Arbitration & civil litigation

Is there anything that civil procedure could import from arbitration to improve the resolution of costs disputes, asks Andy Ellis

IN BRIEF

- The range of potential costs outcomes between arbitration and civil litigation is widening.
- At the same time, we have seen measures introduced that are aimed at controlling costs on both sides of the dispute resolution fence.

The approach to costs control in civil litigation over the last 10 years has been dominated by the Jackson reforms and LASPO. The ability to recover additional liabilities from the losing party (ie conditional fee agreement (CFA) success fees and ATEI premiums) has been largely curtailed. Only publication proceedings and mesothelioma cases have continued to escape the cut.

Costs budgeting is now commonplace in civil litigation, even in cases above the £10m threshold and especially in group litigation. A good indicator of the direction of travel is found in the recently published decision of Nugee J in *Sharp v Blank and others* [2017] EWHC 141 (Ch). Taken on behalf of investors against former directors of Lloyds bank over its takeover of HBOS in 2008, the case is said to be worth £350m. Costs management has been ordered.

The defendants' costs budgets, at an aggregate £24m, represented a small arithmetical proportion, approximately seven percent, of the estimated value of the action. Nevertheless, the court determined that the principle of proportionality went beyond such a simple comparison. In deciding to make a costs management order, a key concern was the desire 'to bring more certainty to the quantification of risk'.

Meanwhile the costs of lower value claims look destined for a much-expanded fixed costs regime covering all the fast track and encroaching further with the creation of a new intermediate track to snare cases worth up to £100,000 and to which a fixed cost matrix would apply. Formal consultation has not yet started but the governmental reaction is thought to be supportive.

These instruments of control are extremely blunt and are not yet correlated with procedural weight loss. In order to preserve the fundamental benefit of costs shifting for successful litigants, lawyers are under increasing pressure to provide more for less.

Yet the risk of being '*Mitchelled*' remains real for missed deadlines and other procedural misdemeanours. The final straw for cases that get as far as detailed assessment can also be the imposition of a stand-back test that places proportionality above necessity and reasonableness.

Arbitration

In the arbitration world suggested reform and newer guidelines at least start from the right end. Procedural innovation is regarded as the key to controlling time and cost, where it is increasingly likely that tribunals will commit to a schedule for deliberations and delivery of final awards.

In 2015 the International Arbitration Survey conducted by Queen Mary College London found that the simplification of rules was overwhelmingly popular among respondents.

The March 2017 amendments to the ICC Arbitration Rules introduced an expedited procedure for lower value cases with opt-in provisions for cases worth above $2m. In Singapore the SIAC Rules now encourage tribunals to distil preliminary issues which could dispose of a case faster and at lower cost.

The position is more fraught when it comes down to the scope and amount of arbitral costs awards.

The decision of Judge Waksman QC in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm) allowed the successful party, albeit in fact-sensitive circumstances, to recover £1.94m in addition to more conventional costs. This sum represented the share of damages due to the third-party funder under the funding agreement and was found to fall within the ambit of 'other costs' under s59 Arbitration Act 1996.

Given discretion is so wide it is no wonder that a City partner recently confided to me that he approached costs awards in arbitration with the same fear as a naturist being asked to operate a barbecue.

There is a strong case for arbitral institutions to recognise and reflect on the public policy issues that lay behind the exclusion of all funding elements from costs awards in civil litigation.

Best of both worlds

Having touched lightly on some of the differences, is there anything that civil procedure could import from arbitration to improve the resolution of costs disputes?

The biggest problem with detailed assessment in the High Court is that there is a one size fits all procedure – and it is founded on the notion that the costs judge is able to review the supporting material to every item in the bill and conduct an informed line-by-line assessment. This is feasible, however turgid, for small simple matters but wholly impractical from any six-figure assessment, let alone those involving seven or eight figure costs.

We are increasingly instructed in arbitrations to analyse costs schedules and help marshal arguments to support claims and challenges to costs awards.

Arbitration offers opportunities for us to collaborate with the legal team and present higher-level summaries, sensibly categorised into workstreams. Tribunals expect crisp submissions around case specific issues of conduct and the relative degrees of success in various heads of claim. The process is shorter and cheaper and I am not convinced that the justice delivered is discernibly rougher than the aggregate of broad-brush decisions that costs judges are inevitably driven to.

Of course, specialist costs judges, unlike arbitrators, do not have the advantage of having heard the case and the background material may need to be more comprehensive.

Nevertheless, I believe a shorter form of detailed assessment in high cost cases with concise bills and submissions would be popular and effective to the extent that it would rehabilitate the court's role in resolving costs litigation. NLJ

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