COMMERCIAL ARBITRATION COSTS

Sixth Annual Energy, Mining and Resources Arbitration Conference

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Ranchmen's Club
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I. Canadian Law Governing Commercial Arbitration Costs

(Bill Kenny)

II. What's the Reality – Full Cost Recovery By the Victor or Court Based Court Rules? I had suggested the topic because I have found the issue to be a complex one. Those coming from a tradition of international commercial arbitration think in terms of full cost recovery to the victor. If results are divided, so too are costs. Those coming from a background of domestic litigation and arbitration tend to think in terms of Rules of Court scale of costs. When challenged as to the possible relevance of the Rules of Court cost schedule, the response is "well the hearing was held in Alberta (or B.C., or Ontario). I asked for the issue to be the subject of briefs in a recent arbitration but neither party could come up with any authority. I had to decide the issue and I could talk about that...

(Jack Marshall)

III. What about Costs in international commercial arbitration - Should a losing party in an arbitration proceeding have to pay for the legal costs of the winning party? Should an arbitrator have the authority to include payment of legal costs in an award? In modern arbitration the authority to order costs is not confined by laws or statutes other than the applicable arbitration statute. The authority of the arbitrator to award costs is always subject to the agreement of the parties at any time. Conclusion.....

(Murray Smith)

IV. What Factors may be taken Into account in Assessing Cost?

- General principle: costs should follow the event;
- Admissions of liability or of facts
- Offers to settle
- Degree of success of the claim
- Misconduct warranting sanctions by way of costs

- Reasonableness of legal fees – considerations:
  - Complexity of matters in issue
  - Degree of risk involved
  - Degree of difficulty in conducting the case

SITUATIONS

The Panel thanks all of you for submitting accounts or comments you have experienced in arbitrations or relating to commercial arbitration cost awards. Portions of those submissions have been copied and pasted below. In past WCCAS energy conferences audience participation has contributed to the success of the conference. So please, rise, introduce yourself and let's hear what you have to say. Thank you.

A. Cost Escalations Caused By One Arbitrant Without A Lawyer

One of the most vexing problems is the question of costs with a self represented arbitrant where the arbitrant may be impecunious and/or slows the proceeding down or otherwise causes increased costs to the represented party because of inexperience on the part of the self represented party. Problems arise where pleadings, documents and arguments are done wrong and the other side brings a motion to remedy the defect. Hearing dates may be lost and proceedings prolonged. In the final result the unrepresented party may have been successful but the costs may have been increased by reason of no lawyer. Should the represented party bear cost increases because of no lawyer on the other side? Should the unrepresented party be compensated for their time in preparing the case without counsel if so and at what rate?

(Murray Smith)

B. Many of the arbitrations in which I have participated have been based on agreements where the costs of the arbitration are to be born equally among the parties unless the arbitrators determine otherwise. It seems, inevitably, that the panel has followed the "equal split" provision. In other cases where I have sat as arbitrator, the parties have agreed to the allocation of costs before I actually had to rule on them.

I have been involved in at least one case, as counsel, where the Claimant made a pre-hearing offer to accept a certain sum and said it would be seeking cost consequences (presumably by some analogy to the "offer of settlement" provisions of the Rules of Court), if it beat the offer in the Award. We never had to deal with the issue, however, as the Award was not more than the offer. It would have been interesting (perhaps) to see how the panel would have dealt with a pre-hearing offer of settlement from a costs perspective, including whether it would have had regard to the mechanism of the Alberta Rules of Court.

(Frank Foran)

C. In my experience the costs have followed the event to the tune of millions of dollars/euros. In one case, the contract said that the parties shall bear their own costs but both parties claimed costs in the proceedings, which the Tribunal relied on as the parties' agreement that the loser should pay. This was good for us in that case because we won and the costs were around US$15 million. My above-noted experience is in international rather than domestic arbitration.

(Craig Chiasson)

D. We have had arbitrations with split results and seemingly no ability to get a split on costs. We had one case where the Respondent won on the financially most significant issue and the Claimant won on the smaller of its two claims (being less than 20 % of both its claims). Respondent didn't seek costs, believing costs wouldn't be awarded in a split result. Notwithstanding the relative dollar amounts claimed by the Claimant in its two claims and the success only on the lesser dollar valued claim, the arbitral panel concluded that, based on the case put forward by the Claimant, the lesser claim was the fundamental issue in the case and on that lesser claim the Claimant was totally successful. The arbitrators allowed the Claimant its costs on a reduced basis to reflect the lack of success on its failed claim. The arbitral tribunal found the Claimant was the winner on the fundamental issue in the case.

(Anonymous)

E. A pet peeve of mine are arbitration agreements that provide that the parties shall bear their own costs. Where I am lucky enough to be advising on the drafting of arbitration clauses, I typically advise clients that one of the advantages of arbitration is that the more typical cost regime allows for something approaching full indemnity as opposed to court which typically (at least in BC) awards costs of about 1/5 of actual costs for any complex commercial litigation. In my view when one is dealing with two sophisticated commercial parties the potential for a full indemnity costs award has a number of advantages: i) it provides an ongoing incentive for parties to act reasonably with respect to commencing the arbitration in the first place as well as any discovery, pre-hearing motions, direct and cross-examination, etc; ii) it gives the arbitrator(s) another tool in crafting a fair award in all the circumstances of the case.

(Joe McArthur)

F. I have a few anecdotes that might be interesting. Both relate to the international context.

I've now seen two cases (both under the ICC Rules) where London has been the place of arbitration and the parties had a costs provision in their original

agreement. In both cases, the Arbitration Act, 1996 was argued as invalidating an agreement on costs made before the dispute arose. Of course, the ICC Rules give the arbitrators discretion in awarding costs, but it is interesting to consider the potential problems that can arise in this situation - are the arbitrators exceeding their jurisdiction by awarding costs in a manner that is inconsistent with the parties' earlier agreement?

Another issue is whether the disparity in costs incurred by the two parties should be a factor taken into consideration in assessing the reasonableness of costs incurred by the winning party. I once saw a construction case where the claimant incurred and claimed over 20 million GBP as costs of the arbitration (including expert fees, etc.) and the Respondent had only incurred about $300,000 US in defending the claim. Although the Respondent lost and the defence was not as detailed as it could have been, the lawyers did an admirable job defending the claim on the much lower budget. I will come prepared. It looks like it will be an interesting session.

(Tina Cicchetti)

G. The only unique experience on costs I have experienced is where the parties agreed on a capped cost arrangement that recognized different amounts of costs based on the quantum of the award.

(Ronald M. Kruhlak, Q.C.

H. What of "distributive costs"? – (based on a party's relative success in litigation). Appear to be controversial. Proponents say it seems odd that a litigant who raises eight issues and loses on seven of them should receive a full set of costs if successful only on issue eight. Perhaps the settlement offer provisions of the rules provide a good enough answer. This goes to the matter of how frequently followed is the general principle that costs should follow the event except in exceptional circumstances? This explanation is not attributable to Mr. Cherniak.

(Earl Cherniak, Q.C.)