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ICC COMMISSION REPORT

DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION

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Decisions on Costs in International Arbitration

Note to readers

In international arbitration, no party has an automatic right to recover any costs of the arbitration, defined by Article 37(1) of the 2012 ICC Arbitration Rules as including the fees and expenses of the tribunal and the arbitral institution and the reasonable legal and other costs incurred by the parties. Article 37(4) 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. Unlike the ICC Rules, some arbitration rules, such as those of CIETAC, DIS, LCIA, PCA and UNCITRAL, incorporate a rebuttable presumption that the successful party may recover such costs from the unsuccessful party.

The considerations contained in this Report are intended to inform users of arbitration how tribunals may allocate costs in accordance with the parties' agreement and/or any applicable rules or law. However, they should not be regarded as affecting a tribunal's discretion to allocate costs. In particular, the fact that a tribunal does not take into account any or all of these considerations in its decision on the allocation of costs is not and cannot be a basis upon which to dispute or challenge the exercise of its discretion to allocate costs.

This Report does not endorse any particular approach to decisions on costs. Nor does it establish guidelines or checklists.

Acknowledgements

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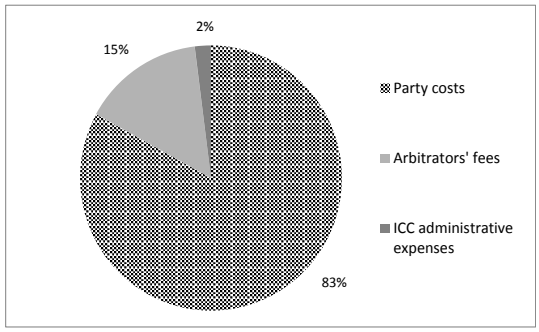
Contents

I. Introduction

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

2. Party costs (including lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration) make up the bulk (83% on average) of the overall costs of the proceedings. Arbitrators' fees and case administration account for a much smaller proportion of the overall costs, as shown below.[1]



3. Significant work has already been done by the Commission to help keep party costs under control. It includes the 2014 guide, *Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives,* the 2012 report *Techniques for Controlling Time and Costs in Arbitration*,[2] and a revision of the ICC Arbitration Rules leading to the latest version of 2012 (the '2012 ICC Rules').

4. The 2012 ICC Rules introduced two new additions to encourage greater control of time and costs 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 to control 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 the allocation of costs are often influenced and informed by practice in the courts and/or under the laws of the countries of origin of the parties and the arbitrators or of the place of arbitration. That practice reveals two basic approaches: either the loser pays the successful party's costs (sometimes called 'costs follow the event'); or each party pays its own costs regardless of the outcome. These approaches are understood and applied differently in different countries (see Appendix B).

6. In international commercial arbitration, various trends are emerging in relation to cost allocation practices and expectations. However, little has been written about them and it is unclear which are the prevailing approaches and practices. This Report seeks: (a) to identify the various approaches applied by arbitral tribunals by analysing decisions on costs in ICC awards rendered under the 2012 ICC Rules and the preceding version of the ICC Arbitration Rules (the '1998 ICC Rules') and in awards from eight other major arbitral institutions; and (b) to identify underlying national differences.

7. The ultimate objective of this Report is to consider how the allocation of costs between the parties can be used effectively to control time and costs and to assist in creating fair, well-managed proceedings matching users' expectations. The Report is not intended to be prescriptive, nor does it endorse any particular practice or approach. Given that party autonomy and flexibility are central to international arbitration, there is no single, universal approach to the allocation of costs.

8. With this objective in mind, the Commission established a Task Force on Decisions as to Costs, which took the following initiatives:

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

(ii) Representatives from countries in which the ICC has a National Committee or Group responded to a survey on approaches to costs under national laws (see Appendix B)

1 The calculations were based on 221 ICC awards from 2012.

2 Both available at http://www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/.

(iii) The Secretaries to the ICC Commission studied ICC awards to identify how arbitrators have dealt with the allocation of costs (see Appendix A)

(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) were invited to submit analyses of awards showing how arbitrators have dealt with the allocation of costs under their respective rules (see Appendix A)

(v) On the basis of an analysis of the practices of arbitral tribunals and national courts, the Task Force identified factors that a tribunal may in its discretion take into account when making decisions on costs at any stage of the proceedings and when fixing and allocating costs in the final award.

(vi) The Task Force identified and described in this Report how the exercise of the power to allocate costs can be used to improve efficiency in arbitration.

II. Outline of the Report

9. This Report is divided into five main parts:

(i) a summary of general approaches to awarding costs, based on the Task Force's (a) analysis of commercial arbitration awards (the results of which are set out in Appendix A) and (b) a survey of national practices (in litigation and arbitration), including in relation to third-party funding, cost-capping and cost disparities (or inequalities) between parties (the results of which are set out in Appendix B) (**Section III**);

(ii) a discussion of how the power to allocate costs may be used for the purpose of effective case management (**Section IV**);

(iii) a discussion of considerations taken into account by arbitrators when allocating costs (**Section IV)**;

(iv) specific challenges raised by funding arrangements and settlement negotiations (**Sections V and VI**);

(v) concluding observations (**Section VIII**).

III. Overriding observations

10. The detailed analyses of decisions on the allocation of costs in arbitral awards and the conclusions of the survey of ICC National Committees and Groups are set out, respectively, in Appendices A and B. The principal findings drawn from those analyses are summarized below.

a) Analysis of cost allocation decisions in arbitral awards

11. Based on its study of the allocation of costs in proceedings administered by the major arbitral institutions worldwide (see Appendix A), the Task Force has been able to make the following general observations on the way arbitrators allocate costs in awards.

12. A starting point for any decision on costs is the applicable arbitration rules. They are not identical in this respect. For example, the 2015 CIETAC Rules,[3] the 1998 DIS Rules, the 2014 LCIA Rules, the 2012 PCA Rules and the 2010 UNCITRAL Rules all include an express, rebuttable presumption that the successful party will be entitled to recover its reasonable costs. By contrast, the ICC, HKIAC,[4] ICDR, SCC and SIAC Rules simply authorize the tribunal to make an award apportioning costs but do not contain any presumption on their 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. Despite the fact that the ICC and at least half of the other major institutional rules contain no presumption in favour of the recovery of costs by the successful party, it appears that the majority of arbitral tribunals broadly adopt that approach as a starting point, thereafter adjusting the

3 Article 52(2) of the 2015 CIETAC 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 the principle was simply stated, without listing factors to consider in determining the reasonableness of the costs and with a 10% cap (10% of the amount awarded to the winning party). This provision changed to the current version as early as 2005. Arbitrators in cases administered by CIETAC accordingly follow this rule in practice.

4 This is the case in 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).

allocation of costs as considered appropriate.[5] 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.[6] This was also the case in most LCIA and PCA[7] awards, which is not surprising as LCIA and PCA Rules contain a rebuttable presumption in favour of recovery of costs by the successful party.

14. An alternative starting point is that each party will pay its own costs.[8] Where this presumption applies, whether by agreement between the parties or otherwise, the recovery of costs from the other party will be permitted only in rare circumstances.

15. Irrespective of the starting point, tribunals also assess the reasonableness of the costs claimed. Although the factors taken into consideration to determine reasonableness vary, reasonableness in itself was a criterion considered in most of the awards studied. Generally, arbitrators appear to be relatively willing to deduct legal fees on the basis of unreasonableness. Even where arbitrators begin from the starting point that the successful party is entitled to recover its costs, they frequently adjust the amount recovered, by awarding less than the full amount of the fees claimed.

16. Arbitrators tend to take party conduct into account. It was observed that parties whose conduct was seen to have contributed to excessive costs often did not recover all of the costs claimed.

17. Although in the analysis of the awards reference is made to certain issues such as success fees and disparities between the legal fees of each party, the Task Force did not see enough cases to be able to draw conclusions or infer trends in relation to these.

18. Costs in arbitration include not only the legal fees and costs of the parties (party costs) but also the costs of the tribunal, institution and any facilities used (sometimes called arbitration costs). Liability for arbitration costs is of course a question peculiar to arbitration. In domestic court proceedings there are generally little or no court, judge or counsel costs as they are invariably local. Where an arbitral tribunal decides that each party shall pay its own costs, it will still need to determine which party is to pay the arbitration costs.

19. It should be noted that this Report covers international commercial arbitration awards and practices only. Investor-state arbitration, to which different considerations apply, is beyond the scope of this Report. For the purpose of its research and analysis, the Task Force took into account the rules of several arbitral institutions and the UNCITRAL Arbitration Rules, whose relevant rules can be found in Appendix C. The International Centre for Settlement of Investment Disputes (ICSID) Rules are included for reference only.

b) Approaches to costs in different jurisdictions

20. Based on its study of the allocation of costs by courts in different countries (see Appendix B), the Task Force is able to make the following observations that may be relevant to arbitration.

21. In most jurisdictions, the recovery of costs under fee arrangements, irrespective of whether such arrangements are ultimately funded by a third party, is generally acceptable. Most countries reported that such arrangements are likely permissible even where not specifically provided for in relevant statutes or rules. In a handful of countries such arrangements are specifically permitted, sometimes with certain preconditions. In at least seven jurisdictions certain fee arrangements are specifically prohibited and considered null and void by national courts. In some countries different rules apply to contingency or success fees and other types of conditional fee arrangements, so it is difficult to generalize. Frequently, the rules that apply to fee arrangements and third-party funding in domestic litigation are different from those that apply in

5 This is sometimes called 'costs follow the event', 'loser pays' or the 'English approach'. Within national court systems where this approach is followed, the recovery of costs 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 some countries statutory/official rates are set for specific activities, e.g. meetings, preparing submissions, attending hearings, at least in court litigation.

6 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.

7 The PCA reports however that there is a notable difference in approaches to costs between its administered interstate arbitrations and mixed arbitrations (investment treaty and contract-based arbitrations). In 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. In mixed arbitrations cost allocation decisions vary, referring to factors such as relative successes of the parties, circumstances of the case and the reasonableness of the costs.

8 This is sometimes called the 'American approach'.

arbitration, usually being more restrictive in the former. Several jurisdictions reported that the reasonableness of such fee arrangements could be taken into account when allocating costs in arbitration or that the parties' arbitration agreement would prevail.

22. The majority of jurisdictions could not cite any reported cases on the recovery of costs related to third-party funding. In Switzerland, on the other hand, the Swiss Supreme Court invalidated a law that prohibited third-party funding in domestic cases, as it violated economic freedom. 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 to claim costs in the proceedings, and the party that was funded did not actually incur the costs. Singapore suggested that a third-party funding agreement could be considered champertous and therefore unenforceable by Singapore courts in both litigation and arbitration.

23. As far as pre-dispute agreements on the allocation of costs are concerned, 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 that agreement is made after the dispute arises. Other jurisdictions reported that such agreements are seen with some frequency, be it in an arbitration agreement, when a dispute arises, or towards the end of the arbitration. Finland and Ontario described them as rare, but possible, in their jurisdictions. Such agreements are generally upheld, unless national law provides otherwise.

24. Several jurisdictions reported that their laws do not contain any rule on the arbitral tribunal's power to cap costs, but that this was generally considered permissible. The English Arbitration Act 1996 empowers the tribunal to cap the recoverability of costs, though this power is rarely used in practice. Other jurisdictions reported cost-capping mechanisms under local arbitration rules. For example, under the Polish Chamber of Commerce rules a cap would be imposed on a contingency agreement, and the rules of the Belgian arbitration centre, CEPANI, expressly encourage arbitrators to remind parties of the possibility of agreeing a cap on costs. Many jurisdictions noted that the arbitrators' assessment of the reasonableness of the costs to be allocated would constitute a form of cost-capping when the award is made.

25. With regard to disparities between expensive and less expensive legal counsel (e.g. major international law firms compared with law firms from developing countries or smaller and less expensive firms), several jurisdictions noted that arbitrators have 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 noted that the parties' backgrounds could be taken into account, e.g. whether they are foreign and might require local counsel, or whether they are multinational corporations as compared to small businesses. Many jurisdictions noted the importance of proportionality of costs, both in relation to the dispute and between the parties.

IV. Allocation of costs and effective case management

26. The Task Force found that: (i) arbitrators were prepared and permitted to exercise their powers to allocate costs at various stages of the arbitral process, not only in the final award; and (ii) in light of the absence of any uniform approach to the allocation of costs, arbitrators and parties may wish to set out their expectations on this matter relatively early in the proceedings.

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

28. As to the second point, the tribunal's use of the allocation of costs to encourage the efficient conduct of the proceedings was addressed in the second edition of the Commission's report

Techniques for Controlling Time and Costs in Arbitration[9] in the following terms (§ 82, emphasis added):

> **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 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.

29. The Task Force expressly recognizes the importance of controlling time and costs in arbitration and, moreover, that the tribunal may use the allocation of costs as a tool for managing efficiency and thereby controlling time and costs at every stage of the arbitral process, including:

(a) by discussing cost allocation principles at the outset or early in the proceedings, e.g. at the case management conference or in the terms of reference;

(b) throughout the proceedings, by way of interim awards on costs or orders on costs relating to interim applications, steps or decisions; and

(c) in the final award or interim awards as a means of sanctioning improper conduct or behaviour, including where it is not efficient or reasonable.

a) At the outset of the proceedings

30. The report, *Techniques for Controlling Time and Costs in Arbitration*, encourages a tribunal 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'.

31. Irrespective of whether it so informs the parties at the outset of the proceedings, an ICC tribunal is authorized to take into account such conduct pursuant to Article 37(5) of the 2012 ICC Rules. However, by raising this matter with the parties at an early stage the tribunal can better manage their expectations and those of their lawyers for the duration of the proceedings.

32. The tribunal might also consider discussing with the parties, at the outset of the arbitration or during the proceedings (typically at the first case management meeting), other aspects of cost management, including:

(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 be assessed only at the end of the arbitration in the final award;

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

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

(iv) sensitive matters, such as whether there is third-party funding and any implications it may have for the allocation of costs, whether the identity of the third-party funder (which could be relevant to possible conflicts of interest) should be disclosed, and whether contingency, conditional or success fee arrangements have been agreed, and how the parties expect these matters to be considered in relation to the assessment of costs;

(v) whether cost-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'[10]);

(vi) whether (depending on the applicable regime or the agreement of the parties) and how the tribunal should be informed about settlement offers that came close to or were better than the amount determined by the tribunal and would have saved significant costs and time if they had been accepted; and

(vii) when submissions on costs should be made (e.g. at the same time as post-hearing briefs).

9 2d ed. (2012), available at http://www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/.

10 Hong Kong Arbitration Ordinance, s. 57. The English Arbitration Act contains a similar provision in s. 65.

33. Addressing cost issues at the outset of the proceedings can have several advantages. It will enable parties to be:

(i) fully informed about the tribunal's approach to costs, which removes uncertainty and improves predictability;

(ii) fully informed about the tribunal's expectations on submissions relating to costs, which will 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 of them at a procedural level (e.g. observing the procedural timetable, producing documents ordered by the tribunal, timely communications);

(iv) provided with an opportunity to discuss what behaviour and professional conduct is expected of the parties and counsel; and

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

34. There may be concerns that raising the question of 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 can be addressed if and when they arise in a given case. As a general observation, they might be adequately addressed if the tribunal clearly indicates to the parties that it will take into account the arbitration as a whole when deciding on costs, and ensures that it has full discretion to do so under the applicable rules.

35. Another way of indicating to the parties what will be taken into account is for the tribunal to address this in a (first) procedural order, as was done in an ICC case under the 2012 ICC Rules.[11]

11 The tribunal indicated as follows: '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.'

b) During the proceedings (partial awards and interim orders)

36. Most institutional arbitration 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.

37. Most arbitration rules and statutes also permit tribunals to make awards or interim orders in respect of costs, including those that arise out of applications for interim relief and other procedural applications. For example, the UNCITRAL Model Law on International Commercial Arbitration specifically provides as follows in Article 17G (emphasis added):

> 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.

38. If the tribunal were to make a determination on costs in the form of an order rather an award, which is entirely permissible, such an order may not be enforceable under the New York Convention until or unless incorporated into a final award. However, the *lex arbitri* may contain a mechanism for enforcing such orders.

39. A potential downside of making an award or an order on costs at an interim stage is that it may alter the dynamic of the proceedings. Once such costs are paid, it may not be possible for them to be recovered later; 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 benefit of raising these issues at the outset, at a preliminary meeting with the parties.

40. As an alternative to an interim costs award (or order), arbitrators may consider issuing a direction or order containing a final decision on the allocation of costs with respect to certain interim action or conduct, but state that payment will only fall due pursuant to the final award. In such cases, the arbitrators must obviously be mindful to incorporate such orders or directions in the final award.

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

c) At the end of the proceedings

42. Finally, the tribunal has full discretion to award reasonable costs in any final award or awards. This is normally what happens in the majority of cases. The ICC Rules require the tribunal to fix costs in its final award and decide which of the parties shall bear them or in what proportion they shall be borne by the parties. Under the ICC Rules, and the rules of many other institutions, the tribunal may take into account the conduct of the parties when doing so.

43. 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 a full opportunity to be heard on the matter. Appropriate directions on the timing and nature of submissions on costs should be given in the course of the proceedings.[12]

V. Cost allocation considerations

44. When allocating costs in international commercial arbitration it may be necessary to:

(i) identify and establish the scope of any agreement between the parties on costs;

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

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

(iv) take into account other circumstances, where relevant, including the extent to which each party conducted the arbitration in an expeditious and cost-effective manner.

Some considerations relating to each of the above are set out below.

a) Agreement of the parties

45. The parties' agreement on costs is the principal factor to take into consideration in any decision on costs.[13] There are at least five aspects to consider in relation 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.

Arbitration/submission agreement

46. Subject to the requirements of applicable mandatory law, the tribunal should respect any agreement between the parties on the allocation of costs. That agreement may be contained in an arbitration clause, submission agreement, terms of reference or may be in some other form.

47. Standard arbitration clauses issued by the major arbitral institutions tend to be silent on costs. For example, the standard ICC arbitration clause simply provides as follows:

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

48. Generally, parties are not prevented from including in their arbitration agreement express wording on the allocation of costs.[14] The parties' agreement will be upheld under most national laws. However, a specific agreement on costs in the arbitration agreement must not contravene any mandatory provisions of the *lex arbitri* or any other relevant mandatory law. For example, section 60 of the English Arbitration Act 1996 and section 74(8) of the Hong Kong Arbitration Ordinance both provide that an agreement

12 For instance, some tribunals direct the parties to include their cost submissions in their post-hearing briefs.

13 See Appendix A.

14 See e.g. the JAMS Comprehensive Arbitration Rules, Rule 24(f) of which provides (emphasis added): '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 (emphasis added): '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

requiring a party to pay all or part of the costs of the arbitration in any event is valid only if made after the dispute has arisen.[15]

Institutional rules

49. If the parties have incorporated the rules of an arbitration institution into their arbitration agreement by reference, the tribunal will normally apply the rules of that institution concerning costs. As mentioned in section III above, although most institutional rules leave tribunals with broad discretion to allocate reasonable costs, there are subtle and important differences between some of them, especially in respect of presumptions.

Terms of reference

50. Under the ICC Rules the tribunal is required to draw up terms of reference. In the terms of reference or otherwise at the outset of the proceedings the tribunal may issue, or the parties may agree on, certain directions in relation to costs. Where this is the case, the tribunal must bear those directions in mind when subsequently deciding on costs.

Applicable law

51. The tribunal should be mindful of any mandatory and other statutory law or case law applicable to decisions on costs.[16] It is widely accepted that the law applicable to decisions on costs is the *lex arbitri*, although some commentators have argued that it is the law governing the contract.[17]

52. While giving effect to the parties' agreement on costs, arbitral tribunals will also be mindful of any applicable mandatory provisions concerning the allocation of costs, usually (but not necessarily exclusively) found in the arbitration statute of the *lex arbitri* (law of the seat) and potentially that of the place of enforcement.[18]

53. Tribunals (and parties) may further take guidance from other non-mandatory provisions in the arbitration statute of the *lex arbitri*. For example, Article 17G of the UNCITRAL Model Law on International Commercial Arbitration, on which many national arbitration statutes are based,[19] expressly provides that a party that requests interim measures will be liable for any costs and damages caused by the measure if the tribunal subsequently determines that the order should not have been granted. In such a case, interim costs may be awarded.

54. As further examples, some national arbitration statutes expressly permit a tribunal to award interest on costs;[20] order payment of security for costs, including in respect of requests for interim relief;[21] or limit the amount of costs recoverable at any stage of the proceedings;[22] or permit parties to seek assistance from the courts for taxation of costs.[23]

Additional rules/guidelines

55. The parties may agree on the application of other rules or guidelines such as 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. For example, 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.

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15 Note that such restrictions do not necessarily prevent parties from agreeing that the unsuccessful party will pay the successful party's costs, in the form of the JAMS provision above.

16 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 Nov. 2011; *Pirelli* v. *LP*, Court of Cassation, Civ. 1re, 28 Mar. 2013, no. 11-27.770; *Société Lola Fleurs* v. *Société Monceau Fleurs*, Paris Court of Appeal, 29 Feb. 2013, no. 12/12953.

17 See G. Born, *International Commercial Arbitration,* 2d ed. (Kluwer Law International, 2014), c. 23 'Form and Content of Awards' at 3099.

18 See e.g. English Arbitration Act, s. 60; Hong Kong Arbitration Ordinance, s. 74(8).

19 See e.g. Hong Kong Arbitration Ordinance, Singapore International Arbitration Act, New Zealand Arbitration Act, German Arbitration Law.

20 Hong Kong Arbitration Ordinance, s. 79; Singapore International Arbitration Act, s. 20.

21 Singapore International Arbitration Act, s. 12(1)(a); New Zealand Arbitration Act, Schedule I, s. 17I; German Arbitration Law, § 1041(1); Spanish Law 60/2003 on Arbitration, Art. 23(1).

22 Hong Kong Arbitration Ordinance, s. 57; English Arbitration Act, s. 65.

23 Hong Kong Arbitration Ordinance, s. 75; Singapore International Arbitration Act, s. 21.

Cultural expectations

56. Parties may have unspoken expectations in respect of costs. These may well be coloured by the parties' origins. Given that international arbitration generally involves parties and arbitrators of several nationalities and different legal and cultural traditions, it may be helpful to address cultural expectations early in the proceedings (e.g. at the first case management conference) to ensure greater understanding among the parties and the tribunal.

b) Relative success and failure of the parties

57. As indicated above, some arbitration rules, including those of UNCITRAL, the LCIA and the PCA, contain a presumption that the successful party is entitled to recover its reasonable costs. Some national arbitration statutes lay down a similar (non-mandatory) presumption.[24] Those rules and statutes leave various questions unaddressed, including whether and when the presumption should be displaced and what amount (or proportion) of such costs is recoverable.

58. Other rules, including the 2012 ICC Rules, contain no presumption on costs but instead give the tribunal discretion to allocate costs, including reasonable legal and other costs, to either party. Article 37(4) of the 2012 ICC Rules[25] provides as follows (emphasis added):

> 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.

Article 37(5) further provides that, when deciding on costs, 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.

59. Even where the applicable rules or statute do not create a presumption that the successful party is entitled to recover its reasonable costs, awards show that when deciding on costs tribunals often pay at least some regard to the relative success or failure of the parties. However, determining relative success is not necessarily straightforward, particularly in complex disputes involving multiple causes of action, counterclaims, set-off, multiple 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.

60. 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.

61. Arbitrators may take into account the relative success of the prevailing party by: (i) assuming that if a claimant or respondent succeeded in its core or primary claim or outcome, then it is entitled to all of its reasonable costs;
(ii) apportioning costs on a claim-by-claim or issue-by-issue basis according to relative success and failure; or (iii) apportioning success against the amount of damages originally claimed or the value of the property in dispute. Other approaches may be used as well (and in all cases there might be an additional assessment based on conduct). Whatever approach is used, it is important to take into account differences in the complexity and importance of different issues.

62. Any apportionment of costs may involve consideration of some or all of the factors discussed above, as well as bad faith or improper conduct by the parties as discussed below in paragraphs 78 to 85. Any costs so apportioned must nevertheless be reasonable.

c) Reasonableness of legal and other costs incurred by the parties

63. As indicated in paragraph 15 above, reasonableness is a standard applied to the allocation of costs under most arbitration rules. This is so even where there is a presumption that costs will be awarded to the successful party, as such a presumption remains subject (at least) to the reasonableness of the legal and other costs incurred by the parties. However, there is no definition of reasonableness in institutional

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24 E.g. English Arbitration Act, s. 61(2); Argentine National Code of Civil and Commercial Procedure, Art. 68 (cross-reference from Art. 772); Turkish International Arbitration Law (Law No. 4686 of 21 June 2001), Art. 16(D).

25 See also the HKIAC, ICDR, SCC and SIAC Rules, which simply set out the tribunal's authority to make an award apportioning costs, but do not include any presumption on costs.

arbitration rules or national arbitration statutes.[26] A common-sense approach is to assess whether the costs are reasonable and proportionate to the amount in dispute or value of any property in dispute and/or the costs have been proportionately and reasonably incurred.[27]

Costs reasonable/proportionate to monetary value/property in dispute

64. Tribunals may be proactive in assessing the reasonableness of the amount of costs claimed in a dispute as a whole and award only those costs that they consider reasonable and proportionate. Knowing that the tribunal can do so may encourage parties to adopt a responsible attitude when making decisions on legal expenses and deter them from unnecessarily running up costs. 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 its costs in full.

65. To determine whether the costs sought are reasonable in amount, the tribunal may take into account various factors, depending on the circumstances of the case, including but not limited to the following:

(i) the reasonableness of the rates and number and level of fee-earners when evaluating whether the amount of work charged was reasonable;

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

(iii) the reasonableness of the amount of time spent, at various levels and rates, on the various phases of the arbitration; 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.

66. As far as proportionality is concerned, the amount of monetary claims and the value of any property in dispute are usually high. In international arbitration claims can range from less than USD 100,000 to billions of dollars. That wide differential, coupled with the need to ensure that arbitration remains cost-effective in all cases, means that proportionality is likely to be a factor to consider. When assessing the reasonableness of the amount of costs incurred, tribunals might take into account the amount in dispute or the value of any property that is the subject matter of the dispute.

67. In this regard, it should be borne in mind that arbitration is intended to meet the needs of all users and a wide range of cases and disputes, including those of low value. However, even small cases can give rise to significant costs and the successful party should not be penalized for having commenced proceedings to recover losses caused by the unlawful conduct of the counterparty. Moreover, there are cases where the amount in dispute appears on its face to be insignificant, 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).

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26 Hong Kong Arbitration Ordinance, s. 74(7) (emphasis added): '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 Law, § 609(1), in part (emphasis added): '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 defence.' The 2012 CIETAC Arbitration Rules, Art. 50(2), lists some factors that may be taken into account by the arbitral tribunal to assess reasonableness (emphasis added): '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.'

27 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, which refers also to similar English Civil Procedure Rules. The Swiss Federal Tribunal, in a ruling of 9 Jan. 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 Law also alludes to concepts of necessity and proportionality at § 1057(1), which provides (emphasis added): '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.'

Costs proportionately and reasonably incurred

68. 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, a national court reviewing a decision on costs in arbitration observed as follows (emphasis added):[28]

> [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.

69. Consistent with this approach, tribunals might take into account the proportionality between the amount of costs incurred and all the circumstances of the proceedings. However, doing so takes time and will in itself increase costs, so a balanced approach needs to be taken.

70. In assessing whether the amount of work done is proportionate and reasonable tribunals may, and often do, take into account various factors that 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 phases of the proceedings and, in particular, whether parties have unnecessarily prolonged the proceedings and/or increased their cost (e.g. as a result of repeated applications for document production, other procedural motions, unnecessary steps in the proceedings);

(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, both when requesting the production of documents and responding to such requests;

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

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

(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.

Internal legal and other costs

71. While it is widely accepted that parties' costs in respect of outside legal counsel, witnesses and experts are recoverable, most arbitral rules are silent on internal legal, management and other costs, leaving the issue of their recoverability to the discretion of the tribunal.[29]

72. The decision whether to pursue arbitration increasingly depends on an extensive cost/benefit analysis carried out by companies on the basis of initial advice from in-house counsel and other internal specialists. Thus, internal costs may represent a large portion of a party's total costs when in-house counsel, managers, experts and other staff take a proactive role before and during the arbitration. They must study the case to be able to make informed decisions and provide instructions, as well as to collect evidence.

28 *VV and Another* v. *VW*, [2008] SGHC 11, [2008] 2 SLR 929.

29 But see Paris Arbitration Rules, Art. 7.6 (emphasis added): '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.'

Sometimes companies appoint a staff member specifically to manage a case, possibly even full-time. From a managerial standpoint, time spent by company staff on the arbitration cannot be used for usual business activities and thus has a cost.

73. In recognition of the above, tribunals may consider allowing the recovery of costs associated with: (i) executives' 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.

74. There is no principle prohibiting the recovery of internal costs incurred in direct connection with the arbitration, and some tribunals have awarded such costs insofar as they were necessary, did not unreasonably overlap with outside counsel fees, were substantiated in sufficient detail to be distinguished from ordinary staffing expenses, and were reasonable in amount.

75. Given that few parties keep detailed reports of time spent and costs incurred internally for an arbitration, tribunals may find it useful to discuss with them at the outset of the proceedings the potential recoverability of internal costs.

d) Proof of costs

76. The tribunal may award such reasonable costs as are incurred and paid or payable by the party claiming them. The tribunal must therefore satisfy itself, through proper verification, of the reality of those costs.

77. Tribunals may prefer to avoid lengthy submissions and arguments in which parties give a detailed breakdown of costs, but they will at least seek satisfactory evidence that the amount of costs claimed was in fact incurred. Copies of invoices will rarely be appropriate if they show details of work done, as they will often contain information that 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 between parties and/or the tribunal regarding the required level of substantiation can be avoided if discussed early in the proceedings.[30]

e) Improper conduct/bad faith of the parties

78. As mentioned earlier, the rules of a number of institutions and guidelines issued by other bodies provide that the tribunal may take into account the conduct of the parties (and that of their representatives) when allocating reasonable costs to either party. Some national arbitration statutes contain similar provisions.[31] Article 37(5) of the 2012 ICC Rules, for example, empowers a tribunal, when making decisions on costs, to consider whether a party conducted itself in an expeditious and cost-effective manner. The broad language of Article 37(5) allows the conduct of all parties to be assessed in the course of the proceedings, and in some cases even prior to the proceedings, 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 find that a party's improper conduct or bad faith is the sole determinative factor in its decision on costs. Some aspects of conduct that may be taken into account by the tribunal when apportioning costs between the parties are discussed below.

Improper conduct in procedural steps

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

(i) Pre-arbitral behaviour that occurred prior to commencement of the arbitration proceedings. In particular, arbitrators might look at improper conduct by a party in its dealings leading up to the proceedings, including but not limited to attempts to avoid the arbitration, threatening behaviour, parallel court proceedings in breach of an arbitration agreement, interference affecting the counterparty's business interests and/or unfair

30 Few tribunals will wish to become involved in taxation of costs as in English courts, 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.

31 E.g. Brazilian Arbitration Act, Art. 27 (emphasis added): '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 litigation, as the case may be, with due respect to the stipulations of the arbitration agreement, if any.'

or prejudicial press campaigns. Although uncommon, costs arising from pre-arbitral behaviour may be expressly provided for in the arbitration statute of the *lex arbitri*.[32]

(ii) Guerrilla tactics on those rare occasions when parties seek deliberately to interfere in the conduct of the proceedings in order to render an award unenforceable or otherwise affect the tribunal's ability to finally resolve the dispute between the parties.

(iii) Post-formation conflicts aimed at destabilizing the tribunal and the arbitration. These result, for example, from counsel appointments late in the proceedings that create a conflict of interest for an arbitrator. The arbitrator in question may be forced to resign, otherwise the enforceability of the award could be jeopardized.[33] The tribunal may take into account any tactic deployed by a party to create such a conflict, and any costs arising out of such conduct.

(iv) Repeated, unsuccessful challenges, known to be unfounded, against the appointment of an arbitrator or the jurisdiction or authority of the tribunal.[34]

(v) Unnecessary court involvement where parties commence parallel litigation in breach of the arbitration agreement, seemingly in an effort to torpedo the arbitration process.[35] Although most arbitration rules and national statutes permit necessary and appropriate court support for arbitration at the seat or the 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 when deciding on costs.

(vi) Deliberate undermining of the arbitral process, such as through ex parte communications with arbitrators that give rise to a conflict of interest, forcing the arbitrator to resign or jeopardizing the enforceability of the award.[36]

Improper conduct in document production

80. As a preliminary remark and as made clear by the Commission in its report, *Techniques for Managing Electronic Document Production When it is Permitted or Required in International Arbitration*, 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.[37]

81. 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 has otherwise engaged in improper conduct or bad faith in the production of documents.

32 Hong Kong Arbitration Ordinance, s. 74(7) (emphasis added): '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.'

33 In an effort to alleviate concerns caused by the arbitrary occurrence of such a scenario, some arbitral institutions have expressly empowered the tribunal to withhold approval of the change of counsel, and some tribunals include such provisions in the terms of reference or their terms of appointment (e.g. LCIA Rules (2014), Art. 18.4; IBA Guidelines on Party Representation in International Arbitration (2013), Guidelines 4 to 6).

34 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 through costs (e.g. LCIA Rules (2014), Annex, para. 2).

35 The New York Convention provides for the enforceability of arbitration agreements as well as awards and is fundamental to the pro-arbitration approach adopted by most contracting state courts.

36 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 and other professional organizations have published rules or guidelines in an effort to prohibit such conduct or direct as to the best approach (e.g. LCIA Rules (2014), Annex, para. 6; IBA Guidelines on Party Representation in International Arbitration (2013), Guidelines 7 and 8). This type of conduct also may fall within Article 35(7) of the ICC Rules.

37 § 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 or deliberate tampering with evidence.'

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

(i) deliberately abusive or improper conduct in the form and/or manner in which documents are requested or responses made to reasonable and appropriate document requests from the other party;[38]

(ii) deliberately and improperly failing to comply with directions concerning requests for document production or destroying or failing to preserve documents that have been properly requested or are otherwise admissible and relevant. Although in international arbitration there is no automatic duty to preserve relevant evidence, parties and party representatives should nonetheless refrain from intentionally thwarting the disclosure of relevant and material evidence by destroying information;

(iii) deliberate falsification of documentary evidence.

False witness or expert evidence

83. When allocating costs, a tribunal may take into account the fact that a party has presented false testimonial evidence to the tribunal and/or that its representatives knowingly procured or assisted in the preparation of the false evidence. The conduct of witnesses and experts may also be subject to and punishable under the *lex arbitri*.[39] The conduct of legal representatives may be further subject to sanction by the professional organizations to which they belong.[40]

False submissions to the tribunal

84. When allocating costs, the tribunal may take account of any false submissions made to mislead the tribunal or undermine the integrity of the proceedings.[41] Such conduct on the part of legal representatives may again be subject to sanction by professional organizations.[42]

Aggression/lack of professional courtesy/ unsubstantiated fraud allegations

85. Other factors that could influence the allocation of costs include aggressive conduct by a party or its representatives, or professional discourtesy. If unsubstantiated allegations of fraud (which are actively discouraged by some professional bodies) have been made, they too may be taken into consideration by the tribunal in its decision on costs.

VI. Funding of costs in arbitration and success fees or uplifts

86. The rationale behind allocating costs to a successful party is that the party should not be out of pocket as a result of having to seek adjudication to enforce or vindicate its legal rights.[43] Recovery of the costs by the successful party therefore presupposes that they must ultimately be incurred by that party.

38 In an effort to alleviate concerns that arise from abusive requests to produce documents or abusive responses to requests, the IBA published guidelines for parties and tribunals on the best approach (see IBA Guidelines on Party Representation in International Arbitration, Guidelines 12–17). This type of conduct may also fall within Art. 35(7) of the ICC Rules (as well as Art. 9.7 of the IBA Rules on the Taking of Evidence in International Arbitration).

39 E.g. see English Perjury Act 1911; China's 2010 law on measures of punishment for the illegal acts of lawyers and law firms.

40 In an effort to alleviate concerns that arise from intentionally false testimony, some arbitral institutions and other professional organizations have published guidelines or rules in an effort to direct the tribunal as to the best approach (e.g. LCIA Rules (2014), Annex, para. 4; IBA Guidelines on Party Representation in International Arbitration (2013), Guidelines 9–11). This type of conduct may also fall within Art. 35(7) of the ICC Rules (as well as Art. 9.7 of the IBA Rules on the Taking of Evidence in International Commercial Arbitration).

41 Counsel are usually governed by professional codes or rules of conduct and may be subject to sanction by their governing professional organizations for any breach arising out of such conduct. However, counsel typically come from different jurisdictions with different ethical rules, and the ethical rules of a particular jurisdiction are geared to practice in that jurisdiction and not necessarily to international arbitration practice. Some arbitral institutions and other professional organizations have published rules or guidelines in an effort to prohibit such conduct or offer directions on the best approach (e.g. LCIA Rules (2014), Annex, para. 3; IBA Guidelines on Party Representation in International Arbitration (2013), Guidelines 9–11).

42 See also the Chartered Institute of Arbitrators Code of Conduct.

43 In England, this historic rationale for allocating costs was set out in *Harold* v. *Smith* (1860) 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, Art. 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 (2d Civil Chamber, 23 June 1982, appeal no. 7917094).

a) Third-party-funded costs

87. Where a successful claimant or counterclaimant has been funded by a third party, the third-party funder[44] is usually repaid (at least) the costs of the arbitration from the sum awarded. Therefore, the successful party will itself ultimately be out of pocket upon reimbursing such costs to the third-party funder and may therefore be entitled to recover its reasonable costs, including what it needs to pay to the third-party funder, from the unsuccessful party. The tribunal will need to determine whether these costs were actually 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.

88. It should be borne in mind that the third-party funder is not a party to the arbitration and in most cases its existence is not even known. Where a funded party is unsuccessful, its own impecuniosity may render it incapable of complying with 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, as it is not a party to the proceedings.

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

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

91. When considering an application for interim or conservatory measures as a means of protecting the non-funded party's ability to recover costs, a tribunal might also consider making the applicant liable for any costs and damages caused by the measures ordered if the funded party were ultimately to prevail. This would be in line with Article 17G of the UNCITRAL Model Law on International Commercial Arbitration.

b) Success fees and uplifts

92. 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 only needs to satisfy itself that a cost was incurred specifically to pursue 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.

93. The requirement that the cost be reasonable serves as an important check and balance in protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders. Tribunals have from time to time dealt with this when assessing the reasonableness of costs in general, sometimes including the success fee in the allocation of costs and sometimes not, depending on their view of the case as a whole.

VII. Unsuccessful settlement negotiations: associated costs and unaccepted offers

94. As a general matter, successful settlement negotiations can result in significant savings of time and cost, and remove the uncertainty of the ultimate outcome. 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.

95. Settlement negotiations usually take place outside the purview of the arbitrators, as they are conducted privately between the parties, who generally agree that they should be confidential and not be disclosed to the arbitral tribunal (or court). To that end, settlement discussions and offers in writing will often be clearly marked as

44 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.

'without prejudice'[45] or 'for settlement discussions only and not to be presented to a court or tribunal'.[46]

96. 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 affect the way in which the costs of the proceedings are allocated. Specifically, if the unaccepted offer is the same as or higher than the judgment sum, some national courts will not permit recovery by the party that rejected the offer of any costs incurred after the date of the offer.[47] In some legal systems, a settlement offer is confidential between counsel, and therefore if not accepted cannot be referred to elsewhere.[48] In all cases, parties should take care not to bring settlement offers to the attention of the arbitrators prior to final determination on the merits, so as to avoid prejudice (usually against the offering party).[49]

97. 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 disadvantaging 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 the allocation of costs, the sealed offer would be revealed 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.

45 This is the legal expression used in England to keep offers outside courts and tribunals.

46 This is the language more frequently used in the USA.

47 E.g. in England, Civil Procedure Rules (CPR), Part 36.

48 In France, there are no specific provisions on settlement offers and cost implications, but legal professional privilege applies to correspondence between two lawyers according to Art. 66-5 of amended Law No. 71-1130 of 31 Dec. 1971 and an unaccepted offer between counsel cannot therefore be referred to in court. In England, an unaccepted settlement offer will usually be subject to without prejudice protection and therefore be 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 CPR Part 36 procedure).

49 In fact, some national arbitral statutes expressly forbid this.

98. The existence of settlement negotiations potentially gives rise to two main cost allocation considerations.

99. First, when allocating costs arbitrators may take into account those costs arising out of or associated with efforts by the parties to seek to settle their disputes, including mediation proceedings. In a number of ICC awards, costs were ordered to be paid for a party's work and loss of time on unsuccessful negotiations with a view to settlement. In one case, the tribunal expressly noted the relevance of such negotiations to the party's claim, and the costs incurred in unsuccessful settlement negotiations were considered part of its preparation of the litigation.

100. Second, in certain circumstances, the tribunal may take into account the existence of unsuccessful negotiations and/or unaccepted offers between the parties when allocating costs. There is no general provision in international arbitration for the use of settlement offers to reduce costs, but, if appropriate, it could be considered at the first case management meeting.

VIII. Concluding observations

101. Given that party autonomy and flexibility are inherent to arbitration, it is no surprise that arbitral awards reveal a variety of approaches to costs. This also reflects the diversity of approaches found in national legal systems.

102. The Task Force has endeavoured to demonstrate the many facets of decision-making on costs. The Report and the material assembled in its comprehensive appendices aim to give users of international arbitration a better understanding of the issues that are and need to be considered when deciding on costs and how they are to be allocated. These concern not only the nature and amount of the costs, but also the relevant instruments, presumptions, standards and expectations that have a bearing on their assessment and allocation.

103. Further, pursuing the work already undertaken by the Commission on case management, the Task Force has highlighted the relevance of cost decision-making to case management, and particularly the use of cost allocation as a means of incentivizing efficient and cost-effective procedural conduct and sanctioning inefficient and improper conduct.

APPENDIX A
Analysis of Allocation of Costs in Arbitral Awards

I. Review of ICC awards dealing with the allocation of costs[1]

As the Task Force was mandated to review and report on 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, its starting point was to look closely at ICC Rules[2] and practice. In addition to Articles 22 and 37, Appendix IV of the 2012 ICC Rules provides examples of case management techniques that can be used by the arbitral tribunal and the parties to control time and cost, including by ensuring that time and costs are proportionate to what is at stake in the dispute. The Secretariat to the Commission carried out an extensive study of costs decisions in ICC awards from 2008 to December 2014. For the purpose of that study, 'arbitration costs' were understood to cover the fees and expenses of the arbitrators, the administrative fees of the ICC, and the fees and expenses of any experts appointed by the arbitral tribunal, while 'legal costs' were understood as the reasonable legal and other costs incurred by the parties for the arbitration.

The study was conducted in four parts:

- Review of awards rendered under the 2012 ICC Rules in 2013 and 2014.
  From some 300 awards in English issued during this period, 88 final awards were selected as offering detailed and interesting reasoning on the allocation of costs. Special attention was paid to whether the arbitral tribunals took account of the parties' procedural behaviour and whether the parties conducted the arbitration in an expeditious and cost-effective manner as required under the 2012 ICC Rules. Awards in languages of civil law jurisdictions, such as French, German and Spanish, were also analysed. Ten partial awards issued under the 2012 ICC Rules, which specifically dealt with costs, were also analysed.

- Review of awards rendered under the 1998 ICC Rules in 2012 and 2013.
  172 awards from 2012 and 142 awards from 2013 were examined and the most important and interesting decisions in terms of allocation of costs were selected.

- Review of awards rendered under the 1998 ICC Rules in 2008, 2009 and 2011.
  An earlier study selected 35 awards from 2008, 2009 and 2011 which contained interesting decisions on costs.

- A selection of seven awards rendered in cases brought pursuant to bilateral investment treaties were also examined. Two of these awards were rendered under the 2012 ICC Rules.

Part I of this Appendix A contains a summary report on the results of that study with examples of the factors commonly mentioned by tribunals when apportioning costs.

First and foremost, it became clear that tribunals used their discretionary powers to award costs in diverse ways and with a variety of results. ICC tribunals generally began by mentioning the discretion they are allowed under the ICC Rules. This discretion was particularly emphasized by ICC tribunals acting under the ICC 2012 Rules, whose awards often referred directly to Article 37(5). Almost all of the decisions on costs in awards rendered under the 2012 ICC Rules took into account whether the parties had conducted the arbitration in an expeditious and cost-effective manner.

Many arbitral tribunals considered whether the parties had entered into a contractual agreement over the allocation of costs. Where there was no such agreement, they then tended to take one of two approaches: (i) allocate all or part of the costs to the successful party, or (ii) apportion costs equally between the parties. A third approach was to apportion costs between the parties on a bespoke basis, taking account of the specific circumstances of the case, rather than starting from the principle of the loser pays or equal apportionment.

With respect to the two predominant approaches it should be noted that:

- When ordering cost shifting tribunals considered, among other things, whether or not it had been possible for the parties to avoid the arbitration; the prevailing principles on cost allocation under the applicable law; whether there was an agreement between the parties on costs; what costs had been

1 This review was researched and drafted by Dr Hélène van Lith, Secretary to the ICC Commission on Arbitration and ADR.

2 See Appendix C for the relevant provisions on costs in the 2012 and 1998 ICC Rules.

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 apportioning costs on the basis of the parties' relative success, they measured success in various ways (e.g. claims won, quantum of claims/damages awarded). Some tribunals calculated precisely the percentage of success on the basis of 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.

- When apportioning costs tribunals considered, among other things, whether the parties contributed equally to any unnecessary lengthening and complication of the arbitration and associated increased cost and/or whether their pursuit of the arbitration was in good faith due to a genuine disagreement between them.

In the 1998 awards, the vast majority of tribunals followed the approach of allocating all or part of the costs to the successful party (costs follow the event). Some tribunals described this approach as common practice among arbitrators, while others referred to leading textbooks in which this approach was said to be the leading principle. However, many took into account other factors and adjusted the allocation of costs accordingly, sometimes expressly stating that awarding costs to the prevailing party is not the only guiding principle or approach. These tribunals indicated that they would allocate costs on the basis of a combination of factors and criteria. For example, one tribunal said 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 emerged even more clearly in the awards rendered under the 2012 Rules. Here, however, the 'costs follow the event' rule is considered less as a starting point and more as one of the principal factors to be considered when allocating costs, along with the parties' conduct that occasioned the arbitration and whether the parties conducted the arbitration in an expeditious and cost-effective manner.

When costs are awarded to the party considered to have prevailed, on the basis of an overall assessment of the relative success of the parties' claims, defences and counterclaims as measured against the relief sought, tribunals adopted different approaches, especially when measuring success. In some awards, if a party succeeded in all its claims (or sometimes most of its claims), the other party was ordered to pay all of the successful party's reasonable costs. For example, in one case, the tribunal held as follows:

> 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 were awarded more in proportion to the degree of success of the prevailing party.

Another approach is to apportion costs in proportion to the relative success and failure of each party. The difficulty here lies in measuring success when there is no clear-cut winner or loser. In one case, the claimant won on liability but could not prove most of the damages it claimed, which meant that the respondent won in terms of the monetary outcome and on that basis costs were awarded almost entirely against the claimant. Another tribunal observed that as neither party was the outright winner or loser, costs must be apportioned 'in the ratio of their winning or losing when the award is not quantified' and that 'there are no clear-cut rules to determine the ratio when the claim is not quantified'.

In some cases, tribunals have decided that the losing party should not pay some of its costs even where the result was unequivocally against it. For example, in one case the claimant was successful in about 75% of its claims but was ordered to bear 25% of its costs. Another particularly good example is a case in which the tribunal, while noting the overwhelming success of the claimant, decided to reduce the amount of costs payable to it, albeit in 'very modest proportions', as it 'did not prevail entirely'. The tribunal decided that the respondent should bear 98% of the claimant's costs.

Widely varying approaches have been adopted by tribunals when apportioning costs according to the parties' relative success or failure. Some tribunals roughly determined the parties' relative degrees of success by taking into account who won on the merits or liability and who won on the quantum, while others took a more calculated approach and determined the percentage of success of each claim and counterclaim, and set

these off against each other to reach an overall success ratio. In some cases this success quotient was used to calculate both the arbitration costs and the legal costs, while in others the tribunal distinguished between arbitration costs and parties' legal costs and applied the success quotient only to the arbitration costs and awarded the parties' legal costs in a different manner. For example, in one case where the claimant succeeded but did not win the entire amount it had claimed, the respondent bore all the arbitration costs and its own legal costs but only a portion of the claimant's legal/party costs.

It is not uncommon for tribunals to start from the principle that costs are to be awarded to the successful party, but then go on to order a 50/50 split on the basis of the relative success of each side or where neither side was successful.

The principle that each party should pay its own costs was applied far less frequently by tribunals. The starting point here is that each party bears its own legal costs and the arbitration costs are split equally between the parties, even where one party (clearly) succeeds on the merits. This must be distinguished from the situation where the tribunal starts from the position 'costs follow the event' and ends up apportioning the costs equally between the parties.

The factors most commonly taken into account by tribunals when apportioning costs include the following:

1. whether the parties could have avoided the arbitration;
2. prevailing cost allocation principles in the applicable law;
3. agreements between the parties with regard to costs;
4. costs incurred in determining preliminary issues such as jurisdiction;
5. procedural behaviour of the parties;
6. reasonableness of the costs incurred;
7. legal and factual complexity of the case;
8. the parties' legal fees and expenses (outside counsel);
9. disparities between the costs claimed by each party;
10. recoverability of different types of costs.

1. Whether the arbitration could have been avoided

The awards rendered under both the 2012 and the 1998 ICC Rules showed that arbitral tribunals often took into account party conduct that gave rise to the arbitration. Many tribunals considered that the arbitration could have been prevented if one party had acted differently in settlement discussions or correspondence prior to the arbitration. In such cases, even if the claimant lost on most or all of its claims, tribunals ordered that the costs of arbitration be divided evenly between the parties, or at least differently from the division of liability. A party's refusal to settle a dispute has been taken into account by arbitral tribunals, even where the settlement terms were more favourable than the eventual outcome in the arbitration. The tribunals' main concerns appeared to be whether arbitration was the proper forum and whether parties had brought the claims in good faith, including in situations where the contractual provisions were ambiguous. Similarly, arbitral tribunals considered whether claims or counterclaims that it rejected had nonetheless been rightfully raised or whether they were frivolous.

Examples of tribunal findings:

- '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.'
- 'No frivolous claims and parties acted in good faith.'
- Conversely, one tribunal merely stated what was 'fair and just' to award to the respondent, but noted that it had 'no jurisdiction to determine whether or not Respondent has caused the Claimant to incur expenses in relation to the prosecution of its principal claim'.
- The tribunal took into account the extent to which the costs were justified by the need to

commence arbitration: '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'.

- The tribunal considered the consequences, in terms of costs, of a claimant withdrawing its claim and found that in such circumstances the claimant should bear the entire arbitration costs, as well as its own and the respondent's legal costs.

- The tribunal considered whether arbitration was necessitated by a party's refusal to accept a settlement offer. The tribunal found that the claims were unmeritorious, that the offer should not have been rejected, and that the arbitration could thereby have been avoided.

- Although claimant lost the case, the costs were apportioned equally between the parties because they had been cooperative and acted fairly, and the arbitration had been necessitated by the failure of settlement negotiations.

2. Prevailing cost allocation principles in the applicable law

Some tribunals took into account cost allocation presumptions or principles in the law at the seat of the arbitration or the *lex arbitri.* They did so not because this law was applicable to the allocation of costs, but as a guiding principle in the allocation of costs.

Examples of tribunal findings:

- '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.'

- The tribunal referred 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.'

- '[Costs follow the event] 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.'

3. Agreements between the parties with regard to costs

Tribunals have also taken into account agreements on costs, although few examples of such agreements were found in the awards studied:

- The parties agreed in their submission on costs that the general principle of 'costs follow the event' should be applied. The tribunal insisted on the discretion it was allowed under the ICC Rules and held that costs should follow the event '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 clause to be mandatory and that its 'determination is essentially limited to whether any of [X]'s claimed costs is not reasonable.'

- Excerpt from 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 that this agreement prevailed over Article 31 of the 1998 ICC Rules.

- The parties had agreed on the apportionment of costs 'in equal shares'. The exact meaning of 'costs' in the agreement was disputed by the parties as it was unclear whether it meant only arbitration costs or included also the parties' legal costs. The tribunal applied the agreement to legal fees only. With regard to the agreement on the arbitration costs it

found that it could exercise its discretion and held that they should be borne entirely by the claimant.

4. Costs incurred in determining preliminary issues such as jurisdiction

Tribunals have considered whether, and at what stage of the proceedings, costs on preliminary issues such as objections to jurisdiction are recoverable. The party in whose favour preliminary issues are decided may be different from the party that wins on the merits.

Examples of tribunal findings:

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

5. Procedural behaviour of the parties

The parties' procedural behaviour was systematically taken into account by the majority of tribunals. Unacceptable behaviour by the parties was often taken into account, not only in itself, but also to justify departing from the principle of awarding costs to the successful party. Almost all of the awards rendered under the 2012 ICC Rules that were studied took into account whether the parties had conducted the arbitration in an expeditious and cost-effective manner. When sanctioning misconduct through a reduction in the amount of costs awarded, some tribunals understood conduct as including whether the parties acted in good faith.

Examples of conduct that gave rise to cost-shifting include: (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) abandoning of claims very late in the proceedings; (vii) failure to abide by major time limits; (viii) disregard of standard procedural rules; (iv) lack of professional courtesy; (v) failure to provide timesheets to substantiate claims for legal fee; (vi) withholding of evidence needed by another party; (vii) obscuring of the factual and legal situation; (viii) persistence in arguing on issues already determined by procedural orders; (ix) bad or ill-timed submissions; and (x) unreasonable conduct that fell short of bad faith.

Examples of tribunal findings:

- The respondent chose to challenge threshold issues (such as applicable law), thereby expanding the litigation, and although it made concessions at the beginning of the proceedings by not disputing the claim, it then went on to raise arguments disputing the claim very late in the proceedings.
- Conduct of the parties considered reasonable except for the fact that the respondent raised a time-bar defence in its rejoinder whereas it could have done so earlier (e.g. in its answer to the request for arbitration or in its full statement of defence). This caused delay and additional costs. The respondent was ordered to reimburse the claimant for the additional costs it had incurred.
- The respondents' unresponsive and uncooperative behaviour resulted in unnecessary delays in the proceedings (e.g. it repeatedly missed deadlines and asked for last minute extensions) which accounted for a significant part of the costs.
- The parties argued their case in a protracted and costly manner, which led to a waste of time and money. They also acted unreasonably during document production. For example, the respondent's 110-page post-hearing brief far exceeded the claimant's comparatively short 17-page brief by far; the respondent filed unsolicited submissions, notably with regard to document production; the respondent's legal fees were considerably higher than those of the claimant. As a consequence of this bad behaviour, the tribunal deducted 15% from the legal fees claimed.

- Causing costs by engaging in several court proceedings relating to the arbitration considered as misbehaviour.

- The claimant filed very large claims, two of which were clearly exaggerated, unsubstantiated and then more or less abandoned. The tribunal took this into account and reduced the costs awarded to it proportionately.

- The claimant's case was based on a hypothetical relationship unsupported by evidence. The tribunal regarded this as a reason to reduce the costs awarded to it.

- In one case, the tribunal found the legal expenses of outside counsel reasonable, regardless of whether, as alleged, outside counsel violated professional rules on avoiding conflicts of interests.

- In another case, the respondent argued that during the arbitration the claimant conducted itself in an improper and unprofessional manner, as well as contrary to Thai law insofar as the appointment of its counsel infringed the Alien Working Act. 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'.

As well as sanctioning bad behaviour, tribunals have commended good behaviour or the fact that parties displayed good faith by facilitating or simplifying proceedings and thereby contributing to procedural efficiency. Tribunals sometimes confirmed the professionalism of parties and their counsel when their conduct was considered acceptable. For example, tribunals have expressed appreciation for counsel who were professional and forthcoming, excelled in their advocacy and took care to keep them informed throughout the procedure. One tribunal confirmed that the arbitration was conducted in an expeditious and cost-effective manner when one party chose not to file certain briefs.

6. Reasonableness of the costs incurred

Various additional factors have been taken into account by tribunals when considering whether the amount of the costs claimed was reasonable. In any event, the ICC Rules require tribunals to consider the reasonableness of the costs sought, which they do either when deciding how to award costs and in what proportions, or when reducing costs that they consider to be unreasonable after deciding how they should be apportioned.

The majority of tribunals attached considerable importance to whether the fees were substantiated, differentiated, well documented and supported by evidence. If the legal fees were not substantiated, some tribunals assessed their reasonableness simply by comparing them with the other side's costs, while others were inclined to fix an amount they considered to be reasonable in the circumstances.

Examples of tribunal findings:

- The respondent failed to provide evidence that the amount alleged to have been incurred for attorney's fees had actually been invoiced. 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 had not provided it with a detailed description of the services rendered by their legal counsel and did not contest the time spent and the hourly rate charged by the other party's legal counsel. The tribunal awarded an amount it believed to be appropriate.

7. Legal and factual complexity of the case

When taking into account the legal and factual complexity of the case in deciding on costs, tribunals have considered, in particular, the following factors:

- The need to argue the case under a certain applicable law, the number of witnesses, the duration of the hearing, the difficulty of marshalling evidence, the amounts in dispute and the number of issues to be decided.

- High legal fees and expenses justified by the fact that the case required an understanding of various fields of expertise and the predictably large amount of work and expenditure by experts.

8. The parties' legal fees and expenses: outside counsel

The approaches and reasoning adopted in relation to legal fees varied. Some tribunals did not assess the amounts in any detail as they considered that each party was free to choose its counsel. Others closely scrutinized invoices and considered whether the number of hours declared, the hourly rates and the number of partners involved were reasonable in light of the duration and complexity of the case. Some tribunals took a much more general approach and determined the reasonableness of the legal fees as they saw fit in the circumstances.

Examples of tribunal findings on the criteria for assessing the reasonableness of parties' legal fees and expenses:

- Legal fees claimed have to be relevant and related to the presentation of the case.

- Legal fees considered reasonable in view of the duration and complexity of the case, factual and legal analysis, time spent and hourly rates, the legal reasoning and evidence required.

- Reasonableness of the fees assessed against the amount in dispute. For example:

  - Legal fees reduced by half because the damages awarded were significantly less than the damages sought.

  - The tribunal required claimant's legal costs to be reasonable, relevant, transparent, and proportionate to the debt concerned. Claimant sought costs of USD 65,000 for claim of USD 300,000. The tribunal held that the costs were relevant and transparent, but found that costs representing 10% of the amount in dispute would be reasonable and therefore allowed only USD 30,000 to be recovered.

- Reasonableness assessed in relation to the importance of the outcome of the proceedings, their potential impact on claimant's efforts to prosecute alleged breaches under related contracts and the claimant's overall liability in the project.

- The tribunal considered costs reasonable in light of what was at stake financially and the relatively straightforward nature of the case.

Other findings on reasonableness:

- '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 to the time spent on the case or hourly rates charged.'

- The tribunal found costs of USD 300,000 for a claim of USD 320,000 to be disproportionate 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. USD 225,000.'

- The tribunal found hourly rates consistent with those usually charged, not excessive, and the total amount appropriate given the amounts claimed and awarded.

9. Disparity between the costs claimed by each party

Tribunals have addressed large differences between the parties' costs submissions and dissimilarities in the amounts spent by the parties, for example when the claimant's costs are substantially lower than those of the respondent or vice versa. Tribunals often concluded that although one party's costs were significantly higher than those of the other party, they still remained reasonable. In other words, imbalance does not automatically signify unreasonableness. In some cases tribunals fixed the reasonableness of the legal costs by calculating the average of the fees claimed by both parties.

Examples of tribunal findings:

- Although the parties' costs were at opposite ends of the scale, the tribunal did not consider the claimant's expenses to be excessive in the circumstances.

- The tribunal noted that there was a great disparity between the amounts claimed by each side for legal costs. It held that both amounts were reasonable, that the disparity reflected the parties' differing strategies, and that there was no reason why one should be penalized for the more costly strategy of the other.

- A strong indication that the claimant's costs were reasonable was the fact that the respondent's costs were higher.

- In a case where the claimant's expenses were three times lower than those of the respondent, 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 enquired why a party hired more expensive US lawyers when the seat of the arbitration was in Switzerland and there were no American parties involved: 'It is questionable what a US trial law firm could reasonably 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 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 deducted the legal fees of the US law firm from the reimbursement of costs claimed by the respondent.

- In one case the costs of one party were 50% higher than those of the other. The tribunal looked carefully 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 costs of contract consultants, should be reimbursed.

- The tribunal found there had been duplication of work and allowed only 65% of the costs claimed. It applied this percentage to the average amount of the parties' respective legal costs.

10. Recoverability of different types of costs

Success fees

Only a few awards considered success fees.

Examples of tribunal findings:

- In one case the legal fees of claimant depended on a service agreement under which its counsel would be paid 20% of the refunded costs and be recompensed if the respondent was ordered to make payments to the claimant in 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.

Witnesses/experts

Some tribunals found costs relating to expert witnesses to be reasonable when necessary to the defence of a party's case and when the witness or expert is well-established and recognized for his or her expertise in the field. Other tribunals decided not to give any weight to expert witness evidence and for this reason dismissed the claim for reimbursement of costs related thereto.

In-house counsel, management and employees' costs

There were differing views on whether or not the costs of in-house counsel, management and employees were reimbursable. With respect to management costs, some tribunals held that these should not be awarded as 'other' costs as managing conflicts is part of management's role and especially if outside counsel were hired to deal with other aspects of the conflict. Other tribunals took the opposite view and stated that time spent on an arbitration is time not spent on managing the company and should therefore be included in the costs 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 seem to be important to tribunals. On several occasions they have found that parties failed sufficiently to substantiate and prove that the costs claimed had actually been incurred and therefore refused to order reimbursement.

Examples of tribunal findings:

- The tribunal found that the costs for the claimant's representatives were 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 staff, but the costs of any such time are not part of legal costs of the proceedings.'

- The tribunal did not accept that 'the USD 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 allows 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 were related to the arbitration proceedings, they shall be accepted by the Arbitral Tribunal, otherwise they have been rejected.'

- The tribunal required a party to sufficiently substantiate and prove its 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 be reasonable. Furthermore, the party needed to identify whether the actual expenses were incurred or whether they rather reflect or include a profit which was anticipated to be achieved 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 give to the arbitration.

- The tribunal considered reimbursement of in-house counsel costs: 'It is controversial especially when the 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 rationale and rejected the in-house costs.

- The tribunal held that the respondent's defence contained a detailed description of technical aspects and that decisive work was done by the 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 (i.e. received their salaries) anyway, irrespective of the existence of the arbitration, failed. The tribunal held that the respondent could have put the employees to work on other projects had they not been required to work on the arbitration.

- The 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'.

- The tribunal pointed to the difficulty of substantiating in-house costs. The claimant had not presented any information or evidence of time spent by in-house staff or enabling in-house costs to be quantified.

II. Allocation of costs under other arbitration rules

In order to obtain a broader view of the practice of arbitrators in allocating costs in international arbitration, the Task Force invited several other arbitral institutions to submit reports on how costs were allocated in recent awards rendered under their rules. The China International Economic and Trade Arbitration Commission (CIETAC), German Institution of Arbitration (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS), Hong Kong International Arbitration Centre (HKIAC), International Centre for Dispute Resolution (ICDR), London Court of International Arbitration (LCIA), Permanent Court of Arbitration (PCA), Stockholm Chamber of Commerce (SCC) and Singapore International Arbitration Centre (SIAC) all kindly submitted reports on the allocation of costs under their respective systems. Their reports and conclusions are included in Part II of this Appendix A,

China International Economic and Trade Arbitration Commission (CIETAC)

The report provided by CIETAC did not contain any statistical data or samples. Its comments and conclusions have been directly included in the body of this Report.

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

The DIS provided an analysis containing examples of cases administered under the 1998 DIS Arbitration Rules (the 'DIS Rules') in which arbitrators gave special consideration to specific situations concerning the allocation of costs.

1. General remarks

Section 35.1 of the DIS 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 section 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.

2. Case analysis

a) Parties' contribution to dispute resolution in the pre-arbitration phase

Case 1: Despite the dismissal of the claim, the respondent had to bear 30% of the costs. The tribunal justified the departure from the 'costs follow the event' principle by referring to the respondent's behaviour in the pre-arbitration phase. Due to the respondent's unwillingness to provide information to the claimant in the pre-arbitration phase, the claimant saw itself justifiably provoked into initiating arbitral proceedings. Had the respondent provided the information upfront, the dispute could probably have been settled amicably.

Case 2: After concluding a partial settlement, the claimant withdrew its claim. Nevertheless, the tribunal decided to split the costs equally because in the pre-arbitration phase the respondent had strictly refused even partly to recognize the claim, which turned out to be legitimate.

Case 3: In this case, which overall was decided in favour of the 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 resolution in favour of the respondents. The arbitrators noted, in light of the ambiguous wording of resolution, that the respondents, in their capacity as shareholders, were partly responsible for the resolution's unclear meaning. They therefore had to bear their own costs of legal representation.

b) Claimant's duty to submit the facts conclusively

Arbitral tribunals acting under DIS Rules also take into consideration the 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 the claimant had submitted extensive exhibits without properly explaining their meaning. Consequently, the tribunal allocated an additional share of costs (15%) to the claimant because its behaviour had contributed to an unnecessary increase in the respondent's costs of legal representation, which were twice as high as the costs incurred by the claimant.

Case 6: A similar rationale was applied in a case that overall was decided in favour of the claimant, which nevertheless had to bear 5% of the costs. The tribunal explained that this was because the claimant's allegations at the initial stage of the proceedings were considered to be 'to some extent ambiguous'.

c) Respondent's duty to contribute to the continuation of the proceedings

Case 7: In this regard, arbitrators have taken into account the respondent's unwillingness to pay the advance on costs, thereby forcing the claimant to pay the respondent's share of the advance.

Case 8: Even though the 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 turned out to be unfounded. The claimant therefore had to bear 25% of the overall costs.

Case 9: In this case the tribunal took into account the fact that the respondent's jurisdictional, res judicata and time-bar objections were all denied. However, it noted that the respondent's waiver of older claims helped to speed up the proceedings, even though the waiver could have been declared at the outset of the proceedings.

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

d) Non-participation in the administration of the proceedings

Case 11: In the context of ensuring time- and cost-efficient conduct of the proceedings, the fact that a party refused to participate for a relatively long 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 applying the 'costs follow the event' rule, the tribunal decided that the respondent had to bear 90% of the overall costs because it was considered to have increased the workload of the participants in the arbitration by, among other things, being entirely responsible for the postponement of the oral hearing.

e) Multiparty considerations

Case 13: In this case the claimant succeeded in its claim against the first respondent almost entirely (80%), but its claim against the second respondent was declared inadmissible. In light of these findings the tribunal's allocation of costs reflected the success rate of the first claim (80% to be borne by the first respondent). In addition to bearing 20% of the administrative and arbitrators' fees and costs, the claimant had to bear the legal fees of the second respondent.

f) Cooperation between the parties

Case 14: In light of a settlement agreement relating to one aspect of the dispute, the sole arbitrator considered that splitting the costs equally would help restore legal peace between the parties. He also took into account the fact 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.

3. Conclusion

The review of costs decisions in arbitral practice under the DIS Rules shows that tribunals follow the 'costs follow the event' principle in most cases, yet are also willing to take into account the parties' behaviour in and before the arbitration. Due to the fact that the DIS Rules, German arbitration law and German civil procedure make explicit reference to the 'costs follow the event' principle, arbitrators seem to set the threshold for departing from that 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 of such considerations tend to have a relatively small financial impact. Therefore, the 'costs follow the event' principle clearly reflects general arbitral practice and arbitrators acting under the DIS Rules depart from it only reluctantly.

Hong Kong International Arbitration Centre (HKIAC)

The HKIAC reviewed decisions administered by it under the 2013 and 2008 versions of the HKIAC Administered Arbitration Rules between 2008 and 2014.

The 2013 and 2008 versions of the HKIAC Administered Arbitration Rules both contain provisions dealing specifically with the allocation of costs by the arbitral tribunal (see Appendix C hereinafter). 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. Article 33.3 allows 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 for 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 share all or part of the costs between the parties if reasonable in the circumstances of the case.

The report submitted by the HKIAC showed 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 combining '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). The HKIAC report shows that the 'costs follow the event' approach is the most commonly adopted by HKIAC tribunals. It was followed in just over 91% of the awards. 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 followed in only 2% of cases and the latter in 7%.

In most cases where the 'costs follow the event' approach was followed, the arbitral tribunal recognized that the principle of reasonableness was the benchmark in assessing costs. In determining reasonableness, tribunals took into account all the circumstances of the case, including but not limited to the complexity and nature of the dispute. Notwithstanding the general presumption in favour of 'costs follow the event' 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 under the Arbitration Ordinance. The agreement stated that 'each 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 part in which the parties agreed to pay their own costs was void under the Arbitration Ordinance but held that the terms 'otherwise directed by the arbitral tribunal' remained effective.

International Centre for Dispute Resolution (ICDR)

The ICDR reviewed the decisions on costs in 68 international arbitration awards rendered under the International Dispute Resolution Procedures effective as of 1 June 2009. The cases were filed between June 2009 and July 2012 and the awards rendered 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			

In the cases categorized as 'other', the administrative costs and compensation costs were mostly allocated on 50/50% basis with minimal or no reasoning provided, and the attorneys' fees and other costs were mostly denied or not addressed at all.

London Court of International Arbitration (LCIA)

The LCIA's report covered awards rendered under the 1998 LCIA Arbitration Rules (the 'LCIA Rules') in 2012 and 2013. The report distinguished between the costs of arbitration and the parties' legal costs.

The LCIA Rules set out that tribunals should follow the general principle of 'costs follow the event', although the tribunal retains discretion to vary this as it sees fit. The relevant parts of the 1998 LCIA Rules 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.

The LCIA examined 46 awards from 2012. In 37 of these awards the claimant prevailed in 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 eight awards from 2012. In six of these awards the claimant was ordered to pay all of the costs of arbitration (in the other two these costs were split unequally), and in all eight 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 five 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.

The LCIA examined 46 awards from 2013. In 35 of these awards, the claimant prevailed in 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 from 2013. In ten of these awards the claimant was ordered to pay all of the costs of arbitration, and also in ten 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 and in an additional case this was ordered pursuant to an agreement between the parties. The costs of arbitration were split equally in three cases and in proportion to success in six cases.

The current LCIA Rules, which came into force on 1 October 2014, contain additional provisions dealing with party conduct and costs, while retaining the presumptive starting point that 'costs follow the event' (see Appendix C).

Permanent Court of Arbitration (PCA)

1. Introduction

The information in this note,[3] submitted by the PCA, provides an overview of how tribunals in arbitrations administered by the PCA have exercised their discretion in the allocation of costs. It sets out:

- The types of cases administered by the PCA and the procedural rules used in those cases;
- Decisions on the allocation of costs of arbitration in interstate, mixed, and contractual disputes, and certain trends that emerge from these cases; and
- Some novel approaches to cost issues and interesting aspects of cost allocation that have arisen in recent cases.

It should be noted 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. The report identifies 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 the cases to be identified has been excluded. Pending confidential cases have also been excluded.

While most PCA cases are administered under the UNCITRAL Arbitration Rules (see below), several have been conducted pursuant to PCA Optional Rules, ad hoc procedures in the parties' arbitration agreement, or rules agreed specifically for the purposes of the dispute at hand. There may be some discrepancies in approaches depending on the content of the applicable procedural rules.

2. The PCA's case docket and applicable rules of procedure

a) Types of cases administered by the PCA

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 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the '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 2012 PCA Rules, 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 relating to natural resources and the environment and for disputes relating to outer space activities.

Of the 95 cases being administered by the PCA in March 2015, 6 were interstate cases under specially agreed Rules of Procedure, 38 investment treaty arbitrations under the 1976 UNCITRAL Rules, 14 investment treaty arbitrations under the 2010 UNCITRAL Rules, 17 contractual disputes under the 1976 UNCITRAL Rules, and 9 contractual disputes under the 2010 UNCITRAL Rules. The others included cases conducted under specialized PCA Rules, conciliation rules and ad hoc procedures agreed by the parties.

3 The note was prepared by PCA Senior Legal Counsel Judith Levine, Assistant Legal Counsel Nicola Peart, and intern Mariana Binder. It builds on information contained in B.W. Daly, E. Goriatcheva, H.A. Meighen, *A Guide to the PCA Arbitration Rules* (Oxford University Press, 2014) at 156–160, updating that information to include cases decided since the book was written.

b) Relevant provisions on allocation of costs

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:[4]

> 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 2012 PCA 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'.

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 2012 PCA 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.

3. Decisions on allocation of costs in PCA-administered cases

a) 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.

4 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 Organizations and States; PCA Optional Rules for Arbitration between International Organizations and Private Parties; and PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment.

Usually, the rules of procedure adopted specifically for each case include a presumption that the parties will pay the tribunal costs in equal shares.[5] 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.[6]

For example, in the *ARA Libertad Arbitration*, which was conducted pursuant to Annex VII ('Arbitration') of the United Nations Convention on the Law of the Sea ('UNCLOS'), 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.[7]

With respect to the parties' legal costs, Article 27 of the Rules of Procedure in the *ARA Libertad Arbitration* 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:[8]

> this 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 involving multiple states and an intergovernmental organization of which the states were all contributing members, the costs of the arbitration were handled by the intergovernmental organization with a further contribution from the PCA's Financial Assistance Fund at the request of those parties that qualified as member states for the purposes of the Fund.

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5 See e.g. *ARA Libertad Arbitration*, Argentina v. Ghana, PCA Case No. 2013-11 (UNCLOS), Rules of Procedure, Arts 26–7; *The MOX Plant Case*, Ireland v. United Kingdom, PCA Case No. 2002-01 (UNCLOS), Rules of Procedure, Art 16(1); *Guyana* v. *Suriname*, PCA Case No. 2004-4 (UNCLOS), Rules of Procedure, Arts 18–19; *Barbados* v. *Trinidad and Tobago*, PCA Case No. 2004-2 (UNCLOS), Rules of Procedure, Arts. 19–20; Eritrea-Ethiopia Boundary Commission, PCA Case No. 2001-1, Rules of Procedure (based on PCA State/State Rules), Art. 31(1)(a); *Iron Rhine Arbitration*, Belgium v. the Netherlands, PCA Case No. 2003-2, Rules of Procedure (based on PCA State/State Rules), Art. 26(1), (4); *The OSPAR Arbitration*, Ireland v. United Kingdom, PCA Case No. 2001-3, Rules of Procedure, Arts. 21–2; *The Railway Land Arbitration*, Malaysia v. Singapore, PCA Case No. 2012-01 (PCA State/State Rules), Award, 30 Oct. 2014, decision; *The Bay of Bengal Maritime Boundary Arbitration*, Bangladesh v. India, PCA Case No. 2010-16 (UNCLOS), Rules of Procedure Arts. 19, 20 and Procedural Order No. 1, 28 Aug. 2013 which provided for equal division of tribunal costs associated with a site visit; *The Atlanto-Scandian Herring Arbitration*, Denmark (in respect of the Faroe Islands) v. The European Union, PCA Case No. 2013-30 (UNCLOS), Rules of Procedure Arts. 26-27.

6 See e.g. *The Chagos Marine Protected Area Arbitration*, Mauritius v. United Kingdom, PCA Case No. 2011-3 (UNCLOS), Award, 18 Mar. 2015, para 546; *The Indus Waters Kishenganga Arbitration*, Pakistan v. India, PCA Case No. 2011-01. Final Award, 20 Dec. 2013, para. 124. See also *The Railway Land Arbitration*, Malaysia v. Singapore, PCA Case No. 2012-01 (PCA State/State Rules), Award, 30 Oct. 2014; *ARA Libertad Arbitration*, Argentina v. Ghana, PCA Case No. 2013-11 (UNCLOS), Termination Order, 11 Nov. 2013; *Eritrea-Ethiopia Boundary Commission*, PCA Case No. 2001-1, Decision on Delimitation of the Border between Eritrea and Ethiopia, 13 Apr. 2002 and Eritrea's Damages Claims, 17 Aug. 2009, p. 3, note 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 to bear their own costs for legal representation and equal shares of the costs of arbitration); *The OSPAR Arbitration*, Ireland v. United Kingdom, PCA Case No. 2001-3, Final Award, 2 July 2003.

7 *ARA Libertad Arbitration*, Argentina v. Ghana, PCA Case No. 2013-11 (UNCLOS), Rules of Procedure, Arts. 26–7 and Termination Order, 11 Nov. 2013.

8 *The Indus Waters Kishenganga Arbitration*, Pakistan v. India, PCA Case No. 2011-01, Final Award, 20 Dec. 2013, § 124.

b) Mixed arbitrations

In 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 the PCA Rules. In the PCA's experience, the allocation of costs has ultimately been made on the basis of (1) relative success of the parties, (2) the circumstances of the case, and/or (3) the reasonableness of the costs.[9]

i) Relative success of the parties

Some tribunals have noted the existence of a practice according to which the costs follow the event save in exceptional circumstances.[10] For example, the tribunal in *Achmea (formerly known as "Eureko B.V.")* v. *Slovak Republic* made the following observations in its final award:[11]

> 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.

As further support for this approach the tribunal observed 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 Law states that a factor affecting the exercise of discretion by the tribunal is 'the outcome of the proceedings' (the seat of the 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 the tribunal costs in equal portions, 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.[12]

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'.[13] For example, in a contract dispute, the tribunal in *Polis Fondi Immobliare di Banche Popolare SGRpA* v. *International Fund for Agricultural Development (IFAD)* observed as follows:[14]

> 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

9 For the purpose of this note, no analysis has been made on the basis of 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.

10 *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 Aug. 2011, § 375, reproduced in D.D. Caron & L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2d ed. (Oxford University Press, 2013) 882. A 'costs follow the event' approach has been applied in at least four other investor-state arbitrations, in which the PCA has not received the parties' consent to publish the awards. See also discussion of the *Yukos* awards below.

11 *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 Dec. 2012, § 348.

12 *Ibid.,* §§ 348–50.

13 See e.g. *Romak SA* v. *The Republic of Uzbekistan*, PCA Case No. 2007-6 (1976 UNCITRAL Rules) (Switzerland-Uzbekistan BIT), Award, 26 Nov. 2009, § 250. In an investor-state arbitration, in 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'.

14 *Polis Fondi Immobliare di Banche Popolare SGRpA* v. *International Fund for Agricultural Development (IFAD)*, PCA Case No. 2010-8 (1976 UNCITRAL Rules), Award, 17 Dec. 2010, §§ 223, 224 (citations omitted).

> 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 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, [which] has been to follow the practice under public international law that the parties shall bear their own costs of legal representation and assistance.'[15]

ii) The circumstances of the case

In addition to the relative success of the parties, when allocating either or both the costs of arbitration and the costs of legal representation, tribunals have considered other relevant factors such as the complexity and novelty of the issues in the arbitration,[16] access to justice concerns,[17] the parties' cooperation toward the progression of the proceedings,[18] any abusive behaviour by a party aimed at derailing or delaying the arbitration,[19] as

15 *Vito G. Gallo* v. *The Government of Canada*, PCA Case No. 2008-3 (NAFTA, 1976 UNICTRAL Rules), Award, 15 Sept. 2011, § 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 UNCITRAL Rules), Order for the Termination of the Proceedings and Award on Costs of 2 August 2010; *Chemtura Corporation (formerly Crompton Corporation)* v. *Government of Canada*, PCA Case No. 2008-01 (NAFTA, 1976 UNCITRAL Rules), Award, 2 Aug. 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, in which the PCA has not received the parties' consent to publish the awards.

16 See e.g. *Romak SA* v.*The Republic of Uzbekistan*, PCA Case No. 2007-6 (Switzerland-Uzbekistan BIT, 1976 UNCITRAL Rules), Award, 26 Nov. 2009, § 50, in which the tribunal explained why it considered 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 e.g. *Azinian* 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.'

See also *HICEE BV* v. *The Slovak Republic*, PCA Case No. 2009-11 (Netherlands–Slovakia BIT, 1976 UNCITRAL Rules), Partial Award, 23 May 2011 as reproduced in D.D. Caron & L.M Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2d ed. (Oxford University Press, 2013), §§ 56, 57.

17 See e.g. *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 Sept. 2003, §§ 125-129 (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).

18 See e.g. *HICEE BV* v. *The Slovak Republic*, PCA Case No 2009-11 (Netherlands–Slovakia BIT, 1976 UNCITRAL Rules), Partial Award, 23 May 2011 as reproduced in D.D. Caron & L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2d ed. (Oxford University Press, 2013), §§ 56, 57 ('the Parties were animated 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').

19 See e.g. *Romak SA (Switzerland)* v.*The Republic of Uzbekistan*, PCA Case No. 2007-6 (Switzerland-Uzbekistan BIT, 1976 UNCITRAL Rules) Award, 26 Nov. 2009, § 51. In a final award in an investor-state arbitration, the publication of which by the PCA has not been authorized by the parties, the tribunal allocated 100% of the costs (amounting to tens of thousands of euros) related to a challenge against 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.

well as the plausibility of the arguments and the professionalism of the unsuccessful party's lawyers.[20]

iii) The reasonableness of costs claimed by the parties

In cases in which a distinction has been made between the allocation of the costs of arbitration and the costs of legal representation, some tribunals have concerned themselves 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.[21]

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.

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.[22] The claims totalled more than USD 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 USD 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 USD 31.5 million. The respondent submitted 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'.[23]

With respect to the parties' own costs, the tribunal noted the divergence between the amounts presented by the claimants (which were claiming legal costs) and the respondent (which 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

20 See e.g. *Polis Fondi Immobiliari di Banche Popolare SGRpA* v. *International Fund for Agricultural Development*, PCA Case No. 2010-8 (1976 UNCITRAL Rules), Award, 17 Dec. 2010, §§ 225, 226. 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.'

21 This was an investor-state arbitration under the 1976 UNCITRAL Rules, in which the parties have not consented to PCA publication of the award. 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, in which the parties have not consented to PCA publication of the award.

22 *Hulley Enterprises Limited (Cyprus)* v.*The Russian Federation*, PCA Case No. AA-226 (Energy Charter Treaty, 1976 UNCITRAL Rules), Final Award, 18 July 2014, § 4 ('By any standard, and as will be seen, these have been mammoth arbitrations') and p. 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, § 4 and p. 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, § 4 and p. 564 et seq. (Section XIII, 'Costs').

23 *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, PCA Case No AA-226 (Energy Charter Treaty, 1976 UNCITRAL Rules), Final Award, 18 July 2014, § 1869.

awarded a significant portion of their costs of legal representation and assistance' and then turned to determine the portion that it considered reasonable, taking into account a number of relevant factors. These factors included:

- the amount in dispute (over USD 114 billion) and, in light of how high the stakes were, the vigour with which both sides had pressed their claims and defences;
- 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]');
- 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;
- the fact that the tribunal was not surprised that the claimants' costs in this case were higher than those of the respondent 'since they bore the burden of proof for their claims under the ECT and produced many fact witnesses in the Hearing on the Merits whereas Respondent produced no fact witness';
- the fact that some of the fees of the claimants' experts (amounting to many million dollars) were 'plainly excessive', especially those that at the end of the day were of 'limited assistance' to the tribunal's determinations;
- 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
- '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.

After scrutinizing the costs for legal representation and assistance of the claimants and taking into account all the factors mentioned above, the tribunal, in the exercise of its discretion, considered that the reimbursement of USD 60 million to the claimants would be fair and reasonable in the circumstances, noting that this figure represented approximately 75% of the total costs, thus mirroring the proportion by which damages were reduced.[24]

4. Some special issues relating to costs that have arisen in recent PCA cases

a) 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.[25] For example, in a PCA-administered arbitration brought under the 1976 UNCITRAL Rules, the tribunal found that while the claimant prevailed in its allegation of breach of an operating agreement by the respondent, 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.[26]

There may be no clear overall 'success' when 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 a party that withdraws its claim is, as a result of that unilateral withdrawal, to be

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24 *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*; *Yukos Universal Limited (Isle of Man)* v. *The Russian Federation*; *Veteran Petroleum Limited (Cyprus)* v. *The Russian Federation*, PCA Case No. AA 226; PCA Case No. AA 227; PCA Case No. AA 228 (Energy Charter Treaty, 1976 UNCITRAL Rules), Final Award, 18 July 2014. See especially *Hulley Enterprises Limited (Cyprus)* v. *The Russian Federation*, PCA Case No AA-226 (Energy Charter Treaty, 1976 UNCITRAL Rules), Final Award, 18 July 2014, pp. 574–576.

25 See e.g. *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, § 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 Aug. 2011, § 376, as reproduced by D.D. Caron & L.M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, 2d ed. (Oxford University Press, 2013) 882. This approach was adopted in at least one other investor-state arbitration under the UNCITRAL Rules, in which the PCA does not have the consent of the parties to publish the award.

26 Confidential case on file with the PCA.

considered as the 'unsuccessful' party for both costs of arbitration and costs of legal representation.[27]

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 an 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.[28]

b) 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 to later in the proceedings.[29] Other tribunals, however, have considered it appropriate to distinguish independent claims and stages within the proceedings.[30]

Allocation of costs on an interim basis is important in bifurcated multiparty proceedings, where only certain claimants and/or respondents proceed to the merits phase after a finding on jurisdiction. For example, in a multiparty 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 commencement of the arbitration and the date on which the respondent raised its jurisdictional objections. It 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 equally between the parties the costs of the arbitration in

27 The PCA does not have the parties' consent to publish the awards.

28 *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, § 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 the time this note was prepared, that decision on costs remained confidential.

29 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 Nov. 2009, § 600(e); *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 Oct. 2010, § 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 Republic*, PCA Case No. 2001-4, (Czech Republic-Netherlands BIT, 1976 UNCITRAL Rules), Partial Award, 17 Mar. 2006.

30 For example in an investor-state arbitration under a BIT and the 1976 UNCITRAL Rules, in 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.'

the jurisdictional phase. The tribunal left it for the claimants to decide between themselves how to allocate costs.[31]

In another bifurcated contract arbitration involving multiple parties, 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. It held that 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.[32]

c) Allocation of costs specifically provided for by special agreement

It is within the power of the parties to an arbitration to agree on the allocation of costs in their arbitration agreement or in an agreement by which they settle their dispute. In the *Abyei Arbitration* between the Government of Sudan and the Sudan People's Liberation Movement/Army, brought pursuant to a special agreement,[33] the parties set out in their arbitration agreement that the Government of Sudan would pay the costs of arbitration 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.'[34]

In cases that are settled parties most often agree to bear their own costs,[35] but an unequal allocation of costs may also form part of a settlement. In a termination order issued in a PCA-administered multiparty 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.[36]

The legal seat of PCA-administered arbitrations varies from case to case.[37] When allocating costs and considering party agreements on costs, 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 over the allocation of costs.[38]

d) 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 in the arbitration costs, which, according to Article 42(1) of the same Rules, are in principle borne by the unsuccessful party. Those provisions do not specify, however, whether they would include costs relating to interventions by non-parties.

In *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, on 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

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

32 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.

33 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.

34 Abyei Arbitration Agreement, Art. 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, § 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.

35 See e.g. *Saint Marys VCNA, LLC* v. *Government of Canada*, PCA Case No. 2012-19 (NAFTA, 1976 UNCITRAL Rules), Consent Award, 29 Mar. 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.

36 The termination order is confidential and on file at the PCA.

37 For a discussion of the *lex arbitri* in PCA-administered cases, see B.W. Daly et al., *supra* note 3, §§ 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').

38 See e.g. the English Arbitration Act 1996, s. 60 or the Mauritian Arbitration Act 2008, s. 33(2).

costs of that phase evenly 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.[39] Neither the European Commission nor the Dutch Government made any requests in relation to their own costs.

The question of who should bear 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 upon to apply the 2014 UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration.[40]

Stockholm Chamber of Commerce (SCC)

The SCC reviewed 87 decisions from cases administered by it under the 2007 and 2010 SCC Arbitration Rules between 2007 and 2012.

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

> 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. [Art. 43(5)]
>
> 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. [Art. 44]

The SCC divided its findings according to 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 cases.[41]

(i) In 29 out of 48 cases in which the claimant won all or almost all claims the losing party was ordered to pay all of the costs. In 4 cases the claimant was awarded 75-80% of its costs, generally in proportion to its success. In 10 cases each party was ordered to pay half the costs; in each of these cases the claimant's conduct was found to have contributed to the costs (e.g. pursuing claims that were later dropped, change of counsel resulting in extra costs, legal fees twice as high as those of the other party)

(ii) In 10 out of 14 awards in half successful cases each party was ordered to bear its own costs. In one award costs were divided on a percentage basis in proportion to each party's success. In two awards costs were awarded unequally due to the parties' conduct (disproportionately extensive argument on one small issue, respondent's later actions causing issues to become moot).

(iii) In 9 out of 14 cases in which the claimant obtained substantially less than half of the amount claimed 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 in proportion to the percentage of success. In one case the losing party paid all the arbitration costs but the winner paid part of the loser's legal costs because of the prevailing party's conduct in the proceedings.

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

Singapore International Arbitration Centre (SIAC)

SIAC reviewed all decisions administered by it under SIAC Rules in 2012. The relevant 2013 SIAC Rules on the allocation of costs are set out below. These are identical to the 2010 Rules except that in Rule 33.1 the words '(apart from the costs of the arbitration)' no longer follow the words '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.
>
> 33.1. 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.

39 *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 Dec. 2012, Final Award.

40 For example, Arts. 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'.

41 The fourth category includes cases settled by the parties, cases in which the claimant withdrew its claims, and cases in which all claims from both parties were rejected, leaving no clear winner or loser.

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

Reasons cited for deviation included the conduct of the party (e.g. unhelpful arguments and witnesses, late disclosure of documents, late admission of liability) and the arbitrators' interpretation of party agreements on the apportionment of costs in the arbitration. In some cases a portion of the legal costs claimed was deducted 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 a party's travel requirements when assessing the reasonableness of its claim for costs. Other factors taken into consideration to assess the reasonableness of costs claims were the amount claimed, the volume of pleadings, the complexity and novelty of the case, the number and importance of the documents perused, the reasonableness of the positions taken during the arbitration, the parties' procedural behaviour, and the rates of remuneration of the lawyers involved.

APPENDIX B
Summary of National Reports

Introduction

The assistance of the members of the Task Force and ICC National Committees was enlisted to report on how the issues listed below are addressed in the legal systems and arbitration practice in their respective countries:

1. Where lawyers have worked under some form of conditional fee, contingency or upgrade arrangement, can legal fees and costs be recovered, do the same rules apply in arbitration as in litigation, and are such arrangements contrary to professional codes of ethics?

2. What information is relevant to the recovery of costs funded by a third party, and how is the role of third-party funders regarded?

3. What, if any, legal provisions and precedents are there allowing contracting parties to agree funding arrangements in advance of a dispute or in their arbitration agreement (e.g. to protect the weaker from the stronger party), and how are costs divided (e.g. each party to pay its own costs in any event, or costs to be paid by the unsuccessful party)?

4. Is cost-capping by tribunals authorized, what form does the rule take, and how is it implemented or applied?

5. How have arbitrators explained their decisions on the allocation of costs in cases where there was a disparity between expensive and less expensive lawyers, or between major international law firms and law firms from developing countries or smaller and less expensive firms?

Answers ('national reports') were received from Algeria, Argentina, Austria, Bahrain, Belgium, Brazil, Canada, Egypt, Finland, France, Germany, Ghana, Guatemala, Lebanon, Iraq, Ireland, Italy, Jordan, Kuwait, Lebanon, Mexico, Morocco, the Netherlands, New Zealand, Nigeria, Oman, Poland, Qatar, Russia, Saudi Arabia, Senegal, Singapore, Spain, Sweden, Switzerland, Thailand, Tunisia, Ukraine, the United Arab Emirates, the United Kingdom and the United States.

Before presenting a summary of those national reports, the Task Force notes that, in a global review of costs in national court litigation conducted by the law firm Lovells (now Hogan Lovells) in February 2010, it was reported that:[1]

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

The 41 national reports received by the Task Force revealed broad acceptance of some form of cost shifting in arbitration proceedings, as well as in national court systems. Likewise, the jurisdictions concerned appeared to be reasonably accepting of funding arrangements, including third-party funding and various fee structures or agreements, even when not specifically foreseen in local legislation. Yet, the reports show that there are some important differences between jurisdictions, as the following summary will show.

1. Right to recover under fee arrangements

Most national reports mentioned that, although not specifically covered in statutes or rules, such arrangements are likely to be permitted in their jurisdictions (Austria, Brazil, British Columbia, Egypt, France, Kuwait, Lebanon, Ontario, Poland, Mexico, Saudi Arabia, the United Arab Emirates and the United States). Such arrangements are specifically permitted in Finland (if there is a particular reason for the arrangement), Nigeria (provided they comply with rules of professional conduct), Spain, Sweden (if reasonable), the Netherlands (provided the lawyer's costs and a modest salary are covered and the fee is not entirely contingent on outcome), New Zealand (if based on a 'normal fee plus premium' rather than

1 Lovells, *At what cost? A Lovells multi jurisdictional guide to litigation costs* (2010) at 4, http://www.chrysostomides.com/assets/modules/chr/publications/16/docs/LitigationCostsReport.pdf.

a percentage), Argentina, Ghana (if an invoice signed by the lawyer is issued and the client has been given one month's notice), Senegal, Tunisia (provided the agreement in writing, the conditional fee does not exceed 2% of the result to be achieved, is not payable in kind and does not affect the lawyer's 'dignity and honour') and British Columbia (if in compliance with the statutory cap).

Contingency fees are specifically prohibited and considered null and void in Austria, Bahrain, Iraq, Ireland, Morocco, Oman and Qatar. In French domestic proceedings contingency fees are prohibited where they are based solely on the outcome of the case; they are not prohibited in international arbitration. In Mexico they are prohibited in one code of ethics but regarded as admissible by another, provided the lawyer does not draw greater benefit than the client. In Guatemala, although not prohibited, such arrangements are contrary to ethical rules applicable to lawyers.

In Germany contingency fee arrangements are contrary to national standards of professional conduct and are generally prohibited, although the German Federal Constitutional Court ruled in 2008 that outright prohibition was unconstitutional because it unduly restricts the professional freedom of lawyers. Thus, fee arrangements may be allowed on a case-by-case basis where it is reasonable to assume that the client, due to its economic situation or the level of financial risk involved, would otherwise be barred from pursuing its claims. Nonetheless, in both arbitration and litigation, contingency fee arrangements remain uncommon in Germany.

In Singapore contingency and uplift fees are prohibited in both litigation and arbitration for Singapore lawyers, but appear to be permitted for foreign lawyers and law firms so long as they do not engage in the practice of Singapore law. They are also prohibited under ethical rules. An arbitration seated in Singapore or governed by Singapore law is likely to amount to the practice of Singapore law as Singapore procedural law will apply. This trend may change in the future.

In some countries contingency fees are subject to different rules from success fees or other arrangements, with success fees being generally permitted but restrictions imposed on contingency fees (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 permitted.

Several countries reported that the rules applying to domestic litigation and arbitral proceedings differ, with those applying to domestic proceedings usually being more restrictive (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 the courts apply tariffs to costs, whereas arbitral proceedings are more flexible. In Spain the costs recovered in the courts may not exceed one third of the amount of the claims, whereas in arbitration the tribunal is likely to be less restrictive. In Guatemala, Lebanon[2] and Senegal the rules are the same for litigation and arbitration.

The national reports for Brazil and the United Kingdom enquired whether success fees and contingency fees can be considered as procedural costs when they have not actually been incurred at the time of the award.

In Russia it was reported that contingency fee arrangements are not prohibited by statute or under any professional rules. However, Russian courts have in the past refused to enforce such arrangements because they were often used to legitimize the reimbursement of illegal payments made by counsel to bribe the judiciary. In recent years, the courts have become more open to enforcing contingency fee arrangements where the fees corresponded to work actually done and were in line with market rates. Arbitral tribunals normally take a more liberal approach than state courts and allow contingency fees, provided they are reasonable.

Several national reports indicated that the reasonableness of such fee arrangements can be taken into account in the awarding of costs (Austria, British Columbia, Italy, Ontario, Quebec, Mexico, Russia, Spain, Switzerland and the United Kingdom).

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

It was reported that in Argentina and Poland contingency agreements are only binding on the client and its lawyers and will not be taken into consideration in the calculation of the costs of the arbitration.

2 Article 69 of the Lebanese Advocacy Law No. 8/70.

2. Third-party funders

Most countries were unable to cite 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), while case law in the Canadian provinces of Ontario and British Columbia was inconsistent and unrelated to arbitration.

A law prohibiting third-party funding in domestic cases was invalidated by the Swiss Supreme Court, as it violated economic liberty.

Many national laws do not refer at all to third-party funding. They include those of Austria, Brazil, Finland, France, the Netherlands, Nigeria, Senegal, Spain, Ukraine 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 has no impact on the recoverability of costs. A third-party funder can be held liable for an adverse costs order, and is usually insured against such an order. There are no rules or guidance on the subject in arbitration, although such arrangements appear to be common. Arbitral tribunals have no jurisdiction to make an adverse costs order against a third-party funder, as it is not a party to the arbitration. It is suggested that any funding arrangement should be disclosed early in the arbitration, so that an application for interim security for costs can be made.

In Germany there is no obligation to disclose information on third-party funding in court proceedings. Such arrangements do not generally affect the recoverability of costs and usually remain undisclosed.

The national reports for Brazil, Finland, Nigeria and Sweden all suggested that the costs of third-party funding may not be recoverable, because the funder has no standing to make such a claim in the proceedings, and the party for which the funding was provided did not actually incur the costs and therefore would not be entitled to claim their recovery. Likewise, it was suggested that in Ontario and Ukraine third-party funding does not qualify as a legal service and may not be recoverable unless specifically mentioned in the arbitration agreement. In Singapore 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 funding provided by a (non-Lebanese) third party were reported from Lebanon. It was believed that there are no legal principles or specific regulations or laws preventing a party to a dispute related to Lebanon from contracting with a third-party funder, and that such a contract would therefore be enforceable under the general rules of Lebanese contract law. In particular, Lebanese law contains no potential impediment or obstacle, such as the prohibition of champerty and maintenance, which would bar a party (and a third party) from funding litigation or arbitration by such means. On the contrary, it would appear to be endorsed by Lebanese contract law on the assignment of disputed rights, which could be applicable to such funding.[3]

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

The national reports for Austria and Ghana suggested that a third-party funding arrangement would not alter the recoverability of costs, although the funder is unlikely to be held directly liable for the winning party's costs.

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

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

The national reports for Mexico, Switzerland and the United Kingdom all mentioned disclosure of the arrangement as a relevant consideration. It was also observed that in the United Kingdom third-party funding could give rise to a 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 uncommon, as access to courts is inexpensive and the awarding of costs strictly regulated, making such arrangements less attractive. However, they would not be invalid.

3 Articles 280 and 281 of the Lebanese Code of Contracts and Obligations.

Case law was reported from New Zealand indicating that the third-party funder should not have played an active role in strategic decision-making in relation to the dispute. There is no requirement to disclose third-party funding, and a tribunal would likely consider it a matter between the parties.

In Guatemala third-party funding is used neither for litigation nor arbitration.

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

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, Kuwait and Qatar third-party funding is not yet available in local markets.

3. Funding arrangements agreed in advance between the parties

Several jurisdictions were reported to have no specific rules on such agreements. They include Brazil, the Canadian province of Alberta, France, Germany, Guatemala, Lebanon, Nigeria, Poland, Russia, Switzerland and Ukraine.

The United Kingdom's 1996 Arbitration Act contains a mandatory provision forbidding agreements whereby a party undertakes to pay the costs in any event, unless they are made after a dispute arises.

Agreements on funding arrangements between the parties were reported to occur with some frequency in Austria, the Canadian province of Quebec, Mexico, Nigeria and Sweden, be it in the arbitration agreement, when a dispute arises, or (as in Austria) towards the end of the arbitration. Such agreements were reported in Singapore, too. In Finland and Ontario they are rare, but possible. 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.

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

In Iraq agreements between the parties on the allocation of costs are likely to be respected. Failing such an 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 agreements on funding arrangements would be valid, although 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 in domestic proceedings is that each party bears its own costs. Failing an agreement between the parties, arbitral tribunals typically order each party to bear the costs of its own legal counsel and the arbitrator it appointed, 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 an agreement between the parties, the principle in domestic litigation and domestic arbitration is that the unsuccessful party bears all legal costs. In ad hoc arbitrations conducted under Tunisia's Arbitration Code, arbitral tribunals generally 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 shows that courts have reduced the agreed legal fees where they were considered to be unreasonably high. This issue has not arisen before an arbitral tribunal. In the absence of an agreement between the parties, 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. Parties wishing to agree on the 'costs follow the event' rule would need to make this clear.

It was reported that courts in Poland are likely to treat agreements between the parties on funding arrangements as valid, but that a waiver of statutory regulations on the division of costs cannot be made in advance but only once the litigation has ended. Such agreements are likely to be upheld by arbitral tribunals.

Under Guatemalan legislation the loser generally has to indemnify the winner, but courts can make exemptions to recognize good faith. The Guatemalan Chamber of Industry's rules state that the award should determine who pays the costs.

It was suggested that in Finland such agreements would be considered binding on the parties, which therefore cannot deviate from it unilaterally by requesting costs contrary to their agreed arrangement. However, if both parties were to do so, it could be held that they had waived the agreement.

In Switzerland such an agreement between the parties is likely to be seen as trumping any institutional rules on the division of costs, which would otherwise apply in an arbitration. It is possible that a court faced with such an agreement could still use its discretion when awarding costs.

In French domestic proceedings costs are divided between court costs and other costs such as attorney's fees. Court costs are at the judge's discretion and any agreement relating to them would be null and void. An agreement on attorney's fees would be permissible, although subject to the court's discretion, and a party would be unlikely to recover its attorneys' fees in full. In arbitration, the recognition of either kind of agreement is unlikely to be problematic.

4. Cost-capping

The following countries were reported to have no statutory rules on a tribunal's power to cap costs: Algeria, Austria, Bahrain, Brazil, Canada (provinces of Alberta, British Columbia and Ontario), 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.

Cost-capping by tribunals was reported to be forbidden in Argentina and Guatemala.

The United Kingdom's 1996 Arbitration Act authorizes the tribunal to cap recoverable costs, although this power is rarely used in practice. In Ukraine, tribunals are given broad power to determine their own procedure, which would include the power to limit costs, but there is no evidence of any cost-capping orders having been issued. Tribunals in Ghana are reported to have discretion to cap costs, and when so doing have regard to a number of factors including the amount in dispute.

It was suggested that in the Canadian province of Ontario, although party spending cannot be capped, a cap could be imposed on the recoverable amount.

In Poland it was reported that under the Polish Chamber of Commerce rules a cap would be applied to contingency agreements.

The national reports from Bahrain, Egypt, Kuwait, Lebanon, Morocco, the Netherlands, Oman, Qatar, Saudi Arabia, Senegal, Switzerland and the United Arab Emirates suggested that a cap agreed by the parties is likely to be upheld. The rules of the Belgian arbitration centre, CEPANI, expressly invite arbitrators to remind parties of the possibility of agreeing to cap costs.

In several jurisdictions it was reported that tribunals are likely to consider the reasonableness of the costs incurred when making an award on costs (Alberta, Belgium, British Columbia, Egypt, Finland, Guatemala, Italy, Nigeria, Russia, Spain, Sweden and Tunisia). In Brazil it was noted that a tribunal, while having regard to the parties' arbitration agreement, has the power to take account of tactics undertaken in bad faith. Quebec's Code of Civil Procedure contains a provision on the proportionality of expenditure, which could potentially be relevant.

It was reported that German tribunals do not impose caps without the parties' authorization, although 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. Arbitrators have assessed the reasonableness of the time spent on the case by counsel on the basis of their own preparation time or even their own experience as legal practitioners. Case law is inconsistent on the question of what hourly rate may be deemed reasonable. When allocating costs, tribunals tend to consider the outcome of the case, without regard to the procedural behaviour of the parties, although some have apportioned costs on the basis of procedural behaviour or other factors rather than outcome.

It was suggested that in Mexico, Nigeria, the Netherlands and New Zealand a spending cap could be seen as affecting the right of a party to present its case. Prudence required that tribunals should not to impose a cap without the parties' authorization in Austria and Jordan, while in Finland and Switzerland tribunals were considered to have no power to impose a cap at all.

No cases were reported to have arisen on this issue in the Canadian provinces of Alberta, British Columbia, Ontario and Quebec, or in France, Qatar and Ukraine.

5. Reasoning in decisions on costs where there are cost disparities

Courts and tribunals in several countries (Austria, Germany, Lebanon, Russia, Singapore, Ukraine, the United Kingdom and the United States) were reported to have wide discretion in making orders on costs, which 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. In Germany arbitrators generally do not place particular emphasis on the types of law firms used by the parties. In Austria the parties' backgrounds may be taken into account (e.g. whether they are foreign parties requiring local as well as foreign counsel, whether they are multinational corporations or small businesses). In Russia both tribunals and courts may take account of the cost of comparable legal services in a particular region. Tribunals in Ghana are in practice guided by the scale of fees of the Ghanaian Bar, and the tendency is to award costs up to 15% of the amount claimed.

The Canadian provinces and Tunisia were reported to frequently apply the principle of proportionality when awarding costs, such that a mid-range sum of fees may be awarded if the party with higher costs wins. In Tunisia, an international tribunal faced with this issue found that the fees claimed by the party represented by an international law firm were in line with the rates to be expected, but reduced the amount recoverable 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 the allocation of costs.

It was reported that in Argentina, Iraq, Morocco, Sweden, the United Arab Emirates and the United States the nature of the law firm retained has no impact on the apportioning of costs. In Egypt, Saudi Arabia and Sweden consideration would be given to the reasonableness of the expenditure and the amount. In Jordan and the United Arab Emirates the successful party is typically awarded its legal costs regardless of the type of law firm used.

Reference was made to a commercial arbitration case in Spain, in which the losing party, which had retained a small law firm, was ordered to pay legal fees of the successful party, which had retained a large international law firm. The tribunal considered the costs as reasonable given the procedural complexity of the case, which had been exacerbated by the losing party persisting with claims that had little chance of success.

In the Netherlands, although arbitrators have the power to award the legal costs actually incurred, in practice legal costs are awarded on the basis of fixed tariffs, unrelated to the costs actually incurred.

It was reported that in Mexico parties are usually ordered to pay their own costs, and 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, and the awarding of actual costs will be subject to their being reasonable. In New Zealand, too, the winning party will be awarded reasonable costs, which often leads to an award of two-thirds of the amount claimed.

In Singapore the wide variety of nationalities found among the members of arbitral tribunals based there leads to a corresponding variety of decisions on costs.

No cases addressing this issue have been reported in Brazil, Finland, France, Guatemala, Italy, Oman, Qatar, Senegal and Ukraine.

The national report from France suggested that the disparity may not have to be addressed, as more expensive firms may create more work for the tribunal (through lengthy submissions, etc.) but their past experience may make them more efficient and enable them to accomplish their work in fewer hours, which would balance out the cost. Similar comments on the efficiency of large firms were raised in the national reports from Argentina and New Zealand.

Appendix C
Relevant Provisions of Arbitration Rules

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.

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.

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.

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.

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.

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:

(a) the fees of the arbitral tribunal to be determined in accordance with Articles 36.2 and 36.3;

(b) the travel and other expenses incurred by the arbitrators;

(c) the costs of expert advice and of other assistance required by the arbitral tribunal;

(d) the travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) 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;

(f) 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.

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 (in order 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.

LCIA Arbitration Rules (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.

ICDR Dispute Resolution Procedures (2014) International Arbitration Rules

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.

ICDR Dispute Resolution Procedures (2009) International Arbitration Rules

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.

ICSID Rules of Procedure for Arbitration Proceedings (2006) Arbitration Rules

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.

PCA 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.

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.

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.

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.

UNCITRAL Arbitration Rules (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.

4.
(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.

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

6. 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.

ICC COMMISSION ON ARBITRATION AND ADR

The ICC Commission on Arbitration and ADR is the ICC's rule-making and research body for dispute resolution services and constitutes a unique think tank on international dispute resolution. The Commission drafts and revises the various ICC rules for dispute resolution, including arbitration, mediation, dispute boards, and the proposal and appointment of experts and neutrals and administration of expert proceedings. It also produces reports and guidelines on legal, procedural and practical aspects of dispute resolution. In its research capacity, it proposes new policies aimed at ensuring efficient and cost-effective dispute resolution, and provides useful resources for the conduct of dispute resolution. The Commission's products are published regularly in print and online.

The Commission brings together experts in the field of international dispute resolution from all over the globe and from numerous jurisdictions. It currently has over 600 members from some ninety countries. The Commission holds two plenary sessions each year, at which proposed rules and other products are discussed, debated and voted upon. Between these sessions, the Commission's work is often carried out in smaller task forces.

The Commission aims to:

- Promote on a worldwide scale the settlement of international disputes by means of arbitration, mediation, expertise, dispute boards and other forms of dispute resolution.
- Provide guidance on a range of topics of current relevance to the world of international dispute resolution, with a view to improving dispute resolution services.
- Create a link among arbitrators, counsel and users to enable ICC dispute resolution to respond effectively to users' needs.

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