Kluwer Arbitration Blog

Anti-arbitration: and the survey says….

Michael McIlwrath (MDisputes) · Thursday, October 4th, 2012

The new international survey on arbitral practices has just been released.

Now in its fourth iteration, the survey has come a long way since its inception in 2006 at the School of International Arbitration of Queen Mary, University of London. While the first three surveys purported to measure in-house counsel attitudes about arbitration and the enforcement of arbitral awards, this year's survey questioned a broader group of stakeholders and seeks to answer questions about preferred practices.

Not just about in-house counsel anymore

With the support of lawyers from White & Case, the 2012 survey captured data from 710 respondents, a much larger sample than the school's past surveys. And this time in-house counsel are not the sole respondents. In fact, they account for only 10% of those who answered, with 53% being private practitioners, 26% arbitrators, and 11% consisting of employees of arbitral institutions, experts, and academics (a truly mixed bag).

The survey also attempted to measure the extent of the respondents' experience in international arbitration. 71% stated that they had been involved in more than five arbitrations in the previous five years. Thus, the survey's reported data can be said to include a fair degree of experience with the subject matter, although the survey did not give less weight to the 29% who said they had been involved in fewer than five arbitrations in five years.

Unsurprising consensus views

International arbitration practitioners will not find many surprises in the general consensus reported by the survey. Most of those responding said they believe that tribunals should award costs to the prevailing party (80%); that the IBA Rules on the Taking of Evidence are useful for the management of proceedings (85%); that pre-appointment interviews with arbitrators are appropriate (86%); and a whopping 87% said having tribunals identify issues to be determined soon after their constitution would move proceedings more quickly.

These are often referred to as accepted practice in international arbitration; the survey just purports to provide some data about how widely accepted.

Indeed, the survey hints at the existence of a stubborn but substantial minority view. For the same practices above: 20% do not think prevailing parties should recoup costs; 15% do not find the IBA

Rules to be useful; 14% will not talk to a party-appointed arbitrator before appointing them; and 13% don't think it's more efficient for tribunals to identify issues to be decided early in the arbitration.

Seriously?

Rather than legitimate, considered views, the minority position may simply represent the third (29%) of respondents who have little experience with international arbitration. Perhaps they just did not understand or appreciate what was being asked. If so, the consensus view among experienced practitioners, the acceptance of preferred practices, is even stronger than what the raw percentages suggest.

He said/she said

The survey gets more interesting (and is unique) where it segments answers according to the categories of the respondents, providing interesting contrasts and potential sources of tension over the quality of arbitral proceedings.

For example, respondents indicated that arbitrators had "split the baby" in 17% of their arbitrations. That's already a significant number of cases. But the segmented data underlying this statistic suggests a severe misalignment of perceptions.

In-house counsel and private practitioners roughly agreed on how frequently baby splitting occured, at 20% and 18% of their cases, respectively. That's one in five arbitral awards decided on the basis of accommodation rather than the merits. One would think arbitrators would be especially sensitive to such a widespread problem.

Yet according to the survey, they barely acknowledge a problem exists. Arbitrators said that only **one in twenty** of their cases (5%) had produced a split baby.

If these statistics are genuinely representative of these constituencies, they show that arbitrators believe they halve the baby only 25% as often as parties and their advocates say they do.

The segmented data, therefore, indicates a huge gap in perceptions of the quality of arbitral awards, between those who write them and those who pay for the results. That's a problem for arbitration generally.

And, honestly, we need to come up with a better metaphor for this type of decision.

The 2012 survey results can be downloaded at:

https://www.whitecase.com/files/Uploads/Documents/Arbitration/Queen-Mary-University-London-International-Arbitration-Survey-2012.pdf

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