Controlling the costs of arbitration: “fixed fees for arbitrators”

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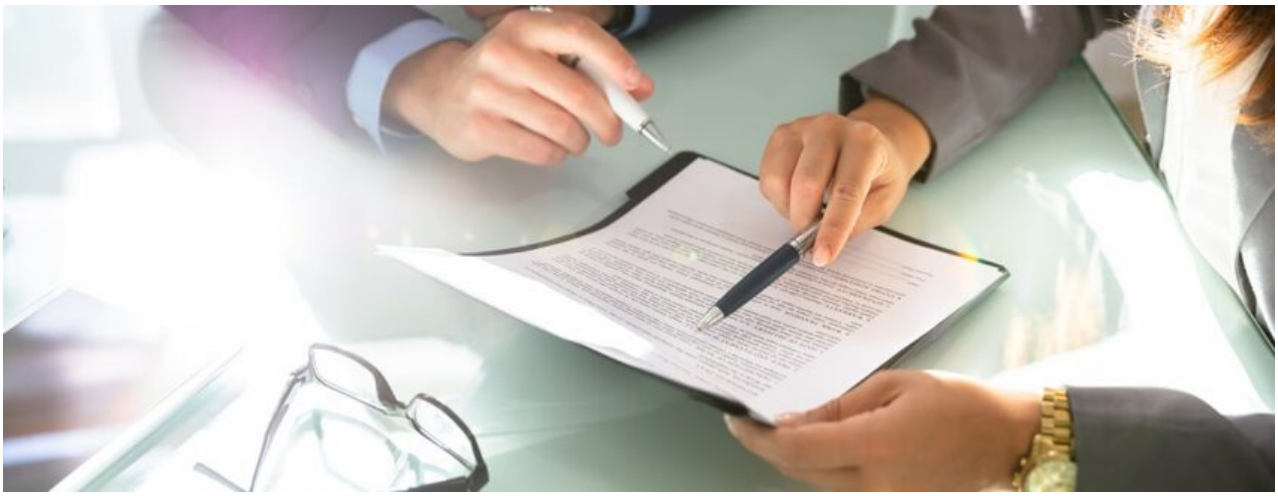

One of the most vibrant and intricate issues in international arbitration is unquestionably the costs that go along with this mechanism to solve disputes. Service providers and users across the globe seem unable to find a satisfactory framework to a binomial “cost & time-efficient” procedure with excellence. It is true that arbitral institutions are constantly seeking to adapt their structures of costs to the perceived needs of their “customers”. Yet, finding an optimal balance is not an easy task.

Businesses and other users are always struggling to find ways to predict and reduce these costs. Most times, however, they fail to realize that the costs of the dispute does not lie in those associated with the decision-maker but rather in their own legal teams or other ancillary procedures (such as disclosure measures), to name but a few examples of the costs that increase their bills. Accordingly, when speaking about reducing the costs of arbitration, it inevitably leads to the discussion surrounding the fees of the arbitrators, a topic that is anything but a walk in the park.

Arbitration is a product of contractual freedom, but it is surprising to find that parties often draft their dispute resolution clauses without giving serious thought to the implications that such a choice may bring when the dispute arises.

Indeed, most times, when parties are stipulating their arbitration clauses, they focus on the seat and applicable law, the language of the proceedings, and the institution to conduct their case. Mostly, they forget about the costs of the arbitration (including the most significant issue: the arbitrators’ fees).

However, after the contract is signed, and when the dispute has arisen, the first and initial question is: how much is this going to cost me? Then, the party initiating the arbitration wonders why a clause on costs was not included in the first place. Often, it is too late: the institution will apply its schedule, and that’s it.

To add insult to injury, usually, the advance on costs may be set up in an amount corresponding to half of the total costs of the arbitration. Significantly, if the dispute is settled before the final award or even before the final hearings, or even worse, after the first exchange of submissions, the tribunal and / or the institution will fix their fees in a not so negligible amount.

Usually, it will take a subsequent arrangement between the parties in dispute, and the members of the tribunal, for a different costs structure to be applied. This is extremely challenging to achieve after a dispute arises, and especially if one of the parties is a recalcitrant litigant.

This picture may be even darker when one takes into account a unique feature of the Portuguese arbitration setting. There are many disputes—arising out of industrial property rights when reference medicines and generic medicines are at stake—that must be resolved through mandatory arbitration. Nonetheless, the law that enacted this legal regime did not go so far as to suggest–and much less impose–that those disputes be resolved by an arbitral institution.

Also, given the amount at stake in those disputes—usually, patents worth dozens of millions of euros in sales—it was not a surprise that some arbitrators have become infatuated by the idea of considering those millions as being the amount in dispute.

Not surprisingly, the imagination of those figures has led some arbitrators to order the parties to produce their annual sales statements related to the products of the patent in dispute. Hence, in spite of the values indicated by the parties in their requests (usually, the amount corresponding to an "immaterial" value claim of 30,000 euros), some arbitrators have amended the value of the claim "ex officio". Following suit, they resorted to institutional rules or otherwise fixed their fees, in any case applying "ad valorem" criteria. As a result, arbitrators started fixing their fees at unreasonable standards, only to find that the state courts began overturning their decisions by reducing the tribunal fees substantially.

Anecdotal evidence in other countries shows a recent trend among savvy parties to start the arbitration proceeding with merely declaratory purposes (that is, a procedure aimed at declaring the existence and enforceability of the claim at stake and the liability of the counterparty, leaving the issue of the quantum to subsequent proceedings). However, as the Portuguese experience shows, there is no guarantee that the arbitrators will not circumvent this attempt to reduce their fees by considering a higher value in dispute and by applying an "ad valorem" schedule.

For these reasons, it is worth considering the anticipation of this pothole, especially in the context of "ad hoc" arbitration (where the arbitral tribunal, more often than not, opts for the application of a schedule of fees of any given institution). Hence, one may suggest an arbitration clause that includes a fee schedule.

In this regard, one may look specifically at a schedule that is gaining general acceptance in "ad hoc" arbitrations seated in Portugal. Perhaps, amidst so many time & cost-efficient "schedules", "rules", and similar mechanisms, eventually named after their creators, one could start referring to this clause as the "Portuguese Fees Schedule for Arbitrators".

At the same time, because smaller claims are usually less complex, it is also worth considering a tiered-clause that provides for a sole arbitrator to solve disputes below a certain threshold.

The clause at stake reads as follows (numbers are left only for illustrative purposes):

Clause —
Arbitration

1. All disputes arising out of or in connection with this Agreement shall be finally settled by arbitration according to Law [specify lex arbitri].

2. If the overall amount in dispute, including the amount stated in the Initial Request for Arbitration and the amount stated in the corresponding Response (in the event of a possible counter-claim), does not exceed or is equal to $ 500,000.00, the dispute shall be settled by one arbitrator. If the overall amount in dispute is superior to $ 500,000.00, the dispute shall be settled by three arbitrators appointed in accordance with Law [specify lex arbitri]. If the amount in dispute changes after the Tribunal is already constituted, such will not have an impact on the number of arbitrators composing the Tribunal.

3. The seat of the arbitration shall be in [specify country of the seat], in the city of [city of the seat].

4. The language of the arbitration shall be [specify language of the proceedings].

5. Without disregard for the clauses mentioned below, the value of the fees to pay to each arbitrator will not be determined according to the amount in dispute or the value of the procedure determined by the arbitral tribunal per applicable law. Thus, the parties agree that the maximum amount of fees to pay to each arbitrator shall be $ 20,000.00.

a. If however:
(i) The arbitral proceedings end before the submission of any memorials, or without relevant activity from the Arbitral Tribunal, the value of the fees to pay to each Arbitrator will be fixed in $ 3,000.00;

(ii) The tribunal merely ratifies an agreement of the parties or declares the incidental uselessness of the proceedings without a Respondent's memorial having been submitted, the amount of the fees to pay to each arbitrator shall be fixed between $ 3,000.00 and $ 5,000.00;

(iii) A Claimant's memorial is submitted but not a Respondent's memorial, without an evidentiary hearing taking place, the amount of the fees to pay to each arbitrator shall be fixed between $ 5,000.00 and $ 9,000.00;

(iv) Both Claimant's and Respondent's memorials are submitted, but without an evidentiary hearing being held, the amount of the fees to pay to each arbitrator shall be fixed between $ 5,000.00 and $ 9,000.00;

(v) A Claimant's memorial is submitted and a Respondent's memorial is not, but still, an evidentiary hearing is held, the amount of the fees to pay to each arbitrator shall be fixed between $ 6,000.00 and $ 12,000.00;

(vi) There are procedural incidents (such as an injunction procedure), the fees of the arbitrators shall be determined autonomously by the reason of 1/3 of the fees due for the main proceedings;

b. The fees of the chairman shall be calculated in the ratio of 1,30 of the fees of the other arbitrators. For the avoidance of any doubt, the fees of the chairman will not exceed $ 26,000.00;

c. The secretary, should the tribunal decide to appoint one, will be paid in an amount corresponding to 10% of the fees of a party-appointed arbitrator.

d. The expenses relating to trips and stays of the arbitrators, as well as administrative and production of evidence costs shall be fixed according to its effective cost.

e. If the Arbitral Tribunal is composed by a sole arbitrator, the rule determined under 5.b of the present clause will apply.

Conclusion

It is a commonplace that disputant parties in general—and arbitration users in particular—require control and predictability of costs. Institutions administrating arbitration cases usually offer tools that help parties control and predict these costs, but ultimately this happens only when the dispute arises. At such a stage, decisions that could limit or otherwise control an escalation on costs must be taken by both parties in dispute, with the agreement of the arbitral tribunal. And that is no piece of cake.

While it is beyond any question that the fees of the arbitrators are nothing but a small fraction of the entire cost of any given arbitration, it is usually the first factor the parties look at when the dispute arises. It may well turn out to be relatively easy to calculate the costs of the institution and the arbitrator, but it may also prove to be an unpleasant surprise. Indeed, when facing a materialised claim, the most expected exclamation is: "I didn't see it coming".

And then, the parties may start wondering why they hadn't thought of a way to better predict the costs.

Establishing fixed fees, like the structure suggested above, is not a panacea for all diseases in arbitration, and will certainly leave many service providers uncomfortable with such an arrangement. However, it leaves the parties with some control over the costs of some portions of the case from the very outset and long before the dispute emerges.