



Using Costs Orders to Control the Expense of
International Commercial Arbitration
By Professor Doug Jones AO

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The Roebuck Lecture, 9 June 2016

Using Costs Orders to Control the Expense of International Commercial Arbitration

Professor Doug Jones AO*

It is truly an honour and a privilege to follow in the steps of the many distinguished speakers who have presented at this eminent annual event, named in honour of my good friend Professor Derek Roebuck, whose works on the history of arbitration, amongst other contributions to the field, are truly unique. I am delighted to see Susanna (whose histories of the role of women in many places around the world are fascinating) and Derek joining us this evening. I would like to thank the Director General of the CI Arb, Anthony Abrahams, for inviting me to speak and for giving me the opportunity to share my thoughts with you all on a topic that has been the subject of a great deal of discussion and scrutiny among the international arbitration community, certainly over the past decade, but especially in the last few years. Finally, by way of introduction, I would like to congratulate the CI Arb and all those involved in making last year's centenary celebrations such a success. 2015 was a year which saw thoughtful reflection on the years past, and identification of the challenges ahead. Now in 2016, there is a need to strive to meet them.

The challenges which I will be discussing today are those emerging from cost allocation, or more specifically, the manner in which tribunals approach their task of cost allocation in practice, and the purposes which this exercise of allocation might usefully serve.

It would not be inaccurate to say that costs in arbitration resemble blind man's bluff. Parties spend a lot of money, in many cases millions, without the capacity to confidently predict what proportion of the amounts spent might be recoverable in the event of success, or how much the other side might be spending and what of the amounts spent by the opposition might be payable in the event of defeat. For this to be the case is extraordinary, and should be regarded by all participants in the process as unacceptable.

Further the costs implication, if any, of "bad behaviour" are presently opaque to say the least; a position quite unsatisfactory where there are limited other encouragements for good behaviour.

My lecture will be divided into five parts:

- First, I will introduce the general landscape of costs in international arbitration and why there is a need to discuss the uses of cost allocation, in particular, in this context.
- Secondly, I will explore the Jackson Reforms of England and Wales, focusing in particular on the concept of "budgeting" that they introduced, and whether there is any potential value in this practice in international arbitration.
- Thirdly, I will look at the ways in which tribunals can manage the expectations of parties at an early stage in the proceedings, foster an understanding of how the discretion as to costs will be exercised and thereby create a real impetus for parties and their counsel to make efficient choices in the conduct of their cases.
- Fourthly, I will consider in some detail cost allocation in international arbitral practice, including the factors that a tribunal may wish to take into account

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in exercising its discretion, building on the ICC Commission's 2015 *Report on Decisions on Costs in International Arbitration*.

- Finally, I will discuss my experiences in allocating costs at interim stages of arbitrations and the benefits that can flow from this practice.

Ultimately, it is my hope to leave you with an enhanced appreciation of the value that allocation of costs can add to an arbitration. In seeking to do so, I will discuss a broad range of ideas, some of which have been discussed in the past, and some which are more novel. On this note, I will move to the first part of my lecture.

1. Costs Landscape

The pursuit of expeditious cost-effective dispute resolution is not peculiar to our times. Since ancient civilisation, humankind has trialled a multitude of different dispute resolution processes, whether tied to the rational or the irrational. As examined in the works of Derek Roebuck himself, the writings of Aristotle, Homer and Hesiod evidence the use of third party arbiters to decide disputes between merchants in ancient Greece.¹ Millennia ago, Aristotle famously tied this procedure to two foundational principles, namely, the principles of “fairness and impartiality”. To this day, the desirability of a neutral decision maker remains a central motivation for the election of arbitration by contracting parties.

Yet there is a further fundamental element in play, which has contributed to the flourishing of arbitration, at first in the construction industry, and since then in a broad array of business sectors worldwide.

That is, the flexible party-centred approach that lies at the heart of arbitration. As a product of the agreement of contracting parties, arbitration serves the commercial needs of its participants, rather than concepts of sovereign justice. Modern arbitration was therefore proclaimed as a dispute resolution procedure capable of delivering significant time and cost savings, compared to curial processes. However, these cost and time advantages have grown increasingly elusive of late, in the additional context of the reform of commercial court processes themselves designed to deliver flexible expeditious international commercial dispute resolution.

There is no shortage of empirical evidence on the subject of costs. The recent 2015 survey by Queen Mary University of London and White & Case reported that high cost was the most commonly cited “worst characteristic of arbitration” among the survey participants. Coming in close second was the “lack of effective sanctions during the arbitral process”.

These statistics allude strongly to what has been termed “due process paranoia” on the part of arbitral tribunals who are concerned that adopting robust approaches to case management and procedural directions may expose their award to challenge, or may even expose themselves to civil liability. This is particularly the case in jurisdictions where arbitrators’ immunity is less than established, as some of us can attest to first hand.

The problem often manifests when counsel versed in adversarial domestic litigation procedures seek to capitalise on this opportunity, sometimes going to extraordinary lengths to do so. It is perhaps unsurprising that the ICC Commission Report on Controlling Costs in 2012 found that “costs incurred by the parties constitute the largest part of the total cost of international arbitration proceedings”, accounting for 83 per cent of the total cost.

Viewing these two problems together, it becomes apparent that the solving of one offers the unique opportunity to solve the other also.

I should pause here to say that I am bemused by the focus of arbitral institutions on arbitrators’ fees, which not only represent a small part of the total cost of arbitration but

¹ C. Calavros, *Law of Arbitration; I: National Arbitration — Vol A: Introduction*, 2nd edn (Athens: Sakkoulas Publications, 2011), p.73 (translated); Derek Roebuck, *A Miscellany of Disputes* (Oxford: HOLO Books, The Arbitration Press, 1999), pp.45–46.

when concentrated upon by arbitral institutions can easily ignore the value which arbitrators can add to the preservation and advancement of the institution of commercial arbitration.² Perhaps it is easier to grasp the low-hanging fruit, thus ignoring the wood for the trees.

There is clearly a need to encourage sensibly efficient party conduct which will, by extension, minimise the time and cost of an arbitration. The infusion of an element of sanction into this encouragement has, in my experience, proved to be a critical and often necessary element, and it is here that the tribunal's allocation of costs comes into play. Cost allocation is an important tool by which to sanction improper or inefficient party conduct, hold parties and their representatives accountable, and as a result, facilitate more focused and efficient arbitral proceedings.

To this end, there is in my view a need for greater sophistication in the use of cost allocation by tribunals than is often the case. This can be achieved through establishing clear expectations between the parties and tribunal early in the proceedings, the use of interim cost decisions, and taking into account the manner in which the parties have conducted their cases in the ultimate award of costs. I would like today to explore some of these concepts, beginning now with the findings and recommendations of the Right Honourable Jackson LJ in his Review of Civil Litigation Costs.

2. The Jackson Report

In 2009, Jackson LJ conducted the largest review of civil litigation, procedure and cost in England and Wales since Lord Woolf's *Access to Justice Report* of 1996. His objective was

“to carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost”.³

His Lordship's findings and recommendations have since extensively reformed civil procedure in England and Wales (but interestingly not yet in major commercial list matters so far as costs budgets are concerned).

Although the scope of matters covered by the Lord Justice in his report are far ranging, I will speak to his Lordship's recommendations as to cost management which formed an innovative foundation for effective costs practice, the relevance of which I believe may extend beyond the confines of civil litigation.

A key feature of the reforms was the introduction of what is often termed “budgeting”. This entails a cost management process by which parties prepare and exchange litigation budgets for approval by the court and, so far as possible, the court will manage the case within the limits of the approved budgets. These budgets include reasonable allowances for intended activities, specified contingencies, and disbursements. Parties are required to provide updated figures of expenditures as the proceedings develop, and the judge will either, by agreement between the parties or after hearing submissions, approve or disapprove any departures from the original budget. The objective of this cost management practice is to control the costs of litigation such that they remain proportionate to the amount at stake, and to monitor the equal footing of parties in litigation. At the end of litigation, the judge will approve as reasonable and proportionate any costs claimed which fall within the previously approved total.

It is important to identify that all these reforms do is potentially limit the costs able to be awarded against the other party, not what a party may itself spend.

² ICC Commission Report, *Decisions on Costs in International Arbitration* (New York: ICC, 2015), p.3 reported that on average, arbitrators' fees make up only 15 per cent of total arbitration costs.

³ Rt Hon Lord Justice Jackson, *Review of Civil Litigation Costs. Final Report* (London: The Stationery Office, 2009), p.2

In Lord Jackson's Report, the experience of practitioners and judges who trialled the cost management methodology was mixed, as was commentary provided by numerous institutions such as the Council of Her Majesty's Circuit Judges, the Bar Council and the Law Society. One of the main arguments raised against budgeting was that the preparation of a budget in each and every case is an exercise which ironically in itself increases time and costs. Another criticism was that there were insufficient penalties for serious deviations from original budgets. Those in favour, however, argued that if exercised properly, cost management would save substantially more costs than it generates.

In my mind, given its success to date in the English courts, there is nothing to say that such cost management should not be considered in the context of international arbitration. The question is, how might budgeting find footing in the arbitral landscape?

Indeed there is already to be found in the English Arbitration Act a stillborn provision providing a basis for doing this: s.65 titled "Power to limit recoverable costs" grants the tribunal a discretion to limit recoverable costs to a specified amount, and to adjust this limit over the course of the proceedings. The discretion is expressly subject to any agreement by the parties to the contrary.

As my first impression, budgeting could be raised pursuant to the procedural autonomy of the parties, the driving force behind any arbitration. However, the incentive for counsel to advise their client to opt into a budgeting process is perhaps lacking. One would expect mutual agreement to the use of budgeting to be a rare occurrence indeed. Hence the stillborn s.65.

Nonetheless, one could expect counsel to candidly raise the option with their client and explain the potential benefits of the practice, with added encouragement to be found from arbitrators and arbitral institutions. Endorsement of budgeting to any extent by arbitral institutions would be a most revolutionary step, one that could be approached incrementally. As a starting point, the recognition of budgeting could perhaps occur in commentaries and informal sources, rather than in formal rules and practice notes. This would be a useful step towards sparking a discussion that could pave the way for detailed consideration of how this might be usefully deployed in international arbitration.

This is certainly a novel concept, but one deserving of consideration and discussion in the future. At the very least, it draws attention to the need for active strategies from the outset of any given arbitration to address the management of costs, including how the tribunal's discretion as to costs may serve as an impetus in the control of costs.

The concept may well have relevance to balancing cultural and party resource issues to be mentioned shortly.

3. Managing Parties' Expectations

The process for tribunals should start at the commencement of the arbitration, where a level playing field in terms of expectations between the tribunal, the parties and their representatives is established. This should be achieved at an early case management conference in which the tribunal discusses, among other procedural aspects, costs and on what basis costs orders will be made.

A number of issues in the process can sensibly be dealt with at the outset. These include:

- First, the general factors which the tribunal will take into account when allocating costs and whether the tribunal may fix costs during the interim stages of the proceedings. I will address this later in my lecture.
- Secondly, the expectations that arise from the legal cultures of the parties.
- Thirdly, concerns relating to imbalance arising from the relative size of the parties and their representatives. This imbalance is seen all too often where, for example, an SME represented by a boutique firm is matched up against

a government entity or conglomerate represented by an international magic circle firm and, as a result, is left facing a disproportionately large bill.

- Fourthly, standards to which the parties are expected to conduct themselves, such as the standard of good faith.

A critical task at the outset is to clearly enunciate the role of the tribunal, its expectations of the parties and the manner in which the tribunal intends to exercise its discretion as to costs. It is often helpful to document areas of agreement in the first Procedural Order. I have personally found there to be significant value in including a general provision in Procedural Order No.1 which by agreement expressly addresses the tribunal's expectation that the Parties will conduct themselves in a manner consistent with the efficient use of time and resources, and that the tribunal shall take into account any unreasonable behaviour by a party when using its discretion to allocate costs. Typically, the provision will further explain that unreasonable behaviour could include excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified interim applications and unjustified failure to meet deadlines contained in procedural orders.⁴

Significant value is added to this process where the parties themselves are present at the initial and subsequent case management meetings. Indeed this was recognised by Lord Woolf in his final report in the context of civil litigation, the idea being that as the ultimate bearers of the financial burden of their cases, the parties would be particularly receptive to these cost considerations which might otherwise be lost on the ears of their representatives. Lord Woolf set out a list of objectives which might be achieved by ensuring the parties are in attendance, which notably included to "prevent major litigation strategies without instructions" and "emphasise that the case belongs to the client".⁵ In my view, these arguments remain compelling in the context of controlling costs in international arbitration where the complexity and sheer scale of disputes can result in counsel taking a lead role in driving their client's case, while their client becomes increasingly disengaged from the process. Accordingly, it is a common practice of mine to request the attendance of the parties at case management meetings, face-to-face where possible or otherwise through technological means such as video or telephone conferencing.

A substantial obstacle when seeking to settle clear expectations regarding cost allocation arises where the parties are from different legal cultures. It is inevitable that international arbitration brings together disputing parties from all kinds of business cultures, from both civil inquisitorial and common law adversarial legal traditions, each with their own variations of legal practice and with lawyers commonly trained only in the laws of their respective jurisdictions. The problems that arise from the differences between legal traditions are as unique as they are many. As the former Justice of the High Court of Australia Michael Kirby has commented, if the opportunities and advantages of commercial arbitration are to be understood, lawyers of all legal traditions will need to be conscious of the practices of other cultures and the alternative forms of dispute resolution available in them.⁶

Looking to cost allocation in curial courts, it is clear that the practice is diverse around the world. There is one dichotomy that is commonly drawn, being the distinction between the acclaimed "English rule" which is employed by many Commonwealth countries and provides that costs "follow the event", and on the other hand, the rule that each party bears its own costs, which is applied broadly in the US and in parts of Europe. The motivation for the approach in the US and civil law jurisdictions is of course different. In the US litigation is often financed on a contingency basis and funded by larger damages awards than are

⁴ For a detailed model costs protocol, see Colin Ong and Michael P. O'Reilly, *Costs in International Arbitration* (New York: LexisNexis, 2013), ch.3, pp.44-47.

⁵ Rt Hon the Lord Woolf, *Access to Justice, Final Report to the Lord Chancellor on the Civil Justice System in England and Wales* (The Woolf Report) (London: The Stationery Office, 1996), pp.84-85, s.30.

⁶ Michael Kirby, "International Commercial Arbitration and Domestic Legal Culture", paper delivered at the Australian Centre for International Commercial Arbitration Conference 2009, Melbourne, p.12.

available in other common law jurisdictions. In those civil law jurisdictions which do not award costs following the event, there is often a quite different burden on the claimant where the court takes a significant role in the prosecution of the case.

Most arbitration statutes are silent on the method of cost allocation (with the notable exception of the English statute), and that decision is largely left to the broad discretion of the arbitrators, with primacy held by the parties' procedural autonomy, as is ever the case in arbitration. Gary Born's leading text puts it plainly, stating: "virtually all developed legal regimes will give effect to the parties' agreement with regard to awards of legal costs".⁷

Having said so, at the beginning of any cost allocation decision, tribunals should always have regard for any mandatory applicable statutes that may influence the parties' agreement or otherwise impact on the tribunal's discretion to allocate costs. In Hong Kong⁸ and England,⁹ for example, no agreement as to costs between the parties is binding unless made after the dispute arises. Other national arbitration statutes expressly permit or limit tribunals from awarding interest on costs, security for payment, interim relief, the amount of costs recoverable at any given stage of the proceedings or even so far as seeking assistance from the courts for taxation of costs. The exercise of discretion finds its roots in written sources, often in the form of arbitration rules and international soft law and guidelines. By way of example, art.37(5) of the 2012 ICC Rules explicitly provides arbitrators with the discretion to consider the extent to which each party has conducted themselves in an expeditious and cost-effective manner when allocating costs.

It is interesting that the ICC's 2015 Report revealed the prevailing practice was for tribunals to order "costs follow the event".¹⁰ Most arbitration statutes are silent on the point, and more than half of the major institutional arbitration rules create no presumption in favour of this position. Where it is included, it is included only as a rebuttable presumption,¹¹ and naturally it is this rebuttable nature of the presumption that presents an opportunity for arbitrators to capitalise on their discretion to control time and costs.

Parties should always be mindful of taking the opportunity to present submissions in rebuttal rather than staying silent in the hope that the tribunal will allocate costs in their favour. The Arbitration Institute of the Stockholm Chamber of Commerce conducted a study of cost allocations in 2014 in which they found that in cases where costs were allocated mostly or wholly against the losing party, that party's failure to express its views on allocation was understood as agreement in principle to the amount of costs claimed by the opposing party.¹² Indeed, this practice is not limited to SCC arbitrations.

The comparative merits of the English and American rules on costs are a debate of their own, a debate outside the scope of my lecture. Whether or not costs are awarded to the "victor" is an issue which, in my view, has very little bearing on the broader issue of encouraging the efficient and ethical conduct of parties. It is with various other factors that we ought to concern ourselves.

Some of these factors are drawn from rules of civil procedure from national courts such as England and Australia which not only grant courts broad general discretions, but also confer upon them nuanced powers to cater for specific circumstances, such as party misconduct, the wasting of the court's time with unnecessary objections and requests, and unwillingness to agree to a settlement offer where to do so is in the financial interests of

⁷ Gary B. Born, *International Commercial Arbitration*, Vol.II (New York: Kluwer Law International, 2009), p.2489.

⁸ Hong Kong Arbitration Ordinance s.74(8).

⁹ English Arbitration Act 1996 s.60.

¹⁰ The 2015 ICC Commission Report, *Decisions on Costs in International Arbitration* (New York: ICC, 2015) found that this was the case in 91 per cent of HKIAC awards, 90 per cent of SIAC awards, the majority of ICDR awards, more than half of the SCC awards and most LCIA and PCA awards.

¹¹ 2015 CIETAC Rules, 1998 DIS Rules, 2014 LCIA Rules, 2012 PCA Rules and 2010 UNCITRAL, to name a few.

¹² Annette Magnusson and Celeste E. Salinas Quero, "Recent Developments in International Arbitration Allocation of Costs: a Case Study", paper presented to Arbitration Institute of the Stockholm Chamber of Commerce, 2014 International Conference on Arbitration and Mediation, 30–31 August 2014, p.5.

the party offered. Underpinning these provisions is a pragmatic attempt to allocate costs to the party responsible for their incursion.

Others have emerged from international soft law and guidelines, such as the CI Arb guidelines. Otherwise they stem from institutional rules.

The 2015 ICC Report usefully compiles an extensive range of potential cost allocation practices for use in international arbitration. It is this report which frames much of my lecture today.

I will now move on to the factors considered, and practices adopted, by tribunals when making decisions on cost allocation. It should be noted that the evaluation of these factors in the context of international arbitration is distinct from allocation in domestic courts. Critical differences to be borne in mind include the lack of sovereign coercive powers in arbitration, the consensual foundation of the tribunal's jurisdiction and the import of procedure from a range of international sources of rules and law.

4. Factors Relevant to Allocation of Costs

There are two factors in allocating costs that are, in my view, worthy of careful consideration. The first is taking account of the reasonableness of the costs claimed. The second is taking account of any improper or bad faith conduct by the parties. I will address each in turn, and then look at a number of other factors and statistics.

Reasonableness

Reasonableness as a factor in cost allocation can be used to compel counsel to conduct their case reasonably in the circumstances, in a manner conducive to expeditious and cost-effective dispute resolution. As a criterion, "reasonableness" appears in many arbitration rules, guidelines and statutes, however often without any clear indication of what factors constitute reasonableness or how it is to be applied. Therefore, what costs are considered "reasonable" is often vague, the answer depending, of course, on the point of reference from which the assessment is made. There are two key factors to take into account in this context; one in the sense of proportionality, and the other in the sense of what I describe as necessity.

The question of reasonableness in comparison with the value in dispute inevitably evokes considerations of proportionality. This is not foreign in arbitration. Proportionality is one of the criteria listed in the IBA Guidelines on the Taking of Evidence in making decisions on parties' disclosure requests. Proportionality principles are also applied to factors such as the rates, number and level of fee-earners involved, the level and number of specialists involved, the amount of time spent at various phases of the arbitration, the legal complexity of the arbitration and even the disparity of costs incurred by the parties.

Looking at the bigger picture of any dispute resolution process, it is sensible for costs to be kept to a relatively small proportion of the amount in dispute if the disputing parties are to obtain value from the process.

Of course, the reality can often be quite different, as unexpected turns of events can lead to cost escalation. Nonetheless, the ICC Commission's 2015 Report suggests that knowing the tribunal has to take proportionality into account "may encourage parties to adopt a responsible attitude when making decisions on legal expenses and deter them from unnecessarily running up costs".¹³ It might be hoped, perhaps somewhat idealistically, that at the crucial juncture, as counsel is deciding whether or not to advance a further procedural application, the prospect of the tribunal's ultimate cost decision might prompt counsel to think twice.

A word of caution however. Arbitration is not state court litigation where public policy considerations designed to equitably distribute limited public resources are an important

¹³ ICC Commission Report, *Decisions on Costs in International Arbitration* (New York: ICC, 2015), p.12.

feature of court processes. Parties in arbitration have chosen to participate in a process which they pay for themselves. In the spirit of party autonomy so important to arbitration parties are entitled to a degree of latitude in assessing the processes which they choose. They should not be forced by state court public policy considerations to settle or shorten their process for the reasons behind rules of court, and judicial discretion.

Moving to the second aspect, there is the question of reasonableness in all the circumstances of the dispute, or in other words, whether the circumstances justified the costs incurred. This second principle has before been observed in national courts, with the Supreme Court of Singapore, in particular, going to great lengths to stress its importance next to the proportionality principle.¹⁴ In my view and the view of the ICC Commission, no consideration of reasonableness can be had without forcing an onus on counsel to identify the circumstances which necessitated their particular choices, actions and conduct.

The ICC Commission Report provides a non-exhaustive list of issues for tribunals to consider in light of the necessity principle. This rather extensive list includes: the complexity of the matter, the existence of any unnecessary claims or counterclaims, the withdrawal of unmeritorious claims in a timely manner, the scope of evidence submitted by the parties, the accuracy and method in which evidence was submitted and the length and relevance of any oral or written testimonies of witnesses and experts. The question underlying these factors is whether the chosen course of action is justified in the circumstances.

Tribunals should use reasonableness as a means for deciding whether costs incurred should be recoverable, not simply whether they are too high. The reason is obvious, i.e. the efficient and fair management of proceedings calls for tribunals to condemn disproportionate and unnecessary spending by denying the recoverability of that spending should it occur. The value is in the deterrent message this denial would send to parties and counsel. Although they are entitled to present their client's case fully, they should not, without consequences as to recoverable costs, exceed the confines of necessity.

Improper conduct/bad faith

Moving to improper or bad faith conduct, arbitration has long been susceptible to guerrilla tactics. The reason for this is no mystery. Arbitral tribunals, as creatures of contract, are not imbued with the immunities and prerogative powers of sovereign courts. Specifically, the inability to hold representatives in contempt, or to impose professional disciplinary sanctions, leaves much to the integrity of arbitration counsel. Many of you will recognise the large number of initiatives currently under way in an effort to address this particular issue. One that springs to mind is that of the Swiss Arbitration Association for the creation of a Global Arbitration Ethics Council. Nonetheless, at present, it is cost allocation that forms the primary weapon in a tribunal's arsenal.

The power to combat party misconduct through the allocation of costs can for example be found in the IBA Guidelines on Party Representation which list remedies for party misconduct at art.26. This provides one potential criterion which the parties and tribunal may adopt or otherwise mirror by way of procedural order. Broad authority is also afforded to arbitral tribunals under national arbitration statutes. Uniquely, Brazil's Arbitration Act at art.27 expressly includes bad faith as a factor for consideration in cost allocation.

The ICC Commission's 2015 Report lists a variety of instances where improper conduct or bad faith may arise. Many of these are intuitive, such as excessive document disclosure and requests for the same, falsifying witness or expert evidence, falsifying submissions to the tribunal and even acting aggressively and without professional courtesy. Interestingly, the report also identifies pre-arbitral conduct as an area for tribunals to consider when allocating costs, including whether arbitration could reasonably have been avoided, threatening litigious behaviour, parallel court proceedings in breach of an arbitration

¹⁴ *VV v VW* [2008] 2 SGHC 11; [2008] 2 SLR 929.

agreement, interfering with the counterparty's business interests and prejudicial press campaigns.

Of particular importance, in my view, and a point that is identified in the ICC Report, are any post-formation conflicts that parties instigate with the aim of destabilising the tribunal and the arbitration. For example, the late appointment of counsel once an arbitrator has been appointed may create a conflict of interest issue for the arbitrator, forcing them to resign or else threaten the enforceability of the award. Some institutional rules have developed specifically to prohibit and actively sanction doing so, art.18.4 of the LCIA Rules 2014 and ss.4–6 of the IBA Guidelines on Party Representations to name a few. Such egregious forms of misconduct can and should be taken into account by arbitrators when allocating costs, with the two main objects being compensation for any party that has incurred unnecessary costs as a result thereof, as well as deterrence.

Also the Calderbank

A further technique which is deserving of exploration is taking into account unsuccessful settlement negotiations, or as it is known under English law, the “*Calderbank offer*”, the name originating from the iconic English Court of Appeal case of *Calderbank v Calderbank*.¹⁵

The focal point of this technique is to encourage settlement. Arguably, this motive is more compelling in the context of publicly funded courts with limited resources, than in international arbitrations. Further, a commonly cited counter-argument to the *Calderbank* is that it militates against a party's right to pursue a claim to the end in order to have its position vindicated by a successful award, which may be desirable for the commercial certainty which this brings.

A measured approach to the consideration of settlement negotiations may serve to mitigate these issues, bearing in mind that the rejection of a more favourable settlement offer is but one factor that weighs on the allocation of costs. Further, a tribunal would be at liberty to consider the circumstances in which the party declined the offer, as is frequently undertaken in common law courts.¹⁶

Again, much like “budgeting” which I discussed earlier, the use of the *Calderbank offer* is a somewhat novel concept in international arbitration. It is however worthy of further exploration as a potential avenue by which to increase the potency of the tribunal's discretion as to costs, with a view towards rewarding efficient party conduct.

Having now discussed a number of important factors in the allocation of costs, I would but say that there are a broad range of factors to consider, some of which will be relevant in a particular case, and some which may not. This will turn on the facts and circumstances of the dispute, the legal and cultural background of the parties and their representatives and the designing of a procedure that fits the parties' unique needs in any given case.

Statistics and factors from arbitral tribunals

Part of the ICC Commission Task Force's review included the analysis of hundreds of ICC awards delivered from 2008 to 2014 under both the 1998 and 2012 ICC Rules. During the course of their review, the Task Force identified 10 particular considerations that ICC tribunals had when making decisions on the allocation of costs. Many of these I have mentioned already. Of note, however, the Task Force also found that many tribunals gave weight to the costs incurred in determining preliminary issues such as objections to jurisdiction, as well as interim applications.

Looking to civil law jurisdictions, the German Institution of Arbitration, which operates chiefly under the 1998 DIS Arbitration Rules, reported findings largely consistent with

¹⁵ *Calderbank v Calderbank* [1975] 3 All E.R. 333; [1975] ADR L.R. 06/05.

¹⁶ *Miwa Pty Ltd v Stantan Properties Pte Ltd (No.2)* [2011] NSWCA 344 at [5]–[8] and [17]–[20].

those of the ICC Commission. However, owing to implied prescribed duties under the 1998 DIS Arbitration Rules,¹⁷ the tribunals there emphasised the importance of the claimant submitting facts conclusively, without ambiguity, such that costs on both sides of the arbitration did not become inflated when addressing the submissions. I, and many of you, will no doubt be familiar with the challenges that arise from submissions that fall short of these standards, and their consequences on costs. From vague and inconclusive submissions stem procedural applications and difficulties when addressing the parties' arguments in the final award.

A further particular issue is the allocation of costs where there is no clearly successful party, for example, where a claimant succeeds on the grounds of jurisdiction and merits, whilst the respondent concurrently succeeds on the question of damages. This has occurred in a confidential Permanent Court of Arbitration case in which the 2015 ICC Commission Task Force noted that the tribunal placed greater weighting on the claimant's success on the merits, rather than the respondent's success on the damages. I think there is merit in such an approach where circumstances permit. It is consistent with the principle that a righteous claimant is entitled to be compensated for the cost of asserting its legal rights.

I turn now finally to speak briefly about my own experiences as an arbitrator.

5. My Experiences in Cost Allocation

The making of preliminary decisions on costs during the interim stages of an arbitration is a technique which I have found to be valuable in a number of instances.

The rationale for doing so is to address poor cost management in the instance that it arises, affording relief to the prejudiced party and seeking to deter further inefficiencies on the part of the impugned party. These objects are not equally served where all determinations on costs are reserved by the tribunal for a final award at the end of the proceedings.

A common hurdle tribunals face in making such determinations is establishing the jurisdictional basis for the tribunal's authority to do so.

As an example, a hearing in an arbitration I was chairing last year was adjourned at late notice by the claimant owing to an oversight on their part in relation to one of their witness's availability. The respondent in the arbitration filed an application seeking an award in respect of its costs of the adjournment application and the costs wasted as a result of the adjournment of the hearing. The claimant opposed this application by submitting that the tribunal had no jurisdiction to order immediate payments of the adjournment costs by way of a partial award. They also relied upon the English rule that "costs follow the event" to submit that the respondent, being unsuccessful in their opposition to the adjournment, should be liable.

Neither of the claimant's arguments were found compelling in the circumstances. The arbitration was conducted under the auspices of the 1998 LCIA Rules and the English Arbitration Act 1996. Article 26.7 of the Rules equips the tribunal with expansive powers to issue "separate awards on different issues at different times". Sections 47 and 61 of the Act equip the tribunal with the same power to issue multiple awards, which would appear to include awards of costs, and is not subject to any express limitations. The tribunal concluded that these provisions provided the requisite authority to determine and order immediate payment of costs at the interim stage of the arbitration. It was appropriate to do so as we had already explained to the parties at the commencement of the arbitration that their conduct would be relevant to our discretion as to costs and this understanding had been documented formally in the first procedural order.

An alternative mechanism I have used where the tribunal does not have clear authority to determine and order immediate payments of costs is to fix the costs to be taken into account in the final award of costs, without ordering immediate payment. The benefits of

¹⁷ DIS Arbitration Rules 1998 s.6.

this technique are similar to those mentioned earlier, although perhaps not as definitive as an order for the immediate payment for costs. This may be appropriate in certain jurisdictions to avoid breaching national arbitration statutes.

For example, an arbitration I worked on seated in Dubai and conducted under the 1998 ICC Rules was confronted with this situation. It concerned another application for aptly named “costs thrown away” as a result of the vacation of a hearing date. In the UAE, it is well known that tribunals arguably have no jurisdiction to order costs unless the parties agree to it, usually in the terms of reference expressly, or impliedly through the adoption of particular institutional rules allowing it. The legitimacy of interim awards on costs, however, remains ambiguous, although the UAE courts have indicated that in the absence of express party agreement to the tribunal’s authority to order interim costs, these interim measures should be regarded as unenforceable.¹⁸ In this matter the tribunal fixed the costs but did not order immediate payment, which enabled us to demonstrate to the parties the cost consequences of their actions, in a manner consistent with UAE law.

Cost allocation at interim stages avoids leaving costs out of the armoury of a tribunal for influencing behaviour during a case by simply discussing cost allocation at the commencement of the arbitration, and not again until the final award.

6. Conclusion

For the international arbitration community, the cost allocation discretion offers itself as a two-for-one solution to the very real issues of inflated costs and lack of sanctions which threaten the integrity of our practice as an effective method of dispute resolution. However, tribunals face the challenge of attempting to rectify the situation within their jurisdictional limitations, which include the parties’ arbitration agreement and national arbitration statutes.

Thus a balanced approach is necessary moving forward. Further debate will be important in educating arbitrators and parties regarding the broad options available to them. The recent ICC Commission Report has been useful in that regard, especially in the collection of factors which frame the discretionary power. I am hopeful that this lecture will add value to this debate.

¹⁸Gordon Blanke and Khalil Mechantaf, Ch.40, “United Arab Emirates” in Lawrence W. Newman and Colin Ong (eds), *Interim Measures in International Arbitration* (Huntington, NY: JurisNet LLC, 2014), p.827; Challenge No.214/1998, 3 January 1999, Court of Cassation of Dubai, (2010) 2(4) *International Journal of Arab Arbitration* 121.

