COMISIÓN DE ARBITRAJE Y ADR | LÍDER MUNDIAL EN RESOLUCIÓN DE CONTROVERSIAS

INFORME

DECISIONES SOBRE COSTOS EN EL ARBITRAJE INTERNACIONAL

ICC Dispute Resolution Services

Cámara de Comercio Internacional (ICC)
33-43 avenue du Président Wilson
75116 París, Francia
www.iccwbo.org

La versión española de este informe es una traducción del original en inglés titulado *Decisions on Costs in International Arbitration*. ICC agradece a Gabriela Álvarez-Ávila, Cecilia Flores Rueda, Mariana Gómez Vallin, Carlos McCadden, Jesús Remón, Amanda Jimenez Pinton y Angela Daniela Reyes González por su colaboración en la realización de la traducción al español del presente documento.

Fecha de publicación: Julio de 2019

Decisiones sobre Costos en el Arbitraje Internacional

Nota a los lectores

En el arbitraje internacional ninguna de las partes tiene el derecho de recuperar automáticamente los costos del arbitraje, definidos en el Artículo 37(2) del Reglamento de Arbitraje de la CCI de 2012 y que incluyen los honorarios y gastos del tribunal y de la institución arbitral, así como los honorarios legales y otros gastos razonablemente incurridos por las partes. El Artículo 37(4) establece que el tribunal fijará los costos del arbitraje en el laudo final, donde decidirá cuál de las partes habrá de pagarlos o en qué proporción deben repartirse entre las partes. A diferencia del Reglamento de la CCI, las reglas de otras instituciones arbitrales, como las de CIETAC, DIS, LCIA, CPA y de la CNUDMI, incorporan una presunción *iuris tantum* de que la parte vencedora podrá recuperar tales costos de la parte vencida.

Las consideraciones contenidas en este Informe tienen la intención de informar a los usuarios de arbitraje sobre cómo los tribunales pueden distribuir los costos de conformidad con el acuerdo de las partes y/o cualquier regla o norma de derecho aplicable. Sin embargo, no debe entenderse que limiten la discrecionalidad del tribunal para repartir los costos. En particular, el hecho de que el tribunal no aplique, en todo o en parte, estos criterios en su decisión sobre la distribución de los costos no es ni puede ser fundamento para discutir o impugnar el resultado del ejercicio de su potestad discrecional a la hora de distribuir los costos.

Este Informe no defiende un método particular en cuanto a las decisiones sobre costos. Tampoco pretende establecer directrices ni listados.

Reconocimientos

Este Informe de la Comisión de Arbitraje y ADR de la CCI fue preparado por el Grupo de Trabajo sobre Resoluciones sobre Costos.

Co-Presidentes del Grupo de Trabajo: Bernard Hanotiau, Julian Lew, Wendy Miles, Philippe Cavalieros.

Con la participación de:

Christopher Newmark (Presidente, Comisión de Arbitraje y ADR de la CCI), Peter Wolrich (ex presidente, Comisión de la CCI sobre Arbitraje y ADR).

Hélène van Lith (Secretaria de la Comisión de Arbitraje y ADR de la CCI), Anne Secomb (ex Secretaria de la Comisión de Arbitraje y ADR de la CCI);

Miembros del Grupo de Trabajo: Nabil N. Antaki, Hamid Reza Aslani, Hans Bagner, Efraim Barak, Yeheskell Beinisch, Eduard Beltran Betriu, Marc Blessing, Fabio Bortolotti, Olivier Caprasse, Carlos Alberto Carmona, Luiz Claudio Corrêa da Costa de Aboim, Christian Dorda, Jalal El Ahdab, Nils Eliasson, José Tomás Errázuriz, Louis Flannery, Cecilia Flores Rueda, Luigi Fumagalli, Isabelle Hautot, Axel Heck, Naoki Iguchi, Sapna Jhangiani, Nihad Kabir, Christopher P. Koch, Christopher Lau, Crenguta Ioana Leaua, Timothy Lindsay, Claes Lundblad, Alexandr Mares, Isabelle Michou, Kirin Shanti Moganasundram, Reza Mohtashami, Nathalie Najjar, Rajendra Navaratnam, Colm O'Hoisín, Bazil Oglinda, Yejide B. Osunkeye, Chris Parker, Pawel Pietkiewicz, Wilson Pimentel, Adedoyin O. Rhodes-Vivour, Stefan Riegler, Mika Savola, Markus Schifferl, Matthew Secomb, Petri Taivalkoski, Rachel Thorn, Stamatios Tsetos, Alexander Vaneev, Herman W. Verbist, Maria Vicien-Milburn, Nina Grigorievna Vilkova, Claus von Wobeser, Tomasz Wardynski, Muhammad Zahir, David Zaslowsky, Roland Ziadé;

Centro de Documentación de la Corte de la CCI: Sylvie Picard Renaut, Stéphanie Torkomyan, Betina Damvergi y los practicantes Matthew Hudson y Vanessa Strauss.

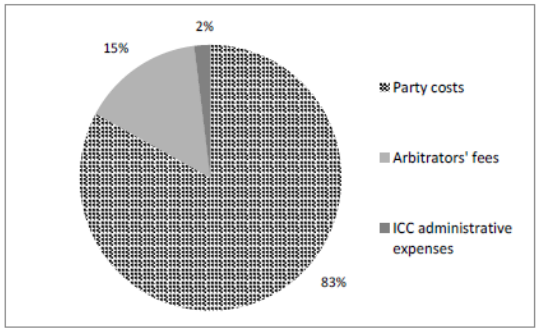
Este Informe fue aprobado por la Comisión de Arbitraje y ADR en su reunión en París el 7 de mayo de 2015 y por el Comité Ejecutivo de la CCI en su Sesión 149 en Nueva Delhi el 16 de septiembre de 2015.

Índice

I. Introducción

1. La Comisión de Arbitraje y ADR de la CCI (la "Comisión") se propone continuar proporcionando a los usuarios del arbitraje internacional los medios para asegurar que los procedimientos sean conducidos de manera efectiva y eficiente.

2. Los costos de las partes (incluyendo honorarios legales, gastos relacionados con testigos y pruebas periciales, y otros costos incurridos por las partes en el arbitraje) comprenden la parte sustancial (83% en promedio) de los costos del procedimiento. Los honorarios de los árbitros y el arancel de gastos administrativos representan una proporción mucho menor de los costos, como se muestra a continuación.[1]



3. Se ha realizado ya un trabajo significativo por la Comisión para ayudar a mantener los costos de las partes bajo control. Esto incluye la guía de 2014, *Manejo Efectivo del Arbitraje: Una Guía para Abogados Internos y otros Representantes de las Partes*, el informe de 2012 *Técnicas para Controlar el Tiempo y los Costos en el Arbitraje*[2] y una revisión del Reglamento de Arbitraje de la CCI en su versión de 2012 (el 'Reglamento de CCI 2012').

4. El Reglamento de la CCI 2012 introdujo dos adiciones encaminadas a incentivar que los árbitros ejerzan un mayor control sobre el tiempo y los costos del arbitraje. El Artículo 37(5) establece que:

> Al tomar decisiones sobre costos, el tribunal arbitral podrá tomar en cuenta las circunstancias que considere relevantes, incluyendo la medida en la que cada parte haya conducido el arbitraje de forma expedita y eficaz en términos de costos.

El Apéndice IV del Reglamento de la CCI incluye además ejemplos de técnicas para la gestión de casos que pueden ser utilizadas por el tribunal arbitral y las partes con el fin de controlar el tiempo y los costos. Uno de los objetivos de estas técnicas es asegurar que el tiempo y los costos sean proporcionales al objeto de la controversia.

5. Al preparar este Informe, se puso de manifiesto que los métodos de los árbitros al distribuir los costos se ven a menudo influenciados e informados por la práctica judicial y/o las leyes de los países de origen de las partes, de los árbitros o del lugar del arbitraje. Esa práctica revela dos métodos básicos: o el vencido paga los costos de la parte vencedora (conocido como "los costos siguen el resultado" o el criterio del vencimiento); o cada parte paga sus propios costos sin importar el resultado. Estos métodos se entienden y se aplican de manera diversa en diferentes países (ver Apéndice B).

6. En el arbitraje comercial internacional, están surgiendo varias tendencias en relación con las prácticas y expectativas de distribución de los costos. Sin embargo, poco ha sido escrito al respecto y no está claro cuáles son los métodos y las prácticas. Este Informe pretende: (a) identificar los diversos métodos aplicados por tribunales arbitrales mediante el análisis de resoluciones sobre costos en laudos CCI dictados en aplicación del Reglamento de CCI 2012 y la versión anterior del Reglamento de Arbitraje CCI (el "Reglamento CCI 1998") y en laudos de otras ocho instituciones arbitrales principales; (b) para identificar las diferencias nacionales subyacentes.

7. El objetivo último de este Informe es destacar cómo la distribución de costos entre las partes puede usarse de manera efectiva para controlar el tiempo y los costos y para ayudar a crear procedimientos justos, correctamente ordenados que respondan a las expectativas de los usuarios. Este Informe no pretende ser prescriptivo, como tampoco apoya ninguna práctica o método en particular. Dado que la autonomía de las partes y la flexibilidad son fundamentales en el arbitraje internacional, no hay un solo método válido para la distribución de los costos.

8. Con este objetivo, la Comisión estableció un Grupo de Trabajo sobre Resoluciones sobre Costos, que tomó las siguientes iniciativas:

1 Los cálculos se basaron en 221 laudos CCI de 2012.

2 Ambos disponibles en https://iccwbo.org/dispute-resolution-services/commission-on-arbitration-and-adr/ .

(i) Los miembros del Grupo de Trabajo se reunieron en cinco ocasiones para desarrollar un marco conceptual para su trabajo y este Informe.

(ii) Los representantes de países en los que la CCI tiene un Comité Nacional o Grupo respondieron a una encuesta acerca de los métodos sobre los costos conforme al derecho nacional (ver Apéndice B).

(iii) Las Secretarías de la Comisión de la CCI estudiaron laudos CCI para identificar cómo los árbitros han abordado la distribución de los costos (ver Apéndice A).

(iv) La Comisión de Arbitraje Internacional Económico y de Comercio de China (CIETAC), el Centro de Arbitraje Internacional de Hong Kong (HKIAC), el Instituto Alemán de Arbitraje (Deutsche Institution für Schiedsgerichtsbarkeit e.V., DIS), el Centro International para la Resolución de Disputas (ICDR), la Corte de Londres de Arbitraje Internacional (LCIA), la Corte Permanente de Arbitraje (CPA), la Cámara de Comercio de Estocolmo (SCC) y el Centro de Arbitraje Internacional de Singapur (SIAC) fueron invitados a presentar análisis de sus laudos mostrando cómo los árbitros habían abordado la distribución de los costos de conformidad con sus respectivas reglas (ver Apéndice A).

(v) Sobre la base del análisis de las prácticas de los tribunales arbitrales y de las cortes nacionales, el Grupo de Trabajo identificó factores que un tribunal puede aplicar discrecionalmente cuando adopta decisiones sobre costos en cualquier fase del procedimiento y en el momento de fijarlos y distribuirlos en el laudo final.

(vi) El Grupo de Trabajo identificó en este Informe cómo el ejercicio de la facultad de distribuir los costos puede ser utilizado para mejorar la eficiencia en el arbitraje.

II. Estructura del Informe

9. Este informe se divide en cinco secciones:

(i) un resumen de los métodos generales al conceder los costos, basado en el análisis del Grupo de Trabajo: (a) análisis de los laudos arbitrales comerciales (cuyos resultados se describen en el Apéndice A), y (b) un muestreo de las prácticas nacionales (en litigio y arbitraje), incluyendo la financiación de litigios por terceros y la limitación de los costos y disparidades (o desequilibrios) entre las partes (cuyos resultados se mencionan en el Apéndice B) (**Sección III**);

(ii) un análisis sobre cómo la facultad para distribuir costos puede ser utilizada para la gestión eficiente del caso (**Sección IV**);

(iii) un análisis sobre los métodos aplicados por los árbitros al distribuir los costos (**Sección IV**);

(iv) retos específicos que presentan los acuerdos para la financiación de litigios y las negociaciones para alcanzar un acuerdo transaccional (**Secciones V y VI)**;

(v) observaciones finales (**Sección VII**).

III. Principales observaciones

10. El análisis detallado de las decisiones sobre la distribución de costos en los laudos arbitrales y las conclusiones de la encuesta de los Comités Nacionales y Grupos de la CCI se encuentran, respectivamente, en los Apéndices A y B. Los hallazgos principales obtenidos de dichos análisis se resumen a continuación.

a) Análisis del reparto de costos en los laudos arbitrales

11. Con base en el estudio de la distribución de costos en los procedimientos administrados por las principales instituciones arbitrales del mundo (ver Apéndice A), el Grupo de Trabajo ha sido capaz de hacer las siguientes observaciones generales sobre la manera en la que los árbitros distribuyen los costos en sus laudos.

12. El punto de partida para cualquier decisión sobre los costos son las reglas arbitrales aplicables. A este respecto, las reglas no son idénticas. Por ejemplo, las reglas de 2015 de la CIETAC,[3] las Reglas de 1998 del DIS, el Reglamento de 2014 de LCIA, las Reglas de 2012 de CPA y las Reglas de 2010 de CNUDMI incluyen una presunción iuris tantum de que la parte vencedora tendrá derecho a recuperar los costos considerados razonables. En contraste, los

3 El Artículo 52(2) de las Reglas de la CIETAC 2015 no es una nueva disposición y ha sido durante mucho tiempo la práctica de CIETAC. La regla de "los costos siguen el resultado"(o criterio del vencimiento) fue incluida por primera vez en las reglas de arbitraje de la CIETAC en 1994, donde el principio se estableció simplemente, sin enumerar los factores a considerar para determinar la razonabilidad de los costos y con un límite del 10% (10% del monto concedido a la parte vencedora). Esta disposición se cambió por la versión actual en 2005. En consecuencia, los árbitros en los casos administrados por la CIETAC siguen esta regla en la práctica.

Reglamentos de CCI, HKIAC,[4] ICDR, SCC y el de SIAC simplemente autorizan al tribunal a hacer una distribución de los costos pero no contienen ninguna presunción sobre su distribución. Adicionalmente, el Reglamento de la CCI de 2012 y el Reglamento de la LCIA de 2014 expresamente se refieren a la discreción del tribunal para tener en cuenta la conducta de las partes, incluso, si se condujeron en el arbitraje de una manera expedita y eficiente.

13. A pesar de que la CCI y, al menos, la mitad de las demás principales reglas institucionales no contienen una presunción a favor de la recuperación de los costos por la parte vencedora, parece que la mayoría de los tribunales arbitrales adoptan este método como punto de partida, para posteriormente ajustar la distribución de los costos según consideren apropiado.[5] Este fue el método de la mayoría de los laudos de la CCI revisados, en el 91% de los laudos HKIAC, en la mayoría de los laudos ICDR, en el 90% de los laudos SIAC y en más de la mitad de los laudos SCC.[6] Este también fue el caso en la mayoría de los laudos LCIA y CPA[7], lo que no es sorprendente pues tanto el Reglamento de la LCIA y las Reglas de la CPA contienen presunciones *iuris tantum* a favor de la recuperación de los costos por la parte vencedora.

14. Un punto de partida alternativo es que cada parte asuma sus costos.[8] Cuando esta presunción resulte aplicable, sea por acuerdo de las partes o por otra razón, la recuperación de los costos de la otra parte se permitirá únicamente en circunstancias excepcionales.

15. Independientemente del punto de partida, los tribunales también valoran la razonabilidad de los costos reclamados. Aunque los factores tomados en consideración para determinar la razonabilidad varían, la razonabilidad en sí misma fue un criterio considerado en la mayoría de los laudos analizados. Generalmente, los árbitros se muestran relativamente dispuestos a reducir los honorarios sobre la base de la falta de razonabilidad. Aun cuando los árbitros inician su análisis partiendo de que la parte vencedora tiene derecho a recuperar sus costos, frecuentemente ajustan los montos a recuperar, concediendo menos del monto total de los honorarios reclamados.

16. Los árbitros tienden a tomar en cuenta la conducta de las partes. Se observó que las partes cuya conducta se consideraba que había contribuido a costos excesivos no recuperaron con frecuencia todos los costos reclamados.

17. Aunque en el análisis de los laudos se hace referencia a temas tales como los honorarios según el éxito y la disparidad entre los honorarios legales de cada parte, el Grupo de Trabajo no encontró suficientes casos para alcanzar conclusiones o inferir tendencias al respecto.

18. Los costos en el arbitraje incluyen no solo los honorarios legales y costos de las partes (costos de parte), sino también los costos del tribunal, de la institución y de cualquiera de las instalaciones utilizadas (en ocasiones llamados los costos del arbitraje). La responsabilidad por los costos del arbitraje es por supuesto una cuestión propia del arbitraje. En los procedimientos judiciales nacionales generalmente los costos son reducidos o inexistentes por parte del tribunal o de los abogados ya que son invariablemente locales. Cuando un tribunal arbitral decide que cada parte deberá pagar sus propios costos, también deberá determinar qué parte habrá de pagar los costos del arbitraje.

19. Debe notarse que este Informe solamente aborda los laudos arbitrales comerciales internacionales y sus prácticas. El arbitraje de inversión, al cual aplican distintas consideraciones, está fuera del alcance de este Informe. Para los

4 Este es el caso de las Reglas de la HKIAC 2013; las Reglas de HKIAC de 2008 establecían que otros costos de arbitraje, por ejemplo los costos distintos de la representación y asistencia legal, correrían, en principio, a cargo de la parte vencida (ver el informe HKIAC en el Apéndice A).

5 Esto a veces se denomina "los costos siguen el resultado", "el perdedor paga", el "enfoque inglés" o el "criterio del vencimiento". Dentro de los sistemas judiciales nacionales que aplican este método, la recuperación de los costos por la parte vencedora generalmente implica una serie de conceptos comunes y requiere la comprensión de la forma en que funciona el sistema. Sin embargo, esos conceptos comunes no siempre existen en el arbitraje internacional, donde las partes y abogados a menudo tienen procedencias muy diferentes. En algunos países, las tarifas legales/oficiales se establecen para actividades específicas, por ejemplo reuniones, preparación de escritos, asistencia a audiencias, al menos en el litigio ante los tribunales.

6 Estas cifras deben tratarse con cierta precaución; representan solo el subgrupo de laudos seleccionados para el análisis (es decir, aquellos laudos que contenían una decisión en cuanto a los costos) y no el universo completo de laudos institucionales existentes.

7 Sin embargo, la PCA informa que existe una diferencia notable en los métodos sobre los costos entre sus arbitrajes interestatales administrados y los arbitrajes mixtos (arbitrajes con base en tratados de inversión y con base en contratos). En los arbitrajes interestatales, la tendencia es que cada parte asuma sus propios honorarios legales y la mitad de los demás costos del arbitraje, independientemente del resultado del caso. En los arbitrajes mixtos, las decisiones sobre distribución de costos varían, refiriéndose a factores tales como el éxito relativo de las partes, las circunstancias del caso y la razonabilidad de los costos.

8 Esto es algunas veces llamado el "enfoque americano".

fines de la investigación y análisis, el Grupo de Trabajo tomó en cuenta las reglas de diversas instituciones arbitrales y las Reglas de Arbitraje de CNUDMI, cuyas reglas relevantes pueden encontrarse en el Apéndice C. Las Reglas de Arbitraje del Centro Internacional de Arreglo de Diferencias relativas a Inversiones (CIADI) se incluyen solo como referencia.

b) Métodos sobre los costos en distintas jurisdicciones

20. Con base en el estudio sobre la distribución de costos por parte de los tribunales en distintos países (ver Apéndice B), el Grupo de Trabajo hace las siguientes observaciones que pueden ser relevantes para el arbitraje.

21. En la mayoría de las jurisdicciones, la recuperación de costos es generalmente aceptable conforme a los acuerdos de honorarios, independientemente de si dichos acuerdos son financiados por terceros. La mayoría de los países informaron que dichos acuerdos están generalmente permitidos aun cuando no estén contemplados en las leyes o reglas relevantes. En un grupo reducido de países, dichos acuerdos están específicamente autorizados, en ocasiones con algunas condiciones previas. En al menos siete jurisdicciones, ciertos acuerdos de honorarios se encuentran específicamente prohibidos y son considerados nulos por los tribunales nacionales. En algunos países, se aplican diferentes reglas a los acuerdos sobre prima de éxito y otro tipo de acuerdos sometidos a condición, así que es difícil generalizar. Frecuentemente, las reglas que aplican a los acuerdos de honorarios y a la financiación de litigios por terceros en casos de disputas domésticas son distintas de aquellas que aplican al arbitraje, siendo usualmente más restrictivas las primeras. Varias jurisdicciones han informado que la razonabilidad de dichos acuerdos puede ser tenida en cuenta cuando se distribuyen los costos en el arbitraje o cuando el acuerdo de las partes del arbitraje prevalece.

22. La mayoría de las jurisdicciones no pudieron citar casos reportados sobre la recuperación de costos relacionados con la financiación de litigios por terceros. Por otra parte, en Suiza, la Corte Suprema declaró la nulidad de una ley que prohibía la financiación de litigios por terceros en casos domésticos, ya que suponía una violación a la libertad económica. En el Reino Unido las cortes han resuelto que un tercero que financie un litigio puede ser declarado responsable en una resolución adversa sobre costos. En otras jurisdicciones, los informes sugieren que los costos de terceros que financian no son recuperables, ya que quien financia carece de legitimación para reclamar costos en el procedimiento y la parte que fue financiada en realidad no incurrió en los costos. Singapur ha sugerido que un acuerdo de financiación por terceros puede ser considerado ilegal y por lo tanto no es ejecutable ante las cortes de Singapur ni en litigio ni en arbitraje.

23. Por lo que concierne a los acuerdos previos a la disputa sobre la distribución de costos, diversas jurisdicciones reportaron que carecen de reglas específicas. La Ley Inglesa de Arbitraje (*English Arbitration Act*) de 1996 contiene disposiciones obligatorias en el sentido de que las partes no pueden acordar el pago de los costos en ningún caso a menos que el acuerdo se haga después de que surja la disputa. Otras jurisdicciones informan que dichos acuerdos se ven con cierta frecuencia en un convenio arbitral, cuando la disputa surge, o casi al final del arbitraje. Finlandia y Ontario los describieron como escasos pero posibles en sus jurisdicciones. Dichos acuerdos son generalmente admitidos a menos que la ley nacional disponga lo contrario.

24. Varias jurisdicciones informaron que sus leyes no contienen norma alguna sobre la facultad del tribunal para establecer límites a los costos, no obstante generalmente es permisible. La Ley de Arbitraje (*English Arbitration Act)* Inglesa de 1996 faculta al tribunal para limitar la recuperación de costos, aunque esta facultad se utiliza rara vez en la práctica. Otras jurisdicciones reportaron mecanismos de limitación de costos conforme a leyes de arbitraje locales. Por ejemplo, conforme a las reglas de la Cámara de Comercio Polaca, un límite podría ser impuesto en un acuerdo condicional; y las reglas del centro de arbitraje belga, el CEPANI, expresamente alientan a los árbitros a recordar a las partes de la posibilidad de acordar un límite en los costos. Numerosas jurisdicciones señalaron que la evaluación de la razonabilidad de los costos por parte de los árbitros podría constituir una forma de limitar los costos cuando se dicta el laudo.

25. Respecto a las disparidades entre abogados costosos y otros menos costosos (por ejemplo las principales firmas internacionales comparadas con las firmas en países en desarrollo o firmas más pequeñas y menos costosas), varias jurisdicciones señalaron que los árbitros tienen amplia discreción para tomar en cuenta factores tales como la complejidad e importancia del caso, el monto en disputa y la naturaleza del trabajo realizado. Austria señaló que los antecedentes de las partes pueden tomarse en cuenta, por ejemplo, si son

extranjeros y requieren de abogados locales, o si son corporaciones multinacionales o pequeñas empresas. Muchas jurisdicciones señalaron la importancia de la proporcionalidad de los costos, tanto en relación con la disputa como entre las partes.

IV. Distribución de costos y la gestión efectiva de casos

26. El Grupo de Trabajo concluyó que: (i) los árbitros estaban preparados y autorizados para ejercer sus facultades de distribución de los costos en varias etapas del proceso arbitral, no solo en el laudo final; y (ii) en vista de la inexistencia de un método uniforme sobre la distribución de costos, los árbitros y las partes quizá deseen plantear sus expectativas sobre esta cuestión en una etapa relativamente temprana del procedimiento.

27. Respecto al primer punto, en el arbitraje comercial internacional, casi todas las reglas y leyes de arbitraje permiten la asignación de costos en el laudo final. Los laudos que distribuyen los costos en la etapa final y/o en las etapas intermedias pueden permitir al tribunal asegurar que la parte vencedora sea razonablemente compensada por todas las pérdidas y los daños sufridos, incluyendo los costos del procedimiento. Si es utilizada cuidadosamente, la distribución de costos durante el procedimiento puede mejorar en general la eficiencia en cuanto a costos y efectividad del arbitraje comercial. En la medida en que sean necesarias y apropiadas, las solicitudes de órdenes o laudos en cuanto a costos durante cualquier procedimiento arbitral deben usarse con cautela y a la medida de las circunstancias específicas de cada caso.

28. En cuanto al segundo punto, la facultad del tribunal para distribuir los costos para promover la conducción eficiente del procedimiento fue abordada en la segunda edición del informe de la Comisión.

Técnicas para Controlar el Tiempo y los Costos en el Arbitraje[9] en los siguientes términos (§ 82, énfasis agregado):

> **Asignación de costos para incentivar la conducción eficiente en los procedimientos**
>
> La asignación de costos puede ser una herramienta útil para incentivar una conducta eficiente y para desincentivar una conducta no razonable. Conforme al Artículo 37(5) del Reglamento, el tribunal arbitral tiene discreción para asignar los costos de la manera que considere apropiada. Se señala expresamente que, al tomar la decisión sobre los costos, el tribunal arbitral puede tomar en consideración la medida en que cada parte ha conducido el arbitraje de manera expedita y eficiente en términos de costos. El tribunal debe considerar informar a las partes al inicio del arbitraje (por ejemplo en la conferencia sobre la conducción de procedimiento) que pretende tomar en cuenta la manera en que cada parte se haya conducido en el procedimiento y que sancionará cualquier conducta poco razonable de una parte al decidir sobre los costos. El comportamiento poco razonable puede incluir: solicitudes excesivas de documentos, argumentos jurídicos excesivos, contrainterrogatorio excesivo, tácticas dilatorias, pretensiones exageradas, no acatamiento de órdenes procesales, solicitudes injustificadas de medidas provisionales y el incumplimiento injustificado del calendario procesal.

29. El Grupo de Trabajo expresamente reconoce la importancia de controlar los tiempos y costos en el arbitraje y, más aún, que el tribunal puede usar la distribución de costos en todas las etapas del procedimiento arbitral como una herramienta para la gestión eficiente y el control del tiempo y de los costos en cada etapa del procedimiento arbitral, incluyendo:

(a) la discusión sobre los principios de distribución de costos al inicio o en una etapa temprana del procedimiento, por ejemplo, en la conferencia sobre conducción del procedimiento o en el acta de misión;

(b) a lo largo del procedimiento, mediante los laudos provisionales o las órdenes sobre los costos relativos a las solicitudes, trámites o medidas provisionales; y

(c) en el laudo final o los laudos provisionales como mecanismo para sancionar las conductas y comportamientos inadecuados, incluyendo cuando éstos no son eficientes o razonables.

a) Al inicio del procedimiento

30. El informe *Técnicas para Controlar el Tiempo y los Costos en el Arbitraje* alienta al tribunal a tratar los costos al inicio del procedimiento, indicando "que pretende tomar en cuenta la manera en que cada parte se conduzca en el procedimiento y sancionar cualquier conducta irrazonable por una parte al decidir sobre los costos".

31. Independientemente de si informa o no a las partes al inicio del procedimiento, un tribunal CCI está autorizado para tomar en cuenta tal

9 2ª ed. (2012), disponible en https://iccwbo.org/dispute-resolution-services/commission-on-arbitration-and-adr/.

conducta conforme al Artículo 37(5) del Reglamento de la CCI de 2012. Sin embargo, el tribunal, al poner de manifiesto esta cuestión a las partes en una etapa inicial puede manejar mejor sus expectativas y las de sus abogados durante el transcurso del procedimiento.

32. El tribunal podría también considerar discutir con las partes, al inicio del arbitraje o durante el procedimiento (típicamente en la primera conferencia sobre la conducción del procedimiento), otros aspectos sobre la gestión de costos, incluyendo:

(i) qué costos considera el tribunal arbitral que podrían ser potencialmente recuperables, por ejemplo, costos y gastos de abogados internos y otros de personal que de otra manera sólo serían fijados al término del arbitraje en el laudo final;

(ii) qué documentos serán requeridos para sustanciar las solicitudes de tasación de costos;

(iii) si los costos serán tasados de manera provisional, la frecuencia de tales determinaciones y la base sobre la cual habrán de realizarse;

(iv) cuestiones sensibles, tales como si habrá financiación por terceros y cualesquiera implicaciones que ello podría tener para la distribución de los costos, si la identidad del tercero financiador (que podría ser relevante por posibles conflictos de interés) debería revelarse, y si los acuerdos contingentes, condicionales y sobre primas de éxito han sido acordados, y cómo las partes esperan que estas cuestiones sean abordadas con relación a la tasación de costos;

(v) si fijar límites a los costos puede ser una herramienta apropiada para controlar el tiempo y los costos en el arbitraje, incluyendo cuando esté expresamente permitido por la lex arbitri (en algunas sedes, a menos que las partes acuerden lo contrario, el tribunal tiene facultades para "instruir que los costos recuperables en los procedimientos arbitrales se limiten a determinadas cantidades"[10]);

(vi) si (dependiendo del régimen aplicable o del acuerdo de las partes) y de qué manera debe ser informado el tribunal sobre las propuestas de arreglo que estuvieran cercanas a cerrarse o si fuesen mejores que el monto determinado por el tribunal y que ahorrarían costos y tiempo de manera significativa de ser aceptadas; y

(vii) cuándo deberán presentarse los escritos sobre costos (por ejemplo, al mismo tiempo que los escritos posteriores a la audiencia).

33. Abordar las cuestiones sobre costos al inicio del procedimiento puede tener varias ventajas. Permitiría a las partes:

(i) estar plenamente informadas sobre el método del tribunal respecto de los costos, lo cual elimina la incertidumbre y mejora la predictibilidad;

(ii) estar plenamente informadas sobre las expectativas del tribunal en cuanto a los escritos relativos a los costos, lo que permitirá a las partes registrar apropiadamente el tiempo invertido y los costos incurridos, particularmente, respecto a costos legales internos y otros costos;

(iii) tener la oportunidad de discutir lo que se espera de ellos a nivel procesal (por ejemplo, respetar el calendario procesal, producir los documentos ordenados por el tribunal, comunicaciones oportunas);

(iv) tener la oportunidad de discutir qué comportamiento y conducta profesional se espera de las partes y de los abogados; y

(v) ser capaces de realizar mejor el análisis de costes y de riesgos cuando se considere tomar varios pasos intermedios o tácticos en el procedimiento, o incluso decidir si debe continuarse con el procedimiento en general.

34. Puede existir la preocupación de que plantear el tema de los costos al inicio del procedimiento pueda causar incomodidad al tribunal o a las partes, o limitar la capacidad del tribunal para ser flexible al tratar con cuestiones inesperadas surgidas durante el curso del procedimiento. Estas preocupaciones pueden ser abordadas siempre que surjan en un caso determinado. Como observación general, el tema puede ser abordado adecuadamente si el tribunal indica a las partes que tomará en cuenta el arbitraje en su totalidad al resolver sobre los costos y se asegura de que tiene completa discreción para hacerlo conforme a las reglas aplicables.

10 Ordenanza de Arbitraje de Hong Kong, s. 57. La Ley Inglesa de Arbitraje contiene una disposición similar en la s. 65.

35. Otra forma de indicar a las partes lo que será tomado en cuenta es que el tribunal aborde esto en una (primera) orden procesal, como se hizo en un caso CCI conforme al Reglamento de la CCI de 2012.[11]

b) Durante el procedimiento (laudos parciales u órdenes provisionales)

36. La mayoría de las reglas arbitrales institucionales y leyes arbitrales nacionales permiten que los tribunales repartan los costos en laudos parciales que resuelven cuestiones preliminares de manera definitiva, por ejemplo, jurisdicción/arbitrabilidad, ley aplicable o una excepción de prescripción o caducidad. Tales laudos parciales, incluyendo aquellos respecto a los costos, serán ejecutables conforme a la Convención de Nueva York como laudos finales.

37. La mayoría de las reglas arbitrales y leyes también permiten que los tribunales dicten sus laudos u órdenes provisionales respecto de costos, incluyendo aquellos que surjan de la solicitud de medidas cautelares u otras solicitudes de carácter procesal. Por ejemplo, la Ley Modelo de la CNUDMI sobre Arbitraje Comercial Internacional específicamente establece lo siguiente en su Artículo 17G (énfasis añadido):

> El solicitante de una medida cautelar o el peticionario de una orden preliminar será responsable de las costas y de los daños y perjuicios que dicha medida u orden ocasione a cualquier parte, siempre que el tribunal arbitral determine ulteriormente que, en las circunstancias del caso, no debería haberse otorgado la medida o la orden. El tribunal arbitral podrá condenarle en cualquier momento de las actuaciones al pago de las costas y de los daños y perjuicios.

38. Si el tribunal tuviera que hacer una determinación sobre costos en la forma de una orden en lugar de un laudo, lo cual es completamente admisible, dicha orden puede no ser ejecutable conforme a la Convención de Nueva York hasta que o salvo que sea incorporada en un laudo final. Sin embargo, la *lex arbitri* puede contener mecanismos para ejecutar tales órdenes.

39. Una posible desventaja de dictar un laudo u orden sobre costos en una etapa intermedia es que puede alterar la dinámica del procedimiento. Una vez que dichos costos sean pagados, quizá no puedan ser recuperados posteriormente; con frecuencia se vuelven definitivos y firmes en la fase en la que fueron concedidos u ordenados, sin importar lo que suceda después. Tal laudo u orden puede tener un impacto no deseado en la parte que paga si tiene dificultades financieras o de liquidez. Estos factores subrayan el beneficio de plantear estas cuestiones al inicio, en una reunión preliminar con las partes.

40. Como una alternativa a un laudo provisional sobre costos (u orden), los árbitros pueden considerar emitir una instrucción u orden que contenga una decisión final sobre la distribución de costos con respecto a cierta acción o conducta provisional, señalando que el pago solo será exigible una vez que se dicte el laudo final. En tales casos los árbitros obviamente deben ser cuidadosos en incorporar tales órdenes o instrucciones en el laudo final.

41. Adicionalmente, los árbitros podrán invitar a las partes en cualquier momento del procedimiento a discutir o hacer propuestas en relación con los costos.

c) Al final del procedimiento

42. Finalmente, el tribunal tiene total discreción para condenar a pagar los costos que considere razonables en cualquier laudo o laudos finales. Esto normalmente es lo que sucede en la mayoría de los casos. El Reglamento de la CCI requiere que el tribunal fije los costos en su laudo final y decida cuál de las partes habrá de asumirlos o en qué proporción deberán ser asumidos por las partes. Conforme al Reglamento de la CCI, y a las reglas de muchas otras instituciones, el tribunal puede tomar en cuenta la conducta de las partes al resolver al respecto.

43. Cualquier laudo final deberá contener las razones de la decisión sobre la distribución de los costos. Para que pueda dictarse una decisión motivada sobre costos, es necesario que los árbitros otorguen a las partes plena oportunidad para que puedan formular alegaciones sobre esta cuestión. Deberán emitirse instrucciones apropiadas sobre el plazo y naturaleza de los escritos sobre costos durante el curso del procedimiento.[12]

11 El tribunal señaló lo siguiente: "Se recuerda a las Partes que de conformidad con el Artículo 37 (5) del Reglamento de CCI, el Tribunal Arbitral podrá tomar en cuenta 'las circunstancias que considere relevantes, incluyendo la medida en la que cada parte haya conducido el arbitraje de forma expedita y eficaz' en términos de costos".

12 Por ejemplo, algunos tribunales instruyen a las partes a incluir sus escritos sobre costos en sus escritos posteriores a la audiencia.

V. Consideraciones sobre la distribución de costos

44. Al distribuir los costos en el arbitraje comercial internacional puede ser necesario:

(i) identificar y establecer el alcance de cualquier acuerdo de las partes sobre costos;

(ii) decidir cuál de las partes deberá asumir los costos o en qué proporción serán asumidos por las partes, incluyendo, cuando sea apropiado, la consideración de su éxito relativo y fracaso;

(iii) evaluar la razonabilidad y la realidad de los costos incurridos por las partes; y

(iv) tener en cuenta otras circunstancias, cuando sea relevante, incluyendo la medida en la que cada parte se condujo en el arbitraje de manera expedita y eficiente en materia de costos.

Algunas de las consideraciones relativas a lo anterior se mencionan a continuación.

a) El acuerdo de las partes

45. El acuerdo de las partes sobre costos es el principal factor a tomar en consideración en cualquier decisión sobre los costos.[13] Hay por lo menos cinco aspectos a considerar en relación con el acuerdo de las partes: (i) el convenio arbitral escrito (o cláusula compromisoria) de las partes; (ii) las reglas arbitrales institucionales aplicables (usualmente incorporadas por referencia en el convenio arbitral escrito (o cláusula compromisoria)); (iii) el acta de misión; (iv) las normas imperativas y otras que resulten aplicables; y (v) cualesquiera otras reglas o directrices acordadas.

El convenio arbitral / cláusula compromisoria

46. Sujeto a los requerimientos de las leyes aplicables obligatorias, el tribunal deberá respetar cualquier acuerdo entre las partes respecto a la distribución de costos. Este acuerdo podrá ser parte de un convenio arbitral, cláusula compromisoria, acta de misión o en cualquier otra forma.

47. Las cláusulas arbitrales estándar propuestas por las principales instituciones arbitrales tienden a ser omisas en el tema de costos. Por ejemplo, la cláusula estándar de la CCI simplemente establece lo siguiente:

> Todas las controversias que deriven del presente contrato o que guarden relación con éste serán resueltas definitivamente de acuerdo con el Reglamento de Arbitraje de la Cámara de Comercio Internacional por uno o más árbitros nombrados conforme a este Reglamento.

48. Generalmente, a las partes no se les impide incluir en su acuerdo de arbitraje previsiones expresas sobre la distribución de costos.[14] El acuerdo de las partes está permitido por la mayoría de las leyes nacionales. Sin embargo, un acuerdo específico sobre costos en un acuerdo de arbitraje no debe contravenir ninguna disposición obligatoria de la *lex arbitri* o a cualquier otra norma imperativa. Por ejemplo, tanto la sección 60 de la Ley Inglesa de Arbitraje (*English Arbitration Act*) de 1996 como la sección 74(8) de la Ordenanza de Arbitraje de Hong Kong disponen que un acuerdo que requiera que una parte pague todo o parte de los costos del arbitraje en cualquier caso será válido solo si se hace después de que la controversia haya surgido.[15]

Reglas institucionales

49. Si las partes han incorporado las reglas de una institución arbitral en su acuerdo de arbitraje por remisión, el tribunal normalmente aplicará las reglas de la institución respecto de los costos. Como se menciona en la sección III anterior, aunque la mayoría de las reglas institucionales dejan al tribunal gran discreción para distribuir costos razonables, hay algunas diferencias sutiles e importantes entre algunas de ellas, especialmente respecto de las presunciones.

13 Ver Apéndice A.

14 Ver por ejemplo las Reglas Integrales de Arbitraje de JAMS, Regla 24(f), la cual señala lo siguiente: (énfasis añadido): "El Laudo del Árbitro podrá asignar cuotas de arbitraje y una compensación y gastos para el Árbitro, salvo que dicha asignación esté expresamente prohibida por el acuerdo entre las Partes. (Dicha prohibición no podrá limitar la facultad del Árbitro para asignar cuotas de arbitraje y una remuneración y gastos para el Árbitro conforme a la Regla 31(c))." La Regla 24(g) de las mismas Reglas dispone lo siguiente (énfasis añadido): "El Laudo del Árbitro podrá asignar honorarios y gastos de abogados e intereses (a la tasa y desde la fecha que el Árbitro considere adecuados) si está estipulado en el acuerdo de las Partes o está permitido por la ley correspondiente. Cuando el Árbitro esté autorizado para adjudicar honorarios de abogados y deba determinar el monto razonable de dichos honorarios, podría considerar si la falta de cooperación razonable de una Parte en el proceso de admisión de pruebas y/o el cumplimiento de las órdenes para la exhibición de pruebas del Árbitro ocasionaron el retraso del procedimiento o significaron costos adicionales para las demás Partes." http://www.jamsadr.com/rules-comprehensive-arbitration/#Regla 24 (NT: Estas son traducciones libres ya que no existe una versión en español).

15 Hay que tener en cuenta que tales restricciones no impiden necesariamente que las partes acuerden que la parte perdedora pagará los costos de la parte vencedora, en la forma de la disposición de JAMS anterior.

El acta de misión

50. Conforme al Reglamento de la CCI, el tribunal está obligado a redactar el acta de misión. En el acta de misión o, en su caso, al inicio del procedimiento el tribunal podrá emitir, o las partes podrán acordar ciertas directrices sobre costos. Cuando este sea el caso, el tribunal deberá tomar esas instrucciones en cuenta cuando decida sobre los costos.

El derecho aplicable

51. El tribunal deberá considerar cualquier norma imperativa, disposición o precedente sobre costos.[16] Es ampliamente aceptado que la ley aplicable a las decisiones sobre costos es la *lex arbitri*, aunque algunos autores han argumentado que es la ley que rige el contrato.[17]

52. Cuando apliquen el acuerdo de las partes sobre costos, los tribunales arbitrales también considerarán cualesquiera disposiciones aplicables obligatorias respecto a la distribución de costos, que usualmente (pero no necesariamente de forma exclusiva) se encuentran en la legislación arbitral aplicable de la *lex arbitri* (ley de la sede) y potencialmente en aquella del lugar de ejecución.[18]

53. Los tribunales (y las partes) podrán además tomar como guía otras disposiciones no vinculantes de la regulación del arbitraje en la *lex arbitri*. Por ejemplo, el Artículo 17G de la Ley Modelo sobre Arbitraje Comercial Internacional de la CNUDMI, en la que varias leyes nacionales arbitrales se basan,[19] expresamente establece que una parte que solicita medidas cautelares será responsable por los costos y daños causados por la medida si el tribunal determina ulteriormente que la medida no debió de haberse otorgado. En tal caso, podrán concederse costos en relación con la medida cautelar.

54. Como ejemplos adicionales, algunas leyes arbitrales nacionales expresamente le permiten a un tribunal arbitral conceder intereses sobre los costos;[20] ordenar la constitución de una garantía para el pago de los costos, incluyendo los relativos a las solicitudes de medidas cautelares;[21] o limitar el monto de costos recuperables en cualquier fase del procedimiento;[22] o autorizar a las partes a solicitar el auxilio judicial para tasar los costos.[23]

Reglas adicionales/ directrices

55. Las partes pueden acordar la aplicación de otras reglas o directrices como las Directrices de la IBA sobre Práctica de Prueba en el Arbitraje Internacional o las Directrices de la IBA sobre Representación de Parte en el Arbitraje Internacional. Estas reglas o directrices pueden contener disposiciones específicas sobre costos. Por ejemplo, el Artículo 9(7) de las Directrices de la IBA sobre Práctica de Prueba en el Arbitraje Internacional permite al tribunal conceder costos en detrimento de la parte que omite conducirse de buena fe en la práctica de la prueba.

Expectativas culturales

56. Las partes pueden tener expectativas tácitas respecto de los costos. Éstas pueden estar influenciadas por los orígenes de las partes. Dado que el arbitraje internacional generalmente involucra partes y árbitros de varias nacionalidades y diferentes tradiciones jurídicas y culturales, puede ser útil abordar las expectativas culturales en una etapa inicial del procedimiento (por ejemplo, en la primera conferencia sobre la conducción del caso) para asegurar un mayor entendimiento entre las partes y el tribunal.

b) El éxito y el fracaso relativo de las partes

57. Como se indica más arriba, algunas reglas arbitrales incluyendo aquellas de la CNUDMI, de la LCIA y de la CPA, contienen una presunción de que la parte vencedora tiene el derecho de recuperar los costos considerados razonables. Algunas leyes arbitrales nacionales establecen una presunción similar (que admite prueba en

16 En Francia, ha habido algunos casos judiciales en los que se ha determinado que se le deniega el acceso a la justicia a una parte insolvente si un árbitro se niega a admitir la demanda/ reconvención de esa parte únicamente porque no puede pagar su adelanto de los costos. Ver *LP* v. *Pirelli*, Corte de Apelación de París, 17 de nov. 2011; *Pirelli* v. *LP*, Corte de Casación, Civ. 1re, 28 de mar. 2013, no. 11-27.770; *Société Lola Fleurs* v. *Société Monceau Fleurs*, Corte de Apelación de París, 29 feb. 2013, no. 12/12953.

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

18 Ver por ejemplo Ley Inglesa de Arbitraje, s. 60; Ordenanza de Arbitraje de Hong Kong, s. 74(8).

19 Ver por ejemplo Ordenanza de Arbitraje de Hong Kong, Ley de Arbitraje Internacional de Singapur, Ley de Arbitraje de Nueva Zelanda, Ley Alemana de Arbitraje.

20 Ordenanza de Arbitraje de Hong Kong, s. 79; Ley de Arbitraje Internacional de Singapur, s. 20.

21 Ley de Arbitraje Internacional de Singapur, s. 12(1)(a); Ley de Arbitraje de Nueva Zelanda, Anexo I, s. 17I; Ley Alemana de Arbitraje, § 1041(1); Ley Española 60/2003 de Arbitraje, Art. 23(1).

22 Ordenanza de Arbitraje de Hong Kong, s. 57; Ley Inglesa de Arbitraje, s. 65.

23 Ordenanza de Arbitraje de Hong Kong, s. 75; Ley de Arbitraje Internacional de Singapur, s. 21.

contrario).[24] Esas reglas y disposiciones dejan varias cuestiones sin tratar, incluyendo si y bajo qué circunstancias puede desplazarse la presunción y en qué importe (o proporción) son recuperables tales costos.

58. Otras reglas, incluyendo el Reglamento de la CCI de 2012, no contienen una presunción sobre costos, pero en su lugar confieren al tribunal discreción para distribuir los costos, incluyendo costos legales y de otra índole considerados razonables, a cualquiera de las partes. El Artículo 37(4) del Reglamento de la CCI de 2012[25] prevé lo siguiente (énfasis añadido):

> El laudo final fijará los costos del arbitraje y decidirá cuál de las partes debe pagarlos o en qué proporción deben repartirse entre ellas.

El Artículo 37(5) además establece que, al tomar decisiones sobre costos, los árbitros podrán tomar en cuenta tales circunstancias según las consideren relevantes, incluyendo la medida en la que cada parte se haya conducido o no en el arbitraje de forma expedita y eficiente.

59. Incluso cuando las reglas o leyes aplicables no den lugar a la presunción de que la parte exitosa tiene derecho a recuperar los costos considerados razonables, los laudos muestran que, al decidir sobre los costos, los tribunales toman en cuenta frecuentemente el éxito o fracaso relativo de las partes. Sin embargo, determinar el éxito relativo no es necesariamente sencillo, especialmente en disputas complejas que involucran múltiples causas de pedir, reconvenciones, compensaciones, contratos múltiples y multiplicidad de partes. En la medida en que se acumulan las reclamaciones, se revocan, se modifican o se consolidan durante el transcurso del procedimiento, puede volverse muy difícil establecer qué fue lo originalmente reclamado respecto de lo que fue finalmente concedido en el laudo.

60. El método general es valorar el grado y alcance del éxito y, cuando sea relevante, la duración del procedimiento. Una parte vencedora podrá prevalecer en algunas, pero no en todas las reclamaciones planteadas, y/o recuperar algunos, pero no todos los daños solicitados. En los casos de recuperación de menos de la totalidad de lo reclamado, los árbitros han adoptado diferentes métodos.

61. Los árbitros podrán tomar en cuenta el éxito relativo de la parte vencedora: (i) asumiendo que un demandante o demandado tiene éxito en cuanto a su reclamación principal o en el resultado, y en consecuencia, tiene derecho a todos los gastos considerados razonables; (ii) distribuyendo los costos reclamación por reclamación o caso por caso de acuerdo con el éxito o fracaso relativo; o (iii) distribuyendo el éxito contra el monto de daños originalmente reclamado o el valor de la propiedad en disputa. Otros métodos pueden utilizarse también (y en todos los casos puede existir un estudio adicional basado en la conducta). Cualquiera que sea el método utilizado, es importante tomar en cuenta las diferencias en la complejidad e importancia de las diferentes cuestiones.

62. Cualquier distribución de costos puede aplicar algunos o todos los factores indicados anteriormente, así como la mala fe o la conducta inapropiada de las partes como se trata más adelante en los párrafos 78 a 85. Los costos concedidos deberán ser, en todo caso, razonables.

c) La razonabilidad de los costos legales y otros costos incurridos por las partes

63. Como se indicó en el párrafo 15 anterior, la razonabilidad es un estándar aplicado a la distribución de costos conforme a la mayoría de las reglas arbitrales. Esto es así incluso cuando hay una presunción de que los costos serán otorgados a la parte vencedora, en la medida en que la presunción se sujeta (como mínimo) a la razonabilidad de los costos legales y otros costos incurridos por las partes. Sin embargo, no hay una definición de razonabilidad en las reglas arbitrales institucionales o en las leyes arbitrales

24 Por ejemplo Ley Inglesa de Arbitraje, s. 61(2); Código Civil y Comercial de la Nación Argentina, Art. 68 (referencia cruzada del Art. 772); Ley de Arbitraje Internacional Turca (Ley No. 4686 del 21 de junio de 2001), Art. 16(D).

25 Ver también las Reglas de la HKIAC, ICDR, SCC y SIAC, las cuales simplemente señalan la autoridad del tribunal de emitir un laudo que distribuya los costos, pero que no incluya ninguna presunción sobre los costos.

nacionales.[26] Un enfoque de sentido común es valorar si los costos son razonables y proporcionales al monto en disputa o al valor de cualquier bien en disputa y/o si los costos se han causado proporcional y razonablemente.[27]

Costos razonables/proporcionales al valor monetario/bienes en disputa

64. Los tribunales pueden ser proactivos al evaluar la razonabilidad del monto de los costos reclamados en una disputa en su conjunto y conceder solo aquellos costos que consideren razonables y proporcionados. Saber que el tribunal puede hacerlo puede alentar a las partes a adoptar una actitud responsable al tomar decisiones sobre los gastos legales y a evitar que aumenten innecesariamente los costos. Si bien se reconoce que la parte ganadora tiene derecho a formular o defender sus reclamaciones de la manera que considere necesaria y apropiada, y podría decirse que la parte y sus representantes están en mejores condiciones para evaluar qué recursos se requieren para ganar el caso, dependerá de la decisión del tribunal si una parte recupera o no la totalidad de sus costos.

65. Para determinar si los costos solicitados son razonables en cuanto al importe, el tribunal puede tomar en cuenta varios factores, según las circunstancias del caso, que incluyen, entre otros, los siguientes:

(i) la razonabilidad de las tarifas y el número y nivel de los perceptores de honorarios al evaluar si el monto del trabajo cobrado fue razonable;

(ii) la razonabilidad del nivel de conocimiento especializado y la responsabilidad derivada de la disputa, incluyendo la cualificación legal de los representantes, la participación de equipos de especialistas o alguno de sus miembros y el nivel de experiencia;

(iii) la razonabilidad de la cantidad de tiempo dedicado, en varios niveles y tarifas, en las diversas fases del arbitraje; y

(iv) cualquier disparidad entre los costos incurridos por las partes como un indicador general de razonabilidad en lugar de un factor considerado en sí mismo.

66. En lo que respecta a la proporcionalidad, el monto de las reclamaciones monetarias y el valor de cualquier bien en disputa suele ser elevado. En las reclamaciones de arbitraje internacional, el importe de la reclamación puede oscilar entre menos de USD 100.000 a miles de millones de dólares. Ese amplio rango, junto con la necesidad de garantizar que el arbitraje siga siendo eficiente en todos los casos, significa que es probable que la proporcionalidad sea un factor a considerar. Al evaluar la razonabilidad del monto de los costos incurridos, los tribunales podrían tener en cuenta la cantidad en disputa o el valor de cualquiera de los bienes que sea objeto de la disputa.

67. A este respecto, debe tenerse en cuenta que el arbitraje está destinado a satisfacer las necesidades de todos los usuarios y una amplia gama de casos y disputas, incluidos aquellos de baja cuantía. Sin embargo, incluso los casos pequeños pueden dar lugar a costos significativos y la parte vencedora no debe ser penalizada por haber iniciado un procedimiento para recuperar las pérdidas causadas por la conducta ilícita de la contraparte. Asimismo, hay casos en los que la cantidad en disputa parece ser insignificante, pero están en cuestión principios muy importantes que afectan la relación de las partes u otros casos relacionados dependen del resultado del caso concreto (posiblemente sin el conocimiento del tribunal).

---

26 Ordenanza de Arbitraje de Hong Kong, s. 74(7) (énfasis añadido): "El tribunal arbitral (a) solo debe permitir costos que sean razonables teniendo en cuenta todas las circunstancias; y (b) a menos que las partes acuerden lo contrario, puede permitir los costos incurridos en la preparación del procedimiento arbitral antes del inicio del arbitraje". La Ley Austriaca de Arbitraje, § 609(1), señala (énfasis añadido): "El tribunal arbitral, en el ejercicio de su discreción, tomará en cuenta las circunstancias del caso, en particular el resultado del procedimiento. La obligación de reembolsar puede incluir alguno y todos los costos razonables apropiados para presentar la demanda o la defensa". Las Reglas de Arbitraje de la CIETAC de 2012, Art. 50(2), enlista algunos factores que pueden ser tomados en cuenta por el tribunal arbitral para evaluar la razonabilidad (énfasis añadido): "El tribunal arbitral tiene la facultad de decidir en el laudo arbitral, teniendo en cuenta las circunstancias del caso, que la parte perdedora indemnizará a la parte ganadora por los gastos razonablemente incurridos por esta en la tramitación del caso. Al decidir si los gastos incurridos por la parte ganadora en la tramitación del caso son o no razonables, el tribunal arbitral tomará en consideración factores específicos tales como el resultado y la complejidad del caso, la carga de trabajo de la parte ganadora y/o su(s) representante(s) , y el monto en disputa, etc".

27 Este enfoque ha sido aprobado en algunas jurisdicciones de derecho común, incluyendo en una decisión de la Corte Superior de Singapur, *VV and Another* v. *VW*, [2008] SGHC 11, [2008] 2 SLR 929, la cual se refiere también a Reglas de Procedimiento Civil Inglés similares. El Tribunal Federal Suizo, en una decisión del 9 de enero de 2006, 4P.280/2005, especificó que solo podría intervenir respecto de la decisión de un árbitro sobre costos excepcionalmente si los costos adjudicados fueran totalmente desproporcionados respecto a los costos necesarios de defensa. La Ley Alemana de Arbitraje también alude a conceptos de necesidad y proporcionalidad en § 1057(1), la cual señala (énfasis añadido): "A menos que las partes acuerden lo contrario, el tribunal arbitral asignará, mediante un laudo arbitral, los costos del arbitraje entre las partes, incluidos los incurridos por las partes necesarios para el correcto ejercicio de su reclamación o defensa. Lo hará a su discreción y tomará en consideración las circunstancias del caso, en particular el resultado del procedimiento".

Costos incurridos de forma proporcionada y razonable

68. Además de considerar si el monto de los costos es razonable y proporcional a la cuantía en disputa, los tribunales también podrían tomar en cuenta, en términos más generales, si los costos fueron proporcional y razonablemente incurridos. Por ejemplo, un tribunal nacional que revisa una decisión sobre costos en un arbitraje observó lo siguiente (énfasis añadido):[28]

> [e]l principio de proporcionalidad no se limitaba a una relación entre el monto involucrado en la disputa y el monto de los costos adjudicados. El principio significaba realmente que cuando se tenían que evaluar los costos legales, todas las circunstancias de los procedimientos legales en cuestión tenían que examinarse, y no solo el monto de la disputa, aunque era un factor importante, especialmente al evaluar si la cantidad de trabajo realizado fue razonable.

69. De conformidad con este método, los tribunales podrían tomar en cuenta la proporcionalidad entre el monto de los costos incurridos y todas las circunstancias del procedimiento. Sin embargo, hacerlo requiere tiempo y en sí mismo aumentaría los costos, por lo que se debe utilizar un método equilibrado.

70. Al evaluar si la cantidad de trabajo realizado es proporcionada y razonable, los tribunales pueden, y lo hacen a menudo, tomar en cuenta varios factores que pueden ser relevantes para el caso, incluyendo, entre otros:

(i) la importancia general de la disputa y las cuestiones subyacentes a la disputa para todas las partes;

(ii) la complejidad general del asunto;

(iii) la cuantificación precisa del monto en disputa (tanto en las reclamaciones como en las reconvenciones);

(iv) la existencia de reclamaciones o reconvenciones innecesarias y sin fundamento;

(v) la duración y fases del procedimiento y, en particular, si las partes han prolongado innecesariamente el procedimiento y/o aumentado su costo (por ejemplo, como resultado de solicitudes repetidas de producción de documentos, otras solicitudes procesales, pasos innecesarios en el procedimiento);

(vi) la oportuna retirada de cualquier reclamación sin fundamento;

(vii) la manera en que las partes y sus representantes se han ocupado de la producción de documentos, tanto al solicitar la presentación de documentos como al responder a tales solicitudes;

(viii) el ámbito, la relevancia y el alcance de los elementos fácticos en las declaraciones escritas de testigos y testimonios orales, incluyendo el contrainterrogatorio;

(ix) el ámbito, la relevancia y el alcance de las pruebas periciales en los informes escritos de peritos e interrogatorios, incluyendo el contrainterrogatorio (por ejemplo, número de peritos, extensión de los informes, relevancia del material);

(x) la duración y la conducción de las audiencias orales, incluyendo, entre otras, las audiencias de prueba;

(xi) las aproximaciones de las partes sobre la bifurcación y la determinación de cuestiones preliminares, incluyendo el resultado de cualquier procedimiento bifurcado o preliminar; y

(xii) cuando las partes hayan acordado permitir que el tribunal tome en cuenta las conversaciones para alcanzar un acuerdo después de que hayan llegado a una conclusión sobre el fondo, los esfuerzos de las partes para resolver su disputa podrán tomarse en cuenta, en caso de que dicha información esté adecuadamente al alcance del tribunal.

Costos legales internos y otros

71. Aunque se acepta ampliamente que los costos de las partes con respecto a asesores jurídicos externos, testigos y peritos son recuperables, la mayoría de las reglas de arbitraje no mencionan los costos legales internos, de gestión y de otro tipo, dejando la cuestión de su recuperación a discreción del tribunal.[29]

72. La decisión de recurrir al arbitraje depende cada vez más de un análisis exhaustivo de coste beneficio llevado a cabo por las empresas con base en el asesoramiento inicial de los abogados

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

29 Pero ver Reglas de Arbitraje de París, Art. 7.6 (énfasis añadido): "El Tribunal Arbitral puede, en cualquier laudo, asignar la totalidad o parte de los costos, a su discreción. Los costos pueden incluir los honorarios y los gastos de los árbitros (incluyendo al Árbitro Provisional), el costo de la representación legal, de peritos y consultores (incluyendo los testigos que actúen como consultores). Los costos también pueden incluir tiempo y gastos de gestión. Al tomar decisiones en cuanto a costos, el Tribunal Arbitral puede tomar en cuenta las circunstancias que considere relevantes, incluyendo la medida en que cada parte ha llevado a cabo el arbitraje de manera expedita y eficiente en materia de costos".

internos y otros especialistas internos. Por lo tanto, los costos internos pueden representar una gran parte del costo total de una de las partes cuando los abogados internos, gerentes, expertos y demás personal adopten un rol proactivo antes y durante el arbitraje. Deben estudiar el caso para poder tomar decisiones informadas y proporcionar instrucciones, así como para reunir material probatorio. A veces las empresas nombran a un miembro de su plantilla específicamente para administrar un caso, posiblemente incluso a tiempo completo. Desde un punto de vista gerencial, el tiempo que el personal de la empresa dedica al arbitraje no puede utilizarse para las actividades comerciales habituales y, por lo tanto, tiene un costo.

73. En reconocimiento de lo anterior, los tribunales pueden considerar la recuperación de los costos asociados con: (i) el tiempo y los desembolsos de los ejecutivos; y (ii) costos administrativos y gastos adicionales para: investigación fáctica, asesoramiento legal interno, expertos técnicos externos, procesamiento del arbitraje y empleados que comparecen como testigos.

74. No existe un principio que prohíba el cobro de costos internos incurridos en conexión directa con el arbitraje y algunos tribunales han otorgado tales costos en la medida en que fueran necesarios, no se superpusieran injustificadamente con los honorarios del abogado externo, estuvieran especificados con suficiente detalle como para ser distinguidos de los gastos ordinarios de personal, y su monto fuera razonable.

75. Dado que pocas partes registran detalladamente el tiempo invertido y los costos incurridos internamente para un arbitraje, los tribunales pueden considerar útil tratar al inicio del procedimiento la posible recuperación de los costos internos.

d) Prueba de los costos

76. El tribunal puede conceder los costos considerados razonables en que incurra, pague o abone la parte que los reclama. Por lo tanto, el tribunal debe asegurarse, a través de una verificación adecuada, de la realidad de esos costos.

77. Los tribunales pueden preferir evitar escritos largos y argumentos en los que las partes proporcionan un desglose detallado de los costos, pero, como mínimo buscarán pruebas suficientes de que realmente se haya incurrido en el monto de los costos reclamados. Las copias de las facturas rara vez serán apropiadas si muestran detalles del trabajo realizado, ya que a menudo contienen información confidencial, que no guarda relación con el caso en sí y que también puede estar sujeta a privilegios legales de confidencialidad. Dichos costos deben estar debidamente especificados de conformidad con el estándar de prueba aplicable para las reclamaciones sustantivas en el procedimiento. Cualquier incertidumbre o posible dificultad creada por las diferentes expectativas de las partes y/o del tribunal con respecto al nivel requerido de especificación se puede evitar si se trata al principio del procedimiento.[30]

e) Conducta inadecuada/mala fe de las partes

78. Como se mencionó anteriormente, las reglas de varias instituciones y las directrices emitidas por otros órganos establecen que el tribunal puede tomar en consideración la conducta de las partes (y la de sus representantes) al distribuir razonablemente los costos a favor de cualquiera de las partes. Algunas leyes nacionales de arbitraje contienen disposiciones similares.[31] El artículo 37(5) de las Reglas de la CCI de 2012, por ejemplo, faculta a un tribunal, al tomar decisiones sobre costos, a considerar si una parte se condujo de manera expedita y eficiente. El amplio tenor del Artículo 37(5) permite que la conducta de todas las partes se evalúe en el curso del procedimiento, y en algunos casos incluso antes del procedimiento, con independencia de si dicha conducta ha causado un retraso o ha incrementado los costos del arbitraje de otra manera. Este es un ejercicio diferente al de examinar el éxito relativo o fracaso de las partes en el arbitraje, de ser relevante, y la razonabilidad y especificación de cualquiera de los costos reclamados. Por ejemplo, está enteramente dentro de la discreción del tribunal determinar si la conducta inadecuada o de mala fe de una parte es el único factor relevante en su decisión sobre costos. Algunos aspectos de la conducta de las

30 Pocos tribunales desearán involucrarse en el gravamen de los costos como los tribunales ingleses, donde se analiza el costo de cada trabajo, junto con la antigüedad del abogado involucrado y las tarifas cobradas. También puede generar costos adicionales e innecesarios, y puede consumir mucho tiempo.

31 Por ejemplo, la Ley de Arbitraje Brasileña, Art. 27 (énfasis añadido): "El laudo arbitral debe decidir sobre la responsabilidad de las partes en cuanto a los costos y gastos del arbitraje, así como cualquier cantidad resultante de la mala fe en el litigio, como sea el caso, con el debido respeto para las estipulaciones en el acuerdo de arbitraje, si es que las hay".

partes que el tribunal puede tomar en consideración al distribuir los costos se abordan a continuación.

Conducta inadecuada en etapas procesales

79. La conducta procesal que se toma en cuenta al distribuir los costos entre las partes puede incluir, entre otros, las siguientes:

(i) Conducta pre-arbitral de las partes, antes del comienzo del procedimiento arbitral. En particular, los árbitros pueden considerar la conducta inadecuada de una de las partes en las negociaciones que den lugar al procedimiento, incluyendo, entre otros, los intentos de evitar el arbitraje, el comportamiento amenazante, los procedimientos judiciales paralelos en violación de un acuerdo de arbitraje, la interferencia que afecte los intereses en el negocio de la contraparte y/o campañas de prensa injustas o perjudiciales. Aunque es poco común, los costos derivados de la conducta pre-arbitral pueden estar expresamente previstos en la lex arbitri.[32]

(ii) Tácticas de guerrilla en aquellas raras ocasiones en que las partes intentan deliberadamente interferir en la conducción del procedimiento a fin de que se emita un laudo que no se pueda ejecutar o afectar de otro modo la capacidad del tribunal para resolver finalmente la controversia entre las partes.

(iii) Conflictos posteriores a la designación del tribunal destinados a desestabilizar al tribunal y al arbitraje. Estos resultan, por ejemplo, de nombramientos de abogados en una etapa tardía del procedimiento que genera un conflicto de intereses para un árbitro. El árbitro en cuestión puede verse obligado a renunciar, ya que, de lo contrario, la ejecutoriedad del laudo podría verse comprometida.[33] El tribunal puede tener en cuenta cualquier táctica desplegada por una de las partes para crear dicho conflicto y cualquier costo derivado de dicha conducta.

(iv) Recusaciones repetidas y sin éxito, manifiestamente infundadas, contra el nombramiento de un árbitro, la jurisdicción o la autoridad del tribunal.[34]

(v) Intervención judicial innecesaria derivada de que las partes inicien un litigio paralelo incumpliendo el acuerdo de arbitraje, en un intento visible de afectar el proceso de arbitraje.[35] Aunque la mayoría de las reglas de arbitraje y leyes nacionales permiten el apoyo judicial necesario y apropiado para el arbitraje en la sede o el lugar de ejecución, lo que es acorde con la Convención de Nueva York, el tribunal puede considerar ciertos procedimientos como perjudiciales para el arbitraje y puede tomar eso en cuenta al decidir sobre los costos.

(vi) El debilitamiento deliberado del proceso arbitral mediante, por ejemplo, comunicaciones ex parte con árbitros que dan lugar a un conflicto de intereses, obligando al árbitro a renunciar o poniendo en peligro la ejecutabilidad del laudo.[36]

Conducta inadecuada en la producción de documentos

80. Como observación preliminar y tal como lo dejó claro la Comisión en su informe *Técnicas para gestionar la producción de documentos electrónicos cuando se permite o se requiere en arbitraje internacional*, no existe el deber de divulgar documentos de forma automática, ni el derecho de solicitar u obtener documentos (incluyendo, sin limitación, la producción de documentos electrónicos) en el arbitraje internacional. El informe continúa afirmando que las solicitudes de producción de documentos, en la medida en que se consideren necesarias y apropiadas en cualquier arbitraje, deben seguir siendo limitadas, adaptadas a las circunstancias específicas del caso y sujetas a los principios

32 Ordenanza de Arbitraje de Hong Kong, s. 74(7) (énfasis añadido): 'El tribunal arbitral (a) debe únicamente permitir costos que son razonables tomando en cuenta todas las circunstancias; y (b) a menos de que las partes hayan acordado otra cosa, pueden otorgar costos incurridos en la preparación de los procedimientos arbitrales antes del inicio del arbitraje".

33 En un esfuerzo para aliviar las preocupaciones causadas por la ocurrencia arbitraria de dicho escenario, algunas instituciones arbitrales han facultado expresamente al tribunal arbitral para retener la aprobación del cambio de representante legal, y algunos tribunales incluyen algunas disposiciones en el acta de misión o en los términos de la designación (por ejemplo, Reglamento de LCIA (2014), Art. 18.4; Directrices de la IBA sobre Representación de Parte en el Arbitraje Internacional (2013), Directrices 4 a 6).

34 En un esfuerzo por mitigar las preocupaciones que surgen del aumento de recusaciones sin mérito, algunas instituciones arbitrales han prohibido expresamente dicha conducta y han establecido sanciones por incumplimiento, incluso a través de los costos. (por ejemplo Reglamento de LCIA (2014), Anexo, para. 2).

35 La Convención de Nueva York estipula la ejecutabilidad de los acuerdos de arbitraje así como los laudos y es fundamental para el enfoque favorable al arbitraje adoptado por la mayoría de los tribunales estatales contratantes.

36 En un esfuerzo por mitigar las preocupaciones que surgen del contacto unilateral inapropiado con un árbitro relacionado con el arbitraje o la disputa de las partes, algunas instituciones arbitrales y otras organizaciones profesionales han publicado reglamentos o directrices para intentar prohibir tal conducta o dirigirla a un mejor alcance (por ejemplo, Reglamento de LCIA (2014), Anexo, párrafo 6, Directrices de la IBA sobre Representación de Parte en el Arbitraje Internacional (2013), Directrices 7 y 8). Este tipo de conducta también puede caer dentro del Artículo 35 (7) del Reglamento de CCI.

generales de especificidad, relevancia, materialidad y proporcionalidad aplicables a la producción de documentos.[37]

81. En general, la utilización de pruebas documentales en el arbitraje internacional debe ser eficiente, económica y justa. Al distribuir los costos, un tribunal puede tomar en cuenta en qué medida una parte ha fallado en conducirse de manera eficiente, económica o justa, o ha participado inadecuadamente o de mala fe en la producción de documentos.

82. La conducta inadecuada que surge de la producción de documentos puede incluir, sin ánimo de exhaustividad, las siguientes:

(i) conducta deliberadamente abusiva o inadecuada en la forma y/o manera en la cual se solicitan los documentos o se responde a las solicitudes de documentos razonables y oportunas de la otra parte;[38]

(ii) incumplir deliberada e indebidamente las instrucciones relativas a las solicitudes de producción de documentos, destruir o no conservar los documentos que se han solicitado debidamente o que de otro modo serían admisibles y pertinentes. Aunque en el arbitraje internacional no existe un deber automático de preservar pruebas relevantes, las partes y los representantes de las partes deben aun así abstenerse de frustrar intencionadamente la divulgación de pruebas relevantes y materiales mediante la destrucción de información;

(iii) falsificación deliberada de pruebas documentales.

37 § 5.31: 'Los tribunales deberían evitar importar de otros sistemas nociones con respecto a la preservación de pruebas que puedan generar inconvenientes o gastos innecesarios. Si bien los esfuerzos intencionales de una parte para frustrar la divulgación de pruebas relevantes y materiales mediante la destrucción o alteración de un documento electrónico pueden justificar sanciones apropiadas (como una inferencia negativa contemplada en el Artículo 9(5) de las Directrices de la IBA sobre Práctica de Prueba), destrucción inadvertida o alteración de un documento electrónico como resultado de la operación rutinaria de la red informática de esa parte no refleja comúnmente ninguna conducta culpable ni garantiza ninguna de tales sanciones. Además, aunque una parte pueda desear, para su propio beneficio, tomar medidas para preservar las pruebas pertinentes, no tiene la obligación automática de hacerlo. Tampoco debe un tribunal considerar la imposición de tal deber sin una razón específica para hacerlo, como las alegaciones creíbles de fraude, falsificación o manipulación deliberada de pruebas.'

38 En un esfuerzo por mitigar las preocupaciones que surgen de solicitudes abusivas para producir documentos o respuestas abusivas a solicitudes, la IBA publicó directrices para partes y tribunales sobre el mejor enfoque (ver Directrices de la IBA sobre Representación de Parte en Arbitraje Internacional, Directrices 12-17). Este tipo de conducta también puede caer dentro del Art. 35(7) del Reglamento de CCI (así como el Art. 9.7 de las Directrices de la IBA sobre Práctica de Prueba en el Arbitraje Internacional).

Pruebas falsas de testigos o de peritos

83. Al distribuir costos, un tribunal puede tomar en cuenta el hecho de que una parte haya presentado pruebas testimoniales falsas ante el tribunal y/o que sus representantes hayan adquirido con conocimiento o ayudado en la preparación de las pruebas falsas. La conducta de los testigos y los peritos también puede estar sujeta a la *lex arbitri* y ser punible.[39] La conducta de los representantes legales puede igualmente estar sujeta a sanciones por parte de las organizaciones profesionales a las que pertenecen.[40]

Presentaciones falsas al tribunal

84. Al distribuir costos, el tribunal puede tomar en cuenta cualquier presentación falsa realizada para inducir a error al tribunal o conculcar la integridad del proceso.[41] Tal conducta por parte de los representantes legales puede estar igualmente sujeta a sanción por parte de organizaciones profesionales.[42]

Agresión/falta de cortesía profesional/ alegaciones de fraude infundadas

85. Otros factores que podrían influir en la distribución de costos incluyen la conducta agresiva de una de las partes o de sus representantes, o la descortesía profesional. Si se han formulado alegaciones de fraude infundadas (las cuales algunos organismos profesionales

39 Por ejemplo, ver Ley Inglesa de Perjurio de 1911; Ley de China de 2010 sobre medidas de castigo por los actos ilegales de abogados y despachos de abogados.

40 En un esfuerzo por mitigar las preocupaciones que surgen del testimonio falso de forma intencional, algunas instituciones de arbitraje y otras organizaciones profesionales han publicado directrices o normas en un esfuerzo por dirigir al tribunal hacia el mejor enfoque (por ejemplo, Reglamento de LCIA (2014), Anexo, párrafo 4, Directrices de la IBA sobre Representación de Parte en el Arbitraje Internacional (2013), Directrices 9-11). Este tipo de conducta también puede caer dentro del Art. 35 (7) del Reglamento de CCI (así como el Art. 9.7 de las Reglas de la IBA sobre Práctica de Prueba en el Arbitraje Internacional).

41 Los abogados generalmente se rigen por códigos profesionales o reglas de conducta y pueden estar sujetos a sanciones por parte de sus organizaciones profesionales por cualquier incumplimiento que surja de dicha conducta. Sin embargo, los abogados generalmente provienen de diferentes jurisdicciones con diferentes reglas éticas, y las reglas éticas de una jurisdicción particular están orientadas a la práctica en esa jurisdicción y no necesariamente a la práctica de arbitraje internacional. Algunas instituciones de arbitraje y otras organizaciones profesionales han publicado reglas o directrices en un esfuerzo por prohibir tal conducta u ofrecer instrucciones sobre el mejor enfoque (por ejemplo, Reglamento de LCIA (2014), Anexo, párrafo 3, Directrices de la IBA sobre Representación de Parte en el Arbitraje Internacional (2013), Directrices 9-11).

42 Ver también el Código de Conducta del *Chartered Institute of Arbitrators*.

desincentivan activamente), el tribunal también puede tomarlas en consideración en su decisión sobre los costos.

VI. Financiación de los costos en el arbitraje y primas de éxito o estímulo

86. El fundamento de la distribución de costos a una parte vencedora es que dicha parte no debe quedarse sin recursos al buscar la atribución o reivindicación de sus derechos legales.[43] Por lo tanto, la recuperación de los costos por parte de la parte vencedora presupone que en última instancia deben ser incurridos por esa parte.

a) Costos financiados por terceros

87. Cuando un demandante vencedor o demandante reconvencional ha sido financiado por un tercero, al tercero financiador [44] generalmente se le reembolsan (como mínimo) los costos del arbitraje correspondientes a la suma otorgada. Por lo tanto, la parte vencedora en última instancia se quedará sin dinero tras reembolsar tales costos al tercero financiador y, por lo tanto, puede tener derecho a recuperar sus costos razonables de la parte vencida, incluyendo lo que debe pagar al tercero financiador. El tribunal deberá determinar si estos costos fueron realmente incurridos y pagados o pagaderos por la parte que busca recuperarlos, y si fueron razonables. El hecho de que la parte exitosa deba a su vez reembolsar esos costos a un tercero financiador es, en sí mismo, en gran medida irrelevante.

88. Debe tenerse en cuenta que el tercero financiador no es parte en el arbitraje y, en la mayoría de los casos, ni siquiera se conoce de su existencia. Cuando una parte financiada no tiene éxito, su propia falta de solvencia puede hacer que sea incapaz de cumplir con cualquier laudo sobre costos en su contra. En tal situación, el tribunal generalmente no tiene jurisdicción para ordenar el pago de los costos por parte del tercero financiador, ya que no es parte en el procedimiento.

89. Cuando un tribunal tiene razones para creer que existe financiación por terceros y tal financiación probablemente impacte en la capacidad de la parte no financiada para recuperar los costos si tiene éxito, el tribunal podría considerar ordenar la divulgación de dicha información de financiación según resulte necesario para verificar que el proceso siga siendo efectivo y justo para ambas partes.

90. Si hay pruebas sobre un acuerdo de financiación que pueda afectar a la capacidad de la parte no financiada para recuperar los costos, esa parte puede decidir solicitar medidas cautelares o provisionales anticipadamente en el procedimiento para salvaguardar su posición respecto de los costos, incluyendo, sin limitación, buscar protecciones para esos costos o alguna forma de garantía o seguro. Tales medidas pueden ser apropiadas para proteger a la parte no financiada y situar a ambas partes en igualdad con respecto a cualquier recuperación de los costos.

91. Al considerar una solicitud de medidas provisionales o cautelares como medio para proteger la capacidad de la parte no financiada para recuperar los costos, un tribunal también puede considerar la posibilidad de responsabilizar al solicitante de los costos y daños causados por las medidas ordenadas si la parte financiada prevaleciera finalmente. Esto estaría en consonancia con el Artículo 17G de la Ley Modelo de la CNUDMI sobre Arbitraje Comercial Internacional.

b) Primas de éxito o estímulo

92. En realidad, los acuerdos de financiación rara vez se limitan únicamente a los costos del arbitraje. Por lo general, el tercero financiador requerirá el pago de primas de éxito o estímulo a cambio de aceptar el riesgo de financiar la reclamación, que en puridad es el costo del capital. Como un tribunal solo necesita asegurarse de que se incurrió en un costo específico para proseguir con el arbitraje, se pagó o es pagadero,

43 En Inglaterra, esta razón histórica para distribuir los costos se estableció en *Harold v. Smith* (1860), 5 H. y N. 381, 385, en donde Bramwell B. dijo: "Los costos entre parte y parte están otorgados por la ley como una indemnización a la persona que tiene derecho a ellos; no se les impone como un castigo a la parte que los paga, ni se les da como una bonificación a la parte que los recibe". Del mismo modo, en Francia, el Art. 700 del Código de Procedimiento Civil faculta al juez a ordenar a una parte que no ha tenido éxito a pagar los costos legales para compensar a la otra parte, pero con respecto a "la equidad y la situación financiera de la parte que no ha tenido éxito". Esta disposición busca garantizar el derecho fundamental de cada persona a tener acceso a la justicia en lugar de castigar a la parte perdedora. En consecuencia, la Corte de Casación francesa ha declarado que no es necesario demostrar la existencia de un recurso dilatorio o abusivo ni una responsabilidad por parte de la parte condenada a pagar (2ª Sala Civil, 23 de junio de 1982, recurso de casación nº 7917094).

44 Un tercero financiador es una parte independiente que proporciona una porción o la totalidad de la financiación para los costos de una parte del procedimiento (generalmente el demandante), comúnmente a cambio de primas de éxito o estímulo en caso de resultar vencedora.

y fue razonable, es factible que en ciertas circunstancias el costo del capital, por ejemplo, el préstamo bancario otorgado específicamente para los costos del arbitraje o la pérdida de uso de los fondos, pueda ser recuperable.

93. El requisito de que el costo sea razonable es un control importante para proteger a las partes de un trato injusto o desigual con respecto a los costos y a las ganancias inadecuadas que puedan percibir los terceros financiadores. En ocasiones, los tribunales han tratado esta cuestión al evaluar la razonabilidad de los costos en general, incluyendo a veces las primas de éxito en la distribución de costos, dependiendo de su visión del caso en conjunto.

VII. Negociaciones fallidas para llegar a un acuerdo: costos asociados y ofertas no aceptadas

94. Como cuestión general, las negociaciones para llegar a un acuerdo pueden dar lugar a importantes ahorros en cuanto a tiempo y costo y eliminar la incertidumbre del resultado final. Si se llega a un acuerdo, el procedimiento arbitral puede darse por terminado y los términos del acuerdo pueden ser implementados (incluyendo cualquier acuerdo relacionado con los costos). Si no se llega a un acuerdo, el arbitraje continuará.

95. Las negociaciones para llegar a un acuerdo suelen llevarse a cabo fuera del ámbito de los árbitros, ya que se realizan en privado entre las partes, quienes generalmente aceptan que sean confidenciales y no se den a conocer al tribunal arbitral (o judicial). Con ese fin, las discusiones y ofertas por escrito para llegar a un acuerdo a menudo incluirán referencias como "sin perjuicio de" [45] o "para fines de negociación para llegar a un acuerdo únicamente y no para presentarse ante una corte o tribunal".[46]

96. Los diferentes sistemas nacionales protegen la confidencialidad de las negociaciones para llegar a acuerdos en litigios (y algunas veces en el arbitraje) de diferentes maneras. En algunos sistemas judiciales nacionales, una oferta formal para llegar a un acuerdo hecha de conformidad con el procedimiento adecuado puede afectar la forma en que se distribuyen los costos del procedimiento. Específicamente, si la oferta no aceptada es igual o superior a la suma del fallo, algunos tribunales nacionales no permitirán la recuperación de la parte que rechazó la oferta de ninguno de los costos incurridos después de la fecha de la oferta.[47] En algunos sistemas jurídicos, una oferta para llegar a un acuerdo es confidencial entre los abogados y, por lo tanto, si no se acepta, no se puede remitir a otra parte.[48] En todos los casos, las partes deben tener cuidado de no presentar ofertas para llegar a un acuerdo a la atención de los árbitros antes de la determinación final sobre el fondo, a fin de evitar predisposiciones (generalmente en contra de la parte oferente).[49]

97. La Secretaría de la CCI (y sin duda otras instituciones arbitrales) puede ayudar a las partes a presentar la información relacionada con negociaciones fallidas y/u ofertas no aceptadas para llegar a acuerdos ante los árbitros a tiempo para el laudo final en casos apropiados, sin perjudicar a la parte oferente. Por ejemplo, la oferta puede ser presentada en un sobre sellado y depositada o bien ante los árbitros, o preferiblemente ante la Secretaría de la CCI, para que se mantenga hasta que los árbitros hayan decidido sobre el fondo de la disputa. Una vez que se llega a la decisión sobre el fondo y los árbitros están listos para proceder a la distribución de los costos, la Secretaría revelará la oferta sellada a los árbitros. La razón para detener la oferta sellada es evitar que la oferta de acuerdo influya en la decisión de los árbitros sobre el fondo.

98. La existencia de negociaciones para llegar a un acuerdo puede dar lugar a dos consideraciones principales de distribución de costos.

99. En primer lugar, al distribuir costos, los árbitros pueden tomar en consideración los costos que surjan de, o estén asociados con, los esfuerzos de las partes para tratar de acordar sus disputas, incluyendo procedimientos de mediación. En varios laudos CCI, se ordenó el

45 Esta es la expresión legal utilizada en Inglaterra para mantener las ofertas fuera de cortes y tribunales.

46 Este es el lenguaje más utilizado en los Estados Unidos.

47 Por ejemplo en Inglaterra, Reglamento Procesal Civil (CPR), Parte 36.

48 En Francia, no hay disposiciones específicas sobre ofertas para llegar a acuerdos e implicaciones de costos, pero el privilegio profesional legal aplica a la correspondencia entre dos abogados según el Art. 66-5 de la Ley enmendada No. 71-1130 del 31 de diciembre de 1971, y una oferta no aceptada entre abogados no puede por lo tanto ser referida en la corte. En Inglaterra, una oferta para llegar a un acuerdo no aceptada generalmente estará sujeta a la protección sin perjuicio y, por lo tanto, estará sujeta a privilegio y no podrá divulgarse. Esta consecuencia solo se evita cuando la oferta se realiza sin perjuicio de los costos (o en litigios sujetos al procedimiento del CPR Parte 36).

49 De hecho, algunas leyes arbitrales nacionales expresamente prohíben esto.

pago de los costos por el trabajo de una parte y la pérdida de tiempo por su parte en las negociaciones fallidas mantenidas con miras a un acuerdo. En un caso, el tribunal señaló expresamente la relevancia de tales negociaciones para la reclamación de la parte, y los costos incurridos en las negociaciones fallidas para llegar a un acuerdo se consideraron parte de su preparación para el litigio.

100. En segundo lugar, en determinadas circunstancias, el tribunal puede tomar en cuenta la existencia de negociaciones fallidas y/u ofertas no aceptadas entre las partes al distribuir los costos. No existe una disposición general en el arbitraje internacional para el uso de ofertas de acuerdo para reducir costos, pero, de ser apropiado, podría considerarse en la primera comparecencia sobre la conducción del procedimiento.

VIII. Observaciones finales

101. Dado que la autonomía de las partes y la flexibilidad son inherentes al arbitraje, no sorprende que los laudos arbitrales revelen una variedad de métodos respecto de los costos. Esto también refleja la diversidad de métodos encontrados en los sistemas legales nacionales.

102. El Grupo de Trabajo se ha esforzado por demostrar los múltiples aspectos de la toma de decisiones sobre los costos. El Informe y el material reunido en todos sus apéndices tienen como objetivo brindar a los usuarios del arbitraje internacional una mejor comprensión de las cuestiones que son y deben tomarse en cuenta a la hora de decidir sobre los costos y la forma en que estos deben distribuirse. Estas cuestiones se refieren no solo a la naturaleza y cantidad de los costos, sino también a los instrumentos, presunciones, estándares y expectativas relevantes que influyen en su evaluación y asignación.

103. Además, siguiendo el trabajo ya emprendido por la Comisión sobre la conducción del procedimiento, el Grupo de Trabajo ha destacado la importancia de la toma de decisiones sobre costos para la conducción del procedimiento, y particularmente el uso de la distribución de costos como un medio para incentivar conductas procesales eficientes y efectivas, así como para sancionar conductas ineficientes e inadecuadas.

Apéndices originales en inglés

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.

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.

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 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.

---

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

---

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.

COMISIÓN DE ARBITRAJE Y ADR DE LA CCI

La Comisión de Arbitraje y ADR de la CCI es el órgano normativo y de investigación de la CCI en materia de servicios de resolución de controversias y constituye un grupo de reflexión único sobre la resolución de controversias internacionales. La Comisión redacta y revisa los diferentes reglamentos de la CCI referentes a la resolución de controversias, incluyendo el arbitraje, la mediación, los dispute boards, la propuesta y el nombramiento de peritos y la administración de procedimientos de peritaje. También elabora informes y directrices relacionados con los aspectos legales, procedimentales y prácticos de la resolución de controversias. En su calidad de investigador, propone nuevas políticas destinadas a asegurar una resolución de controversias eficaz y económica y brinda recursos útiles para llevar a cabo la resolución de controversias. Los productos de la Comisión se publican regularmente tanto de manera impresa como en línea.

La Comisión reúne a expertos en el ámbito de la resolución de controversias internacionales de todas partes del mundo y de numerosas jurisdicciones. Actualmente cuenta con más de 850 miembros procedentes de unos 100 países. La Comisión celebra dos sesiones plenarias anuales en las que se discuten, se debaten y se someten a votación los reglamentos propuestos y otros productos. Entre estas sesiones, el trabajo de la Comisión suele realizarse en grupos de trabajo más pequeños.

Los objetivos de la Comisión son:

- Promover a escala mundial la resolución de controversias internacionales mediante el arbitraje, la mediación, el peritaje, los dispute boards y otras técnicas de resolución de controversias.
- Proporcionar orientación sobre una variedad de temas de actualidad en materia de resolución de controversias internacionales con vistas a mejorar los servicios de resolución de controversias.
- Crear una relación entre los árbitros, los abogados y los usuarios para permitir que la resolución de controversias de la CCI pueda responder eficazmente a las necesidades de los usuarios.

Comisión de Arbitraje y ADR de la CCI
www.iccwbo.org/commission-arbitration-ADR
commission.arbitrationADR@iccwbo.org
T +33 (0)1 49 53 30 43

ICC Publication 833-0 SPA
ISBN 978-92-842-0546-2