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Why not give the clients what they want?

Lisa Bench Nieuwveld (Conway & Partners) · Monday, December 17th, 2012

There are many clients who are often engaged in industrious works that result in disputes. Typically, the applicable arbitral agreements requirement submitting claims to international arbitration and, in this author's opinion, appropriately so. However, these same clients may also be subject to frequent claim assertions that lack any true merit. Despite this, there is not truly a mechanism in place to protect such clients against having to fully defend themselves against such frivolous claims.

Under the ICSID rules the situation is different. Originating in the 2006 Amendments, Rule 41(5) allows a party to object to a claim that is "manifestly without legal merit." This rule has, over the years, been tested and utilized by ICSID investment treaty claims. As the ICSID framework operates independently, however, it is not subject to a review under the terms of the New York Convention.

Could and should such a process be extended to international commercial claims under the auspices of international arbitration institutions? Many arbitral rules have recently undergone rigorous review and changes from appointed committees, such as the ICC Arbitration Rules. However, no such rule as found in the ICSID Rules exists. Why? There are, perhaps, many cultural reasons but the most obvious issue stems from the New York Convention, which may allow a party to claim under Article V that it was not given a proper opportunity to be heard and make its case. Clearly, protecting one's right to assert its full claim is legitimate, it can also lead to abuse of the system – ultimately, hassling companies by making them carry-on a full defense on what can be determined early-on as a claim "manifestly without legal merit."

Other commentators have considered models found in the common law system, such as that often referred to summary judgment or in the civil law system, such as the "kort geding" in the Netherlands which captures elements of both the common law summary judgment style motions and interim measure reviews.

The question raised is whether it could possibly hold up against a claim under the New York Convention when seeking recognition or enforcement of an arbitral award. Published in the Arbitration International (the Journal of the London Court of International Arbitration) in 2010, myself along with two co-authors (Ned Beale and Matthijs Nieuwveld) considered some preliminary motion options in practice in the United Kingdom and The Netherlands. In the article, entitled Summary Arbitration Proceedings: A Comparison Between the English and Dutch Regimes, "The authors recognize that the Dutch kort geding procedures should be distinguished

from the English summary judgment procedure, having a requirement of urgency, as opposed to a strong case on the merits, and producing, at least technically, only interim remedies. However, given that interim awards resulting from arbitration kort geding procedures are often not challenged in subsequent main proceedings, in reality such an interim award often amounts to a final, summary, disposition of the claim. Specific provision for arbitration kort geding procedures make such 'summary' dispositions fairly frequent in the Netherlands, and also on the authors' analysis protect against risk of being refused recognition and enforcement under the New York Convention.

Given that arbitral summary judgment is relatively rare in England, and that on the authors' analysis there is a risk of such awards being appealed to the English court or refused recognition and enforcement under the New York Convention, the authors conclude that there is a good argument for specifically providing for summary judgment in the 1996 Act and/or the LCIA Rules. Obviously, whether a tribunal would exercise such a power would remain in the tribunal's discretion, but in the authors' opinion an express statement of the tribunal's powers in this regard would be a useful clarification of the law." (Ned Beale, Lisa Bench Nieuwveld, and Matthijs Nieuwveld, 26/1 Arbitration International 159 (2010)).

Furthermore, there is no precedent – looking to the ICSID examples can give arbitrators something to rely on when considering using a rule that would allow early-on review of the merits. What is crucial is finding a way to satisfy the NY Convention Article V(b) wherein the party may seek setting aside the arbitral award because the party was "unable to present his case."

Surely, this can be worked around? The parties can "adequately" present their case while clearly demonstrating early on whether there are sufficient merits to press forward with a full-blown arbitration? I have no doubt this sparks controversy arising from all of our legal system biases, etc., but thoughts would be interesting to hear – is it ever possible to follow the ICSID example when constrained by the NY Convention? If so, how?

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