Make them an offer they can't refuse

► *Simon Tatham*

Regular columnist Simon Tatham looks at the pitfalls of negotiating an award and how best to increase your chances of avoiding being ordered to pay your opponent's costs

Sometimes resort to the courts or arbitration is unavoidable. Fortunately for clients' pockets, and our blood pressure, this is quite a rare event. One factor that encourages parties to settle their differences amicably is the risk that they could, in addition to paying their own legal costs, be faced with an order to pay the other side's costs as well: the English law principle that costs follow the outcome and 'winner takes all'.

When you add arbitrator or court fees this can amount to a hefty exposure. That you have been ordered to pay an award of damages and both sides' costs is unlikely to win friends and influence when reporting to the company board.

I am therefore going to talk about the artful science of making 'open offers'. This is a tactical device open to any party and designed to avoid such an outcome. It is means by which an offer to settle is made with the purpose of throwing the risk of legal costs on to your opponents. Technically these are known as 'without prejudice save as to costs' offers. At this point I suspect many readers will be turning the page to examine the latest DP or ballast water treatment system, but for those who have not yet had their fingers burned please bear with me.

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A simple example of this working is in salvage cases. Let's assume you are the respondent property owners of ship or cargo and you consider 10 per cent of the salved fund is a fair figure for a quick settlement, but the advice you receive is that an award could be 15 per cent. However salvors are holding out for 20 per cent.

The parties are far apart and the matter proceeds. If nothing is done to protect the position, you will inevitably be faced with an order to pay the claimants' costs whether the award is low, as you predicted, or high as salvors would have it. They may not recover every penny, as only reasonable costs are allowed, in descretion of the tribunal. Roughly you would expect to have to pay at least two thirds, but frequently more.

There are three key issues to think about if you are to make an effective offer that is to throw the risk of costs on to the opponents: when, at what level and in what precise terms should you make the offer?

As to the precise terms, you will need to take advice. As to timing, the earlier the better and certainly no later than a month before the hearing when the costs will really begin to escalate. The crucial question is how to pitch it at the right level to ensure maximum protection? This can be agonising.

Firstly, because it is difficult to predict with any precision the arbitrator's award. Secondly, because you may have held back in negotiations from putting your best figure forward, but now feel compelled to do so. Thirdly, because if the offer does not equal or exceed the eventual award, you will still end up paying the claimant's costs. Fourthly, the offer may, of course, be accepted leaving you wondering if you had paid too much.

It is best, and I say this with the benefit, if I am honest, of bitter experience, to pitch the offer at the very highest level that you can steel yourself to make. This may have to be higher than your best figure and it may be outside your comfort zone. But there is simply no point making an ineffective offer. It must have a realistic prospect of equalling or beating the award. If it does not make the claimants really sweat, then it is too low. It needs to instil in the opponents' camp a serious worry and real risk that they will end up paying all the costs of taking the matter forward. In a modest case this may still be more than £100,000.

Where claimants are being wholly unrealistic in their expectation of a salvage award this becomes quite interesting and to a degree nerve-racking. It now pays to ascertain the opponents' bottom line, this with a view to pitching your offer at the highest possible level at which you are certain, or at least as confident as you can be, that they will reject it.

You test the water, reopening discussions at 12.5 per cent. Your opponents eventually indicate that they will accept 18 per cent with interest and costs, if offered, but no less. Your 15 per cent is then rejected. You could make the formal offer at that level, but cannot be confident that this will be effective, given the risk that the arbitrator may go higher. You prefer to have a greater margin of safety even if this means pitching it higher than your top figure. You call the opponents one last time and ask, without commitment, whether they would go for 17.5 per cent, if offered. Again they say no.

Now you strike, serving your formal offer in writing at 17.5 per cent with interest and costs to be assessed by the arbitrator if not agreed. It is not accepted, as you predicted. In four months' time when the award is to be made you have the comfort of a reasonably good insurance against exposure to costs. Good luck!

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In brief

Indonesia summoned the British ambassador after a ship operated by a British company ran aground on a coral reef, causing extensive damage. Expedition cruise ship, the 4,290-ton ***Caledonian Sky*** was refloated with tug assistance after it went aground on a popular dive site reef at Raja Ampat, Indonesia, causing superficial damage to its hull, but extensive damage to the reef.

A barge being towed by the tug ***Meredith Reinauer*** that ran aground near Catskill, New York, was later refloated on the evening tide. After visual inspections, the tug continued its journey northward to Albany, escorted by the tug ***Mary Kay***. Following an inspection, the US Coast Guard said there were no signs of pollution.

As *IT&O* went to press, US Coast Guard response and incident management teams were co-ordinating with G & H Towing and T & T Marine Salvage to prevent disabled tug ***OSG Independence*** and its barge running aground on Galveston Island, after they got into difficulty in high seas.

Euronav Ship Management has contracted SMIT Singapore and PT Samudera Indonesia to undertake the refloating operation of its crude oil tanker ***M/T Alex***, which was involved in a grounding incident between Borneo and Sumatra.