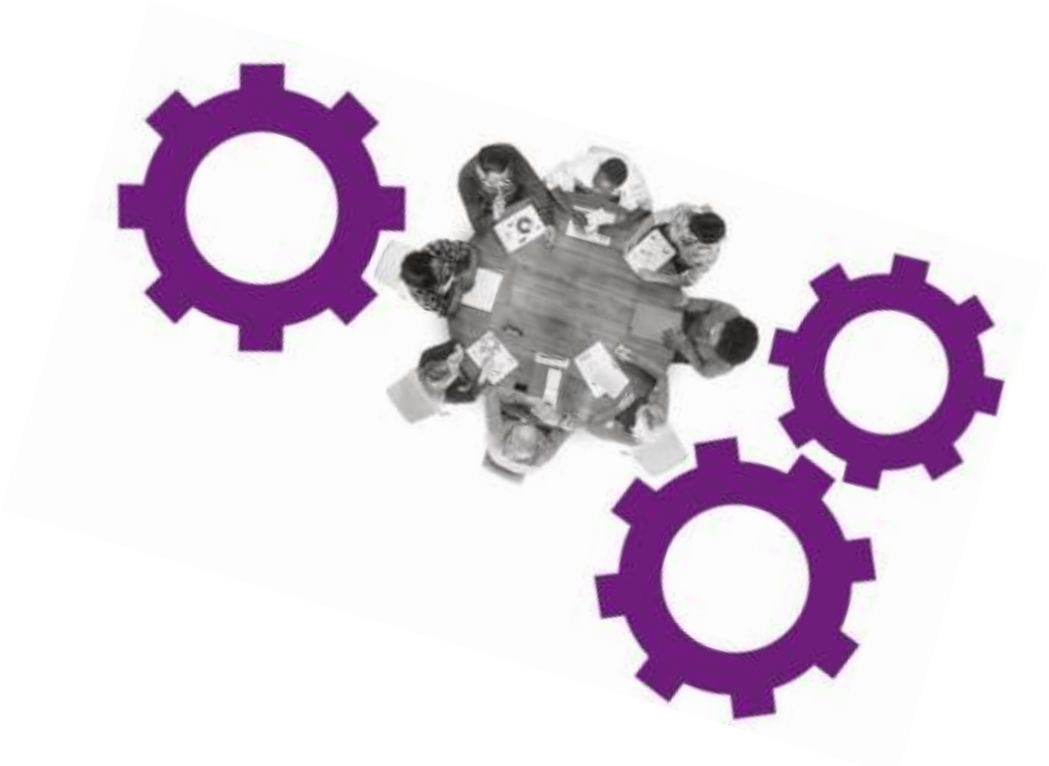
EVERSHEDS SUTHERLAND

ICC INTERNATIONAL CHAMBER OF COMMERCE YAF

ICC YAF:
Smooth cooperation & enforceable measures

Tips on effective arbitration for young practitioners



On 21 June 2019, Eversheds Sutherland Dvořák Hager office in Prague, Czech Republic, hosted the ICC YAF event. The event was titled Smooth cooperation & enforceable measures.

The event was opened with welcome remarks by **Stanislav Dvořák**, managing partner of the hosting law firm Eversheds Sutherland Dvořák Hager.

Stanislav was followed by **Natalia Jodlowska**, representative of ICC YAF. Natalia introduced the YAF platform aimed at young practitioners and arbitrators under 40. The platform already has around 10 000 members and focuses on strengthening relationships among young arbitrators by providing them with an opportunity to meet and discuss different issues. Natalia also mentioned the next ICC YAF events which are going to be held in 2019.

The participants were then greeted by **René Cienciala**, associate from Havel & Partners who spoke on behalf of the Arbitration Committee of the ICC Czech Republic.

Martin Svatoš

Arbitrator and mediator

The first panel was moderated by **Martin Svatoš**, arbitrator and mediator. **Lucie Ivančová**, Senior International Legal Advisor from TNT/FedEx, and **Miranda Mako**, Legal Counsel from Mondi Group, discussed and debated how to ensure smooth cooperation between in-house counsel and external lawyers.

Miranda Mako

Mondi Group

Miranda Mako said that one of the most important pillars of cooperation with external lawyers is understanding the company's business. Externals should be informed and aware of what the company does, and they should understand the core of company's business procedures. Simultaneously, external lawyers should act as their "team members". According to Miranda, high-quality cooperation is achieved by external counsels accepting responsibility and providing in-house counsels with regular updates about the case and keeping them informed of the progress.

As an in-house counsel, Miranda expects highly practical solutions, taking into account business and company's interests. The best external lawyers should give business friendly advice. Miranda also pointed out that she prefers simple but informed outputs instead of multi-pages ones. At the same time, Miranda expects that externals' services also include case management. All these points might seem easy to do and obvious but in practice, such comprehensive services are often not provided.

Lucie Ivančová

TNT/FedEx

In terms of delivering outputs, **Lucie Ivančová** said she preferred clear, concise solutions. Multi-pages outputs are unnecessary. Of course, such outputs must be kept and can serve for case management purposes of the external lawyers, but Lucie (as an in-house counsel) expects outputs in a simplified form. Once they cooperate with externals, they count on them. In this kind of relationship between in-house counsels and external lawyers trust is the most important element. It takes a long time to build the trust, but it can be lost in one second. Lucie sees external counsels as partners.

Next, panellists provided several insights concerning the best practice for cooperation between in-house and external lawyers. Miranda pointed out that in practice, it is essential for her that external lawyers work independently and do not need to be supervised, i.e. they do not need to be controlled and urged in providing information to in-

house team. Regarding the choice between arbitral and court proceedings, it depends on the amount in dispute and the jurisdictions involved.

Lucie said that if a dispute arises, she tries to resolve it out of the court. Court proceedings are always an ultimate option as they cost a lot of money, not only direct court fees, but also time of involved employees has its value and price. In practice, there are often cases, not just court cases, but e.g. contract negotiations, where lawyers try to artificially prolong the case and send unnecessary outputs. This always becomes obvious, e.g. when in the later phases of contract negotiation counterparty´s lawyers start to repeat the same comments and arguments they raised in the beginning.

Another thing important to Lucie is that a cooperating external legal company is one step above professional level, i.e. when external lawyers work not only for 100 percent, but 110 percent. Added value is anticipated as well as tailored business legal advice.

Discussion

Presentations were followed by discussion. First question concerned Lucie's preferences of settlement. Lucie was asked if she prefers settlement even if a plaintiff is her client or customer. Lucie's answer was generally positive and she pointed out that it would apply particularly in this situation, i.e. when the plaintiff is a client. On the other hand, some values and claims are non-negotiable – e.g. law violations, threats. Every subject and case must be assessed on ad hoc basis.

As for budget and cost estimates provided by external counsels, Lucie pointed out that when working with external lawyers, she does not expect unrealistically low-cost estimates. Lower offers often contain many conditions so in the end, the price for legal services is always higher than the original offer. In this context, Lucie always oversees the work of external lawyers. If they unreasonably increase costs, it is an incentive to end the cooperation. Lucie is of the opinion that if cooperating lawyers artificially increase costs once, they will do it again in the future. As a result, Lucie cannot trust such lawyers and that is a crucial point.

It is important to Miranda to set up a reasonable budget at the beginning of the cooperation. As for institutional arbitrations, Miranda said that especially once the arbitration has already been initiated and the arbitral tribunal is appointed, the external lawyer should be able to provide the client with a fairly accurate cost estimate. Miranda also added that it is not only the hourly rates of external lawyers but, in particular, their efficiency and effectiveness that really count.

Both of the speakers were asked how they choose external lawyers. Miranda said their choice is based on, for instance, previous experience with lawyers, personal recommendations or Chambers and Partners but they prefer not to enter unknown territory. Lucie said the first thing she looks at is whether there were mistakes in the lawyer´s previous outputs (just in case Lucie already has some experience with the particular lawyers). Lucie also considers the quality of their previous cooperation and as Lucie stated before, it is very important to her that they have never tried to artificially increase legal fees.

Eliška Miklíková
Eversheds Sutherland Dvořák Hager

The second panel addressed the issue of preliminary and interim measures in international arbitration. It was moderated by **Eliška Miklíková**, senior associate from Eversheds Sutherland Dvořák Hager.

Johanna Henschel
Walder Wyss AG

The first speaker of the second panel was **Johanna Henschel**, associate from Walder Wyss AG Zurich. Johanna addressed the issue whether it is possible to obtain interim measure or partial award regarding advance on costs of the arbitration proceedings if the other party did not pay its share of the advance on costs. The first thing Johanna does when she encounters such issue is that she looks whether the rules applicable in the arbitration provide solution to her.

If LCIA or SCC rules are applicable, there will be solution to that scenario. Both LCIA and SCC rules allow claimant to be granted partial award for reimbursement of the advance on costs he paid on respondent's behalf. ICC rules, Swiss rules and other rules oblige both parties to pay half of the advance on costs. Also, in most arbitral rules there are provisions on interim measures.

There are two stances on how to approach the issue of what to do when the counterparty does not pay its share of advance on costs. Depending how this issue is seen, different criteria need to be demonstrated to the tribunal. The possible result for this scenario can be an interim award, a partial award or a procedural order – the answer also depends on the taken stance. Therefore, it is really relevant whether the obligation to pay advance on costs of the arbitration proceedings is characterized as a substantive law commitment or as a procedural obligation.

The most predominant (in particular under ICC Rules) stance is that it is a substantive law (contractual) obligation amongst the parties. The first issue to address is which law governs this obligation. It can be either the law governing arbitration agreement, or substantive law of the underlying contract. Most civil legal orders conclude that the conditions for this obligation are determined by substantive law. For claimant to ask for damages caused by respondent not paying his share of advance, damage, breach and causal relation between them would need to be proved under Swiss law. As to damages, under ICC case law, first the final allocation of costs needs to be ascertained. Only then the amount of damages can be determined.

Also, besides monetary claim for damages, claim for specific performance can be raised. The claim for specific performance is difficult if respondent´s share of advance has already been paid by claimant. Then there is no specific performance to be requested.

The second stance is that obligation to pay advance on costs is a procedural obligation stemming from procedural agreement – in this case, arbitration agreement. With this stance, according to the commentators, only two things are necessary to establish – rules that say each party pays half of the advance and a party failing to do so. Then claimant can request direct reimbursement of advance from respondent.

In Johanna´s opinion, procedural nature of the obligation to pay advance on costs and the good faith obligation make the most sense intuitively. The good faith obligation means that the party cannot agree to arbitrate and pay for half of the arbitration and then start torpedoing the arbitration by refusing to pay. The good faith obligation has been mentioned in many awards.

Before the arbitrator decides on reimbursement of paid advance on costs and drafts some document, he needs to know whether it is a substantive law obligation or procedural law obligation or whether an interim measure can be rendered. Johanna considers solution through interim measure illogical. Interim measure solution might result from the approach which do not differentiate between advance on costs and allocation of costs in a final award.

According to Johanna, obligation to pay advance on costs is a procedural obligation based on arbitral agreement. It is not of preliminary nature and thus preliminary measure cannot be rendered. At some point in the proceedings, it does not make sense to enforce the other party´s obligation to pay the advance on costs.

Those who defend interim measures approach would usually render procedural order. There is ICC case law which allows for interim measures if one of the parties does not pay the advance on costs but in Johanna´s opinion, this approach is a clear minority.

Different approach states that consequences of non-payment of the advance on costs are clearly set out in the applicable rules – usually the arbitration proceedings will be terminated without any award on merits, if the advance is not paid in full. This approach would lead to big problems if the applicable arbitration rules does not contain clause similar to the Art. 24 (5) of the LCIA Rules.
Lastly, one procedural sub-opinion, which concerns ICC in particular, states that the ICC court exclusively deals with advance on costs. Therefore, the arbitral tribunal does not have power to order respondent to reimburse the advance to claimant because it lacks jurisdiction to do so.

To conclude, Johanna recommends before deciding for one of the abovementioned approaches to consider following factors:

a) Applicable procedural rules;
b) Stance on this issue in the seat of arbitration and also in the jurisdiction where the decision on advance might be enforced;
c) Other factors, e.g. is there a valid reason why respondent did not pay its share of advance (e.g. prima facie decision that there is no arbitration agreement), stage of the proceedings, amount of advance, procedural strategy etc.

In Johanna´s opinion, when the other party does not pay its share of advance on costs, it is possible to file a request for an immediate partial award. The obligation to pay advance on costs is a procedural one and it stems from the arbitration agreement and incorporation of the arbitral rules. However, the value of motion for such immediate partial award is mostly psychological rather than practical.

Zdeněk Kučera
Kinstellar

The second panelist, **Zdeněk Kučera**, Head of Dispute Resolution and TMT Practice at Kinstellar office, said that he considered himself to be a technical lawyer and he always tried to avoid any litigation and going to court and especially any international arbitration.

Zdeněk then posed two questions for the audience - who had a court case where he was dealing with interim measures under local laws and who of the audience have ever had this situation in the arbitration. There were only a few people who answered yes to the second question while almost everybody answered yes to the first one.

By raising these questions, Zdeněk wanted to discuss underlying reasons why interim measures under local laws are rarely used in international arbitration. Zdeněk mentioned that his law firm covers ten countries and mostly they deal with interim measures only in Ukraine where it is much easier than in other countries.

The interim measures are very often of different nature, e.g. interim awards, preliminary orders or partial awards. Zdeněk also pointed out that this is crucial for the enforcement of the interim measures under local laws. Why? Because the New York Convention does not recognize interim measures. Even the UNCITRAL Model Law had not recognized that until 2006 when there was the amendment. However, there have not been many countries in the world that implemented the UNCITRAL Model Law in the revised version. Zdeněk mentioned four examples - France and Belgium, each one on the different end of the scale, and then Australia and Great Britain.

The problem with the enforcement of interim measures is that until there is a final award, it might be a problem to enforce something what is called an "order", especially under Czech law. Zdeněk does not recall any successful enforcement of preliminary measure issued by a foreign arbitral tribunal in the Czech Republic.

As mentioned before, Ukraine is a different example where they were successful in enforcement of interim measures rendered in different country. It was an investment dispute, JKX Oil v. Ukraine. Another example is Yahoo v. Microsoft.

There are ongoing discussions about what is more important - substance of interim measure, or form of the measure. These two aspects are very often considered by local courts. In the Czech Republic, the form of the decision would prevail. In the USA, it is more complicated because both substance and form are considered. Some states in Europe introduced very interesting solution that is based on 2006 UNCITRAL Model Law.

In the context stated above, Zdeněk highlighted the German solution. There is an option to select between the court or arbitral tribunal to decide on interim measure. Under German law, there are two procedural stages of deciding on interim measures. The first one is the finding and second one is the enforcement. The enforcement is always done by the local courts. These courts have obligation to accept the decisions of the arbitral tribunals with seats outside Germany or even of the tribunal which has not have determined its seat yet.

But in Germany, there is a slight preference of the court over the arbitral tribunal. There are two reasons for that. First one is purely procedural - once the request is filed with German court, it is not possible to go to arbitral tribunal. Secondly, German courts, when deciding on motion for preliminary measure, only look at conditions stipulated in German civil procedure code. If these conditions are fulfilled, the courts do not investigate any further and they simply issue the preliminary injunction. This approach is different from the approach of arbitral tribunal which would consider the presented arguments.

In many countries in the EU, there is not this kind of solution available. Therefore, enforcement of interim measures rendered in international arbitration is questionable in these countries.

Jan Ortgies

Legal Adviser to His Excellence Judge Bruno Simma at the Iran-United States Claims Tribunal

Zdeněk was followed by **Jan Ortgies**, Legal Adviser to His Excellence Judge Bruno Simma at the Iran-United States Claims Tribunal, who discussed preliminary measures in general. Jan thinks that whichever arbitral rules you pick, when it comes to preliminary measures, 99 % of the arbitral tribunals will consider balance between rights of defendant and rights of claimant. It is a balancing act and presumption which needs to be overcome if a party wants to go for an interim measure. Usually, the tribunal´s presumption is against the applicant.

Jan came up with six points that should be considered before applying for interim measures. These points are (i) timing, (i) tribunal, (iii) case, (iv) costs and (v) strength and (vi) weakness of the particular arbitration.

According to Jan, first steps is to realize why motion for interim measure needs to be filed. If interim measure aims only at the same thing which is subject of the main proceedings but wants it delivered earlier, then it might not be a good idea to go for an interim relief. Jan believes that it is important to have precise and specific answer as to what we want to achieve with request for an interim measure. One example of interim measure can be a motion for securing evidence or payment of security but only if the requested amount is correct and the motion is really necessary.

A lot also depends on the client and what he wants to achieve. Filing for preliminary motion can be a possibility how to turn the narrative, especially for the defendant. The defendant can provide in the motion such information to the arbitral tribunal which he considers as the most relevant and which supports his side of the story. By presenting this information through motion for preliminary measure, the party makes sure that the information will be absorbed by the arbitral tribunal. By motion for interim measure, proceedings can be slowed down or made more expensive if that is what client is after.

In practice, motions for interim measures are often too broad and too optimistic about what they can achieve. These motions also often broach their own mini-trial. If that is the main goal of such motion, it would be better to wait for hearing on merits and final award.

Jan thinks that because most lawyers come from national law where interim relief and emergency relief and all other reliefs sound very quick, then lawyers tend to expect such speed also in international arbitration. However, such motion in international arbitration is not going to be quick. There are no rules on the time, there are hearings, there will be award etc. And that is what needs to be communicated to the client before motion for preliminary measure is made.

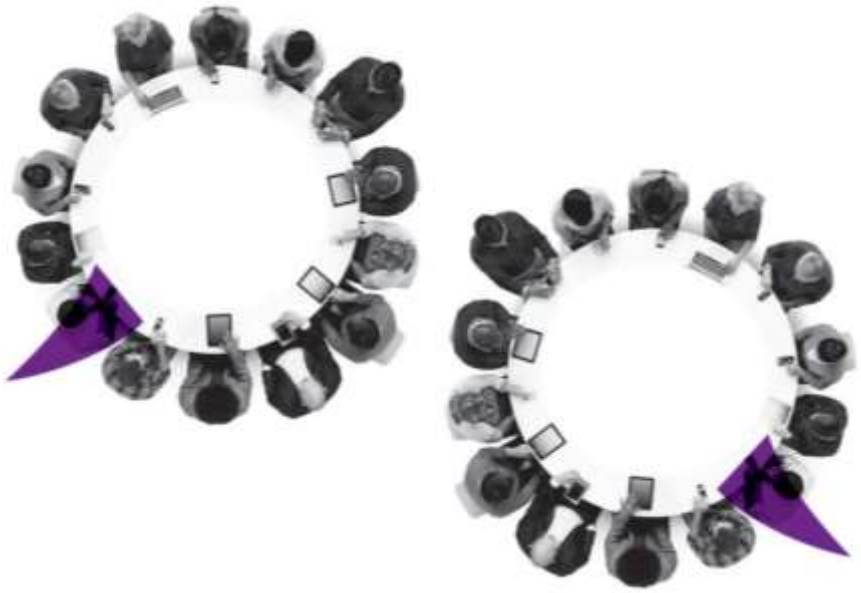
Another point to consider when applying for an interim measure is the case and relevant institution. It also helps to have good knowledge of the tribunal - how quick and responsive the tribunal is, if there has already been contact with the tribunal, does the tribunal have an assistant, how busy the arbitrators are on other cases, how do they react, what they did in another case, what they think about specific performance and preliminary injunctions etc.

It is also wise to avoid irritating the tribunal. Motion for interim relief is always sudden and it is a sudden stop to the full agendas of everybody involved including arbitrators. If there is a good reason for interim measure, usually everybody will be very understanding. If there is not a good reason for motion for interim measure or if it is purely tactical, then filing of such motion should be avoided because it will not be granted and it might alienate the tribunal. If the case is strong, then it might be better from tactical point of view to deal with the merits directly instead of wasting time on interim measure.

Jan also mentioned other aspects to consider including costs of such motion. Each preliminary measure is a mini-trial and it will annoy the respondent who will need to engage lawyers to work on his submission, often at nights and weekends. The tribunal also needs to read everything and draft an award or an order. These costs will often be separated from the costs of the main proceedings. In the end, even if the party prevails on the merits, it might still need to pay the costs for mini-trial on motion for preliminary measure which can be significant.

The last and fuzziest point to consider is general weaknesses and strengths of interim measures. Arbitration is slow and very much oriented towards due process while on the contrary, preliminary measures are one-sided, preferably ex parte process. Therefore, only necessary things should be asked in motions for preliminary measures. For example, asking for a security from respondent who is very rich or who is a state is meaningless because such motion will not be granted.

Therefore, Jan recommends considering these six points first and then just do it. Interim measure can be a mighty tool if used appropriately.



Discussion

Afterwards there was a discussion. First question from the audience was related to Jan`s presentation and that it is not a good idea to annoy the arbitral tribunal. Is it really so frequent that parties would not comply with interim measures orders? Because if the parties do not comply with the tribunal´s order, then they are annoying the tribunal.

Johanna answered the question and stated that in Switzerland, procedural orders are usually complied with because of exactly that reason, i.e. parties do not want to annoy the tribunal. Johanna then wondered whether the Czech hesitance to enforce interim awards or procedural orders affects whether party complies with it or not. Zdeněk answered that the reason for non-enforcement of foreign arbitral interim measures is purely formal. It is only a grammatic interpretation of procedural rules which Eliška confirmed.

Zdeněk then added a few more comments not related to arbitration but generally to preliminary injunctions. The panellist so far focused on the situation of the applicant for interim measure. Zdeněk has now pending case where they are in different situation. They are waiting for preliminary injunction to be issued against client across the world. They started with the opposition. In Germany and in some other countries, it is possible to file a preliminary response to motion for preliminary injunction. In Germany, this preliminary response can be submitted to the court and it has to be done electronically. Whenever preliminary injunction is filed against the respondent, the competent court needs to consider all arguments that are stated in the response which ultimately leads to oral hearing. So the court does not issue preliminary injunction immediately but they usually schedule an oral hearing.

Zdeněk was then asked if this German procedure is not easily misused. Because respondent can then file anything and it will render the motion for preliminary motion useless. Zdeněk does not think so. According to Zdeněk, this procedure basically helps potential respondent to react and it is up to court to consider the arguments in the response. Also, the court is under no obligation to schedule oral hearing. Eliška then added that this procedure can help even without the hearing because it buys defendant more time.

Then Zdeněk asked Johanna whether similar procedure exists in Switzerland as well. Johanna said that in Switzerland, there is so-called protection brief. But it needs to be filed in each of 26 cantons because there is no central database. Also, it often needs to be filed in more languages as each canton has different official languages.

The next question was for Johana - whether she thinks payment of the advance could be requested from the other party based on preliminary injunction or some kind of partial award even if there is no such provision in the applicable arbitration rules. The questioner´s argument was if there are institutions who have incorporated provisions for this situation, does not it mean that with other institutions which rules does not contain this provision, such approach is not possible?

Johanna answered that before she files motion in this situation, she checks the tribunal. Because there are lots of writings on the issue of non-payment of the advance on costs. If there is an old and established arbitrator in the tribunal, he will most certainly have a stance on that. And then Johanna decides accordingly. Under ICC rules, there is only a rule that advance on costs needs to be paid in equal shares. However, there is a lot of case law saying that the tribunal can render partial award ordering the respondent to pay his share of advance. Therefore, Johanna would not be too afraid to request such partial award under ICC rules even if the specific provision is absent. Johanna was successful with this approach in the past. But unfortunately, the client did not have enough money to enforce the partial award.

There were then comments from **Ulrich Kopetzki** from ICC YAF that especially in ICC arbitration, the arbitrators are not paid extra for dealing with motions for interim measures. However, if the party does not spend too much time on the brief, it is rather easy to request partial award. But the arbitrators need to draft the award basically for free. Also, some arbitral institutions put unnecessary provisions into their rules so that should not be used as an argument why such partial award cannot be rendered in ICC arbitration.

Then Ulrich commented on possibilities how to achieve reimbursement of the part of advance on costs which has already been paid by the other party. Under ICC rules, the request for specific performance consisting of payment of half of the advance on costs can still be raised even if the other half has already been paid by claimant. The mere fact that claimant substituted respondent´s half does not mean that respondent's obligation to pay his share of costs vanished. It would be also possible to claim unjust enrichment instead of damages.

The next question from Ulrich was why it is relevant to determine the nature of obligation to pay advance on costs, i.e. whether it is procedural, or substantial obligation. Johanna answered that the difference is only in what you need to establish in the motion. If the applicant needs to go into substance, then it is more complicated. Therefore, it is easier to present it as a procedural obligation. If the applicant decides that obligation to pay advance on costs of the arbitral proceedings is a substantive law obligation, then it is a more complicated solution.

What is more, this solution is just dramatically wrong according to Johanna. Arbitration agreement in Johanna's view is a procedural agreement thus, no substantive obligations can arise out of it. Johanna had seen all kinds of procedures, even a case where the tribunal first rendered a procedural order ordering party to reimburse the other party. The procedural order also stated that if the party does not comply with this order, the tribunal will render partial award.

The very important point to Johanna is to avoid going into substantive law. For example, if specific performance is not possible anymore, then it would need to be established whether there is a legally protected interest when ICC has already received 100 % of advance. Also, another point to consider would be how to reimburse the money – directly to claimant, or first to ICC and then ICC would reimburse claimant?

Jan then pointed out that the claim for reimbursement of paid advance could wait until the end of the arbitral proceedings. According to Jan, respondent might also have problem with the argument where respondent is unjustly enriched by somebody else paying for claim against respondent. Jan further mentioned possibility of prodding the tribunal to do something about the respondent not paying his share of advance, e.g. sending him an angry letter.

According to Johanna, in ICC arbitration, these letters are sent by the court which is usually very generous when granting additional time for payment. If respondent does not pay, then the court asks the claimant to pay respondent´s share of advance on costs.

Ulrich then commented that ICC never asks claimant to pay respondent´s part of advance, it only invites claimant to do so.

In Johanna´s opinion, that is the reason why they filed the motion for reimbursement of the advance on costs paid for respondent. Respondent in this case was a very big and wealthy company and the motion was a way how to make the arbitrator dislike the respondent. Because it was due to respondent´s inactivity that the arbitrator had to deal with the whole situation and basically for free.

According to Ulrich, in ICC arbitration such situation is usually solved by partial awards on reimbursement, never through interim measures. That means that no urgency needs to be shown. Sometimes procedural order is considered.

Jan then reacted that partial award meant that claimant – if he succeeded on merits - needed to go through the enforcement process twice, first with the partial award and secondly with the final award. In his opinion, it does not make sense. In Ulrich´s point of view, it might not make sense but that is up for the parties to decide. In Johanna´s opinion, it makes sense when the advance is very high, e.g. over a million euros because then it matters whether claimant has this money now, or in several years.

Then there was a question from audience whether there is a hearing before partial award on reimbursement is granted. The answer from both Ulrich and Johanna was that there is no hearing. But Ulrich pointed out that it still takes few months because it is an award. That makes motion for specific performance pointless because there is not enough time for claimant not to perform, then ask for specific performance, i.e. payment of respondent´s share on advance, and wait for the award on specific performance.

The debate was then ended by closing remarks from Eliška who thanked the panellists for their interesting contributions and the audience for their questions.

Note: All the speakers stated only their personal views which are not be attributed to the entities they work with.

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