I plead guilty to suggesting the inclusion of "Ouch" in the title for tonight, but before I get there I am going to raise a few short points, in no particular order, save that those which have a link with "Ouch" will come towards the end.

Costs of seeking security

First a grouse. Arbitrators can only order the payment of costs of the arbitration unless there is some special agreement to the contrary, something which I have never seen.

The costs of an arbitration do **not** include the costs of seeking or obtaining security to cover any eventual award, or the costs of enforcement, for example of an interim (or partial) award.

That ought to be self-evident. Yet time and again, the schedules in support of costs assessments cover just such matters, and reference is made to two High Court decisions in attempts to persuade us that because judges have the power to award costs of seeking and obtaining security etc., so do we.

Those decisions are based on the Rules of Supreme Court and/or the CPR. They have nothing to do with the Arbitration Act, which allows us only to award *costs of the arbitration*. It would be nice - and it would save some unnecessary costs - if people would take this point on board and stop trying to recover the irrecoverable.
Interlocutory costs orders

Since the Woolf reforms, the courts increasingly order that the costs of interlocutory applications be paid by one party or the other in any event. Arbitrators are similarly taking that approach more and more. We generally do not think it appropriate to assess and make orders for payment of those costs on an interim basis, preferring to leave such matters until the end of the case, but that does not mean that we do not make the orders in principle; and I think it likely that we shall do so more and more often. Practitioners should be aware of this because it might (but I do not have much hope that it will) discourage hopeless, cost-wasting applications.

Capping costs

One application that arbitrators sometimes themselves make, but with pretty increasing hopelessness (at least in the maritime field), is to ask the parties if they would agree that costs should be capped. (Note that the capping of costs under s 65 of the Arbitration Act does not – contrary to popular belief – limit the amount of costs that may be incurred in a case. All it does is to limit the recoverable costs of a successful party.)

One might think that parties would often be interested in the idea of having recoverable costs limited, but that appears not to be the case, for in my experience, whenever we ask (invariably through lawyers) whether a cap should be imposed, the joint answer is, in 99 cases out of 100 "No". Of course, when parties agree to something like this (and we have to assume that it is the parties themselves who have agreed), there is nothing we can do to the contrary.

I fear there may be a reason for this, which I will touch upon later when I come to the "Ouch" part of my presentation.
Security for costs

Security for costs can of course be ordered, in appropriate circumstances, against a claimant, including a counterclaiming respondent. In my experience applications for security are being made with increasing frequency. On the whole, they are not generally too difficult to deal with.

Often the main problem is to decide whether the respondent has sufficiently shown grounds for the ordering of security so as to shift the burden of proving the contrary on to the claimant. In shipping, because of where parties are incorporated (e.g. Liberia and Panama) it is often difficult for a respondent actually to show the financial standing of a claimant, so he must frequently rely on circumstantial evidence, e.g. the fact of the registration in a place such as Panama and, perhaps, that the company's only asset – usually a ship – has been sold and the respondent has not been able to trace anything else. The other problem is normally as to the level of security, but this again comes under "Ouch".

One question that arbitrators ask themselves is what, if any, reasons they should give for ordering or not ordering security. My own feeling is that very brief reasons ought, in all fairness, to be given, but they should probably not extend beyond something such as "The respondent has sufficiently satisfied us that the claimant's financial situation is such that it ought to be ordered to provide security". When it comes to dealing with the figures I do not think any particularisation should be provided, and that there should be a fairly bland statement such as "Taking everything into account and doing the best we can, we think that justice will be done if we order £X by way of security".

Assessing costs

At the end of the case costs may have to be assessed. My experience is that this happens pretty rarely as it seems that, in most instances,
parties' lawyers are able to agree. I am not persuaded that this is
necessarily a good thing, but again I shall come back to that.

When we do have to assess costs, we find it helpful to have fairly detailed
schedules including, in particular, timesheets showing how much time is
said to have been spent by whom, and doing what. And in a large case I
find it desirable for at least one member of the tribunal to spend some
time going through the files of the successful party's solicitors against
such a time sheet. I have found that very informative, sometimes
persuading me that work which, on looking at the schedule, I thought was
unnecessary or excessive was in fact necessary and justifiably took the
time claimed. On the other hand, the contrary can be the result of such
an examination.

My experience of assessing substantial bills is that they usually fall to be
reduced by something in the region of 20 or 25%. This is not mainly
because of any question about the rates, which generally seem to be
fairly universally accepted now, but rather because of it appearing that
excessive work was done that cannot reasonably be charged for.

Whilst talking about assessment, it is important to remember that in the
absence of any special provision in the arbitration agreement, or other
agreement between the parties, there is no summary assessment
procedure available - at least in my view. That may not be a bad thing
since the practise of summary assessment, with each side putting in its
own schedule, has in some instances led to judges assuming that because
the schedules are more or less matching, the costs being claimed are
reasonable. However, in a recent case in the Commercial Court, Mr
Justice Males said:

> It is important that the message should go out loud and clear that the
> Commercial Court will not assess costs summarily in such disproportionate
> amounts merely because the figures on both sides are broadly comparable. Control will be exercised to ensure that the costs claimed
> from the unsuccessful party are reasonable and proportionate.
And this brings me to the "Ouch" part of what I have to say. Mr Justice Males was speaking in the context of a 1-day hearing of an application to continue an injunction. Including work relating to an earlier "without notice" hearing, the claimant sought costs of £242,000. The defendants' statement of costs, which did not of course cover the "without notice" hearing, was put at £165,000. The judge held that the costs incurred on both sides were grossly disproportionate and awarded the successful defendants only £75,000 out of the £165,000 they claimed.

Although Lord Justice Jackson, in his recent report, said that no one in the Commercial Court is seriously concerned about costs at all, that is not the case, at least as regards the judges. And it certainly should not be taken to be the case in arbitration, at least as regards the arbitrators and at least some parties.

On the contrary, many arbitrators are concerned about the level of costs being run up nowadays, and this is something that should also concern practitioners, because London arbitration – and I speak not only of maritime arbitration – is rapidly gaining a reputation for being the most expensive in the world. Whether that is justified or not is not the point: perceptions are everything in this kind of situation.

I know it has been said that this is a universal problem in international arbitration: see for example comments by the Chief Justice of Singapore at a recent conference of the Chartered Institute in Malaysia. Whether he is right about the problem being so widespread or not, it certainly does seem to be a difficulty for London. And with competition from centres such as Singapore getting hotter by the day, we cannot afford to ignore this perception.
Why are costs so high and rising?

Numbers

It seems to me that one of the reasons is the involvement of extraordinary numbers of people in case-handling. In almost every arbitration I see nowadays, there is not just a single case-handler on one side. In small cases there seem always to be 2 or 3 and in anything of any substance there may be 5 or more, all of whom have to be copied in on every email. And on those occasions when one sees a costs schedule with timesheets, one often sees the same or strikingly similar work apparently being done by different people at around the same time. Some of this absolutely has to be duplication, and from what I have seen when assessing costs, quite a large part of it is.

Churning

I will be accused of cynicism, but I am firmly convinced that in some instances there is "churning" going on, i.e. people doing or re-doing work unnecessarily. In some instances there is creative timekeeping: timesheets being filled in dishonestly. And I am sure that there are a lot of unconscious processes of this kind. After all, there is enormous pressure on assistants to show that they have worked large numbers of hours, sometimes more than are considered to be humanly possible. How are they to do that without a deal of inventiveness?

I of course see these things at a couple of removes, but my impressions have recently been reinforced by a commercial silk whose practice is very much arbitration-oriented, though he does not do shipping work, and I think James Drake can also confirm this. The silk I refer to is frequently horrified by the numbers of individuals involved in one case at his instructing solicitors, most of them unnecessarily in his view. A Commercial Judge has also made the same point to me.
Aggression

Another factor is the extraordinary level of aggression one sees in the conduct of interlocutory matters. In a recent application for security for costs, the respondents' solicitors opened their written submissions by saying that the claim was "hopeless, defamatory, misconceived and ill-intentioned" as well as "unmeritorious" and went on to say that the respondent was incensed, that the fees were an outrage and the claimants' allegations wantonly scandalous. There was more of the same kind of thing.

None of this had any relevance to the application to security for costs. Indeed such points are unlikely to be relevant to almost any interlocutory application. However, solicitors are nowadays endlessly arguing the merits of cases in interlocutory exchanges, to absolutely no purpose whatsoever. The result is that temperatures are raised, responses written which become lengthy and vitriolic, arbitrators have to read all this stuff and take out of it what is essential, and of course everyone's charges go up.

Prolinity

Then there is prolixity. The security for costs application just mentioned, which is sadly far from untypical, ran to 19 pages, some 9,500 words. 500 pages of annexures were attached. 13 of the 19 pages related to legal arguments in respect of the ordering of security for costs, including references to the CPR (once again irrelevant), 10 citations of articles or books, 8 references to authorities (some from Australia and Canada) and 29 quotations overall. The whole application could have been made in 2 or possibly 3 pages, with only a handful of annexures.

Should clients have to pay for this kind of thing? Should the other side? I leave you to answer those questions for yourselves.
All this demonstrates a terrible lack of focus on the part of those who write such communications. I am told that much of the aggression is in order to impress clients who are routinely copied in on inter-party communications. If that is right and the clients are indeed favourably impressed, then they are sorely mistaken, because nothing useful is achieved by this kind of conduct – except from the point of view of the lawyers, who can of course charge for it.

Copies to arbitrators

There are also the practices of copying every communication to arbitrators, and of making applications without seeking first to reach agreement with opponents. Arbitrators have to read, and they therefore charge for, everything that comes in to them. But if people take sensible approaches and try to agree interlocutory matters they are often able to do so, more quickly and cheaply than applying to a tribunal. And this is conducive to a more cooperative attitude throughout a case, which can only help keep costs down.

The risks in all this

The risk, of course, is that parties who complain about the cost of London arbitration are going to start going elsewhere, but we will not see that happening immediately because disputes usually arise long after an arbitration clause has been agreed. For all I know, parties may already be opting for other centres when they sign their contracts. If so, we will only see the results in a couple of years' time or possibly even longer, but when they come they may be dramatic and practically irreversible. Just look at the remarkable diminution in work for the New York Society of Maritime Arbitrators over the past 10 or 15 years. It has been both substantial and rapid.
Back scratching

I think another cause of difficulties for us may lie in what I call "back scratching", i.e. "You scratch my back and I'll scratch yours". I should be interested to hear whether Mark Hook believes this goes on, but it does strike me as being remarkable that in so many cases, both firms of solicitors will say that they do not want costs to be capped. Have they, I wonder, consulted their clients, and if so, have they explained to them the full ramifications of a costs cap?

It is also striking how many costs claims seem to be settled between solicitors. Assessments, at least in arbitration, are a relative rarity. There is of course much to be said for matters being dealt with by agreement wherever possible, but I still recall that when I worked in a firm of solicitors, 40-odd years ago, there was an attitude prevalent between costs clerks (as they were called) in various firms, based on the premise that today's solicitors for a paying party would be tomorrow's solicitors for a claimant party, and therefore it was undesirable to be too harsh on one another when examining costs claims. Whilst that is a perfectly understandable posture, it does not serve the interests of the clients. Can that culture really have changed?

Some of you may have a reaction of "Ouch", or outrage at some of the things I have said. I make no apology for that: I think they need to be said and I fear that if nothing is done we will be saying "ouch" for a very different reason, namely the loss of work.

Arbitrators' charges

Let me finish with a word about arbitrators' fees. In a recent ICC survey it was said that only 16% of the costs of any arbitration are made up of the arbitrators' fees (and possibly expenses). That survey was on what are called international arbitrations, not maritime ones, where I suspect that the percentage is generally considerably lower. That is not to say
that the fees do not sometimes appear high. In those cases it is usually because of the amount of work to which arbitrators are put, often entirely unnecessarily.

But sadly there are a few individuals who have an inflated sense of their own value and think that, because their more experienced (and perhaps more successful) peers charge £x per hour, they are entitled to do so too, although they may only be half as efficient as those colleagues.

And I am aware that there are some who wait to find out what their colleague or colleagues are charging in a particular case, when those colleagues have done most of the work, and then pitch their own fees at slightly less. That too is unjustifiable and reprehensible, and I and most of my colleagues do what we can to face down such demands, but it is not easy.

So far as I know it has been many, many years since anyone challenged arbitrators' charges in court, at least publicly. In a way I think that is a pity because it leaves us with no objective guidance as to what may reasonably be charged. No doubt as much as anything that is to do with the costs of mounting a challenge which may not be felt to be justified unless the arbitrators' charges are very high indeed, but I suspect also it has a lot to do with a fear on the part of lawyers and possibly parties that if they do challenge arbitrators' fees, they may not get a fair hearing in future. That attitude, if I am right, would be perfectly understandable, although unfortunate.

**Conclusion**

The real cost in arbitration is that of the lawyers and those they employ, such as experts. I think most cases now are over-lawyered, over-argued and handled excessively aggressively. We risk losing our position as the world's leading arbitration centre if this continues. James Drake, I know, has some concrete ideas for reducing costs in other ways, but I fear that
unless the matters I have mentioned are addressed seriously, the risk will not go away. Indeed, I fear it may already be too late. Remember the definition of a pessimist: an optimist who has experience. Thank you.

Bruce Harris