Welcome to the first in a series of briefings designed to give in-house counsel brief, practical information on key aspects of international arbitration.

In these briefings we will focus on the five sets of arbitration rules which we come across most frequently in the context of international commercial disputes: the rules of the International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), Stockholm Chamber of Commerce (SCC), Singapore International Arbitration Centre (SIAC) and the United Nations Commission on Trade Law (UNCITRAL).

This first briefing focuses on a topic which is central to those who become involved in arbitration, but may not have been fully considered when signing off on an arbitration clause: costs. As will be seen, the different arbitral bodies have differing rules as to costs, which not only affect the ultimate costs of bringing a claim but also have other implications for the parties, such as the requirements for up-front payments on account.

The costs of arbitration proceedings
An important distinction of arbitration proceedings from proceedings in court is that in arbitration proceedings the arbitrators charge on a time-cost basis. Whilst court fees in England are fixed and will rarely amount to more than £25,000 over the life of a claim (irrespective of the value and notwithstanding recent increases), an arbitral tribunal may consist of three senior lawyers, each charging at their hourly rates over
the course of the matter. If an institution is nominated, it will also charge administrative fees, which are not inconsiderable.

There is a distinction in the rules of the arbitral institutions we are considering between those which allow the arbitrators to charge on a simple time-cost basis (the LCIA, UNCITRAL) and those which set a scale of fees depending on the value of the dispute (the ICC, SIAC, SCC). By way of example, the following table compares the arbitrators’ fees payable for different quantum disputes before the ICC, SIAC and SCC (based on a three arbitrator tribunal):¹

<table>
<thead>
<tr>
<th>INSTITUTION</th>
<th>$10 MILLION DISPUTE (US$)</th>
<th>$30 MILLION DISPUTE (US$)</th>
<th>$50 MILLION DISPUTE (US$)</th>
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<tbody>
<tr>
<td></td>
<td>Average: 339,852</td>
<td>Average: 431,352</td>
<td>Average: 517,452</td>
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<tr>
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<td>Maximum: 562,200</td>
<td>Maximum: 706,800</td>
<td>Maximum: 843,600</td>
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<td></td>
<td>Average: 274,623 (SGD386,793)</td>
<td>Average: 402,449 (SGD566,829)</td>
<td>Average: 492,969 (SGD694,323)</td>
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</tbody>
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It is important to remember that even though not charging on a strict time-cost basis, fees are determined by the ICC taking into account the time spent by the arbitrators. It will be plain from the above that for each case the maximum fees permitted by the ICC are notably higher than those charged by SIAC.² The SCC is consistently substantially less expensive. This accords with our experience that the ICC tends to be more expensive than any other arbitral body.

In addition, administrative fees are payable to the appointing institution. Again, there is a difference of approach; the ICC, SCC and SIAC have a sliding scale of

¹ Conversion rates valid as at 18.08.15, being 1 SGD = 0.71 USD, 1 EUR = 1.11 USD, rounded to the nearest dollar.
² The actual differences will vary depending on exchange rate fluctuations.
administrative fees (up to a maximum of US$113,215 for the ICC) whereas the LCIA charges 5% of the fees payable to the tribunal plus time spent at an hourly rate. As UNCITRAL does not provide institutional support, its rules leave the question of compensation for administrative costs to the tribunal. Finally, each institution will have upfront filing fees, although these tend to be comparably minor (US$3,000 in the case of the ICC) and are likely to be offset against the full amount of administrative fees when fixed.

Taking the example of the US$30 million dispute used above, the total costs of an ICC arbitration with a three person tribunal are likely to be in the range of US$508,866 to US$784,315 (using average to maximum administrators’ fees, and taking into account administrative expenses). The same dispute before SIAC would likely cost US$443,536 (SGD 624,698) to US$591,381 (SGD 832,931) and before the SCC would cost on average US$317,825 (EUR 286,329) to US$467,770 (EUR 421,414) (including an estimate of expenses).

It is difficult to compare arbitrations pursuant to the LCIA and UNCITRAL rules, as they will depend on the time spent by the arbitrators, but in our experience arbitration pursuant to either set of rules is usually less expensive than a comparable ICC proceeding.

**Interim payments**

Another feature of arbitration is that the relevant institution (or tribunal, in the case of ad hoc arbitration) will expect payment on account of costs at an early stage in the proceedings. Further advances on costs may also be requested as the arbitration proceeds.

In the case of the ICC, the initial interim payment comes in two stages; first in the form of a provisional advance to cover the ICC’s administrative costs until the Terms of Reference stage, then subsequently as the Advance on Costs (against which the provisional advance will be offset).

Each set of rules which we are considering provide for payment of an Advance on Costs, generally in the discretion of the institution (ICC, SCC LCIA and SIAC) or tribunal (UNCITRAL). The amount of the Advance is not usually prescribed, but in our experience can amount to a significant proportion of the expected costs of the arbitration (indeed the SCC’s rules provide that the Advance shall correspond to the estimated cost of the entire proceedings).

The Advance on Costs is generally payable in equal parts by the claimant and respondent parties. However, in the event that a party refuses to pay their part (generally an unwilling respondent), each set of rules which we are considering permits the relevant institution or arbitrators to suspend or dismiss the proceedings (or specific claims within the proceedings) unless the Advance is paid in full by the other party.

To put this in context, we have recently been involved in proceedings before the ICC where US$30 million was in dispute, the provisional advance amounted to over US$75,000 and the Advance was almost US$600,000 in total. When the respondent didn’t pay, that amount had to be satisfied by the claimant alone before it could proceed with the arbitration. Such a failure to pay will not be a repudiatory breach of the agreement containing the arbitration clause, such that the other party...
can pursue their claim in court: see BDMS Ltd v Rafael Advanced Defence Systems (2014) EWHC 451 (Comm).

Conclusion
There are many advantages to international arbitration. A number of these will be covered in our future briefings, including enforcement rights, the presumption of confidentiality and the relatively limited rights to disclosure of documents and appeal which can apply. However, when drafting a dispute resolution clause, in-house counsel should also bear in mind the increased costs of obtaining a decision, should they need to. The question should always be: do the benefits outweigh the costs, whether considering if arbitration should nominated in place of court proceedings or whether three arbitrators or only one need be appointed.

The costs of international arbitration can of course have an impact strategically; a party who can predict with certainty that it will be in the stronger financial position when arbitration may be commenced may seek to nominate a set of institutional rules which will discourage the other party from issuing proceedings, should it wish to. In that context, the costs liability may encourage the parties to negotiate prior to issuing proceedings where they might not otherwise have done so.

In the next briefing we will consider the truth about confidentiality in arbitration; it’s not what you think.

FOR MORE INFORMATION

Should you like to discuss any of the matters raised in this Briefing, please speak with the author, Andrew Waters, or your regular contact at Watson Farley & Williams.

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