



Module 11A: Costs and Interest in Arbitration

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Costs and Interest



- Practice to order losing party to pay part of winning party's costs in Hong Kong , England and other commonwealth countries
- Tribunal must consider parties' legal cultures, provision of rules chosen and their expectations in awarding costs
- Term 'costs' can be divided into 2 categories:
 - Costs of arbitration
 - Costs of parties

Costs of the Arbitration



- Costs of reference
- Costs of arbitration include fees and expenses of:
 - Arbitrators
 - Administering institution or appointing authority
 - Experts appointed by arbitral tribunal
 - Administrative secretary
 - Other incidental expenses incurred by arbitral tribunal

Costs of the Parties



- Costs of parties include fees and expenses of:
 - Lawyers representing parties
 - Preparation and presentation of case
 - Any experts involved in dispute
 - Any witnesses
- “Hidden” costs may be claimed, although rare
- Rules chosen by parties may provide guidelines or indication of what party might claim

Costs under HK Arbitration Ordinance



- Tribunal may include in award directions as to costs of arbitral proceedings
- Tribunal may take into account written offer of settlement and direct in award apportionment of costs
- Tribunal may order party to pay costs of order of direction issued (e.g. interim measure)

Costs under HK Arbitration Ordinance



- Provision in arbitration agreement stipulating that parties must pay own costs is void, unless part of a “compromise” (S.74(8) and (9))
- Tribunal rendering its award has many options with apportionment of costs
- Costs in Hong Kong awarded to successful party on a :
 - Party to party basis
 - Common fund basis
 - Indemnity Basis (more rare)

Costs under HK Arbitration Ordinance



- Customary for parties' counsel to make submission on costs either at close of hearings or in post-hearing briefs
- Parties' counsel set out fees and expenses expended by or on behalf of clients and make legal or circumstantial arguments as to amount tribunal should award
- Cost-effectiveness plays important part in Hong Kong's ADR arena (since Civil Justice Reform in 2009)

Assessing the Costs



- Tribunal not obliged to follow scales or practice adopted by Hong Kong courts
- Tribunal should only allow costs that are reasonable having regard to all circumstances
- Tribunal may allow costs incurred in preparation of arbitral proceedings prior to commencement of arbitration, unless agreed otherwise (S.74)
- Tribunal may wish to penalise a party because of conduct during arbitration proceedings

Assessing the Costs (cont'd)



- Tribunals reluctant to order unsuccessful party to pay entirety of winning party's legal costs
- Obligation of conducting proceedings efficiently and without undue expense to guide tribunal in assessing party's claim for costs
- Other controversial issues relating to costs:
 - Success fees and contingency billing
 - Awarding fees on an hourly rate basis or on an ad valorem basis
- Courts reluctant to intervene where tribunal has made an order for costs

Limiting Recoverable Costs



- Hong Kong Arbitration Ordinance permits tribunal to set in advance cap on recoverable costs
- Successful party will only received from losing party the maximum agreed in advance by parties or set by tribunal, regardless of amount spent

Offers to Settle



- Payment into court
 - Amount or existence not disclosed until end of procedure
 - If plaintiff refuses payment and is awarded less than amount paid into court, it will be ordered to pay wasted costs
 - Payment may be made into court as offer in settlement of arbitration
 - Requires action in Hong Kong court
 - Payment may be made to neutral stakeholder (ex. HKIAC)

Offers to Settle (cont'd)



- Sealed offer
 - Parties deliver sealed envelope to tribunal and request that it only be opened after decision on merits has been reached
 - Envelope will be opened only to assess reasonableness of parties' position
 - Recognised in Hong Kong law

Taxation under HK Arbitration Ordinance



- Parties can agree that court will assess costs of proceedings
- Unless arbitral tribunal addresses it, award deemed to include costs to be taxed by court (s.75(1)(a))
- After taxation by court, tribunal must make additional award
- Taxation by court not subjected to appeal (S.75(3))
- Rare for parties to ask Hong Kong courts to tax costs

HKIAC Administered Arbitration Rules



- Art. 36 provides detailed provisions to guide tribunal in determining costs of arbitration
- Parties free to choose how arbitrators should be compensated
- If parties choose fee schedule for tribunal's fees, these are fixed by HKIAC Council

Interest



- Purpose of interest
 - Not to penalise losing party, but compensate winning party's loss of use of money
- Types of interest
 - Pre-award interest (S.70)
 - Interest on sums awarded either from date of award or other date, until paid (S.80(2))

Interest (cont'd)



- Rate of interest
 - Tribunal has discretion in awarding interest
 - Unless otherwise provided, judgment rate of interest applies to sums awarded until they are paid in full
- Simple or compound interest
 - Simple interest: interest on amount awarded until paid in full
 - Compound Interest: interest payable on interest
- Party may request additional award if it asked for interest and tribunal failed to award it (S.69(1)(3))

Q&A



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