Kluwer Arbitration Blog

Costs in International Arbitration: A Plea for a Debate on Early Guidance by the Arbitral Tribunal on the Principles it Will Apply when Deciding on Costs

Ank Santens (White & Case LLP) · Wednesday, June 10th, 2009 · White & Case

One of the greatest challenges for international arbitration in recent times is the users' complaint that the process has become too costly. In-house counsel are under pressure to control costs, and they grumble that arbitrators and international arbitration counsel are not sufficiently responsive to their concerns.

Outside counsel are rightly troubled by these complaints. Frustrating as it is for a client to win on the merits but to be stuck with the bill, it is as frustrating for outside counsel to win a hard-fought battle for a client which feels it has not been made whole because the tribunal decided not to award it any costs.

Much disappointment could, in our view, be avoided if the outcome on the costs of the arbitration were more predictable.* Whereas the outcome on costs is often almost as important as the outcome on the merits, this is an area where uncertainty reigns. Major international arbitration rules, such as the ICC Rules of Arbitration, leave the decision on costs entirely to the discretion of the arbitral tribunal.** And because the approach to the recovery of costs incurred in legal proceedings diverges widely across legal systems, it is difficult to make any predictions. This sets international arbitration apart from national litigation, where the outcome on costs is usually predictable.

We will leave for another day the question whether international arbitration rules should provide more guidance with respect to costs. The purpose of this posting is instead to focus the debate on another possible solution: early guidance by the arbitrators on the principles they will apply when the time has come to decide on the costs of the arbitration.

The case for early guidance on costs

The arbitral tribunal must make various decisions with respect to the costs of the arbitration. For each of these, there are several reasons why early guidance would benefit the arbitral process:

(1) The tribunal must decide whether it will *allocate the costs of the arbitration between the parties depending on the result on the merits*.

In different legal cultures, entirely different approaches are taken in this respect, with at one end of the spectrum the U.S. "costs remain where they fall" rule and on the other end the English "costs follow the event" approach. Without early guidance, it is impossible to predict where within the

spectrum any given tribunal will come out. Early guidance allows counsel to provide the client with more accurate predictions in this respect. This may, in certain cases, foster early settlement. It will also allow the client to budget better. And if the approach taken is some form of apportionment, this may encourage the parties not to inflate their claims.

(2) The tribunal must decide whether it will, where necessary, use its power to allocate the costs of the arbitration in order to *police the proceedings*.

Whereas to some this may seem self-evident, others take an entirely different view. Early guidance on whether the tribunal will award costs depending on the parties' conduct during the arbitration is a powerful tool. A party will think twice to submit excessive document production requests when told that this may lead to an award of the cost involved to the other side.

(3) The tribunal must determine which *types of costs* are considered costs of the arbitration, which can then be allocated between the parties. For instance, there is no clear consensus on whether time spent by in-house counsel or project personnel on a case could be recoverable.

Early guidance in this respect allows the parties to plan and to keep records of costs that may be recoverable.

Early guidance would also encourage the tribunal to discuss and think through these matters up front. Most importantly, early guidance would help manage the parties' expectations with respect to the outcome on costs and thereby avoid unnecessary disappointment.

The case against early guidance on costs

In view of the above considerations, it is almost surprising that arbitral tribunals scarcely provide guidance at an early stage of the proceedings on how they plan to deal with costs. We presume that such guidance is rarely requested and, if requested, not easily granted. At least three reasons come to mind as to why tribunals might be reluctant to provide early guidance on costs.

First, tribunals may be adverse to early guidance in view of the fact that this is not commonly done. Few will disagree that novelty alone cannot be a sufficient reason for dismissing early guidance on costs.

Second, it is said that a unanimous award is often reached through compromise in the decisions on costs. The importance of finding common ground among the members of a three-person tribunal cannot be underestimated. But we are not convinced that early guidance on costs should be sacrificed for potential compromise down the road. As stated before, costs have become an increasingly important aspect of an international arbitration. An adverse decision on costs may leave a party just as unsatisfied as an adverse decision on jurisdiction, merits, or quantum.

Third, arbitrators wish to retain flexibility with respect to the decision on costs. However, we do not see why the decision on costs is less worthy of principled and thorough reasoning than other aspects of the award. Further, in its early guidance, the tribunal would only set forth the principles that it considers should be followed, and the tribunal would retain the flexibility to apply these principles to the case.

We thus see few reasons why early guidance on the costs of the arbitration would *not* be appropriate in the majority of cases. But we look forward to responses to this posting which set forth a different view.

Timing and form of the early guidance

Our proposal is that early guidance on the costs of the arbitration be part of the planning that is done at the outset of every international arbitration. The parties' views on the matter could be solicited at the same time as their views on, e.g., the amount of submissions required, and the parties' agreements and/or tribunal decisions could be set forth in the document which memorializes the ground rules for the arbitration. For instance, in ICC arbitration, this guidance could be set forth in the Terms of Reference or the first procedural order.***

Conclusion

The dissatisfaction of corporate counsel with the cost of international arbitration is in our view due in significant measure to the fact that an arbitral tribunal's decision on costs is unpredictable. Leaving aside whether there should be some form of harmonization of the substantive principles regarding costs, serious consideration should be given to a procedural harmonization towards early guidance by arbitral tribunals on the principles they will apply when deciding on costs. We believe that this would enhance the process and thereby the users' satisfaction. We look forward to the views of others.

By Ank Santens and Olga Mouraviova

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* By "costs of the arbitration" or "costs," we refer to all expenses that a party incurs in an arbitral proceeding, including the administrative expenses of the arbitral institution (if applicable), the arbitrators' fees and expenses, the fees and expenses of outside counsel, experts and witnesses, and internal fees and expenses.

** Note, though, that, e.g., Articles 38 and 40 of the UNCITRAL Rules give some guidance as to the types of costs that are recoverable, as well as the method of allocation.

*** In its report on "Techniques for Controlling Time and Costs in Arbitration," the ICC Commission on Arbitration suggests that "[i]t may be helpful to specify at the outset of the proceedings that in exercising its discretion in allocating costs, the arbitral tribunal will take into account any unreasonable behaviour by a party."

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