

PRC Companies in International Arbitration: Who shall bear the arbitration costs?

by Steven C. Nelson

Our previous article raised the issue that costs of commercial arbitration are pretty high in Hong Kong. Then who should bear the costs at the end of the arbitration? Generally, the arbitral tribunal has the power to decide on the proportion of arbitration costs to be borne by the parties thereto. Herein, we provide a brief introduction on how the arbitral tribunal assesses the costs of the arbitration, including administrative costs, the tribunal's fees and expenses, and the parties' own legal and other costs.

Section 74(1) of the Hong Kong Arbitration Ordinance provides that "an arbitral tribunal may include in an award directions with respect to the costs of arbitral proceedings." Section 74(2) further states that the arbitral tribunal may direct in the award to whom and by whom and in what manner the costs are to be paid.

Generally, at least in international commercial arbitrations, the basic principle for assessment of costs is that "Costs follow the Event", meaning that broadly speaking the losing party must pay the costs of the arbitration. In other words, the losing party will be required to pay its own costs as well as the costs of the winning party, the arbitral tribunal and the administering institution, if any.

It is worth noting that the said principle is only the starting point for the tribunal to award the arbitration costs; the tribunal will comprehensively take into account all relevant factors and assess the proportion and amount of the arbitration costs.

Firstly, the arbitral tribunal shall determine by whom the costs are to be paid. The outcome of an arbitration is the starting point to decide which party shall pay the arbitration costs. However, in many cases, the award of an arbitration is not necessarily as simple or straightforward as we think. For example, where a dispute involves multiple causes, including a claim of the claimant and a counterclaim and offset of the respondent, and sometimes where the arbitration proceedings involves more than one contract or different parties to one contract or a series of issues involving the same contract, the final outcome of arbitration might be that one party has succeeded in some

Related People

- Steven C. Nelson

Related Capabilities

- International Arbitration & Litigation
- International Trade
- China

claims while failed in the others, or that only a small portion of the amounts claimed was awarded.

In these situations, the arbitral tribunal, when deciding the outcome of the arbitration, needs to take the following factors into account:

1. Which party has prevailed on the key claims?
2. If there are several claims, which party has prevailed on the numerical or quantitative majority of its claims?
3. What is the proportion between the claimed amounts and the amounts of compensation finally awarded by the tribunal?

Secondly, the arbitral tribunal shall determine the amounts of each party's own costs to be paid. Here, the arbitral tribunal shall consider the reasonableness of the costs incurred by the prevailing party by taking the following into account:

1. Whether the costs incurred are reasonable and appropriate in relation to the amounts in dispute: if the amounts in dispute are relatively low, then the costs should not be excessive.
2. The complexity of the subject matter in dispute and its importance to the parties thereto: if an arbitration involves a simple dispute over a sale and purchase contract, the legal points are relatively simple and its factual background in concern is less disputable, then the winning party should not have incurred excessive costs. On the other hand, if the arbitration involves a complex construction contract dispute, with substantial factual issues, involving many witnesses and documents, and covering a long period of time, then the legal fees incurred should be relatively high.
3. Whether the lawyers' qualifications, professional expertise, charge-out rates and the number of team members providing the services are reasonable: if certain work can be done by a junior associate, it should not be carried out by a senior associate; also, the same work should not be handled by too many attorneys.
4. Any improper or dishonest conduct of the parties in an arbitration also constitutes an important factor to be considered: for example: if one party makes excessive requests for document disclosure, employs various delaying tactics, does not comply with the procedural schedules, makes redundant, irrelevant or excessive legal arguments, conducts excessive cross-examinations during the trial, makes unfounded allegations of fraud or more seriously, submits false evidence and statements to the tribunal, these are factors to be considered by the tribunal in assessing the arbitration costs.
5. Generally, the losing party must bear 60%-70% of the total costs incurred by the winning party and otherwise allocable in accordance with the foregoing.

Thirdly, "without prejudice" settlement: if a party to an arbitration has made an offer to settle the case on a "without prejudice" basis but the offer is not accepted by the other party and eventually an arbitration award is made wherein the amount awarded by the tribunal to the winning party is lower than that offered by the losing party in the settlement, the tribunal would then the settlement offer into account when assessing the costs of the winning party.

For example, assume the claimant claims HK\$500,000 in the arbitration and the respondent proposes on a "without prejudice" basis to pay HK\$350,000 to reach a settlement and requests that the claimant accept the settlement offer by June 30 but the

claimant rejects such proposal. In the award, the arbitral tribunal rules in favour of the claimant, but the amount payable by the respondent is HK\$100,000.

In normal circumstances, the respondent has lost the arbitration as a whole and should have paid the costs of the winning party. However, the respondent may request the tribunal to decide that the claimant shall pay the arbitration costs incurred after July 1. This is because that costs incurred by the parties thereafter could have been avoided if the claimant had accepted the settlement offer.

Fourthly, Third-Party Funding: if the losing party in an arbitration is funded by a third party, can the arbitral tribunal make an adverse costs order against the third party funding? There is no express provisions on this under the revised Arbitration Ordinance, but as stipulated in the Code of Practice, funding agreements must set out whether, and to what extent, third party funders will be liable to funded parties for adverse cost assessments.

Conclusion

The arbitral tribunal has broad discretion to determine responsibility for payment and the amount of arbitration costs. In addition to the final result of an arbitration, the behaviour of both parties in the course of the arbitration is also a relevant factor for the tribunal to consider in awarding the arbitration costs.