A Question of Fairness: Why Costs Submissions should not be Overlooked by Tribunals

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The recent English Commercial Court case of *Oldham v QBE Insurance (Europe) Ltd* [2017] EWHC 3045 (Comm) ("Oldham v QBE") serves as a reminder to tribunals that all parties must be given the opportunity of putting their case on costs and responding to the case put to them. In *Oldham v QBE*, the Commercial Court held that an arbitrator's decisions on costs could be challenged on grounds of serious irregularity under Section 68 of the English Arbitration Act 1996 (the "Act") on the basis that the applicant had been denied the opportunity to make submissions. While decided under English law, the case is of international relevance, not least because similar considerations will apply under the major institutional rules and in UNCITRAL Model Law jurisdictions.

Oldham v QBE

Mr Oldham was the subject of civil liability proceedings ("the Civil Liability Claim"). This led to a dispute between Mr Oldham and his professional indemnity insurers, QBE, in relation to the extent of his coverage, and this dispute was referred to ad hoc arbitration seated in London.

In an award dated 7 October 2016, the arbitrator found that the Civil Liability Claim was not covered by Mr Oldham's policy, and ordered that Mr Oldham reimburse QBE the Civil Liability Claim defence costs which it had already paid (with the arbitrator's reasons to be set out in a later second part of the award). The arbitrator also awarded costs against Mr Oldham in relation to the arbitration, on the basis that there was no reason to depart from the principle that costs follow the event. This was made despite neither QBE nor Mr Oldham having made submissions in relation to arbitration costs.

QBE then served costs submissions on Mr Oldham, requesting payments of its costs and serving a costs schedule. The arbitrator gave Mr Oldham 28 days to respond to QBE's costs submissions and this was later extended by 14 days. Before that time had expired, the arbitrator issued the second part of his award and ordered Mr Oldham to make an interim payment on account of QBE's costs in the arbitration and the Civil Liability Claim defence costs.

Mr Oldham successfully challenged to the parts of the award dealing with arbitration costs pursuant to section 68 of the Act. He argued that he had not been given a reasonable opportunity to address argument in relation to (i) the awarding of arbitration costs to QBE and (ii) the order for payment on account of arbitration costs. A challenge made under section 69 of the Act on the grounds that the arbitrator had made an error of law in awarding the Civil Liability defence costs was unsuccessful.

Section 68 challenge

Under section 68(2) of the Act, a party may challenge an award where there has been a serious irregularity that has caused or may cause a substantial injustice to the applicant. This includes a failure by the tribunal to comply with its general duty under section 33 of the Act to act fairly and impartially as between the parties, and to give each party a reasonable opportunity of putting their case and dealing with that of their opponent.

While the Court noted the *"deliberately high"* nature of the threshold test for a challenge under section 68(2) of the Act, it found that Mr Oldham had been deprived of a fair opportunity to advance arguments in relation to arbitration costs, and this amounted to a breach of the arbitrator's duty under section 33 to give Mr Oldham a reasonable opportunity of addressing argument in relation to those costs. The argument which Mr Oldham would have made had he been given opportunity to do so met the threshold as one which an arbitrator might have accepted, and the Court found that a serious irregularity had therefore occurred that caused substantial injustice.

In relation to the arbitrator's order for payment on account of costs in relation to the arbitration, the Court found that this gave rise to the same irregularity and substantial injustice as the award of costs. The Court further held that, because the arbitrator had requested submissions from Mr Oldham but subsequently decided the point without waiting for the submissions, this was also a clear breach of section 33 and amounted to a substantial injustice.

The Court remitted the orders for arbitration costs and payment on account of costs in relation to the arbitration back to the arbitrator reconsideration after hearing submissions.

Comment

Section 61(2) of the Act establishes that, unless the parties otherwise agree, the tribunal should award costs on the general principle that costs should follow the event, but it retains a discretion to make a different award where it appears to the tribunal that in the circumstances it is not appropriate. The arbitrator in *Oldham v QBE* followed section 61(2) and made an order that costs should follow the event. Despite making an order which appeared to be compliant with section 61(2), the arbitrator's failure to give the parties the opportunity to make submissions on costs breached the general duty to act fairly and impartially between the parties and to give each party a reasonable opportunity of putting their case, under section 33.

Oldham v QBE is in line with earlier English case law in relation to arbitration costs, *Gbangbola v Smith & Sheriff Ltd* [1998] 3 All ER 73. In that case, an arbitrator made an award on costs which relied on matters which neither of the parties had raised. This was found to be in breach of the duty under section 33 of the Act, giving rise to a serious irregularity under section 68. The Court noted that:

> "The duty in section 33(1)(a) may be a difficult duty always to observe when it comes to costs. Nevertheless it is a general duty that applies to every part of any case including decisions on costs. Section 33(2) requires compliance 'with that general duty in conducting the arbitral proceedings, in its decisions of matters of procedure and evidence and in the exercise of all other powers conferred on it'. The power to award costs whether arising under section 61 or under the applicable procedural rules is therefore subject to the general duty which is … a mandatory duty and thus overrides anything that may have been agreed by the parties."

As noted in Merkin, the opportunity to be heard is *"perhaps the most important single aspect of*

fairness and is codified in the general principle in the Arbitration Act, s.33," and this has been emphasised by the English Courts (see for example *Pacol Ltd v Joint Stock Company Rossakhar* [2000] C.L.C. 315). Tribunals seated in London should therefore ensure that they do not overlook the parties' rights to be heard fairly and impartially in relation to costs, and should allow (and indeed invite) the parties to make submissions on costs.

The lessons from *Oldham v QBE* and *Gbangbola v Smith & Sheriff* are also of relevance to arbitrations seated in other jurisdictions and conducted pursuant to institutional rules. A failure by a tribunal to provide the parties with an opportunity to be heard on the issue of costs is likely to expose that part of the award to annulment or non-recognition: Article V(1)(b) of the New York Convention allows a national court to refuse recognition of an award where the party against whom the award is invoked is denied an opportunity to present their case, and Articles 34(2)(a)(ii) and 36(1)(a)(ii) of the UNCITRAL Model law provide that an award may be set aside by a court and refused recognition and enforcement if a party was unable to present its case. Article 18 of the UNCITRAL Model Law provides that *"the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case,"* and is the provision upon which section 33 of the Act is based.

Similarly, while the ICC, LCIA, SIAC, HKIAC and UNCITRAL Rules all empower the tribunal to make orders as to costs (whether generally or on the presumption that costs follow the event), all of these rules also contain provisions which oblige tribunals to treat the parties fairly and impartially and to afford each party a reasonable opportunity to present its case. These provisions apply as much to a party's opportunity to present its case on costs as they apply in relation to a party's substantive case more generally (e.g. on jurisdiction and liability).

Whether seated in London or elsewhere, and where conducted under any of the major rules, the lesson from *Oldham v QBE* is clear: tribunals should allow (and indeed invite) the parties to make submissions on costs, or risk annulment and non-recognition of the award.