CHAPTER 1

INTRODUCTION

Contents

1.1 International arbitration and costs

Arbitration is the primary method for the resolution of intractable international commercial disputes. It is also used for quasi-commercial disputes arising from bilateral investment treaties. In each of these areas there has been significant growth in activity over the past few decades.

This book deals primarily with international commercial arbitration, although much of it applies also to investment disputes resolved by arbitration; the latter topic is dealt with specifically in Chapter 13. In other chapters, reference will be made to practice in investment cases where appropriate.

The advantages and disadvantages of international arbitration relative to state litigation have been outlined by a number of authors.[1] In brief, the key attractions are: (1) the use of a neutral and impartial international tribunal, (2) use of counsel of choice, (3) convenience for the parties and their witnesses, (4) speed and finality and (5) relatively straightforward recognition and enforcement in relevant jurisdictions. These advantages are, however, attended by a costs disadvantage, namely that the parties must pay for the services of the tribunal and, where applicable, the

1 See for example N Blackaby and C Partasides with A Redfern and M Hunter, *Redfern and Hunter on International Arbitration* (5th Ed, Oxford University Press, 2009) (hereafter 'Redfern & Hunter') at p 31, 1.86–1.125; Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) pp 71–90; Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (3rd Ed, 2009).

relevant arbitral institution. This disadvantage is usually tempered by the fact that proceedings before an arbitral tribunal may be more focused, more compressed in time and assisted by modern communications technology all of which assist in reducing costs. Nonetheless international arbitration is often more expensive than the equivalent state litigation. Learned commentators have accepted that 'arbitration proceedings–particularly where the dispute is complex and there are large amounts at stake–can be extremely costly'[2] and '[i]t used to be said that arbitration was a speedy and relatively inexpensive method of dispute resolution. This is no longer so, at least where international arbitration are concerned.'[3] In a survey of users of international arbitration by the School of International Arbitration at Queen Mary University of London respondents were asked to identify advantages and disadvantages of international arbitration; the summary was:

> The expense of the international arbitration process (including the costs of arbitration lawyers, arbitrators, and the arbitration institution that may be involved) was the most widely recognised disadvantage. Seventy out of 80 respondents cited it as one of their top three concerns, with 50% of respondents ranking it as their primary concern. This challenges one of the common myths surrounding international arbitration, namely that it is less expensive than transnational litigation.[4]

Given that arbitration is not inexpensive, and must be paid for by the parties, the question of who pays the costs–the fees of any arbitral institution, the fees and expenses of the tribunal members and the legal and other costs of the parties–is of great practical importance to the parties. As leading commentators on international arbitration have put it:

> Apart from the ultimate outcome and the time that may be required for the conduct of an arbitration, there is usually no aspect of the arbitration process that is of greater concern to the parties than its cost.[5]

In arbitrations at the high end of the value scale, and which involve an array of complex matters, the costs can be very substantial indeed. At the other end of the value scale, the costs will generally be very much less but

2 Fouchard, Gaillard and Goldman, Emmanuel Gaillard and John Savage, *International Commercial Arbitration* (Kluwer Law International, 1999) p 686.

3 Redfern and Hunter, para 1.100, p 35.

4 Queen Mary School of International Arbitration, International Arbitration: Corporate Attitudes and Practices, International Arbitration Survey 2006, s 2.

5 Yves Derains and Eric A Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd Ed, Kluwer Law International, 2005) p 328.

can be a significant proportion of the sums in substantive dispute and will often exceed them; so whilst the question of costs may be less significant in absolute terms, in relative terms the question of costs can dominate the outcome.

The question of costs arises in each of the many thousands of arbitrations commenced every year worldwide. This is true even where the proceedings do not proceed to a final award: anticipated costs will be a factor to be weighed when deciding whether or not to initiate proceedings, whether to continue or discontinue when adverse information is provided, for example on discovery and when deciding and implementing a settlement strategy.[6]

Despite the unquestionable importance of costs, the academic and scholarly attention paid to it has been modest in amount. It may be that it is thought to be an arid subject. Or it may be that it is thought that the discretion as to costs is so flexible that there is not much that can usefully be said. We hope that this book will present an alternative view.

This book is designed to meet what the authors perceive to be a genuine need for improved information and guidance on the subject of costs. We do not, and cannot, claim to have authoritative answers to many of the questions. Many areas of debate remain uncharted. Judicial comment is often jurisdiction specific. Academic comment is often sparse. Commentators have described the approach of international arbitration tribunals to apportionment and allocation of liability for costs as unpredictable and the approach of most tribunals as 'broad brush.'[7] We hope that by setting out the arguments for and against various approaches, and identifying what we see as emerging trends we can play some small part in establishing a framework within which submissions on costs can be more focused and decisions based more on transparent principles than is sometimes perceived to be the case at present. In the shorter term we hope that this book will provide a useful source of ideas for the application of the relevant principles in practice.

6 Michael W Buhler, Awards of Attorney's Fees in International Arbitration, Mealey's International Arbitration Report, Vol 20, No 5, p 3, May 2005:

> The costs of arbitration, not in the least attorney's fees, are an important element in any party's risk assessment when considering whether to enter into the arbitration process.

7 See Redfern and Hunter p 548, para 9.97 who suggest that:

> For the present, however, most international arbitral tribunals that decide to make an award of costs in favour of the winning party tend to adopt a 'broad-brush' approach in assessing the amount to be paid, if any.

1.2 The award as to costs

The award as to costs 'completes the mission of the arbitral tribunal… [and] renders the arbitral tribunal *functus officio*.'[8] Whilst the tribunal will generally have the power to correct slips the making of an award as to costs is usually its final action in the proceedings.

The award as to costs may be included in the substantive award or, where the provisions applicable to the conduct of the proceedings permit, may be in a separate subsequent award.[9]

Although, as we shall see, it is possible in some cases to delegate to a third party the quantification of the costs under the award, it is increasingly recognised that it is appropriate for the tribunal to retain control of the entire process to ensure that the award–both as to liability and quantum–reflects a fair and reasonable outcome given the tribunal's knowledge and experience of the proceedings.[10]

1.3 The definition and classification of costs: *central costs* and *party costs*

The term 'costs' refers to those items of expense incurred in or incidental to an arbitration which may be included in an award as to costs. The precise definition of costs which applies in each case will depend on the terms of the arbitration agreement, the provisions of the law of the seat and any applicable rules of procedure.

Some legislative provisions or rules of procedure identify recoverable costs by providing a partial definition. An example of arbitration legislation which identifies relevant costs is the English Arbitration Act 1996, section 59 of which provides that:

> (1) References in this Part to the costs of the arbitration are to – (a) the arbitrators' fees and expenses, (b) the fees and expenses of any arbitral institution concerned, and (c) the legal or other costs of the parties…[11]

A number of procedural rules provide a list of costs which can be awarded. An example is the UNCITRAL Rules 2010 Art 40, which, by using the qualifier 'only' provides an exclusive definition:

8 Redfern and Hunter, 9.18.

9 See Chapter 4 for practice in relation to awards.

10 See Chapter 6 for determination of recoverable costs.

11 Another similar example is the New Zealand Arbitration Act 1996 which states in the Second Schedule:

> 6(1) Unless the parties agree otherwise (a) The costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration…

> 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 [The Permanent Court of Arbitration at The Hague, the default appointing authority].

Authors and rules (and hence tribunals applying those rules) draw a distinction between two classes of costs, which we shall in this book refer to as *central costs* and *party costs*:

(1) *Central costs* are those costs which relate to the central administration of the proceedings. They include the fees and expenses of the tribunal and those of any appointing authority or relevant arbitral institution. They include the costs of any services properly commissioned directly by the tribunal or arbitral institution, such as tribunal-appointed experts.

(2) *Party costs* are those expenses incurred directly by the parties. They include each party's expenditure on investigations, witnesses, representation in the proceedings and so on.

The utility of this distinction is widely recognised, but a range of expressions is used to describe these two categories. A leading commentator on costs proposes: 'The costs of international arbitration are two-fold and consist of the costs of the proceeding and the costs of the parties.'[12] A leading textbook suggests: 'The term 'costs' in the context of arbitration may be divided into two broad categories: the costs of the arbitration and the costs of the parties.'[13] Another, by equally eminent

12 John Y Gotanda, Attorneys' Fees Agonistes: The Implications of Inconsistency in the Awarding of Fees and Costs in International Arbitrations, in MÁ Fernández-Ballesteros and David Arias (eds), *Liber Amicorum Bernardo Cremades* (La Ley, 2010)

13 Redfern and Hunter p 545, 9.87.

authors, echoes this: 'Costs related to arbitration can be divided into two main groups: arbitration costs and legal costs.'[14] However, expressions such as 'costs of the arbitration' or 'arbitration costs' bear a range of meanings in international arbitration rules and legislation–including, confusingly, the legal costs of the parties[15] from which they are to be distinguished. For this reason we suggest that it may be appropriate to introduce a new term: hence *central costs* which is not used in any other sense.

The examples of costs definitions we have seen already–the English Arbitration Act 1996 and the UNCITRAL Rules 2010–do not highlight the distinction as clearly as they might.[16] The costs referred to in s 59(1)(a) and (b) of the Act are *central costs* whilst s 59(1)(c) relates to *party costs*. Likewise in the UNCITRAL Rules, all the costs listed in subparagraphs 40(2)(a)-(d) and (f) are *central costs*; only those in 40(2)(e) are *party costs*. Some rules seem to apply terms which could, with respect, be clearer; this is not the place to identify those rules which could be improved and we recognise that practical difficulties rarely arise as tribunals apply the rules sensibly and appropriately. But we suggest that in order to promote clarity of thought about costs it is useful to begin with clarity of terminology.

1.4 The nature of costs in international arbitration

Three fundamental features of costs in international arbitration are worthy of preliminary note. First, the applicable law of costs is generally part of the procedural law of the seat of the arbitration. Second, the remedy of costs is an incidental or derivative remedy. And third, the award of costs is generally discretionary.

14 Julian DM Lew, Loukas A Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ss 24–80, p 652.

15 ICC Rules 2012, 37(1) 'The costs of the arbitration shall include… the reasonable legal and other costs incurred by the parties for the arbitration.' UNCITRAL Rules 2010 Article 40(1) The arbitral tribunal shall fix the costs of arbitration… (2) The term 'costs' includes only… (e) The legal and other costs incurred by the parties… 'English Arbitration Act 1996: "(1) References in this Part to the costs of the arbitration are to… (c) the legal or other costs of the parties…"'

16 Although in the old English legislation the terms *costs of the award* and *costs of the reference* were used to refer to *central costs* and *party costs* respectively. English Arbitration Act 1950; see *Government of Ceylon v Chandris* [1963] 1 Lloyd's Rep 214 in which the distinction is explained.

Costs as determined primarily by the procedural law of the seat

The applicable law of costs is generally considered to be part of the procedural law of the seat of the arbitration[17] and the law governing the underlying commercial transaction will rarely be relevant to the decision as to costs.[18] Consistent with this analysis, the procedural law of many jurisdictions establishes the framework for awards as to costs.[19] Where a national court interprets its own procedural law relating to costs in international proceedings it will where appropriate–and should we suggest–have regard to international practice. Where the procedural law is silent on costs, the general principle accepted in international practice is that the tribunal may award costs.[20] Where there is no express procedural

17 Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) p 2493:

> There is little question that the arbitrators' power to make a costs award is governed by the procedural law of the arbitration (typically, that of the seat of the arbitration). That is consistent with the treatment of the arbitrators' power to order provisional measures, disclosure and other forms of relief, and no other national legal system is a plausible candidate to govern this issue.

18 However, this is not universally settled and Redfern and Hunter at 9.100 p 549 suggests: 'international tribunals… should be guided by the *lex arbitri* and the substantive law…' Gary Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) states at p 2493–4:

> …a serious argument can be made that the substantive law governing the parties' underlying contract (or dispute) should provide the standard for awards of legal costs. This body of law arguably has the closest connection to the parties' presentation of their respective claims, and could therefore plausibly be applied to determine their rights to reimbursement of the costs of such presentation; that would be particularly true where the parties had contractually selected the law governing their agreement."

Born, however, goes on to prefer the principle that:

> …the better view is that the standards governing awards of legal costs should be international standards, developed in light of the particular nature and needs of international arbitration.

We endorse this. The law applicable to the underlying transaction is often selected because of its neutrality and accessibility, and rarely because of an implicit agreement about the applicable laws as to costs.

19 For example: Hong Kong Ordinance 2011, s 74; Australian International Arbitration Act, s 27; Mauritius International Arbitration Act 2008, s 33; Brunei International Arbitration Order 2009, ss 22 and 33; English Arbitration Act 1996, ss 59–65; New Zealand Arbitration Act 1996, Schedule 2, s, 6; Singapore International Arbitration Act, s 21; Swedish Arbitration Act, s 42.

20 See Chapter 2.1.

(6) The costs of the step/application/procedure are reserved until the final award.

Each such indication needs to be made carefully, as, even if not incorporated into an award at the time, it may create an irrevocable expectation upon which the parties will rely.

Where a party abandons heads of claim, the effort spent to that date responding to them will be wasted. It may be appropriate for the tribunal to make a costs order that those costs will be the costs of the responding party in any event; but this should be done cautiously as otherwise it may have the effect of encouraging parties to fight to the bitter end.

A party who seeks to amend his case will normally be allowed to do so 'on the usual terms', namely that the costs incurred and thrown away by the amendment and the costs of any consequential amendment are to be the other party's in any event. In some situations, however, the arbitrator may adjudge that the amendment was made necessary by some action on the part of the opposing party, in which case a different costs order may be made.[63]

Where a party requests and is granted a procedural indulgence, eg a change of date for a hearing etc. which causes incidental costs to the other or the tribunal, it will usually be appropriate to order that the consequential costs be borne by the requesting party in any event.

63 Approved by Prakash J in *Econ Piling Pte Ltd and another (both formerly trading as Econ-NCC Joint Venture) v Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246 at paras 99–100.

Chapter 5

APPORTIONING CENTRAL COSTS AND ALLOCATING LIABILITY FOR PARTY COSTS

Contents

5.1 Introduction

Where, as is ordinarily the case, the tribunal is empowered and obliged to award costs, it must, when it has made its award as to substantive issues, decide how to apportion liability for *central costs* and allocate liability for *party costs*. In this chapter we shall examine the considerations applicable to the tribunal's decision on these matters.

As discussed in Chapter 3, parties are generally free, in accordance with principles of party autonomy, to make an agreement as to how costs should be awarded, including how *central costs* may be apportioned and how liability for *party costs* may be allocated. Provisions dealing with costs in arbitration legislation or rules of procedure tend in practice to be permissive or provide outline guidance only so that the discretion is preserved largely intact. In the sections which follow, it will be presumed that there are no substantial constraints on the tribunal's broad discretion as to costs. The question addressed is: how should the tribunal with a broad discretion approach the apportionment of *central costs* and allocation of liability for *party costs*. Where, in the particular circumstances of the case,

the tribunal's discretion is constrained, the text should be read in the light of that constraint.

5.2 The discretionary nature of an award as to costs

The discretionary nature of the decision on costs is widely recognised in published arbitral awards, both in purely commercial decisions such as ICC administered arbitrations and in investment arbitrations.[1] Although the discretion may be wide, the tribunal should make its decision on the basis of principles that it can justify. In one investment arbitration, an illustrious Ad Hoc Committee hearing annulment proceedings stated:

> ...the Committee has broad discretion in determining costs. However discretion may not be capricious or arbitrary. It must be the result of rational consideration of relevant factors.[2]

National courts usually also exercise a similarly wide discretion as to costs and the judgments of senior courts may provide useful guidance. It has been said by the English House of Lords:

> ... the Court has an absolute and unfettered discretion to award or not to award them [costs]. This discretion, like any other discretion, must of course be exercised judicially and the judge ought not to exercise it against the successful party except for some reason connected with the case. Thus if... a judge were to refuse to give a [successful] party his costs on the ground of some misconduct wholly unconnected with the cause of action or of some prejudice due to his race or religion... then a Court of Appeal might well feel itself compelled to intervene.[3]

There is, further, clear authority for the desirability of exercising the discretion in a broadly predictable way. Bingham LJ articulated this clearly:

> While the exercise of any discretion necessarily means that there is an area within which the judge's discretion is final and unchallengeable, it is highly desirable that the general lines on which a familiar discretion will be exercised should be generally known and broadly predictable.[4]

We suggest that this important point translates directly into arbitration practice because the same obligation of fairness to the parties applies both in litigation and arbitration.

1 Chapter 1.4.
2 *ATA Industrial v Jordan* ICSID case no Arb/08/2.
3 *Donald Campbell and Co v Pollak* [1927] AC 732 per Viscount cave LC at 811–12.
4 In *K/S A/S Bani v Korea Shipbuilding and Engineering Corporation* [1987] 2 Lloyd's Rep 445 Bingham LJ said at 448.

It is appropriate for arbitrators to familiarise themselves with and to have regard to practice as to costs in international arbitration and to use that knowledge both in making the decision and in explaining that decision to the parties through the text of the award. The tribunal must show itself capable not only of dealing professionally with the seeming paradox that it possesses an unfettered discretion that should be exercised in a predictable way but also of explaining coherently what it has done and the reasons for it.

5.3 Factors which the tribunal may properly take into account when exercising its discretion

In the exercise of its discretion as to costs, the tribunal may take into account any relevant factor. Rules of procedure may express this as permitting or enjoining the tribunal to have regard to 'all the circumstances... of the arbitration'[5] or 'the circumstances of the case'[6] or a similar expression.

The decided cases and views of commentators and practitioners consistently identify two key factors to which the tribunal may properly have regard when exercising its discretion as to the apportionment of liability for *central costs* and allocating liability for *party costs*, namely:

(1) the outcome of the proceedings (ie which party has succeeded or the degree of success of each)
(2) the conduct of the parties in and about the proceedings.

Outcome may be described as a primary factor. Should both parties conduct the proceedings in a reasonable way the decision as to costs will largely turn on success. Conduct may be described as a secondary or subsidiary factor because it will generally be significant only where the parties have not conducted the proceedings reasonably.

In the domestic courts of many jurisdictions outcome plays a strong and often decisive role in decisions as to costs;[7] this is frequently described as an application of the principle that *costs follow the event*. The *event* is a somewhat archaic term, used historically in English court practice. It was adopted by arbitration practitioners[8] and appears in the English Arbitration

5 WIPO 2002 Article 72.
6 UNCITRAL Rules 2010, Article 42.1.
7 This includes Singapore, Malaysia, Hong Kong, Australia, New Zealand, Canada and many of the European jurisdictions (see Sir Rupert Jackson's Review of Civil Litigation Costs, Preliminary Report, Vol 2, 2009 which reviews a number of jurisdictions).
8 For example in *The Erich Schroeder* [1974] 1 Lloyd's Rep 192 Mocatta J said at 194:

> In exercising his discretion judicially an umpire/arbitrator must have regard in the first place to the primary principle guiding courts and

Act 1996.[9] Shortly after the enactment of the Arbitration Act 1996, the term was dropped from English court rules, which now provide: 'The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party.'[10] That formulation is, we suggest, a fair translation of the expression *costs follow the event*.[11] Nonetheless, the term *event* continues to be widely used in the literature on arbitration costs as a convenient shorthand, although it has been remarked by the Chartered Institute of Arbitrators that a more direct term might possibly have been adopted.[12]

Where secondary factors such as conduct weigh significantly in the balance (and/or where costs are tested for reasonableness and proportionality as discussed in chapter 6) this leads to a more flexible approach which may be described as a *moderated costs follow the event* principle. Some jurisdictions which have traditionally been considered to operate a strong *costs follow the event* approach, now apply a range of moderating factors based on conduct and reasonableness/proportionality. The English Civil Procedure Rules, for instance, provide that the success

arbitral tribunals in the exercise of their discretion in relation to costs, namely, that costs follow the event.

And in *Tramountana Armadora SA v Atlantic Shipping Co SA* [1978] 1 Lloyd's Rep 391 Donaldson J said at 399:

The starting point is always the rule that costs follow the event.

9 English Arbitration Act 1996, section 61(2): 'Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event…'

10 English Civil Procedure Rules r 44.2(2)(a).

11 This interpretation accords with the judgment of Winn J as long ago as 1961, where in *Messers Ltd v Heidner & Co* [1961] 1 Lloyd's Rep 107 at 115 he used a plain English version of the principle:

The arbitrators were… making an award as to costs without having, as their formal award shows, applied their minds to the most important consideration relevant to the exercise of their discretion, namely who had won – who had been successful in the proceedings.

12 Chartered Institute of Arbitrators' Practice Guideline 9: Guideline for Arbitrators on Making Orders Relating to the Costs of the Arbitration, section 4.3.2:

The concept is worded indirectly so that its meaning may not be entirely clear to the non-lawyer. It requires the arbitrator to consider what was the relevant 'event'. In most cases this can be equated with the outcome of the arbitration viewed in terms of the relative success of each party. Accordingly it would have been possible to express the general principle more directly, without change to its meaning, by adopting the formula that, as a general rule, the unsuccessful party should be ordered to pay the costs of the successful party.

or outcome is the primary factor but also stress that conduct is relevant[13] and similar provisions are being introduced into a number of other jurisdictions.[14]

In international arbitration, a number of leading authors have observed an approach which may be described as a *moderated costs follow the event* approach, although they have not used that terminology. A major text by Civil Law practitioners observes:

> It is increasingly common for the arbitral tribunal to order the party which is defeated on the merits of a dispute to pay all or a substantial part of the costs of the arbitration. That is traditionally the practice in some common law countries and now frequently occurs when the arbitral tribunal has its seat in continental jurisdictions such as France or Switzerland. In reaching their decision on the allocation of costs between the parties, arbitrators may take into account the attitude of the parties during the arbitral proceedings.[15]

The term 'attitude' may equate to 'conduct', in that conduct may be considered the outward manifestation of attitude; but it may import a sense that the parties should adopt a positive attitude which goes beyond refraining from poor conduct and extends to actively promoting cost- and time-effective arbitration. A study from 2003 written by authors from both Civil law and Common Law backgrounds identifies the same trend:

> An emerging trend can be recorded for the arbitration tribunal to order the losing party to pay all or the substantial part of the costs of the arbitration. This tradition is widely accepted and can be seen, for example, in England, in

13 English Civil Procedure Rules 44.2:

(4) In deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including: (a) the conduct of all the parties… (5) The conduct of the parties includes (a) conduct before, as well as during, the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated its claim.

14 In Hong Kong, for instance, the Civil Justice Reforms (since 2009) for domestic litigation have expressly made reference in the context of costs awards to such matters as Hong Kong Order 62 rule '5(1)… (e) the conduct of all the parties'.

15 Emmanuel Gaillard and John Savage (eds) *Fouchard, Gaillard and Goldman, International Commercial Arbitration* (Kluwer Law International, 1999) p 685.

> France and Switzerland. The other emerging trend in allocating costs between the parties is to take into account their attitude during the proceedings…[16]

More recently, in 2011, an experienced Civil Law practitioner reports:

> Some arbitral decisions hold that the principle of 'costs should follow the event' is becoming a governing principle in international arbitration. There is an emerging trend for arbitral tribunals to order the losing party to bear both the procedural costs and the legal costs of the other party unless the circumstances of the case warrant a departure from such rule.[17]

These observations as to emerging trends are consistent also with Principles of Transnational Civil Procedure drawn up by Unidroit and approved by the American Law Institute[18] which establish 'standards for adjudication of transnational commercial disputes' including arbitration[19] and which offer an important view of the perceived direction of travel in relation to costs in transnational cases.

5.4. Success/outcome as a primary factor for the exercise of discretion

Arbitration legislation and success in the outcome as the primary factor

Some arbitration legislation specifically refers to success or outcome. The German legislation provides:

> … the arbitral tribunal shall allocate… the costs of the arbitration as between the parties… It shall do so at its discretion and take into consideration the circumstances of the case, in particular the outcome of the proceedings.[20]

16 Julian DM Lew, Loukas A Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) ss 24–82 p 653.

17 José Rosell, Arbitration Costs as Relief and/or Damages, Journal of International Arbitration 28(2): 115–126, 2011.

18 Unif L Rev 2004–4, 758. The relevant provisions are set out in Chapter 1.

19 Quoted in Chapter 1.6

20 German ZPO 1057(1). The translation is from the DIS website ('Deutsche Institution fur Schiedsgerichtsbarkeit').

The Austrian legislation uses similar wording.[21] The Finnish Arbitration Act provides:

> …the arbitral tribunal may, in its award… order a party to compensate, in whole or in part, the other party for his normal legal costs, in accordance with the provisions of the Code of Judicial Procedure….[22]

The Code provides eg 'The party who loses the case is liable for all reasonable legal costs incurred by the necessary measures of the opposing party…' although there are exceptions to this principle.[23] Mexican legislation provides:

> Except as provided in the following paragraph, the costs of arbitration shall be borne by the unsuccessful party. 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. With respect to the costs of legal representation and assistance, the arbitral tribunal, taking into account the circumstances of the case, shall determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.[24]

The English legislation provides that:

> … 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…[25]

and indicates that costs are, absent overriding circumstances, to be awarded to reflect success.

21 Austrian ZPO 609. See the translation on the VIAC website. See also Jenny WT Power and Christian W Konrad, Chapter IV: The Award – Costs in International Commercial Arbitration–A Comparative Overview of Civil and Common Law Doctrines in Christian Klausegger, Peter Klein, et al (eds), *Austrian Arbitration Yearbook 2007*, (CH Beck, Stämpfli & Manz 2007) pp 261–274.

22 Arbitration Act, s 49 (967/1992 as amended). Finland Ministry of Justice unofficial translation.

23 Chapter 21 — Legal costs (1013/1993), s 1 (368/1999).

24 Mexican Commercial Code, Title IV Commercial Arbitration, Article 1455. Translation appears on the website of Centre for Mediation and Arbitration of Centro de Mediacion y Arbitraje de Mexico.

25 English Arbitration Act 1996, s 61(2).

> An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.[11]

The legislation of England,[12] Mauritius,[13] Japan,[14] Sweden[15] etc and many rules of procedure often do likewise.

11 UNCITRAL Model Law Article 30(2).
12 English Arbitration Act 1996, s 51.
13 Mauritius International Arbitration Act 2008, s 35.
14 Japanese Arbitration Law 2003, Article 38.
15 Swedish Arbitration Act 1999, s 27.

CHAPTER 12

APPLICATIONS TO THE COURT IN RESPECT OF COSTS

12.1 Introduction

Where the parties have agreed to refer disputes to arbitration, the courts may nonetheless on occasions become involved in questions as to costs of the arbitration. In particular, the procedural law of the seat may provide the courts with jurisdiction to:

(1) order security for costs;
(2) tax costs;
(3) supervise arbitrators' fees;
(4) exercise a supervisory jurisdiction in respect of procedural irregularity and/or breaches of public policy;
(5) entertain an appeal on a question of law or, more specifically, in relation to the merits of a costs award;
(6) assist in the recognition or enforcement of an award as to costs.

In this chapter we shall briefly examine these topics in a number of jurisdictions. This is intended to provide no more than a sketch because the procedure in relation to court applications will be covered by detailed rules, which are individual to each jurisdiction.

Before we deal with these substantive topics, we need to address two preliminary points: first, the question of improper applications to the court and secondly the question of entitlement to appear before courts in proceedings ancillary to international arbitrations.

12.2 Improper applications to the court

The opportunities to make applications to the courts are generally limited. Many procedural laws discourage applications unless a specific avenue is

identified in the legislation[1] and strict criteria are met. Where unjustified proceedings are pursued, the court will dismiss the application and will often require the applicant to pay costs on an enhanced basis. Thus, for example, where it considers the proceedings to have been commenced in breach of an arbitration agreement, it may award costs on an indemnity basis.[2] Likewise, failed applications to set aside awards will frequently be met by an order for indemnity costs; the Hong Kong Court of Appeal has made it clear that that where a party has been unsuccessful in setting aside or resisting enforcement of an arbitral award in Hong Kong, that party should ordinarily pay costs on an indemnity basis unless there are any special circumstances present.[3] Courts in Australia have not followed this principle.[4]

12.3 Entitlement to appear in ancillary court proceedings

Unlike state court proceedings, there is no general restriction on legal representation in arbitrations. One does not ordinarily need to be a member of a local Bar or Law Society in order to act as an advocate or counsel in an arbitration, although some jurisdictions prohibit the provision of legal services within their borders without being registered. It is important to remember that there is a restriction on foreign lawyers appearing in state court proceedings of many jurisdictions. This is not only an inconvenience but raises questions of the recoverability of costs for non-admitted lawyers who have assisted in such proceedings.[5]

1 English Arbitration Act 1996, s 1(c): 'in matters governed by this Part the court should not intervene except as provided by this Part.' Hong Kong Arbitration Ordinance, s 3(2)(b): 'the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance.' Malaysian Arbitration Act 2005, s 8: 'No court shall intervene in matters governed by the Act, except where so provided in this Act.' (inserted by the Arbitration Amendment Act 2011).

2 *A v B* [2007] EWHC 54 (Comm).

3 *Hong Kong Court of Appeal in Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* (2012) CACV 136/2011The Court adopted its own earlier approach in *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491 as well as that of the High Court in *A v R* [2009] 3 HKLRD 389. These decisions took the position that since the parties had agreed to resolve future disputes by way of arbitration, unless there were special facts or exceptional events in place, the court would take a dim view of any application by a party to set aside an arbitral award or to resist enforcement of an award.

4 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*, 2011 VSCA 248.

5 *Westland Helicopters Ltd v Sheikh Salah Al-Hejailan (No 2)* [2004] EWHC 1688. In some jurisdictions like England, the courts have ruled that the costs of engaging an English barrister who had been instructed by a US lawyer not admitted in England and Wales to deal with the challenges to an award were not recoverable as it was prohibited by the Solicitors Act 1974.

12.4 Security for costs

Historically, a number of state courts were empowered to order security for costs in arbitration. Where legislation deals expressly with security for costs, it is now more common to reserve this power exclusively to the tribunal.[6] In Malaysia, however, s 11(1) of the Arbitration Act 2005 provides:

> A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for: (a) security for costs;…

This does not preclude the tribunal from deciding this question in advance of any court intervention.[7] A number of questions continue to arise from this, including the interaction between an application for security for costs and an application for a stay to arbitration.[8] Although courts were at one stage ready to review the exercise of powers to order security for costs by a tribunal, the tendency is increasingly to consider this a matter for the tribunal alone.[9]

12.5 Taxation in the court

The procedural laws of a number of countries provide that the courts may tax costs if the tribunal fails to do so. Examples include England[10]

6 English Arbitration Act 1996, s 38(3). Singapore International Arbitration Act, s 12(1)(a).

7 Malaysian Arbitration Act 2005, s 19.

8 *Borneo Samudera Sdn Bhd v Siti Rahfizah bt Mihaldin & Ors* [2008] 6 MLJ.

9 Eg *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642: at first instance the judge decided that the tribunal had exceeded its jurisdiction in ordering security for costs, but the Court of Appeal for Ontario held that the judge had no jurisdiction to review the order which was for the arbitrator alone.

10 English Arbitration Act 1996, s 63(4):

> If the tribunal does not determine the recoverable costs of the arbitration, any party to the arbitral proceedings may apply to the court (upon notice to the other parties) which may— (a) determine the recoverable costs of the arbitration on such basis as it thinks fit, or (b) order that they shall be determined by such means and upon such terms as it may specify.

and where the parties agree, Malaysia.[11] Taxation by the court of the amount of costs payable is rare in practice, as the tribunal is generally best placed to deal with costs and considers it a professional duty. Some jurisdictions, such as Singapore, have withdrawn the court's jurisdiction to tax arbitration costs but have provided that the default taxing authority is an official in the recognised leading arbitration institution.[12]

12.6 Review of the arbitrators' fees by the court

Although the tribunal's power to make a binding award covers all aspects of the *party costs* and the apportionment of the *central costs*, it does not generally extend to fixing the tribunal's entitlement to its own fees. The fees recoverable by the tribunal are contractual in nature and are subject to the same general principles as apply to similar contracts for services under the law applicable to the agreement between the tribunal and the parties.

The arbitration laws of a number of countries make specific provision for the arbitrator's fees.

In Sweden, the Supreme Court has held[13] that even where the fees of three well known arbitrators had been determined by an internationally recognised arbitral institution the parties were entitled to seek a review of the tribunal's claimed fees pursuant to s 41 of the Swedish Arbitration Act 1999. The Supreme Court returned the question of the costs to the Stockholm District Court for review of the claimed fees.

In a Swiss case[14] the arbitrators sought to enforce a claim for fees by the device of styling the claim as an award and instituting a stay if the fees were not paid. The court held that:

> [19]… claims arising out of the relationship between the arbitral tribunal and the parties do not fall within the scope of the arbitration clause; second, because this would be an unacceptable decision in one's own case…. [20] The jurisdiction of the arbitral tribunal to render an effective decision is limited to the dispute submitted by the parties and ends where no longer the dispute between the parties but rather the relationship between the parties on the one hand and the arbitral tribunal on the other is at issue. Thus, according to the correct opinion, disputes between the parties and the arbitral tribunal as to the arbitrators' compensation are to be decided by the competent civil courts…

11 Malaysian Arbitration Act 2005, s 44(1)(b):

> …any party may apply to the High Court for the costs to be taxed where an arbitral tribunal has in its award directed that costs and expenses be paid by any party, but fails to specify the amount of such costs and expenses within thirty days of having being requested to do so.

12 Singapore International Arbitration Act, s 21 provides that unless the awards stated otherwise, the Registrar of SIAC will tax the costs.

13 *KH v Soyak International Construction* [2008] Ö 4227-06.

14 Switzerland Budesgerichtshof First Civil Law Chamber, 10 November 2010, Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2011 – Volume XXXVI*, Yearbook Commercial Arbitration, Volume XXXVI (Kluwer Law International, 2011) pp 604–606.

In England, the Arbitration Act 1996 provides for applications to the court in respect of the arbitrators' fees. Applications may be made to have the amount of fees and expenses considered and adjusted, for a review of the fees and expenses claimed and for any question as to the reasonable fees and expenses of the arbitrator to be reviewed.[15] These provisions have rarely been used.

In a Finnish case,[16] a wider attack was instituted in which the tribunal's fees were just one element. An arbitrator whose award had been set aside because he had continued to provide legal opinions to the owners of one of the parties during the proceedings, but failed to disclose this to the other party, was held by the Supreme Court liable for damages, namely the loss incurred by the applicant having engaged in the failed proceedings. It was emphasised by the court that the breach in question was not having a conflict but failing to disclose it. What was at stake here was more than his own fees, although they were an important aspect.

12.7 Procedural irregularity and or public policy issues

UNCITRAL Model law

In countries that have adopted the Model Law the scope for any challenge to the award, including an award as to costs, is limited. Article 34 provides a series of exclusive grounds for setting aside the award and is restrictive also in relation to the available court, the remedy permitted and the time within which any application may be made.

Article 34(2) sets out the grounds for an application to set aside. These are largely the same grounds for refusing to recognise or enforce an award under the New York Convention. We can divide the heads of challenge into (1) procedural irregularities and (2) breaches of public policy.

Procedural irregularities

The grounds specified in Article 34(2) are lack of notice, excess of jurisdiction and lack of arbitrability. In *Kanoria v Guinness* it was said that the analogous ground in the New York Convention is engaged where

15 Respectively ss 28(2), 56(2) and 64(2).

16 KKO 2005:14. A case note appears as Gustaf Möller, The Finnish Supreme Court and the Liability of Arbitrators, *Journal of International Arbitration*, (Volume 23 Issue 1, Kluwer Law International, 2006) pp 95–99.

'the structural integrity of the arbitration proceedings… is fundamentally unsound.'[17]

The lack of notice ground in Art 34(2)(a)(ii) may apply where the tribunal surprises the parties by making an award as to costs without an opportunity to address the tribunal, eg on offers of settlement, before it makes its decision. Ordinarily this will normally apply only where the applicant has failed to indicate that the tribunal should hear submissions on costs.

The excess of jurisdiction ground in Art 34(2)(a)(iii) may arise in two distinct ways. First, there may be an excess of fundamental jurisdiction, for example where the costs of two arbitrations heard concurrently but not formally consolidated are confused; where the first arbitration involves parties A and B and the second involves B and C, A cannot be ordered to pay C's costs directly. Secondly, there may be a decision in excess of the submission (*ultra petita*); for example where a party declines to make a request for costs where this is a precondition and yet the tribunal nonetheless awards that party costs, this may constitute an excess.

As to arbitrability grounds in Art 34(2)(b) will rarely be engaged specifically in relation to costs.

Public policy

Most jurisdictions have adopted a restrictive approach to questions of violations of public policy. In a decision of the Singapore Court of Appeal[18] the Chief Justice, echoing a number of leading cases from a variety of jurisdictions,[19] said:

> In our view, [public policy] should only operate in instances where the upholding of an arbitral award would 'shock the conscience'… or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' … or where it violates the forum's most basic notion of morality and justice …

Despite this narrow scope, this avenue has been pursued successfully in a number of costs cases. The Singapore Court of Appeal has held that costs awarded in relation to a champertous agreement (champerty being a crime in that jurisdiction) violated public policy.[20] In a Philippines case, the court set aside (with respect, against principle) an award seated in Singapore which required the losing party to pay costs; it was set aside on the grounds that it was a violation of Philippines' public policy that a bona fide litigant should not be penalised for pursuing a claim.[21] Subsequent developments in the Philippines probably indicate that this result would not be followed today.[22]

By and large, the courts have taken a restrictive view of what offends public policy. The Singapore case of *VV v VW*[23] provided a test of the resilience of costs awards. The tribunal awarded disproportionate *party costs*; the question for the court was whether this disproportionality offended against public policy so that the award might be set aside. Prakash J gave a long and thoughtful judgment, characterising the award as disproportionate, expressing disapproval and indicating that tribunals should follow established legal principles. Nevertheless, on the specific point whether this background permitted the court to set aside the award under Singapore law, the court held [at 31] that:

> …it is not part of the public policy of Singapore to ensure that the costs incurred by parties to private litigation outside the court system, eg, arbitration, whether the same is domestic or international, are assessed on the basis of any particular principle including the proportionality principle.

Accordingly, the award was not set aside.

Non-UNCITRAL jurisdictions

In non-UNCITRAL jurisdictions a variety of broadly similar tests are applied; these will be subject to individual interpretation. In Sweden, it is provided that the court may set aside the award 'if, without fault of the party, there otherwise occurred an irregularity in the course of the proceedings

17 May LJ in in *Kanoria & Ors v Guinness* [2006] EWCA Civ 222 (21 February 2006), para 30.

18 *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at para 59.

19 *Downer Hill* [2005] 1 NZLR 554 (HC), *Deutsche Schachbau v Shell International Petroleum Co. Ltd.* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR, *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du papier (RAKTA)*, 508 F2d 969 (2d Cir 1974) at 974.

20 *Otech Pakistan Pvt Ltd v Clough Engineering Ltd & Anor* [2007] 1 SLR(R) 989.

21 *Luzon Hydro Corp v Hon Rommel O Baybay & Transfield Philippines, Inc* (2007) XXXII Yearbook of Commercial Arbitration 456.

22 The Philippines has since introduced Special Rules of Court on Alternative Dispute Resolution, 2009 which appear to endorse the principle that a successful party in court proceedings in connection with arbitration may recover attorney's costs; so it may be that even the Philippines should no longer to be treated as representing a potential exception.

23 *VV v VW* [2008] 2 SLR(R) 929. See also O' Reilly, 'The Problem with Costs in International Arbitration', presented at the RAIF Conference, Bali, 2012 found at http://www.baliraif2012.com/assets/pdf/session5/Michael%20O'Reilly_The%20problem%20of%20costs%20in%20international%20arbitration.pdf