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The case for costs management in arbitration

Guest post by Andy Ellis, a costs lawyer and managing director at Practico

Way back in May this year, when the grass was still green and some people in London could be spotted wearing two layers of clothing, Sir Rupert Jackson popped over to Mauritius and delivered the keynote speech at the 11th International Conference on Construction Law and ADR.

Although barely 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 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 affected or delayed by political issues.

The closing section of his speech brought him back to familiar territory and noted that 67% of respondents to a Queen Mary University review this year 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. He forecast in 2013 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 proved correct.

My experience bears out the notion that active costs management has become absorbed into normal litigation life. The mechanics of the process are more familiar, the *Harrison* judgment has made sure litigators take the whole thing more seriously, and the advantages of increased predictability have become more evident.

Added to that, pragmatic guidance such as Master Marsh’s in *Sharp v Blank* has taken the convolution away from presenting budget variations. I find that most people these days 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.

At our quarterly costs roundtable meetings, senior litigators regularly discuss the pros and cons of arbitration versus litigation under the relaxed environment of the Chatham House rule. One City partner described going into an arbitrator’s costs award determination as being about as comfortable as cooking burgers at a barbecue while naked.

Certainly, 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 Oil v Norscot* in 2016, the receiving party was even able to recover the third-party funder’s bounty as a recoverable cost in the arbitration – a decision held up on appeal.

Having some notice at an early stage as to what the arbitrator may award in costs is liable 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.

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, even though costs-capping powers were conferred by section 65 of the Arbitration Act back in 1996.

Senior lawyers have also reported a reluctance by arbitrators 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 and that the examination of any level of detail on costs will side-track the process. And if indeed this is the prevailing attitude, I can't see Sir Rupert's initiative gaining traction in the short term.

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