COSTS IN INTERNATIONAL ARBITRATION: THE CONTINUAL SEARCH FOR COST-EFFICIENT ARBITRATIONS

Mercedes Romero / Nicolás Sierra[1]

Resumen: *Los costes del arbitraje internacional son de las cuestiones que más preocupan a la comunidad del arbitraje. Así lo han reconocido los 750 encuestados por la Queen Mary University a finales de 2015. Estas noticias no son nuevas. Así, la Corte de Arbitraje de la Cámara de Comercio Internacional de París ha reconocido en varias ocasiones su firme compromiso con la reducción de los costes de los arbitrajes que administra. Por otro lado, la Corte de Arbitraje de la Cámara de Comercio Internacional de París ha publicado recientemente un informe del que se no se desprende ninguna corriente mayoritaria respecto de las decisiones en materia de imposición de costas de los tribunales arbitrales. Conclusiones similares fueron alcanzadas por el Instituto de Arbitraje Internacional de la Cámara de Comercio de Estocolmo en su informe sobre costas en arbitraje de 2014. Por tanto, parece aconsejable que las partes alcancen un acuerdo sobre la imposición y distribución de costas con carácter previo o durante las primeras etapas del procedimiento arbitral.*

A. Costs in international arbitration as one of the main concerns of the arbitration community: the Queen Mary arbitration survey

1 At the end of 2015, the School of International Arbitration at Queen Mary University of London issued the newest volume of its international arbitration survey[2] (the "**Survey**"), focusing this time on the improvements and innovations in international arbitration. For the purpose of this article, we will focus on the main concern highlighted by the Survey, which was rather unsurprisingly shared by the participating arbitration practitioners: the high costs incurred in international arbitration.

2 The Survey, which more than 750 respondents participated in (including private practitioners, arbitrators, in-house counsels and academics, among others) between March 2015 and June 2015, showed that cost of arbitration was perceived to be one of the three worst characteristics of international arbitration by 68% of the respondents. Indeed, cost was seen to be by far the worst feature of international arbitration, with the second most complained of characteristic being a lack of effective sanctions during the arbitral proceedings, which was selected by less than 50% of the respondents of the Survey.

3 The cost of arbitration was also repeatedly mentioned by respondents of the Survey when asked what improvements could be made to international arbitration. Two of the main issues highlighted by respondents regarding this matter were: *(i)* the need for procedural innovations in order to control the time and cost of international arbitration and; *(ii)* the concept of *"due process paranoia"*. The issue of *"due process paranoia"* is defined as the reluctance of arbitral tribunals to act decisively in

---

1 Abogados en Pérez-Llorca

2 2015 *International Arbitration Survey: Improvements and Innovations in International Arbitration.* Queen Mary University of London, 2015, p. 51.

certain situations for fear of the final award being challenged on the grounds of a party not having had the opportunity to fully present its case. Needless to say, this "*due process paranoia*" also results in longer arbitration times and higher costs, with parties arguing over procedural issues that could be more efficiently decided by arbitrators without any further discussion (e.g. admissibility of evidence).

4 Respondents were also asked what procedural improvements could be made in order to improve the time and cost efficiency of proceedings. However no particular suggestions received overwhelming support. The most positively valued suggestion was requiring arbitral tribunals to commit to a schedule regarding deliberations and the delivery of the final award, notifying parties of this schedule. This suggestion was closely followed by proposals to ensure stronger pre-appointment scrutiny of prospective arbitrators' availability, sanctions for dilatory conduct by parties or their counsels, early procedural conferences, and the possibility of a pre-hearing preparatory meeting of the arbitral tribunal.

5 Another widely supported proposal was the inclusion in institutional rules of simplified procedures for claims under a certain value. In this case, the majority of respondents believed that $1 million was the appropriate value under which the arbitration should be followed by means of the simplified proceedings.

6 Finally, respondents of the Survey also believed that parties' counsels should proactively take measures that may result in a more cost-effective arbitration. For instance, the more widely supported measures were that counsels should: (i) collaborate with the opposing counsel to narrow the issues of the arbitration and to limit document production; (ii) encourage settlement; and (iii) not practice overlawyering, a term that can be interpreted as a disproportionate use of resources when conducting matters (e.g. by engaging in too many procedural conflicts or by overstaffing).

7 Therefore, we can deduce that costs in international arbitration are the main concern of practitioners. However, this is not news. Practitioners and institutions have been aware of the costs of arbitration for years and this matter has been widely studied and written about. We should rather ask, would any of the innovations proposed in the Survey be effective in reducing the costs of arbitration? Or should the parties themselves adopt measures to decrease costs?

B. The ICC's most recent initiatives aimed at conducting arbitrations in the most efficient and cost-effective manner

a. The ICC's commitment to the rationalisation of international arbitration costs

8 The ICC has recently firmly committed to undertaking several initiatives in order to rationalise the delays and costs of arbitrations. In August 2007 the ICC issued the first edition of its report 'Techniques for Controlling Time and Costs in Arbitration', which was updated in 2012. The new version of the report is meant to be an adjunct to the latest 2012 version of the ICC Arbitration Rules (the "**ICC Rules**") and should be used by parties and arbitrators in the tailor-making process required by the ICC Rules.

9 In this new version of the ICC Rules, the drafting committee introduced two new additions to encourage a greater control by arbitrators of time and cost. Firstly, article 22(1) provides that:

> *"The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute".*

10 Moreover, article 37(5) further provides that:

> *"In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner".*

11 Finally, appendix IV of the new ICC Arbitration Rules provides practitioners with a selection of the techniques first announced in the second edition of the report 'Techniques for Controlling Time and Costs in Arbitration'.

12 Therefore, the current ICC Rules in force and the latest version of the report 'Techniques for Controlling Time and Costs in Arbitration', provide arbitration practitioners with several techniques that may be taken into account during a particular arbitration and which the parties may agree to use. These techniques are not exhaustive. However, they are open-ended, which means that the parties are encouraged to develop them in the way that they may find appropriate.

b. The ICC Report

(i) Aim of the Report

13 The ICC's most recent publication is its new 'Report on Decisions on Costs in International Arbitration' (the **"Report"**). The Report is the result of the work of a specially appointed 'Task Force on Decisions as to Costs' (the **"Task Force"**), which was in charge of coordinating ICC National Committees Groups and other arbitration institutions[3]. The Task Force was also in charge of identifying the factors that fall under arbitrators' discretion when decisions on costs are made (which could be at any stage during the proceedings) and when the final allocation of costs is fixed.

14 The Report noted that, on average, 83% of the costs of arbitration relate to party costs. These costs include counsels' fees, expenses related to witnesses and independent experts, and any other costs incurred by parties during the arbitration. On the other hand, arbitrators' fees and institutional administrative expenses only amount to 17% of the total costs (15% for arbitrators and the remaining 2% for the institution).

15 As the Report expressly states, its ultimate objective is to consider how the allocation of costs can be used effectively to control time and cost and to assist in creating fair, well-managed proceedings matching users' expectations.

3 Among other institutions, the CIETAC, the HKIAC, the ICDR, the LCIA, and the SCC were invited to submit analyses of awards rendered under their administration showing how arbitrators deal with the allocation of costs under their respective arbitration rules.

16 Regarding the allocation of costs, the Report does not endorse any particular approach nor does it provide any guidelines to be followed by arbitral tribunals. The Report only takes into account the different approaches concerning the allocation of costs applied by arbitral tribunals. The allocation of costs is usually influenced by the practice of the courts and under the laws of the countries of origin of the parties and arbitrators. Two basic approaches were noticed:

(i) The "costs follow the event" approach, where the losing party pays for the successful party's costs.

(ii) The "American Rule", under which each party bears its own costs regardless of the outcome of the arbitration.

17 The ICC Rules are not an exception, given that the majority of institutional rules do not adopt any particular approach to the allocation of costs, giving arbitrators autonomy to decide: while some institutional arbitration rules do state the "costs follow the event" approach (e.g. LCIA Arbitration Rules), the majority do not establish any such presumption (e.g. the ICC Rules). Despite the absence of specific provisions on the allocation of costs in the ICC Rules, a large majority of tribunals adopted the "costs follow the event" approach. The Report stated that these tribunals took the "costs follow the event" approach into account as a starting point for the allocation of costs, thereafter adjusting the decision on costs as considered appropriate.

(ii) Considerations taken into account by arbitral tribunals in their decisions on costs

18 The Report takes into account many considerations for the arbitral tribunals' decisions on costs. The following considerations will be highlighted: (a) specific agreement on costs; (b) relative success of a claim and the complexity of proceedings; (c) reasonableness of legal costs incurred by parties; and (d) improper conducts or bad-faith behaviour of the parties during the arbitration.

a. Specific agreement on costs

19 The first stage is the agreement of the parties, which is allowed in almost all jurisdictions[4], however this is also subject to special regulation in certain countries[5].

The parties may not only expressly agree on the allocation of the costs of the arbitration, but also by referring to the institutional arbitration rules. Arbitrators should also bear in mind the Terms of Reference[6] in which the parties may agree to provisions concerning this matter. Finally, arbitrators should comply with any lex arbitri mandatory provisions and should take into account the eventual place of enforcement of the award.

4 In Spain, the parties' agreement on the allocation of costs is allowed under article 37.6 of the Spanish Arbitration Act.

5 In the United Kingdom, the 1996 Arbitration Act contains a mandatory provision forbidding agreements whereby a party undertakes to pay the costs in any event, unless such agreement is made after the dispute arises.

6 Article 23 of the ICC Rules.

b. Relative success of a claim and the complexity of proceedings

20 In addition, the Report states that arbitrators need to define the relative success of the parties. Although certain institutional arbitration rules include provisions by which the successful party is entitled to recover its own costs, these rules do not address other questions regarding the allocation of costs. For example, these institutional rules do not address how arbitrators should allocate costs when the winning party has not been awarded its full claim.

21 Regarding the ICC Rules, there is no provision in these rules that states that the losing party should bear the successful party's costs. The ICC Rules only give arbitrators the discretion to allocate costs as they may find appropriate, and they recommend that arbitrators should take into account whether parties have conducted the arbitration in an expeditious and cost-efficient manner.

22 Therefore, assuming that in complex cases it is difficult to determine the actual success of the prevailing party, the Report acknowledges that arbitrators may evaluate whether: *(i)* the claimant succeeded in its main claim; *(ii)* it would be appropriate to allocate costs on a claim-by-claim basis; or *(iii)* such allocation should be apportioned against the amount of damages originally claimed.

c. Reasonableness of legal costs incurred by parties

23 The Report furthermore states that arbitrators should take into account the reasonableness of the legal costs incurred by parties. In this respect, reasonableness is the standard applied by most arbitration rules when it comes to the allocation of costs, including the ICC Rules, although there is no definition of its meaning in these or any other arbitration rules. Therefore, a common-sense approach is required to assess whether costs are reasonable[7], proportionate to the amount in dispute, and proportionately and reasonably incurred by the parties[8].

d. Improper conduct or bad-faith behaviour of the parties during the arbitration

24 In addition to all of these matters, arbitrators should assess any improper conduct or bad-faith behaviour committed by the parties during the arbitration[9].

As stated, article 37(5) expressly allows arbitrators to consider whether the parties conducted the arbitration in a cost-effective and expeditious manner. Regarding this assessment, the Report notes that it is the intention of the ICC Rules to

---

7 In this regard the Report noted that arbitrators may take into account: (i) the reasonableness of the rates and the number of fee-earners; (ii) the reasonableness of the level of the specialist knowledge and responsibility required for the dispute and the legal qualification of its representatives; (iii) the reasonableness of time spent; and (iv) the disparity between costs incurred by both parties.

8 In this sense, arbitrators should bear in mind, among other factors: (i) the overall importance of the dispute and the matters underlying it; (ii) the complexity of the matter; (iii) the existence of unnecessary and meritless claims and counterclaims; (iv) the length and phases of the proceedings; or (v) the manner in which parties and their representatives handled document production.

9 The Task Force found that the parties' procedural behavior was consistently taken into account by the majority of the tribunals, in line with article 37(5) of the ICC Rules. The Report observed that the parties whose conduct was seen to have contributed to excessive costs often did not recover all of the costs claimed. However, the decisions on costs when the procedural behavior of the parties was taken into account were found to be divergent, meaning that no trends could be inferred from the award analysis by the Task Force.

allow arbitrators to conduct an independent examination, regardless of the outcome of the arbitration, with it being within the arbitrators' discretion to conclude whether the improper behaviour of a party is the one and only determinative factor in the allocation of costs.

25 Finally the Report indicates that the improper or bad-faith behaviour of the parties during certain stages of the proceedings may result in certain delays or increased costs. In this regard, the Report notes that this improper conduct may take place during different procedural steps[10], such as the document production of the arbitration, or that such improper conduct may be reflected in false witnesses' statements, in the false reporting of evidence, or in false submissions to the tribunal.

(iii) Brief mention of current cost allocation in Spain

26 As explained above, article 37.6 of the Spanish Arbitration Act allows the agreement of the parties to be sufficient in the allocation of arbitration and parties' costs, without any further provisions being required.

27 According to the Report, arbitral tribunals in Spain take reasonableness into account as one of the main principles in order to make a decision on costs. Indeed, special reference is made to Spain in the Report regarding a particular commercial arbitration: the losing party, which had retained a small firm, was ordered to pay the legal expenses of the successful party, which had retained a large international law firm. The arbitrators concluded that, given the procedural complexity of the case, which had been exacerbated by the losing party persisting with meritless claims, the losing party was to bear all of the costs as a result of its procedural behaviour.

(iv) Conclusions of the Report

28 The Report concluded that the arbitral awards analysed had no uniform approach to the allocation of costs, but a diverse range of approaches, depending on the national legal systems of the parties and arbitrators. Furthermore, it was concluded that the Report and its annexes are intended to be used in further arbitrations when it comes to allocating costs and when specifying the factors that should be taken into account during the decision-making process. Finally, the Report insisted on the significance of the cost allocation decision, signalling that it can be used as a tool to incentivise the parties to conduct arbitrations in a cost-efficient and expeditious manner.

29 Nevertheless, this Report is not the first study that has tried to analyse the allocation of costs by arbitral tribunals, concluding that no trends can be inferred. Similar conclusions were drawn by the Stockholm Chamber of Commerce (the "SCC") in 2014.

---

10 This improper conduct of the parties may constitute, among others: (i) pre-arbitration behaviours such as attempts to avoid arbitration, threatening behaviours, or parallel court proceedings in breach of the arbitration agreement; (ii) guerrilla tactics seeking an unenforceable award in order to affect the tribunal's ability to render a decision on the merits; (iii) repeated, unfounded and unsuccessful allegations against appointments of arbitrators or decisions on jurisdiction; and (iv) unnecessary court involvement.

C. The 2014 SCC study

30 Almost two years ago, the Arbitration Institute of the SCC conducted a brief study[11] (the **"SCC Study"**) on costs in arbitration. The SCC Study was shorter and less detailed than the Report; however its conclusions were very similar to those of the ICC Task Force.

31 The SCC Study only referred to awards rendered under its arbitration rules, meaning that the starting point for analysis could be none other than the SCC Arbitration Rules. Article 44 of the SCC Arbitration Rules states the following:

> *"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 of representation, having regard to the outcome of the case and other relevant circumstances".*

32 This approach is similar to the standard allocation of costs under the ICC Rules: arbitrators may allocate costs (both arbitration and party costs) as they deem appropriate, taking into account the reasonableness of such costs, the decision on their merit, and any other relevant circumstances.

33 The purpose of the SCC Study was to describe how arbitral tribunals appointed under the SCC Arbitration Rules apply article 44. For this purpose, the SCC Study provides an analysis of 140 arbitral awards rendered between 2007 and 2013, including both domestic and international cases.

34 The SCC Study noted, much like the Report, that SCC arbitrators tend to allocate costs in three different manners:

(i) All costs to be borne by one party (the "costs follow the event" approach).

(ii) Costs to be allocated depending on the relative success of the parties.

(iii) Arbitration costs to be divided between both parties, with each party paying its own costs (the "American Rule").

35 The SCC Study then proceeded to classify the awards depending on the decision on the merits.

36 In the cases in which the claimant was awarded all or most of its claims, the majority of the cost decisions allowed this prevailing party to recover its own arbitration and party costs (namely, the "costs follow the event" approach).

37 Among these cases in which the winning party was awarded the majority of its claims, the tribunal followed the "American Rule" and ordered the parties to bear their own costs in only 10% of cases. The tribunals based their decisions on whether adopt this approach in view of: *(i)* any meritless claims by the prevailing party which were withdrawn further on in the proceedings; and *(ii)* an absence of

---

11 *Recent Developments in International Arbitration Allocation of Costs: a Case Study.* Arbitration Institute of the Stockholm Chamber of Commerce, 2014.

justification regarding the costs[12], or *(iii)* both parties having equally influenced the time and costs required in the arbitration by raising numerous procedural incidents. Therefore, the SCC Study is clear with regard to arbitrators' intentions to sanction any dilatory tactics used by the parties during the arbitration.

38 In all of the cases in which the claimant was awarded half (or nearly half) of its claims, the arbitral tribunals ordered each party to bear its own costs or allocated these costs depending on the relative success of the parties.

39 Finally, in the cases in which the claimant did not succeed or was awarded substantially less than half of its claims, the majority of arbitral tribunals followed the "costs follow the event" principle.

D. Brief conclusion

40 Both the Report and the SCC Study demonstrate that no clear trends can be inferred from the decisions made on the allocation of costs in international arbitration. These studies also show that arbitrators are allowed to take into account the factors that they deem to be appropriate when deciding on costs: these factors may vary from objective matters (the outcome of the case or the amount of the arbitration) to subjective matters (the legal traditions of parties and arbitrators and the behaviour of the parties during the arbitration).

41 What also seems clear is that arbitrators are taking into account the bad-faith or dilatory behaviours of the parties, which seems appropriate under institutional arbitration rules and is in line with the concerns of practitioners on current arbitration costs.

42 As demonstrated by the Survey, there are widespread concerns regarding costs in international arbitration. In addition, arbitrators take into consideration a wide range of factors when deciding on cost allocation. With this in mind, it could be advisable for all parties to agree on cost allocation matters before a decision is rendered.

12 The prevailing party claimed the fees of counsels that did not appear in the arbitration.