Kluwer Arbitration Blog

Can Discovery Costs be treated as Arbitration Costs?

Alexis Mourre (Castaldi Mourre & Partners) · Tuesday, July 13th, 2010

As is well known, Section 1782(a) provides that a "*the district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal*".

The applicability of 28 U.S.C. § 1782 to international arbitration has generated an interesting debate, especially on this blog (*see* lastly G. Born's post, L. Reed's post, E. Triantafilou's post, *adde*, Y. Lahlou, *l'applicabilité de l'article 28 USC 1782 à l'arbitrage commercial international*, *Gaz. Pal*., 2009-3). The debate is essentially concerned with the question whether an international arbitral tribunal constitutes a "foreign tribunal" for purposes of § 1782 (see the recent: In re Application of Chevron, 2010 WL 1801526, at *6 (S.D.N.Y. May 6, 2010 and Roger Alford's blog). Conflicting solutions on this issue have been rendered in the United States (against the application of § 1782 to international arbitration *see e.g.*: *National Broadcasting Co. Inc and NBC Europe v. Bear Steans & Co., Inc et al*, 165 F.3d 184 (2d Cir. 1999); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa* No 08-20771, 2009 US App. Lexis 17596 (5th Cir. Aug. 6 2009); *In re Arbitration in London, England*, No. 09-C-3092, 2009 US Dist. Lexis 49827. For the application of § 1782 to international arbitration see e.g. *In re Oxus Gold plc*, MISC 06-82-GEB, 2007 WL 1037387 (D.N.J. April 2,2001), I*n re Roz Trading Ltd*, 469 F. Supp. 2d 1226; *In re Hallmark Capital Corp.*, 534 F Supp. 2d 951 (D. Minn. 2007), *Comisión Ejecutiva, Hidroeléctrica del Río Lempa v. Nejapa Power Co., LLC*, No. 08-135, 2008 WL 4809035, at *1 (D. Del. Oct. 14 2008).

A related, and somewhat minor question, has however attracted little interest, and that is whether costs incurred by the party to an arbitration procedure in court proceedings based on § 1782 ("the Discovery costs") may be treated as costs of the arbitration and allocated by the arbitral tribunal. The question will be relevant to the parties since, as it is known, costs are not refunded to the prevailing party in the context of Discovery court proceedings in the United States.

The critical issue is whether the Arbitral Tribunal has jurisdiction to allocate Discovery costs as costs of the arbitration.
The first element of answer may be found in the arbitration agreement.
Proceedings related to a Discovery application in aid of the arbitration may well be considered as a dispute *arising out or relating to* the underlying contract. Hence, there should not be any difficulty to admit that, in principle, Discovery applications are related to the contract. As a consequence, a broadly formulated arbitration clause (such as a clause worded as follows "*all disputes arising out of or in connection with the present contract shall be finally settled through arbitration by one or*

more arbitrators") may well be construed as applying to Discovery costs. This is not the end of the story, however.

A first argument against the arbitral tribunal's jurisdiction to apportion Discovery costs is that applications for Discovery in aid of the arbitration applications usually involve third parties in possession of the evidence sought. Such circumstance, however, should not be relevant as long as the parties in dispute in the arbitration are also parties to the Discovery court proceedings.
Another possible objection relates to the concept of "costs of the arbitration".

In the context of UNCITRAL or institutional arbitration, it should be seen whether the applicable arbitration rules permit to treat such costs as costs of the arbitration.

It is for example doubtful that, under Article 38 of the 1976 UNCITRAL rules, Discovery costs can be treated as costs of the arbitration. Article 38 provides that "*the term 'costs' includes only: (a) the fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39; (b) the travel and other expenses incurred by the arbitrators; (c) the costs of expert advice and of other assistance required by the arbitral tribunal; (d) The travail and other expenses of witness to the extent such expenses are approved by the arbitral tribunal; (e) the costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable; (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at the Hague*".

The new 2010 UNCITRAL rules, however, include a new wording of § (e) below. The new Article 40 (e) of the Rules now provides that costs include "*the legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable*". Arguably, Discovery costs are costs incurred "*in relation to the arbitration*". As a consequence, Discovery costs would be treated as costs of the arbitration.

The ICC rules, with respect to costs, provide in Article 31(3) that "*The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties*". Article 31(1) also provides that the costs of the arbitration include the "*reasonable legal and other costs incurred by the parties for the arbitration*". Such a provision does not seem to encompass costs incurred "*in relation*" to the arbitration. It is generally admitted, however, that arbitrators have wide discretion in apportioning costs. Whether such discretion could be used to allocate Discovery costs remains to be seen.
The LCIA rules confer to an arbitral tribunal the power to "*order in its award that all or part of the legal or other costs incurred by a party be paid by another party*" (Article 28.3). However, this provision seems to relate to the costs incurred in the arbitration, and would thus not apply to costs incurred in court proceedings. The ICDR rules refer in Article 31 to "*the costs of arbitration*". Although the rules also provide for a non-exhaustive list of what "*may*" be included as such costs, , the concept of costs of arbitration is arguably not equivalent to that of costs incurred "*in relation to" the arbitration*. The same observation applies with respect to Article 38 of the Swiss Rules.

Another possible ground to recover Discovery costs could be as damages for breach of the arbitration agreement. It is unlikely that the *lex arbitri* would prevent a party from seeking Discovery in aid of the arbitration, but it may well be that the arbitral tribunal enjoined the party from doing so or from pursuing an application made without the tribunal's leave.

A U.S. court has, in this respect, decided that § 1782 application suppose the consent of the arbitral tribunal (*see In re Bacock Borsig AG*, 583 F. Supp. 2d a 233 (D. Mass. 2008)). Such principle is healthy as Discovery applications – as they include leave to depose witnesses and suppose broad discovery – are likely to be inconsistent with the tribunal's procedural directions. In such a scenario, an application made in disregard of the tribunal's directions or order would constitute a breach of the arbitration agreement insofar as the arbitration agreement obliges the parties to cooperate in good faith to the proceedings. There should be no valid reason why such a breach could not give rise to damages.

Alexis Mourre/Alexandre Vagenheim

This entry was posted on Tuesday, July 13th, 2010 at 6:50 pm and is filed under Arbitration Agreements, Arbitration Institutions and Rules, Arbitration Proceedings, Costs in arbitral proceedings, Disclosure, Domestic Courts, United States
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a

response, or trackback from your own site.