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The 2012 International Arbitration Survey: Looking behind the closed doors of international arbitration

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In October 2012, the School of International Arbitration at Queen Mary, University of London, and White & Case LLP released the results of a global survey on practices in international arbitration. Entitled "*2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (www.practicallaw.com/6-522-2998)*", the survey examines:

- The extent to which harmonised practices are emerging in international arbitration.
- Whether those harmonised practices reflect the preferred practices of the international arbitration community.

The survey comprised responses to a written questionnaire by 710 private practitioners, arbitrators and corporate counsel, as well as 104 interviews to contextualise and explain the quantitative findings. The pool of questionnaire respondents and interviewees was diverse, consisting of participants from a wide range of industry sectors, roles, legal backgrounds and locations. The unprecedented number and diversity of participants makes this survey the most comprehensive empirical study ever conducted in the field of international arbitration.

In a departure from previous International Arbitration Surveys, views were sought not only from in-house counsel, but also from private practitioners and arbitrators. This provided a pool of respondents that was both highly knowledgeable of international arbitration and dramatically larger than earlier surveys. This critical mass of participants provided authoritative empirical evidence on what actually occurs in international arbitration. It also enabled the results to be broken down by categories of respondents, whether by different geographic regions, legal backgrounds or roles.

The results of the survey are set out under seven thematic sections, which broadly follow the life of an arbitration. This article provides a summary of each section's key findings.

Selection of arbitrators

A significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally. This shows that the arbitration community generally disapproves of recent proposals calling for an end to unilateral party appointments.

There has been a long-standing debate about whether pre-appointment interviews with arbitrators are appropriate. The survey reveals that two-thirds of respondents have been involved in them, and only 12% find them inappropriate. The chief disagreement is not on whether such interviews are appropriate, but on the topics that may properly be discussed.

Almost three-quarters of respondents (74%) believe that party-appointed arbitrators should be allowed to exchange views with their appointing party regarding the selection of the chair.

Organising arbitral proceedings

The *IBA Rules on the Taking of Evidence in International Arbitration (www.practicallaw.com/4-502-4254)* (IBA Rules) are used in 60% of arbitrations, in 53% as guidelines and in 7% as binding rules. In addition, a significant majority of respondents (85%) confirm that they find the IBA Rules useful.

Tribunal secretaries are appointed in 35% of cases. Only 10% of arbitrators said that tribunal secretaries appointed in their cases prepared drafts of substantive parts of awards, and only 4% said tribunal secretaries discussed the merits of the dispute with them.

The most effective methods of expediting arbitral proceedings are (in order):

- Identification by the tribunal of the issues to be determined as soon as possible after constitution.
- Appointment of a sole arbitrator
- Limiting or excluding document production.

Even though fast-track arbitration is regularly cited as a prime method of cost control, the survey reveals that it is not commonly used in practice. The vast majority of respondents (95%) either had no experience with fast-track arbitration (54%) or were involved in only one to five fast-track arbitrations (41%). However, 65% of respondents are either willing to use fast-track clauses for future contracts (5%) or are willing to do so, depending on the contract (60%).

Interim measures and court assistance

Despite being the subject of significant legal commentary, requests for interim measures to arbitral tribunals are relatively uncommon: 77% of respondents said they had experience with such requests in only one-quarter or less of their arbitrations. Even rarer are requests to courts for interim measures in aid of arbitration: 89% of respondents had experience with them in only one-quarter or less of their arbitrations.

Only 35% of all applications to the arbitral tribunal for interim measures are granted. Of those applications which are granted, the majority are complied with voluntarily (62%) and parties seek their enforcement by a court in only 10% of cases.

There is no consensus on whether arbitrators should have the power to order interim measures *ex parte* in certain circumstances. Just over half of respondents (51%) believe that arbitrators should have such a power, while 43% believe they should not (6% were unsure).

Document production

Requests for document production are common in international arbitration: 62% of respondents said that more than half of their arbitrations involved such requests.

The survey confirms the widely held view that requests for document production are more frequent in the common law world: 74% of common lawyers (compared to only 21% of civil lawyers) said that 75% to 100% of their arbitrations involved such requests.

Notwithstanding the differing traditional approaches to document production in civil and common law systems, the survey reveals that 70% of respondents believe that documents "relevant to the

case and material to its outcome" (that is, the standard in Article 3 of the IBA Rules) should be the applicable standard for document production in international arbitration.

How important are disclosed documents to the outcome of the case? The survey reveals that they are crucial in a statistically significant percentage of arbitrations: a majority of respondents (59%) stated that documents obtained through document production materially affected the outcome of at least one-quarter of their arbitrations.

Fact and expert witnesses

!n a significant majority of arbitrations (87%), fact witness evidence is offered by exchange of witness statements, together with either direct examination at the hearing (48%) or limited or no direct examination at the hearing (39%). 59% of respondents believe that the use of fact witness statements as a substitute for direct examination at the hearing is generally effective.

The vast majority of respondents believe that cross-examination is either always or usually an effective form of testing fact (90%) and expert witness evidence (86%).

While mock cross-examination of witnesses prior to their appearance at a hearing is considered unethical in some legal cultures, the survey shows that it is commonly done and often considered acceptable in international arbitration. 55% of respondents noted that there was mock cross-examination of witnesses in their arbitrations. 62% of them (civil and common lawyers alike) find it appropriate.

In the vast majority of arbitrations, expert witnesses are appointed by the parties (90%) rather than by the tribunal (10%). However, respondents' preferences are less stark: only 43% find expert witnesses more effective when they are appointed by the parties, while 31% find tribunal-appointed experts more effective.

Pleadings and hearings

Not only does sequential exchange of substantive written submissions occur much more regularly (82%) than simultaneous exchange (18%), there is also a strong preference for this type of exchange (79%).

The survey reveals that only a small minority (15%) of merits hearings are held outside the seat of arbitration.

The most common duration of a final merits hearing is three to five days (53%), followed by six to ten days (23%), one to two days (19%) and ten days or more (5%).

Civil lawyers have traditionally claimed that their hearings are shorter than those of common lawyers. The survey confirms this to be true. 31% of civil lawyers said the average duration of their merits hearings was one to two days, compared to only 9% of common lawyers.

Time limits are imposed for oral submissions and/or examination of witnesses in two-thirds of arbitration hearings. Most respondents prefer some form of time limits (57%), while only 6% prefer no time limits at all (34% said it depends on the case).

The arbitral award and costs

How long should a tribunal take to render an award? For sole arbitrators, two-thirds of respondents believe that the award should be rendered within three months after the close of proceedings. For three-member tribunals, 78% of respondents believe that the award should be rendered either within three months (37%) or in three to six months (41%).

A common criticism of arbitration is that tribunals unnecessarily "split the baby". Overall, respondents believe this has happened in 17% of their arbitrations, while those actually making the rulings (the arbitrators) said this occurs in only 5% of their arbitrations.

Tribunals allocate costs according to the result in 80% of arbitrations, and leave parties to bear their own costs and half of the arbitration costs in 20% of arbitrations. However, only 5% prefer this latter approach, which shows there is a desire for tribunals to allocate costs according to the result even more frequently than they are currently doing.

An overwhelming majority of respondents (96%) believe that improper conduct by a party or its counsel during the proceedings should be taken into account by the tribunal when allocating costs.

This sends a strong message to arbitrators that they are expected to penalise improper conduct when allocating costs.

Conclusion

Despite the dominance of international arbitration as the dispute resolution method of choice for international business, little empirical evidence exists about what goes on in this inherently private process. For the very first time, the closed doors of international arbitration have been opened up for the world to look behind. We now know which practices in the arbitral process are most common around the world and which are preferred. We hope that the 2012 International Arbitration Survey acts as a reference point for the international arbitration community for years to come, not least when arguing points of procedure before arbitrators.

The survey can be found at: *2012 International Arbitration Survey: Current and Preferred Practices in the Arbitral Process, White & Case LLP (October 2012) (www.practicallaw.com/6-522-2998)*.

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