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FOR ADOPTION

ICC REPORT ON DECISIONS AS TO COSTS IN INTERNATIONAL ARBITRATION

Summary and highlights

This Report was prepared by the ICC Commission on Arbitration and ADR (the “Commission”) and its Task Force (TF) on “Decisions as to Costs”. The document listed above (and attached) is being submitted to the Executive Board for adoption.

The Commission is committed to its effort to provide users of international arbitration with the means to ensure that proceedings are conducted in an effective and cost efficient manner. Following the significant revisions to the 2012 ICC Arbitration Rules encouraging greater control of time and costs in proceedings; the 2012 Report on ‘Techniques for Controlling Time and Costs in Arbitration’ and the Guide on ‘Effective Management in Arbitration: A Guide for In-House Counsel and other Party Representatives’ in 2014, this Report is the Commission’s latest initiative to ensure that ICC arbitration continues to be a viable and attractive form of dispute resolution for its users and promote improved management of time and costs.

ICC National Committees and Groups were called to nominate Members to the Task Force on “Decisions as to Costs” (“TF”) on 04 January 2011. A first kick off meeting was held on 9 February 2012 followed by five other meetings, the last one was held in February 2015. Several draft reports and working documents were circulated to the TF and its members were invited to comment. The draft Report was initially composed of two Parts: Part I was discussed at the Commission meeting of the Commission on Arbitration and ADR in Paris on 15 May 2014. Part II, which was integrated in a consolidated draft Report, was extensively discussed at the Tokyo Commission Meeting on 18 October 2015. Various drafts documents were also submitted to all National Committees ahead of each commission meeting encouraging them to provide any comments they may have. The Commission unanimously approved the Report at its meeting in Paris on 7 May 2015, while authorizing the Drafting Group to make the necessary minor changes in light of the comments made.

Key Features and the added value of the Report

Given the fact that the vast majority of costs incurred in international arbitration proceedings (83% on average) are party costs including lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration, it was decided to examine the specific role of arbitrators and counsel in managing these costs. The ICC Commission mandated the ‘Task Force on Decisions as to Costs’ to study the various considerations that an arbitral tribunal could take into account in making decisions

1 The calculations were based on 221 ICC awards from 2012.
Continued from: ICC Report on Decisions as to Costs in International Arbitration

as to the costs of the arbitration, including the nature and allocation of any costs. By compiling these considerations, the objective of this Report is to inform users how arbitral tribunals may allocate costs in accordance with the parties’ agreement and/or any applicable rules or law, with a view to controlling time and costs effectively and to assist in creating fair, well-managed proceedings which meet the expectations of users. Under the ICC Arbitration Rules, an arbitral tribunal has discretion to allocate costs and this discretion remains unaffected by the content of this Report. Therefore, this Report does not establish guidelines or checklists and is not intended to be prescriptive or to endorse any particular practice or approach.

With this objective in mind and while there was a lack of clarity as to prevailing approaches and practices, the TF undertook the following initiatives and studies:

a) National Committees and other representatives from 41 ICC member states completed a detailed survey of questions regarding approaches to costs pursuant to national laws. (Appendix B)

b) In order to identify the various approaches applied by ICC arbitral tribunals, the Secretaries to the ICC Commission undertook a comprehensive study of ICC awards to identify the ways arbitrators have dealt with costs allocation; (Appendix A)

c) Eight other major arbitral institutions were invited to provide the TF with separate studies of awards under their respective rules to identify the way arbitrators have dealt with costs allocation. The following institutions provided such an overview: the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA), the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC); (Appendix A)

Based on the work completed in accordance with the TF’s objectives and each of the initiatives undertaken, the Report reveals a number of interesting issues and aspects of costs allocation in the practice of international arbitration and is divided as follows: Section I and II introduce the Report, and are followed by Section III summarizing the overriding observations resulting from the studies of awards and the survey of national practice in litigation and arbitration regarding costs. It includes issues such as treatment of third party funding, cost-capping and disparity (or inequality) of costs between parties. Section IV discusses effective costs management by identifying techniques and approaches, at different stages of the arbitral proceedings, which improve costs efficiency in arbitration including how arbitrators (and parties) may utilise costs allocation powers. Based on the studies of arbitral awards and national court practice, Section V provides for an analysis on costs allocation considerations that a tribunal may in its discretion take into account in making decisions on costs at any stage of the proceedings or in fixing and allocating the costs of the arbitration in the final award. Sections VI and VII include discussions on specific cost-related challenges arising out of funding arrangements and settlement negotiations after which the Report concludes in Section VIII.

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ICC REPORT ON DECISIONS AS TO COSTS IN INTERNATIONAL ARBITRATION

Prepared by the ICC Commission on Arbitration and ADR
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In international arbitration, no party has an automatic right to recover any costs of the arbitration defined by Article 37(1) of the ICC Arbitration Rules of 2012 as including the fees and expenses of the tribunal and the arbitral institution, as well as the reasonable legal and other costs incurred by the parties. Article 37(1) requires the tribunal only to fix the costs of the arbitration in its final award and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. Some arbitration rules incorporate a rebuttable presumption that the successful party may recover such costs from the unsuccessful party, including the CIETAC, DIS, LCIA, PCA and UNCITRAL Rules.

The considerations contained in this Report are compiled to inform users of arbitration how tribunals may allocate costs in accordance with the parties’ agreement and/or any applicable rules or law, with a view to controlling time and costs effectively. However, a tribunal’s discretion to allocate costs remains unaffected by the content of this Report. In particular, the fact that a tribunal does not take into account any or all of these considerations in its decision and allocation of costs is not and cannot be a basis upon which to dispute or challenge that tribunal’s exercise of its discretion to allocate costs.

This Report does not endorse any particular approach to requests for costs and it does not establish guidelines or checklists.
I. Introduction

1. The ICC Commission on Arbitration and ADR ("ICC Commission") seeks to continue to provide users of international arbitration with the means to ensure that proceedings are conducted in an effective and cost efficient manner.

2. The vast majority of costs incurred in international arbitration proceedings (83% on average) are party costs including lawyers’ fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration. A much smaller proportion is costs of arbitrators and administration.²

3. Accordingly, significant work already has been undertaken by the ICC Commission on controlling time and costs with a focus on controlling party costs. Earlier initiatives include the 2014 Guide on ‘Effective Management in Arbitration: A Guide for In-House Counsel and other Party Representatives’, the 2012 Report on ‘Techniques for Controlling Time and Costs in Arbitration’³ and revisions to the ICC Rules of Arbitration adopted in 2012 (the “2012 ICC Rules”).

4. The 2012 ICC Rules introduced two new additions to encourage greater control of time and costs in proceedings by arbitrators. Article 37.5 provides that:

   “In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.”

Appendix IV of the ICC Rules further provides examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and costs. One of the objectives of these techniques is to ensure that time and costs are proportionate to what is at stake in the dispute.

5. It became apparent in the preparation of this Report that arbitrators’ approaches to costs allocation are often influenced and informed by practice in the national courts and/or under national laws of the jurisdiction of the parties, arbitrators and/or place of arbitration. There are generally two basic approaches in national systems: the loser pays the successful party’s costs (sometimes called ‘costs

² The calculations were based on 221 ICC awards from 2012.
follow the event’); or each party pays its own costs regardless of the outcome. These approaches are understood differently and applied in different ways in different national systems.4

6. In international commercial arbitration, various broad practices and expectations are emerging in relation to costs allocation. However, there is little written about these and there is a lack of clarity as to prevailing approaches and practices. This Report seeks: (a) to identify the various approaches applied by arbitral tribunals by analysing costs decisions in ICC awards under both the 2012 ICC Rules and the ICC Rules of Arbitration adopted in 1998 (the “1998 ICC Rules”), as well as awards from eight other major arbitral institutions; and (b) to identify differences in underlying national systems and laws.

7. Overall, the object of this Report on ‘Decisions as to Costs’ is to consider how costs allocation between the parties can be used effectively to control time and costs and to assist in creating fair, well-managed proceedings which meet the expectations of users. This Report is neither intended to be prescriptive nor to endorse any particular practice or approach. Given the nature of international arbitration and the centrality of party autonomy and flexibility, no single, universal approach to costs allocation exists.

8. With this objective in mind, the ICC Commission established the ‘Task Force on Decisions as to Costs’ and the Task Force undertook the following initiatives:

(i) the Task Force members met five times to develop a framework for its work and this Report;

(ii) representatives from a number of ICC member states completed a detailed survey of questions regarding approaches to costs pursuant to national laws;5

(iii) the Secretaries to the ICC Commission, Hélène van Lith and Anne Secomb, undertook a study of ICC awards to identify the ways arbitrators have dealt with costs allocation;6

(iv) the China International Economic and Trade Arbitration Commission (CIETAC), the Hong Kong International Arbitration Centre (HKIAC), the German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration (PCA), the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC) undertook separate studies for the Task Force of awards under their respective rules to identify the way arbitrators in each system have dealt with costs allocation;7

(v) the Task Force identified and set forth in this Report techniques and approaches for improving efficiency in arbitration by utilising cost allocation powers; and

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4 As evidenced in the results of the survey of national committees as summarised in Appendix B.
5 See Appendix B for the list of contributing countries.
6 See Appendix A.
7 See Appendix A.
(vi) the Task Force identified considerations that a tribunal may in its discretion take into account in making decisions on costs at any stage of the proceedings or in fixing and allocating the costs of the arbitration in the final award, based on an analysis of arbitral and national court practice on the matter.

II. Outline of Report

9. This Report is divided into five main parts:

(i) summaries of the overriding observations from the Task Force’s (a) analysis of commercial arbitration awards (Appendix A contains the study) and (b) survey of national practice (in litigation and arbitration) in member states including treatment of third party funding, cost-capping and disparity (or inequality) of costs between parties (Appendix B contains the study) (Section III);

(ii) a discussion of effective costs management, including how arbitrators (and parties) may utilise costs allocation powers (Section IV);

(iii) analysis of costs allocation considerations as taken into account by arbitrators in making decisions regarding costs allocation (Section V);

(iv) specific cost-related challenges arising out of funding arrangements and settlement negotiations (Sections VI and VII); and

(v) concluding observations (Section VIII).

III. Overriding Observations

10. The detailed analyses of costs allocation decisions in arbitral awards and conclusions of the survey of national committees are set out in full in Appendices A and B, respectively. A number of overriding observations are summarised below.

1. Analysis of Costs Allocation Decision in Arbitral Awards

11. Based on its examination of costs allocation in proceedings administered by the major arbitral institutions worldwide, the Task Force has been able to make several general observations as to the way arbitrators allocate costs in awards across institutional rules and seats of arbitration.

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8 Appendix A contains the full report.
12. First, all arbitration rules contain a starting point for any costs decision, but that starting point is not uniform across all institutional or other arbitration rules. For example, the CIETAC Rules 2015, the DIS Rules 1998, the LCIA Rules 2014, the PCA Rules 2012 and the UNCITRAL Rules 2010, all include an express, rebuttable presumption that the successful party will be entitled to recover its reasonable costs. By contrast, the ICC, HKIAC, ICDR, SCC and SIAC Rules simply set out the tribunal’s authority to make such an award apportioning costs and none includes any presumption on costs allocation. In addition, the 2012 ICC Rules and recent 2014 LCIA Rules both refer expressly to the tribunal’s discretion to take into account parties’ conduct, including whether they conducted the arbitration in an expeditious and cost-effective manner.

13. Second, despite the fact that the ICC and at least half of the other major institutional rules contain no presumption in favour of costs recovery by the successful party, it appears that the majority of arbitral tribunals broadly adopt that approach as a starting point, thereafter adjusting costs allocation as considered appropriate. This was the approach in the majority of ICC awards examined, in 91% of HKIAC awards, in the majority of ICDR awards, in 90% of SIAC awards and in more than half of the SCC awards.

14. Unsurprisingly, this was also the case in most LCIA and PCA awards, where costs recovery by the successful party is the rebuttable presumption imposed by the respective Rules.

15. Third, an alternative approach adopted by arbitrators as a starting point is that each party pays its own costs. Where there is a presumption that each party will meet its own costs (by agreement between

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9 Article 52(2) CIETAC 2015 Rules is not a new provision and has long been CIETAC’s practice. The “costs follow the event” rule was first written into the CIETAC’s arbitration rules in 1994, where only the principle was stated without listing the elements in determining the reasonableness of the costs and with a 10% cap (10% of the amount awarded to the winning party). This provision has changed to the current version as early as 2005. Arbitrators in CIETAC administered cases follow this rule in practice accordingly.

10 This is the case for the 2013 HKIAC Rules. The 2008 HKIAC Rules stated that other arbitration costs, e.g. costs not for legal representation and assistance, shall in principle be borne by the unsuccessful party. See HKIAC Report in Appendix A.

11 This is sometimes called ‘costs follow the event’, ‘loser pays’ or the ‘English approach’. Within national court systems where this approach is followed, costs recovery by the successful party generally involves a commonality of charges and understanding of the way the system works. However, that same commonality does not always exist in international arbitration where parties and counsel are often from very different backgrounds. In fact, in some countries, statutory/official rates are set for specific activities, e.g. meetings, preparing submissions, attending hearings, at least in national court litigation.

12 These figures must be treated with some caution; they represent only the sub-group of awards selected for analysis (i.e., those awards that contained a decision as to costs) and not the entire body of existing institutional awards.

13 The PCA reports however that there is a notable difference in costs approaches between its administered interstate arbitrations and mixed arbitrations (investment treaty and contract-based arbitrations). For interstate arbitrations, the trend is for each party to bear its own legal fees and half of the other costs of arbitration regardless of case outcome. For mixed arbitrations, however, the costs allocations decisions vary with reference to factors such as relative successes of the parties, circumstances of the case and the reasonableness of the costs.

14 This is sometimes called the ‘American approach’.
the parties or otherwise), costs recovery from the other party will be permitted only in rare circumstances.

16. Fourth, irrespective of the starting point, tribunals ultimately proceeded to assess the reasonableness of costs claimed. Specific factors used to determine “reasonableness” varied but the application of a reasonableness standard in general was common to most awards. Generally arbitrators appeared to be relatively willing to deduct legal fees on the basis of unreasonableness. Even where arbitrators began from the starting point that the successful party was entitled to recover its costs, they frequently adjusted the amount recovered, instead of awarding 100% of fees claimed.

17. Fifth, arbitrators tended to take into account the procedural behaviour and conduct of the parties and their conduct during the arbitration. Parties who were seen by their conduct to have contributed to an excess of costs often did not recover all of the costs claimed.

18. Sixth, although the awards analysis includes reference to certain specific costs issues such as treatment of success fees and treatment of disparity between the legal fees of each party, it has not been possible to draw conclusions or infer trends based on these. The Task Force simply has not seen enough cases dealing with these issues.

19. Seventh, the awards analysed highlighted that consideration of costs in arbitration must involve two aspects: party legal fees and costs (party costs), and costs of the tribunal, institution and facilities (sometimes called arbitration costs). Responsibility for the costs of the arbitration, i.e. arbitrators’ fees, hearing rooms, and travel of counsel, is a unique feature of arbitration. In the domestic arena there is generally little or no cost for the court and the judge and counsel are invariably local. Hence in circumstances where a tribunal decides that each party shall pay its own costs, it still needs to determine which party shall pay the arbitration costs.

2. Approach to Costs under National Systems

20. Based on its study of specific aspects of costs allocation in national courts/litigation systems, the Task Force is able to make several further observations that may be relevant to arbitration.

21. First, in most jurisdictions, recovery of costs arising out of fee arrangements, irrespective of whether such arrangements are ultimately funded by a third party funder, is generally acceptable. This appears to be the case even where there is no specific national legislation prohibiting such practice.

22. Most countries reported that such arrangements are likely permissible despite statutes and rules not specifically covering them. In a handful of countries, such arrangements are specifically permitted, sometimes with certain preconditions. However, in at least seven jurisdictions, certain fee arrangements

15 Appendix B contains the full report.
are specifically prohibited and are considered null and void in national litigation. In some countries different rules apply to “contingency” or “success” fees and other types of conditional fee arrangements, so it is difficult to generalise. Frequently, different rules in respect of fee arrangements and third party funding apply to domestic litigation as compared to arbitral proceedings, usually with more restrictive rules in domestic proceedings. In the arbitration context in particular, several jurisdictions reported that the reasonableness of such fee arrangements could be taken into account when allocating costs or that the parties’ arbitration agreement would prevail.

23. Second, in relation to recovery of costs provided by a third party funder, the majority of jurisdictions could identify no reported cases. By way of exception, in Switzerland, the Swiss Supreme Court invalidated a law that prohibited third party funding in domestic cases, as it violated economic liberty. Also, in the United Kingdom the courts have found that a third party funder can be held liable for an adverse costs order. In other jurisdictions, the reports suggested that third party funding costs may not be recoverable, because the funder does not have standing in the proceedings to make such a claim, and the party who was funded did not actually incur the costs. Singapore suggested a third party funding agreement could be considered champertous and therefore unenforceable by Singapore courts in both litigation and arbitration.

24. Third, in relation to pre-dispute agreements on costs allocation, several jurisdictions reported that they do not have specific rules. The English Arbitration Act 1996 contains a mandatory provision to the effect that parties cannot agree on paying the costs in any event unless the agreement is made after the dispute arises. Other jurisdictions reported that such agreements arise with some frequency, either in an arbitration agreement, when a dispute arises, or towards the end of the arbitration. Finland and Ontario reported that such agreements are rare (but possible) in their jurisdictions. These are generally upheld, save where provided under the national law otherwise.

25. Fourth, as to costs capping, several jurisdictions reported that their laws do not contain any rule regarding a tribunal’s power to impose a cap, but these were generally considered to be permissible. The English Arbitration Act 1996 empowers the tribunal to cap the recoverability of costs, though this is rarely used in practice. Other jurisdictions reported costs capping mechanisms under local arbitration rules. For example, under the Polish Chamber of Commerce Rules a cap would be applied to a contingency agreement, and Belgium’s arbitration centre (CEPANI) Rules expressly suggest that arbitrators remind parties of the possibility of agreeing a cap on costs. Many jurisdictions noted that a form of costs capping at the time of the award would be achieved by the arbitrators when assessing the reasonableness of the costs to be allocated.

26. Fifth, in relation to treatment of disparity between “expensive” and “less expensive” legal counsel (major international law firms as compared to law firms from developing countries or smaller and less expensive firms for instance), several jurisdictions referred to arbitrators’ wide discretion to take into account factors such as the complexity and importance of the case, the amount at stake, and the nature of the
work involved. Austria specified that the background of the parties could be taken into account, such as whether they are foreign parties who may require local as well as foreign counsel, or whether they are multinational corporations as compared to small businesses. Many jurisdictions noted the importance of proportionality, both of costs to the dispute and as between the parties’ costs.

3. Arbitral Rules

27. Finally in relation to the Task Force’s research and analysis, the rules of the various arbitral institutions, as well as the UNCITRAL Rules, as set out at Appendix C of the Report, were taken into account in the preparation of this Report.

28. The International Centre for Settlement of Investment Disputes (ICSID) Rules are included for reference purposes only. It is to be noted that the content of this Report is based exclusively on international commercial arbitration awards and practices. Investor-state arbitration is subject to separate analysis and often different conclusions and is beyond the scope of this Report.

IV. Costs Allocation and Effective Case Management

29. Based on the research and analysis described at Section III above, the Task Force identified that: (i) arbitrators were prepared and permitted to exercise their costs allocation powers at various times in the arbitral process, not just in the final award; and (ii) in light of the absence of any uniform approach to allocation of costs, arbitrators and parties may wish to set out their expectations in relation to costs allocation relatively early in the proceedings.

30. As to the first point, almost all arbitration rules and statutes permit the allocation of costs in international commercial arbitration in the final award. Awards allocating costs at that final stage, and/or at interim stages, may assist a tribunal to ensure that a successful party is reasonably compensated for all loss and damage, including costs of the proceedings. If used carefully, costs allocation at various stages throughout the proceedings could improve the overall cost-efficiency and effectiveness of commercial arbitration. However, requests for costs orders or awards at any stage of the proceedings – to the extent they are deemed necessary and appropriate in any given arbitration – should remain limited and tailored to the specific circumstances of each case.

31. As to the second point, the ICC Commission’s Report on “Techniques for Controlling Time and Costs in Arbitration”17 had addressed the tribunal’s use of allocation of costs to encourage efficient conduct of the proceedings.

“Using allocation of costs to encourage efficient conduct of the proceedings. The allocation of costs can be a useful tool to encourage efficient behaviour and discourage unreasonable

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16 Appendix C contains relevant rules.
behaviour. Pursuant to Article 37(5) of the Rules, the arbitral tribunal has discretion to award costs in such a manner as it considers appropriate. It is expressly stated that, in making its decisions on costs, the tribunal may take into consideration the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. The tribunal should consider informing the parties at the outset of the arbitration (e.g. at the case management conference) that it intends to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behaviour by a party when deciding on costs. Unreasonable behaviour could include: excessive document requests, excessive legal argument, excessive cross-examination, dilatory tactics, exaggerated claims, failure to comply with procedural orders, unjustified applications for interim relief, and unjustified failure to comply with the procedural timetable.” (Emphasis added).

32. This Task Force thus expressly recognises the importance of controlling time and costs in arbitration and, moreover, that the tribunal may use costs allocation as a tool for controlling time and costs at every stage in the arbitral process, including:

   (i) to manage efficient conduct at the outset of or early on in the proceedings, e.g., at the case management conference or in the terms of reference;

   (ii) to manage the efficiency of conduct throughout the arbitral proceedings, including by issuing interim cost awards or orders to deal with interim applications, steps or decisions; and

   (iii) to sanction improper conduct or behaviour, including where it is not efficient or reasonable, in the final award or interim awards.

1. Outset of the Arbitration

33. The ‘Techniques for Controlling Time and Costs in Arbitration’ Report encourages tribunals to deal with costs at the outset of proceedings by indicating that “it intends to take into account the manner in which each party has conducted the proceedings and to sanction any unreasonable behaviour by a party when deciding on costs.”

34. Irrespective of whether a tribunal so informs the parties at the outset, an ICC tribunal retains the right to take into account such conduct pursuant to Article 37.5 of the 2012 ICC Rules. However, by addressing this at an early stage the tribunal can assist in managing the expectations of the parties and their lawyers for the duration of the proceedings.

35. In addition to allocating costs to sanction a party’s conduct, the tribunal might further consider discussing with the parties other aspects of costs management at the outset of the arbitration or during the proceedings. Specific issues that can be raised with parties at an early stage in the proceedings, typically at the first case management meeting, include:
(i) what cost items the tribunal considers may potentially be recoverable, e.g. in-house counsel and other staff costs and expenses, which would otherwise only be assessed at the end of the arbitration in the final award;

(ii) what records will be required to substantiate claims for cost assessment;

(iii) if costs are to be assessed on an interim basis, the frequency and basis for such assessments;

(iv) sensitive issues, such as whether there is third party funding (see Section VI.1 below) and if so its implications if any for costs allocation, whether the identity details of the third party funder (which could be relevant for the tribunal’s conflict of interest purposes) should be disclosed, and whether contingency, conditional or success fees arrangements have been agreed, and how the parties expect these issues to be considered in the context of costs assessments;

(v) whether costs capping might be an appropriate tool to control time and costs in the arbitration, including where expressly permitted by the lex arbitri (in some seats, unless the parties otherwise agree, the tribunal is permitted to “direct that the recoverable costs of arbitral proceedings before it are limited to a specified amount”);

(vi) whether (depending on the arbitral regime or the agreement of the parties) and how the tribunal should be informed about settlement offers (see Section VII below) which were in the region of or better than the final award or decision of the tribunal, and had they been accepted would have saved significant costs and time; and

(vii) when costs submissions should be made (along with post-hearing briefs, for instance).

36. There are potential advantages to addressing costs issues at the outset of the proceedings, including that all parties are:

(i) fully informed as to the tribunal’s approach to costs, which alleviates uncertainty and improves predictability;

(ii) fully informed as to the tribunal’s expectations on costs submissions, to allow the parties to properly record time spent and costs incurred, particularly with respect to internal legal and other costs;

(iii) provided with an opportunity to discuss what is expected procedurally (e.g., observing the procedural timetable, producing documents ordered by the tribunal, timely communications);

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18 Hong Kong Arbitration Ordinance, Section 57. The English Arbitration Act, Section 65, contains a similar provision.
(iv) provided with an opportunity to discuss what is expected by way of behaviour and professional conduct from parties and counsel; and

(v) better able to assess a cost benefit and risk analysis when considering whether to pursue various interim or tactical steps in the proceedings, as well as the proceedings as a whole.

37. There may be concerns that raising costs at the outset of the proceedings could cause discomfort for the tribunal or the parties, or limit the tribunal’s ability to be flexible in dealing with unexpected events during the course of the proceedings. Such concerns could be addressed if and when they were to arise in any given case. As a general observation, such concerns might be adequately managed provided the tribunal clearly indicates to the parties that it will take into account the arbitration as a whole in any costs decisions, and further ensures that it retains full discretion to do so in accordance with the applicable rules.

38. One other way to clearly indicate to the parties what an arbitral tribunal will take into account is to address this in a (first) procedural order, as was done in an ICC case under the 2012 ICC Rules.¹⁹

2. During Proceedings (Partial Awards and Interim Orders)

39. Most institutional arbitral rules and national arbitration statutes permit tribunals to allocate costs in partial awards that finally determine preliminary issues, e.g., jurisdiction/arbitrability, applicable law or a time-bar/limitation claim. Such partial awards, including in respect of costs, will be enforceable under the New York Convention as final awards.

40. Most arbitral rules or statutes further permit tribunals to make awards or interim orders in respect of costs, including arising out of applications for interim relief and other procedural applications. For example, the UNCITRAL Model Law specifically provides, at Article 17G, that:

“The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.” (Emphasis added.)

41. If the tribunal were to make any costs determination in the form of a costs order as opposed to an award – which is entirely permissible – such order may not be enforceable under the New York Convention until or unless incorporated into the body of a final award. However, the lex arbitri (law of the seat) may contain a mechanism for enforcement of such orders.

¹⁹ The tribunal indicated that: “The Parties are reminded that pursuant to Article 37(5) of the ICC Rules, the Arbitral Tribunal may take into account, inter alia, ‘the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner’ when making its decision as to the costs of the arbitration.”
42. A potential downside of making a costs award or order at an interim stage is that it may alter the
dynamic of the proceedings. Once such costs are paid they can rarely be recovered; often they become
definitive and final for the stage in respect of which they were awarded or ordered, regardless of what
may follow. Such an award or order may have an unintended impact on the paying party if it has
financial or cash-flow difficulties. These factors underscore the value of raising these issues from the
outset at a preliminary meeting with the parties.

43. As an alternative to an interim costs award (or order), arbitrators may consider issuing a direction or
order stipulating a final decision on allocation of costs for certain interim steps or conduct, but direct that
the payment only falls due pursuant to the final award. In such cases, the arbitrators must obviously be
mindful to incorporate such orders or directions in the form of the final award.

44. In addition, during the course of the proceedings arbitrators may invite the parties at any time to discuss
or make proposals in relation to costs matters.

3. Final Award

45. Finally, the tribunal has full discretion to award reasonable costs in any final award or awards. This is the
normal situation in the majority of cases. The ICC Rules require that the tribunal must fix costs in its final
award and may, in its discretion, decide which of the parties shall bear them or in what proportion they
shall be borne by the parties. As discussed below, under the ICC Rules, and many other institutional
rules, the tribunal may take into account the conduct of the parties in doing so.

46. Any final award must contain reasons for the decision on the allocation of costs. In order to render a
fully reasoned decision on costs, arbitrators need to give the parties full opportunity to be heard.
Appropriate directions as to timetabling and nature of submissions on costs should be established in the
course of the proceedings.\textsuperscript{20} The 2012 ICC Rules provide that arbitrators deal with costs allocation in the
final award.

V. Costs Allocation Considerations

47. The allocation of costs in international commercial arbitration can involve the following elements:

(i) establishing the scope of any agreement between the parties in respect of costs;

(ii) deciding which of the parties shall bear the costs or in what proportion they shall be borne
by the parties including, where appropriate, based on relative success and failure;

(iii) assessing the reasonableness of costs incurred by the parties; and

\textsuperscript{20} For instance, some tribunals direct the parties to include their costs submissions in their post-hearing briefs.
(iv) where relevant, taking into account other circumstances including the extent to which each party had conducted the arbitration in an expeditious and cost-effective manner.

Various considerations that may arise in each respect are set out below.

1. Agreement of the Parties

48. The agreement of the parties in respect of costs is the prevailing factor in any costs decision.\(^{21}\) There are at least five aspects to the parties’ agreement: (i) the parties’ written arbitration (or submission) agreement; (ii) applicable institutional arbitration rules (usually incorporated by reference in the written arbitration (or submission) agreement); (iii) terms of reference; (iv) mandatory and other applicable law; and (v) any other agreed rules or guidelines. The tribunal should take into account any agreement by the parties, permitted by and where possible in accordance with mandatory law requirements, in any costs allocation decision.

   a. Arbitration (or Submission) Agreement

49. First, the tribunal should, subject to applicable mandatory law requirements, respect any agreement by the parties in respect of costs allocation. Parties’ agreement may be contained in an arbitration clause, submission agreement, terms of reference or other form.

50. Standard arbitration clauses from the major arbitral institutions tend to be silent in respect of costs. For example, the standard ICC Arbitration Clause provides that:

   “All disputes arising out of or in connection with the present contract shall finally be settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.”

51. Generally, parties are not prevented from expressly incorporating their agreement as to costs allocation in their arbitration agreements.\(^{22}\) Most national laws will respect and uphold the parties’ agreement. However, a specific agreement on costs incorporated in the arbitration agreement should not contravene mandatory provisions of the *lex arbitri* or other relevant mandatory law. For example, the English Arbitration Act 1996, Section 60 and Hong Kong Arbitration Ordinance, Section 74(8) both provide that

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\(^{21}\) See Appendix A.

\(^{22}\) See e.g. the JAMS Comprehensive Arbitration Rules, provides at Rule 24(f): “The Award of the Arbitrator may allocate Arbitration fees and Arbitrator compensation and expenses, *unless such an allocation is expressly prohibited by the Parties’ Agreement.* (Such a prohibition may not limit the power of the Arbitrator to allocate Arbitration fees and Arbitrator compensation and expenses pursuant to Rule 31(c).)” Rule 24(g) of the same Rules provides: “The Award of the Arbitrator may allocate attorneys’ fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) *if provided by the Parties’ Agreement* or allowed by applicable law. When the Arbitrator is authorized to award attorneys’ fees and must determine the reasonable amount of such fees, he or she may consider whether the failure of a Party to cooperate reasonably in the discovery process and/or comply with the Arbitrator’s discovery orders caused delay to the proceeding or additional costs to the other Parties.” http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule 24

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an agreement to the effect that a party is to pay the whole or part of the costs of the arbitration in any event is valid only if made after the dispute in question has arisen.23

b. Institutional Rules

52. Second, if the parties’ arbitration agreement incorporates by reference the rules of an arbitral institution, the tribunal will normally apply the relevant institutional rules in respect of costs. As set out in Part I of the Report, although most institutional rules confer a broad discretion on tribunals to allocate reasonable costs, there are subtle and important differences between various rules – especially in respect of presumptions.

c. Terms of Reference

53. Third, pursuant to the ICC Rules, the tribunal is required to issue terms of reference. In the terms of reference or otherwise at the outset of the proceedings, the tribunal may direct or the parties may agree to certain costs directions. If so, the tribunal should bear those in mind in any subsequent decisions as to costs.

d. Applicable Law

58. Fourth, the tribunal should be mindful of any mandatory and other law or case law applicable to costs decisions.24 A widely accepted approach is that the lex arbitri is the law applicable to costs decisions, although some commentators have argued that the governing law of the contract is applicable to costs decisions.25

59. Whereas tribunals will usually give effect to parties’ agreement on costs, they will also be mindful of any applicable mandatory provisions concerning the allocation of costs, usually (but not necessarily exclusively) found in the national arbitration statute of the lex arbitri (law of the seat) and potentially the place of enforcement.26

60. Tribunals (and parties) may further take guidance from other non-mandatory provisions in the national arbitration statute of the lex arbitri. For example, as noted above (at paragraph 40) Article 17G of the

23 Note that such restrictions do not necessarily prevent parties agreeing that the unsuccessful party will pay the successful party’s costs, in the form of the JAMS provision above. Article 41 reference: potential may be relevant.
24 In France, there have been some court cases on how an impecunious party may be denied access to justice if an arbitrator refused to hear that party’s claim/counterclaim solely because it could not afford to pay its advance on costs. See: LP v. Pirelli, Paris Court of Appeal, 17 November 2011; Pirelli v. LP, Court of Cassation, Civ. 1er, 28 March 2013, n° 11-27.770; Société Lola Fleurs v. Société Monceau Fleurs, Paris Court of Appeal, Paris, 29 Feb. 2013, n° 12/12953.
26 See e.g. Section 60 of the English Arbitration Act and Section 74(8) of the Hong Kong Arbitration Ordinance.
UNCITRAL Model Law, which is adopted in a number of national arbitration statutes, expressly provides that a party which requests interim measures will be liable for any costs and damages caused by the measure if the tribunal determines in due course that the order should not have been granted. In such a case interim costs may be awarded.

61. By way of further example, some national arbitration statutes expressly permit a tribunal to award interest on costs, to order payment of security for costs including in respect of requests for interim relief, or to limit the amount of costs recoverable at any stage of the proceedings, or for parties to seek assistance from the national courts for taxation of costs.

e. Additional Rules or Guidelines

62. Fifth, the parties may agree to the application of rules or guidelines of other sets of procedural rules, including for example the IBA Rules on the Taking of Evidence in International Arbitration or the IBA Rules on Party Representation in International Arbitration. These rules or guidelines may contain specific provisions on costs, e.g., Article 9(7) of the IBA Rules on the Taking of Evidence in International Arbitration permits the tribunal to order costs against a party that fails to conduct itself in good faith in the taking of evidence.

f. Cultural Expectations

63. Further, the nationality of the parties may impact their reasonable expectations in respect of costs. Given the nature of international arbitration and the likelihood of involvement by parties and arbitrators from multiple nationalities and different legal and cultural traditions, costs expectations is a matter that arbitrators and parties may wish to discuss, perhaps at the first management conference. Cultural expectations could be managed early in the proceedings to ensure maximum understanding between parties and tribunal.

2. Relative Success and Failure of the Parties

64. As indicated above, some institutional rules, including the UNCITRAL Rules, the LCIA Rules and the PCA Rules, expressly create a presumption that the successful party is entitled to recover its reasonable costs. Similarly, some national arbitration statutes impose such a (non-mandatory) presumption. Various

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27 See for example: Hong Kong Arbitration Ordinance, Singapore International Arbitration Act, New Zealand Arbitration Act, German Arbitration Law.
28 Hong Kong Arbitration Ordinance, Section 79, Singapore International Arbitration Act, Section 20.
29 Singapore International Arbitration Act, Section 12(1)(a), New Zealand Arbitration Act, Schedule I, Section 17I, German Arbitration Law, Section 1041(1), Spanish Act 60/2003 on Arbitration, Article 23(1).
30 Hong Kong Arbitration Ordinance, Section 57, English Arbitration Act, Section 65.
31 Hong Kong Arbitration Ordinance, Section 75, Singapore International Arbitration Act, Section 2I.
32 E.g. English Arbitration Act, Section 61(2); Argentine National Code of Civil and Commercial Procedure, Article 68 (referred to by Article 772 thereof); and Turkish International Arbitration Law (Law No. 4686 of 21 June 2001), Article 16(D).
questions remain unaddressed in such rules and statutes, including whether and when such presumption should be displaced and what amount (or proportion) of such costs is recoverable.

65. Other rules, including the 2012 ICC Rules, contain no costs presumption but instead grant the tribunal the discretion to allocate costs, including reasonable legal and other costs, to either party. Article 37.4 of the 2012 ICC Rules provides that:

“The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.” (Emphasis added.)

Article 37.5, further provides that the arbitrators may take into account such circumstances as it considers relevant, including the extent to which each party has or has not conducted the arbitration in an expeditious and cost-effective manner.

66. Even where the applicable rules or statute do not create a presumption that the successful party is entitled to recover its reasonable costs, in most costs decisions in awards the tribunal appears to have at least some regard to the relative success and failure of the parties. However, determining relative success is not necessarily straightforward, particularly in complex claims involving multiple causes of action, counterclaims, set-off, multi-contracts and multiple parties. As claims are added, withdrawn, modified or merged in the course of proceedings, it may become increasingly difficult to track what was originally claimed against what is ultimately awarded.

67. The general approach is to assess the degree and scope of success and, where relevant, the timing of that success. A successful party may prevail in some, but not all claims brought, and/or recover some, but not all damages sought. In the case of less than full recovery, different approaches have been taken by arbitrators.

68. Arbitrators may take into account the relative success of the prevailing party by: (i) taking the view that provided a claimant or respondent succeeded in respect of its core or primary claim or outcome, that party is entitled to all of its reasonable costs in the proceedings; (ii) apportioning costs on a claim by claim or issue basis according to relative success and failure; or (iii) apportioning success against the amount of damages (or value of property in dispute) as originally claimed. There may be other approaches as well (and in all cases there might be an additional assessment based on conduct). These approaches however, may not reflect the differences in complexity and importance of different issues, which also should be taken into account.

69. Any costs apportionment may involve consideration of some or all of the factors discussed above, as well as the specific improper or bad faith conduct of the parties as discussed below at paragraphs89 to 97. However, any costs so apportioned must, nevertheless, be reasonable.

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33 See also the HKIAC, ICDR, SCC and SIAC Rules, which simply set out the tribunal’s authority to make such an award apportioning costs and none includes any presumption on costs.
3. Reasonableness of Legal and Other Costs Incurred by the Parties

70. As indicated above at paragraph 16, the standard for costs allocation under most arbitral rules is usually one of reasonableness. This is the case even where there is a presumption of costs in favour of the successful party, as such presumption remains subject to the legal and other costs incurred by the parties (at least) being reasonable. However, reasonableness is not defined in the rules of any arbitral institution or national arbitration statute.\(^\text{34}\)

71. A common-sense approach is to consider those costs that have been proportionately and reasonably incurred and/or are proportionate and reasonable in amount.\(^\text{35}\) This approach suggests tribunals (and courts in reviewing awards on costs) may consider whether costs: (i) are reasonable and proportionate to the amount in dispute or value of any property in dispute; and (ii) are incurred proportionately and reasonably.

72. These considerations are useful general indicators as considered in more detail below. In addition, certain specific costs, such as internal legal costs and costs associated with settlement negotiations and/or unsuccessful settlement offers, which may be considered reasonable in certain circumstances, are also discussed below.

a. Costs Reasonable/Proportionate to Monetary Value/Property in Dispute

73. Tribunals may pro-actively evaluate and assess the reasonableness of the amount of costs in the context of the dispute as a whole and award only such costs that it considers to be reasonable and proportionate. Knowing that the tribunal may do so may encourage parties to make responsible decisions on legal

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\(^{34}\) Hong Kong Arbitration Ordinance 74(7), does provide that “The arbitral tribunal (a) must only allow costs that are reasonable having regard to all the circumstances; and (b) unless otherwise agreed by the parties, may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement of the arbitration.” The Austrian Arbitration Act, section 609(1) also reads, in part: “The arbitral tribunal shall, in exercise of its discretion, take into account the circumstances of the case, in particular the outcome of the proceedings. The obligation to reimburse may include any and all reasonable costs appropriate for bringing the action or defense.” The CIETAC Arbitration Rules 2012, provide at Article 50(2) some factors that may be taken into account by the arbitral tribunal to assess reasonableness: “The arbitral tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case. In deciding whether or not the winning party’s expenses incurred in pursuing the case are reasonable, the arbitral tribunal shall take into consideration such specific factors as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), and the amount in dispute, etc.”

\(^{35}\) This approach has been approved in some common law jurisdictions, including in a Singapore High Court decision, VV and Another v VW [2008] SGHC 11 - [2008] 2 SLR 929 – 2007, which refers also to similar English Civil Procedure Rules. The Swiss Federal Tribunal, in a ruling of 9 January 2006, 4P.280/2005, specified that it could only intervene with respect to an arbitrator’s decision on costs exceptionally if the costs awarded were wholly disproportionate to the necessary costs of defence. The German Arbitration Act also alludes to concepts of necessity and proportionality at Section 1057(1), which provides: “Unless the parties agree otherwise, the arbitral tribunal shall allocate, by means of an arbitral award, the costs of the arbitration as between the parties, including those incurred by the parties necessary for the proper pursuit of their claim or defence. It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.”
expenses and prevent them from unnecessarily running up costs. Moreover, although it is acknowledged that the successful party is entitled to prosecute or defend its claims in the manner it considers necessary and appropriate, and arguably the party and its representatives are best placed to evaluate what resources are required to win the case, it will remain within the tribunal’s discretion whether or not that party will recover those in full.

74. As to reasonableness of the amount of costs when assessing the amount of costs sought, various factors may be considered by the tribunal depending on the circumstances of the case including, but not limited to the:

(i) reasonableness of the rates and number and level of fee earners in evaluating whether the amount of work incurred was reasonable;

(ii) reasonableness of the level of specialist knowledge and responsibility required for the dispute, including consideration of the legal qualification of representatives, involvement of specialist teams or team members and level of seniority;

(iii) reasonableness of the amount of time spent, at various levels and rates, at the various phases of the arbitration, in evaluating whether the amount of work incurred was reasonable; and

(iv) any disparity between the costs incurred by the parties as a general indicator of reasonableness as opposed to a separate factor in itself.

75. As to proportionality of the amount of costs, the amount of the monetary claim and value of any property that is the subject matter of the dispute is usually important. In particular, there exists a broad range of claim values in international arbitration proceedings, ranging from less than $100,000 to billions of dollars. That large differential, coupled with the objective to ensure that arbitration remains cost-effective in all cases, means that proportionality could be a factor in allocating costs. Accordingly, tribunals might take into account the amount in dispute and value of any property that is the subject matter of the dispute when assessing the reasonableness of the amount of costs incurred.

76. In this respect it should be borne in mind that arbitration is intended to meet the needs of all users in a range of cases and disputes, including lower value cases. However, even small cases can give rise to significant costs and the successful party should not be penalised for having commenced proceedings to recover losses caused by the unlawful conduct of the counterparty. Moreover, there are cases where on its face the amount in dispute is not significant but very important principles affecting the parties’ relationship are at issue or other related cases are dependent on the outcome of the immediate case (possibly unbeknown to the tribunal).
b. Costs Proportionately and Reasonably Incurred

77. In addition to considering whether the amount of costs is reasonable and proportionate to the amount in dispute, tribunals might also take into account more broadly whether they were proportionately and reasonably incurred. For example, it has been observed in a national court review of a decision on costs in arbitration that:

“[t]he proportionality principle was not limited to a relationship between the amount involved in the dispute and the amount of costs awarded. The principle truly meant that when legal costs had to be assessed, all circumstances of the legal proceedings concerned had to be looked into, and not only the amount of the dispute though that was an important factor, especially when assessing whether the amount of work done was reasonable.” (Emphasis added.)

78. Consistent with this approach, tribunals might take into account the proportionality between the amount of cost incurred and all circumstances of the proceedings. However, the process of doing so takes time and, in itself, increases costs, so a balanced approach is appropriate.

79. In assessing whether the amount of work done is proportionate and reasonable tribunals may take into account various factors as may be relevant to the case including, but not limited to:

(i) the overall importance of the dispute and the matters underlying the dispute to all parties;

(ii) the overall complexity of the matter;

(iii) the accurate representation of the amount in dispute (both in the claims and counterclaims);

(iv) the existence of unnecessary and meritless claims or counterclaims;

(v) the length and stages of proceedings and, in particular, whether parties have unnecessarily prolonged the proceedings and/or increased the cost of proceedings (e.g., as a result of repeated applications for document production, other procedural motions, unnecessary steps in the proceedings etc);

(vi) the withdrawal of any unmeritorious claims in a timely manner;

(vii) the manner in which the parties and their representatives have dealt with document production, including in the conduct of requests as well as responses to requests;

(viii) the scope, relevance and extent of testimonial fact evidence, in written witness statements and oral testimony, including cross-examination;

(ix) the scope, relevance and extent of testimonial expert evidence, in written witness expert reports and oral testimony, including cross-examination (e.g., number of experts, length of reports, relevance of material etc);

(x) the length and conduct of any oral hearings, including but not limited to evidentiary hearings;

(xi) the parties’ approaches to bifurcation and the determination of preliminary issues, including the outcome of any bifurcated or preliminary proceedings; and

(xii) where the parties have agreed to allow the tribunal to take into account settlement discussions after they have reached a conclusion on the merits, efforts by parties to resolve their dispute may be taken into account, in the event that such information is properly available to the tribunal.

80. The broader approach of considering all circumstances of the legal proceedings and not simply the relationship between the amount involved in the dispute and the amount of costs sought is often applied by tribunals.

c. Internal Legal and Other Costs

81. While it is widely accepted that parties’ costs in respect of outside legal counsel, witnesses and experts are recoverable, most arbitral rules are silent as to internal legal, management and other costs, leaving the issue of recoverability of such costs to the discretion of the tribunal. 37

82. A company’s decision to pursue arbitration in itself tends increasingly to be the product of an extensive cost-benefit analysis based on the initial advice of in-house counsel and other internal specialists. Internal costs may also amount to a considerable portion of a party’s costs, when in-house counsel, managers, experts and other staff take a proactive role before, and during the arbitration. In-house counsel, senior officials or executives must study the case to be able to make informed decisions and provide instructions as well as to collect evidence. In certain instances, parties appoint a dedicated internal person to manage a case, sometimes on a full-time basis.

83. From a managerial standpoint, the time that such company staff dedicates to the arbitration cannot be spent on the usual business activities and thus translates into costs.

37 However, Article 7.6 of the Paris Arbitration Rules provides that: “The Arbitral Tribunal may, in any award, allocate all or part of the costs, in its discretion. Costs may include the fees and expenses of the arbitrators (including the Interim Arbitrator), the cost of legal representation, of experts and consultants (including witnesses acting as consultants). Costs may also include management time and expenses. In making decisions as to costs, the Arbitral Tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.” (Emphasis added.)
84. In recognition of the above, tribunals may consider allowing the recovery of costs associated with: (i) executive time and disbursements; and (ii) administrative costs and out-of-pocket expenses for: factual research, in-house legal advice, outside technical experts, processing the arbitration, and employees who serve as witnesses.

85. There is indeed no principle prohibiting the recovery of internal costs that have been incurred in direct connection with the arbitration, and some tribunals have awarded such costs to the extent that they were necessary, with no unreasonable overlap with outside counsel fees, substantiated in sufficient detail to be distinguished from ordinary staffing expenses, and assessed on a test of reasonableness.

86. Given that few parties adhere to the practice of keeping detailed reports of time spent and costs incurred internally for the arbitration, tribunals may find it useful to discuss the potential recoverability of internal costs at the outset of the arbitration.

4. Costs In Fact Incurred by the Party

87. The tribunal may award such reasonable costs as are incurred and are paid or payable by the party seeking them. Therefore, the tribunal should be satisfied that it has received proper verification that the costs claimed were not just reasonable, but actually incurred and have been paid or are payable by the party seeking them.

88. Tribunals may prefer to avoid lengthy submissions and arguments requiring parties to itemise or provide detailed breakdowns of individual costs items. However, a tribunal will wish to receive at least satisfactory evidential proof that the amount of costs claimed was in fact incurred. Copy invoices will rarely be appropriate if they show details of work done, as they often will contain information which is confidential, of no relevance to the case itself and may also be subject to legal privilege. Such costs should be properly substantiated in accordance with the applicable standard of proof for substantive claims in the proceedings. Any uncertainty or potential difficulties created by different expectations as between parties and/or the tribunal regarding the required level of substantiation can be avoided if discussed at an early stage in the proceedings.38

5. Improper Conduct/Bad Faith of the Parties

89. As discussed above, various institutional rules and guidelines of other bodies further provide that the tribunal may also take into account the conduct of the parties (including their representatives) in allocating reasonable costs to either party. Some national arbitration statutes contain similar provisions.39

38 Few tribunals will wish to become involved in an English court style taxation of costs where the cost of each piece of work is analysed, together with the seniority of the lawyer involved and the rates charged. It also can result in unnecessary additional fees and costs and can be time-consuming.

39 E.g., the Brazilian Arbitration Act expressly provides at Article 27: “The arbitral award shall decide on the parties’ responsibility regarding the costs and expenses of the arbitration, as well as on any amounts resulting from bad faith
90. As noted above, Article 37.5 of the 2012 ICC Rules empowers a tribunal, in making a costs decisions, to consider whether a party conducted itself in an expeditious and cost-effective manner. The broad language of Article 37.5 of the 2012 ICC Rules permits a further assessment of the conduct of all parties in the course of the arbitral proceedings, and in some cases even pre-arbitral behaviour, irrespective of whether such conduct has caused a delay or otherwise increased the costs of the arbitration. This is a separate exercise from examining the parties’ relative success or failure in the arbitration – if relevant – and the reasonableness and substantiation of any costs claimed. For example, it is entirely within the discretion of the tribunal to determine that a party’s improper conduct or bad faith is such that it is the sole determinative factor in its costs decision. Alternatively, tribunals may take some or all aspects of conduct into account when apportioning costs between the parties.

a. Improper Conduct in Procedural Steps

91. Procedural conduct taken into account when allocating costs between the parties may include, but is not limited to the following:

(i) *Pre-arbitral behaviour* relating to conduct that occurs before the arbitration proceedings were commenced. In particular, arbitrators might look at the improper conduct by a party in its dealings leading up to the proceedings, including but not limited to the possibility to have avoided the arbitration, threatening behavior, parallel court proceedings in breach of an arbitration agreement, other interference with the counter-party’s business interests and/or unfair or prejudicial press campaigns. Although it is not a common provision, costs arising out of pre-arbitral behaviour may be expressly provided for by the national arbitration statute of the *lex arbitri.*

(ii) *Guerrilla tactics* arising out of those rare occasions where parties seek deliberately to interfere with the conduct of the proceedings in order to render an award unenforceable or otherwise affect the ability of the tribunal finally to resolve the dispute between the parties.

(iii) *Post-formation conflicts* aimed at destabilizing the tribunal and the arbitration. In this respect there are examples of counsel appointments late in the proceedings creating an arbitrator conflict of interest. In such circumstances, the conflicted arbitrator may be forced to resign or, if not, the enforceability of the award may be jeopardised. The tribunal may take into

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*Litigation*, as the case may be, with due respect to the stipulations of the arbitration agreement, if any.” (Emphasis added.)

Hong Kong Arbitration Ordinance 74(7) does provide that “The arbitral tribunal (a) must only allow costs that are *reasonable having regard to all the circumstances*; and (b) unless otherwise agreed by the parties, *may allow costs incurred in the preparation of the arbitral proceedings prior to the commencement* of the arbitration.” (Emphasis added.)

In an effort to alleviate concerns that arise from this scenario in an ad hoc and inconsistent manner, some arbitral institutions have expressly empowered the tribunal to withhold approval of the change of counsel, and some tribunals are including such provisions in the terms of reference or their terms of appointment. For example, LCIA Rules 2014, Article 18.4 and IBA Guidelines on Party Representation in International Arbitration 2013, Guidelines 4 to 6.
account any tactic deployed by a party to create such conflict, and any costs arising out of such conduct when assessing costs.

(iv) *Repeated and unsuccessful challenges* to an arbitrator’s appointment or to the jurisdiction or authority of the tribunal known to be unfounded.42

(v) *Unnecessary court involvement* where parties commence parallel litigation proceedings in national courts in breach of the arbitration agreement, seemingly in an effort to torpedo the arbitration process.43 Although most arbitration rules and national statutes permit necessary and appropriate court support for arbitration in the relevant seat or place of enforcement, which is consistent with the New York Convention, the tribunal may consider certain proceedings to be an abuse of the arbitration process and may take that into account in costs.

(vi) Deliberate interference with the arbitral process, such as *ex-parte communications with arbitrators*, giving rise to an arbitrator conflict of interest, forcing the conflicted arbitrator to resign or jeopardising the enforceability of the award.44

b. Improper Conduct in Document Production

92. Preliminarily in relation to allegations of improper conduct in the production of documents, the ICC Commission made clear in its Report on Managing E Document Production that there is no automatic duty to disclose documents, nor right to request or obtain document production (including but not limited to e-document production) in international arbitration. The Report goes on to state that requests for the production of documents — to the extent they are deemed necessary and appropriate in any given arbitration — should remain limited, tailored to the specific circumstances of the case and subject to the general document production principles of specificity, relevance, materiality and proportionality.45

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42 In an effort to alleviate concerns that arise from increasing unmeritorious challenges, some arbitral institutions have expressly prohibited such conduct and provided sanctions for breach, including in costs. For example, LCIA Rules 2014, Annex A, paragraph 2.

43 The New York Convention provides for the enforceability of arbitration agreements as well as awards and is a founding instrument for the pro-arbitration approach adopted by most member state courts.

44 In an effort to alleviate concerns that arise from inappropriate unilateral contact with an arbitrator relating to the arbitration or the parties’ dispute, some arbitral institutions (e.g., the LCIA Rules 2014, Annex A, Paragraph 6) and other professional bodies (e.g., the IBA Guidelines on Party Representation in International Arbitration 2013, Guidelines 7 and 8) have published rules or guidelines in an effort to prohibit such conduct or direct as to the best approach. This type of conduct also may fall within Article 35.7 of the ICC Rules.

45 ICC Commission Report on Managing E Document Production, Para 5.31: “Tribunals should avoid importing from other systems notions with regard to the preservation of evidence that may give rise to unnecessary inconvenience or expense. While a party’s intentional efforts to thwart disclosure of relevant and material evidence by destroying or altering an electronic document may warrant appropriate sanctions (such as an adverse inference contemplated by Article 9(5) of the IBA Rules of Evidence), inadvertent destruction or alteration of an electronic document as a result of routine operation of that party’s computer network does not ordinarily reflect any culpable conduct or warrant any such sanctions. Moreover, whilst a party may wish, for its own benefit, to take steps to preserve relevant evidence, it is under no automatic duty to do so. Nor should a tribunal consider imposing such a duty absent a specific reason to do so, such as credible allegations of fraud, forgery.”
93. Overall, the use of documentary evidence in international arbitration should be efficient, economical and fair. When allocating costs a tribunal may take into account the extent to which any party has failed to conduct itself in an efficient, economical or fair manner, or otherwise engaged in improper conduct or bad faith in the production of documents.

94. Improper conduct arising out of document production may include, but is not limited to:

(i) deliberately acting in an abusive or improper manner in the form and/or manner of requests for documents or in responses to reasonable and appropriate requests by the other party;\textsuperscript{46}

(ii) deliberately and improperly failing to comply with directions concerning requests for document production or to preserve or destroying properly requested or otherwise admissible and relevant documents. Despite there being no automatic duty in international arbitration to preserve relevant evidence, parties and party representatives nevertheless should not engage in intentional efforts to thwart disclosure of relevant and material evidence by destroying information; or

(iii) deliberate falsification of documentary evidence.

c. False Witness or Expert Evidence

95. A tribunal may take into account when allocating costs that a party has presented false testimonial evidence to the tribunal and/or that the party representatives knowingly procured or assisted in the preparation of this false evidence. Such conduct by witnesses or experts also may be subject to national laws of the \textit{lex arbitri}, and punishable under those laws.\textsuperscript{47} Such conduct by legal representatives also may be subject to sanction by their governing legal professional bodies.\textsuperscript{48}

d. False Submissions to the Tribunal

\textsuperscript{46} In an effort to alleviate concerns that arise from abusive requests to produce documents or abusive responses to requests, the IBA published guidelines in an effort to direct the parties and the tribunal as to the best approach (see Guidelines 12-17). This type of conduct may also fall within Article 35.7 of the ICC Rules (as well as Article 9.7 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration).

\textsuperscript{47} E.g., see English Perjury Act, 1911. China’s law on ‘Measures for the Penalties for Violation of Law by Lawyers and Law Firms’ of 2010.

\textsuperscript{48} In an effort to alleviate concerns that arise from intentionally false testimony, some arbitral institutions (e.g., the LCIA 2014, Annex A, Paragraph 4) and other professional bodies (e.g., the IBA Guidelines on Party Representation in International Commercial Arbitration 2013, Guidelines 9-11) have published guidelines or rules in an effort to direct the tribunal as to the best approach. This type of conduct may also fall within Article 35.7 of the ICC Rules (as well as Article 9.7 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration).
96. A tribunal may take into account when allocating costs false submissions to the tribunal intended to
mislead or undermine the integrity of arbitral proceedings and the arbitral process.\textsuperscript{49} Such conduct by
legal representatives also may be subject to sanction by their governing legal professional bodies.\textsuperscript{50}

\hspace{0.5cm} e. Aggression/Lack of Professional Courtesy/Unsubstantiated Fraud Allegations

97. Other factors that could influence the allocation of costs may include aggressive conduct by a party or its
representatives, or a broad lack of professional courtesy. Also, making unsubstantiated fraud allegations
(which are actively discouraged by some legal professional bodies) may be a factor that a tribunal might
take into account in its costs decision.

\textbf{VI. Funding of Costs in the Arbitration and Success Fees or Uplifts}

98. The basic rationale for allocating costs to a successful party is that the unsuccessful party is required to
pay all or part of the successful party’s reasonable costs, based on the belief that a party should not be
‘out of pocket’ as a result of having to seek adjudication to enforce or vindicate its legal rights.\textsuperscript{51} Based
on that rationale, the party itself must ultimately incur the cost of the proceedings in order to recover
costs.

1. Third Party Funded Costs

Where a funded claimant or counterclaimant prevails in its claims or counterclaims, the third party
funder\textsuperscript{52} is usually reimbursed (at least) the cost of the arbitration from the proceeds of the award sum.
Therefore, the party itself will, ultimately, still be ‘out of pocket’ for the cost of the proceedings upon
reimbursing such costs to the third party funder. In such a case, the successful party may be entitled to
recover its reasonable costs, including what it needs to pay to the third party funder, from the
unsuccessful party. The issue for the tribunal will be to determine whether these were costs actually

\textsuperscript{49} Counsel are usually governed by professional codes or rules of conduct and may be subject to sanction by their
governing professional legal bodies for any breach arising out of such conduct. However counsel typically come from
different jurisdictions with different ethical rules which are aimed at practice in that jurisdiction and not necessarily at
the practice of international arbitration. Some arbitral institutions (e.g., the LCIA 2014, Annex A, Paragraph 3) and other
professional bodies (e.g., the IBA Guidelines on Party Representation in International Arbitration 2013 Guidelines 9-11)
have published rules or guidelines in an effort to prohibit such conduct or direct as to the best approach.

\textsuperscript{50} See also the Chartered Institute of Arbitrators Code of Conduct.

\textsuperscript{51} In England, this historic rationale for allocating costs was set out in Harold v Smith [1850] 5 H. & N. 381, 385, where Bramwell B. said: “Costs as between party and party are given by the law as an indemnity to the person entitled to them; they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.”

Similarly, in France, Article 700 of the Code of Civil Procedure empowers the judge to order an unsuccessful party to pay
legal costs to compensate the other party but with regard to “equity and the financial situation of the unsuccessful
party.” This provision seeks to ensure the fundamental right of every individual to have access to justice rather than to
punish the losing party. Accordingly, the French Court of Cassation has held in regard to this provision that it is not
necessary to demonstrate the existence of a dilatory or abusive appeal nor liability on the part of the party ordered to
pay (2nd Civil Chamber, 23 June 1982, appeal n° 7917094).

\textsuperscript{52} A third party funder is an independent party that provides some or all of the funding for the costs of a party to the
proceedings (usually the claimant), most commonly in return for an uplift or success fee if successful.
incurred and paid or payable by the party seeking to recover them, and were reasonable. The fact that the successful party must in turn reimburse those costs to a third party funder is, in itself, largely immaterial.

99. It should be borne in mind that the third party funder is not a party to the arbitration and its existence in most cases is not even known. Nonetheless, where a funded party is unsuccessful, its own impecuniosity may render it unable to meet any costs award against it. In such a situation, the tribunal usually has no jurisdiction to order payment of costs by the third party funder, who is not party to the proceedings.

100. Where a tribunal has reason to believe that third party funding exists, and such funding is likely to impact on non-funded party’s ability to recover costs if successful, the tribunal might consider ordering disclosure of such funding information as is necessary to assess and ensure that the process remains effective and fair for both parties.

101. In the event that there is evidence of a funding arrangement that is likely to impact the non-funded party’s ability to recover costs, that non-funded party might decide to pursue interim or conservatory measures in order to preserve its position on costs, including but not limited to seeking security for those costs or some form of guarantee or insurance, at an early stage of the proceedings. Such measures may be appropriate to protect the non-funded party and put both parties on equal footing in respect of any costs recovery.

102. When considering such interim or conservatory measures to preserve the non-funded party’s ability to recover costs, a tribunal might also consider requiring that the party applying for such measures be liable for any costs and damages caused by the measure or order if the funded party ultimately were to prevail. This would be in line with Article 17G of the UNCITRAL Model Law, referred to above at paragraph 43.

2. Success Fees and Uplifts

103. In reality, funding arrangements are rarely limited solely to the costs of the arbitration. Usually the third party funder will require payment of an uplift or success fee in exchange for accepting the risk of funding the claim, which is in effect the cost of capital. As a tribunal need only be satisfied that a cost was incurred specifically for the purpose of pursuing the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable.

104. However, the reasonableness requirement is an important check and balance in protecting against unfair or unequal treatment of parties in respect of costs, or improper windfalls to third party funders. Tribunals have dealt with this on an ad hoc basis in the context of assessing reasonableness of costs; sometimes the success fee is allocated on the basis it is reasonable and sometimes it is not, having regard to the case as a whole.

VII. Unsuccessful Settlement Negotiations: Associated Costs and Unaccepted Offers
105. As a general matter, successful settlement negotiations can result in significant savings in time and costs, in addition to overcoming the uncertainty of result. If a settlement is reached the arbitration proceedings can be terminated and the terms of the settlement implemented (including any agreed terms relating to costs). If a settlement is not reached then the arbitration will proceed. The existence of settlement negotiations potentially gives rise to two main costs allocation considerations.

106. First, arbitrators may take into account in any costs allocation those costs arising out of or associated with efforts by the parties to seek to settle their disputes. In a number of ICC awards, costs were ordered to be paid for a party’s work and loss of time in connection with unsuccessful negotiation concerning the settlement of the dispute. In one case, the tribunal expressly noted that this was of immediate importance for the party’s claim and the costs incurred in unsuccessful settlement negotiations were considered part of its preparation of the litigation.

107. Second, in certain circumstances, the tribunal may take into account the existence of unsuccessful negotiations and/or unaccepted offers between the parties in allocating costs. There is no general provision in international arbitration for the use of settlement offers to reduce costs, but this may be a matter for discussion at the first case management meeting to be agreed by the parties if they consider it appropriate.

108. Settlement negotiations usually take place outside the purview of the arbitrators as parties endeavour privately to resolve their disputes whilst maintaining their litigation positions. Negotiations are almost invariably expressly agreed by the parties to be confidential and not to be disclosed to the arbitral tribunal (or court). To that end, settlement discussions and offers in writing often will be clearly marked as “without prejudice” or “for settlement discussions only and not to be presented to a court or tribunal”.

109. Different national systems protect the confidentiality of settlement negotiations in litigation (and sometimes in arbitration) in different ways. In some national court systems a formal offer to settle made in accordance with proper procedure may be relevant to reducing the costs of the proceedings. Specifically, if the unaccepted offer is the same as or higher than the judgment sum, some national courts will not permit recovery of costs incurred after the date of the offer. In some legal systems, a settlement offer is confidential between counsel, and therefore if not accepted cannot be referred to elsewhere. In all cases, parties should take care not to bring settlement offers to the attention of the

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53 This is the legal term used in England to keep offers made outside courts and tribunals.
54 This is language more frequently used in the USA.
55 For example, in English litigation pursuant to the Civil Procedure Rules, Part 36.
56 For example, in English litigation pursuant to the Civil Procedure Rules, Part 36.
57 In France, there are no specific provisions on settlement offers and cost implications, but legal professional privilege applies to correspondence between two lawyers by virtue of Article 66-5 of amended Law n° 71-1130 dated 31 December 1971 and an unaccepted offer between counsel thus cannot be referred to in court. In England, an unaccepted settlement offer will usually be subject to without prejudice protection and therefore subject to privilege and may not be disclosed. This consequence is only avoided where the offer is made without prejudice save as to costs (or in litigation subject to the formal Part 36; CPR procedure).
arbitrators prior to final determination on the merits, so as to avoid prejudice (usually to the offering party). 58

110. The ICC Secretariat (and no doubt other arbitral institutions) may assist parties to put information relating to unsuccessful negotiations and/or unaccepted settlement offers before the arbitrators in time for the final award in appropriate cases, without prejudicing the offering party. For example, the offer might be produced in a sealed envelope and deposited either with the arbitrators, or preferably with the ICC Secretariat, to be held until after the arbitrators have determined the merits of the dispute. Once the decision on the merits is reached and the arbitrators are ready to proceed to consider the allocation of costs, the sealed offer would be divulged to the arbitrators by the Secretariat. The reason for holding back the sealed offer is to prevent the settlement offer from influencing the arbitrators’ decision on the merits.

VIII. Concluding Observations

111. The analysis of awards, national practices and approaches contained in this Report underscores the nature of international arbitration and the centrality of party autonomy and flexibility. It reinforces that there is no single, universal approach to costs allocation in international arbitration.

112. However, the Task Force has endeavoured in the body of this Report and its comprehensive appendices to provide users of international arbitration with an additional means to ensure that proceedings are conducted in an effective and cost efficient manner. In particular, it has sought:

(i) to identify various stages in the arbitration when tribunals (and parties) might use costs allocation powers to promote cost effective and efficient conduct of proceedings, including at the initial case management conference;

(ii) to clarify the treatment of presumptions and the variety of considerations that tribunals take into account in assessing reasonableness of costs and apportionment;

(iii) to highlight the availability of additional costs apportionment powers to sanction improper or bad faith conduct; and

(iv) to consider treatment of additional costs issues arising out of third party funding, success fees, cost-capping and treatment of settlement offers.

58 In fact, some national arbitral statutes expressly forbid this.
APPENDIX A
Analysis of Allocation of Costs in Arbitral Awards

1. Review of ICC Awards Dealing with the Allocation of Costs

As the object of the Task Force is to review and provide a report as to how arbitrators can exercise their discretion in allocating costs between the parties in international arbitration, with particular reference to Articles 22 and 37 of the 2012 ICC Rules, the starting point was to look closely at the ICC Rules and practice.

In addition to the new Article 37 (and Article 22) of the 2012 ICC Rules, Appendix IV of the ICC Rules provides examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost, including in order to ensure that time and costs are proportionate to what is at stake in the dispute.

The ICC Secretariat to the Commission on Arbitration and ADR undertook extensive review of costs decisions in ICC awards from 2008 to December 2014. For the purpose of this ICC study the following definitions were applied: ‘arbitration costs’ include the fees and expenses of the arbitrators and of the administrative fees of the ICC, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal; ‘legal costs’ include the reasonable legal and other costs incurred by the parties for the arbitration.

This research was conducted in four parts:

Review of Awards under the 2012 ICC Rules: 2013-2014. Among the approximately 300 ICC awards issued under the 2012 ICC Rules since their entry into force on 1 January 2013 to 31 December 2014, 88 final awards were selected on the basis of detailed and interesting reasoning on the allocation of costs. Special attention was given to the question as to whether the arbitral tribunals would more often take into account the procedural behaviour or conduct of parties and whether the parties conducted the arbitration in an expeditious and cost effective manner as explicitly referred to under the 2012 ICC Rules. Additionally, the original awards in a language from a civil law jurisdiction, such as French, German and Spanish, were also analysed. Finally another 10 partial awards, specifically dealing with costs, issued under the 2012 ICC Rules, were analysed.

Review of Awards under the 1998 ICC Rules: 2012-2013. Second, a review of ICC awards for 2012 and 2013 (January to August) rendered under the 1998 ICC Rules was undertaken. The vast majority of the awards analyzed for this review were rendered under the 1998 ICC Rules: 172 ICC awards for 2012 and 142 ICC awards of 2013 were examined and the most important and interesting decisions as to costs were selected on the basis of the criteria adopted for the allocation of costs.


A selection of 7 awards rendered under BIT cases, from which 2 awards were rendered under the 2012 Arbitration Rules, was also analyzed.

Summary

Based on a comprehensive review of that data set, this Appendix A sets out a summary report of the outcome of this ICC study and includes samples and examples of the more common factors cited by tribunals in deciding on the apportionment of costs allocation.

First and foremost, it became clear that tribunals relied on and used their discretionary powers to award costs in diverse ways and with an array of results. ICC tribunals generally began by emphasizing the discretion given to them under the ICC Rules. This discretion was particularly underscored by ICC tribunals in awards issued pursuant to the ICC 2012 Rules, often directly followed by explicitly citing or referring to article 37(5). Almost every analysed decision on costs of these 2012 awards took into account whether the parties conducted the arbitration in an expeditious and cost effective manner. Procedural behaviour or conduct of parties was systematically taken into account by the majority of arbitral tribunals.

Many arbitral tribunals considered whether the parties had concluded a contractual agreement as to the allocation of costs. In the absence of such costs agreement, arbitral tribunals then tended to take one of two approaches: (i) to allocate all or part of the costs to the successful party, or (ii) to apportion costs equally between the parties. A third approach was to apply a bespoke formula to apportion costs between the parties, taking into account the specific circumstances of the case (but with no loser pays or equal apportionment principle as starting point).

In the context of the two predominant approaches to costs it should be noted that:

- Tribunals ordering cost shifting considered, among other things, the possibility of the parties having avoided the arbitration; what they considered to be guiding principles on cost allocation under the applicable law; the agreement between the parties with regard to costs; the costs incurred in determining preliminary issues such as jurisdiction; the legal and factual complexity of the case; and the necessity of witness or expert evidence. Where tribunals considered an apportionment of costs based on the success of the parties, there was variety in the way the tribunals measured success, i.e. on the issues won or on the quantum of claim (e.g. proving the amount of damages claimed). Some tribunals were specific in calculating the percentage of success based on the amount claimed, while others simply reduced the costs awarded by an approximate proportion. Tribunals did not always apportion both the legal and arbitration costs in the same manner.

- Tribunals equally apportioning costs considered, among other things, that the parties equally contributed to the unnecessary lengthening and complication of the arbitration and associated increased cost and/or that the parties were equally justified in continuing with the arbitration due to good faith misunderstandings between them.
Among the analyzed 1998 ICC awards, the vast majority of tribunals followed the approach of allocating all or part of the costs to the successful party (broadly the costs follow the events approach). Some tribunals described this approach as ‘the common practice of arbitral tribunals,’ others referred to leading arbitration manuals where the costs follow the events rule was said to be the leading principle. However, many expressly took into account other factors and adjusted the allocation of costs accordingly by explicitly stating that it is not the only guiding principle or approach to allocate costs to the prevailing party. These tribunals explicitly indicate that they would allocate costs on the basis of a combination of factors and criteria. For example one tribunal indicated that it ‘may consider the outcome of the case, the relative success of the parties’ claims and defences as measured in proportion to the relief sought, the reasonableness of the parties’ positions and the procedural conduct of the parties, the more or less serious nature of the case.’ Another stated that ‘costs should be determined in light of all relevant circumstances, and not only in the light of the ultimate outcome of the dispute on the merits.’

This trend was even clearer in the analysis of the awards rendered under the 2012 Rules, however the ‘costs follow the event rule’ is less considered as a starting point and is more embodied as one of the major criteria, along with whether the parties conducted the arbitration in an expeditious and cost effective manner and the conduct giving rise to the arbitration.

When costs are allocated to the party that prevailed in its claims by taking into account the relative success of the claims, defences and counterclaims as measured in proportion to the relief sought, tribunals differed considerably in their approach and especially when measuring success.

In some awards, if a party succeeded in the entirety of its claim (or sometimes most of its claims), the other party was ordered to reimburse 100% of its reasonable costs. For example, in one case, the tribunal said the ‘Claimant is the party prevailing to a predominant extent with regard to the final outcome of the proceedings. The Arbitral Tribunal determines that Respondent shall bear the Arbitration Costs entirely’. In other awards, costs have been allocated more on the basis of proportionality to success.

Another approach is to apportion costs based on the proportionate success and failure of each party. The difficulty with following the proportional or relative success and failure of the parties lies in measuring success when there is no clear-cut ‘winner’ or ‘loser’. In one case, the claimant won the merits, but could not prove most of the substantial damages of its claims. Conversely, the respondent was the ‘winner’ on the monetary outcome of the arbitration (and on that basis costs had to be borne almost exclusively by the claimant). Another tribunal held that ‘hence, no party losing the case, costs must be allocated ‘in the ratio of their winning or losing when the award is not quantified, there are no clear cut rules to determine the ratio when the claim is not quantified’.

In some cases, tribunals have decided that some of its costs should not be paid by the losing party even where the result against it was decisive. For example, in one case the claimant, successful in about 75% of its claims, was ordered to carry 25% of its costs. Another particularly good example is a case in which the tribunal, noting the overwhelming success of the claimant, decided to reduce the amount of costs reimbursable to the
claimant on the basis that it ‘did not prevail entirely’, even if the reduction was only of ‘very modest proportions’. In that case, the tribunal decided that the respondent should bear 98% of the claimant’s costs.

The approaches taken by tribunals varied greatly in this respect; either the tribunal roughly determined the proportion of relative success of the parties by taking into account who won on the merits or liability and who won on the quantum, or took a more calculated approach and determined the percentage of success of each claim and counterclaim, followed by a set off of these percentages in order to come to an exact success quota. This success quotient has been applied to calculate both the arbitration costs and the legal costs, but some tribunals distinguished between arbitration costs and parties’ legal costs and applied the success quotient to the arbitration costs only, apportioning parties’ legal costs in a different manner. For example, in one case where the claimant succeeded in his claim, but not for the full 100%, the respondent bore all arbitration costs and its own legal costs but only a portion of the claimant’s legal/party costs.

It is also not uncommon for tribunals to have started from the principle of allocating costs to the successful party, but ultimately ordered 50/50 on the basis of relative success of both claimant and respondent, or in cases where neither side was successful.

The notion of ‘each party pays its own costs’ was applied by tribunals, although far less frequently. This approach begins from the position that each party should bear its own legal costs and that arbitration costs should be apportioned equally between the parties. This is so even if one party (clearly) succeeds on the merits. This must be distinguished from the situation where the tribunal commences from a “costs follow the event position” and ends with a 50/50 apportionment.

Furthermore, the review examined some of the more common factors cited by tribunals in deciding on the apportionment of costs allocation. These included:

- possibility of having avoided arbitration
- guiding principles on cost allocation in the applicable law
- agreements between the parties with regard to costs
- costs incurred in determining preliminary issues such as jurisdiction
- procedural behavior of parties
- reasonableness of costs incurred
- legal and factual complexity of the case
- parties’ legal fees and expenses: outside counsel
- disparity of costs
- determining of what type of costs were recoverable
Possibility of having avoided arbitration

The review of the awards under both the 2012 and 1998 ICC Rules showed that arbitral tribunals often took into account parties’ conduct giving rise to the arbitration. Many tribunals considered that the arbitration could have been prevented for example if one party had acted differently, either in settlement discussions or correspondence in the lead-up to the arbitration. In such cases, even if most or all of the Claimant’s claims had failed, tribunals ordered that the costs of arbitration be divided evenly, or at least in a different proportion to the decision on liability. The refusal of a party to settle a dispute has been taken into account by arbitral tribunals, even though the settlement terms were more favorable than the eventual outcome in the arbitration. The tribunals’ main concerns appeared to be whether arbitration is considered to be the proper forum and whether parties had brought the claims in good faith, including in the situation where contractual provisions were ambiguously drafted. Similarly, arbitral tribunals considered whether the existence of claims or counterclaims, though rejected, had been rightfully raised or whether they were frivolous.

Example of findings of tribunals:

- ‘Even if Claimant didn’t prevail Respondent could have avoided Arbitration but didn’t.’
- ‘The fact that the Claimant did not prevail because it failed to establish causal link, does not automatically relieve Respondents from any responsibility for the fact that Claimant decided to put the arbitration in motion. In other words, the Arbitral Tribunal is convinced that this arbitration and therefore the costs could have been avoided by Respondents.’
- ‘No alternative for Claimant but to bring this arbitration to enforce its rights.’
- ‘Conversely, one tribunal merely stated what is ‘fair and just’ to award the respondent, but notes that it has ‘no jurisdiction to determine whether or not Respondent has caused the Claimant to incur expenses in relation to the prosecution of its principal claim.’
- ‘No frivolous claims and parties acted in good faith.’
- Tribunal takes into account to which extent the costs were appropriate for bringing the action, ‘given that respondent prevailed on the vast majority of substantive issues the need for recourse to arbitration has thus been almost entirely due to the claimant’s stance on the disputed issues.’
- Tribunal considered the costs consequences for a claimant who has withdrawn its claim and found that in such circumstances the claimant should bear 100% of the arbitration costs, as well as its own and the respondent’s legal costs.
- The need to have recourse to arbitration as a result that the counterparty refused to accept a settlement offer. The tribunal found that the offer was not a ‘Calderbank’ type offer; it found that the settlement offer was not formally made ‘without prejudice save as to costs’; the time for

60 Is a type of settlement offer which, if rejected would certainly result in a court finding that such rejection was unreasonable
acceptance of the offer, 7 days, was unreasonably short; after rejection of the proposing party it continued to pursue claims which the tribunal held as unmeritorious.

- Even if claimant ‘lost’ the case, the costs were allocated in equal shares. Because parties acted fairly with a cooperative attitude and claimant started arbitration as result of failed settlement negotiations.

**Guiding principles on cost allocation in the applicable law**

Some tribunals have taken into account what presumption or principle for the allocation of costs is applied by the law of the seat or the *lex arbitri*. This was predominantly done as a criterion for consideration and not because this law was applicable to the allocation of costs.

Example of findings of tribunals:

- ‘The Tribunal’s broad discretion is largely confirmed by the *lex arbitri*’.

- ‘The tribunal has further taken into account the practices as to costs in effect at the place of arbitration which the parties may reasonably expect to apply as one of the guiding principles to the tribunal’s decision on costs’.

- ‘If the success of both parties in the proceedings is deemed to be approximately equal, each party bears its own legal costs (arbitration costs 50/50%). This principle is generally recognized in the jurisdiction of the place of the arbitration proceedings and the applicable law in these arbitration proceedings’.

- Tribunal refers to ICC Rules but ‘as this arbitration has its seat in London, the Tribunal has also taken account of the general principle in section 61(2) of the Arbitration Act 1996’ that costs follow the events except where it appears to the Tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.’

- ‘It is also the governing principle under German Arbitration Law as the law of the place of arbitration. Arbitral tribunals in Germany generally exercise their discretion for the allocation of costs provided for in paragraph 1057 ZPO in line with the rules existing for court proceedings where paragraph 91 ZPO explicitly sets out this principle.’

**Agreements between the parties with regard to costs**

Tribunals have also taken into account agreements on costs, but examples of agreements on costs were rare:

- Parties agreed in their submission on costs that the general principle of ‘costs follow the event’ should be applied. Tribunal stressed its discretion under the ICC Rules and resolved that costs should follow the events ‘subject to certain adjustments’.

- Clause from a supply agreement: ‘the prevailing party shall be entitled to recover its reasonable attorneys’ fees, costs and other expenses’. The tribunal considered this agreement to be mandatory and that its ‘determination is essentially limited to whether any of X’s claimed costs is not reasonable.’
Detailed arbitration clause: ‘The contracting parties shall each bear their respective expenses and fees. In the event the arbitrator renders an award for only one party, the costs of the arbitration shall be borne by the other party.’ The tribunal considered this agreement to prevail over Article 31 of the ICC Rules.

In one case there was an agreement between parties as to the allocation of costs ‘in equal shares’. But the exact meaning of ‘costs’ in the agreement was disputed by the parties as it was unclear whether the contract included only arbitration costs or also legal parties costs. The tribunal upheld the agreement only in relation to legal fees and ordered the allocation of the arbitration costs in equal shares. The tribunal found that such an agreement as to the arbitration costs itself is a matter for the tribunal’s discretion and decided that they should be entirely borne by the claimant.

**Costs incurred in determining preliminary issues such as jurisdiction**

Tribunals have specifically considered whether the costs spent on preliminary issues, principally objections as to jurisdiction should be recoverable and at what stage of the procedure such costs are recoverable. The outcome of preliminary issue decisions may differ from decision(s) on the merits. Examples of tribunals’ findings include:

- ‘Claimant’s declaratory relief and Respondent’s set off claims needed to be examined as preliminary issues of most of the Claimant’s monetary claims. To this extent they are integral components of the Claimant’s monetary claims and their success of slightly less than 50% in this arbitration.’

- ‘However it should be considered that the Respondent unsuccessfully contested the Claimant’s locus standi. This issue produced additional costs and had to be decided in a separate interim award.’

- ‘For this specific successful phase of the procedure, the Claimant should be awarded for its legal costs.’

- ‘Each party should bear its own legal costs as well as the legal costs as to the locus standi- costs.’

**Procedural behavior of parties**

When the parties’ conduct was considered to be acceptable, tribunals sometimes confirmed the professionalism of parties and their counsel. When parties’ conduct was not acceptable, this was often taken into account as a criterion justifying the derogation to costs allocation to the successful party, as well as a separate factor.

The procedural behaviour or conduct of parties was systematically taken into account by the majority of tribunals. For those awards rendered under the 2012 Rules, almost each and every one of the analysed decisions on costs takes into account whether the Parties have conducted the arbitration *in an expeditious and cost effective manner*.

There are various examples of procedural conduct being taken into account for the apportionment of costs, with conduct or misconduct being sanctioned by reduction in the amount of costs awarded by the tribunal.
Some arbitrators also include within this ‘conduct’ criteria that the parties were behaving in good faith, sometimes by interpreting procedural efficiency as an act of good faith.

The conduct that gave rise to cost shifting included: (i) uncooperative behaviour, resulting in unnecessary delays; (ii) failure to pay advance on costs; (iii) refusal to participate in drafting terms of reference and procedural arrangements; (iv) failure to reply to document production requests; (v) failure to appear at the hearing in person; (vi) claims that were abandoned very late in the proceedings; (vii) missed major procedural deadlines; (viii) disregarding standard procedural rules; (iv) lack of professional courtesy; (v) failure to provide timesheets to substantiate legal fee claims; (vi) withholding evidence needed by another party; (vii) causing opacity as regards the factual and legal situation; (viii) continuing to make arguments on issues that had been determined by procedural orders; (ix) raising ‘bad’ points or raising points at the wrong time; and (x) unreasonable conduct that fell short of bad faith.

Examples of tribunals’ findings include:

- Claimant chose to challenge threshold issues (such as applicable law) thereby expanding the litigation and where they chose to make concessions, they yet decided to raise arguments disputing the claim very late in the proceedings.

- Conduct of the parties was considered reasonable with one exception: the respondent raised a defence as to its statute of limitation in its Rejoinder and could have done so at an earlier stage (i.e. in its Answer to the Request for Arbitration or Full Statement of Defence). This caused delay and additional costs. The additional costs incurred by claimant should be reimbursed by the respondent.

- The respondents’ unresponsive and uncooperative behaviour resulted in unnecessary delays in the proceedings (i.e. the respondent repeatedly missed deadlines, asked for last minute extensions and in general delayed proceedings, thereby causing a significant share of costs).

- Bad behaviour of the parties while arguing the case in a rather extensive and costly manner; such as causing unnecessary expenditures of money or time (including wasting hearing time), acting unreasonably during document production. Example listed by Arbitral Tribunals: the respondent’s brief exceeded the claimant’s brief by far (the respondent’s post hearing brief was 110 pages, and the claimant’s was only 17 pages); the respondent filed various unsolicited submissions, notably with regard to production of documents; the respondent’s legal fees exceeded the claimant’s costs significantly. As a consequence, the tribunal deducted 15% from the legal fees claimed.

- Causing costs notably by engaging in several court proceedings relating to the arbitration.

- The claimant asserted very large claims, two of which were clearly exaggerated, not substantiated and more or less abandoned at the hearing. The tribunal took this into account and deduced the reimbursement proportionally.

- Claimant’s case was based on a theoretical relationship but was not supported by evidence (this consideration was mentioned as a reason to deduct the reimbursement).
Tribunals have noted in costs decisions the parties’ ‘good behaviour’ or the fact that parties acted in ‘good faith’ when they facilitated or simplified proceedings and thereby contributed to procedural efficiency. Tribunals have expressed appreciation for counsels who have shown professional and forthcoming attitude, excellence of advocacy and took care to keep the tribunal informed throughout the procedure. For example, one tribunal confirmed that the arbitration was conducted in an *expeditious and cost effective* manner because a procedure was significantly simplified thanks to one party who chose not to file certain briefs.

**Reasonableness of costs incurred**

Various additional factors have been taken into account by tribunals in considering whether or not amounts on costs claimed are reasonable. Irrespective of the starting point, if there is to be any cost shifting at all, the tribunal is required under the ICC Rules to consider the reasonableness of the costs sought. The reasonableness of the amount of the submitted incurred legal and other costs is either taken into account in the exercise of deciding whether to allocate costs and in what proportions or, when the submitted costs are considered unreasonable, as a matter of ‘reduction’ of the costs after the general allocation is determined.

It should be mentioned that the majority of tribunals gave considerable importance to the way fees are substantiated, differentiated, well documented or supported by evidence. If the legal fees were not substantiated, some tribunals simply compared with the other parties’ costs submission to appreciate the reasonableness of the incurred costs, others were inclined to fix an amount of what they appreciated to be a reasonable fee in that case.

Examples:

- The respondent’s costs submissions were unsubstantiated legal costs, because respondent had failed to provide for evidence that such amount incurred for attorney’s fees had actually been invoiced to any of the respondents. The tribunal decided that these costs were not recoverable.

- ‘The claimant has not filed any supporting documentation for their cost items, but the respondent has not contested these costs items, and the amounts claimed by the claimant remain undisputed. The respondent has however filed adequate supporting evidence of the amounts claimed. The total cost claims of both parties are of similar size and amounts reasonable in view of the nature of this case, the issues raised, the quality of the assistance provided to each side and the respective fee arrangements.’

- One tribunal indicated that parties have refrained from providing the tribunal with detailed description of the services rendered by their legal counsel and have refrained from contesting the actual time spent by and the hourly rate charged by the other parties’ legal counsel. Costs were awarded by fixing what the tribunal believed should be appropriate.

**Legal and factual complexity of the case**

Tribunals have taken into account the legal and factual complexity of the case in their costs decisions. In particular, tribunals have taken into account, among others, the following factors:
- The necessity to argue the case under some applicable law, the number of witnesses the duration of the hearing, the necessary marshalling of evidence, the amounts in dispute and the number of issues decided.

- Highly complex arbitration, requiring an understanding in various fields of expertise; workload and high expenditure involved from experts should not come as a surprise and justifies high legal fees and expenses.

**Parties’ Legal Fees and Expenses: Outside Counsel**

There are different approaches and reasoning as to legal fees; some tribunals did not assess the amounts in any detail as they consider it to be part of the freedom of each party to choose their own counsel; others closely scrutinized invoices considering whether the number of declared hours, hourly rates and the number of partners was reasonable in light of the duration and complexity of case. Some tribunal took a much more general approach and fixed the ‘reasonableness’ of legal fees as they saw fit in light of the case. In other words, different criteria are applied to assess the reasonableness of parties’ legal fees and expenses:

- Submitted legal fees have to be relevant and related to the presentation of the case.

- Legal fees are reasonable in view of the duration and complexity of the case, factual and legal analysis, time spent and hourly rates are reasonable, the contribution of legal arguments made and of the evidence marshalled.

- Reasonableness of the fees are considered in view of the amount at stake. For example:

  - reduction by 50% of the legal fees because the damage awarded was significantly less than the damages sought.

  - tribunal held that the claimant’s legal costs should be 1) reasonable, 2) relevant, 3) transparent, *in proportion to the debt concerned*. The claimant claimed 65,000 in respect of costs in a claim of 300,000, the tribunal held that the costs, are relevant, and transparent, but finds 10% of the amount at stake is reasonable and therefore ordered that only 30,000 is recoverable.

- Reasonableness of the fees in relation to the importance of the outcome of the proceedings with respect to its potential impact on the claimant’s efforts to recover alleged breach of contract under related contracts and the claimant’s general liability under the specific project.

- The tribunal considers these costs reasonable in light of the financial stakes of the matter and its relatively straightforward nature.

Other examples of findings of tribunals:

- ‘Expenses of hearing of parties’ representatives are reasonable. – it is for each party to decide who should attend the arbitration, who should be its legal counsel and whether they should attend the
hearing or not and the expenses that may be incurred in this respect. – the tribunal does not allow a
discount in this respect.’

- ‘in assessing reasonableness of legal costs, the tribunal considers that the parties are free to select
legal counsel of their choice. The ‘reasonableness’ of the costs incurred by the counsel so selected can
only be questioned with a view of to the time spent on the case or hourly rates charged.’

- Tribunal found a claim for costs of 300,00.00 for a claim of 320,00.00 disproportionate to the amount
and unreasonable; ‘Advancing the Claimant’s claim could simply not justify the efforts of two senior
Partners, one mid-level Associate, a Paralegal, a Case Clerk and a Practice Support Specialist who at
their respective hourly rates, generated fees charged to Claimant of approx. 225,000.’

- Tribunal found hourly rates consistent with rates usually charged; hours charged was not excessive;
and total amount claimed certainly appropriate to the amounts claimed and awarded.

**Disparity of costs**

Tribunals have addressed considerable differences between the parties’ costs submissions as well as
imbalanced amounts spent between the parties, for example when the claimant’s costs are substantially
lower than those paid by the respondent or vice versa. Quite often tribunals concluded that although one
party’s costs were significantly higher than the other party’s, the costs still remained in the range of
‘reasonable costs’. In other words, the fact that there is an unbalance does not automatically lead to
unreasonableness. Conversely, in some cases, tribunals fixed the reasonableness of the legal costs by
calculating the average of both parties’ submitted legal fees.

Example of tribunals’ findings:

- The respective amounts appear to be at the lower and the upper part of the scale, but the tribunal
considers that the claimant’s expenses do not appear excessive in the present circumstances.

- Tribunal notes that there is significant disparity between the amount of the claimant’s and the
respondent’s legal costs. The tribunal holds that both are reasonable and that the disparity reflects two
different strategies adopted and that there is no reason that the claimant should be penalized by the
more costly strategy adopted by the respondent.

- A strong indication that the Claimant’s costs in this arbitration are reasonable is that the Respondent’s
costs are higher.

- In a case where the claimant’s expenses were three times lower than the respondent’s, the tribunal
held: ‘It is certainly true that Claimant’s expenses were clearly on the high side. However, it is also true
that Claimant had a difficult task in assembling evidence from X for its various claims to be directed
against four different entities located in Europe. Also, in principle, there is nothing wrong with the fact
that Claimant chose in the first place a law firm located in Paris and in addition retained services of
German Counsel and to a very small extent of Indian counsel.’
- In another case, the tribunal inquires why a party hired more expensive US lawyers when the seat of arbitration was Switzerland and there were no American parties involved: ‘It is questionable what a US trial law firm could reasonable contribute to the representation of respondent in this case. – The Tribunal does not consider it to be reasonable to retain US counsel in addition to European Counsel for an arbitration taking place in continental Europe governed by the laws of the a civil law country. Of course, every party is free to retain any kind of legal advice which it deems helpful to its case, but it then may not automatically ask for full reimbursement of such costs.’ The Tribunal subtracted the USD amount of respondent’s legal costs.

- In one case one of the party’s costs was 50% higher than the other party’s costs. The tribunal carefully looked into all the costs and decided what was reasonable and what was not. It found that only 60% of the work done before the Request for Arbitration was filed, including contract consultants’ costs, should be reimbursed.

- And finally, the tribunal found an amount of duplication of efforts and only allowed 66% of the amount claimed for reimbursement. Consequently the tribunal decided to calculate the 65% on the basis of the average between the respective legal costs of each party.

**Determining what type of costs were recoverable**

**Success Fees**

Only a few costs awards considered the question of success fees. Examples include:

- In one case, the legal fees of the claimant depended on a service agreement with its counsel, under which its counsel would be paid 20% of the refunded costs and compensation if respondent is ordered payment to the claimant based on the arbitral award. The tribunal calculated the (success) fees and found them reasonable.

- In another case, a 3.5% success fees claimed was excluded from the legal fees to be reimbursed.

**Professional Rules of Client Representation**

Some awards took into account allegations of violation of professional conduct. Examples include:

- In one case, the tribunal found the legal expenses of outside counsel reasonable, independent of the fact whether the outside counsel (law firm) (allegedly) acted in violation of professional rules relating to the avoidance of conflict of interests.

- In another case, the respondent argued that the claimant, during the arbitration, conducted itself in an improper and unprofessional manner, and also contrary to Thai law, on the basis that the appointment of the claimant’s counsel was in violation of the Thai Working of Aliens Act. In response to this argument, the tribunal concluded that the “arbitration is governed by the ICC Rules and it is not within the Arbitral Tribunal’s authority to deprive a party’s entitlement to costs by reason that its counsel did not have the appropriate work permit. This issue may be a matter for decision in another forum”. As such, the tribunal said it could not “consider this as a ground to deprive a party from its entitlement to costs”.


Witnesses/Experts

Some tribunals found costs relating to expert-witnesses to be reasonable when they were considered necessary to defend a party’s case and when the witness or expert is a well-established expert as to his expertise in the relevant field. Other tribunals decided not to give any weight to such evidence and for the same reason dismissed the claim for its costs reimbursement.

In-house Counsel, Management and Employees’ Costs

There are quite different views on whether or not in-house counsel costs, management costs or employee’s costs are reimbursable. With respect to management costs, some tribunals held that these fees should not be awarded under ‘other’ costs as it is part of management’s role to manage and deal with conflicts, especially if parties hired outside counsel to deal with the rest. Others took the opposite view and stated that all time spent on an arbitration is time not spent on managing the company and should therefore be awarded. Both views have also been expressed in relation to employees’ costs. Proof and justification of alleged costs and the role of the in-house counsel seems to be important to the tribunals. On several occasions tribunals have found that parties failed to sufficiently substantiate and prove the actual incurring of the costs in the amount as claimed and therefore refused to order reimbursement.

Example of tribunal’s findings:

- Tribunal found the costs for the claimant’s representatives not recoverable: ‘such costs are not part of the costs of arbitration but part of the normal costs for running a business enterprise. Arbitrations inevitably take up time of the Parties themselves and their staffs, but the costs of any such time are not part of legal costs of the proceedings.’

- Tribunal did not accept that ‘the 350,000 requested for working days of employees in connection with the defence of this case is unreasonable. As regards the 35 days spent by Dr Miss X, neither her maternity leave which lasted only for a part of the proceedings, nor the content of her witness statement allow the conclusion that she did not spend 35 days on the case. Together with her direct supervisor Dr Miss Y, Dr Miss X was head of the department and the closest employee to the case. There is no reason to deduct the amount.’

- ‘if well documented by bills etc. hourly rates, proof of when and why those hours where related to the arbitration proceedings, they shall be accepted by the Arbitral Tribunal, otherwise they have been rejected.’

- Tribunals required a party to sufficiently substantiate and prove their in-house ‘costs’ and substantiate and prove the accuracy of the so-called ‘benchmark rates’ used to calculate its reimbursement claim. These benchmark rates needed to reasonable. Furthermore parties needed to identify whether the actual expenses were incurred or whether they rather reflect or include a profit that was anticipated to achieve in due course of business with the assistance of its legal and commercial team and that it did not achieve due to the time its legal and commercial team had to allocate to the arbitration.
- Tribunal considered reimbursement of in house counsel costs: ‘it is controversial especially when party already hired (and claimed) the services of an external counsel. Rationale behind this is that where a party obtains legal assistance from external legal counsel, the internal case management should normally not exceed expenditures of time that would have to be considered as being beyond the ordinary course of business of an in house legal department’. The tribunal was convinced by that rational and rejected the in-house costs.

- Tribunal held that the respondent’s defence contained a detailed description of technical aspects and that conclusive work was put by respondent’s employees in defending the claim which would not have been necessary without the claim.

- The claimant’s argument that the employees would have been paid anyway irrespective of the existence of the arbitration (i.e. paying the salary) failed, tribunal held that the employees could have been employed by the respondent on other projects had they not done work in connection with the arbitration.

- Tribunal considered that the time spent by management on arbitration should be taken into account because ‘the time of management is an important cost factor caused by an arbitration and that in a number of cases these costs have been taken into consideration by Tribunals’.

- ‘[T]he difficulty with in-house costs is their substantiation. Claimant has not presented any information of evidence for the time spent and other factors of the quantification of these in house costs.’
2. Allocation of Costs under Other Arbitral Rules

Further and in order to obtain a broader view of the practice of arbitrators in allocating costs in international arbitration proceedings, the Task Force invited several other arbitration institutions to provide it with a report examining the allocation of costs in recent awards issued under their arbitration rules. The China International Economic and Trade Arbitration Commission (CIETAC), The German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS), the Hong Kong International Arbitration Centre (HKIAC), the International Centre for Dispute Resolution (ICDR), the London Court of International Arbitration (LCIA), the Permanent Court of Arbitration, the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre (SIAC), each kindly provided a report on the allocation of costs under their systems.

Their reports and conclusions are included in this Appendix A, in connection with the pertinent rules on the allocation of costs, in order to gain a picture of the practice of arbitrators operating under different systems.

a. China International Economic and Trade Arbitration Commission (CIETAC)

The CIETAC provided a report which did not contain statistical data or samples. Its comments and conclusions have been directly integrated in the main text of this Report.

b. German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS)

The DIS provided a case analysis containing examples of cases in which arbitrators acting under DIS rules gave special considerations to specific situations for the allocation of costs. In coming to the conclusions in this section, the DIS reviewed decisions administered by it under the DIS Arbitration Rules 1998.

I. General remarks

Sec. 35.1 of the DIS Arbitration Rules (the “Rules”) provides:

“unless otherwise agreed by the parties, the arbitral tribunal shall also decide in the arbitral award which party is to bear the costs of the arbitral proceedings, including those costs incurred by the parties and which were necessary for the proper pursuit of their claim or defence”.

Furthermore, the DIS rules make explicit reference to the “costs follow the event” principle in Sec. 35.2 DIS rules, according to which “in principle, the unsuccessful party shall bear the costs of the arbitral
proceedings. The arbitral tribunal may, taking into consideration the circumstances of the case, and in particular where each party is partly successful and partly unsuccessful, order each party to bear his own costs or apportion the costs between the parties”.

II. Case analysis

- Parties’ contribution to dispute resolution in the pre-arbitration phase

Case 1: Despite the dismissal of the claim, Respondent had to bear 30% of the costs. The Tribunal justified the departure from the “costs follow the event” principle with Respondent’s behaviour in the pre-arbitration phase. Due to Respondent’s unwillingness to provide information to Claimant in the pre-arbitration phase, Claimant saw itself justifiably provoked to initiate arbitral proceedings. Had Respondent provided the information upfront, the dispute could probably have been settled amicably.

Case 2: After having concluded a partial settlement, Claimant withdrew the claim. Nevertheless the Tribunal decided to split the costs equally, because in the pre-arbitration phase Respondent had strictly refused to recognise even partly the claim which turned out to be legitimate.

Case 3: In this case, which was overall decided in favour of Claimant, the Tribunal considered that the claim could have been brought in another arbitration conducted between the parties some years before. Because the additional arbitration caused additional costs, the Tribunal decided to split the arbitration costs equally between the parties.

Case 4: The conduct in the pre-arbitration phase was also considered in a case concerning a dispute among shareholders, where the claim was dismissed after the Tribunal had interpreted a litigious shareholder’s resolution in favour of Respondents. The arbitrators noted in light of the ambiguous wording of resolution that Respondents in their capacity as shareholders were partly responsible for the resolution’s unclear meaning. They therefore had to bear their own costs for legal representation.

- Claimant’s duty to submit the facts conclusively

Arbitral tribunals acting under DIS rules also take into consideration claimant’s duty to submit all relevant facts and circumstances in support of their claim in a conclusive manner.

Case 5: This is illustrated by a case, where the arbitrators found that Claimant had extensively submitted exhibits, but without explaining their meaning properly. Consequently the Tribunal allocated an additional share of costs (15%) to Claimant, because its behaviour had contributed to an unnecessary increase of Respondent’s costs for legal representation, which were twice as high as the costs incurred by Claimant.
Case 6: A similar rationale was applied in a case which was overall decided in favour of Claimant, who nevertheless had to bear 5% of the costs. The Tribunal explained the decision with Claimant’s allegations at the initial stage of the proceedings, which were considered to be “to some extent ambiguous”.

- Respondent’s duty to contribute to the continuation of the proceedings

Case 7: In this sense arbitrators have taken into account Respondent’s unwillingness to pay the advance on costs and thereby forcing Claimant to pay for Respondent’s share of the advance.

Case 8: Even though Claimant was almost entirely successful (94%) in this case, the Tribunal noted that it had requested a far-reaching interim order which caused significant work for the Tribunal and which turned out to be unfounded. Claimant therefore had to bear 25% of the overall costs.

Case 9: In this case the Tribunal took into account that Respondent’s jurisdictional, res judicata and time bar objections were all denied. On the other hand, the arbitrators noted that Respondent’s waiver of older claims helped to speed up the proceedings, despite the fact that the waiver could have already been declared at the outset of the proceedings.

Case 10: The contribution to a time- and cost-efficient conduct of the proceedings was also considered in a case where the Tribunal allocated an additional share of costs to Respondent (5%), even though the claim had been entirely dismissed. According to the arbitrators, Respondent had contributed to additional costs of the proceedings by submitting an unfounded request for securities for costs.

- Non-participation in the administration of the proceedings

Case 7: In the context of ensuring time- and cost-efficient conduct of the proceedings the fact that a party refused to participate for a longer period of time (approx. 9 months) without reacting to the sole arbitrator’s attempts to establish contact has also been taken into account in allocating costs.

Case 12: In addition to the “costs follow the event” rule the arbitrators decided that Respondent had to bear 90% of the overall costs, because she was considered to have increased the workload of the participants in the arbitration, i.a by being entirely responsible for the postponement of the oral hearing.

- Multi-party considerations

Case 11: In this case Claimant succeeded against Respondent 1 almost entirely (80%), but its claim against Respondent 2 was declared inadmissible. In light of these findings the Tribunal applied an allocation of costs reflecting the success rate of claim 1 (80% to be borne by Respondent 1). In addition to the 20% of the administrative and arbitrators’ fees and costs, Claimant had to bear the legal fees of Respondent 2.
Cooperation between the parties

Case 13: In light of a settlement agreement with respect to one aspect of the dispute, the sole arbitrator considered that splitting the costs equally would contribute to establish legal peace between the parties. He furthermore took into account that the claim and counterclaim were both only partially successful and that the conduct of both parties contributed equally to the existence, length and costs of the arbitration.

III. Conclusion

A review of cost decisions in arbitral practice under DIS rules shows on the one hand, that tribunals follow the “cost follow the event” principle in most of the cases. On the other hand, they are also willing to take into account the parties’ behaviour in and before the arbitration. Due to the fact that DIS rules, German arbitration law and German civil procedure make explicit reference to “cost follow the event” principle, arbitrators seem to set the threshold for departing from the general rule relatively high. It also must be noted in this context that even if tribunals take into account circumstances of the case beyond its outcome, the consequences for such considerations tend to have a relatively small financial impact. Therefore, the “costs follow the event” principle clearly reflects the general arbitral practice and arbitrators acting under DIS rules only reluctantly depart from it.

c. Hong Kong International Arbitration Centre (HKIAC)

In coming to the conclusions in this section, the HKIAC reviewed decisions administered by it under the HKIAC Administered Arbitration Rules from 2008 to 2014 under the 2013 and 2008 versions of the HKIAC Administered Arbitration Rules.

The 2013 and 2008 versions of the HKIAC Administered Arbitration Rules each contain provisions dealing specifically with allocation of costs by the arbitral tribunal. (The HKIAC Rules, set out at attached Appendix C.) The HKIAC Rules grant broad discretion to the arbitral tribunal to award and allocate costs. As most HKIAC arbitrations are seated in Hong Kong, the primary statutory basis for the arbitral tribunal to allocate costs in these arbitrations is Section 74 of the Arbitration Ordinance (Cap. 609) (the Arbitration Ordinance).

Article 33.2 of the 2013 HKIAC Rules provides that the arbitral tribunal may apportion the costs of the arbitration (including parties’ legal costs) in a manner it considers reasonable, taking into account the circumstances of the case. Notably Article 33.3 introduces a provision allowing the tribunal to direct that the recoverable costs of legal representation and assistance be limited to a specified amount. These rules are also applicable in a consolidated arbitration, in which case the costs of the consolidated arbitration will also include the fees of any tribunal and any other costs incurred in an arbitration that was subsequently consolidated into another arbitration.

The 2008 HKIAC Rules provide a twin-track approach to the allocation of parties’ legal costs and other costs of arbitration. With respect to the costs of legal representation and assistance, Article 36.5 establishes that the arbitral tribunal is free to determine which party shall bear such costs or may reasonably apportion such costs
between the parties as it determines appropriate. However, in accordance with Article 36.4, other costs of arbitration shall in principle be borne by the unsuccessful party, although this is subject to the ultimate discretion of the tribunal to allocate all or part of the costs between the parties if reasonable in the circumstances of the case.

HKIAC presented a report analysing all awards issued under the 2013 or 2008 version of its administered arbitration rules since their introduction in 2008. It can be discerned from this report that HKIAC tribunals have adopted the following approaches to cost allocation: ‘Costs follow the event’; ‘each party pays its own costs’ and a ‘hybrid approach’: a combination of “costs follow the event” and “costs fall where they are”, i.e. while the losing party bears the registration fee, the HKIAC administrative fee and the tribunal’s fees, each party pays its own legal fees and expenses.

HKIAC’s report shows that “costs follow the event” approach is most commonly adopted by HKIAC tribunals. This approach is adopted in just over 91% of awards issued under the HKIAC Rules. This is, to some extent, driven by Article 36.4 of the 2008 HKIAC Rules, which, as mentioned above, provides that the costs of arbitration (excluding the parties’ legal costs) shall in principle be borne by the unsuccessful party. The ‘each party pays its own costs’ approach and the hybrid approach are rarely followed in HKIAC arbitrations, with the former approach adopted in only 2% of cases and the latter applied in 7%.

In most cases where the “costs follow the event” approach was followed, the arbitral tribunal recognised that the principle of reasonableness was the benchmark in assessing costs. In determining reasonableness, the tribunal took into account all circumstances of the case, including but not limited to the complexity and nature of the dispute.

Despite the general presumption in favour of the “costs follow the event” rule under Article 36.4 of the 2008 HKIAC Rules, in some cases the arbitral tribunal nonetheless exercised its discretion to examine the circumstances of the case and adjusted the costs applying the principle of reasonableness.

In one case, an agreement that the parties bear their respective costs was found invalid in accordance with the Arbitration Ordinance. The agreement stated that “[E]ach party agrees to bear its own costs of arbitration (including solicitors’ costs) and to equally share the fees of the arbitral tribunal and the actual costs of arbitration if any unless otherwise directed by the arbitral tribunal.” The arbitral tribunal found that the portion regarding the parties’ agreement to pay their own costs was void under the Arbitration Ordinance. However, the tribunal held that the portion “otherwise directed by the arbitral tribunal” remained effective.

d. International Centre for Dispute Resolution (ICDR)

In compiling the below, ICDR reviewed 68 international arbitration awards and the dispositions as it pertains to costs which were rendered under the International Dispute Resolution Procedures effective as of 1 June 2009. These awards were filed between June 2009 and July 2012 and awarded between January 2011 and December 2013. The statistical results are contained in the table below and support the rule that costs follow the events in the majority of cases.
Costs Follow the Event | Pursuant to Clause | Other*  
---|---|---  
ICDR Administrative Costs | 37 | 11 | 20  
Arbitrator Compensation Costs | 36 | 11 | 21  
Attorneys’ Fees & Other Costs | 18 | 7 | 43  

*Other: No Reasoning Provided/No Allocation/Not Addressed

* “Other” category: The figures expressed in the Administrative Costs (20) and Compensation (21) sections reflect mostly cases where these costs were awarded but mostly through a 50/50% allocation with minimal or no reasoning provided. The figure in the Attorney Fees section (43) reflect mostly cases where requests for attorney fees were denied or these costs fees were not addressed at all.

e. London Court of International Arbitration (LCIA)

The LCIA presented a report covering awards issued under its rules in 2012 and 2013 under the LCIA Rules 1998. It examined the allocation of the costs of arbitration and of the parties’ legal costs separately.

The LCIA Rules 1998 set out that tribunals should follow the general principle of “costs follow the event”, though the tribunal retains discretion to vary this as it sees fit. The relevant portions of the LCIA Rule (1998) covering costs are as follows:

28.3 The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing. The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.

28.4 Unless the parties agree otherwise in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties’ relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order.

For 2012, the LCIA examined 46 awards. In 37 of these awards, the claimant prevailed on all or some of its claims. In 30 cases, the respondent was ordered to pay all of the costs of arbitration, and in 32 cases, the respondent was ordered to pay all or most of the claimant’s legal costs (15 awards ordered all costs, 17 awarded some costs).
The respondent prevailed in 8 awards in 2012. Along similar lines, in 6 awards the claimant was ordered to pay all of the costs of arbitration (in the other these costs were split unequally), and in all 7 awards the claimant was ordered to pay all or most of the respondent’s legal costs.

In one case where damages claims from both sides were dismissed, the costs of arbitration were borne equally by the parties. In 5 cases each party was ordered to pay its own legal costs. In most of these cases the tribunal considered that the parties had been equally (un)successful, or that the claim arose because of good faith misunderstandings between them. In one case the tribunal specifically noted that it would not award the costs of a party’s success fee because this was a matter between the party and its lawyers.

For 2013, the LCIA examined 46 awards. In 35 of these awards, the claimant prevailed on all or some of its claims. In 26 cases, the respondent was ordered to pay all of the costs of arbitration, and in 32 cases, the respondent was ordered to pay all or some of the claimant’s legal costs (15 awarded all costs, 17 awarded some costs).

The respondent prevailed in 11 awards in 2013. In 10 awards the claimant was ordered to pay all of the costs of arbitration, and in 10 awards the claimant was ordered to pay all or some of respondent’s legal costs.

In only two cases each party was ordered to pay its own legal costs; in an additional case this was ordered pursuant to an agreement of the parties. In three cases the costs of arbitration were split equally, and in 6 cases the costs of arbitration were split proportionately with success.

It is noted that the LCIA Rules 2014, which came into force on 1 October 2014, contain additional provisions for dealing with party conduct and costs, whilst retaining the presumptive starting point that ‘costs follow the event’. The relevant draft rule is set out at attached Appendix C.

f. Permanent Court of Arbitration

Introduction

The ICC Commission on Arbitration and ADR has requested the input of the Permanent Court of Arbitration (‘PCA’) into a draft Report on the Decisions as to Costs., which is due to be submitted to the Commission on Arbitration and ADR in May 2015.

The information in this note provides an overview of how tribunals in arbitrations administered by the PCA have exercised their discretion in the allocation of costs. It sets out:

A. The types of cases administered by the PCA and the procedural rules used in those cases;

B. Decisions on the allocation of costs of arbitration in interstate, mixed, and contractual disputes, and certain trends that might be elucidated from these cases; and

C. Some novel approaches to costs issues and interesting aspects of costs allocation that have arisen in recent cases.
This note, prepared by PCA Senior Legal Counsel Judith Levine, Assistant Legal Counsel Nicola Peart, and intern Mariana Binder, builds on extracts from the book by Brooks W. Daly, Evgeniya Goriatcheva and Hugh A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press, 2014) at 156-160. The information has been updated to account for cases decided since the book was written.

Please note that many PCA cases are confidential. In some PCA-administered cases the parties consent to only limited information being made available on the PCA’s website. In this note, we have identified by name only those cases where the parties have consented to publication of the underlying costs decisions. When confidential cases are used as examples, information that would allow identification of the case is excluded. Pending confidential cases have also been excluded.

Finally, as explained in the next section, while most of the cases administered by the PCA are under the UNCITRAL Rules of Arbitration, several have been conducted pursuant to PCA Optional Rules, *ad hoc* procedures in the parties’ arbitration agreement, or rules agreed specifically for purposes of the dispute at hand. There may be some discrepancies in approach depending on the content of the applicable procedural rules.

**The PCA’s case docket and applicable rules of procedure**

The PCA is an intergovernmental organization with 117 member states. Established by treaty in 1899 to facilitate arbitration and other forms of dispute resolution between states, the PCA has evolved to meet the dispute resolution needs of the international community and now provides full administrative support to tribunals and commissions for resolution of disputes involving various combinations of states, state entities, intergovernmental organizations, and private parties.

The PCA’s Secretariat, the International Bureau, headed by its Secretary-General and headquartered in The Hague, provides administrative support to tribunals where there is agreement by the parties and the tribunal in arbitrations brought under a range of procedural rules. These include the United Nations Commission on International Trade Law Rules of Arbitration 1976 (‘1976 UNCITRAL Rules’), as well as the updated 2010 version of those rules (‘2010 UNCITRAL Rules’). The PCA has developed its own sets of rules modeled on the UNCITRAL Rules which are tailored especially for disputes involving states, state entities and intergovernmental organizations. Most recently, the PCA promulgated its PCA Rules 2012, with earlier rules including the PCA Optional Rules for Arbitration Disputes between Two States, the PCA Optional Rules for Arbitration Disputes between Two Parties of Which Only One is a State and the PCA Optional Rules for Arbitration Involving International Organizations and States. Specialized rules have also been promulgated for disputes relation to natural resources and the environment and for disputes relating to outer space activities.

As at March 2015, of the 95 cases being administered by the PCA, 6 are interstate cases under specially agreed Rules of Procedure, 38 are investment treaty arbitrations under the 1976 UNCITRAL Rules, 14 are investment treaty arbitrations under the 2010 UNCITRAL Rules; 17 are contractual disputes under the 1976 UNCITRAL Rules and 9 are contractual disputes under the 2010 UNCITRAL Rules. The others include cases conducted under specialized PCA Rules, conciliation rules and *ad hoc* procedures agreed by the parties.
The provisions on allocation of costs are similar in the 1976 and 2010 UNCITRAL Rules and the various PCA Rules.

Article 40 of the 1976 UNCITRAL Rules provides that the costs of arbitration, in principle, follow the event, but that the tribunal is ‘free to determine’ how to allocate the parties’ legal costs:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines the apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

Article 42 of the 2010 UNCITRAL Rules slightly modifies the presumptions in the 1976 UNCITRAL Rules as follows:

1. The costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

The PCA 2012 Rules are identical to the 2010 UNCITRAL Rules on the allocation of costs. Thus Article 42(1) provides that the costs of arbitration will in principle be borne by the unsuccessful party, unless the arbitral tribunal decides otherwise and Article 42(2) provides for interim costs awards where the tribunal deems appropriate. The costs of arbitration are fixed by the tribunal pursuant to Article 40(1), subject to the controls exercised by an appointing authority or the PCA Secretary-General under Article 41. The costs of arbitration are exhaustively defined in Article 40(2) and comprise: (i) the fees and expenses of the tribunal; (ii) the fees and expenses of the PCA International Bureau; (iii) the fees and expenses of the PCA Secretary-General acting in his capacity as appointing authority under the Rules; (iv) the costs of expert and other assistance required by the tribunal; (v) the expenses of witnesses; and (vi) the ‘legal and other costs incurred by the parties in relation to the arbitration.’

According to PCA Rules of Procedure for arbitration that are modelled on the 1976 UNCITRAL Rules include: PCA Optional rules for Arbitrating Disputes between Two States; PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State; PCA Optional Rules for Arbitration Involving International Organisations and States; PCA Optional Rules for Arbitration between International Organisations and Private Parties; and PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment. All PCA rules are available at: http://www.pca-cpa.org/showpage.asp?pag_id=1188.
Despite the different presumptions, under all these sets of rules, the decision on allocation of costs remains ultimately at the discretion of the tribunal.

The 2010 UNCITRAL Rules, in Article 41, provide a mechanism for the appointing authority or the PCA Secretary-General to review the reasonableness of costs fixed by the tribunal. In addition to providing this check on the reasonableness of costs at the point in time when they are fixed by the tribunal, the PCA 2012 Rules provide, in Article 43, for the International Bureau of the PCA to monitor the reasonableness of costs disbursed from the deposit throughout the arbitration proceedings.

The decision on allocation of costs is an award and should be reasoned in accordance with Article 34(3) of the 2010 UNCITRAL Rules and 2012 PCA Rules.

Decisions on allocation of costs in PCA-Administered cases

1. Interstate Arbitrations

In interstate proceedings, the practice in cases administered by the PCA has been for each party to bear its own costs of legal representation and half of the other costs of arbitration, regardless of the outcome.

Usually, the rules of procedure adopted specifically for each case include a presumption that the parties will pay the tribunal costs in equal shares.\(^\text{62}\) It is often specified, however, that the relevant tribunal nonetheless retains discretion to decide otherwise “because of the particular circumstances of the case.” In the PCA’s experience, tribunals in interstate proceedings have uniformly decided that the parties should bear their own costs of legal representation and pay equal shares of the other costs of arbitration.\(^\text{63}\)

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\(^\text{63}\) See *e.g. The Chagos Marine Protected Area Arbitration*, Mauritius v United Kingdom, PCA Case No 2011-3 (UNCLOS), Award, 18 March 2015, para 546; *The Indus Waters Kishenganga Arbitration*, Pakistan v India, PCA Case No 2011-01. Final Award, 20 December 2013, para. 124. *See also The Railway Land Arbitration*, Malaysia v Singapore, PCA Case No. 2012-01 (PCA State/State Rules), Award, 30 October 2014; *ARA Libertad Arbitration*, Argentina v Ghana, PCA Case No 2013-11 (UNCLOS), Termination Order, 11 November 2013; *Eritrea-Ethiopia Boundary Commission*, PCA Case No 2001-1, Decision on Delimitation of the Border between Eritrea and Ethiopia, 13 April 2002 and Eritrea’s Damages Claims, 17 August 2009, p.3 fn.5; *The MOX Plant Case*, Ireland v United Kingdom, PCA Case No 2002-01 (UNCLOS), Procedural Order No. 6, 6 June 2008 (stating that ‘the Tribunal considers that there is no reason to depart from the practice of arbitral tribunals in interstate litigation regarding apportionment of costs’ and thus requiring both parties
For example, in the *ARA Libertad Arbitration*, which was conducted pursuant to the United Nations Convention on the Law of the Sea (‘UNCLOS’), Annex VII, the Rules of Procedure, modelled on Article 7 of Annex VII, provided in Article 26:

*Unless the Arbitral Tribunal decides otherwise because of the particular circumstances of the case, the expenses of the Arbitral Tribunal, including the remuneration of its members, shall be borne by the Parties in equal shares.*

When the parties settled their dispute, the termination order provided for the deposit to be reimbursed in equal shares.64

With respect to the parties’ legal costs, Article 27 of the Rules of Procedure in the *ARA Libertad Arbitration*, the Rules of Procedure provided:

*The Arbitral Tribunal may make such award as appears to it appropriate in respect of the costs incurred by the Parties in presenting their respective cases.*

The Termination Order made no order as to party costs.

In *The Indus Waters Kishenganga Arbitration*, the relevant provision of the arbitration annex to the Indus Waters Treaty provided that “the Court shall also award the costs of the proceedings, including those initially borne by the Parties and those paid by the Treasurer.” The Court of Arbitration noted that:

*[T]his arbitration presents difficult issues of treaty interpretation disputed by the Parties. The Parties’ legal arguments were carefully considered, whether or not they prevailed, and the Parties acted with skill, dispatch, and economy in presenting their respective cases. The Court can therefore see no reason to depart from the principle, common in public international law proceedings, that each Party shall bear its own costs. The costs of the Court will also be shared equally.*

In an interstate case conducted under the 1976 UNCITRAL Rules pursuant to a bilateral investment treaty, the tribunal, in a confidential award on file with the PCA, noted the “customary practice in State-to-State arbitration” of “an even division of the costs of the proceedings.” The Tribunal ordered that each party should bear its own legal costs, factoring in the uncertain treaty language which departed slightly from the UNCITRAL Rules, and the fact that this was a novel case involving substantial and reasonable arguments by each side.

In a confidential case, which involved multiple states and an intergovernmental organization of which the states were all contributing members, the costs of the arbitration were handled by the intergovernmental

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65 *The Indus Waters Kishenganga Arbitration*, Pakistan v India, PCA Case No 2011-01, Final Award, 20 December 2013, para. 124.
organization with a further contribution from the PCA’s Financial Assistance Fund at the request of those parties who qualified as member states for the purposes of the Fund.\textsuperscript{66}

2. Mixed Arbitrations

By contrast to the consistent practice in interstate arbitrations, the exercise of tribunal discretion with respect to the allocation of costs has had highly variable results in PCA-administered investment treaty and contract arbitrations conducted under the UNCITRAL Rules and PCA Rules. Nevertheless, in the PCA’s experience, the allocation of costs has ultimately been according to the application of three factors: (1) relative success of the parties; (2) the circumstances of the case; and/or (3) the reasonableness of the costs.\textsuperscript{67}

a. Relative success of the parties

Some tribunals have noted the existence of a practice in accordance with which the costs follow the event save in exceptional circumstances.\textsuperscript{68} For example, the tribunal in Achmea (formerly known as “Eureko B.V.”) v Slovak Republic, made the following observations in its Final Award:\textsuperscript{69}

\begin{quote}
The tribunal is aware of a certain practice in investment treaty arbitration that each party bears its own costs and that the parties divide tribunal costs equally. That practice is not binding on this Tribunal, which prefers the more recent practice in investment arbitration of applying the general principles of ‘costs follow the event’, save for exceptional circumstances, such as when concerns regarding access to justice are raised.
\end{quote}

The tribunal further reinforced this approach by observing that (i) Article 40(1) of the 1976 UNCITRAL Rules expressly provides for a costs follow the event principle; (ii) both parties had argued that costs ought to be allocated according to ‘success’; and (iii) Section 1057 of the German Arbitration Act stipulates that a factor affecting the exercise of discretion by the tribunal is ‘the outcome of the proceedings’ (the seat of the

\textsuperscript{66} Further information about the PCA’s Financial Assistance Fund can be found at: \url{http://www.pca-cpa.org/showpage.asp?page_id=1179}.

\textsuperscript{67} Please note we have not conducted analysis based on the nationalities or legal traditions of the parties, counsel or arbitrators, or the applicable laws of the contract, arbitration agreement or place of arbitration. Any of these factors might conceivably influence approaches to costs in addition to the factors discussed in this note.

\textsuperscript{68} \textit{1 Chevron Corporation and 2 Texaco Petroleum Company v The Republic of Ecuador}, PCA Case No 2007-2 (Ecuador-United States BIT), (1976 UNCITRAL Rules), Final Award, 31 August 2011, para 375; reproduced in David D Caron and Lee M Caplan, \textit{The UNCITRAL Arbitration Rules: A Commentary} (2nd edn, Oxford University Press, 2013) 882. A ‘costs follow the event’ approach has been applied in at least four other investor-state arbitrations, for which the PCA has not received the parties’ consent to publish the awards. See also discussion of the Yukos awards below at paragraphs 31-38 below.

\textsuperscript{69} Achmea B.V. (formerly known as Eureko B.V.) v The Slovak Republic, PCA Case No 2008-13 (Netherlands-Slovakia BIT), (1976 UNCITRAL Rules), Final Award, 7 December 2012, para 348.
arbitration was Frankfurt). The tribunal ordered that for the jurisdictional phase, which dealt with a “difficult and novel question in the form of the Intra-EU Jurisdictional Objection,” each party should bear its own legal costs and share in equal portions the tribunal costs, and for the merits phase, in which the claimant prevailed, the respondent was ordered to bear both the costs of arbitration and both parties’ costs of legal representation.  

Some tribunals however, have observed that ‘a general trend has developed that arbitration costs should be equally apportioned between the Parties, irrespective of the outcome of the dispute.’ For example, in a contract dispute, the tribunal in *Polis Fondi Immobiliare di Banche Popolare SGRpA v International Fund for Agricultural Development (IFAD)* observed that:

223. *It is common practice in international arbitration that tribunals require the parties to share the arbitration costs. Especially in the context of international commercial arbitration, it has been noted that “the most widely used ‘truly international’ arbitration rules do not require a tribunal to award costs to the successful party’ and that “as far as legal costs is concerned the outcome of the merits does not serve as the prevailing yardstick”. Indeed, in many commentators’ opinion, “the ‘loser pays rule’ seems to be the exception rather than the rule” and “cannot be called the traditional approach in international arbitration”. Rather, it is asserted that “[a]n arbitral tribunal in an international commercial arbitration is generally reluctant to order the unsuccessful party to pay the whole of the winning party’s legal costs” thus rejecting the existence of “any presumption of compensation for the successful party”.*

224. *Other commentators have observed that “in most cases, the tribunals simply ordered each party to bear half of the procedural costs” bearing in mind that “a party should not be necessarily penalised for representing claims or defences which are not ultimately successful”. Therefore, in international arbitration, it is common that “where the losing party has behaved itself properly, arbitrators are less likely to grant the winner an award of costs of attorneys.”*

Other tribunals have found that practice corresponds to the rule provided in the 1976 UNCITRAL Rules, which distinguishes between the parties’ costs of legal representation and assistance and the other costs of representation.

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70 *Achmea B.V. (formerly known as Eureko B.V.) v The Slovak Republic, PCA Case No 2008-13 (Netherlands-Slovakia BIT), (1976 UNCITRAL Rules), Final Award, 7 December 2012, paras 348-250.*

71 *See eg Romak SA v The Republic of Uzbekistan, PCA Case No 2007-6 (1976 UNCITRAL Rules) (Switzerland-Uzbekistan BIT), Award, 26 November 2009, para 250. In one investor-state arbitration, for which the PCA has not received the parties’ consent to publish the award, the tribunal reasoned that, in respect of allocation of costs of legal representation, ‘the traditional position in investment treaty arbitration, in contrast to commercial arbitration, has been to follow the normal practice under public international law...that the parties shall bear their own costs of legal representation and assistance.’ The tribunal noted that a number of investment treaty tribunals have applied a principle whereby the costs of legal representation are awarded to the prevailing party. The tribunal decided, however, that it preferred to follow the public international law practice ‘unless a more holistic assessment of the circumstances of the case justifies a departure from that practice.’*

72 *Polis Fondi Immobiliare di Banche Popolare SGRpA v International Fund for Agricultural Development (IFAD), PCA Case No. 2010-8 (1976 UNCITRAL Rules), Award, 17 December 2010, paras 223-224, citations omitted.*
arbitration. For example, the tribunal in Vito G. Gallo v The Government of Canada applied the ‘costs follow the event’ principle to the allocation of the costs of arbitration entirely in favour of the prevailing party, but decided, for the purposes of allocating costs of legal representation, to adopt the ‘traditional position in investment arbitration, in contrast to commercial arbitration,... to follow the practice under public international law that the parties shall bear their own costs of legal representation.’

b. The circumstances of the case

In addition to the relative success of the parties, tribunals have, when allocating either or both the costs of arbitration and the costs of legal representation, considered other relevant factors, such as the complexity and novelty of the issues in the arbitration, access to justice concerns, the parties’ cooperation toward the progression of the proceedings, any abusive behaviour by a party aimed at derailing or delaying the

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73 Vito G. Gallo v The Government of Canada, PCA Case No 2008-3 (NAFTA), (1976 UNICTRAL Rules), Award, 15 September 2011, para 358. See also Melvin J Howard, Centurion Health Corp. and Howard Family Trust v the Government of Canada, PCA Case No 2009-21 (NAFTA), (1976 UNICTRAL Rules) Order for the Termination of the Proceedings and Award on Costs of 2 August 2010 (discussed in more detail at para 41 below); Chemtura Corporation (formerly Crompton Corporation) v Government of Canada, PCA Case No 2008-01 (NAFTA), (1976 UNICTRAL Rules), Award, 2 August 2010 (where the tribunal found the respondent to have prevailed in the arbitration, and therefore decided that the claimant should bear the entire costs of arbitration. The tribunal found it ‘appropriate and just’ that the claimant bear one half of the fees and costs of the respondent). Similar observations were made in at least three other investor-state arbitrations, for which the PCA has not received the parties’ consent to publish the awards.

74 See eg Romak SA v The Republic of Uzbekistan, PCA Case No 2007-6 (Switzerland-Uzbekistan BIT), (1976 UNICTRAL Rules) Award, 26 November 2009, para 50 in which the tribunal explains why it considers that, in investment treaty arbitrations, the costs of arbitration should in principle be equally apportioned between the parties:

One of the reasons for this, as stated in several awards, is that investment treaty tribunals are called upon to apply a novel mechanism and substantive law to the resolution of these disputes (see, for example, Aziñian v. Mexico, Tradex v. Albania, and Berschader v. Russia). Thus, the initiation of a claim that is ultimately unsuccessful is more understandable than would be the case in commercial arbitration, where municipal law applies. With respect to the present dispute, to the Tribunal’s knowledge, there has never been an investment treaty claim decided outside the ICSID system in relation to the enforcement of an arbitral award. Other cases, such as Saipem, share similar factual elements with the present dispute, but offered no direct analogy.


75 See eg The Bank for International Settlements, (Dr Horst Reineccius, First Eagle SoGen Funds, Inc, Mr Pierre Mathieu and La Société de Concours Hippique de La Châtre v Bank for International Settlements), PCA Case No 2000-4, Final Award, 19 September 2003 paras 125-9 (where the tribunal, noting that ‘a correlative of the immunity of international organizations is an obligation to provide for fair access to justice,’ decided that the respondent, the Bank for International Settlement, should bear the cost of legal representation of one of the claimants, a private shareholder, despite a provision in the applicable arbitration rules stating that each party would bear its own costs).

76 See eg HICEE BV v The Slovak Republic, PCA Case No 2009-11 (Netherlands–Slovakia BIT) (1976 UNICTRAL Rules), Partial Award, 23 May 2011 as reproduced in David D Caron and Lee M Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd edn, Oxford University Press, 2013), paras 56–7 (‘the Parties were animatted by a sense of practicality and economy in agreeing to hive off the Treaty Interpretation Issue for preliminary decision ... their sound judgment in that respect has been vindicated by the events...the Parties are particularly to be commended for their cooperation with the Tribunal and for the concision and precision of their written and oral arguments’).
arbitration, as well as the plausibility of the arguments and the professionalism of the unsuccessful party’s lawyers.

   c. The reasonableness of costs claimed by the parties

In cases in which a distinction has been made between the allocation of costs of arbitration and the costs of legal representation, some tribunals have been concerned with the reasonableness of the costs claimed for legal representation.

Similarly, in another PCA-administered arbitration brought under the 1976 UNCITRAL Rules, the tribunal applied a ‘costs follow the event’ rule to legal representation costs but required the unsuccessful party to bear only a reasonable portion of the counterparty’s legal representation fees.

In a confidential contractual dispute brought under the 1976 UNCITRAL Rules, the claimant claimed all of its legal costs on the basis of a contingency fee agreed with its counsel. The tribunal declined to order the contingency fee and instead made an order for what it considered to be reasonable costs in respect of the claimant’s legal representation.

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77 See eg Romak SA (Switzerland) v The Republic of Uzbekistan, PCA Case No 2007-6 (Switzerland-Uzbekistan BIT), (1976 UNCITRAL Rules) Award, 26 November 2009, para 51. In a final award in an investor-state arbitration for which the PCA has not received the parties’ consent to publish, the tribunal allocated 100% of the costs (in the tens of thousands of euros) associated with dealing with a challenge to an arbitrator that had been made after the results of the jurisdictional phase had been conveyed to the parties and many years after the party had acquired knowledge of the circumstances giving rise to the challenge.

78 See eg Polis Fondi Immobiliari di Banche Popolare SGRpA v International Fund for Agricultural Development, PCA Case No 2010-8 (1976 UNCITRAL Rules), Award, 17 December 2010, paras 225–6. In an arbitration between a private party and an intergovernmental organization that arose out of a lease agreement, the tribunal apportioned the costs of the arbitration between the parties on the following grounds:

   225. In the present case, both Parties have behaved professionally in presenting their claims and defenses. It is obvious that the Claimant cannot be considered the ‘unsuccessful party’ in these proceedings within the meaning of Article 40(1) of the UNCITRAL Rules; after all the Claimant ultimately succeeded both in its Claim and in its defense against the Respondent’s Counterclaim. On the other hand, however, the Tribunal is mindful of the fact that the Claimant prevailed on both counts—the Claim and the Counterclaim—because the Tribunal has decided to interpret the Parties’ conduct in relation to the Lease Agreement in a manner that supports the Claimant’s reading of the Lease Agreement, rather than the Respondent’s. Everything in this arbitration ultimately turned on the threshold issue of the interpretation of the Parties’ conduct, and it was not conceivable for either Party to prevail in part on the Claim or the Counterclaim.

   226. In the Tribunal’s view, the Respondent developed a plausible and coherent line of argument in support of its contention that the Parties adjusted the rate of the rental payment by agreement, taking particular account of the Headquarters Agreement. Having reviewed the facts of the case, the Tribunal disagrees with the Respondent’s contention that such an adjustment was indeed agreed between the Parties. The fact that the Respondent’s theory did not prevail, however, does not necessarily mean that the Respondent should therefore be penalized with the entirety of the costs of the proceedings.

79 This was an investor-state arbitration under the 1976 UNCITRAL Rules, the award of which has not been the subject of the parties’ consent for the PCA to publish. The Tribunal found that the costs for legal representation and assistance had been “rather considerable in respect to a rather narrowly defined issue” and ordered the claimant to pay a portion of respondent’s legal representation costs. A similar approach has been taken in at least one other investor-state arbitration under the 1976 UNCITRAL Rules, the award of which has not been the subject of the parties’ consent for the PCA to publish.
The three parallel arbitrations brought by the former majority shareholders of Yukos Oil Company against the Russian Federation, under the Energy Charter Treaty and the 1976 UNCITRAL Rules and administered by the PCA were described by the tribunal as “mammoth” by any standard. The claims totalled more than US$ 114 billion and the proceedings lasted almost a decade. The claimants sought to recover all of their costs of the arbitration, including their lawyers’ and experts’ fees amounting to approximately US$ 81.5 million. The claimants also sought full reimbursement of the other costs of the arbitration. The respondent sought a finding that each side should bear its own legal costs, and provided an indication of the “types of costs” it had incurred, amounting to approximately US$ 31.5 million. The respondent submitted that that the other costs of the arbitration should be shared equally.

With respect to the other costs of the arbitration (which amounted to EUR 8.44 million), the tribunal noted that it was “clear that Claimants have prevailed and have been successful in both the jurisdiction and merits phases” and could “see no reason why Respondent, the unsuccessful party, should not bear the costs of the arbitration.”

With respect to the parties’ own costs, the tribunal noted the divergence between the amounts presented by the claimants (who were claiming legal costs) and the respondent (who was not claiming its legal costs). The tribunal noted that under the UNCITRAL Rules it had “unfettered discretion to fix and to decide in what proportion the costs for legal representation and assistance of the parties shall be borne by the Parties.” The tribunal considered that the claimants, as the successful parties, “should be awarded a significant portion of their costs of legal representation and assistance” and then turned to determine the portion which it considers reasonable, taking into account a number of relevant factors. These factors included:

(i) the amount in dispute (over US$ 114 billion), and, in light of how high the stakes were, the vigour with which both sides had pressed their claims and defences;

(ii) the size of the documentary file and length of the hearings (“thousands of pages of written pleadings and exhibits submitted by the Parties, the myriad requests for production of documents, the Tribunal’s lengthy procedural orders, the ten days of [jurisdictional hearings in 2008] and the 21 days of [merits hearings in 2013]”);

(iii) the high quality of the written and oral pleadings and professionalism by counsel for both sides and the considerable work required for such a case;

(iv) the fact that the tribunal was not surprised that the claimants’ costs in this case were higher than respondent’s “since they bore the burden of proof for their

80 *Hulley Enterprises Limited (Cyprus) v The Russian Federation, PCA Case No AA-226 (Energy Charter Treaty) (1976 UNCITRAL Rules), Final Award, 18 July 2014, para 4 (“By any standard, and as will be seen, these have been mammoth arbitrations”) and page 574 et seq (Section D ‘Tribunal’s Decision on Costs’); Yukos Universal Limited (Isle of Man) v The Russian Federation, PCA Case No AA-227 (Energy Charter Treaty), (1976 UNCITRAL Rules), Final Award, 18 July 2014, para 4 and page 546 et seq (Section XIII, ‘Costs’); Veteran Petroleum Limited (Cyprus) v The Russian Federation PCA Case No AA-228 (Energy Charter Treaty), (1976 UNCITRAL Rules), Final Award, 18 July 2014 para 4 and page 564 et seq (‘Section XIII, ‘Costs’).

claims under the ECT and produced many fact witnesses in the Hearing on the Merits whereas Respondent produced no fact witness”;

(v) the fact that some of the fees of claimants’ experts (in the multi-millions of dollars) were “plainly excessive” and in relation to some of the experts, especially when at the end of the day they were of “limited assistance” to the tribunal’s determinations;

(vi) the fact that even though the claimants prevailed on jurisdiction and damages and were awarded an immense sum in damages, “at the end of the day ... the damages awarded to Claimants were reduced significantly [by 25%] by the Tribunal from the claims advanced by them”; and

(vii) finally, “a factor which the Tribunal has considered particularly relevant in fixing the portion of their costs which Claimants should be awarded is the egregious nature of many measures” by Russia which the tribunal had found were in breach of the ECT.

Having scrutinized the costs for legal representation and assistance of the claimants and taking into account all the factors traversed above, the tribunal, in the exercise of its discretion, considered that the reimbursement of US$ 60 million to the claimants would be fair and reasonable in the circumstances, noting that the figure represented approximately 75 percent of the total of costs, thus mirroring the proportion of the reduction in damages.82

Some Special Costs Issues that have arisen in recent PCA cases

Described below are some special costs situations which have arisen in recent PCA cases.

1. Allocation of costs where there is no overall ‘success’ of one party on the merits

In some cases tribunals have found that there was no clearly successful party. This may happen where the claimant largely succeeds on jurisdiction and merits, while the respondent largely succeeds on damages.83 For example, in a PCA-administered arbitration brought under the 1976 UNCITRAL Rules, the tribunal found that


83 See eg 1 Guaracachi America, Inc. and 2 Rurelec PLC v The Plurinational State of Bolivia, PCA Case No 2011-17 (Bolivia-United States BIT; Bolivia-United Kingdom BIT), (1976 UNCITRAL Rules) Award, 31 January 2014, para 619 (the tribunal acknowledged that, in principle, costs should be borne by the unsuccessful party but since there was no clearly successful party in the case, the costs had to be equally divided between the parties). See also 1 Chevron Corporation and 2 Texaco Petroleum Company v The Republic of Ecuador, PCA Case No 2007-2 (Ecuador-United States BIT), (1976 UNCITRAL Rules) Final Award, 31 August 2011, para 376 as reproduced by David D Caron and Lee M Caplan, The UNCITRAL Arbitration Rules: A Commentary (2nd edn, Oxford University Press, 2013) 882. This approach was adopted in at least one other investor-State arbitration under the UNCITRAL Rules, the award of which the PCA does not have the consent of the parties to publish.
while the claimant had prevailed in its allegations of the respondent’s breach of an operating agreement, the claimant was not entitled to damages. In considering which party ought to be considered ‘successful,’ the tribunal gave greater weight to its findings on the merits, ordering the respondent to bear all the costs of arbitration, along with the costs of the claimant’s legal representation.\(^{84}\)

An absence of a clear overall ‘success’ in the arbitration may also happen where the claimant withdraws its claim and seeks termination of the arbitration prior to a hearing on the merits. Two arbitral tribunals in BIT cases brought under the 1976 UNCITRAL Rules have found that the party that withdraws its claim is, by virtue of that unilateral withdrawal, considered as the ‘unsuccessful’ party for both costs of arbitration and costs of legal representation.\(^{85}\)

Other tribunals have considered that the circumstances of the withdrawal, and not the withdrawal per se, are determinative of the reasonable allocation of costs. In one investment treaty arbitration administered by the PCA in 2006 under the 1976 UNCITRAL Rules, where the proceedings were terminated due to the claimant’s failure to supply its share of the requested deposit (while the respondent had dutifully paid its own share), the tribunal found that although no award deciding the claims had been rendered, the claimant nevertheless should be considered as the unsuccessful party, as it had failed ‘to meet [its] basic obligations and to orderly prosecute [its] claims.’ The tribunal reasoned that the costs of arbitration (other than the respondent’s legal costs) had been incurred as a result of the claimant’s decision to commence the arbitration and its subsequent refusal to pursue its claims in an efficient manner in accordance with the applicable procedural rules. Nevertheless, the tribunal did not consider it reasonable to order the claimant to reimburse the respondent for its costs of legal representation, finding that the respondent’s lawyers had spent an excessive number of hours on the case at an early stage of the proceedings.\(^{86}\)

2. Allocation of costs in partial awards on jurisdiction, prior to a hearing on the merits

Tribunals that consider an application for costs on an interim basis may be faced with the concern that while a party may prevail at an interim stage, the same party may not ‘succeed’ overall. Many arbitral tribunals have thus simply deferred a decision on costs for later in the proceedings.\(^{87}\) Other tribunals, however, have considered it appropriate to differentiate between independent claims and stages within the proceedings.\(^{88}\)

\(^{84}\) Confidential case on file with the PCA.
\(^{85}\) The PCA does not have the parties’ consent to publish the awards.
\(^{86}\) Melvin J Howard, Centurion Health Corp. and Howard Family Trust v the Government of Canada, PCA Case No 2009-21 (NAFTA), (1976 UNCITRAL Rules) Order for the Termination of the Proceedings and Award on costs of 2 August 2010, para 75. The PCA has administered another confidential investment arbitration brought under the 1976 UNCITRAL rules which applied the reasoning in Melvin J. Howard and took a similar approach to the allocation of costs. At time of preparing this Note, that decision on costs remains confidential.
\(^{87}\) The PCA has seen several examples in confidential investor-state arbitrations and contract disputes. For examples of non-confidential cases see Hulley Enterprises Limited (Cyprus) v The Russian Federation, PCA Case No AA-226 (Energy Charter Treaty) (1976 UNCITRAL Rules), Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 600(6); Eureko BV v The Slovak Republic, PCA Case No 2008-13 (Netherlands-Czech and Slovak Republic BIT) (1976 UNCITRAL Rules), Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010, para 293 (where, despite the claimant’s request for an interim costs award, the tribunal reserved all questions concerning ‘costs, fees and expenses, including the Parties’ costs of legal representation, for subsequent determination’); Saluka Investments BV v the Czech
Allocation of costs on an interim basis is important in bifurcated multi-party proceedings, where only certain claimants and/or respondents proceed to the merits phase after a finding on jurisdiction. For example, in one multi-party dispute brought under the 2010 UNCITRAL Rules, involving over 50 claimants, the claimants sought an interim award covering the costs of arbitration as well as the costs of legal representation for the jurisdictional phase of the proceedings. The tribunal differentiated between the time from the commencement of arbitration and the date on which the respondent raised its jurisdictional objections. The tribunal reserved its decision on the pre-bifurcation costs. As regards the post-bifurcation costs, the tribunal considered the relative success of the parties. While the claimants had prevailed on most of the grounds in favour of jurisdiction, the grounds on which the respondent prevailed led the tribunal to decline jurisdiction over more than two thirds of the claimants. The tribunal therefore ordered each party to bear its own costs of legal representation and to divide by equal amounts between the parties the costs of the arbitration in the jurisdictional phase. The tribunal left it to the claimants to decide between them how to allocate costs.\(^89\)

In another multi-party bifurcated contract arbitration, the tribunal found that the pre-bifurcation costs ought to be shared equally between the claimant, on the one side, and the five respondents on the other. The tribunal held the post-bifurcation costs ought to be borne by the four remaining ‘unsuccessful’ respondents whose jurisdictional objections had been dismissed. The tribunal thus ordered the claimant to bear 25% and the respondents 75% of the post-bifurcation costs. Some adjustments were then made to reflect payments made in advance by the claimant.\(^90\)

3. Allocation of costs specifically provided for by special agreement

It is within the power of the parties to an arbitration to agree to the allocation of costs either in the arbitration agreement itself or through a settlement agreement. In the Abyei Arbitration between the Government of Sudan and the Sudan People’s Liberation Movement/Army, brought pursuant to a special agreement,\(^91\) the parties set out in their arbitration agreement that the Government of Sudan would pay the costs of arbitration...

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88 For example in one investor-state arbitration under a BIT and the 1976 UNCITRAL Rules, for which the parties have not consented to PCA publication of the award, the tribunal made the following observations in its award on costs:

...the Tribunal regards as relevant both the overall result as well as each Party’s success in respect of discrete aspects of its case. The party who is successful overall should in principle be made whole, but not necessarily in respect of independent claims, jurisdictional objections, or procedural applications, on which it was not successful and which have contributed to the overall costs of the arbitration in a significant and measurable way. The latter principle is especially appropriate in the apportionment of the costs of legal representation and assistance. Consequently, the Tribunal is inclined to look primarily at the overall result when allocating the costs of arbitration in accordance with Article 40(1), but to look more closely also at the Parties’ respective success on the various claims, jurisdictional objections, and procedural applications that materially impacted upon the Parties’ legal costs when apportioning these under Article 40(2). The Tribunal considers that this difference in approach under the two paragraphs of Article 40 follows from the difference between the starting point under each paragraph.

89 The parties have not consented to PCA publication of the preliminary award on jurisdiction.

90 In this commercial contract dispute under ad hoc procedures before a three-member tribunal in Geneva, the parties have not consented to PCA publication of the award.

91 The agreement provided for the case to be conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State, which are available at: http:// pca-cpa.org/showpage.asp?page_id=1188.
regardless of the outcome. The arbitration agreement also provided that the Government of Sudan would have access to the PCA’s Financial Assistance Fund as well as additional ‘assistance of the international community’.\footnote{Abyei Arbitration Agreement, Article 11 (Costs of Arbitration’). See Government of Sudan / The Sudan People’s Liberation Movement/Army (Abyei Arbitration) PCA Case No 2008-7 (PCA Optional Rules for Arbitrating disputes between Two Parties of Which Only One is a State), Final Award, 22 July 2009, para 773 (‘Recalling Article 11 of the Arbitration Agreement, the Tribunal finds no need to issue a ruling on costs’). The SPLM/A representatives also did much of the work pro bono.}

In cases of settlement, parties most often agree to bear their own costs,\footnote{See eg Saint Marys VCNA, LLC v Government of Canada, PCA Case No 2012-19, (NAFTA), (1976 UNCITRAL Rules), Consent Award, 29 March 2013; TCW Group Inc and Dominican Energy Holdings LP v The Dominican Republic, PCA Case No 2008-6 (CAFTA-DR) (1976 UNCITRAL Rules), Consent Award, 16 July 2009.} but an unequal allocation of costs may also form part of a settlement. In a termination order issued in a PCA-administered multi-party arbitration between two private parties and two states, the arbitral tribunal recorded the parties’ agreement that each side would bear the costs of the arbitrator appointed by it and an equal share of the costs of the chairman, and further determined that each side would bear the remainder of the costs of arbitration in equal shares.\footnote{The termination order is confidential and on file at the PCA.}

The legal seat of PCA-administered arbitrations varies from case to case.\footnote{For a discussion of the \textit{lex arbitri} in PCA-administered cases, see Daly et. al at 3.11 and 5.18 (noting that the “understanding of the place of arbitration is different in proceedings involving only states and intergovernmental organizations. In such cases, the parties generally do not intend to waive their immunity from the jurisdiction of national courts when agreeing to arbitration.”) See eg the English Arbitration Act 1996, s. 60 or the Mauritian Arbitration Act 2008, s. 33(2).} In allocating costs and considering costs agreements by parties, tribunals may be asked by the parties to take account of any applicable legislation at the seat of the arbitration, which in turn might contain provisions on agreements as to allocation of costs.\footnote{See eg Saint Marys VCNA, LLC v Government of Canada, PCA Case No 2012-19, (NAFTA), (1976 UNCITRAL Rules), Consent Award, 29 March 2013; TCW Group Inc and Dominican Energy Holdings LP v The Dominican Republic, PCA Case No 2008-6 (CAFTA-DR) (1976 UNCITRAL Rules), Consent Award, 16 July 2009.}

4. Allocation of costs in cases involving third party interventions

Pursuant to Article 40(2)(c) of the 2010 UNCITRAL Rules, the “reasonable costs of expert advice and of other assistance required by the arbitral tribunal” are included within the arbitration costs that shall, in principle, be borne by the unsuccessful party according to the Article 42(1) of the same Rules. Those provisions, however, do not specify whether they would include costs relating to interventions by non-parties.

In \textit{Achmea B.V. (formerly known as “Eureko B.V.”) v Slovak Republic}, an investment treaty arbitration administered by the PCA under the 1976 UNCITRAL Rules, the respondent objected to jurisdiction based on European law. The tribunal, at its own initiative and after consulting with the parties, requested comments from the European Commission and the Government of the Netherlands (the state of the investor). The parties then submitted comments in response to the observations of the Commission and Dutch Government. When allocating the costs of the arbitration, the tribunal noted that the jurisdictional objection made by the respondent was a difficult and novel issue and, therefore, ordered that the parties share the arbitration costs of that phase even while bearing their own costs of legal representation. It did not make separate reference
to the costs related to the observations provided by the European Commission and the Dutch Government. Neither the European Commission nor the Dutch Government made any requests in relation to their own costs.

The question of who should incur the reasonable costs associated with intervention applications by third parties is one that has arisen in other cases and may recur in the future when tribunals may be called on to apply the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.

g. Stockholm Chamber of Commerce (SCC)

The SCC provided a report, for which it reviewed 87 decisions administered by it under the SCC Arbitration Rules 2007 and 2010 between 2007 and 2012.

The SCC Rules applicable to the allocation of costs are, in pertinent part:

43(5) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances.

44 Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

The SCC divided its findings into four different outcomes: (i) “Claimant won all or almost all claims”; (ii) “Claimant or Respondent were awarded approximately half of their respective claims”; (iii) “Claimant obtained substantially less than half of its claims”; and (iv) “Terminated”.

In “Claimant won all or almost all” cases, in 29 of 48 cases the losing party was ordered to pay all of the costs. In four cases the claimant was awarded 75-80% of its costs, generally following the proportion of its success. In 10 cases, each party was ordered to pay half the costs; in each of these cases claimant’s conduct was found to have contributed to the costs (pursuing claims that were later dropped; change of counsel resulting in extra costs; legal fees being twice as high as the other party’s; etc.)

97 Achmea B.V. (formerly known as Eureko B.V.) v The Slovak Republic, PCA Case No 2008-13 (Netherlands-Slovakia BIT), (1976 UNCITRAL Rules), Final Award, 7 December 2012, Final Award.

98 Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency.html. For example, Article 4.5 and 4.6 of those Rules provide in relation to third party submissions, that tribunals “shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party” and that the disputing parties are given a “reasonable opportunity to present their observations on any submission.”

99 The cases in the category « Terminated » include cases that either : were settled by the parties; the claimant withdrew its claims ; or- all claims from both parties were rejected, so that strictly speaking there were no winner or losers (cases 141/2010 and 191/2009, as indicated in the file sent in December 2013).
In “Half success” cases, 10 out of 14 awards ordered that each party would bear its own costs. In one, costs were divided as a percentage based on the percentage of each party’s success. In two others, unequal costs awards were made based on the parties’ conduct (disproportionate argument on one small issue; respondent’s later actions causing issues to become moot).

In “Claimant obtained substantially less than half of amount claimed” cases, in 9 of 14 cases the losing party was ordered to pay all of the costs. In two cases each party bore its own costs; in two cases the costs were allocated proportionate to the percentage of success; in one the losing party paid all arbitration costs but the winner paid part of the loser’s legal costs because of the prevailing party’s conduct in the proceedings.

Finally, in the 11 “Terminated” proceedings, 8 awards equally split the arbitration costs and provided that each party pay its own legal costs. The others provided that each party pay its own legal costs, but that the claimant should pay the arbitration costs (i.e. arbitration fee, administration fee and application fee).

h. Singapore International Arbitration Centre (SIAC)

The SIAC provided a report that reviewed all decisions administered by it under SIAC Rules in 2012. The relevant SIAC Rules (2013) for the allocation of costs are set out here. These are identical to the 2010 Rules except that in Rule 33.1, the phrase “(apart from the costs of the arbitration)” no longer follows the phrase “legal or other costs of a party”:

31.1 The Tribunal shall specify in the award, the total amount of the costs of the arbitration. Unless the parties have agreed otherwise, the Tribunal shall determine in the award the apportionment of the costs of the arbitration among the parties.

33 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.

Though it did not provide us with a breakdown of the figures regarding the awards examined, SIAC confirmed that the general rule followed by SIAC arbitrators in arbitrations administered by the SIAC under its Arbitration Rules was that costs would follow the event. Only around 10% of awards examined deviated from this principle.

Reasons cited for deviation included the conduct of the party (for instance, unhelpful arguments and witnesses, late disclosure of documents and late admission of liability), and the arbitrators’ interpretation of agreements between the parties as to the apportionment of costs in the arbitration. Some cases showed a deduction of a portion of legal costs claimed to reflect the degree of success of the winning party.

The economic position of the parties was not cited as a factor. One award considered the travel requirements of a party in assessing the reasonableness of its cost claim. Other factors in reasonableness were: the amount claimed, the volume of pleadings, the complexity and novelty of the case, the number and importance of documents perused the reasonableness of the positions taken during the arbitration, the parties’ procedural behaviour, and the remuneration rates of the lawyers involved.
APPENDIX B
Summary of Reports from National Committees

I. Introduction

We requested the assistance of the members of the Task Force and national committees to collate studies on the following issues in their respective national laws and jurisdictions, and using their experience as arbitration practitioners:

- The right to recover legal fees/costs where lawyers have worked under some form of conditional fee/contingency/upgrade arrangement. Are these rules the same for both litigation before the national courts and arbitration? Are these arrangements contrary to the ethical or professional rules of lawyers in your jurisdiction?

- What information is relevant for the recovery of costs provided by a third party funder, and how should the role of third party funders be taken into account?

- Is there any national law/experience on contracting parties agreeing, in advance of the dispute and/or in the arbitration agreement (e.g. to protect the weaker from the stronger party), how costs should be divided, such as each party to pay its own costs in any event, or costs to be paid by the unsuccessful party?

- Also, is it possible for a tribunal to cap the amount of costs being incurred/expended by the parties? What is the form for such a rule, and how is it implemented and/or applied?

- Specific experience of how with reasoning, arbitrators have allocated costs where there has been a disparity between “expensive” and “less expensive” lawyers or major international law firms and law firms from developing countries or smaller and less expensive firms.

The reports from the Task Force members and national committees on these issues are summarised below and include the following countries: Algeria, Argentina, Austria, Bahrain, Belgium, Brazil, Canada, Egypt, Finland, France, Germany, Ghana, Guatemala, Lebanon, Iraq, Ireland, Italy, Jordan, Kuwait, Lebanon, Mexico, Morocco, New Zealand, the Netherlands, Nigeria, Oman, Poland, Qatar, Russia, Saudi Arabia, Senegal, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, the Ukraine, the United Arab Emirates, the United Kingdom and the United States.

II. Summary of General Approach in National Systems

Preliminarily, a global costs review of costs in national court litigation was conducted by the law firm Lovells (now Hogan Lovells) in February 2010. Among other things, that report concluded that:

“... the general principle that the “loser pays” ... generally applies in 49 of the 56 surveyed jurisdictions[]. In a few others very limited costs may be “shifted” to the loser.
Japan is a less well understood example of the jurisdiction where lawyers’ fees are not recoverable in any event.

As a further contrast, in Taiwan, the fees are recoverable only when the lawyer has been appointed by the court. In about 75% of jurisdictions the costs that can be recovered include most of the range of items that would normally be included within the recovery in England and Wales. Thus, lawyers’ fees, counsels’ fees, agency fees and disbursements such as copying charges and witness expenses are recoverable in the majority of instances where costs are permitted to be recovered (Figure 2).

As to the level of costs which may be recovered, here the variation is greater.”

Among the 41 national reports received, there appeared to be broad acceptance of some form of costs shifting in arbitration proceedings, as well as in national court systems. Perhaps unsurprisingly therefore, countries appear to be reasonably accepting of funding arrangements, including third party funding and various fee structures or agreements. This appears to be the case even where there is no specific legislation to that effect. There are some important differences across the respondent jurisdictions, as summarised below.

III. Right to Recover on Fee Arrangements

The first topic put to the national committees concerned the right to recover legal fees/costs where lawyers have worked under some form of conditional fee/contingency/upgrade arrangement. The two questions that national committees were asked to study were: (i) are these rules the same for both litigation before the national courts and arbitration; and (ii) are these arrangements contrary to the ethical or professional rules of lawyers in your jurisdiction?

Most countries reported that such arrangements are likely permissible in their jurisdictions, though statutes and rules do not specifically cover them (Austria, Brazil British Columbia, Egypt, France, Kuwait, Lebanon, Ontario, Poland, Mexico, Saudi Arabia, the United Arab Emirates and the United States). They are specifically permitted in Finland (if a precise reason for the arrangement is raised), Nigeria (if rules of professional conduct are complied with), Spain, Sweden (if reasonable), the Netherlands (if lawyer gets compensation that at least covers his costs and a modest salary and the fee is thus not entirely contingent on outcome), New Zealand (if based on a ‘normal fee plus premium’ rather than a percentage), Argentina, Ghana (if invoice is issued, signed by lawyer and client has been given one month’s notice), Senegal, Tunisia (if agreement in writing, conditional fee does not exceed 2% of the result to be achieved, is not payable in kind and does not affect the ‘dignity and honour’ of the lawyer) and British Columbia (if in compliance with the statutory cap).

Contingency fees are specifically prohibited in Austria, Bahrain, Iraq, Ireland, Morocco, Oman and Qatar and are considered null and void. In French domestic proceedings contingency fees are prohibited where they are solely based on the outcome of the case; they are not prohibited in international arbitration. One code of ethics in Mexico also prohibits them, though another states that they are admissible as long as the benefit

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conferring is not greater than that conferred on the client. In Guatemala such arrangements, though not prohibited, are contrary to the ethical rules for lawyers.

In Germany, contingency fee arrangements are contrary to national standards of professional conduct and are generally prohibited, though the German Federal Constitutional Court ruled in 2008 that a flat prohibition was unconstitutional because it unduly restricts the professional freedom of lawyers. Thus, fee arrangements that are made on a case-by-case basis may be allowed if the client, due to his or her economic situation or the level of financial risk involved, would otherwise be barred from pursuing his or her claims, from the perspective of a reasonable person. Despite this allowance, contingency fee arrangements remain uncommon in Germany, in both a litigation and arbitration context.

In Singapore contingency and uplift fees are prohibited in both litigation and arbitration for Singapore lawyers, but appear to be permitted for foreign law practices as long as they are not in respect of the practice of Singapore law. They are also prohibited under ethics rules. An arbitration seated in Singapore or governed by Singapore law is likely to be deemed the ‘practice of Singapore law’ as Singapore procedural law applies. This trend may change in future.

In some countries different rules apply to contingency fees as compared to success fees or other arrangements, generally with success fees permissible and contingency fees more restricted (France, Ireland, Switzerland and the United Kingdom). The opposite is true in Sweden where success fees are prohibited but “no cure no pay” and conditional fee arrangements are permitted.

Several countries reported that different rules apply to domestic litigation as compared to arbitral proceedings, usually with more restrictive rules in domestic proceedings (Austria, Egypt, France, Ireland, Jordan, Mexico, New Zealand, Poland, Spain, Switzerland and the United Kingdom). In Austria, Egypt, the Netherlands, New Zealand, Poland, and Switzerland tariffs for costs are used in domestic courts whereas arbitral proceedings are more flexible. Spain reported that in domestic courts, the recovery of costs may not exceed one third of the amount claimed in litigation but in arbitration, the tribunal is likely to be less restrictive. In Guatemala, Senegal and Lebanon the rules are the same for national court litigation as for arbitration.101

Brazil and the United Kingdom raised the issue of whether success fees or contingency fees can be considered as costs of the proceedings when they have not actually been incurred at the time of the award.

Russia reported that contingency fee arrangements are not prohibited by statute nor by any professional rules. However, Russian courts in the past refused to enforce such arrangements because they were often used to “legitimize” reimbursement of the counsel’s illegal payments to bribe the judiciary. In recent years, the courts have become more open to enforcing contingency fee arrangements, where the amount of fees were based on actual work performed and were in line with the market rates. Arbitral tribunals normally take a more liberal approach than state courts and allow contingency fees, subject to a test of reasonableness.

101 For Lebanon, Article 69 of the Lebanese Advocacy Law No.8/70.
Several reported that the reasonableness of such fee arrangements could be taken into account when awarding costs (Austria, British Columbia, Italy, Ontario, Quebec, Mexico, Russia, Spain, Switzerland, the United Kingdom).

In arbitration in Ireland, Mexico and Quebec the arbitration agreement between the parties is generally considered to prevail, so it could cover such arrangements.

Argentina and Poland reported that contingency agreements are only binding between the client and his lawyers and will not factor into the calculation of the costs of arbitration.

IV. Third Party Funders

The second topic put to the national committees related to third party funding. National Committees were asked to study what information is relevant for the recovery of costs provided by a third party funder, and how should the role of third party funders be taken into account.

The majority of countries do not have any reported cases dealing with this issue. Argentina, Austria, Belgium, Brazil, the Canadian provinces of Alberta and Quebec, Finland, France, Ireland, Italy, Lebanon, Mexico, Nigeria, Ukraine, Russia, Spain and Sweden reported that this issue had not arisen before their national courts, while the provinces of Ontario and British Columbia had inconsistent case law that was not in the context of arbitration.

The Swiss Supreme Court had invalidated a law that prohibited third party funding in domestic cases, as it violated economic liberty. Many other national laws do not discuss third party funding at all, including those of Finland, the Netherlands, Nigeria, Brazil, Austria, Ukraine, France, Senegal, Spain and the Canadian provinces.

In the United Kingdom and Ireland there is no obligation to disclose the details of third party funding in court proceedings, and such an arrangement does not impact the recoverability of costs. A third party funder can be held liable for an adverse costs order, and usually carries insurance in the event of such an order. However, in arbitral proceedings there are no developed rules and no guidance, though such arrangements appear to be common. In arbitration there is no jurisdiction for an adverse costs order against a third party funder, as the funder is not a party to the arbitration. It is suggested that the funding arrangement should be disclosed early in the arbitration, so that an application for interim security for costs could be made.

Germany reported that there is no obligation to disclose the details of third party funding in court proceedings. Such arrangements do not generally affect the recoverability of costs and are typically undisclosed.

Brazil, Finland, Nigeria and Sweden all suggested that third party funding costs may not be recoverable, because the funder does not have standing in the proceedings to make such a claim, and the party who was funded did not actually incur the costs and would therefore not be able to claim for their recovery. Ontario and Ukraine similarly suggested that third party funding does not constitute “legal services” and may not be recoverable unless the arbitration agreement covers such an eventuality. Singapore suggested a third party
funding agreement could be considered champertous and therefore unenforceable by Singapore courts in both litigation and arbitration.

A few arbitration cases involving Lebanese parties and in which a (non-Lebanese) third party funder is acting were reported. In all cases, it was believed that, in the event a party to a dispute related to Lebanon contracted with a third party funder, there are no legal principles or specific regulations or laws that would prevent the conclusion of such an agreement, that would thus remain enforceable under the general rules of Lebanese contract law. In particular, there exists no potential impediment or hurdle under Lebanese Law such as the prohibition of champerty and maintenance, which would bar a party (and a third party) from funding a litigation or arbitration through these means. To the contrary, Lebanese contract law on the assignment of disputed rights, which could be applicable to such funding, appear to implicitly validate this practice.102

Argentina reported that third party funding is unlikely to be taken into account in calculating the costs of the arbitration.

Austria and Ghana suggested that a third party funding arrangement would not alter the recoverability of costs, though the funder would likely not be held directly liable for the winning party’s costs.

Poland suggested that third party funding would likely be considered as akin to commercial financing (i.e. a loan) or the raising of capital, which cannot be reimbursed as a legal cost.

Switzerland suggested that arbitral tribunals may not be bound by a funding arrangement, though theoretically they could indemnify a party for the percentage of fees it has to share with the funder, if the percentage were considered reasonable.

Mexico, Switzerland and the United Kingdom all raised notice of the arrangement as a relevant consideration. The United Kingdom also raised the possibility of a potential conflict of interest between funders and arbitrators, for instance if an arbitrator is counsel in another case requiring funding.

In France third party funding arrangements are not common, as the low costs of access to courts and strict costs awards make such arrangements less attractive; they would however not be invalid.

New Zealand reported case law indicating that the third party funder should not have an active role in the strategic decision making during dispute resolution. There is no requirement to disclose third party funding, and a tribunal would likely consider it a matter for the parties.

Third party funding is not used for litigation in Guatemalan national courts or in arbitration.

In Egypt, Iraq, Tunisia, and the United Arab Emirates there are no rules prohibiting third party funding and though there is no case law available, such agreements would likely be upheld.

102 Articles 280 and 281 COC Lebanese Code of Contracts and Obligations.
In Morocco, third parties, including lawyers, are prohibited from funding claims and there are thus no professional funders active in the local market. In Algeria, Qatar and Kuwait third party funding is not yet available in local markets.

V. Funding Arrangements Agreed in Advance

The third topic put to national committees related to national law/experience on contracting parties agreeing funding arrangements, in advance of the dispute and/or in the arbitration agreement (e.g. to protect the weaker from the stronger party). In particular, they were asked to study how costs should be divided, such as each party to pay its own costs in any event, or costs to be paid by the unsuccessful party.

Several countries, including Brazil, the Canadian province of Alberta, France, Germany, Guatemala, Lebanon, Nigeria, Poland, Russia, Switzerland and Ukraine reported that they do not have specific rules on such agreements.

The United Kingdom’s Arbitration Act 1996 contains a mandatory provision to the effect that parties cannot agree on paying the costs in any event unless the agreement is made after the dispute arises.

Austria, Mexico, Nigeria, Quebec and Sweden reported that such agreements arise with some frequency, either in an arbitration agreement, when a dispute arises, or (in Austria) towards the end of the arbitration. Finland and Ontario reported that such agreements are rare (but possible) in their jurisdictions. Brazil reported that if the arbitration agreement is silent, the parties will often make such an arrangement in the terms of reference. Sweden reported that an arbitration agreement could be attacked on equitable grounds in the absence of such an arrangement. Singapore reported that such agreements have arisen.

In many jurisdictions, such an agreement between the parties will generally be upheld. This includes Alberta, Austria, Bahrain, British Columbia, Finland, Germany, Ghana, Lebanon, Ireland, Italy, Jordan, Mexico, Morocco, the Netherlands, New Zealand, Oman, Quebec, Russia, Senegal, Spain, Sweden, the United Arab Emirates and the United States. In Belgium the 2013 CEPANI Arbitration Rules permit parties to agree on an upper maximum limit for the reimbursement of costs. Arbitrators can draw the parties’ attention to this possibility.

In Iraq a party agreement on costs allocation would likely be respected. Failing agreement, the rule in domestic proceedings is that the losing party bears the legal costs of the successful party, but in accordance with statutory rates and fees.

In Algeria, Egypt and Qatar such an agreement would be valid, though the general rule in domestic proceedings is that the losing party bears all costs. In Qatar it is not uncommon for arbitrators to refer to the provisions applicable to domestic proceedings in this respect.

Similarly, in Saudi Arabia such an agreement would be enforceable, but the general rule applicable to domestic proceedings is that each party bears its own costs. Failing party agreement, arbitral tribunals typically order each party to bear the costs of its own legal counsel and of its appointed arbitrator, whereas the costs of the presiding arbitrator and the arbitration itself are shared between the parties.
In Tunisia, party agreements on the allocation of costs are respected. In the absence of party agreement, the principle in domestic litigation and domestic arbitration is that the unsuccessful party bears all legal costs. In ad hoc arbitrations conducted under the Tunisian arbitration code, arbitral tribunals typically order each party to bear its own legal fees.

In Kuwait, such party agreements would likely be enforced in domestic proceedings and in arbitration. However, case law reveals that national courts have reduced the agreed-upon legal fees if they were deemed to be unreasonably expensive. This issue has not arisen before an arbitral tribunal. In the absence of party agreement, the statutory rules on domestic proceedings provide that the losing party bears all costs. In arbitration, the tribunal has discretion to decide on the allocation of costs in its final award.

In Brazil it is common to agree that the losing party will pay all costs, whereas in the United States it is more common to use the “American rule” of each party paying its own costs. If the parties were agreeing to the “costs follow the event” rule, they would need to make this clear.

Poland reported that such an agreement would likely be treated by national courts as valid, but it would not waive the statutory regulation on division of costs. It would have to be voluntarily made after the litigation was finished. However an arbitral tribunal would more likely uphold it.

Guatemalan legislation establishes that generally the unsuccessful party is made to indemnify the winner but courts can make exemptions based on good faith litigation. The Guatemalan Chamber of Industry’s rules state that the award should determine who pays the costs.

Finland suggests that such a contract would be considered binding on the parties, who could not unilaterally deviate from it and request costs contrary to the arrangement. However, if both parties did so, it could be held that they had waived the agreement.

Switzerland suggests that such an agreement between parties would likely be seen as trumping any institutional rules about the division of costs which would otherwise apply in an arbitration. It is possible that a court could still use its discretion in a costs award.

In French domestic proceedings costs are divided between “court costs” and other costs such as attorney’s fees. Court costs are in the judge’s discretion and any agreement relating to them would be null and void. An agreement on attorney’s fees would be permissible though the court would retain its discretion, and a party would be unlikely to get full recovery of attorney’s fees. In arbitration, recognition of either agreement would likely not be problematic.

VI. Costs Capping

The fourth topic put to the national committees was costs capping. In particular, they were asked to study whether it was possible for a tribunal to cap i.e. to limit the amount of costs being incurred/expended by the parties. What is the form for such a rule, and how is it implemented and/or applied.
The following countries reported that their laws do not contain any rule regarding a tribunal’s power to impose a cap: Algeria, Austria, Bahrain, Brazil, Canada (Ontario, British Columbia, Alberta), Egypt, Finland, France, Germany, Ireland, Italy, Jordan, Mexico, Morocco, the Netherlands, Nigeria, Oman, Poland, Qatar, Tunisia, Saudi Arabia, Singapore, Spain, Sweden, Switzerland and the United Arab Emirates.

Guatemala and Argentina reported that it is not possible for a tribunal to do this.

The United Kingdom’s Arbitration Act 1996 gives the tribunal the power to cap the recoverability of costs, though it is rarely used in practice. In the Ukraine, tribunals are given a wide power of determining their own procedure, including limitation of costs, though there is no evidence of a cap order having been made. Ghana reported that tribunals have discretion to cap costs, by having regard to a number of factors including the amount involved in the dispute.

Ontario suggested that while no cap could be imposed on spending by the parties, it is possible that a cap on recoverability could be imposed.

Poland specifically reported that under Polish Chamber of Commerce Rules, a cap would be applied to a contingency agreement.

Bahrain, Egypt, Kuwait, Lebanon, the Netherlands, Morocco, Oman, Qatar, Saudi Arabia, Senegal, Switzerland and the United Arab Emirates and suggested that if the parties agreed to a cap in their agreement, it would likely be upheld. Belgium’s arbitration centre (CEPANI) Rules expressly suggest that arbitrations remind parties of the possibility of agreeing a cap as costs.

Several countries reported that a tribunal could likely consider the reasonableness of costs incurred when making an award on costs (Alberta, Belgium, British Columbia, Egypt, Finland, Guatemala, Italy, Nigeria, Russia, Spain, Sweden and Tunisia). Brazil similarly noted a tribunal’s power to take into account “bad faith” tactics, subject to the arbitration agreement. Quebec’s civil procedure code contains a provision regarding proportionality of spending; this could potentially be relevant.

Germany reported that tribunals do not impose caps without party authorisation, though they may limit the amount of costs that are recoverable. Only costs that are necessary for the proper pursuit of a claim or defence are recoverable. Arbitral tribunals have wide discretion in assessing necessity. As for the amount of time spent by counsel, arbitrators have estimated their reasonableness on the basis of their own preparation time or even based on their own experience as legal practitioners. As for hourly rates, case law is inconsistent on the question of what hourly rate may be deemed reasonable. In allocating costs, tribunals tend to consider the outcome of the case, without regard to the procedural behaviour of the parties, though some have apportioned costs based on procedural behaviour or other factors rather than on outcome.

Some countries suggested that a spending cap could be seen as affecting the right of a party to present its case (Mexico, Nigeria, the Netherlands, New Zealand), and that it would be prudent for the tribunal not to
impose such a cap without party authorisation (Austria, Jordan). Switzerland and Finland considered that a tribunal could not impose a cap.

Alberta, British Columbia, France, Ontario, Qatar, Quebec and Ukraine all specified that no such case has ever arisen in their jurisdictions.

VII. Reasoning in Costs Decisions

The fifth topic put to the national committees concerned the specific experience of how with reasoning, arbitrators have allocated costs where there has been a disparity between “expensive” and “less expensive” lawyers/major international law firms and law firms from developing countries or smaller and less expensive firms.

Several countries reported that courts and tribunals have a wide discretion in ordering costs that could take into account factors such as the complexity and importance of the case, the amount at stake, and the nature of the work involved (Austria, Germany, Lebanon, Russia, Singapore, Ukraine, the United Kingdom and the United States). Germany specified that arbitrators generally do not place particular emphasis on the types of law firms used by the parties. Austria specified that the background of the parties could be taken into account, such as whether they are foreign parties who may require local as well as foreign counsel, or whether they are multinational corporations as compared to small businesses. Russia noted that tribunals and courts alike may also take into account the comparable costs of legal services in a particular region. In Ghana, tribunals are in practice guided by the Ghana bar scale of fees, and the tendency is to award costs up to 15% of the amount claimed.

The Canadian provinces and Tunisia reported that proportionality is often used as a tool in awarding costs, such that a mid-range sum of fees may be awarded if the party with more expensive costs wins. In Tunisia, an international tribunal faced with this issue found that the fees claimed by the party with an international law firm were in line with the rates to be expected, but reduced the recoverable fees by 20% to align the legal costs with those incurred by the unsuccessful party, which had retained a smaller Tunisian firm. In Ireland proportionality is likely to be an important factor in cost allocation.

Argentina, Iraq, Morocco, Sweden, the United Arab Emirates and the United States, reported that the law firm used is not a factor in apportioning costs. Sweden, Saudi Arabia and Egypt specified that the reasonableness of the disbursement as such, and the amount, would be considered. In the United Arab Emirates and Jordan, the successful party is typically awarded its legal costs regardless of the type of law firm used.

Spain reported that in a commercial arbitration case, the losing party, which had retained a small law firm, was ordered to pay the successful party’s legal fees, though the latter had used a big international law firm. The tribunal had deemed such costs to be reasonable in light of the procedural complexity of the case, especially as the losing party had contributed to it by persisting with claims with little prospect of success.

In the Netherlands, arbitrators do have the power to award actual legal costs incurred but in practice, legal costs are awarded according to fixed tariffs and are not related to actual costs incurred.
Mexico reported that parties are usually ordered to pay their own costs, but that if costs are awarded to one party, the reasonableness of the lawyers’ fees could be taken into account. In Nigeria, costs generally follow the event, but again while actual costs can be awarded, these are specifically subject to a requirement of reasonableness. New Zealand also indicated that tribunals will award reasonable costs to the winning party and that this often leads to an award of two-thirds of the claimed costs.

Singapore indicated that the wide variety of nationalities of arbitral tribunals based there leads to a parallel variety in costs awards.

Brazil, Finland, France, Guatemala, Italy, Oman, Qatar, Senegal and Ukraine all specified that no such case has arisen in their jurisdictions.

France suggested that it is possible that the discrepancy does not need to be addressed, as more expensive firms may create more work for the tribunal (through lengthy submissions, etc.) but they may be more efficient in requiring fewer hours to prepare for cases due to past experience; thus, it would balance out. New Zealand and Argentina raised a similar suggestion regarding the efficiency of large firms.
APPENDIX C
Arbitral Rules

I. ICC Arbitration Rules 2012

Article 37 - Decision as to the Costs of the Arbitration

1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

3. At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

4. The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

5. In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

6. In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

II. ICC Arbitration Rules 1998

Article 31 - Decision as to the Costs of the Arbitration

1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

2. The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.
3. The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

III. CIETAC Arbitration Rules 2015

Article 52 Allocation of Fees

1. The arbitral tribunal has the power to determine in the arbitral award the arbitration fees and other expenses to be paid by the parties to CIETAC.

2. The arbitral tribunal has the power to decide in the arbitral award, having regard to the circumstances of the case, that the losing party shall compensate the winning party for the expenses reasonably incurred by it in pursuing the case. In deciding whether or not the winning party’s expenses incurred in pursuing the case are reasonable, the arbitral tribunal shall take into consideration various factors such as the outcome and complexity of the case, the workload of the winning party and/or its representative(s), the amount in dispute, etc.

IV. DIS-Arbitration Rules 1998

Section 35 Decision on costs

35.1: Unless otherwise agreed by the parties, the arbitral tribunal shall also decide in the arbitral award which party is to bear the costs of the arbitral proceedings, including those costs incurred by the parties and which were necessary for the proper pursuit of their claim or defence.

35.2: In principle, the unsuccessful party shall bear the costs of the arbitral proceedings. The arbitral tribunal may, taking into consideration the circumstances of the case, and in particular where each party is partly successful and partly unsuccessful, order each party to bear his own costs or apportion the costs between the parties.

35.3: To the extent that the costs of the arbitral proceedings have been fixed, the arbitral tribunal shall also decide on the amount to be borne by each party. If the costs have not been fixed or if they can be fixed only once the arbitral proceedings are terminated, the decision shall be taken by means of a separate award.

35.4: Subsections 1, 2 and 3 of this section apply mutatis mutandis where the proceedings have been terminated without an arbitral award, provided the parties have not reached an agreement on the costs.
V. HKIAC Administered Arbitration Rules 2013

Article 33 – Costs of the Arbitration

33.1 The arbitral tribunal shall determine the costs of the arbitration in its award. The term “costs of the arbitration” includes only:

a. the fees of the arbitral tribunal, as determined in accordance with Article 10;
b. the reasonable travel and other expenses incurred by the arbitral tribunal;
c. the reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
d. the reasonable travel and other expenses of witnesses and experts;
e. the reasonable costs for legal representation and assistance if such costs were claimed during the arbitration;
f. the Registration Fee and Administrative Fees payable to HKIAC in accordance with Schedule 1.

33.2 The arbitral tribunal may apportion all or part of the costs of the arbitration referred to in Article 33.1 between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

33.3 With respect to the costs of legal representation and assistance referred to in Article 33.1(e), the arbitral tribunal, taking into account the circumstances of the case, may direct that the recoverable costs of the arbitration, or any part of the arbitration, shall be limited to a specified amount.

33.4 Where arbitrations are consolidated pursuant to Article 28, the arbitral tribunal in the consolidated arbitration shall allocate the costs of the arbitration in accordance with Article 33.2 and 33.3. Such costs shall include, but shall not be limited to, the fees of any arbitral tribunal designated or confirmed and any other costs incurred in an arbitration that was subsequently consolidated into another arbitration.

33.5 When the arbitral tribunal issues an order for the termination of the arbitration or makes an award on agreed terms, it or HKIAC shall determine the costs of the arbitration referred to in Article 33.1, in the text of that order or award.

VI. HKIAC Administered Arbitration Rules 2008

Article 36 - Fees and Costs

36.1 The arbitral tribunal shall determine the costs of arbitration in its award. The term "costs" includes only:

- the fees of the arbitral tribunal to be determined in accordance with Articles 36.2 and 36.3;
- the travel and other expenses incurred by the arbitrators;
- the costs of expert advice and of other assistance required by the arbitral tribunal;
- the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- the costs for legal representation and assistance if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- the Registration Fee and Administrative Fees payable to the HKIAC in accordance with the Schedule of Fees and Costs of Arbitration attached hereto.
36.2 [...]; 36.3 [...]  

36.4 Except as provided in Article 36.5, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion all or part of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

36.5 With respect to the costs of legal representation and assistance referred to in Article 36.1(e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

36.6 When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it or the HKIAC shall determine the costs of arbitration referred to in Article 36.1 and Article 36.2, in the text of that order or award.

36.7 No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under Articles 33 to 35.

VII. LCIA Arbitration Rules 2014

Article 28 - Arbitration Costs and Legal Costs

28.1 The costs of the arbitration other than the legal or other expenses incurred by the parties themselves (the “Arbitration Costs”) shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the LCIA and the Arbitral Tribunal for such Arbitration Costs.

28.2 The Arbitral Tribunal shall specify by an award the amount of the Arbitration Costs determined by the LCIA Court (in the absence of a final settlement of the parties’ dispute regarding liability for such costs). The Arbitral Tribunal shall decide the proportions in which the parties shall bear such Arbitration Costs. If the Arbitral Tribunal has decided that all or any part of the Arbitration Costs shall be borne by a party other than a party which has already covered such costs by way of a payment to the LCIA under Article 24, the latter party shall have the right to recover the appropriate amount of Arbitration Costs from the former party.

28.3 The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the “Legal Costs”) be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

28.4 The Arbitral Tribunal shall make its decisions on both Arbitration and Legal Costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate under the Arbitration Agreement or otherwise. The Arbitral Tribunal may also take into account the parties’ conduct in the arbitration, including any cooperation in facilitating the proceedings as to time and cost and any non-cooperation resulting in undue delay and unnecessary expense. Any decision on costs by the Arbitral Tribunal shall be made with reasons in the award containing such decision.
28.5 In the event that the parties have howsoever agreed before their dispute that one or more parties shall pay the whole or any part of the Arbitration Costs or Legal Costs whatever the result of any dispute, arbitration or award, such agreement to be effective shall be confirmed by the parties in writing after the Commencement Date.

28.6 If the arbitration is abandoned, suspended, withdrawn or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal the Arbitration Costs determined by the LCIA Court.

28.7 In the event that the Arbitration Costs are less than the deposits received by the LCIA under Article 24, there shall be a refund by the LCIA to the parties in such proportion as the parties may agree in writing, or failing such agreement, in the same proportions and to the same payers as the deposits were paid to the LCIA.

VIII. LCIA Arbitration Rules Effective 1 January 1998

Article 28 - Arbitration and Legal Costs

28.1. The costs of the arbitration (other than the legal or other costs incurred by the parties themselves) shall be determined by the LCIA Court in accordance with the Schedule of Costs. The parties shall be jointly and severally liable to the Arbitral Tribunal and the LCIA for such arbitration costs.

28.2. The Arbitral Tribunal shall specify in the award the total amount of the costs of the arbitration as determined by the LCIA Court. Unless the parties agree otherwise in writing, the Arbitral Tribunal shall determine the proportions in which the parties shall bear all or part of such arbitration costs. If the Arbitral Tribunal has determined that all or any part of the arbitration costs shall be borne by a party other than a party which has already paid them to the LCIA, the latter party shall have the right to recover the appropriate amount from the former party.

28.3. The Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing. The Arbitral Tribunal shall determine and fix the amount of each item comprising such costs on such reasonable basis as it thinks fit.

28.4. Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should reflect the parties' relative success and failure in the award or arbitration, except where it appears to the Arbitral Tribunal that in the particular circumstances this general approach is inappropriate. Any order for costs shall be made with reasons in the award containing such order.

28.5. If the arbitration is abandoned, suspended or concluded, by agreement or otherwise, before the final award is made, the parties shall remain jointly and severally liable to pay to the LCIA and the Arbitral Tribunal the costs of the arbitration as determined by the LCIA Court in accordance with the Schedule of Costs. In the event that such arbitration costs are less than the deposits made by the parties, there shall be a refund by the LCIA in such proportion as the parties may agree in writing, or failing such agreement, in the same proportions as the deposits were made by the parties to the LCIA.
IX. **ICDR Dispute Resolution Procedures (Mediation and Arbitration Rules) 2014**

Article 34 - Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

a. the fees and expenses of the arbitrators;
b. the costs of assistance required by the tribunal, including its experts;
c. the fees and expenses of the Administrator;
d. the reasonable legal and other costs incurred by the parties;
e. any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;
f. any costs incurred in connection with a request for consolidation pursuant to Article 8; and
g. any costs associated with information exchange pursuant to Article 21.

X. **ICDR Dispute Resolution Procedures (Mediation and Arbitration Rules) 2009**

Article 31 – Costs

The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case. Such costs may include:

(a) the fees and expenses of the arbitrators;
(b) the costs of assistance required by the tribunal, including its experts;
(c) the fees and expenses of the administrator;
(d) the reasonable costs for legal representation of a successful party; and
(e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

XI. **ICSID Rules of Procedure for Arbitration Proceedings (Arbitration Rules) (as Amended and Effective April 10, 2006)**
Rule 28 - Cost of Proceeding

1. Without prejudice to the final decision on the payment of the cost of the proceeding, the tribunal may, unless otherwise agreed by the parties, decide:

   (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the tribunal and the charges for the use of the facilities of the Centre;

   (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

2. Promptly after the closure of the proceeding, each party shall submit to the tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

XII. Permanent Court of Arbitration, Arbitration Rules 2012

Article 40 - Definition of costs

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term “costs” includes only:

   (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
   (b) The reasonable travel and other expenses incurred by the arbitrators;
   (c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
   (d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
   (e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
   (f) The fees and expenses of the International Bureau, including the fees and expenses of the appointing authority.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Article 42 - Allocation of costs

1. The costs of arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.

XIII. SCC Arbitration Rules 2010

Article 43 Costs of the Arbitration

(1) The Costs of the Arbitration consist of:

(i) the Fees of the Arbitral Tribunal;
(ii) the Administrative Fee; and
(iii) the expenses of the Arbitral Tribunal and the SCC.

(2) Before making the final award, the Arbitral Tribunal shall request the Board to finally determine the Costs of the Arbitration. The Board shall finally determine the Costs of the Arbitration in accordance with the Schedule of Costs (Appendix III) in force on the date of commencement of the arbitration pursuant to Article 4.

(3) If the arbitration is terminated before the final award is made pursuant to Article 39, the Board shall finally determine the Costs of the Arbitration having regard to when the arbitration terminates, the work performed by the Arbitral Tribunal and other relevant circumstances.

(4) The Arbitral Tribunal shall include in the final award the Costs of the Arbitration as finally determined by the Board and specify the individual fees and expenses of each member of the Arbitral Tribunal and the SCC.

(5) Unless otherwise agreed by the parties, the Arbitral Tribunal shall, at the request of a party, apportion the Costs of the Arbitration between the parties, having regard to the outcome of the case and other relevant circumstances. (6) The parties are jointly and severally liable to the arbitrator(s) and to the SCC for the Costs of the Arbitration.

Article 44 - Costs incurred by a party

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for representation, having regard to the outcome of the case and other relevant circumstances.

XIV. SCC Arbitration Rules 2007

Article 44 - Costs incurred by a party

Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, or an award under Article 39, upon the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case and other relevant circumstances.

XV. SIAC Arbitration Rules 2013

Rule 31 - Costs of the Arbitration
31.1 The tribunal shall specify in the award, the total amount of the costs of the arbitration. Unless the parties have agreed otherwise, the tribunal shall determine in the award the apportionment of the costs of the arbitration among the parties.

31.2 The term "costs of the arbitration" includes:

   a. the tribunal’s fees and expenses;
   b. the Centre’s administrative fees and expenses; and
   c. the costs of expert advice and of other assistance required by the tribunal.

Rule 32 - Tribunal’s Fees and Expenses

32.1 The fees of the tribunal shall be fixed by the Registrar in accordance with the Schedule of Fees and the stage of the proceedings at which the arbitration ended. In exceptional circumstances, the Registrar may allow an additional fee over that prescribed in the Schedule of Fees to be paid.

32.2 The tribunal’s reasonable out-of-pocket expenses necessarily incurred and other allowances shall be reimbursed in accordance with the applicable Practice Note.

Rule 33 - Party’s Legal and Other Costs

33.1 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.

XVI. UNCITRAL Arbitration Rules (as revised in 2010)

Article 40 - Definition of costs

1. The arbitral tribunal shall fix the costs of arbitration in the final award and, if it deems appropriate, in another decision.

2. The term “costs” includes only:
   a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;
   b) The reasonable travel and other expenses incurred by the arbitrators;
   c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;
   d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
   e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
   f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA.

3. In relation to interpretation, correction or completion of any award under articles 37 to 39, the arbitral tribunal may charge the costs referred to in paragraphs 2 (b) to (f), but no additional fees.

Article 41 - Fees and expenses of arbitrators
1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If there is an appointing authority and it applies or has stated that it will apply a schedule or particular method for determining the fees for arbitrators in international cases, the arbitral tribunal in fixing its fees shall take that schedule or method into account to the extent that it considers appropriate in the circumstances of the case.

3. Promptly after its constitution, the arbitral tribunal shall inform the parties as to how it proposes to determine its fees and expenses, including any rates it intends to apply. Within 15 days of receiving that proposal, any party may refer the proposal to the appointing authority for review. If, within 45 days of receipt of such a referral, the appointing authority finds that the proposal of the arbitral tribunal is inconsistent with paragraph 1, it shall make any necessary adjustments thereto, which shall be binding upon the arbitral tribunal.

   a) When informing the parties of the arbitrators’ fees and expenses that have been fixed pursuant to article 40, paragraphs 2 (a) and (b), the arbitral tribunal shall also explain the manner in which the corresponding amounts have been calculated;

   b) Within 15 days of receiving the arbitral tribunal’s determination of fees and expenses, any party may refer for review such determination to the appointing authority. If no appointing authority has been agreed upon or designated, or if the appointing authority fails to act within the time specified in these Rules, then the review shall be made by the Secretary-General of the PCA;

   c) If the appointing authority or the Secretary-General of the PCA finds that the arbitral tribunal’s determination is inconsistent with the arbitral tribunal’s proposal (and any adjustment thereto) under paragraph 3 or is otherwise manifestly excessive, it shall, within 45 days of receiving such a referral, make any adjustments to the arbitral tribunal’s determination that are necessary to satisfy the criteria in paragraph 1. Any such adjustments shall be binding upon the arbitral tribunal;

   d) Any such adjustments shall either be included by the arbitral tribunal in its award or, if the award has already been issued, be implemented in a correction to the award, to which the procedure of article 38, paragraph 3, shall apply.

4. Throughout the procedure under paragraphs 3 and 4, the arbitral tribunal shall proceed with the arbitration, in accordance with article 17, paragraph 1.

5. A referral under paragraph 4 shall not affect any determination in the award other than the arbitral tribunal’s fees and expenses; nor shall it delay the recognition and enforcement of all parts of the award other than those relating to the determination of the arbitral tribunal’s fees and expenses.

Article 42 - Allocation of costs

1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.
2. The arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs.
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