Brought to order
Arbitration – costs considerations and recovery
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This information is for guidance purposes only and should not be regarded as a substitute for taking legal advice. Please refer to the full terms and conditions on our website.
Happy new year and welcome to the winter edition of Costs Guru. Whilst this edition looks particularly at arbitration costs, there are still a number of interesting issues and topics covered for non-arbitrators, as well as the usual costs cases update.

The increased availability of third party funding is an issue which concerns litigators and arbitrators alike. The added bonus in arbitration proceedings is the potential scope for recovery of the funding costs from the unsuccessful party. A number of our contributors touch on this issue. We also look more widely at potential costs consequences and recoveries in other jurisdictions, as well as seeking to compare, specifically in the UK, the relative advantages and merits of litigation as against arbitration.

Guru is, as ever, indebted to 4 New Square chambers and specifically in this issue, Stephen Innes, for providing another interesting and thought-provoking argument.

Case updates include salutary warnings to parties who inflate their costs claims, as well as consideration of a recent Court of Appeal decision concerning the assignment of CFAs.

Peering over the horizon, by the time the spring edition is upon us, we will be in the world of electronic bills of costs and one step closer to the introduction of fixed costs in lower value litigation matters. As always Guru will endeavour to bring you up to speed as and when developments occur and any feedback or queries are more than welcome.

It only leaves me to thank you for taking the time to read this edition and hope you find the content enjoyable and informative.

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Arbitrate or litigate? – counting the cost

Arbitration is generally considered a quicker, more flexible and therefore less expensive process than its court run counterpart. However, with the introduction of a number of pilot schemes in the commercial court, are the courts finally catching up? Louise Hoyle considers the potential impact.

The fees and expenses of your lawyer will be by far the most significant direct cost to a business of any litigation. There will be other expenses, including management time and lost productivity. As anyone who is involved in litigation will be well aware, these costs increase over time in direct proportion to the time to resolution of the case. In short, the longer a matter takes to resolve, the more it costs.

Arbitration is generally viewed as a quicker process and therefore, often a less expensive option, with parties often writing arbitration only clauses into contracts. But with the implementation of the shorter and flexible trial procedures in civil litigation and the proliferation of costs budgeting, are the judiciary fighting back and is arbitration still a cheaper option?

Whilst procedures are changing in civil litigation, the arbitration option remains steadfast in its flexible approach. For example, because the parties have a direct input into the timetable, the time from dispute to resolution is generally shorter, meaning the overall cost of the arbitration can prove less expensive than judicial proceedings.

However, there are other potential advantages over judicial proceedings, particularly where the issues are highly technical, as arbitrators with the appropriate expertise can be appointed, and awards are confidential.
Unlike court judgments, arbitration awards are not directly enforceable. A party seeking to enforce an arbitration award must resort to judicial remedies at an additional cost which could potentially negate any saving made by arbitrating in the first place. Any appeal lies with the High Court and either will increase costs and increase the length of the process.

The latest cost and duration report from the London Court of International Arbitration (“LCIA”) includes data from 2013. This report takes into account 224 cases that have reached final award up to 2016, allowing us more insight into the cost and duration of the arbitration process.

This report shows the median LCIA arbitration lasts for a period of 16 months from receipt of a request for arbitration to the date of final award, and taking about three months from the date of the parties’ final submissions to produce the award. The average cost is set in US dollars at $97,000, of which $17,000 are administrative charges. Such costs though, do of course not include lawyer or expert fees. Again, for those regularly dealing with large litigation matters, a 16 month resolution is a pretty impressive figure.

Over 70% of cases where the amount in dispute is under $1m are concluded within 12 months and just over half of LCIA cases are heard by a sole arbitrator, the remainder by a three member panel, with sole arbitrators sitting commonly on disputes valued at $1m to $10m.

Whilst the report makes interesting reading and will give parties some indication, at least in part, of the costs and the duration of proceedings under
LCIA Rules, those are of course only one factor. The fees of the arbitrators and the costs of the institutions are only a small part of the overall cost of the process, but if disputes are generally concluded within 16 months with only one arbitrator, then that must impact favourably on the overall legal spend.

The courts have set in place two pilot schemes which come to an end in September this year designed to shorten the length of litigation for commercial cases, the shorter trials scheme and the flexible trials scheme.

Under the shorter trials scheme, it was envisaged by the Lord Chief Justice in his 2016 report that the trial would take place within eleven and a half months of issue and judgments handed down within six weeks, interim applications are disposed of on paper by default, disclosure is limited by proportionality, and oral evidence is kept to the minimum necessary to do justice. Finally, trials are limited to four days and costs assessed summarily rather than being subject to costs management and detailed assessment.

The flexible trials scheme places the parties in control of the process, subject to necessary intervention by the court. The scheme enables parties, by agreement, to adapt procedure to suit their particular case, and, in that sense, enables cases to proceed in a similar manner to arbitrations. Both sides must, of course, agree to the measures taken but it has been designed with the overall aim to reduce costs, reduce the time required for trial, and to enable earlier trial dates to be obtained. Of course, mutual co-operation of the parties is required.

With the streamlining of the court process and the implementation of flexibility, we are likely to see the perceived advantages of arbitration in terms of flexibility, time frame and costs narrowing. The conclusion of the judiciary’s pilot later this year will provide some interesting statistics. If the eleven and a half months to trial, as envisaged on the shorter trial list, has in fact been achieved, then the court process may prove competitive in terms of timescale when compared to the median of 16 months for arbitration. We will also be able to compare the flexible scheme and whether this has in fact produced an overall shorter time period to trial.

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In England, Wales and Northern Ireland, sections 59 – 65 of the Arbitration Act 1996 set out relatively detailed provisions as to how the costs of an arbitration are to be dealt with. Richard Antuch considers the two options, arbitrator assessment versus court assessment, in a bit more detail.

As one might expect, there are a number of factors which might influence a decision as to whether to seek an assessment of costs by the arbitral tribunal or seek a more traditional detailed assessment.

There are certainly practical advantages to having costs assessed by the arbitrator. For one, the arbitrator is likely to be able to deal with the question of costs in fairly short order. To have a decision on costs within two months of the final decision is not unusual. In contrast, traditional court proceedings could be barely off the ground by this time, let alone be concluded.

As well as speed, the arbitrator will also have the advantage of being able to view the costs against the backdrop of an in-depth knowledge of the case, as opposed to a costs judge coming to the facts for the first time. Of course, whilst
the arbitrator might have an in-depth knowledge of the case on the one hand, he or she is unlikely to have the in-depth understanding of costs that a costs judge would have. This disadvantage is perhaps less marked, however, as one practical solution open to an arbitrator is to appoint an expert, possibly a costs lawyer to assist with the assessment. Again, speed is a real advantage.

At first glance, assessment by the tribunal appears to be very attractive – a determination from someone who has a detailed knowledge of the facts making a decision in fairly short order. Why then even consider a court assessment?

One issue that might persuade a party to argue for a court assessment of costs is the fact that the arbitrator is likely to take a very “arbitral” approach to assessing the costs. Costs assessments undertaken by arbitrators, for example, might be based upon consideration of a high level breakdown and copies of invoices, with high level submissions from both sides. A court assessment on the other hand will involve the production of a formal bill of costs, points of dispute and replies. As such, if there are significant technical points to be argued, the paying party in particular might feel that they will get a better chance of reducing the costs if the assessment takes place in the court. This potential additional reduction will need to be tempered by the knowledge that interest on costs runs (judgment rate is 8%), and court assessments can take upwards of 12 months to conclude.

This factor, the length of time which an assessment takes, might cause a paying party to push for court assessment in order to push back the payment date, possibly quite considerably. Receiving parties need to be alive to this tactic and if forced along the court route, seek a payment on account.

However, whatever the parties’ views might be about the most appropriate costs assessment venue, it should not be forgotten that the parties cannot force the arbitrator to assess costs, even where the parties are in agreement. It may be, therefore, that the parties do not have the luxury of choosing how they want costs to be dealt with. Where they are able to influence the way in which costs are assessed however, it would be prudent for the parties to give some consideration to the route which best suits them.
The table below summarises some of the differences between the two routes:

<table>
<thead>
<tr>
<th>Arbiter Assessment</th>
<th>Court Assessment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedure can be flexible to suit the arbitrator and the parties</td>
<td>Part 8 proceedings need to be issued in order to turn a costs award into a court order</td>
</tr>
<tr>
<td>Often submission of invoices or a high level schedule, with submissions in response</td>
<td>Formal bill of costs, points of dispute and replies</td>
</tr>
<tr>
<td>Can be assessed on paper and often is</td>
<td>Can be assessed on paper if costs are less than £75,000</td>
</tr>
<tr>
<td>Dealt with by the arbitrator who knows and understands the case - Arbitrator can appoint an expert to assist with the assessment</td>
<td>Costs judge is a fresh pair of eyes so will have to be “read-in” at the outset but will conduct the assessment alone</td>
</tr>
<tr>
<td>Appeal to a High Court judge</td>
<td>Appeal to a High Court judge</td>
</tr>
<tr>
<td>Likely to be a fairly speedy process</td>
<td>From issue to resolution will take at least 12 months</td>
</tr>
<tr>
<td>Need to pay arbitrator’s fees</td>
<td>Court fee on issue is minimal but the fee for a detailed assessment hearing is up to £6,000 depending on level of costs</td>
</tr>
<tr>
<td>Interest needs to be awarded</td>
<td>Interest runs automatically from the date of the court order</td>
</tr>
</tbody>
</table>

The Costs Unit have considerable experience of dealing with arbitration (including international arbitration) costs, as well as at traditional court assessment and are able to advise and guide you through the process and the route that might be best suited to you. If you would like to discuss further, please do not hesitate to contact one of the team.

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Litigation funding and security for costs

Often it seems that what the law gives with one hand it takes away with the other. Stephen Innes of 4 New Square looks at key decisions bringing contrasting fortunes for litigation funders over the last couple of years.

Litigation funding in arbitration

Norscott was the successful claimant in an ICC arbitration against Essar. The arbitrator, Sir Philip Otton, awarded Norscott its costs, and determined that these should include the costs of the litigation funding which Norscott had incurred: it had obtained a funding advance of nearly £650,000, repayable at the greater of 300% or 35% of the damages recovered. The arbitrator held that the third-party costs were recoverable in principle pursuant to section 59(1)(c) of the Arbitration Act 1996 and article 31(1) of the ICC Rules. Section 59(1)(c) is widely drafted to allow the arbitrator to award “the legal or other costs of the parties”. The relevant provision of the ICC Rules uses similar language.

Essar sought to appeal the arbitrator’s award, arguing in particular that the decision was at odds with what would be recoverable in civil litigation. In Essar Oilfiled Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm) HHJ Waksman QC dismissed Essar’s appeal. He held that the Arbitration Act was intended as a complete code and was not subservient to the costs provisions of the CPR, which did not contain similar wording, so that the approach of the courts was not directly relevant. There was no reason to construe “other costs” narrowly.

Clearly this decision has very significant ramifications for arbitrations, not least in that substantial pressure can be applied by a funded party to the opponent which could potentially see the value of the award in effect being increased by say 35%.
Third party costs orders
At the end of a claim, if the losing claimant was supported by funders who had an interest in the litigation, the successful defendant can apply under section 51 of the Senior Courts Act 1981 for a non-party costs order against the claimant’s funders.

Traditionally the liability of the funders to pay such costs is as fixed by Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] 1 WLR 3055, which limited the liability to the extent of the funding provided.

A recent example of such a non-party costs order being made was Excalibur Ventures LLC v Texas Keystone Inc [2017] 1 WLR 2221. Significantly, however, the funders were ordered to pay costs on the indemnity basis – not because of anything to do with their own conduct, but because of the conduct of the funded parties in the way it had run the case and the allegations it had pursued: the Court of Appeal held that the funders could not disassociate themselves from that conduct. This means that funders must closely monitor the conduct of the litigation by the parties they are funding.

Security for costs
There is now a jurisdiction in CPR 25.14 to order litigation funders to provide security for costs. An order may be made against a person who:

"has contributed or agreed to contribute to the claimant’s costs in return for a share of any money or property which the claimant may recover in the proceedings."

In the RBS Rights Issue Litigation [2017] EWHC 1217 (Ch) Hildyard J set out comprehensively for the first time the principles relevant to such applications:

“(1) Whether it is sufficiently clear that the non-party is to be treated as having in effect become in all but name a real party motivated to participate by its commercial interest in the litigation;

(2) Whether there is a real risk of non-payment such that security against the contingent liability should be granted;"
(3) Whether there is a sufficient link between the funding and the costs for which recovery is sought to make it just for an order to be made;

(4) Whether a risk of liability for costs has sufficiently been brought home to the non-party, either by express warning, or by reference to what a person in its position should be taken to appreciate as to the inherent risks;

(5) Whether there are factors, including for example, delay in the making of an application for security or likely adverse effects such as to tip the overall balance against making an order.”

In an unreported decision in July 2017, In the matter of Hellas Telecommunications (Luxembourg) II SCA, Snowden J concluded that there was a power inherent or implied in CPR 25.14 to make orders so as to enable an effective application to be made under the provision, even where there was no pre-existing costs order against anyone in the proceedings. He therefore made an order requiring the claimants to disclose the identity of the funders and the details of the funding arrangements.

Litigation funders, like other claimants, may well wish to rely on an ATE policy as security. A number of cases had previously looked at whether a policy could be considered an appropriate form of security, given the risks in any given case that the insurer might not pay out on the claim, particularly if there were allegations in the proceedings of dishonesty by the insured.

The Court of Appeal considered the issue fully, as applicable to all claimants, for the first time in Premier Motorauctions v Price Waterhouse Coopers LLP [2016] EWHC 2610 (Ch), with security being sought against the claimant insolvent company. Longmore LJ noted that the court had not been provided with the placing information put before insurers, but considered that even if it had been, it was unlikely that the court could be satisfied that the prospect of avoidance was illusory.

This means that an ATE policy is likely now to be considered as a suitable alternative to security for costs where there is some suitable form of endorsement providing that the policy cannot be avoided.

In Bailey v GlaxoSmithKline UK Ltd [2017] EWHC 3195 (QB) Foskett J had to consider an application for security for costs against the claimants’ funder, Managed Legal Solutions Limited. MLS relied on an ATE insurance policy obtained by the claimants and on the fact that its own liability as a funder would be subject to the Arkin “cap”. Foskett J determined that:
(a) in this case the funder could not rely on the Arkin “cap” at the security for costs stage: he noted that there had been criticism of the decision in Arkin, and postulated that a challenge to Arkin might be made, particularly in a case where the funder underwrote the whole of the claimant’s costs or where the funding arrangements might be said to be objectionable in some way; it could not therefore be said with certainty that if an order for costs was made under s51 at the conclusion of the case, the funder’s liability would be capped;

(b) even though the ATE policy did not contain an anti-avoidance provision, the court could, at the security for costs stage, attribute some value to the ATE policy to take into account the likelihood that the policy would not be avoided. With the policy providing cover at £750,000, and assessing, in a very broad brush way, the risk of avoidance at 1/3, the judge reduced the amount of security which was to be ordered by £500,000.
For the future

I was recently instructed, with Nicholas Bacon QC, in the substantive hearing of the security for costs application against funders in Hellas Telecommunications. The application was again heard by Snowden J. In this case the application was ultimately resolved by agreement, so a ruling was not required, but the submissions and discussions in court indicate some issues which are likely to be explored in future cases:

(a) what type of funding arrangement is caught by CR 25.14? The funder must have contributed to the claimant’s costs “in return for a share of any money or property which the claimant may recover in the proceedings”, but what is meant by a “share” here? At one end of the spectrum, this requirement will plainly be met where the funder is to receive a fraction or percentage of the proceeds. At the other end of the spectrum, it seems to be generally recognised that that a bank which simply makes a loan to a claimant subject to a normal commercial rate of interest would not be caught. But how will cases in between be determined - how does the payment to the funder following settlement or judgment have to be related to the proceeds in order for the funding arrangement to be caught?

(b) is the Arkin “cap” to be taken into account at the security for costs stage? In Bailey, concerns were raised about the funder MLS, which was not a member of the Association of Litigation Funders, and whose key shareholder, it was said, had previously been convicted of serious dishonesty; in future cases it may be possible still to argue that the amount of security should be limited by the cap;

(c) can it really be right that at the security for costs stage it is possible to attribute some partial value to an ATE policy to take into account the risk of the policy being avoided, when in reality the value will turn out either to be zero if the policy is avoided or 100% if it is not, and there is no halfway house?

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Third party funders, recovery of and liability for costs

Will recent changes in legislation and supportive case law see a proliferation in the use of third party funding in arbitrations? Joanne Dorgan explores the potential impact.

“Third party funding” is the collective name given to funding provided to a party in litigation or arbitration by a professional funder. Professional funders are often investment houses and funds are usually provided in exchange for an agreed return, for example, a percentage of the damages recovered or a multiplier of the original investment. Typically the funding will cover the funded party’s legal fees and expenses. The funder may also purchase an insurance (ATE) policy to meet the other side’s costs, the premium for which being no longer recoverable in court litigation, but potentially recoverable in an arbitration.

The position in respect of third party funding and the consequences of such within litigation and arbitration is fast developing. The use of funding in arbitration globally is, or appears to be, on the increase. Both Hong Kong and Singapore have recently introduced legislation to permit and regulate the use of third party funding in international arbitration. In Hong Kong the Arbitration and Mediation Legislation (Third Party Funding) Amendment Bill 2016 has been passed to permit third party funding of arbitration proceedings which are seated in Hong Kong.

In litigation matters, the court has the power to make non-party costs awards such that a third party funder could become potentially liable for the costs of the opposing party. Historically, only to the extent of the funding provided to that party. Elsewhere in Guru Stephen Innes of 4 New Square sets out the decisions of the court in the matters
of Arkin v Borchard Lines Limited and Others [2005] EWCA Civ 65 and Excalibur Ventures LLC v Texas Keystons Inc and Others [2016] EWCA Civ 1144 where the funder’s potential liability is explored further.

The rationale behind these decisions being that a funder who benefits financially if the funded party is successful, should not be able to avoid all responsibility for adverse costs in the event that the funded party is unsuccessful. The position is different in circumstances where a funder, or group of funders, provide a party with funds to run or defend a litigation in circumstances where the funders receive no direct benefit from the outcome. The court of appeal considered such a situation in the Hamilton v Fayed matter where the Hamiltons’ case was funded in part by friends and family who contributed as an act of charity, rather than to benefit from a successful outcome. The same would apply, in modern parlances, to matters which have been subject to social media or internet based funding or “crowd funding” as it is called. The individual contributors would not be liable for adverse costs if the litigation was unsuccessful.

So what is the position regarding third party funding and liability for costs in arbitration matters? The Arbitration Act 1996 deals with the process and procedures in an arbitration where the seat of the arbitration is in England, Wales or Northern Ireland.

In accordance with Section 61(2) 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 it is not appropriate in relation to the whole of part of the costs. The arbitrator has a wide discretion to deal with costs and who is to pay those costs and in the matter of Essar Oilfield Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361 (Comm), a decision of the arbitrator to allow the recovery, not only of legal and expert costs, but of the cost of funding those costs, that is the multiplier on the funded amount referred to above, was upheld by the court on appeal as being permissible in arbitration matters.

This decision makes the potential use of third party funding in arbitration matters a particularly attractive one as the additional costs associated with funding, which are irrecoverable in court proceedings (as per the 1987 decision in Hunt v RM Douglas Roofing), are potentially recoverable as expenses in arbitration.
There is also a question mark as to whether the costs penalties in *Arkin* and *Essar* apply to funders in arbitration matters as it is at least arguable that the arbitrator does not have the jurisdiction to make an award of costs against a non-party to an arbitration. However, the 2017 SIAC Investment Arbitration Rules provide in Article 35 that “The Tribunal shall have the authority to order in its Award that all or a part of the legal or other costs of a Party be paid by another Party. The Tribunal may take into account any third party funding arrangements in ordering in its Award that all or a part of the legal or other costs of a Party be paid by another Party.”

Of course an arbitration award is not of itself enforceable and would have to be turned into a judgment or order of the court before any enforcement could proceed. However, it seems unlikely that a funder, faced with an arbitration decision that it pay costs, would seek to contest the jurisdiction of the arbitrator unless it considered the award itself to be unreasonable, as to do so would not only potentially cause a conflict with its own funded client, but also damage the reputation of the said funder in relation to arbitration matters.

Whilst the decision in the matter of *Essar* may result in the use of third party funding in respect of arbitration increasing, the current legislation in the England, Wales and Northern Ireland does not provide for an arbitrator to make an award of costs against a non-party to the arbitration. Legislation has recently been changed in Singapore and Hong Kong to deal with the use of third party funding in these jurisdictions. It remains to be seen as to whether the UK will consider legislation to deal with third party funding or whether arbitrators will use their wide discretion regarding costs awards in relation to third party funders.

There seems little doubt that decisions such as the one in *Essar* makes the use of third party funding in arbitration matters a considerably more attractive proposition. With the increase in jurisdictions allowing third party funding, now more than ever, those practicing in international arbitration need to be in a position to advise their clients on the wealth of potential funding options available. If you are not talking to your client about third party funding, someone else will be.

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Recovery of costs in arbitration: where in the world?

Whilst a common concept for those of us conducting litigation and arbitration in the UK, costs shifting, the method by which the costs of the successful party is met by the unsuccessful party, is not universal. Indeed, globally, true costs shifting is the exception.

Whether you will be able to recover your costs is undoubtedly a consideration a party will want to have regard to, where they have the choice, when deciding which jurisdiction a claim should be brought.

Where parties are seeking to resolve their dispute by arbitration rather than litigation, it is open to the parties to agree beforehand the manner in which costs should be dealt with. Whether agreed between the parties, or perhaps adopted from pre-written rules – such as Article 42 of the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, which provides that the costs of the arbitration “shall in principle be borne by the unsuccessful party or parties” – it should be noted that the applicable lex arbitri (law of the place of arbitration) will prevail if there is a conflict between the institutional rules with the mandatory rules of the lex arbitri.

If there is no provision as to how the question of costs is to be dealt with in the arbitration agreement, or the lex arbitri makes no express provisions about costs, or both, the tribunal will have a broad discretion to allocate costs. The manner in which this is done will be influenced by the national rules and principles regarding the allocation of costs.

The table below sets out a brief summary of the recovery of costs of arbitration in different seats, which might prove a useful point of reference when considering where to hold any arbitration.
### Venue | Power to award costs
---|---
Vienna, Austria | As a general rule, the tribunal has a wide discretion when deciding the allocation of costs. In principle, all costs are reimbursable provided they are found to be reasonably incurred in pursuing the claim(s). In reaching a decision, the tribunal will take into account the circumstances of the individual case and the outcome of the proceedings.

Brussels, Belgium | There is no express provision for the allocation of costs in the Judicial Code. As such, the issue is left to the agreement of the parties. In absence of agreement, the allocation of costs is determined by the tribunal.

London, England | The tribunal has a wide discretion to allocate costs between the parties. In general, the loser pays the costs of the winning party.

Paris, France | The Code of Civil Procedure makes no specific provisions in respect of costs. The arbitrators generally have discretion to make an order for costs, which tends to result in an order the loser pay the costs of the winning party.

Munich, Germany | If there is no express agreement between the parties, the arbitral tribunal will allocate costs between the parties. Ordinarily, the losing party will be required to pay the costs of the winning party.

Budapest, Hungary | An arbitral tribunal can grant any remedy available to Hungarian courts, which includes orders for costs of the arbitration and legal costs.

Dublin, Ireland | If the parties have not agreed on the allocation of costs, the arbitral tribunal may allocate and award costs between the parties as it sees fit. The general rule is the loser pays the costs of the winning party.

Milan, Italy | The arbitrators are empowered to allocate the costs of the arbitration, including the costs of the arbitrator’s fees. If not paid, the court has the power to enforce any claim of the arbitrators for their compensation.

Amsterdam, Netherlands | There are no statutory provisions providing a mechanism for allocating arbitration costs. As such, the parties should agree any costs allocation between themselves.
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<thead>
<tr>
<th>Venue</th>
<th>Power to award costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Warsaw, Poland</td>
<td>Polish law does not provide any specific rules as to how costs will be allocated. The Polish Code of Civil Procedure provides for joint and several liability of the parties for the arbitrator’s fees and expenses, however.</td>
</tr>
<tr>
<td>Madrid, Spain</td>
<td>In Spain, the successful party can seek an order for costs against the defeated party.</td>
</tr>
<tr>
<td>Stockholm, Sweden</td>
<td>The arbitral tribunal has the power to award costs. The general rule is the loser pays the costs of the winning party.</td>
</tr>
<tr>
<td>Geneva/Zurich, Switzerland</td>
<td>The Swiss Private International Law Act (SPILA) is silent on the costs of the arbitral proceedings, but the losing party is usually ordered to pay the costs of the winning party.</td>
</tr>
<tr>
<td>Doha, Qatar</td>
<td>There is no specific provision for allocation of the costs of the arbitration in the civil and commercial code. Unless the parties have agreed otherwise, the QFC Arbitration Regulations allow the tribunal to allocate the costs of the arbitration and to fix the amount of such costs or part of such costs.</td>
</tr>
<tr>
<td>Abu Dhabi/Dubai, UAE</td>
<td>The arbitral tribunal is empowered with a discretion to allocate and award the costs of the arbitration. Usually costs will follow the event.</td>
</tr>
<tr>
<td>DIFC, UAE</td>
<td>A DIFC-LCIA tribunal has discretion to allocate and award the costs of the arbitration.</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>The tribunal will determine the allocation of costs between the parties.</td>
</tr>
<tr>
<td>Singapore</td>
<td>Costs may be awarded by the arbitral tribunal. Normally the loser pays the costs of the winning party.</td>
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A letter from the court revising deadline akin to an order says the TCC!

*Freeborn v de Almeida Marcal (t/a Dan Marcal Architects)* [2017] EWHC 3046 (TCC)

The court was required to decide whether the defendant needed to apply for relief from sanctions having filed and served its budget 7 days before, as opposed to 21 days before the CMC.

The defendant relied on correspondence from the court, which asked for budgets to be exchanged 7 days before the CMC. Coulson J held that the letter from the court amounted to an order and as such, no application for relief from sanctions was required. Coulson J went on to state that even if the defendant had been obliged to apply for relief, relief would have been granted under the *Denton* test as there had been no delay to the budgeting process, and there was good reason for the delay in serving the budget.

A non-literal interpretation of the rules gives the court the power to approve budgets retrospectively

*Sharp et al v Blank et al* [2017] EWHC 3390 (Ch)

The defendants sought approval of a revised costs budget. The claimants argued that the court had no power to approve the incurred element of the additional budget sought. The claimants relied on Practice Direction 3E, para 7.4, which states “…the court may not approve costs incurred before the date of any costs management hearing”. Their argument was that any incurred costs should therefore be ignored and dealt with at assessment.

Chief Master Marsh considered the wording of paragraph 7.4 of PD3E in his judgment and stated that this could not be read literally. If the claimants’ submission was to be accepted, the incurred element of the revised budget would fall into a “black hole”, which would lead to the eventual assessment of costs being fragmented. It was held that estimated costs which had been incurred by the time the hearing took place would still be treated as such, meaning the court has the power to approve them.

This guidance is far-reaching in terms of its application, as it relates not only to revised budgets, but all budgets. Given that multi-track budgets are generally required to be exchanged 21 days prior
to a CMC, it is inevitable that part of the projected costs will have been incurred by time the CMC hearing takes place. This appears therefore welcome guidance as it will apply to the majority of multi-track litigation matters.

**Conduct in the arbitration tribunal leads to adverse costs order – a cautionary tale**

*The Renco Group Inc v The Republic of Peru (UNCT/13/1)*

An UNCITRAL tribunal decided not to award the successful party costs, despite the provisions of Article 42(1) of the UNCITRAL Rules which establishes a presumption that the unsuccessful party should meet the successful party’s costs.

The issue as to whether The Republic of Peru (“Peru”) was “successful” was not contentious. The tribunal decided not to award costs due to Peru’s conduct during the arbitration proceedings, which included, inter-alia, a delay in raising objections to the tribunal’s jurisdiction. Peru raised objections regarding the tribunal’s jurisdiction some 3 years after the Notice of Arbitration was served. The tribunal stated that the proceedings would have been dealt with more efficiently if Peru had raised clear and specific objections at the outset.

The decision on costs was that the parties should bear their own, as well as the arbitration costs (split between the parties). This is a stark warning to litigants and practitioners that conduct in arbitral proceedings can have severe consequences on costs awards, as was the case for Peru, whose costs amounted to some $8.4 million.

**Court of Appeal upholds decision to disallow costs following fraudulent costs claim**

*GSD Law Ltd v Craig Wardman of St Gobain Building Distribution* [2017] EWCA Civ 2144

The claimant solicitor acted for 14 claimants in personal injury matters, all of which were successful and the claimants were awarded costs. Statements of costs for each action were served but agreement could not be reached. Bills of costs were subsequently drawn claiming considerably less than the breakdowns, and the matters proceeded to detailed assessment.

The detailed assessment proceedings dealt with all of the claims and the defendant filed and served “particulars of allegations”, alleging fraudulent activity. The defendant alleged that in each case the claimant had been systematically untruthful about the number of hours spent, as well as the hourly rates for which the clients were liable for, under their respective retainers. The judge subsequently found the allegations of fraud to be proven and disallowed all costs.
The claimant appealed on the basis that the allegations were not suitable for summary determination and that a separate civil action should have been brought by the defendant for fraudulent misrepresentation. The Court of Appeal dismissed the claimant’s appeal. The Court of Appeal felt that it was in the public interest to ensure that solicitors did not knowingly mis-certify costs claims, not least due to the consequences of paying parties losing confidence in the *bona fides* of such certificates.

**Pre-Jackson CFA’s can be assigned and success fees recovered, say the Court of Appeal**

*Budana v The Leeds Teaching Hospitals NHS Trust* [2017] EWCA Civ 1980

The Court of Appeal have held that a CFA which is incepted prior to the Jackson reforms can be transferred even after the introduction of the reforms, so as to preserve the ability to recover additional liabilities (i.e. success fees and ATE premiums).

Gloster LJ and Beatson LJ held that the transfer in this case amounted to a novation, as opposed to an assignment. However, the court held that irrespective of whether the transfer of the CFA was a novation or an assignment, the additional liabilities remained to be recoverable. Davis LJ stated that deciding otherwise would “frustrate the policy” underlying the reforms, and to deny the claimant the recovery of a success fee simply because new solicitors were appointed would rephrase the defendant of paying those costs “by virtue of adventitious technicality”.

**Court of Appeal refuse to allow more than fixed costs in a provisional assessment, where costs were awarded on the indemnity basis**

*W Portsmouth and Co Ltd v Lowin* [2017] EWCA Civ 2172

The Court of Appeal upheld an appeal against the award of costs in excess of the provisional costs limit, in circumstances where the costs of assessment were awarded on the indemnity basis.

The court held that, had it been intended for the cap of £1,500 to be dis-applied where indemnity costs were awarded, the rules would have expressly stated this. The costs cap did not prevent the provisional assessment costs from being assessed on the indemnity basis, nor did it affect the quantum of costs being assessed. It merely inhibited the amount which could be awarded following assessment on the indemnity basis. The costs cap was therefore neither dis-applied or modified.

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