Can't pay, won't pay

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The first panel of the conference: Harald Sippel, Yewon Han and Seungmin Lee

Cash-strapped parties in disputes – or those simply unwilling to pay – were the subject of a seminar for young arbitration practitioners in Seoul, who discussed the use that can be made of orders for security for costs and third party-funding, as well as freezing orders to prevent them from hiding or dissipating assets.

The seminar was co-hosted by ICDR Young & International and the Korean Council for International Arbitration Young Arbitration Practitioners' Forum. Following a keynote speech on costs by **John Kim** of KL Partners in Seoul – in which he made the key distinction between parties who can't pay and those who won't pay – a panel chaired by **Harald Sippel** of Yulchon put the focus on apparently impecunious claimants.

Yewon Han of Lee & Ko in Seoul noted that an order for security for costs may be used by a respondent to force the claimant to prove it has sufficient funds to proceed with a potentially unmeritorious claim. The security – often provided through a bank guarantee or a payment into escrow – will only relate to legal fees and expenses arising from the defence of the relevant claims in the proceedings.

Such an order protects the respondent against a catch-22 situation, Han explained. If it does not defend the apparently unmeritorious claim, it could face a default judgment if the tribunal does not have the same view of the merits. If it does defend the claim, but the claimant has no funds, it may end up having to pay the entire costs of the arbitration.

Han went on to explore the power of tribunals to order security for costs. Courts have traditionally held that they lack this inherent power. However, many institutional rules and national arbitration laws, like the Singapore International Arbitration Act, now expressly state that it is possible.

Even when there are no specific provisions granting such powers, institutional rules and national laws usually give arbitrators broad powers to order any interim measure they deem necessary or appropriate, she said. This general power is considered sufficiently wide to include the power to order security for costs.

Han added there is no strict "legal test" to guide a tribunal when ordering security for costs. However, the Chartered Institute of Arbitrators has issued a practice guideline, which identifies certain factors to be taken into account when deciding whether an application for security should be granted.

In practice, tribunals look at several factors, including the claimant's financial situation. Unless there is reason to believe that the claimant will be unable to pay the respondent's costs should the defence of the claim be successful, requests for security are normally denied.

Seungmin Lee of Shin & Kim considered the advantages and disadvantages of third-party funding, where a company pays for part or the entirety of the claimant's legal expenses and receives in return a percentage of the sum recovered in an award (typically around 30%). Lee noted that third-party funding supports access to justice as it allows impecunious claimants to pursue claims despite their lack of funds.

Funding adds value in other ways, she noted. Funders will perform "due diligence" into the claim beforehand, assess the risks of failure, and ensure that efficiency is maintained throughout the proceedings. They can take on the role of objective external advisor without any emotional stake in the case.

As good as this may sound to an impoverished claimant, there are, of course, drawbacks. Lee noted that the economic power of a funder may force a cash-strapped claimant to accept unfavourable terms. Likewise, a funder may push for a decision from the tribunal even though the claimant could have settled on good terms. Third-party funding could also result in the loss of confidentiality.

In Korea, the biggest risk is the "unclear" legal status of third-party funding, Lee said. There are indications that the country may embark on reforms to explicitly allow it, as has recently happened in Singapore and Hong Kong.

A panel chaired by **Lars Markert** of Gleiss Lutz in Stuttgart considered respondents who are poor or unwilling to pay.

Joel Richardson of Kim & Chang suggested that claimants must seek solutions outside the courts if they wish to compel a respondent to pay an advance on costs as the current case law is adverse to claimants seeking court assistance.

One solution is for the claimant to argue that the respondent's non-payment of the advance constitutes a repudiation of the arbitration agreement, allowing the claimant to proceed – at lesser cost – in the local courts.

Courts in various jurisdictions have different approaches to evaluating the validity of an arbitration agreement when the respondent is impecunious. Richardson noted that in the UK, one court found that the respondent's refusal to pay its share of the advance on costs constituted a breach – but not a repudiatory breach – of the arbitration agreement. As a result, a penniless respondent would not invalidate the arbitration agreement itself.

Canada takes the opposite approach. If the respondent does not pay its advance in the arbitration and objects to the court's jurisdiction in later litigation on the basis of the arbitration agreement, the objection is seen as not *bona fide*. French and German courts take a similar approach, Richardson said.

The second solution is for a claimant to obtain an order or award in arbitral proceedings compelling the respondent to pay its share of the advances on cost. He observed that modern arbitration rules – including those of the Stockholm Chamber of Commerce Arbitration Institute and the Korean Commercial Arbitration Board – explicitly provide that a claimant may pay the full amount of the advances on costs and then apply for an interim order or award for reimbursement of the respondent's share. He also pointed out that the latest rules from the ICC and the Singapore International Arbitration Centre could be interpreted to reach the same result.

David MacArthur of Bae Kim & Lee examined the possibility of freezing the assets of an impecunious or dodgy respondent who might seek to hide or move assets to make them inaccessible.

According to MacArthur, freezing orders are generally available in most jurisdictions, but vary in important ways. In Korea, a freezing order may be obtained from the local courts or from a tribunal seated in Korea. One of the advantages for parties requesting provisional measures in Korean courts is that interim relief proceedings can be done *ex parte*— that is, without advance notice to the affected party — which is not the case in most jurisdictions.

Orders attaching assets can also be obtained from the courts within a few days, beating emergency arbitrator proceedings. Parties should consider the different types of assets that may be attached and the amount of security required, he added.

The power to attach assets, however, is not limited to the courts. Tribunals seated in Korea may also attach assets under the Korean Arbitration Act. Provided that certain requirements are met, such awards are enforceable by the local courts pursuant to amendments to the act that came into effect in November 2016.

However, the proceedings before a tribunal are likely to take more time compared to the Korean courts and may not be *ex parte*. He mentioned that under the international arbitration rules of the Korean Commercial Board of Arbitration, as amended last year, preliminary measures proceedings can be obtained through the appointment of an "emergency arbitrator", which is generally speedy.

MacArthur concluded by looking at the advantages and disadvantages of seeking measures from a tribunal or a court and pointed out that the selection of courts or tribunals for issuing preliminary measures will depend on the situation.

While the Korean courts offer some distinct advantages, their jurisdictional reach may be limited compared to that of a tribunal, he said. In other jurisdictions, the courts may be viewed as unreliable or biased and so the tribunal or emergency arbitrator option may be more appealing. The decision must be evaluated on a case-by-case basis.

In his keynote speech, **John Kim** spoke primarily about the costs of international arbitration, which was recently identified as its worst feature in a 2015 Queen Mary University of London survey.

Since arbitral institutions have no preference about which party pays for an arbitration as long as someone does, most major institutions do not intervene if one party pays all the costs of a case in advance while the other refuses to pay. Claimants therefore often advance costs on behalf of their opponents, hoping to recover them later once the tribunal allocates costs, Kim said.

Institutions, however, have taken steps to lower the cost of international arbitration. Some institutional rules provide for emergency arbitrators, who are usually required to render their decision within three weeks of an application being filed. While the time for an award is longer, institutions try to enforce strict adherence to the time limit. The ICC International Court of Arbitration, for example, threatens to reduce arbitrator fees if issuing an award takes too long, he noted.

Expedited proceedings are another way to limit costs, though their applicability will depend on the amount in dispute. Generally, parties should be able to agree to the application of expedited rules even when the amount in dispute exceeds the relevant threshold. Only the future will tell whether such proceedings will soften the criticism against the expensiveness of arbitration, Kim said.

Kim also made the crucial distinction between parties who are genuinely impoverished and those who have the financial resources but are simply unwilling to pay.

Reporting by Min Kyu Lee, foreign attorney at Korean firm Yulchon.