Costs in International Arbitration – Are Changes Needed?

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A little under ten years ago Sir Rupert Jackson proposed significant reforms to reduce the costs of litigation in England and Wales. It is fair to say that while his reforms have received both praise and criticism over the past decade, they are largely considered to have been a success in curtailing the costs of litigating in England. As this anniversary of reforms in English litigation approaches, it is an opportune moment to consider whether lessons can be learnt concerning the way in which costs are dealt with in international arbitration, without, crucially, undermining the advantages associated with the flexibility of arbitration as a dispute resolution method.

Costs in English Litigation

The fundamental principle in English civil litigation is that costs follow the event (i.e. the unsuccessful party pays the costs of the successful party). However, the court has a discretion as to the final amount awarded and it is, on a standard basis, typical for a successful party to recover approximately sixty per cent of its costs from the other side.

While the above principle has not changed, since Jackson's reforms the approach taken by the English courts in respect of costs has. Costs management is now a significant component of case management in litigation. Costs budgets, one of Jackson's more controversial reforms, are fixed early on in proceedings and consistently monitored and reviewed. Any request to increase the budget requires a party to convince the court why such an increase is reasonable and necessary in the circumstances. As such, costs have become a primary consideration from the outset.

With that being said, unless the parties otherwise agree, the court usually determines the final costs award in a separate hearing following the substantive judgment on the merits of the dispute. Costs are then determined on the basis of what is reasonable and proportionate, also taking into account the conduct of the parties. This requires the parties to provide each other, and the court, with a large amount of detail in respect of how their costs were incurred. As such, there are often two separate judgments: one dealing with the substantive dispute and one dealing with costs.

Costs in International Arbitration

Costs in arbitration usually fall into two broad categories: (i) costs of the arbitration (i.e. the costs of the tribunal and institution (if any)), and (ii) legal costs. The approach to these costs adopted in international arbitration largely mirrors that in English litigation in so far as costs are generally recoverable by the successful party. Commonly, the "costs of the arbitration" are awarded in full, whereas the legal costs may be reduced on the grounds of "reasonableness". However, when it comes to the tribunal assessing these costs, this tends to be a far less forensic exercise than in costs proceedings in English litigation.

In determining costs, the tribunal may take into account various aggravating or mitigating factors such as; the level of success of a claim, the behaviour of the parties towards the efficient conduct of the arbitration, or the pursuit of unfounded arguments. See for example Articles 38(4) and (5) of the ICC Rules and Article 28.4

of the LCIA Rules. In this regard, it is notable that efficiency and cost-effectiveness appears to have been at the forefront of recent updates to institutional rules. For example, the new Vienna International Arbitral Centre ("**VIAC**") rules which came into force in January 2018, place an explicit obligation on the parties and the tribunal to conduct proceedings in an efficient and cost-effective manner, with tribunals expressly permitted to take into consideration the parties' efforts in this regard in making their decisions on costs (Articles 16.6, 28.1 and 38). Additionally, in what is a first under institutional rules, the VIAC secretary general is also able to consider the tribunal's contribution to the conduct of efficient proceedings in determining the arbitrators' fees. The VIAC secretary general has the authority to increase and decrease arbitrators' fees by up to forty per cent in light of the efficient (or inefficient) conduct of the proceedings (Articles 16.6 and 44.7).

It is standard practice for issues of costs to be dealt with at the end of the arbitration, typically as part of the final award. This includes costs sought for interim applications – whilst it is common to include a request for those costs in the application, tribunals will often defer their determination until the conclusion of the proceedings as a whole, rather than deal with them at the time of ruling on the application.

What Can be Learnt from English Litigation?

Whilst rules driving toward time and cost-efficiency are helpful, they only serve to encourage the tribunal to have consideration to such issues in attempting to manage the conduct of parties. It is down to the tribunal to make clear that costs consequences can, and will, flow from clearly dilatory and unjustified conduct. To reinforce this notion, tribunals must be prepared to make the necessary costs orders in order for parties to take them seriously. The English courts frequently make such costs orders, which leads parties to think carefully before pursuing applications that may be without merit. Arbitral tribunals, on the other hand, commonly leave all issues of costs until the end of the matter and there is often little correlation between a party's conduct and the final costs order, providing little to no deterrence for bad behaviour.

Tribunals, however, are not required to wait until their final award to deal with the issue of costs. As noted in the 2015 ICC Commission Report, 'Decisions on Costs in International Arbitration', most institutional rules and national arbitration legislation permit tribunals to allocate costs in partial awards which determine preliminary issues and to make awards or interim orders in respect of costs, including in connection with applications for interim relief and other procedural applications.

Thus, in instances where an application without merit was most likely made in an effort only to delay the proceedings, counsel can and should make submissions to the tribunal that costs be dealt with at the outcome of the application rather than being deferred. It may well be appropriate for the tribunal to deploy cost consequences at that time to curtail further such behaviour by the parties or to punish the party causing the delay. This is a common feature of English litigation and applications (if brought at all) are often settled before being heard in order to avoid the risks of immediate costs consequences. Arguably, this is an area where arbitral tribunals can learn from the English court's approach. It is the tribunal's duty to actively manage proceedings to be cost and time efficient and cost orders are a key tool available to achieve this.

Returning to Jackson (who now sits as an arbitrator), in a recent speech given at the 11th annual international conference for Law and Alternative Dispute Resolution, he called for cost budgeting to be used to tackle the high costs now associated with arbitration. He acknowledged that such cost management may only be suitable for lower value claims in the first instance, but he noted the success that such a regime can have: a reference to the English litigation system.

A very pared-down version of costs budgeting already exists in maritime arbitrations under the London Maritime Arbitrators Association's terms. Parties are required to provide an estimate of their costs through to the end of the arbitration. The tribunal can then take this estimate into account when assessing recoverable costs. However, as to whether a more rigid regime should be adopted more widely

(as put forward below) there is perhaps a fence to be sat on.

Where Does Arbitration Get It Right?

As already mentioned, English courts often deal with costs in separate proceedings following the substantive judgment. This is necessary due to the detailed nature of the process and often a specialist costs judge is required to determine this stage of the claim. In arbitration, however, costs can and often are dealt with together with the decision on the merits in one final award, saving both time and costs by avoiding lengthy further proceedings.

Here comes the fence. The lack of a rigid costs budgeting regime is an attractive quality of international arbitration. Its introduction would likely undermine the much-touted flexibility enjoyed by users and practitioners alike. The requirement for parties to prepare cost budgets, have them approved and then to slavishly monitor them would likely stymie the adaptability of the arbitration process. Furthermore, the confidential nature of arbitration would make it difficult for tribunals to compare costs when determining what is reasonable.

Therefore, given the existing reluctance of tribunals to consider the costs of even interim applications, it appears Jackson has another uphill struggle in front of him if he is to convince tribunals to consider the entire costs of the arbitration at the outset of the dispute.