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**COSTS IN INTERNATIONAL ARBITRATION: ARE CHANGES
NEEDED?**

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Introduction

One challenge of cross-border dispute settlement is how to balance the competing approaches of the different legal systems and one way in which these differences often materialise is in treatment of costs. In what follows, this paper aims to appraise the current system of costs in international arbitration while considering whether, and what, changes are required.

It is important to first draw a distinction between ‘cost of arbitration’ which relates to the wider question of what parties spend in the course of prosecuting and defending international arbitration claims¹ and ‘cost in arbitration’ which answers the narrow question of the approach of arbitral tribunals in apportioning costs of the proceedings. It is the latter which this paper is principally concerned with. A distinction has also been drawn between ‘arbitration costs’ which include arbitrators’ fees and institutional administrative fees, and ‘party costs’ which refer to the expenses incurred by parties such as counsel fees, party-appointed experts, witnesses etc.² The ICC Report on Decision on Costs 2015 shows that party costs accounted for more than 80% of the costs of arbitration.³ Accordingly, this paper addresses the changes needed to actualise cost-efficient arbitration.

Allocation of Costs in International Arbitration

Most national arbitration statutes recognise parties’ autonomy to regulate, by their agreement, the issue of costs, subject to the mandatory provisions of the laws; and either expressly confer on the tribunal the power to decide on costs, or treat the question as inherent in the mandate of the arbitrators.⁴ In practice however, the inclusion of specific agreements on costs is an exception rather than the norm. Thus, the best source of the provisions on costs are the various arbitration rules.

The ICC Rules for instance define costs of arbitration to include the fees and expenses of the arbitrators and the ICC administrative expenses as well as the fees and expenses of tribunal-appointed experts and costs incurred by the parties.⁵

Approaches to Costs Allocation in International Arbitration

The overriding theme of the major institutional rules is to grant tribunals broad powers and discretion to apportion arbitration costs; having regard to the degree of a party’s success on its claims, the reasonableness of parties’ expenses and the entire circumstances of the case.⁶

The dominant approaches to the question of costs in international arbitration are the so-called “American Rule” which operates on the basis that parties should bear their respective costs, regardless of the outcome of the proceedings and the “costs follow the event” approach⁷, where costs are apportioned based on a party’s success on the merits.⁸ The latter approach is apparently the more prevalent.

It is an overarching principle that disputing parties are to conduct themselves in good faith, not only in raising a claim, but also during the proceedings on the claim. Thus, the conduct for which a tribunal can impose sanctions are not limited to instances of bad faith or other conduct⁹ in the proceedings, but also on other grounds for which tribunals may allocate costs in a way that constitutes "sanction" based on party conduct.

A party's blatant refusal to comply with the tribunal's order, wilful misstatement of facts, withholding evidence etc are examples of what may constitute bad faith or misconduct in the arbitral process and therefore constitute conducts which the tribunal may consider when awarding costs. 'Other' conducts that do not amount to bad faith, but which may nevertheless fall into the category of conducts which tribunals consider in allocating costs include dilatory conducts that impact the proceedings e.g. failure to comply with tribunal-set deadlines for responses to communications and comments on drafts; failure to produce documents when required; failure to sign terms of reference and revisiting matters already decided by the tribunal.

Additionally, overzealousness in the presentation of a party's case may also lead to costs award.¹⁰ Another interesting facet of parties conduct that may impact on costs award is inflated or exaggerated claims. Further, arbitration practitioners acknowledge that it is not only the conduct of parties, but also those of their legal representatives, that may impact on costs allocation.¹¹

However, the tribunal's wide discretion in costs allocation, the differing approaches and applicable guidelines, lead to opaqueness and a lack of uniformity in the applicable standards for costs determination. Consequently, the concerns of international arbitration users over the costs of arbitration persist.

Reform measures

Some guidelines have been proposed to address these concerns¹² including the use of expedited procedure for small claims, use of technology to ensure cost efficient proceedings, improving the mechanisms for early determination i.e. dismissal of frivolous claims, security for costs etc. The ICC Commission Report also suggested measures to increase the transparency and predictability of costs decisions by tribunals and facilitate the emergence of a 'best practice' in international arbitration for awarding costs.¹³

Concluding remarks/Recommendations

The comparative advantages of arbitration as a dispute settlement mechanism are well documented and account for the exponential growth of international arbitration. However, the legal and technical complexity of the proceedings have resulted in an astronomical increase in the costs of arbitration. We therefore posit that changes are required to retain the overwhelming trust of international arbitration users in the system and to maintain the predominant place of arbitration as the preferred cross-border dispute resolution method.

Firstly, tribunals should be more transparent in their determination of costs allocation to increase the predictability and acceptability of final costs in international arbitral proceedings. Secondly, tribunals should consider proactive discussions with the parties, at the earliest feasible time, to obtain agreement on the various costs related issues, eliminate uncertainty and improve predictability in tribunals' approach to cost issues.¹⁴ Thirdly, awarding costs against a party expressly based on its representative's conduct needs to be contrasted with sanctions personally directed at the representative.

National arbitration laws and institutional rules must continually make progressive provisions on costs, which tribunals are duty-bound to apply in a manner that aids rather than inhibit the growth of international arbitration. Finally, arbitration practitioners, especially counsel, must continue to see themselves as ministers in the arbitration temple and act, not just in the interest of their respective clients, but also to safeguard the practice of international arbitration and engender a system that is satisfactory to the users.

Originality – 40/40

Depth – 20/30

Presentation – 20/30

Total – 80%

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¹ 67% of respondents to the Queen Mary University of London 2018 International Arbitration Survey: The Evolution of International Arbitration identified the high cost of international arbitration as its worst feature.

² Micha Buhler, Costs in 'The Guide to Damages in International Arbitration - Costs' Global Arbitration Review, (3rd edn 2018).

³ The ICC Commission Report 'Decisions on Costs in International Arbitration' ICC Dispute Resolution Bulletin, 2015 Issue 2 para 2 available at < <https://iccwbo.org/publication/decisions-on-costs-in-international-arbitration-icc-arbitration-and-adr-commission-report/>> accessed on 10th June 2019.

⁴ Micha Buhler, Costs (supra).

⁵ Article 38(1) ICC Rules of Arbitration 2017. See also Article 40 of the 2010 UNCITRAL Rules.

⁶ Article 38(5) of the ICC Rules 2017 provides that in making decisions as to costs, the 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. See also Article 28(4) of the LCIA Rules; Article 42(1) of the UNCITRAL Rules and Article 46 of the CRCICA Rules 2011.

⁷ This is also commonly referred to as "winner takes it all" approach.

⁸ See for instance Section 61 of the 1996 English Arbitration Act which provides that, "unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event 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".

⁹ It is worth noting that there is a distinction between bad faith conduct and 'other' conduct that can be warranted. While in cases of bad faith, the allocation of costs is reflective of both *penalty* and *compensation*, the allocation of costs in 'other' conduct is demonstrative of a predominance of compensatory over penal elements.

¹⁰ For example presenting the case at excessive length as an instance justifying an award of costs.

¹¹ Section 26(c) of the 2013 IBA Guideline on Party Representation in International Arbitration provides "*If the Arbitral Tribunal, after giving the Parties notice and a reasonable opportunity to be heard, finds that a Party Representative has committed Misconduct, the Arbitral Tribunal, as appropriate, may [...] (c) consider the Party Representative's Misconduct in apportioning the costs of the arbitration, indicating, if appropriate, how and in what amount the Party Representative's Misconduct leads the Tribunal to a different apportionment of costs.*"

¹² See for example, the ICC Commission on Arbitration and ADR's 2012 Report on 'Techniques for Controlling Time and Costs in Arbitration' and its 2014 Guide on 'Effective Management of Arbitration: A Guide for In-House Counsel and Other Party Representatives', both available at www.iccwbo.org/About-ICC/Policy-Commissions/Arbitration/; Philipp Habegger, Chapter 13, Part V: Saving Time and Costs in Arbitration, in: *Arbitration in Switzerland: The Practitioner's Guide* (Arroyo ed., 2013), 1393 et seq.; David W. Rivkin and Samantha J. Rowe, *The Role of the Tribunal in Controlling Arbitral Costs*, (2015) 81 *Arbitration*, Issue 2, pp. 116-130.

¹³ The ICC 'Decisions on Costs in International Arbitration' para 101. See also the ICC Commission Report on Controlling Time and Costs in Arbitration, 2012 available at < <https://iccwbo.org/publication/icc-arbitration-commission-report-on-techniques-for-controlling-time-and-costs-in-arbitration/>> accessed on 13th June 2019, and The ICC Guide on Effective Management of Arbitration 2017.

¹⁴ 'Taking a Close Look at Today's Arbitral Process and Who Pays for It: A Report from Helsinki International Arbitration Day 2017 (I)', available at <http://arbitrationblog.kluwerarbitration.com/2017/06/07/taking-close-look-odays-arbitral-process-pays-report-helsinki-international-arbitration-day-2017/> accessed on 11th June 2019.