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The Management of Costs Before, During and After an Arbitration Hearing

A Domestic and International Perspective

By

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Introduction

1. The very title suggests that there are enduring problems with the control of costs in both domestic and international arbitration proceedings. It is true; and it is not a new development. What steps can or should the Tribunal, the lawyers and the parties take to manage the costs which will inevitably be incurred in an arbitration? The title asks us to look at three stages of the process, "before", "during" and "after" an arbitration hearing.

2. It is a dry but important subject. The cynics among us would take "before" and say that the most effective tool for the management of costs in arbitration is to avoid it altogether. I take it that you are looking for something a little more constructive than that by way of a response to the question. But actually, as a solution it has merit and increasing numbers of parties are looking to resolve their disputes by means other than arbitration. The cost of arbitration is a consideration in the commercial decision-making process which determines when, where and how a dispute will be resolved.

3. This is the case particularly in domestic disputes, but also increasingly so in international commercial disputes. The last decade has seen a shift in the characteristics of the processes and techniques deployed to manage disputes. Parties are seeking to put machinery in place as a means of avoiding disputes at the outset of their commercial relationships rather than, as before, simply providing for post contract dispute resolution processes. However, on close examination – by way of example – consider the FIDIC Dispute Adjudication/Review Board ("DAB") provisions[1] which are designed to be used to achieve temporary finality of a dispute[2] before parties refer their disputes to arbitration –we can see that in many respects, those processes have developed and in their later

[1] See clause 20.2-4 of, for example, the 1999 FIDIC CoC for Construction for Building and Engineering Works Designed by the Employer (still often referred to as "the Red Book").
[2] The decision of the DAB becomes final and binding subsequently if the parties do not issue a notice of dissatisfaction and intention to refer it to arbitration subsequently.

stages, they actually take on the form of mini arbitrations. What they are, is quicker (generally 3 months or less in duration) and therefore by definition, cheaper.

4. The procedures to be followed are set out in the appendix to the general conditions of the FIDIC CoC, what is evident is that in many respects the procedural powers given to the DAB are similar to those which an arbitral tribunal would be given by the parties to an arbitration agreement under any standard form of institutional rules.

5. Indeed, even at the appointing stage – which is mainly at the commencement of the project[3], the more recent DAB appointing provisions[4] are similar to the processes which are in place to appoint arbitrators to tribunals established to hear disputes under the arbitration provisions which follow. The point is, that the processes are very formal and time consuming, and undoubtedly expensive.

6. Time is always money in such matters so the costs issues are raised as soon as any dispute arises, and a long time before ever a dispute is referred to arbitration. Potentially therefore, by the time a dispute reaches arbitration, substantial costs have already been incurred by the parties in attempts at dispute avoidance or resolution by other means.

7. The same point is true of domestic disputes which are now often referred to mediation, or if construction-related, to adjudication. The presentation of any substantial domestic commercial dispute before a tribunal, even a mediator or an expert, is equally time consuming and expensive. Moreover, if those early dispute avoidance or ADR processes take place and fail, the costs pressures on the parties going into formal arbitration proceedings are that much greater.

8. It is not at all surprising therefore, that the management of costs in arbitration proceedings is a critical issue for everyone involved in the process. Attempts to exercise more control over the costs of arbitration

[3] But not always, the Yellow (CoC for Plant and Design-Build) and Silver (CoC for EPC/Turnkey Projects) Books provide for appointment after a dispute has arisen.
[4] The 2005 MDB forms of the FIDIC CoC refer.

have been made at all levels both domestically and internationally, but with limited success.

The Domestic Arbitration Landscape

9. Whether England and Wales is the designated seat of the arbitration for domestic or international arbitrations, the underlying legal principles which govern the tribunal's powers and duties over the control of costs in the arbitration are the same. The issue of costs is covered by sections 59-65 of the 1996 Arbitration Act.

10. The 1996 Act itself provides:

> *59 Costs of the arbitration*
> *(1)References in this Part to the costs of the arbitration are to—*
>
> *(a)the arbitrators' fees and expenses,*
>
> *(b)the fees and expenses of any arbitral institution concerned, and*
>
> *(c)the legal or other costs of the parties.*
>
> *(2)Any such reference includes the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration (see section 63).*
>
> *60 Agreement to pay costs in any event*
> *An agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen.*
>
> *61 Award of costs*
> *(1)The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*
>
> *(2)Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*
>
> *62 Effect of agreement or award about costs*
> *Unless the parties otherwise agree, any obligation under an agreement between them as to how the costs of the arbitration are to be borne, or under an award allocating the costs of the arbitration, extends only to such costs as are recoverable.*
>
> *63 The recoverable costs of the arbitration*
> *(1)The parties are free to agree what costs of the arbitration are recoverable.*
>
> *(2)If or to the extent there is no such agreement, the following provisions apply.*

(3)The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.

If it does so, it shall specify –

(a)the basis on which it has acted, and

(b)the items of recoverable costs and the amount referable to each.

(4)If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may –

(a)determine the recoverable costs of the arbitration on such basis as it thinks fit, or

(b)order that they shall be determined by such means and upon such terms as it may specify.

(5)Unless the tribunal or the court determines otherwise –

(a)the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and

(b)any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

(6)The above provisions have effect subject to section 64 (recoverable fees and expenses of arbitrators).

(7)Nothing in this section affects any right of the arbitrators, any expert, legal adviser or assessor appointed by the tribunal, or any arbitral institution, to payment of their fees and expenses.

64 Recoverable fees and expenses of arbitrators
(1)Unless otherwise agreed by the parties, the recoverable costs of the arbitration shall include in respect of the fees and expenses of the arbitrators only such reasonable fees and expenses as are appropriate in the circumstances.

(2)If there is any question as to what reasonable fees and expenses are appropriate in the circumstances, and the matter is not already before the court on an application under section 63(4), the court may on the application of any party (upon notice to the other parties) –

(a)determine the matter, or

(b)order that it be determined by such means and upon such terms as the court may specify.

(3)Subsection (1) has effect subject to any order of the court under section 24(4) or 25(3)(b) (order as to entitlement to fees or expenses in case of removal or resignation of arbitrator).

(4)Nothing in this section affects any right of the arbitrator to payment of his fees and expenses.

65 Power to limit recoverable costs
(1)Unless otherwise agreed by the parties, the tribunal may direct that the recoverable costs of the arbitration, or of any part of the arbitral proceedings, shall be limited to a specified amount.

(2)Any direction may be made or varied at any stage, but this must be done sufficiently in advance of the incurring of costs to which it relates, or the taking of any steps in the proceedings which may be affected by it, for the limit to be taken into account.

11. There is nothing particular about these provisions which impacts on the ability to manage the costs of an arbitration at any stage. The Act provides a flexible and generic description of "costs of the arbitration" and makes provisions for the ordering and payment of the costs in arbitration. A general feature of English law, not necessarily shared internationally is the presumption that costs will follow the event – effectively the loser pays the winner's costs. There are however, variations on that theme, and costs may be awarded on an issue basis or a party may be deprived of an award of costs for any number of reasons which, in those circumstances, would need to be explained by the Tribunal.

12. In the Departmental Advisory Committee Report on the Arbitration Bill of February of 1996 ("the DAC Report"), the DAC described the provisions of clauses 59-65 as an attempt "*to provide a code dealing with how the costs of an arbitration should be attributed between the parties.*" In relation to clause 65[5] the DAC considered that it's proposal to limit in advance the amount of recoverable costs provided a power which, if properly used, "*…could prove to be extremely valuable as an aid to reducing unnecessary expenditure*"[6].

13. Tools by which costs can be managed, are to be derived from the procedural powers of the tribunal and the parties in the arbitration agreement or the law. For example, by section 1 of the 1996 Act, the objective of arbitration is said to be to provide the parties with a process

[5] Which later became section 65 of the Act ibid.
[6] Para. 272 of the DAC Report.

whereby they can achieve "*the fair resolution of their disputes without unnecessary delay or expense*". The underlying duty of the Tribunal in section 33 of the Act is to "*[give] each party a reasonable opportunity if putting his case and dealing with that of his opponent*" and to "*adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.*" Indeed, the DAC saw section 65 of the Act as a facet of the Tribunal's general duty under section 33.

14. The Tribunal's powers to control the procedure and evidence in the arbitration, subject to its underlying duties as expressed in sections 1 and 33 of the Act, are very wide. Section 34 of the Act sets out in some detail the powers of the tribunal over procedural and evidential matters. It is for the Tribunal to decide all procedural and evidential matters, subject always to the right of the parties to agree any matter themselves. The DAC describes the list of powers in section 34 as helping "*the Tribunal (and indeed the parties) to choose how best to proceed, untrammelled by technical or formalistic rules.*" The DAC was at pains to refrain from providing any special rules or regimes for the arbitration of small cases (which would obviously need to address specifically issues of costs which can rapidly outstrip the sums in dispute in low value cases) and in relation to particular types of claim, it took the view that associations and institutions concerned with specific areas of trade, were best placed to, and could play a significant part in formulating rules and procedures for arbitrating disputes concerning their members.

15. In addition to the powers expressed in the Arbitration Act 1996, there are a number of forms of arbitration rules which are wholly or primarily for use in the conduct of domestic arbitration proceedings. The Chartered Institute of Arbitrators ("CI Arb.") Arbitration Rules 2000 fall into this category since they are expressed to be for use in arbitrations conducted under the 1996 Act in England, Wales and Northern Ireland.

16. The provisions for controlling procedure and evidence in the arbitration, and the related powers of the arbitrator which impact on the costs of the arbitration are set out in rules 6 and 7. Those rules provide:

> ***Article 6 Arbitration Procedure***
> *6.1 It shall be for the arbitrator to decide all procedural and evidential matters (including but not limited to the matters referred to in section 34(2)), subject to the right of the parties to agree any matter and subject also to Article 1.2 above.*
> *6.2 Before making any application to the arbitrator for directions as to procedural or evidential matters a party must give the other party a reasonable opportunity (being not less than 14 days unless the Arbitrator directs otherwise) to agree the terms of the directions proposed and any agreement on directions must be communicated to the arbitrator promptly.*
> *6.3 Where there is more than one arbitrator and a chairman has been appointed the chairman sitting alone may give directions on procedural or evidential matters after consulting the other arbitrators.*
> *6.4 Any application for directions on procedural or evidential matters or response thereto must be accompanied by all such evidence or reasoned submissions as the applicant may consider appropriate in the circumstances or as directed by the arbitrator and the arbitrator may direct a time limit for making or responding to such applications.*
> *6.5 Unless the arbitrator orders that a meeting shall take place or one is requested by the parties or either of them the arbitrator will give directions on any such application on receipt of the response thereto or, if there is no response, on expiry of the time allowed for such response or such other time as the arbitrator may direct.*
>
> ***Article 7 Powers of the Arbitrator***
> *7.1 The arbitrator shall have all the powers given to an arbitrator by the Act (including, but limited as hereafter set out, those contained in section 35 (consolidation of proceedings and concurrent hearings) and 39 (provisional orders)).*
> *7.2 In addition the arbitrator may limit the number of expert witnesses to be called by any party or may direct that no expert be called on any issue or issues or that expert evidence may be called only with the permission of the arbitrator.*
> *7.3 Where the same arbitrator is appointed under these Rules in two or more arbitrations which appear to raise common issues of fact or law, whether or not involving the same parties, the arbitrator may direct that such two or more arbitrations or any specific claims or issues arising therein be consolidated or heard concurrently…*

17. As appears from the above, there is no obvious restriction on the powers of the tribunal to manage the costs of the arbitration, through its powers

over the procedure to be adopted for the resolution of any particular dispute.

18. The provisions for costs in the CIArb Rules 2000 are set out in Article 10 which provides:

> ***"Article 10 Costs***
> *10.1 The general Principle is that costs shall be paid by the losing party, but subject to the overriding discretion of the arbitrator as to which party will bear what proportion of the costs of the arbitration.*
>
> *10.2 In the exercise of that discretion the arbitrator shall have regard to all the material circumstances, including such of the following as may be relevant:-*
>
> *(a) which of the issues raised in the arbitration has led to the incurring of substantial costs and which party succeeded in respect of such issues;*
> *(b) whether any claim which succeeded was unreasonably exaggerated;*
> *(c) the conduct of the party which succeeded on any claim and any concession made by the other party;*
> *(d) the degree of success of each party;*
> *(e) any admissible evidence of any offer of settlement or compromise made by any party.*
>
> *10.3 In considering any admissible evidence of any offer of settlement or compromise by the Respondent (whether such offer was made before or after the commencement of the arbitration) the arbitrator shall normally follow the principle that a Claimant who is awarded the same as or less overall than was offered should recover the costs otherwise recoverable only up to the date when it was reasonable that the offer should have been accepted and the party making the offer should recover costs thereafter.*
>
> *10.4 In considering any admissible evidence of any offer of settlement or compromise by the Claimant (whether such offer was made before or after the commencement of the arbitration) the arbitrator shall normally follow the principle that a Claimant who is awarded the same as or more than the sum at which he offered to settle or otherwise obtains a more advantageous award should recover his costs otherwise recoverable on an indemnity basis from the date when it was reasonable that the offer should have been accepted unless the arbitrator has good reason to depart from this principle."*

19. The costs provisions add nothing of substance to the general powers given to arbitrators under the 1996 Act save that they pick up on the powers of the Court which are to be found in CPR Parts 36 and 43 to take into account offers of settlement and the conduct and other circumstances which might be relevant to the tribunal's exercise of its

discretion in making orders for costs. This is helpful in the sense that it provides a brake on what might be a party's willingness otherwise to bring economic pressure on its opponent in arbitration by spending very substantial and unnecessary sums of money in the conduct of the arbitration and/or by conducting its case in a manner design to cause its opponent to expend unnecessary sums of money.

20. Of course, as already notice, section 65 of the Arbitration Act 1996 was always intended to provide a brake on the parties' ability to spend excessive sums of money in the conduct of their cases in arbitration but in practice, the power has proved to be a disaster for most tribunals and in fact became a distraction to the central purpose of the arbitration which was to resolve the underlying dispute between the parties. Arguments about section 65 generated not just satellite disputes but also a fair measure of litigation in the early years following its enactment. Tribunals prefer now to avoid section 65 and to put down markers with the parties when settling directions for the conduct of the arbitration which will be applied when it comes to the assessment of costs at the conclusion of the arbitration.

The International Perspective

21. There are a number of Arbitral Institutions with published rules for the conduct of international arbitration. I will look at just three for the purpose of this discussion:

22. The ICC: The ICC Rules of Arbitration are under review and a new edition is expected shortly. The current edition of the Rules was published in 1998. Article 31 contains the relevant provisions concerning the costs of the arbitration. It explains what the costs of the arbitration are and the powers of the tribunal to allocate costs in or following the publication of their award. It provides:

"1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.

3. The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."

23. Articles 15-22 set out the provisions governing the conduct of the arbitration and they are set out in some detail. Article 15 is unusually brief:

Article 15 Rules Governing the Proceedings

1

The proceedings before the Arbitral Tribunal shall be governed by these Rules and, where these Rules are silent, by any rules which the parties or, failing them, the Arbitral Tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

2

In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

24. Thereafter there are long and quite detailed provisions concerning the conduct of the various steps in the arbitration – terms of reference; establishing the facts of the case; conduct of hearings, which, in today's landscape, look rather out of date and too formal. It is not surprising that the rules are under review. The ICC Rules, particularly with the administered procedure, is an extremely costly process of dispute resolution and experience shows that it is very difficult to control or limit

the costs expended in ICC arbitration. This is a problem which the ICC itself acknowledges and has from time to time taken steps to try and address[7]. It is suggested that such efforts have met with little success.

25. Interestingly, in its guidelines for Arbitrating Small Claims under the ICC Rules of Arbitration, the first step recommended to the parties is the exploration of ADR, and the next step is effectively to cut through the unwieldy process of agreeing terms of reference and then pleading a case in the formal sense.

26. Secondly Uncitral: The Uncitral Arbitration Rules 2010[8] provisions as to costs are to be found in Articles 40-42. article 40 sets out to define "costs of the arbitration", it provides:

> ***Definition of costs***
> ***Article 40***
>
> *1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.*
>
> *2. The term "costs" includes only:*
>
> *(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;*
> *(b) The reasonable travel and other expenses incurred by the arbitrators;*
> *(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;*
> *(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;*
> *(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;*
> *(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.*
> *3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.*

27. Article 42 contains the substantive provision governing the powers of the Arbitral Tribunal over the allocation of costs. It provides:

[7] Report on Techniques for Controlling Time and Costs in Arbitration 2007, from the ICC Commission on Arbitration; Guidelines for Arbitrating Small Claims under the IIC Rules of Arbitration, published by the ICC which can be downloaded from its website.
[8] The original rules made in 1976 have been revised substantially in the newly published revised rules.

Allocation of costs
Article 42
1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

28. As far as the powers of the tribunal over the procedure and evidence which may be presented in the arbitration are concerned, these are considered principally in Article 17 of the Rules. Article 17 provides:

Section III. Arbitral proceedings
General provisions
Article 17
1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute.
2. As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed by the parties.
3. If at an appropriate stage of the proceedings any party so requests, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials…

29. These powers are unsurprising and indeed, given that they are the principles which underpin the English 1996 Act, they are very familiar to English practitioners of both domestic and international arbitration.

30. Thirdly, let's look at the LCIA: The LCIA Arbitration Rules 1998 contained details provisions concerning the costs of the arbitration. Article 28 provides:

Article 28
Arbitration and Legal Costs

28.1
The costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the Arbitral Tribunal and the LCIA for such arbitration costs.

28.2
The Arbitral Tribunal shall specify in the award the total amount of the costs of the arbitration as determined by the LCIA Court. Unless the parties agree otherwise in writing, the Arbitral Tribunal shall determine the proportions in which the parties shall bear all or part of such arbitration costs. If the Arbitral Tribunal has determined that all or any part of the arbitration costs shall be borne by a party other than a party which has already paid them to the LCIA, the latter party shall have the right to recover the appropriate amount from the former party.

28.3
The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing. The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.

28.4
Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order.

28.5
If the arbitration is abandoned, suspended or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal the costs of the arbitration as determined by the LCIA Court in accordance with the Schedule of Costs. In the event that such arbitration costs are less than the deposits made by the parties, there shall be a refund by the LCIA in such proportion as the parties may agree in writing, or failing such agreement, in the same proportions as the deposits were made by the parties to the LCIA.

31. The procedural powers of the tribunal are contained in Article 14 of the LCIA Rules which provides:

Article 14
Conduct of the Proceedings

14.1
The parties may agree on the conduct of their arbitral proceedings and they are encouraged to do so, consistent with the Arbitral Tribunal's general duties at all times:

(i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent; and

(ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the final resolution of the parties' dispute.

Such agreements shall be made by the parties in writing or recorded in writing by the Arbitral Tribunal at the request of and with the authority of the parties

14.2
Unless otherwise agreed by the parties under Article 14.1, the Arbitral Tribunal shall have the widest discretion to discharge its duties allowed under such law(s) or rules of law as the Arbitral Tribunal may determine to be applicable; and at all times the parties shall do everything necessary for the fair, efficient and expeditious conduct of the arbitration.

14.3
In the case of a three-member Arbitral Tribunal the chairman may, with the prior consent of the other two arbitrators, make procedural rulings alone.

32. What is evidence from all of these provisions governing the procedure and the allocation and assessment of costs in arbitration proceedings is that there is no obvious reason to explain or justify the excessive costs which are routinely incurred in these proceedings. Tribunals, both domestically and internationally have the basic tools by which they should be able to control the procedure and evidence in arbitrations and thus the costs which are expended in bringing or defending claims which are resolved in arbitration.

33. In terms of practical steps which might or can be taken to manage the costs of arbitration proceedings either in a domestic arbitration or indeed in an international arbitration, given the general nature of the tribunals'

powers to control the procedure and evidence which might be called, and their powers to deal with issues of costs at the conclusion of the arbitration when the outcome of the dispute is known, there are many similarities in the processes which could be adopted in either case.

a. Before a hearing:
    i. Undoubtedly, ensure that the underlying commercial contract has appropriate mechanisms for the resolution of disputes, if possible agree in advance the identity or process by which any tribunals are to be appointed (ADR or arbitration);
    ii. Exhaust ADR processes first;
    iii. If possible use a sole arbitrator rather than a 3-man panel;
    iv. Agree a procedure which is appropriate for the dispute and not necessarily wedded to any legalistic "pleading" process;
    v. Think laterally about what is necessary to prove a case in terms of documents and evidence and act proportionately in requesting and adducing either documents or witnesses;
    vi. Limit pleadings;
    vii. Use witness summaries rather than detailed statements of evidence;
    viii. Consider carefully the extent to which expert evidence is necessary – can joint experts be used; how many experts are required and in which disciplines – is it necessary actually to call the expert to give evidence at the hearing?
    ix. Use experts joint statements and limit experts reports to those issues which remain in dispute;
    x. Make and keep updates estimates of costs being expended and manage that expenditure to ensure that it does not become disproportionate to the sums in issue;

xi. Reduce as much of the case as possible to writing to avoid lengthy or unnecessary hearings;
xii. Limit procedural hearings to those which are strictly necessary to deal with contested interlocutory matters;
xiii. Limit interlocutory disputes to those essential to ensure the proper presentation of the case.
xiv. Fix any hearing in a location which is the most cost effective for the parties and the tribunal.

b. During a hearing:
    i. Ensure that the hearing is for the minimum length necessary to afford the parties the opportunity to present their case and answer their opponents;
    ii. Consider a strict timetable and keep to it;
    iii. If necessary limit cross examination either as to time or as to issues;
    iv. Consider witness conferencing on particular issues;
    v. If appropriate consider written opening and closing submissions rather than lengthy oral submissions.

c. After a hearing
    i. Manage any post hearing briefs so that the costs of production and presentation are contained;
    ii. Set procedures to manage any post hearing procedural issues to avoid lengthy further exchanges;
    iii. Proceed expeditiously to an award.
    iv. Generally leave issues of interest and costs over to a separate award to ensure that all factors relevant to liability for and assessment of costs can be ventilated and considered by the tribunal when making its award.

Conclusion

34. The control of costs, whether in domestic or international arbitration proceedings is paramount to the continued success of the process as a means for resolving commercial disputes. There is no evidence that the users of the system or those involved in the regulation of arbitration have yet managed to exercise any real control over the expenditure of costs in the process be it before, during or after a hearing. What appears from the above lists of points to be considered however, is that the greatest opportunity to manage costs, is prior to the hearing, rather than during or after.

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