Would Introducing Active Costs Management to Arbitration be Beneficial?

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Andy Ellis (Practico Ltd)

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Two initiatives concerning arbitration costs have filled a few column inches over the past several months. The first of these is a fairly straightforward cost-cutting initiative with immediate tangible benefits, while the second is likely to be something of a slow burner.

Starting with the first, more simple example, the American Arbitration Association ('AAA') has introduced a scheme for capped fees relating to its panel arbitrators. The AAA Alternative Fee Arrangements ('AFA') initiative is confined to the capping or fixing of the arbitrator's compensation. The objective is increased predictability rather than express costs reduction, although one would expect to see AAA panel members pitch more competitively and parties will welcome the transparency. There are caveats in that the arrangement applies only to two-party arbitrations with a single arbitrator. But in general, what's not to like?

The second initiative concerns active costs management in arbitration where legal costs are, in principle, payable under 'loser pays' or 'costs-shifting' provisions when applicable. Whilst not yet fully formed, the idea lends itself to wider discussion. This blog post will focus on the merits of this nascent concept. The source of the story is Sir Rupert Jackson, who suggested that when the applicable arbitration regime provides for costs-shifting between the parties, the extent of each party's exposure to adverse costs could be determined at an earlier stage by costs management, in a similar fashion to the developments in English civil litigation since 2013.

One of the major changes implemented in English civil litigation, under what are known generically as the Jackson reforms, has been the introduction of costs management to case management. When the amounts at stake are under £10m (and in any case regardless of value when the court decides to exercise its power to manage costs), the parties are required to submit costs budgets which, once agreed to or approved, will be binding upon the eventual costs award absent good reason to depart.

In May of this year, Sir Rupert travelled to Mauritius and delivered the keynote speech at the *11th International Conference on Construction Law and ADR.*

Although only two months into his new practise as an arbitrator, his observations about the advantages of arbitration over litigation were typically forthright. Perhaps jaundiced by the glacial passage of the litigation reforms that bear his name, Sir Rupert declared that arbitration is 'head and shoulders' above litigation when it comes to procedural reform because it is broadly responsive to the needs of users and not so much affected or delayed by political issues.

The closing section of his speech brought him back to home ground and noted that 67% of respondents to the Queen Mary 2018 International Arbitration Survey identified the high level of costs as the worst feature of international arbitration.

There is no doubt that Sir Rupert regards costs management as one of the more successful strands of his reforms. In 2013, he forecast that within a couple of years practitioners would be wondering what all the fuss was about, and many will now admit that, give or take a year, he was proven right. There are a growing number of examples of judges exercising discretion to apply costs management in cases with a value in excess of £10m and the direction of travel is likely to be wider adoption rather than the mothball that early sceptics expected.

My own experience in practice bears out the notion that active costs management has become absorbed into normal litigation life. The mechanics of the process are more familiar, and the advantages of increased predictability have become more evident. In *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA Civ 792, the Court of Appeal beefed up the status of budgets when it clarified that a party was required at the end of the case to show good reason to depart not only upwards from an agreed or approved budget but also downwards. A degree of wiggle room was, therefore, removed, limiting the scope for arguments about the amount of costs on assessment – and reducing the need for assessment in most cases. This judgment has made sure litigators take the whole thing more seriously.

It is noted that these days most people tend to agree that costs management is here to stay and likely to be extended into higher value cases, especially group litigation.

So, what's to be gained by encouraging the introduction of pre-emptive budgeting to arbitral proceedings? The answer should be obvious.

The wide discretion available in not only the amount of costs but what falls under the ambit of costs, can produce extreme results. In *Essar Oilfields Services Ltd v Norscot Rig Management Services PVT Ltd [2016] EWHC 2361 (Comm)*, the receiving party was even able to recover the third-party funder's bounty as a recoverable cost in the arbitration. This decision sent a few shockwaves through the arbitration world as it ran contrary to the normal principle to exclude any funding costs from recovery between the parties. It follows that having some notice at an early stage as to what the arbitrator may award in costs is likely to help manage clients' expectations and focus more sharply the parties' submissions about the incidence and amount of costs in the short window usually provided by the arbitrator when the award is circulated.

For Sir Rupert's idea to gain traction, it is observed that there would need to be a less granular form of budget submission than the litigation model, perhaps with three simple phases: pre-hearing, the hearing and post-hearing. There would also need to be no reservation preventing approved budgets applying to incurred costs as well as to future costs. However, despite the attractions, I would not expect Sir Rupert's idea to find favour immediately. One wonders why it is that active costs control has not been exercised widely within arbitration with arbitral seats in England, even though costs capping powers were conferred by s65 of the Arbitration Act back in 1996. Senior lawyers have also reported a reluctance by some to entertain security for costs applications, even though the powers have been written into LCIA Arbitration Rules since 1998.

Perhaps the explanation is simply that one of the attractions of arbitration remains its procedural light touch relative to litigation. There is no *White Book* in arbitration and to inject examination of any level of detail on costs will make it feel too much like litigation and potentially side-track the process. And if this negative view reflects the prevailing attitude, I can't see Sir Rupert's initiative gaining traction any time soon.