“Waiter, I did not order this! – The Arbitrator and the Evidentiary Excess”

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Everybody who has visited a certain number of arbitration conferences over the last few years has probably heard at least an equal number of contributions relating to costs in arbitration. Similarly, the number of written articles on the topic in legal literature is enormous and entire books are based on the subject. Considering that cost efficiency is often cited as one of the cornerstones of arbitration as a method of dispute resolution, it is quite understandable that practitioners have taken particular interest in this issue. It has also been repeatedly stated that the costs typically associated with arbitration proceedings have been escalating for a considerable amount of time. For example, the Queen Mary School of International Arbitration 2008 International Arbitration Study cites costs as being perceived by corporate counsels to be one of the two major disadvantages of international arbitration. Commentators on the subject offer a variety of explanations for this trend as well as proposals for dealing with the constant threat of costs. Ultimately, it is safe to say that arbitrators have ways of at least partially disarming the cost trap.

One aspect where this particularly holds true is the issue of costs associated with the taking of (or, in most cases more accurately, the submission of) evidence. Quite a few stories have been told about how truck loads of documents were submitted in fifteen copies to various parties involved in an arbitration. While these examples are probably not representative of the average arbitration case, the costs resulting from a “generous” approach to evidence can be quite considerable even (or, in relation to the amount in dispute, especially) in smaller cases. While the submission of evidence forms an integral part of a party’s opportunity to state its case and right to be heard, it is also generally understood that the “evidentiary excess” does not necessarily serve the arbitral process well. Additionally, the way parties approach evidentiary matters in arbitration can vary greatly and may result in a gross imbalance of potential claims for compensation of costs. The application of the principle of “costs follow the event” can lead to inequitable results in these cases, presenting the losing party with a bill it could and need not have expected.

In some instances, arbitral tribunals attempt to compensate for this in their decision on costs. One principle increasingly applied in practice has been set down in the 2010 revision of the IBA Rules on the Taking of Evidence in International Arbitration (“IBA Rules”) which put the entire evidentiary process under the principle of good faith and provide for the possibility of penalising a party’s violation of this principle. However, excessive approaches to evidence are often not a matter of bad faith. Of course, under most arbitration laws and institutional rules, the cost decision lies within the absolute discretion of the arbitrators who can take these factors into account irrespective of whether a party has acted in bad faith. However, is it always possible to strike an appropriate balance between

the reasonable expectations of all the parties involved in an arbitration? Also, considering these expectations, where do the arbitrators set the mark for excess?

Ultimately, the most reasonable option would be to prevent these questions from arising at all. The arbitrators' power (and duty) to conduct the proceedings provides a means to do so. In providing guidelines on issues of evidence at an early point in the proceedings, an arbitral tribunal can positively influence the likelihood of evidentiary excesses and possibly even prevent an excess from occurring at all.

Readers may now think: "What's the issue? That is exactly what we are doing in an early procedural order or an organisational conference." The issue is not the issuance of boilerplate directions on the evidentiary process in general, the setting of requirements for the specificity of evidence presentation, or the general request to limit documentary evidence to the extent necessary. Nor am I advocating the establishment of an overly restrictive and inflexible regime on the amount of evidence to be presented. Instead, the issue is the early consideration of the particular case which enables the arbitrators to take a proactive approach to evidentiary issues. Two evidentiary aspects can be confined particularly well by this approach. One is the handling of requests for production of documents, and the other is the approach to expert opinions.

Firstly, requests for document production have become quite regular in international arbitration proceedings and the question of whether, and to what extent, document discovery is admissible in an arbitration has been the subject of a multitude of discussions. Whichever way an arbitral tribunal chooses to answer this question, a badly conducted document production procedure can impede the arbitral process and lead to substantial amounts of costs for all the parties involved. Taking a proactive approach in relating discussions with the parties is only the first step in avoiding this. Where a tribunal is confronted with substantial requests for document production, it should assume the duty of thoroughly considering the relevance, materiality and proportionality of the documents requested. An off-the-top-of-the-head decision based on a rough and abstract evaluation of reasonability might be suited to determining the proportionality of a request but will be insufficient in taking into account its evidentiary and legal relevance. In exhibiting a diligent approach, an arbitrator can channel the parties' (or counsels') ambitions and prevent potential discovery torpedoes from blowing up in everyone's faces.

Secondly, the complexity of the commercial or technical issues of a dispute does not always relate to the amount in dispute. Expert evidence can therefore constitute a substantial amount of the overall costs of an arbitration, and, depending on the importance attributed to this issue by the parties, can also lead to considerable differences in the parties' statements of costs. Discussions on this subject are frequent and opinions vary greatly. Approaches like the recent "Sachs Protocol" provide for an increased involvement of the arbitrators in selecting party experts and – although not primarily geared towards this goal – can help contain the costs of expert evidence as well as its potentially negative impact on the arbitration's schedule. Irrespective of whether and how the arbitral tribunal is willing to contribute to the expert selection process, it can limit the experts' work (and resulting costs) by providing specific guidance early on in the proceedings as to the issues on which it expects the experts to opine. This is, once more, a matter of relevance and materiality. Even if some parties may not be willing to relay these limitations to their experts, this approach at least helps establish a yardstick against which an evidentiary excess can be measured.

Of course, managing proceedings in such a way requires a firm knowledge of the case and the identification of the legal issues involved, already at an early stage in the proceedings. In some cases, it will not be possible or appropriate to conduct this kind of preliminary determination immediately. Nevertheless, the arbitrators' authority over the conduct of the arbitration provides tools to flexibly structure the proceedings in a way that enables them to take these issues into account. Naturally, this

calls for specialised attention and is certainly not compatible with any form of “fire and forget” or “laissez-faire” approach. Ultimately, however, the arbitrators themselves will usually benefit from such a process.