

International arbitration costs have been rising fast. Rima Evans asks how they can be curbed

Keeping costs under control

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WHILE INTERNATIONAL arbitration is enjoying strong growth, one factor has been threatening to take the shine off this form of resolution - escalating costs.

It has been a thorny issue for a number of years, not dissipated even by the recession, which accelerated the trend towards international arbitration.

In his Clayton Utz International Arbitration Lecture in 2009, Toby Landau QC FCI Arb said there was an increasing "rumble of discontent" around the entire process and highlighted a number of problems, including inefficiency and inflexibility. But he described cost as an "ever-present issue... an issue of embarrassment."

The increase in size and complexity of disputes is undoubtedly a contributing factor. But the issue goes wider than that, with consensus varying on how costs can be minimised.

One thing is certain - it's imperative that arbitration be kept as cost effective as possible if it is to maintain its position as the commercial dispute resolution method of choice, according to CI Arb. Which is why it has launched a major survey aimed at uncovering how costs are incurred and how processes can be streamlined.

Doug Jones AM FCI Arb, President of CI Arb, said the survey will help generate proposals to restore the "speed and cost effectiveness to the arbitration process."

What is considered excessive cost for international commercial arbitration? Karen Gough FCI Arb, a past President of CI Arb, barrister and Chartered Arbitrator simply says: "Any dispute where costs of

carrying out the arbitration far outstrip the amount or value of the dispute."

A briefing paper drawn up by Winston & Strawn *What can be done about arbitration costs?* gives examples of extravagant cost claims in recent years. One party submitted over \$40 million and the other \$20 million in one case. Another case saw one party request \$12 million in costs. Although these numbers are large, these costs may have been a fraction of what was at stake. Ricardo Ugarte, Geneva Managing Partner at Winston & Strawn and international arbitration specialist notes they were not necessarily sums parties weren't prepared to pay, since arbitration is a commercial decision and the amounts in dispute far surpassed the billion dollar mark.

Nevertheless there are undeniable concerns around the costs issue. Ugarte says the concern is particularly acute in smaller cases: "I don't sense that cost is an intractable issue with respect to the larger claims, where case management should control costs. But when it comes to small claims - those worth \$10 million or less - I find that clients can be put off by arbitration."

"Clients are dissuaded when they have to pay arbitration institutions upfront"

He says such clients are dissuaded when they have to pay arbitration institutions upfront, which could typically be between \$200-250,000 for a \$10 million claim with three arbitrators. But it's also about inefficiency.

"It's a combination of cost plus inefficiency associated with the process," Ugarte says. "It can take a significant amount of time to constitute a tribunal, and in one case it took a year for a tribunal to be constituted once the claim was filed. Then you are asked to pay \$200,000 upfront in arbitration costs per side and it makes for a bad first impression. It's something we have to address."

But what other factors are contributing to costs? A number of issues seem to be emerging as key. Julia Zagonek MCI Arb, international arbitrator and Senior Associate in



the arbitration group at White & Case LLP highlights that costs can be down to the behaviour of the parties. "Proceedings needn't be costly. It depends on how the case is managed. It is easier to manage costs than in litigation but if costs are out of control it may be down to a lack of discipline on the part of the tribunal in ensuring parties are not putting forward endless rounds of submissions which can drive cost up."

Gough agrees. "Parties that go to arbitration very often don't really understand what arbitration is about. They understand it's not court but they don't understand that there's the capacity to be really flexible and produce a procedure that is appropriate to the dispute. Arbitrators seem to get hung up on the rules and what they should be focusing on is how

to solve it. Flexibility is absolutely key and arbitrators have to have the courage to come forward and say, 'Let's do this or that.' All the tools are there to be flexible." In other words, arbitrators must have the capacity and confidence to be able to see what the real issues are and do justice to the parties. On both sides there must be a pragmatic approach to keeping the commercial process going, according to Sarosh Zaiwalla MCI Arb, Senior Partner at Zaiwalla & Co and international arbitrator.

Zaiwalla says the legal profession is guilty of inflating costs by putting unnecessarily large teams on cases to justify greater fees. His overall concern is to see London retain its value as the centre of international arbitration but says that is being jeopardised by firms' lack of cost-effectiveness. "I find from personal experience that where just one or two solicitors are required, there is a team of six or seven from the firm's team. That makes it very expensive."

Zaiwalla also suggests that there is an over-reliance on lawyers as arbitrators. "What is not appreciated is that the whole object of arbitration is getting an expert to decide the dispute. Why should arbitrators always be lawyers? What we can do is appoint arbitrators expert in the field. If the case is on issues of law select a retired judge or top QC, if there are technical issues appoint an arbitrator with technical expertise. We should also appoint more commercial people as arbitrators because they will adopt much more of a commercial approach."

This touches on a sore subject. There has been a growing trend

for parties to limit their choice of arbitrator "to a small group of well-known individuals," reports Winston & Strawn's briefing paper. "All too rarely do parties or their counsel carefully quiz the proposed arbitrator about his or her caseload," the report adds, leading to potential delay and inefficiency.

It is an understandable phenomenon. Zagonek points out that parties will naturally be attracted by "big-name arbitrators" with a strong track record. "Nobody wants their case to be someone's trial case," she says.

Ugarte says this problem can be avoided in commercial arbitration. "There is an abundance of well-qualified international commercial arbitrators. So this issue can be managed by parties with counsel that know the arbitration community. This issue

is more problematic in specialised arbitrations, such as investment treaty arbitration, where the number of qualified arbitrators is restricted."

There seem to be a plethora of other ways in which to reduce cost (see below). However what is more complicated is the difficulty in divorcing the cost issue from other fault lines in the process, all of which is the subject of a much greater debate. In order to safeguard the future of international arbitration, Landau calls for greater radical thinking, and bold decisions in order to improve the entire process, not just reduce cost. Moreover he adds: "We need desperately to open up the field of professionals... new blood is needed, new ideas." ■

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→ HOW CAN COSTS BE REDUCED?

In her paper, *The management of costs before, during and after an arbitration hearing*, Karen Gough states: "The greatest opportunity to manage costs is prior to the hearing, rather than during or after."

The paper proposes a number of steps to minimise cost before a hearing, including:

- Ensuring the underlying commercial contract has appropriate mechanisms for the resolution of disputes.
- Exhausting ADR processes beforehand.
- Using a sole arbitrator rather

than three-man panel if possible.

- Agreeing a procedure that is appropriate for the dispute and not necessarily wedded to any legalistic 'pleading' process.
- Limiting pleadings.
- Using witness summaries rather than detailed statements of evidence.
- Making estimates of costs and managing them so they do not become disproportionate to sums in issue.
- Fixing any hearing in a location that is the most cost-effective for the parties and tribunal.