

Arbitrator-ordered Costs of Injunctive Relief Proceedings in National Court: When Should a Party Be Able to Recover its Costs?

Kluwer Arbitration Blog

April 6, 2017

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Please refer to his post as: Mika Savola, Anna-Maria Tamminen, 'Arbitrator-ordered Costs of Injunctive Relief Proceedings in National Court: When Should a Party Be Able to Recover its Costs?', Kluwer Arbitration Blog, April 6 2017, <http://arbitrationblog.kluwerarbitration.com/2017/04/06/arbitrator-ordered-costs-of-injunctive-relief-proceedings-in-national-court-when-should-a-party-be-able-to-recover-its-costs/>

One of the topics discussed by the panels at last week's 20th Annual IBA Arbitration Day was parallel proceedings. We heard well-prepared and interesting presentations on many aspects of parallel proceedings such as confidentiality and the taking of evidence. As we all know, such parallel proceedings often also take the form of court proceedings initiated to seek conservatory or other interim measures of protection from a national court. One interesting aspect that arises in this context is whether costs related to such proceedings are recoverable in a subsequent or parallel arbitration and if so, when.

Bernard Hanotiau has concluded that, "[i]t seems that the allowability of these costs as costs of the arbitration is generally not accepted. They should be claimed and allocated in the relevant procedures. Some of them might also be claimed as damages." (See Hanotiau, *The parties' costs of arbitration*, in Derains, Yves – Kreindler, Richard H. (ed.), *Evaluation of Damages in International Arbitration*, Dossiers of the ICC Institute of World Business Law, ICC Publication No. 668, Paris 2006, p. 215.) Sometimes this analysis is, however, affected by the applicable cost regime. In some jurisdictions (including Finland) the law provides that the costs of interim measure proceedings shall be determined and allocated between the parties only in connection with the decision on the merits of the dispute, i.e., in a final award rendered by the arbitral tribunal (provided that there is a valid and binding arbitration agreement, and the party initiates an arbitration following the interim measure proceedings). In such cases, a party is allowed to request reimbursement of its costs of ancillary interim measure proceedings only in conjunction with the arbitration.

The above-mentioned question was specifically addressed in a final award recently rendered in an FAI arbitration between two Finnish parties, A and B. The main issue in dispute concerned the allegedly unlawful termination of the parties' co-operation agreement by B. Before the arbitration proceedings were launched, A sought an injunction from Finnish state courts prohibiting B from terminating the co-operation agreement. The application was dismissed in both the District Court and the Court of Appeal. In the meantime, A commenced FAI arbitration proceedings against B, requesting inter alia that the arbitral tribunal (i) declare that the termination had been unlawful and (ii) order B to pay to A the costs and expenses arising out of the injunction proceedings, together with default interest in accordance with the Finnish Interest Act.

The arbitral tribunal ultimately found that the termination of the co-operation agreement by B had

been unlawful. As regards the compensation of A's costs related to the injunction proceedings, the arbitral tribunal stated as follows (direct quotation from the award, with only the names of the parties anonymized):

"A has claimed that as B has not been entitled to terminate the Agreement, A has had the right to seek an injunction. According to A, the Arbitral Tribunal has the power to decide who will bear the costs and expenses arising out of or in connection with the injunction proceedings in front of the national court in accordance with Chapter 7, Section 10 of the Finnish Code of Judicial Procedure. This provision of law reflects the principle that the party who has lost the main proceedings shall also be ultimately liable for the costs and expenses arising out of or in relation to the injunction proceedings.

B has asserted that A should be liable to pay the costs as [it] has lost the injunction proceedings in both instances. The courts have found that no legal grounds for an injunction order have existed. A's injunction application has therefore not been necessary. (...) B has further asserted that the Arbitral Tribunal is in fact bound by the findings of the Court of Appeal, according to which there have been no legal grounds for an injunction order (...)

The Arbitral Tribunal first notes that Chapter 7, Section 10 of the Finnish Procedural Code provides that the question as to which of the parties in the injunction proceedings shall finally bear the cost, shall be resolved when ruling on the main issue in the main proceedings and provided that a party has so requested. Furthermore, Section 11 of the same Chapter provides that an applicant who has unnecessarily resorted to injunction proceedings shall be liable to compensate the opposing party for the damage caused by the precautionary measures and their enforcement, and to cover the expenses incurred. In other words, the question as to who is liable to pay the cost arising from the injunction proceedings is to be decided based on who wins the main issue and whether the injunction proceeding in the light of the outcome of the main issue has been unnecessary. (...) The Arbitral Tribunal also notes that under Finnish law, as a main rule, the binding finality of court decisions is usually limited to the outcome of the decision, not to its reasoning. Furthermore the findings of a court in an injunction proceeding are not legally binding on the court or arbitral tribunal that is competent to decide on the main issue (...) Accordingly, the decisive matter here is whether the injunction proceeding initiated by A was unnecessary in light of the outcome of this arbitration. The answer is no - B has terminated the Agreement without grounds and therefore A's attempt to obtain an injunction to try to prevent the unlawful termination was necessary. (...) For the reasons stated above, the Arbitral Tribunal finds A's claims justified and accepts them and orders accordingly."

The rule contained in Chapter 7, Section 10 of the Finnish Procedural Code - according to which the costs of the injunction proceedings shall be allocated in the main proceedings - hardly lends itself to any other conclusion than the one adopted by the arbitral tribunal, i.e. that it is up to the tribunal to allocate such costs. What this means to a party filing for such injunctive relief in national courts is that that party can seek to recover its costs first once the subsequent or parallel arbitration has been concluded.

More importantly, however, in the light of the decision in the above discussed case, a party seeking injunctive relief from a national court should carefully assess whether it has good grounds to do so at the time of filing its application. Yet, from a costs perspective, the party does not need to worry about

whether or not the arbitral tribunal will ultimately agree with the national court on the merits of the case. Rather, the test is only one of necessity at the time of filing the application for injunctive relief.

The above tribunal's decision thus underlines that a party should subsequently be able to prove that its application for injunctive relief was necessary and made in good faith at the time it was submitted to the court. The decision certainly also discourages any party from bringing injunctive proceedings in bad faith, unless that party is willing to carry the cost of such proceedings.

What this case leaves unanswered is how should an arbitral tribunal weigh the necessity of such application for injunctive relief in a case where a party chooses, for whatever reason, to seek the same interim relief simultaneously from a state court and the arbitral tribunal. To our knowledge, there is no reported case law addressing this question in Finland.