COST AND COSTS IN LONDON ARBITRATION

By

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Whenever we ask users to comment on their experience of London arbitration, one point that almost always arises is that of costs. The perception is that the cost of arbitrating in London is high, indeed too high, and that this stops companies from arbitrating in London, even encouraging them to settle good cases rather than fight them because of a fear of the cost involved in arbitrating. In this paper I consider whether this is true or more the result of a lack of knowledge of the options available in London arbitration, and what can be done to keep costs down.

Putting costs in context

Do these concerns about costs apply to all arbitrations in London and is the position any different elsewhere?

In 2016 there were more than 2750 arbitration appointments made under the LMAA Terms, representing approximately 1,720 new arbitration references. During the year, 535 awards were issued of which 83 followed an oral hearing.

What these figures show is that approximately 70% of cases that are referred to arbitration settle before an award is issued and of the cases that do proceed to an award, only 15% involve an oral hearing – that means that approximately only 5% of all arbitrations commenced proceed to an oral hearing.

Where criticisms are made of costs, they almost always concern these oral hearings. There is no doubt that the costs of such hearings can be extremely high but they represent a small percentage only of the cases referred to arbitration.

As to whether, comparatively, London is more expensive than other arbitration venues, the feedback that we receive suggests that in fact London is cheaper than its two main rivals in the Asia Pacific region.

The concerns about costs may, therefore, be ones more of perception than reality but that does not mean that they can be disregarded or that there are no ways of addressing the concerns expressed.

Imposing limits on recoverable costs

One way of limiting costs is to fix in advance the level of costs that the successful party may recover in the arbitration.

It is natural that if a party expects to win a case and recover their costs from the other party, they may not be too worried about the amount of money they spend on lawyers and experts in pursuing the claim. Where, however, they know from the beginning (or at least from an early stage) of the arbitration that the costs they can recover if successful are limited, then they are likely to moderate their expenditure to work within budget and the limits of the costs they can recover at the end of the case. There is, therefore, an attraction in those procedures that impose such limits on recoverable costs.

The LMAA has two such procedures, the Small Claims Procedure and the Intermediate Claims Procedure. In the case of the Small Claims Procedure (which applies to claims up to US$100,000 or such other amount as the parties may agree), the arbitrators' fees are fixed at a level of £3,000 (and an additional £2,000 if there is a separate counterclaim in the same reference) - part of which may be refundable if the case settles before an award is made - whilst the recoverable legal costs of the parties are fixed at £4,000 (and £4,500 where there is a separate counterclaim in the same reference).

In the case of the Intermediate Claims Procedure (which applies to claims from US$100,000 to US$400,000) recoverable costs are limited to 30% of the claimants' monetary claim as advanced (plus 30% of any separate counterclaim if included in the same reference), increasing to 50% if there is an oral hearing (which is in practice, rare). The tribunal's fees are fixed at one-third of the total at which recoverable costs are capped as above.

It is a feature of both procedures that strict limits are imposed on the time at which various steps in the arbitration must be taken, the length of submissions made and the circumstances in which witness and expert evidence may be allowed. The procedures, therefore, permit both speed and predictability of cost.

Because cases under these procedures are almost always dealt with on documents alone they may be handled by lawyers outside London without the need for any involvement of lawyers in London.

Even in cases where these procedures do not apply and an arbitration proceeds under the standard LMAA Terms 2017, parties may still apply to the tribunal to fix a cap or ceiling on recoverable costs.

For some reason, this remains an underused provision of the LMAA Terms. One explanation sometimes put forward for this is that parties who feel they have a good case do not wish to limit their expenditure on it or have a tribunal limit what they may spend on it. The tribunal is not, however, looking (and does not have the power) to limit what the parties may spend in pursuing a case but only at what they may recover if successful.

For any application to cap costs to be successful, though, it is important that the point be raised at an early stage of the arbitration as otherwise significant sums may already have been expended before any application is made in which case a tribunal is unlikely to impose a costs ceiling retrospectively. Nevertheless, even in such cases it may be persuaded to impose a costs ceiling for future costs.

The recovery of costs

The usual position in London arbitration is that the successful party recovers their costs. That does not mean, however, that the successful party will recover all of the costs they have spent on a case. Traditionally, the courts and arbitrators in London have worked to the principle that the successful party should recover approximately 70% of their costs. This reflects the fact that in any case there are bound to be costs incurred by a party that are not strictly necessary to pursue the case: for example, time may

be taken up in explaining basic principles of the law to the client that have no direct relevance to the way in which the case is progressed in the arbitration or enquiries may be made that turn out to be irrelevant. Rather, however, than look at each minute of time billed by the parties, the courts and arbitrators adopted a general principle of deducting approximately 30% of costs to cover such matters.

This is, however, only a general rule and really no more than a starting point for consideration and certainly no longer applies in every case and there are many cases where a successful party recover more or less than 70% of their costs. This will depend on how efficiently the arbitrators consider the case has been dealt with.

As with many aspects of *ad hoc* arbitration in London, the award of costs lies within the discretion of the arbitrators and in recent years there has been a significant change in the way in which this discretion has been exercised.

Although the successful party may still expect to recover their costs, it may be that they will not recover all of those costs if the arbitrators feel that they have handled the case inappropriately or that they have pursued points that were irrelevant or on which they did not succeed. If, for example, a party pursues ten claims and is only successful in five of those, it is possible that they may only recover a relatively modest percentage of their costs. Indeed, if the points that they argued and lost on occupied more time than the issues in which they were successful, they may even find that they win the case but are liable to pay part of the other party's costs. The significance of

this, therefore, is that parties should be careful to make a critical assessment of the various points that are considering to raise in arbitration because if they argue points that have little merit (perhaps for strategic reasons or in the hope that by raising many arguments they may frighten their opponents into settling) they may find themselves exposed to the costs incurred in arguing those points.

Security for costs

The idea that a party should spend freely on the preparation and presentation of its case in arbitration in the expectation of recovering all those costs if successful is anyway, unrealistic.

Quite apart from the possibility that the case may not succeed or that there may be an apportionment of costs along the lines outlined above, there is, in any dispute, a counterparty risk that it may not prove possible to recover any costs awarded from the other party because they have no assets or their assets are located in a place where enforcement and collection is difficult.

In such cases, where the counterparty is the claimant, or counter-claimant, the ability to obtain an order from the tribunal that they post security for the legal costs of the arbitration may make a big difference.

In London arbitration, a respondent may apply to the tribunal for security for the costs of defending claims made against them. This power is granted by section 38(3) of the

Arbitration Act 1996 and reflected by paragraph 16 of the LMAA Terms 2017.

Security for costs will be ordered where there are doubts as to the existence of assets of the claimant against which any award of costs may be collected or, if assets exist, there are nevertheless doubts as to whether it will be possible to enforce against them in the place at which they are located.

In order to obtain an order for security for costs, a respondent must apply to the tribunal setting out grounds upon which it is considered appropriate for an order for security for costs to be made. This will usually be in cases where no assets belonging to the respondent can be found or where the respondent's assets have little or no real value. Examples of this might be where the claimant is a one ship company and has sold their only vessel or where the vessel is subject to a mortgage that exceeds its value or where the claimant is known from the press to be in financial difficulty. Another typical case is where the claimant is a charterer and has no known assets.

Once such grounds have been outlined, the burden is then on the claimant to show that they do have assets sufficient to cover any potential award of costs made against them. This will usually involve the production of accounts for recent years or bankers' references. It is important to appreciate the need for such proof. This is something that Chinese companies often seem reluctant to produce, with damaging consequences. It is not sufficient, for example, to merely say that the claimant is the charterer of a number of ships as that in itself is no proof of the ownership of assets of

the company. If a claimant fails to provide such information they are likely to find that an order for security for costs will be made against them.

Similarly, if the claimants, or more importantly their assets, are located in a jurisdiction where it is difficult to enforce any award of costs, then the tribunal may be sympathetic to an application that such security be provided. It may not be enough simply for the claimant to show that the assets are in a country that recognises the New York Convention for the enforcement of awards if there is evidence that, despite this, it is still practically very difficult to enforce. In such cases it may be necessary to provide a copy of a lawyer's opinion confirming the ease or practical difficulties of enforcement. If both parties provide conflicting expert evidence it is left to the arbitrators to decide. It is probably right that in such cases the benefit of any doubt should be given to the party seeking security for costs.

A difficulty that arbitrators often face arises in those cases where there is a counterclaim. Where a counterclaim clearly constitutes nothing more than a defence of set off, the position is relatively easy and the discretion to provide security for costs of the counterclaim will not usually be exercised. Where, however, a counterclaim amounts to a distinct and substantive claim raising new issues, then it is more likely that an order for security for costs will be made as the respondent is properly treated as a claimant for the counterclaim.

While London arbitration tribunals recognise the value to respondents of orders for security for costs they also understand that such applications are sometimes made for strategic rather than financial reasons to discourage claimants form pursuing their claims. Inevitably, parties seeking security for costs tend to exaggerate the level of costs for which they seek to be secured.

In recent years the tendency in London arbitration has been to make orders for security for costs up to a certain stage only of the reference rather than for the proceedings as a whole. Thus, for example, security for costs may be ordered for the costs of the respondents up to the completion of disclosure with liberty to apply once disclosure has taken place and further orders for security then being made, for example, up to the exchange of expert evidence and then, eventually, covering the hearing itself. The benefit of such orders is that they enable tribunals to fix security at levels that reflect the next immediate steps to be taken in the reference.

A typical example that illustrates the advantage of this approach is that of the case where, after service of defence submissions in an arbitration (which is the earliest stage at which an application for security for costs may be made under the LMAA Terms 2017), an application is made for security up to and including an oral hearing in an amount of £500,000. It is clearly extremely difficult (if not impossible) at that early stage for a tribunal to accurately estimate the costs likely to be incurred in the reference: further submissions have to be served and then witness and expert evidence exchanged (if any – the tribunal may not

know at the early stage that an application is made) before it is possible to appreciate the likely shape of the arbitration and estimate the need and duration of a hearing. It is far better therefore for the tribunal (if the other requirements for security for costs are met) to make an order for security to be provided on a step by step basis when it will be in a better position to know the likely costs involved.

Common misunderstandings about costs

(a) *We need to instruct expensive English lawyers*:

No. The parties or their lawyers in China can handle arbitrations on document alone, and even those involving an oral hearing although it will usually ne sensible to instruct a solicitor or Counsel in London in those rare cases.

(b) *There will have to be a hearing in London*:

No. Most cases are dealt with on documents only and do not require an oral hearing. Even if an oral hearing is required, the hearing may be held outside London (for example in China or Hong Kong) if the most important evidence (and perhaps witnesses) are present there.

(c) *Costs will be high*:

Costs need not be high. Fees are fixed under the Small and Intermediate Claims Procedures and may be capped in other cases. Local lawyers may be used and the costs need not be high at all as the vast majority of cases are dealt with on documents only.

The fact that costs *may* sometimes be high certainly does not mean that costs *will* always be high. In fact, costs in most cases may be kept to relatively modest and cost effective levels. Where costs are high this is all too often because the parties have either not been aware of, or have chosen not to adopt, the procedures or steps that are intended to limit costs.

Biography

Clive Aston is an LMAA Arbitrator and was President of the LMAA from 2014-2017. Having studied law at Trinity College, Cambridge he was called to the Bar in 1979 but chose, rather than practising as a barrister, to work in the shipping industry and spent nine years at a leading P&I Club where he headed the FD&D and Greek syndicates. He began arbitrating in 1988 as well as running a consultancy practice until switching to full time arbitrating in 2013. As well as being a full member of the LMAA he is a panel member of the China Maritime Arbitration Commission, Singapore Chamber of Maritime Arbitration and Hong Kong International Arbitration Centre.