.

The survey was conducted by TNS SIFO Prospera, one of the leading independent market research firms in the Nordic region. The largest companies in Sweden and Finland were targeted and 146 organizations responded to the survey. The 2012 edition focuses on the same overall themes as before; namely dispute resolution choices, methods applied in actual disputes, alternative dispute resolution and future trends, but it also attempts to answer some of the questions which arose from the results in 2010.

Interestingly, 54% of companies stated that they responded to the survey from a global perspective, whilst 24% responded from a regional perspective and 22% from a local one. Hence, one of our key findings was that over two thirds of the largest companies in the region have a truly international perspective in relation to their dispute resolution practices.

Arbitration number one

According to the survey, arbitration is still clearly the preferred method for resolving disputes. This is in itself unsurprising and corresponds to the general understanding that we have of the market. A more interesting finding is that regardless of that preference, the majority of the actual disputes are litigated in court, even though the majority of these disputes are contractual.

However, when one looks at what dispute features may impact on the choice, the complexity and international nature of the dispute are relevant. According to the survey, companies tend to refer smaller, routine and domestic claims to litigation and more complex and international matters to arbitration.

When asked which are the most important factors for choosing arbitration, the expertise of the decision maker and the non-public nature of the process were considered most important. However, the difficulty of selecting arbitrators, as well as the lack of predictability and objectivity on the part of the arbitrators, were raised as concerns, and was even pointed to as a disadvantage of

arbitration. These are certainly issues that we, as an arbitration community, should take seriously. One should note that, in contrast, the neutrality of the judges was perceived as the most important factor in favor of choosing court litigation.

Whilst costs are in comparison to other factors not perceived as decisive in the choice of arbitration, and whilst arbitration is clearly the preferred method of dispute resolution, several respondents mentioned costs and price setting when asked about the main disadvantages with arbitration. This indicates that companies on balance still prefer arbitration despite costs factors, but that costs are still a concern.

Stockholm popular

Overall the Stockholm Chamber of Commerce (SCC) Rules were the most popular institutional rules among all companies in the survey. Similarly to the results in 2010, companies clearly prefer the rules of the arbitration institutes of their own domicile. The International Chamber of Commerce (ICC) rules were the most popular of the "non-domestic" ones, and were also more popular among the largest companies.

We do not think that it is surprising that companies, if at all possible, still prefer their "domestic" institutions, from which they have the most experience, regardless of the fact that their operations are often global. When the Index was launched, a panel of in-house counsel confirmed that when forced to choose between choice of venue and choice of law, the choice of venue is more important.

When asked which are the most important factors for choosing a certain set of arbitration rules, respondents perceived neutrality and freedom to appoint an arbitrator, followed by the reputation of the rules and the substantive rules of law applicable to a dispute, as the most important factors.

Overall the survey shows that trust in the neutrality of the process is important for Nordic actors. This is also in line with other important values in our societies, for example the high level of non-corruption in the Nordic countries as evidenced by several global surveys.

Trends

In relation to the future, the findings of the survey indicate that overall the number of disputes is increasing. The dispute resolution climate is perceived as tougher by users and it seems as if a more aggressive dispute resolution style is developing, e.g. more claims reach the stage of involving counsel, larger claims are being presented and there is an increase of disputes that are difficult to settle.

In arbitration, it could be said that there is a trend towards what some may call a US-style of litigation, e.g. the presentation of more evidence in proceedings, more requests for disclosure and a harsher style of litigation than the "classic" or "Nordic" style. This was also clearly reflected in some of the open answers that respondents gave in relation to litigation trends. We think that most lawyers that are involved in disputes today have seen evidence of this harsher and more confrontational climate.

On the other hand, the survey shows that there is an apparent willingness to settle the disputes, as an alternative to full-blown arbitration or litigation, and a continued interest in formal ADR. Nevertheless, ADR is still fairly seldom used by companies in the Nordic region.

A copy of the full report and Index is available at the link below:

https://www.roschier.com/files/c9892a989183de32e976c6f04e700201.pdf

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