Kluwer Arbitration Blog

How do You Tax the Costs of International Arbitration Proceedings?

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Introduction

Section 10 of the Singapore International Arbitration Act ("IAA"), allows a party to challenge an arbitral tribunal's determination of its jurisdiction. Section 10(7) further provides that, where the Court rules under section 10 that the tribunal has no jurisdiction, it may make an order as to the costs of the arbitral proceedings.

I was recently involved in a case where, upon a successful challenge to the tribunal's jurisdiction under section 10, the Court made an order under section 10(7) of the IAA for the costs of the arbitration to be *"taxed by the Registrar of the Supreme Court if not agreed"*.

The subsequent taxation proceedings were far from straightforward and threw up a number of issues which have yet to be fully resolved by the courts.

How are the costs of the arbitration to be taxed?

The precise procedure to be adopted by the Registrar of the Supreme Court (the "Registrar") in taxing the costs of the arbitration is not stated in the IAA, but is left to the Rules of Court (the "Rules"). Although the position is not entirely clear, it appears that the procedure for taxing the costs of the arbitration is regulated by Order 59 of the Rules (pursuant to Order 59, rules 2(1) and 12(1)(c)).

To what extent is taxation in the Registrar's discretion?

Typically, subject to the provisions of Order 59, the amount of costs to be allowed in taxation is in the discretion of the Registrar, which is to be exercised having regard to the principle of proportionality as well as all the relevant circumstances: Order 59, rule 31(1) read with paragraph 1(2) of Appendix 1 to Order 59.

This is similar to how arbitrators are expected to approach the issue of costs under various institutional rules. For instance, Article 38(5) of the International Chamber of Commerce Arbitration Rules provides that, in making decisions as to costs, the tribunal *"may take into account such circumstances as it considers relevant"*.

However, in taxation proceedings, the application of the principle of proportionality can result in significant sums being taxed off a Bill of Costs ("Bill"). Indeed it is quite possible for a successful litigant's party and party costs to be taxed down by more than 75%.

Such drastic discounts have been justified on the basis that there is a public interest in controlling the costs of litigation in order to ensure adequate access to justice: *Lin Jian Wei v Lim Eng Hock Peter* [2011] 3 SLR 1052 at [77].

By contrast, there is no similar public interest in controlling the costs of private arbitration: *VV v VW* [2008] 2 SLR(R) 929 ("VV") at [31]. Perhaps as a result, in practice, successful parties in arbitration tend to recover a larger proportion of their costs as compared to successful parties in litigation.

Hence, where an order is made by the Court under section 10(7) of the IAA that the costs of the arbitration are to be taxed by the Registrar, it is not obvious that the procedure prescribed by Order 59 of the Rules is well-suited to this exercise, since it is predicated upon the different principles which apply in a taxation of litigation costs.

For instance, given that international arbitration practitioners are not necessarily regulated by the Legal Profession Act, it is possible for the Registrar to be confronted with a Bill containing legal fees of a quantum or nature that would not typically be permitted in taxation, e.g. contingency fees.

The issue is even more complicated if the tribunal has already assessed the reasonable costs of the arbitration. Although in theory the tribunal's assessment has no legal effect since it was, *ex hypothesi*, made without jurisdiction, in practice the Registrar has no realistic basis upon which to disagree with the tribunal's assessment.

This then begs the question of whether an order under section 10(7) of the IAA that the costs of the arbitration be taxed serves any useful purpose, if the reality is that the Registrar will not second-guess the tribunal's assessment of reasonable costs.

Indeed, given that the costs of the taxation proceedings themselves are frequently heavily taxed down in "Section 2" of the Bill, the only result of such an order appears to be to unjustly penalise a party who successfully invokes section 10 of the IAA.

Costs in a different currency?

Taxation of the costs of the arbitration is even less helpful when those costs have been incurred in a foreign currency, as they were in my case. Not only is it then difficult for the Registrar to determine whether such costs are reasonable, of the more fundamental issue is whether and how costs can be dealt with in a foreign currency.

Damages can of course be ordered in a foreign currency, and there appears to be some authority that so can costs: *Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France SA* [2016] EWHC 3421 (Pat) at [11].

However, as a matter of procedure, in taxation the Bill must be accompanied by a summary which, like the eventual Registrar's Certificate, is composed electronically through the eLitigation platform (Paragraph 95(1) and (4) of the *Supreme Court Practice Directions*), which only permits the inclusion of figures in Singapore Dollars.

As such, I had to submit the costs of the arbitration, although incurred in a foreign currency, for taxation in Singapore Dollars, which raised the issue of the appropriate date of conversion.

In theory, the date of conversion ought to be the date on which the costs were incurred, but this was impracticable given that different costs were incurred on different dates. A more convenient date was the date of the tribunal's award, but the date of the order under section 10(7) of the IAA seemed more principled, since that was the date my client's entitlement to the costs of the arbitration crystallised.

Having said that, the reasonable costs which the successful party is entitled to are not finally quantified until the taxation hearing, and on that basis the date of conversion arguably ought to be the date of the taxation. However, this presents a problem if the taxation hearing is part-heard (as it was in my case): it seems unacceptable that a party's recoverable costs should fluctuate based on exchange rate movements in the intervening period.

Conclusion

As successful jurisdictional challenges under section 10 of the IAA have been rare, the practical implications of an order under section 10(7) of the IAA that the costs of arbitration proceedings be taxed have not yet been fully worked out.

However, it seems likely that section 10 of the IAA will be resorted to with greater frequency, and with more success. If section 10(7) of the IAA is to provide an effective means of providing for the costs of the arbitration proceedings, it will be necessary for the courts to explain exactly how the taxation of such costs is to work.

For further comments on the topic, please see the September 2017 issue of the Singapore Law Gazette.

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