Kluwer Arbitration Blog

# Seoul ADR Festival Recap: Empirical Data and Strategies for Recovery and Management of Arbitration Costs

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On the first day of the 2023 Seoul ADR Festival, Secretariat Advisors hosted a double feature of panels relating to arbitration costs. The first panel focusing on the recovery of arbitration costs featured James Chun (foreign attorney, Kim & Chang), Inkoo Lee (manager, Secretariat), and Bruno Savoie (foreign attorney, City-Yuwa Partners). Messrs. Lee and Savoie both participated in the preparation of a recent report on this topic published by the Young Canadian Arbitration Practitioners (YCAP) and Secretariat. The second panel addressed the management of expert costs and featured Amit Garg, Chaitanya Arora, and Jeffrey Wong—all managing directors in the Singapore and Hong Kong offices of Secretariat. Both panels were moderated by Matthew J. Christensen (senior foreign attorney, Kim & Chang).

The sessions provided insights into practical strategies for recovering and managing arbitration costs based on recent empirical findings and evolving practices.

**The Recovery of Arbitration Costs in Asia in Light of the YCAP Report**

The recent publication of a report by the Young Canadian Arbitration Practitioners (YCAP) and Secretariat on the recovery of arbitration costs in Canada served as the basis for the first panel. Published in October 2023, this report is based on an anonymous survey of more than 50 arbitral cost awards and provides guidance on whether, to what extent, and how parties have recovered their costs in Canadian arbitrations in the last 10 years. The YCAP report is a rare opportunity, given the confidentiality of arbitral awards, to see what parties can expect from arbitral tribunals, and thus provides an important data point for practitioners in advising their clients.

At a high level, the panelists shared the view that the report broadly confirms their experiences with the recovery of arbitration costs. One finding that was surprising to the panel is that respondents, even when they are successful in defending against claims, were less successful in recovering their costs in comparison to prevailing claimants. Although the panelists and the audience raised a few possible explanations (such as whether tribunals may have sympathy for unsuccessful claims that were not entirely meritless), it is not clear what the reason for this discrepancy is, which warrants further research.

As the panelists noted, the survey addressed the factors taken into consideration by arbitral

tribunals when awarding costs, including the prevailing “loser pays” principle, the level of success of the parties’ respective claims, contractual stipulations, and previous settlement offers. However, the survey found that reasons such as the conduct of counsel or allegations of a party’s dishonesty had not been a factor in awarding costs, which the panelists found to be broadly consistent with their experiences.

The panelists then shared some practical strategies in relation to the recovery of costs. In particular, the panel generally concluded that seeking costs on an issue-by-issue or claim-by-claim basis, rather than based on the overall success of each party, can be helpful for the right case, but is often unsuccessful. This is because many arbitrators seem to prefer in practice to award costs on a global basis absent extraordinary circumstances. Moreover, parties who intend to make such arguments should consider keeping track of their time with different billing codes from the beginning to avoid the difficult exercise later in the arbitration of attempting to isolate activities or tasks retroactively.

The panelists also discussed the practice of sealed offers or Calderbank letters. A Calderbank letter, which originates from English litigation practice, typically contains a settlement offer “without prejudice save as to costs,” i.e., with the express reservation of the right to refer the letter to the court on the question of costs if the offer is not accepted. The panel noted that parties (including Japanese and Korean companies) who go through lengthy negotiations before the arbitration is commenced often can be unwilling to make a settlement offer once the arbitration is commenced. The panelists emphasized the advantages of encouraging clients to make such offers specifically for the purpose of recovering costs in the arbitration. The panel also reported that parties in international arbitrations sometimes argue that the opposing parties’ Calderbank offers should not be considered by the tribunal in awarding costs because they failed to meet the formal requirements of a Calderbank offer under English law, such as giving a reasonable amount of time to accept the offer. In light of such risks, parties making Calderbank offers should ensure that their offers comply with the formal requirements both under English law and under any relevant legal requirements or practices at the seat of arbitration.

**Managing the Costs of Experts in Arbitration**

The second panel first addressed the issue of whether there is a threshold of damages that warrants retaining an expert witness. The panelists were unanimous in stating that the need for an expert depends not on the monetary value, but the complexity of the case. Moreover, it was noted that without an expert, the parties sometimes do not have a proper understanding of their damages and whether they are adequately supported. It was suggested that in simpler or lower-value cases, retaining a less experienced expert (such as a suitably experienced lead assistant who is looking to transition to a testifying expert role) can be a good way to reduce costs.

One of the most difficult choices that parties are sometimes asked by an arbitral tribunal to make is whether they would like to appoint a joint or tribunal-appointed expert. The panelists shared the view that while this can be beneficial for the right case (usually in a smaller matter), in many larger cases, retaining a tribunal-appointed expert will often result in the parties later retaining their own experts, thereby adding costs. In particular, in disputes over delays in a construction project, this can further prolong the case and cause dissatisfaction.

With regard to joint expert statements, the panelists were asked to opine on the CIArb Protocol for

the Use of Party-Appointed Expert Witnesses in International Arbitration and its related guidelines, which aim to establish a process to limit the differences between the experts prior to their provision of evidence (see Article 6). It was noted that this is appropriate in the case of technical experts and quantum experts, but that in the case of construction delay analysis, while the experts of opposing sides may agree on methodology, agreeing to the critical path—a key substantive issue in the delay analysis—is a tall order for several reasons. For example, it is not uncommon for one expert to strategically withhold from disclosure, certain relevant information that should arguably be disclosed to the opposing party's expert, in an attempt to "surprise" the opposing party with his/her first expert report submitted in the arbitration. Instead, while having a joint statement on methods and base data is useful, a first report by each party's experts followed by a common report by both side's experts is sometimes a more helpful procedure to reduce fees.

When it comes to the timing of retaining experts and how this impacts costs, the panelists shared the view that the practice of waiting late into the arbitration to retain an expert is not conducive to maximizing the value that an expert can bring, nor is it usually effective in minimizing costs. For example, in a construction dispute about delays, while parties typically submit various delay notices during the project to comply with contractual requirements, the project team often does not have a good understanding of how much time they are actually entitled to without the guidance of a delay expert. Retaining an expert early on will allow the parties to better assess the strength of their case in negotiations and during the arbitration, including by identifying the gaps in the evidence and the best ways to remedy such gaps. Similarly, because quantum experts frequently find that the evidence in the record is not sufficient, involving them late in the arbitration could mean either that key evidence will be missing, or that the document production process will need to be reopened.

## Conclusion

Building upon the YCAP report on arbitration costs in Canada, the panelists shared the view that a case-specific approach is needed for maximizing the chance of cost recovery and the value of experts. The panelists also shared the opinion that the findings of the YCAP report were generally consistent with their experience participating in arbitration in Asia, although a number of interesting results such as the disparity in the recovery between claimants and respondents would benefit from further research. The discussion generated by the YCAP report at the Seoul ADR Festival, on the other side of the world, illustrates the value of such research, and it is hoped that other arbitration associations and institutions around the globe will be inspired to undertake their own surveys of costs awards in their respective jurisdictions, which will prove to be invaluable points of reference in a process that is otherwise confidential.

***More coverage from Seoul ADR Week is available here.***

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