Uncertainty surrounds awards for costs in arbitration proceedings

Vol. 27, No. 44 (March 28, 2008)

Focus on Alternative Dispute Resolution

Most domestic commercial arbitration statutes in Canada expressly give arbitrators the jurisdiction to award costs and, seemingly, jurisdiction to do so at a level exceeding “tariff”, “ordinary” or “party and party” costs.

For example, Ontario’s Arbitration Act, 1991 provides that an arbitral tribunal may award the “costs of an arbitration”, which the legislation expressly provides “consist of the parties’ legal expenses” among other items (see Rosenfeld v. Iamgold International African Gold Corp., [1997] O.J. No. 3770 (Gen. Div.)).

B.C.’s Commercial Arbitration Act provides that in specifying the amount of costs, the arbitrator may specify that the costs include “actual reasonable legal fees.” This wording was described in legislative debate when inserted as “preserv[ing] a desirable feature of arbitration: namely, the ability of a party to recover its actual costs.” However, the B.C. Supreme Court has since described this provision as not entitling a party to “recover more than its objectively reasonable legal fees” determined in light of “the particulars of what the solicitor did” (Williston Navigation Inc. v. BCR Finav No. 3, [2007] B.C.J. No. 269).

In terms familiar to litigators, Alberta’s Arbitration Act specifies that the arbitral tribunal may award all or part of the costs of an arbitration (in Ontario defined to include parties’ legal expenses) on a solicitor-and-client basis, a party-and-party basis or any other basis. Such wording is also found in Manitoba, New Brunswick and Nova Scotia.

However, it is unlikely that arbitrators must award costs at a higher level than the “tariff”, “ordinary” or “party and party” level, even where the legislation does not expressly reference such lesser categories as an option. After all, the very award of costs is discretionary. It makes little sense for the choice to be between no award and an award that in some cases could amount to several millions of dollars.

Certainly full indemnification is not the default, as it could have been in the absence of an award. Under Ontario’s Arbitration Act, 1991, for example, in the absence of an award dealing with costs, each party is responsible for the party’s own legal expenses. This is not to say, however, that the legislative wording may not be ambiguous. Where a statute expressly defines “costs” as including “legal expenses”, without further qualification, there is an argument that the “costs” that arbitrators have discretion to award must include them.

Conversely, it is unclear whether arbitrators are limited to circumstances that would justify a departure from “party and party” costs under the rules of court when awarding costs at a higher level.
While such misconduct-related considerations were pointed to in Rosenfeld, where what amounted to “complete indemnification” was ordered, Ontario’s General Division did not address whether there were other bases on which to make such an award.

In B.C., the power to award solicitor-and-client costs under the rules of court (associated in the case cited below with misconduct by the party against whom it was awarded) was described as “narrower” than that provided by the B.C. Commercial Arbitration Act given its express reference to “actual reasonable legal fees” (Four Seasons Hotels Ltd. v. Pacific Centre Ltd., [2002] B.C.J. No. 158).

Rendering arbitration more attractive to a business community perhaps frustrated by tariff costs also militates against simply following the considerations governing practice under the rules of court. This said, the requirement for a “judicial” exercise of discretion is evident in other aspects of costs awards (AWS Engineers & Planners Corp. v. Deep River (Town), [2006] O.J. No. 2143 (Ont. S.C.J.); Necrovore Inc. v. Andover Land Corp., [2007] O.J. No. 3216 (Ont. S.C.J.)).

From a practical perspective, in the absence of grounds showing why the case departs from the ordinary, a claim for full indemnification appears at least less likely to succeed before an arbitrator accustomed to costs in the litigation context.

The uncertainty which surrounds costs awards in arbitration proceedings reinforces the desirability of some form of publication of redacted arbitral awards in order to obtain a sense of arbitral practice, and expressly addressing issues related to costs, including quantum, in the parties’ arbitration agreement.

While this is not to say that costs-related provisions in arbitration agreements may not themselves spark debate (Metro Canada Logistics Inc. v. UWG Inc., [2007] O.J. No. 1501 (Ont. S.C.J.); Practicar Systems Inc. v. 696373 Alberta Ltd., [2007] A.J. No. 290 (Alta. Q.B.)), they may at least make it easier for parties to predict the costs implications of success or failure in a given arbitration before its conclusion.

Where the arbitration agreement provides for the manner or amount in which costs may be awarded, generally the provisions of the agreement govern. Alternatively, more precise legislative wording setting out arbitral options, and the basis for their exercise, could further the same objective.