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Should Arbitrator or Institutional Fees be Reduced when Awards are Subject to Challenge?

Andrea Menaker (White & Case LLP) · Wednesday, April 22nd, 2009 · White & Case

In two recently reported cases, parties to arbitrations have challenged arbitrator and/or institutional fees where the underlying awards have also been subject to annulment or set aside proceedings. Are these cases isolated instances or do they signal an increased trend? The answer may have widespread ramifications for how, and where, arbitrations are conducted and administered.

In Soyak Int'l Constr. & Investment Inc. v. Hobér, Kraus & Melis, No. Ö 4227-06 (3 Dec. 2008), the Swedish Supreme Court affirmed the power of Sweden's national courts to revise arbitrator fees. Soyak had challenged the arbitrators' fees from a Stockholm Chamber of Commerce ("SCC") arbitration pursuant to Articles 37 and 41 of the 1999 Swedish arbitration law. In a separate action, Soyak also sought to have the award set aside for failing to provide adequate reasons. Ultimately, the Supreme Court would rule in the latter case (Soyak v. Hochtief AG, T 4387-07 (31 Mar. 2009)) that the reasoning in the award was sufficient.

Article 37 of the Swedish arbitration law requires that arbitrator fees be reasonable, and Article 41 specifically empowers litigants to challenge the level of those fees before the courts. The three arbitrators in the case argued that Article 41 should not apply where the fees in question were set by the SCC, rather than by the arbitrators themselves, claiming that the parties had waived their right to contest the fees when they agreed to SCC arbitration. The Swedish Supreme Court disagreed. Finding the decision on fees to be appealable (i.e., subject to judicial review), the Supreme Court remanded the case to the lower court for a determination of the reasonableness of the fees.

Several other jurisdictions also provide, to varying degrees, judicial review of arbitrators' fees, including England (Section 28(2) of the Arbitration Act 1996), Italy (Article 814 of the Italian Code of Civil Procedure), Denmark (Article 34(3) of the Danish Arbitration Act 2005), Finland (Section 47 of the Finnish Arbitration Act) and, for domestic arbitrations only, Switzerland (Article 36(i) of the Intercantonal Arbitration Convention (Concordat)).

Disgruntled parties have also sought to recoup fees paid to arbitration institutions when awards have been vacated. In Coffee Beanery v. WW, L.L.C., No. 07-1830, 2008 U.S. App. LEXIS 23645 (6th Cir. Nov. 14, 2008), two coffee franchise owners that lost an arbitration administered by the American Arbitration Association ("AAA") successfully had the award vacated by the U.S. Sixth Circuit Court of Appeals for manifest disregard of the law. The Court also ruled that the dispute was not arbitrable. The parties subsequently requested the AAA to refund approximately $17,000

in fees paid to it and the sole arbitrator in the case. To date, the AAA has refused.

The Soyak and Coffee Beanerycases raise the question of whether arbitrator and institutional fees should be linked to an award's enforceability. On the one hand, arbitrator fees have been considered a matter of contract between the parties and the arbitrators. Under this theory, the parties' contractual responsibility to pay the arbitrators and the institution for conducting and administering the arbitration, respectively, is analytically distinct from the content of the resulting award. The Swedish Supreme Court's decision in the Soyakcase, for example, focused only on whether the SCC's determination of arbitrator fees was subject to judicial review. And, as the AAA observed in declining the franchise owners' request for a refund, "compensation is an independent obligation between the parties and the arbitrator," and fees paid in connection with arbitrations are not dependent upon the arbitration's outcome, even when awards are vacated. (Excerpts of the correspondence between the franchise owners and the AAA can be found on the website www.bluemaumau.org.)

On the other hand, parties to arbitrations might argue that a failure to render an enforceable award (whatever the outcome) does not fulfill the arbitrators' agreement with the parties, and therefore justifies some fee adjustment since additional time and expense will be incurred to re-litigate the matter. This reasoning appears to have motivated the franchise owners in the Coffee Beanery case who, in fact, had resisted arbitration at an earlier stage.

Whether further attempts are made to recoup arbitrator and institutional fees when awards are annulled remains to be seen. Should such actions become more common, it will be interesting to see whether that results in a shift away from jurisdictions where challenges to fees are permissible or, alternatively, the adoption of more stringent fee arrangements before arbitrations proceed.

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This entry was posted on Wednesday, April 22nd, 2009 at 8:00 am and is filed under Arbitration Awards, Arbitration Institutions and Rules, Arbitrators, Commercial Arbitration, Domestic Courts, Europe, National Arbitration Laws, North America
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