Kluwer Arbitration Blog

ICCA 2014. Gap Filling in International Arbitration: An Unsettled Territory

Joseph Mamounas (Bilzin Sumberg Baena Price & Axelrod LLP) · Wednesday, April 23rd, 2014

Though of paramount importance in jurisprudence, no contract is perfect. Sometimes, at the time the parties negotiated and drafted the contract, they inadvertently failed to anticipate a particular issue that only arose years after execution. As a result, the parties are left with a glaring gap and, naturally, they cannot agree how it should be filled. And when courts and arbitrators ultimately are asked to resolve the parties' dispute, the gap-filling dilemma presents exceedingly difficult questions and inconsistent results.

Gap filling was the subject of a panel at the ICCA 2014 Congress in Miami featuring Professors Alan Scott Rau (Austin), Cristiano Zanetti (Sao Paulo), and Charles H. Brower II (Detroit) and moderated by John H. Rooney, Jr. (Miami). As the audience learned, courts and arbitral tribunals take different approaches to gap filling, and differences also exist between courts in civil and common-law jurisdictions.

U.S. courts ordinarily insist on contractual clarity. This is because courts prefer not to guess at the bargain made by the parties. But, as Panelist Rau posited, the existence of a gap should not impact on the parties' duty to arbitrate, and, accordingly, arbitrators should be empowered to fill gaps. Rau pointed to *Green Tree Financial Corp. v. Bazzle* and *Oxford Health Plans LLC v. Sutteras* instances in which the U.S. Supreme Court upheld the power of arbitrators to determine whether ambiguous contracts allowed class-wide arbitration, so long as the arbitrators, in doing so, were arguably construing the contracts. But by contrast, in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*,the U.S. Supreme Court found that the arbitrators had imposed what they believed to be sound policy, rather than construe the contract, and vacated the arbitrators' decision.

In many respects, gap filling in the civil-law tradition is more ambitious. As Panelist Zanetti explained, a gap should be identified by looking for absent terms that are necessary for the regular performance of the contract. If the gap meets this test, a civil-law court will rely on analogy and good faith to fill it. So, if the price is missing in a sales contract, it must be determined by considering similar situations. These principles also are at play in the arbitration context, as shown by a Swiss case in which the parties had agreed to arbitrate in Geneva, but the contract referred to an arbitral institution that did not exist. The court decided that the parties should arbitrate at the most prominent arbitral institution in Geneva, as the parties were obligated to do what was mandated by the good faith and mutual trust that the civil law provides as existing between them.

The importance of gap filling in international arbitration – where the parties may not be able to

readily resort to a favorable local court to tackle the gap – is particularly great. Arbitrators therefore should have expansive gap-filling authority. In that vein, Panelist Brower took aim at *Stolt-Nielsen*, arguing essentially that its holding should be limited to the extreme instances in which the arbitrators ignore all relevant sources of law and instead impose their own brand of justice. And, as Brower pointed out, *Stolt-Nielsen* expressly endeavors to support arbitral gap filling in some respects, not restrict it.

For these reasons, the impact of a gap on an international arbitration depends in large part on the law applicable to the arbitration. Arbitrators applying Brazilian law, for example, would be inclined to use analogy and good faith to fill most any gaps. On the other hand, under U.S. law and following *Bazzle* and *Oxford Health Plans*, arbitrators might at most be permitted to undertake a contractual interpretation to file a gap. Whether *Stolt-Nielsen* would restrict other means of gap filling in arbitration remains an open question and, hopefully, is one that will be addressed by U.S. courts in the very near future.

This entry was posted on Wednesday, April 23rd, 2014 at 7:23 am and is filed under Arbitration, ICCA Miami 2014
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.