

# AWARDS OF COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION: A SIMPLE GUIDE TO THE PRINCIPLES

DORAN DOEH

36 Stone, Gray's Inn, London

---

## Abstract

In September 2019, I was on a panel discussing 'Forethought spares afterthought: Maximizing return on pre and post-award interest, costs, and other non-core components of arbitration damages' at the American Bar Association/Russian Arbitration Association 11th annual conference on Resolution of CIS-related Business Disputes in Moscow. My part focused on costs. To brief myself, I prepared a note which I also used to make slides. Because time for the panel session was limited, I had to keep the note and slides relatively simple. Although the subject is complex, I did not find a lot of literature on it, even in textbooks and practitioners' works. What there is was either too superficial for my purpose or too long, requiring analysis and some abstraction on my part to achieve a succinct summary. I have prepared this article in order to share my note with others who might find it useful.<sup>1</sup>

**Keywords:** arbitration, tribunal, award, costs, court process, institutional, *ad hoc*, costs follow the event, third-party funding, IBA, CIArb, UNCITRAL, ICC, LCIA

---

## [A] INTRODUCTION

Whereas the courts of countries with reputable legal systems have extensive rules and regulations on virtually all aspects of proceedings, in arbitration there is relatively little such regulation or even formal guidance. In England, for example, the *White Book* (so-called because its covers in hardback form are white) contains the sources of law relating to the practice and procedures of the English courts for civil

---

<sup>1</sup> In this article, I only cover costs in commercial arbitration and not, for example, investor-state dispute settlement (ISDS).

litigation (Vos 2020; *The White Book Civil Procedure Service*, published annually, contains the Civil Procedure Rules of England and Wales—the CPR). When I started in practice over 40 years ago, the White Book seemed enormous, but it was then only half the size it is now—one huge volume then instead of two now (on thin paper and in relatively small print).

By contrast, for an arbitration under the auspices of the London Court of International Arbitration (LCIA), which is frequently used for London-seated arbitrations, the rules (*LCIA Arbitration Rules 2014*) are contained in a slim, narrow pamphlet which, if published on A4 paper, would come to about 25 pages. In addition, there is the Arbitration Act 1996 (the Arbitration Act), which in print comes to about 35 pages of A4.

There is also soft law (in the form of guidance and rules) which is of great practical significance in the arbitration context. Often, soft law guidance and sets of rules provide, with the agreement of the parties and the arbitrators, a framework for the conduct of the arbitration. A number of these are issued by the International Bar Association (IBA) (such as the IBA Guidelines on Conflicts of Interest in International Arbitration 2014/2015; and the *IBA Rules on the Taking of Evidence in International Arbitration 2010*), the Chartered Institute of Arbitrators (CI Arb) (2016, including its very relevant guideline on *Drafting Arbitral Awards Part III—Costs*) and the United Nations Commission on International Trade Law (UNCITRAL) (2010). However, all of these are relatively thin compared with the *White Book*.

In arbitration pleadings, little is usually said about costs. The Claimant often includes, at the end of its request for relief, where it enumerates the various kinds and amounts of damages it seeks, simply the word ‘costs’ on a separate line. The Respondent often mimics this approach, whether it submits only a defence or both a defence and a counterclaim. In some cases, one side or the other (usually the Respondent but not always) will make a specific pleading about the costs on a particularly vexed issue where it feels that it should have its costs regardless of the overall outcome.

The approach of arbitration practitioners—both arbitrators and counsel—is often heavily informed by the practices of their respective national courts but, in international arbitrations, the parties, their counsel and the arbitrators may, and often do, come from different countries. Therefore, the international arbitration profession has evolved ways of approaching this issue, which is the main subject of the remainder of this article.

## [B] WHAT ARE THE MAIN COSTS?

There are essentially two sets of costs in an arbitration. These are the costs of holding the arbitration and the costs of the parties in presenting their respective cases.

The costs of holding the arbitration usually include the following:

- ◇ The costs of engaging the arbitral tribunal—the fees of the arbitrator if a sole arbitrator or of the three arbitrators if there are three. In order to ensure that the decision is not tied where there is more than one arbitrator, normally an odd number of arbitrators is required to be appointed under most arbitration agreements or under the rules specified in the relevant arbitration agreement as being applicable. (Occasionally, the provision may be for two arbitrators and an umpire in case the arbitrators cannot agree amongst themselves.) In some instances, there may be a separate arbitration agreement, but frequently the agreement to arbitrate is contained in the dispute resolution clause of the agreement setting out the terms of the relevant transaction.
- ◇ The fees of the arbitral institution, where an institutional arbitration is designated in the arbitration agreement. In an *ad hoc* arbitration, no institution is designated as such, but an institution may be nominated for the appointment of the arbitrator if the parties cannot agree or for the appointment of the chair or president of the tribunal if the party-appointed arbitrators cannot agree. In such a situation the institution may charge a fee for making the appointment.
- ◇ Other common costs of the arbitration—i.e. costs which are necessarily incurred for the arbitration to take place. These costs include the cost of the hall for the hearing(s), conference rooms to enable each of the parties to meet with its counsel and others involved on its side for confidential discussions at the hearing, a room in which the arbitrators can meet for their own discussions, stenographers, translators/interpreters, meals and refreshments. These costs can, of course, be much reduced if, for example, there is no hearing because the arbitration is based on documents only.

Normally, these costs are either shared by the parties from an early stage or they are carried by the Claimant in order to move the process forward against a recalcitrant Respondent—the Claimant will usually then seek to recover at least half of the costs in the award.

The parties' own costs may include the following.

- ◇ The fees of the lawyers advising and representing the parties in the arbitration, plus those of experts and witnesses, and

other related costs. A study conducted by the International Chamber of Commerce (ICC) in 2015 (*Decisions on Costs in International Arbitration—ICC Arbitration and ADR Commission Report*) reported that usually the parties' own costs were over 80% of the total. The study was based on past arbitration awards rendered under ICC auspices.

- ◇ In addition to fees, there are usually transport, lodging and subsistence costs. In some arbitrations, one or both parties may seek to recover the costs of in-house lawyers, management and other staff—this is not common, however, and tribunals are not usually sympathetic to such claims.

## [C] WHAT ARE THE MAIN APPROACHES TO ALLOCATION OF COSTS?

### The American Rule

The court practice in the US is that each side bears its own costs. The reason for this is that the US and its courts do not want to discourage people from pursuing legal actions. The prospect of costs being awarded against a party bringing a claim might be an inhibiting factor. The US prides itself on being 'the land of the free and the home of the brave', and often recourse to the courts is the only civilized way of resolving a dispute between parties from very different backgrounds or where a party is determined to win by any means. One only needs to view part 1 of Francis Coppola's *The Godfather* (1972) to see what some of the alternatives are (there is a scene early in the film in which a supplicant to Don Corleone explains how disappointed he was in the legal process and asks for extrajudicial help).

The tendency in US arbitration is to follow this approach, in what is called 'the American rule'. There is an exception for manifest fraud, corruption, spuriousness and abusiveness of process. The US Arbitration Act 1925 (more commonly referred to as the Federal Arbitration Act or FAA) makes no mention of costs. The Uniform Arbitration Act (which in various iterations has attempted to harmonize state laws) provides that, absent agreement to the contrary, costs of arbitration are to be dealt with in accordance with the award but excluding lawyers' fees. Specific federal and state laws may provide differently.

The international arbitration rules of the American Arbitration Association (AAA) (called the *International Dispute Resolution Procedures of the International Dispute Resolution Center* but generally referred to as the AAA Rules) allow the tribunal to apportion costs of arbitration in the

award. In its list of costs that may be included, it mentions arbitrators' fees and expenses and the reasonable legal and other costs incurred by the parties.

Parties anticipating arbitration seated in the US or otherwise subject to American rules may be advised that, if they want to ensure that the tribunal is empowered to award lawyers' fees and other costs, they should expressly so provide in their arbitration agreement.

## The English Approach

The English courts take a different approach. It has long been established that the English courts generally award costs, and the principle is that 'costs follow the event' unless there are reasons to take a different approach. The effect is that, in a simple win-lose situation, the loser pays the winner's costs. This approach is of course highly nuanced in actual practice.

The English courts also want to encourage use of the courts to resolve disputes. However, circumstances in England are different from the US, and legal costs for English dispute resolution are generally amongst the highest in the world.<sup>2</sup> The prospect of the loser paying the winner's costs is seen as a way of encouraging a degree of moderation and balance into the process.<sup>3</sup>

The courts in most western European countries take a similar approach to those of England, although they may be more restrictive as to costs they allow to be claimed. However, the process of the English courts relating to costs is probably the most complex and detailed (the English courts have specialist judges dedicated to the assessment of costs). It is for this reason that, although 'costs follow the event' is a commonly shared principle, it is known in arbitration as 'the English approach' or 'the English rule'.

The relevant English legislation for arbitration sets out, in relatively simple terms, that the principle applies to arbitration, without going into the complexity and detail of the CPR.

---

<sup>2</sup> In arbitration, it is, of course, possible for the parties to agree a much more informal process that will greatly reduce costs, such as adopting a documents-only approach or limiting the issues and time involved in a pre-agreed manner carefully managed by both sides.

<sup>3</sup> Until relatively recently, conditional fees—called contingency fees in the US, where they are much more common and have a longer history of usage—were not permitted in England, but since 1990 they have been gradually introduced and the system for using them developed, so that this is no longer the case. Conditional or contingency fees also reduce risk for a party considering bringing a claim.

Section 61(2) of the Arbitration Act provides that:

Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.

Section 63(4) provides that, if the tribunal does not award costs, application may be made to the court for such determination. Section 63(5) provides that unless the tribunal or the court decides otherwise:

- (a) the recoverable costs of the arbitration shall be determined on the basis that there shall be allowed a reasonable amount in respect of all costs reasonably incurred, and
- (b) any doubt as to whether costs were reasonably incurred or were reasonable in amount shall be resolved in favour of the paying party.

The effect of section 61(2) enshrines the ‘costs follow event’ principle as a rebuttable presumption. Section 63(3) provides that the tribunal may determine by award the reasonable costs as it sees fit. Section 63(5) introduces into arbitration the principle that costs are to be assessed on what was known as the ‘standard’ basis in English court practice traditionally. This does not, however, preclude the tribunal from awarding costs on an ‘indemnity’ basis—i.e. full cost recovery provided the costs have not been unreasonably incurred and are not of an unreasonable amount—where it considers appropriate.

An arbitral tribunal, whether seated in England or elsewhere, is of course not itself bound by the CPR, which sets out a very comprehensive and elaborate set of rules for assessment of costs. However, where English practitioners are involved in an arbitration either as arbitrators or as counsel, they will be familiar with the CPR and may in practice import its principles into the assessment of costs in the arbitration, regardless of whether the seat is in England or elsewhere.

Practitioners not from England who are experienced in international arbitration are often also familiar with the principles of English practice on costs. Many western European court systems apply similar (if less detailed or generous) principles, although they may not formalize the ‘costs follow the event’ principle in their legislation affecting arbitration in the same way as English law does.

The situation may be different in eastern Europe (where the legal systems are often based on western European ones, but practice is not the same) or in countries in other parts of the world whose legal systems are not rooted in the systems and practices of western European

countries—or where accessibility to the courts is, as in the US, of primary importance.

## Institutional Rules

The specific rules applicable to the arbitration may also contain provision about costs. It is beyond the scope of this article to deal with these in detail. However, again they tend to be statements of principle rather than extensive sets of detailed rules. Institutional rules either tend to incorporate some form of ‘costs follow the event’ rebuttable principle or simply to provide that the arbitral tribunal is to decide which of the parties should bear the costs and in what proportion. The ICC, which hosts the largest number of arbitrations of all the international arbitral institutions, follows the latter approach but found, in its 2015 report, that in practice ICC tribunals generally apply the rebuttable principle.<sup>4</sup>

As to *ad hoc* arbitrations, the *UNCITRAL Arbitration Rules (as revised in 2010)* provide that the tribunal shall fix the costs of the arbitration in its final award or in another decision. It sets out that the costs of the arbitration are to be borne by the unsuccessful party, but the tribunal may apportion the costs ‘between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case’ (Article 42). Its listing of costs that may be awarded includes arbitrators’ fees and legal costs, with emphasis on reasonability.

By choosing a set of rules (whether institutional or *ad hoc*) for their arbitration, the parties agree contractually that those rules should apply. However, as indicated previously, these generally only provide a framework, and the tribunal has a great deal of discretion in how it awards costs.

It should be noted that there is potential for conflict if the *lex causae* (the law applicable to the matter—in a contractual dispute, this will be the governing law of the contract), the *lex arbitri* (the law applicable to the

---

<sup>4</sup> It may be useful to give an example of how the ‘costs follow the event’ principle is included in a set of institutional rules by setting out rule 28 of the LCIA Rules:

The Arbitral Tribunal shall make its decisions on both Arbitration Costs 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 co-operation in facilitating the proceedings as to time and cost and any non-co-operation 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.

arbitration process, usually the law of the seat) and the applicable institutional or *ad hoc* rules differ from one another.

It is fortunate, therefore, for the issue of costs in general, that the ‘costs follow the event’ principle is so widely applied in one form or another. In a seat where the law makes no provision for a tribunal to award costs, by choosing a set of rules that do make such provision the parties would empower the tribunal accordingly. So, for example, in the US, by choosing the AAA Rules the parties would empower the tribunal to award costs in its discretion.

## [D] HOW DO TRIBUNALS ALLOCATE COSTS IN PRACTICE, WHERE COSTS FOLLOW THE EVENT?

‘Costs follow the event’ is a rebuttable presumption. The tribunal is entitled to take a different approach where it considers it appropriate.

There are number of approaches to implementation:

- ◇ Pure—where there is clearly a winner and loser, there is also usually also a clear case for awarding the winner its costs. However, in some cases, a tribunal may do this even where the outcome is not so clear, for example, where one side has won on some issues, but the preponderance of success is on the other side.
- ◇ Pro rata to success—this is a very common approach, but it begs the question of what success is. There may be differing outcomes on, for example, the merits, the quantum, preliminary issues (e.g. jurisdiction, challenge to arbitrator(s), arbitrability, parallel proceedings). In some instances, it may be appropriate to allocate costs on a claim-by-claim or issue-by-issue basis.
- ◇ Pro rata (as above), but only reasonable, proportionately incurred fees for lawyers and experts (along the lines of the standard basis/indemnity basis distinction in English court practice).

In practice, where it is difficult to determine success because the outcome is relatively balanced, the tribunal may decide to allocate costs 50/50 including lawyers’ fees or 50/50 only as to common costs with each side bearing its own legal and other costs.

If lawyers’ fees are awarded on a 50/50 basis it will mean that, if one side incurred higher fees than the other, the whole pool of fees will be aggregated and shared. This may seem unfair if one side had an expensive

firm and the other had a less expensive firm or if one side took a lot more trouble over its case than the other. However, in some instances the complexity is such that the tribunal recognizes that the dispute could not properly be settled without going to arbitration and one side had a much more demanding case to make—because of either the legal or evidentiary issues on which it had to prove its position—and therefore had to work much harder to put its case.

To illustrate this, I would mention an award I recently came across by a US-seated tribunal. Under the applicable institutional rules, the tribunal had authority to award costs on a ‘costs follow the event’ basis. The Claimant succeeded on the merits, and the Respondent succeeded on quantum. The Claimant’s case was inherently much more difficult to make. The tribunal therefore determined that each side should bear its own legal costs, but that the common costs should be split 55/45 in favour of the Claimant.

## [E] WHAT OTHER FACTORS DO TRIBUNALS TAKE INTO ACCOUNT?

There are other factors which tribunals also take into consideration when determining cost allocations in their awards.

### Offers to Settle

The most important in some instances are offers to settle.

English court practice has special procedures for this. The CPR Part 36 provides a formal process whereby, if the unaccepted offer is the same or higher than the judgment sum, the court will not permit recovery of costs incurred after the offer date. Normally, the court only considers the issue of costs after judgment, so any such offer is effectively made ‘without prejudice, except as to costs’ and served on the offeree. The fact of the offer and its terms must not be communicated to the trial judge until the case has been decided. The judge will then hear arguments as to the costs, at which point the offer will be brought into consideration. If an issue arises in relation to the offer before the case has been decided, the issue must be referred to a judge other than the trial judge. An offer made under CPR Part 36 is usually called a ‘Part 36 offer’.

There is also an informal process for an offer called a ‘Calderbank offer’ (after the case in which this kind of offer was upheld (*Calderbank v*

*Calderbank* 1975) which has a similar effect. It is usually made expressly ‘without prejudice except as to costs’.

Other countries have much simpler processes for making offers to settle but ultimately based on the same principle. However, in some civil law jurisdictions, a settlement offer is confidential between the counsel (subject to a professional obligation of confidentiality) and cannot be raised with the court.

Whatever the relevant law in relation to court process, an arbitration tribunal is not bound by it, but an offer to settle is nonetheless usually an important consideration in allocating costs. Arbitrators and counsel will have experience of such matters from their professional background. If there has been an offer to settle, counsel for the relevant party will usually wish it to be taken into consideration by the tribunal, which will usually be prepared to do so.

However, an offer to settle is much more awkward to deal with in an arbitration context. In English court proceedings, as indicated above, the judgment is usually presented, and counsel then are invited to make submissions on costs. If the issues are complicated, they may be referred to a specialist costs judge. This is impractical in arbitration, where the award (including as to costs) would normally be issued without a further hearing, and it could be problematic in practice to try to hold a further hearing.

To make it more difficult, in many instances (but not always, of course), counsel will not want the tribunal even to know that an offer to settle has been made because it might prejudice the tribunal’s decision on the merits or quantum.

One solution is for the parties to provide sealed written submissions on costs which are only to be opened by the tribunal members after they have decided on all other issues in the award. The ICC has suggested that, because its process involves review of the tribunal’s draft award before finalization, it could retain the sealed submissions on costs and provide them to the tribunal at that stage.

Another alternative is for the tribunal to deliver a partial award on the issues other than costs and invite submissions (hopefully by written submissions without the need for a further hearing) with a view to making a costs award and bringing the arbitration to a close.

## Other Factors

One of the most important ways in which a tribunal can exert discipline over the parties in an arbitration is by indicating at an early stage—e.g. at the initial case management conference or subsequently when considering procedural matters—that, in assessing costs, it will take into account the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. It can also make an interim award as to costs where appropriate.

Amongst the things that a tribunal might take into account are the behaviour of the parties and their representatives. The ICC has helpfully given the following examples of behaviour that might be considered unreasonable, including:

- ◇ excessive document requests;
- ◇ excessive legal argument;
- ◇ excessive cross-examination;
- ◇ dilatory tactics;
- ◇ exaggerated claims;
- ◇ failure to comply with procedural orders;
- ◇ unjustified applications for interim relief; and
- ◇ unjustified failure to comply with the procedural timetable.

Another item that can be regarded as unreasonable is disproportional expenditure, for example, where one party obsessively pursues an issue of relatively little importance and incurs excessive costs.

There are also instances where a party will seek to recover its internal legal costs or the costs of its management or other executives. Tribunals are rarely receptive to this kind of request, but there may be special circumstances where it is warranted.

## [F] THIRD-PARTY FUNDING

Third-party funding has been of increasing importance in dispute resolution in recent years, and parties receiving such funding seek to recover their costs incurred. These can be very substantial.

For court proceedings, there may be provisions of law or regulation as to what is and is not recoverable in relation to funding. These limitations generally do not apply in arbitration.

Arbitrators and counsel are usually familiar with the issues that arise and their treatment in the courts of their own home jurisdiction. They

may or may not seek to bring them to bear in an arbitration depending on the circumstances. Nonetheless, they will not be binding if the arbitrators do not apply them, so that, in an arbitration, it may be possible to get an award of funding costs in excess of what the courts in the relevant jurisdiction would permit.

### *Essar v Norscot*

A significant case in this regard was decided in the English court in 2016.

In *Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* 2016, the dispute related to an operation management agreement for an offshore drilling platform. The sole arbitrator in an ICC-administered arbitration awarded damages and sums due of over \$12 million in Norscot's favour. He awarded costs on an indemnity basis including £1.94 million for the third-party funding which had been paid for Norscot's defence. The funding was for £647,000 on terms that, if successful, Norscot would pay 300% of the funds advanced or 35% of the amount recovered, whichever was higher. Evidence was accepted by the court that these were standard market rates for such funding. The dispute was characterized by the judge as 'a David and Goliath battle' (para 21).

Essar challenged the award in the English court under section 68 of the Arbitration Act, alleging that the arbitrator had acted in excess of his powers. Much of the argument turned on the meaning of the word 'other' in the phrase 'legal and other costs' in section 59(1) of the Arbitration Act.

The arbitrator criticized Essar's conduct and found that Essar had deliberately put Norscot in a position where it could not fund the arbitration out of its own resources, and therefore it was reasonable for Norscot to seek and obtain litigation funding. He awarded costs on an indemnity basis including the funding costs. The judge said the provisions of the CPR as to third-party funding in a court case were irrelevant to an arbitration and upheld the costs award.

The case has been controversial. Critics have argued that no general inference should be drawn from it as to recovery of funding costs because the case was decided on special circumstances due to Essar's behaviour.

### Other Issues

Another issue concerning funding concerns the situation of the winner in an arbitration where the impecunious loser is funded and has no money of its own with which to pay costs when awarded to the winner. A court

would have authority within its own jurisdiction to require the funder to pay if the law of the jurisdiction supports that. An arbitral tribunal would have no such authority.

There are moves in some countries to require funding to be disclosed during court proceedings. Such moves are unlikely to affect arbitration generally unless specifically adopted in actual arbitrations.

One approach to dealing with this issue is for a party to the arbitration that anticipates that the other side may have a problem in paying costs to apply to the tribunal for security for costs. Another is to purchase ‘after the event’ (ATE) insurance. ATE insurance provides cover against the possibility that the insured may have to pay the other side’s legal costs if the insured loses the dispute.

## References

American Arbitration Association-International Dispute Resolution Center (Amended and Effective 2014, Fee Schedule Amended and Effective 2016) *International Dispute Resolution Procedures (Including Mediation and Arbitration Rules)* (AAA Rules) New York: AAA

Chartered Institute of Arbitrators (CI Arb) (2016) International Arbitration Practice Guideline, *Drafting Arbitral Awards Part III—Costs* London: CI Arb.

Coppola, Francis Ford (Director) (1972) *The Godfather* Los Angeles: Paramount Pictures.

International Bar Association (IBA) (2010) *IBA Rules on the Taking of Evidence in International Arbitration* London: IBA.

International Bar Association (IBA) (2014, updated 2015) *IBA Guidelines on Conflicts of Interest in International Arbitration* London: IBA.

International Chamber of Commerce (ICC) (2015) *Decisions on Costs in International Arbitration—ICC Arbitration and ADR Commission Report* Paris: ICC.

London Court of International Arbitration (LCIA) (2014) *LCIA Arbitration Rules* London: LCIA.

United National Commission on International Trade Law (UNCITRAL) (2010) *UNCITRAL Arbitration Rules (as revised in 2010)* Vienna: UNCITRAL.

Vos, The Rt Hon Sir Geoffrey (Editor-in-Chief) (2020) *The White Book Service 2020: Civil Procedure Volumes 1 and 2* London: Sweet & Maxwell.

## Cases Cited

*Calderbank v Calderbank* [1975] 3 All ER 333 (EWCA); [1976] 93 Fam CA

*Essar Oilfields Services Ltd v Norscot Rig Management Pvt Ltd* [2016] EWHC 2361 (Comm)

## Legislation Cited

Arbitration Act 1925 (USA) (known as Federal Arbitration Act/FAA)

Arbitration Act 1996 (UK)

Uniform Arbitration Act (a model statute, originated 1955, updated 2000 as Revised Uniform Arbitration Act) (USA)