Kluwer Arbitration Blog

The State of Play in Costs and Damages in International Arbitration

Michael McIlwrath (MDisputes) and Crina Baltag (Managing Editor) (Stockholm University) · Wednesday, May 15th, 2019

> *"Developing arbitration into a matured system of adjudication that can fully compete with litigation may create tension with its promise of providing a quick, fair, and flexible way to resolve a dispute. … Some years ago, Johnny Veeder posed the question, "whose arbitration is this anyway?" Perhaps the time has now come for the arbitration community, as the caretakers of arbitration, to ask "what do you want to be when you grow up?"* (Patricia Shaughnessy, Pre-arbitral Urgent Relief: The New SCC Emergency Arbitrator Rules', Journal of International Arbitration, (2010), Volume 27, Issue 4), 337 – 360, p. 358)

Patricia Shaughnessy's influence over international arbitration looms large, having pioneered the LLM program at the University of Stockholm and mentored hundreds of practitioners now working around the world. On the occasion of her 65th birthday, colleagues and former students of Shaughnessy contributed to a liber amicorum on costs and networking in international arbitration: Finance in International Arbitration (soon to be published by Wolters Kluwer). Adding to Shaughnessy's surprise, the organizers of the Pre-Vis Moot Conference, Bucerius Law School, University of Vienna, NYU Law, and McGill University, invited the book's contributors to present their perspectives in Vienna on 12 April 2019, and invited Patricia Shaughnessy to moderate one of the sessions.

After a welcome by Prof. Paul Oberhammer in his capacities as dean of the Vienna University Law School and as a co-organizer of the event and by Prof. Franco Ferrari, NYU Law, as co-organizer, the panelists provided their insights ranging from arbitrator practices, the state of soft law on cost awards and allocation, and relevant trends in third party funding and awards of damages for antitrust violation and expropriation.

The costs that arbitrators generate

Prof. Anthony Daimsis of the University of Ottawa and Robin Oldenstam of Mannheimer Swartling in Stockholm presented two areas for arbitrators to improve, in the legal reasoning applied in their awards and in keeping and reporting accurate time records.

Prof. Daimsis made a compelling case that arbitrators often engage in heuristics, or intellectual short-cuts in their legal reasoning, which can lead to increased costs. For example, Prof. Daimsis explained that separability is anything but a "presumption" (at least under the Model Law) and challenged those in the community who have suggested it is to re-read Article 16 of the Model Law. Arbitrators who begin with this false presumption layer on costs by forcing needless motions and submissions for and against this false argument.

Sharing the results of a global survey of seasoned arbitration practitioners, Robin Oldenstam reported that a majority stated they had participated in at least one case where they suspected that an arbitrator had not provided an accurate time record and appeared to be seeking compensation for more work than the arbitrator had actually performed. Noting that this is an area that to date has not been addressed, and emphasizing the issue concerned mere suspicions and only appeared to arise in a minority of cases, Oldenstam nevertheless questioned whether current methods to verify arbitrator compensation are sufficiently transparent. Since the services of an arbitrator are based on the utmost confidence, trust in all aspects of the arbitration process is important for the overall trust in the system. The introduction of more transparency and structure around arbitrator time reporting would offer an opportunity to further improve trust in the arbitration process.

Recoverability & allocation of costs

Steven Finizio of WilmerHale summarized and compared the different approaches to the allocation of costs in commercial and investment treaty arbitration. Finizio observed the lack of a universally-accepted approach. The predominant approach in commercial arbitration is "adjusted costs follow the event." Finizio (and his co-author Ross Galvin) reviewed published awards in investment treaty cases since 2014 and reported that "bear your own costs" is no longer the most common approach in those cases, with a majority of tribunals in recent cases taking an "adjusted costs follow the event" approach, but a significant number continue to require parties to bear their own costs.

Dr. Crina Baltag of the University of Bedfordshire addressed the issue of recoverability of in-house counsel (and management and employees') cost in international arbitration. Baltag explained that the issue must not be addressed in isolation, but by looking at the evolution of the role of in-house counsel in international arbitration. Baltag noted that the broad language of institutional rules has always given arbitrators ample discretion to allow for recovery of such costs, referring to reimbursement of "legal or other costs" or of "legal and other expenses. Surveying the available case law, including ICC cases and investment treaty arbitration cases, such as Oko Pankki v. Estonia, Baltag observed that arbitrators are often inclined to grant in-house costs nowadays in principle but that there appears to be no settled rule as to how these costs should be calculated. She noted that in-house counsel typically do not have time-management systems comparable to those of external counsel.

Providing the perspective of parties, Michael Mcilwrath of Baker Hughes GE in Florence, Italy, said the first thing business executives typically ask about an arbitration is not whether they will win or lose but how much it will cost. Unfortunately, in-house counsel struggle to provide a

reliable answer because of cost issues under the control of tribunals, such as the rule of cost allocation they will adopt in their final award, or the standards they will apply in deciding an application for security for costs or an interim order of costs relating to discovery. Mcilwrath suggested corporate counsel would hold arbitration in higher regard if there were guidelines or standards that permitted them to estimate costs at the outset of a case.

Security for costs and third-party funding

Celeste E. Salinas Quero, legal counsel at ICSID, Washington, D.C., shared results from a review of the forty ICSID cases in which security for costs were requested. She pointed out that tribunals seek to balance a respondent's risk of being unable to recover an award on costs against the risk of infringing on a claimant's right to pursue a meritorious claim. Although there is no express provision in the ICSID Rules, tribunals have dealt with these requests as interim measures, moving from requiring a respondent to demonstrate a right in need of protection to a less restrictive hypothetical entitlement to recover costs. But tribunals still require a showing of exceptional circumstances, which respondents have tried to show by demonstrating the claimant has adopted a specific corporate structure to shield its assets, misrepresented its financial standing, abused the process, or has a history of defaulting. While some tribunals have held that certain circumstances, if cumulatively present, may warrant an order for security for costs, only two ICSID tribunals have granted such requests to date. ICSID tribunals have also consistently held that impecuniosity and third-party funding are not *per se* sufficient to grant security for costs.

John Fellas from Hughes Hubbard & Reed LLP in New York discussed whether a prevailing party who relied upon third party funding could recover the premium paid to a funder, and n whether the use of third-party funding is evidence of impecuniosity. With respect to the first issue, Fellas discussed the English case of *Essar Oilfield Services limited v. Norscot Rig Management Pvt Limited*, where the English High Court declined to vacate a costs award in an ICC case that included the funder's premium on the theory that both the English Arbitration Act and the ICC Rules permitted an arbitrator to award "other costs." Fellas noted that many other arbitration rules provide an arbitrator with that authority. With respect to the second issue, Fellas suggested that arbitrators will often look to the use of funding as rebuttable evidence of impecuniosity on the part of funded party, and typically give that party the opportunity to prove its financial health.

Prof. Catherine Rogers of Penn State Law and Queen Mary, University of London, addressed third-party funding in international arbitration. Starting with a conference at which she and Patricia Shaughnessy spoke on the topic back in 2014, she traced developments in the field and identified the challenges ahead. In homage, she framed her remarks around Professor Shaughnessy's hallmark ability—balancing integrity and pragmatism in establishing manageable responses to professional challenges."

Developments in damages awards

Prof. Stefan Kröll, Bucerius Law School, discussed to what extent post-cartel damages claims are covered by arbitration clauses in contracts between members of the cartel and their customers. The decision of the CJEU in CDC-Akzo had held that such disputes are not covered by "normal" forum selection clauses under the Brussel-I Regulation, but refrained from addressing arbitration clauses.

The case law is divided on the issue. While some courts have followed the approach of the CJEU also in relation to arbitration clauses others have adopted a broad interpretation according to which arbitration clauses also cover post-cartel damage claims irrespective of the fact that the customer did not foresee the participation of its supplier in the cartel. Kröll addressed the various objections raised against such a broad interpretation finding that the arguments in favor of such an interpretation may be weaker in the case of post-cartel damages than in other cases.

Prof. Petra Butler, Victoria University of Wellington, compared the damages regimes for unlawful expropriation under a human rights framework with that under an investment arbitration framework using the respective *Yukos* decisions as examples. Petra's conclusion emphasized that neither damages regime was necessarily better than the other but different which meant that counsel might want to strategically bring a case in both fora.

Prof. Andrea Bjorklund of McGill University in Montreal concluded the rich day by commenting on the presentations and thoughtful papers in honour of Patricia Shaughnessy. Despite the broad range of issues covered, the speakers illustrated recurrent themes: the role of ethics for arbitrators, for counsel, for experts, and for funders; pleas for more guidance in the form of standards or rules instead of ambiguous default presumptions in the award of costs; and a desire to preserve the discretion of arbitrators to adjust their responses in light of the facts and law. Ethics, rules, and faith in arbitrators underscored why educators like Prof. Shaughnessy make an enormous contribution to the quality of arbitration by imparting their wisdom and their ethical sense to their students.

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