English court retains power to award costs after arbitration challenge dismissed

Written by **ELIZABETH KANTOR & CHARLIE MORGAN**

In *Viking Trading OU v Louis Dreyfus Suisse SA* [2023] EWHC 2160 (Comm) the English Commercial Court clarified its discretionary power to grant costs of defending a s69 application under the English Act (Act) for permission to appeal an arbitral award, even if costs were not initially sought.

This decision provides helpful guidance on best practice for recovering costs in this and other arbitration-related claims.

Background

Viking attempted to appeal an arbitration award under s69 of the Act alleging various errors of law (the **Application**). Louis Dreyfus Suisse (LDC), the respondent, opposed the Application but did not initially seek to recover its costs. After Viking's application for permission to appeal was dismissed, LDC requested payment of its costs by Viking. When Viking refused, LDC applied to court for a costs order, and the judge awarded LDC £20,000 subject to Viking's right to challenge that order.

Viking subsequently challenged the order, arguing that (i) the court had no jurisdiction to make the order because its jurisdiction ended when it dismissed the application for permission to appeal; (ii) the general rule is that no party is entitled to recover their costs if the order does not mention costs; and (iii) £20,000 was excessive in any event.

Decision

Bright LJ emphasised the court's residual discretion to award costs after the fact ("ex post facto") but cautioned that this discretion will not be exercised lightly. He noted the lack of clear guidance on when and how a respondent should seek its costs in such cases and upheld

his decision to award costs in this case. However, he reduced LDC's recoverable costs to £17,500 and further reduced that amount to account for a small award of Viking's costs incurred since the Order.

Nevertheless, Bright LJ considered the argument to be *"a close-run thing"*, and he commented that he *"would not want any practitioner or litigant who may read this judgment to assume that every respondent who successfully opposes an application for permission to appeal under s. 69 of the Arbitration Act 1996, but neglects to ask for costs when doing so, will invariably receive the benefit of a similar exercise of discretion. On the contrary, they should assume that they will not."*

Comment

Bright LJ offered guidance on how respondents should approach costs in s69 application emphasising cost control, the importance of stating the desire for cost recovery in a respondent's notice and the potential to provide a statement of costs along with the respondent's notice and skeleton. He warned against causing unnecessary costs, which would be reflected in the judge's decision.

This case underscores the importance of seeking costs upfront to avoid inefficiencies. While cost recovery is discretionary and case-dependent, this decision provides useful guidance for s69 applications and potentially other claims under the Act.

For more information, please contact Charlie Morgan, Partner, Liz Kantor, Professional Support Lawyer or your usual HSF contact.

About the authors

Elizabeth Kantor

Liz is an experienced international arbitration lawyer and solicitor advocate. She was admitted as a solicitor in England and Wales in September 2011 after completing her training contract at Herbert Smith Freehills LLP. Liz has spent her entire career in the international arbitration team at Herbert Smith Freehills LLP, in both the London and Singapore offices. She extensive experience of acting as counsel in large and complex international commercial and investment treaty arbitrations under all the major arbitration institutions. She recently became a professional support lawyer for the Herbert Smith Freehills LLP global arbitration team.

Charlie Morgan

Charlie has broad experience helping clients to resolve complex commercial disputes in the energy and technology sectors.

Charlie is an arbitration specialist, acting as counsel and advocate in ad hoc and institutional arbitrations in a number of jurisdictions. His experience includes resolving contractual and non-contractual disputes arising from clients' high value, strategic projects and transactions in energy, digital transformation and emerging technologies. He has acted for clients in disputes arising from shareholder and joint venture claims, investor-state contracts and treaty protections, VC investments, outsourcing projects, software development and purchase agreements, crypto and digital asset transactions, data migration and cloud computing.