The Plurality and Synergies of Legal Traditions in International Arbitration

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Looking Beyond the Common and Civil Law Divide

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Published by:
Kluwer Law International B.V.
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
E-mail: lrs-sales@wolterskluwer.com
Website: www.wolterskluwer.com/en/solutions/kluwerlawinternational

Sold and distributed by:
Wolters Kluwer Legal & Regulatory U.S.
920 Links Avenue
Landisville, PA 17538
United States of America
E-mail: customer.service@wolterskluwer.com

ISBN 978-94-035-2910-3

e-Book: ISBN 978-94-035-2911-0
web-PDF: ISBN 978-94-035-2912-7

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Printed in the Netherlands.

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CHAPTER 39

Costs in International Arbitration: Synergy Between Civil and Common Law Principles

Emilia Onyema[*]

1 INTRODUCTION

High costs of arbitration have led to criticisms of the system at large as noted by a study by Queen Mary University of London which found that costs were the 'most complained about aspect of international arbitration'.[1] Also cost is seen as arbitration's 'worst feature'.[2] Costs in arbitration gained such prominence that the International Chamber of Commerce (ICC) set up a Task Force to report to it on costs of the arbitration under its arbitration rules and regime.[3] The Report of the ICC Task Force did not find a definitive approach adopted by its arbitral tribunals to allocation of costs in international arbitration. Interestingly some commentators originally listed cost savings (or cheaper forms of dispute resolution) as one of the advantages of arbitration against litigation. Obviously, this perceived advantage is now very much open to

* All errors remain that of Dr Onyema.

1. Queen Mary University of London and White and Case Survey: International Arbitration Survey 2015: Improvements and Innovations in International Arbitration, p. 7. http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf [accessed 27 June 2020].
2. Queen Mary University of London and White and Case Survey: International Arbitration Survey 2018: The Evolution of International Arbitration, p. 8. http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf. [accessed 27 June 2020].
3. ICC Commission on Arbitration and ADR Report, 'Decisions on Costs in International Arbitration' of 1 December 2015. For earlier ICC efforts on the issue, *see also*, Arbitration Commission Report on Techniques for Controlling Time and Costs in International Arbitration, August 2007 with a second edition published in 2012.

contestation.[4] The issue of costs of the arbitration can be exacerbated when parties are unsure of how these costs will be apportioned at the end of the arbitral procedure. This is in contrast to the clear principles already developed over the years in domestic litigation. In recent times the presence of third-party funders has further complicated the amount of costs that can be recovered in international arbitration.[5]

This chapter discusses the main approaches to the apportionment of costs in international arbitration: the 'American approach' where each party bears their own costs;[6] and the 'English Approach' where the costs follow the event and the losing party pays the successful party's legal fees in addition to other costs of the arbitration.[7] Further distinctions are drawn where it is presumed that civil law countries follow the American rule and common law countries follow the English rule. As evidenced in litigation in certain countries, parties do not get their full legal costs but are awarded a notional cost by the courts.[8] This chapter also explores the approaches adopted in international arbitration to the allocation of costs and argues that the Chartered Institute of Arbitrators (CIArb) guidelines on the allocation of costs as articulated in the CIArb Guidelines on the Drafting of Arbitral Awards Part III – Costs (CIArb Cost Guidelines), harmonises these different approaches for adoption in international arbitration.

This chapter will define the costs of arbitration to clarify the expenditures that fall within it and what elements of the parties' expenditure are recoverable (section 2). Section 3 will identify the different approaches to the allocation of costs in international arbitration and examine the arguments for and against each approach to costs. This section presumes that the approaches to the allocation of costs in international arbitration rely heavily on the practices of the allocation of costs in domestic litigation, and is one of the practices imported into arbitration from litigation.[9] The last section

4. Mohamed S. Abdel Wahab, 'Costs in International Arbitration: Navigating Through the Devil's Sea', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration:* (Kluwer Law International 2019), 465.
5. *See* for example some current cases from the English courts: *Essar Oilfields Services Ltd v. Norscot Rig Management PVT Ltd* [2016] EWHC 2361 (Comm); *Excalibur Ventures v. Texas Keystone and others* [2016] EWCA Civ 1144 and; *Arkin v. Borchard Lines Ltd and others* [2005] EWCA Civ 655.
6. *See* for example, Mika Savola, 'Awarding Costs in International Commercial Arbitration' (2017) 63 Scandinavian Studies in Law 293; John F Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 Am U L Rev 1567; Wesley W Peltzer, 'Attorney Fees: The American Rule' (1975) 1 J Contemp L 355.
7. Section 61(2) English Arbitration Act 1996 provides: '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...'.
8. *See* for example, the practice of the Nigerian courts in *Odutola v. University of Ilorin* (2005) 3 MJSC 151; *Melwani v. Five Star* (2002) 3 MJSC 117.
9. John Yukio Gotanda, 'Awarding Costs and Attorneys' Fees in International Commercial Arbitrations', (1999) 21(1) Michigan Journal of International Law 1 DOI: 10.2139/ssrn.208672; Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International (2012) 1199-1200; Christopher Koch, 'Is There a Default Principle of Cost Allocation in International Arbitration? – The Importance of the Applicable Provisions and Legal Traditions', (2014) 31(4) Journal of International Arbitration 485-497 DOI: 10.54648/joia2014022 and; Anne-Carole Cremades and Alexandre Mazuranic, 'Chapter 9: Costs in Arbitration', in Elliott Geisinger and Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd ed., Kluwer Law International (2013) 190-191.

(section 4) of this chapter will examine the harmonising effect of the CIArb Guidelines on the allocation of costs. The chapter concludes that the CIArb Cost Guideline is a soft law that contributes to the emergence of an independent international or transnational practice on the components and reflects the approach to the allocation of costs in international arbitration.

2 COSTS IN INTERNATIONAL ARBITRATION

Two important questions that costs in arbitration raise are why costs in international arbitration are important; and what expenditures of the disputing parties in prosecuting the arbitration are recoverable. The issue of costs in international arbitration (as in litigation) is important primarily because arbitration is a form of private dispute resolution and the parties are responsible for funding every aspect of the arbitral proceeding which can cause costs to become quite substantial.[10] Eric Schwartz argued in 1993 that parties will be disinclined to use arbitration where the costs of prosecuting arbitration dwarf the supposed gains of arbitration.[11] For Micha Buhler, due to the large variance in practice, it can be very difficult to predict how costs will be apportioned as there is precedence to 'support nearly any approach a tribunal may wish to apply to its cost decision'.[12] For example, John Gotanda[13] analysed some International Centre for Settlement of Investment Disputes (ICSID) cases in the late 1990s and found cases where the arbitral tribunal awarded costs of USD 5 million to the successful party,[14] yet in another case the tribunal found that they did not have the authority to award costs at all.[15]

As noted above, in various surveys, parties involved in international arbitration have decried the high costs of arbitration.[16] David Gaukrodger and Kathryn Gordon in 2011 found that, for example, the average cost of an ICSID arbitration is USD 8 million.[17] Arbitral institutions have not been oblivious to the outcries against the high cost of arbitration and have responded by, for example, including provisions on

10. Micha Bühler, 'Awarding Costs in International Commercial Arbitration: An Overview', (2004) 22(2) Association Suisse de l'Arbitrage 249 DOI: 10.54648/asab2004036.
11. Eric A. Schwartz, 'The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration' (1993) ICC Bulletin at 8.
12. Bühler (2004) at 249.
13. Gotanda (1999) *supra*, pp. 1-2.
14. *Southern Pacific Properties Ltd. v. Egypt*, Award of 20 May 1992 (ICSID) Case No. ARB/84/3.
15. *Vacuum Salt Products Ltd. v. Republic of Ghana*, Award of 1 February 1994 (ICSID) Case No. ARB/92/1.
16. *See* for example, Queen Mary, University of London, 2013 International Arbitration Survey: Corporate Choices in International Arbitration: Industry Perspectives, 5; Queen Mary University of London and White and Case Survey: International Arbitration Survey 2015: Improvements and Innovations in International Arbitration and; Queen Mary University of London and White and Case Survey: International Arbitration Survey 2018: The Evolution of International Arbitration. See also, Africa Arbitration Academy, Survey on Costs and Disputes Funding in Africa, (April 2022) in which they found that arbitration costs may be slightly higher than the cost of litigation in the 25 African jurisdictions hey surveyed.
17. David Gaukrodger and Kathryn Gordon, 'Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community', OECD Working Papers on International Investment, 2012/03, *OECD Publishing*, 19.

fast-track procedures for disputes of a certain value threshold. One example is Article 30 of the ICC Rules of 2021 under which disputes of USD 3 million or less will be determined under the Expedited Procedure Rules.[18] Some arbitral institutions also now include cost calculators on their website to provide the parties with a reasonably good idea of the possible cost of the institution and the arbitrators.[19]

It is obvious that parties incur all manner of costs before a dispute arises, while preparing to file or defend a claim, during the prosecution of the claim in the arbitral procedure and even after the award has been rendered to enforce or contest the award.[20] Each item of expenditure is money that could have been spent in performing the contract or building the firm or business. In other words, such expenditure could have been invested to make additional profit for the business. There is therefore loss of use of the capital or money. Any party will rightly want to recover all of the monies it had expended directly or indirectly as a result of the breach of the contract and in pursuing its claim. So, what comprises the costs of the arbitration?

As it is well known, arbitration is a rules-based process for the resolution of disputes between parties that submit themselves to it. This therefore means that the applicable rules will also determine what expenditures of the parties are recoverable. On some of the items listed under arbitration rules, an example from Article 40 of the UNCITRAL Arbitration Rules 2010 provides that costs include:

(a) the fees of the arbitral tribunal;
(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 arbitral tribunal determines that the amount of such cost is reasonable; and
(f) and fees and expenses of the appointing authority.

Some arbitration laws include (usually non-mandatory) provisions on costs. The UNCITRAL Model Law on International Commercial Arbitration ("Model Law") is largely silent on the issue of costs.[21] However, some of the national arbitration laws modelled after the Model Law make some provisions on the costs of arbitration. One

18. Article 30, ICC Arbitration Rules, 2021 refers to its Appendix VI.
19. See for example the Cairo Regional Centre for International Commercial Arbitration (CRCICA) website at: https://crcica.org/arbitration/cost-calculator/; German Arbitration Institute (DIS) at: https://www.disarb.org/en/tools-for-dis-proceedings/cost-calculator; Swiss Arbitration Centre at: https://www.swissarbitration.org/centre/arbitration/cost-calculator-2021/ [Accessed 6 August 2023].
20. Bühler (2004), *supra* at 270; Mohamed S. Abdel Wahab, 'Costs in International Arbitration: Navigating Through the Devil's Sea', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration*, Kluwer Law International (2019) 465, 470-471; Susan D. Franck, *Arbitration Costs: Myths and Realities in Investment Treaty Arbitration*, OUP (2019) 182.
21. UNCITRAL Model Law mentions costs as it relates to interim measures under Article 17G.

example is, section 32B of the Kenyan Arbitration Act[22] which provides that, unless otherwise agreed by the parties, the costs and expenses of the arbitration are the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. Section 50 of the 2023 Nigeria Arbitration and Mediation Act (AMA) sets out a more elaborate and comprehensive costs of the arbitration to include: the fees, travel and other expenses of the arbitrators; the cost of expert advice and other assistance required by the tribunal; travel and other reasonable expenses of the parties, witnesses and other experts consulted by the parties; claimed reasonable costs of legal representation and assistance of the successful party; administrative costs of the arbitration institution, appointing authority, venue, sitting and correspondence; costs of obtaining third party funding; and other costs approved by the tribunal.[23]

For examples from arbitration laws not based on the Model Law, the 1996 English Arbitration Act provides in section 59 that costs of the arbitration refer to, arbitrators' fees and expenses, fees and expenses of the arbitration institution, and the legal and other costs of the parties.[24] Both the Swiss Private International Law[25] and the 2011 French Law of International Arbitration make no mention of what expenses are covered under costs, how they should be allocated or when they should be decided. The 2017 OHADA Uniform Arbitration Act makes no provision on the allocation of costs. However, Article 24 of the Arbitration Rules of the OHADA Common Court of Justice and Arbitration 2017, provides that costs include the 'normal' costs that the parties sustain in their defence, the fees payable to the arbitrators and the administrative costs of the Court.

These few examples clearly show there is no consistency of practice. This is understandable since the items of expenditure of the parties will majorly differ where there is an arbitral centre or administrative support; where there is none (ad hoc arbitration); and where there is an appointing authority (whether institutional or ad hoc). However, there are some items of expenditure that are common to all the arbitration rules and laws mentioned above. These are: the costs of administering the arbitration reference, the cost for the service rendered by the arbitrator (and other non-parties such as experts) in the arbitration, and the cost of the expenses of the arbitrator (and other non-parties such as experts and tribunal secretaries) for purposes of the arbitration.[26] These items of cost therefore flow directly from the participation of these non-parties in the arbitration at the request of the disputing parties.

22. 1995, Chapter 49, Laws of Kenya 2012.
23. Nigeria Arbitration and Mediation Act 2023
24. This is not one of the sections proposed for review by the Law Society. On the reform consultation, see: https://www.lawcom.gov.uk/project/review-of-the-arbitration-act-1996/ [accessed on 6 August 2023].
25. Chapter 12 of the 1987 Federal Private International Law Act.
26. Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration*, Kluwer Law International (2012) 1205.

3 ALLOCATION OF COSTS IN ARBITRATION

Having identified what items of expenditure generally fall within the cost of the arbitration, the next questions are whether the parties can claim back these costs or expenditure and who determines this question. There is convergence in arbitration rules and arbitration laws on who determines the cost of the arbitration, and this question will be answered first. The vast majority of the arbitration rules and arbitration laws that make provision on the issue of costs allocate the power to determine the cost of the arbitration to the arbitral tribunal.

UNCITRAL Arbitration Rules provide in Article 42 that the arbitral tribunal *may* apportion the cost of the arbitration between the parties [emphasis added]. The same applies under the Hong Kong International Arbitration Centre (HKIAC), China International Economic and Trade Arbitration Commission (CIETAC), Singapore International Arbitration Centre (SIAC), Stockholm Chamber of Commerce (SCC), and Cairo Regional Centre for International Commercial Arbitration (CRCICA) Arbitration Rules.[27] Under ICC arbitration, the ICC International Court fixes the costs of the arbitration.[28] The same applies under the London Court of International Arbitration (LCIA) where its court of arbitration determines the fees, and the Nairobi Centre for International Arbitration (NCIA) where the Centre itself determines the costs of the arbitration.[29]

As it relates to arbitration laws, the UNCITRAL Model Law is silent in regard to apportioning costs at the end of the arbitral procedure but makes a brief provision for how costs should be allocated in the case of an interim order.[30] The English Arbitration Act states that costs should generally follow the event but allows the arbitral tribunal to deviate from this provision if it is appropriate.[31] The Ghana Alternative Dispute Resolution Act (ADRA) in section 51 makes it mandatory that the arbitrator shall assess the fees and expenses and compensation in the award while the Nigerian AMA in section 50 provides that the arbitrator shall fix the costs of the arbitration in the award. The Kenyan Arbitration Act makes a similar provision in its section 32, leaving this issue to the discretion of the parties.[32]

As evidenced in the above examples, the question of who allocates the cost of the arbitration is not a mandatory provision in either the arbitration laws or rules. This in effect means that the disputing parties can equally agree with such allocation in their arbitration agreement. Thus, the disputants themselves can agree on *how* the cost of

27. *See* Article 34 HKIAC, Article 49 CIETAC, Article 49 SCC, Article 35 SIAC, and Article 42 CRCICA.
28. Article 38 ICC Rules.
29. Article 28 LCIA Rules, and Article 31 NCIA Rules.
30. Article 17 G UNCITRAL Model Law on International Commercial Arbitration (2006).
31. Section 61(2), English Arbitration Act 1996.
32. The same discretion is contained in section 74 of the Hong Kong Arbitration Ordinance 2011, section 39 of Singapore Arbitration Act 2002, section 33 of the Mauritian International Arbitration Act 2008.

the arbitration shall be allocated between themselves.[33] Such agreement is not uncommon in arbitration. The parties, for example, can agree that each party will bear their own legal cost of pursuing the arbitration and they shall equally pay the cost and expenses of the arbitral tribunal. In the absence of such agreement, the arbitral tribunal or the arbitration centre (if any) will allocate such costs of the arbitration between the parties.

The next question is whether the parties can claim back all or some of the costs spent on the arbitration and the approaches adopted for this exercise in international arbitration. Arbitration rules and laws also provide some guidance on the answer to this question. Under the UNCITRAL regime (Model Law and Arbitration Rules), the losing party will bear the cost of the arbitration. Article 42 of the UNCITRAL Rules provides that the costs of the arbitration shall in principle be borne by the unsuccessful party, but the tribunal is empowered to consider the circumstances of the case when deciding how it will apportion the costs.

The Ghana ADRA makes some detailed provisions under section 55 as follows, each party pays the expenses of their witnesses; expenses of the arbitration shall be paid equally by the parties except they agree otherwise, or the arbitrator decides otherwise. And section 32B of the Kenyan Arbitration Act leaves this issue to the discretion of the arbitrator as does section 31 of the Indian Arbitration and Conciliation Act.[34]

Under the English Arbitration Act, the tribunal is required to allocate the costs in accordance with any agreement of the parties. The Act requests the tribunal to apply the 'costs follow the event' principle except in situations where the tribunal thinks it would be inappropriate.[35] Section 63 of the Act further states that the parties are free to decide which costs will be recoverable, but if they have not decided, the tribunal may choose the recoverable costs; if the tribunal decides which costs are recoverable, they would be expected to specify which items are recoverable and the basis of such decision.[36] Recoverable costs are described as any cost that was 'reasonably incurred'.[37]

The Hong Kong Arbitration Ordinance goes further to state that 'the arbitral tribunal may...direct in the award under subsection (1) to whom and by whom and in what manner the costs are to be paid'.[38] The Mauritian International Arbitration Act expressly provides in section 33 that costs shall follow the event and the successful party should recover a reasonable amount reflecting its actual costs of the arbitration. Rule 54 of the American Arbitration Association Rules refers to costs as 'expenses' which can be divided into the expenses of the witnesses and 'all other expenses'. Each

33. It is important to note that some laws distinguish when such agreement was made. For example, under section 141 of the Commercial Code of Seychelles 1977, a pre-dispute agreement for each party to gear its own cost will be void but if such allocation is agreed post-dispute then it will be valid.
34. The same applies under section 31 of the Arbitration Act of Botswana 1959.
35. Section 61 English Arbitration Act 1996.
36. Section 63(4) English Arbitration Act 1996.
37. Section 63 English Arbitration Act 1996.
38. Section 74 Hong Kong Arbitration Ordinance 2011.

party is responsible for their witnesses' expenses, while all other expenses are to be 'borne equally by the parties', except if the parties have otherwise agreed or if the 'arbitrator in the award assesses such expenses or any part thereof against any specified party or parties'.

A brief examination of some soft laws points to the unsuccessful party bearing the cost of the arbitration. Paragraph 48 of the UNCITRAL Notes on Organizing Arbitral Proceedings (2016) notes that there are various methods of allocating costs but that the general rule is that the costs follow the event which it defines as, 'the costs of the arbitration shall be borne by the unsuccessful party or parties in whole or in part'. The arbitral tribunal is permitted to take account of the conduct of the parties in allocating costs of the arbitration under the 2021 International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration.[39] Also, Article 11 of the 2018 Prague Rules, on the allocation of cost, leaves this to be decided by the arbitral tribunal which requires the tribunal to take the parties' conduct into account in determining the costs of the arbitration and the paying party.[40] This provision of the Prague Rules adheres to the ethos of the Rules which seeks to give the arbitral tribunal greater autonomy over the arbitration reference and to ensure greater efficiency and cost savings.

It is again evident that there is no consistency of principle or practice (as noted under the UNCITRAL Notes) on how the costs of arbitration should be allocated between the parties. The discourse above shows that under some arbitration laws and rules, the unsuccessful party bears the costs of the arbitration while under some laws, rules, and arbitral practice, the allocation is left to the discretion of the arbitral tribunal. This lack of consistency makes it crucial for a party to understand which approach will be used in their case as they could potentially be saddled with very high costs. Due to the increasingly globalised nature of arbitration, parties and arbitrators come from different regions of the world and they bring their various domestic legal experiences and cultures into the ordering of arbitration. It is obvious that where the arbitration law or rules make clear provisions on the issues of cost, there is greater certainty for the parties and less scope for the arbitral tribunal to rely on their own legal or cultural practices to determine the party that will bear the costs of the arbitration.

4 THE APPROACHES TO THE ALLOCATION OF COST IN INTERNATIONAL ARBITRATION

To understand the various approaches or principles adopted in the allocation of costs in international arbitration as articulated above, it is important to briefly examine the principles of cost allocation in litigation or court proceedings in different jurisdictions and legal systems. This examination will help to explain the principles adopted in the allocation of costs in international arbitration since these principles were imported into the arbitration proceedings through their use in domestic litigation.

39. Article 9 (8) of the IBA Rules.
40. Article 11 of the Rules on the Efficient Conduct of Proceedings in International Arbitration, 2018 [Prague Rules].

Under the French approach, costs are divided into the '*dépens*' and the '*frais*'. The *dépens* are primarily the court's administrative costs such as the fees for the clerk's offices, translation costs, expert fees and other associated costs for the running of the court.[41] These costs are typically apportioned to the losing party, although the judge has the power to provide a reasoned decision to apportion the costs to the successful party.[42] The *frais* include the costs charged by the parties' lawyers and each party is expected to pay their own legal costs. Parties can request the other party to pay their lawyers' costs and the judge is empowered to apportion some costs to the losing party, but will consider the financial position of the parties when making this decision.[43] In practice, the fees awarded are relatively modest and not a full reflection of the costs incurred by the parties.[44]

Under the English approach, the costs follow the event. This means that the losing party will be expected to pay the reasonable costs of the successful party.[45] For Bühler, this approach to cost apportionment is 'almost universally recognised' and is utilised in both common and civil law jurisdictions.[46] The English approach is rooted in the Courts of Equity where the Chancellor could use his discretion to allow the successful party to recover their fees, although this was a rare occurrence.[47] The 1278 Statute of Gloucester made cost recovery more common but restricted the right to only successful plaintiffs in certain property cases.[48] In 1607, the ability to recover costs was extended to defendants in cases where the plaintiff would have been able to recover their costs if they had been successful.[49] The apportionment of fees remained relatively unchanged until the promulgation of Order 55 of the Rules of Court 1875,[50] which changed the basis upon which costs were apportioned by maintaining the principle but granting the court discretion when apportioning costs.[51] Under modern English law, the court can decide if and the amount of costs that will be payable by one of the parties but generally maintains that the loser pays the costs.[52] In essence, the 'loser pays' rule

41. Article 695 Civil Procedure Code, France 1975. *See also* Alexandre Bailly and Xavier Haranger, Morgan, Lewis & Bockius, *Litigation and Enforcement in France: Overview*, Thomson Reuters Practical Law [February 2020] para. 22.
42. Article 696 Civil Procedure Code, France.
43. Article 700 Civil Procedure Code, France.
44. Lord Justice Jackson, Review of *Civil Litigation Costs: Preliminary Report* (2009) The Stationery Office, Volume 2, 567.
45. Under this approach, it is highly unlikely that the successful party will receive all its costs. However, the courts have the powers to award most of the costs against the unsuccessful party.
46. Micha Bühler (2004) *supra*, 249 at 251.
47. Phyllis Monroe, 'Financial Barriers to Litigation: Attorney Fees and the Problem of Legal Access' (1981) 46 Albany Law Review 148 at 150.
48. John Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 Am U L Rev 1567 at 1570.
49. 4 JAC. I, c. 3 (1607) as cited in Arthur L. Goodhart, 'Costs' (1929) The Yale Law Journal, 38(7) 849, 853.
50. Supreme Court of Judicature Act 1875 as cited in Arthur L. Goodhart, 'Costs', (1929) *supra*, 849, 854.
51. David Root, 'Attorney Fee-Shifting in America: Comparing, Contrasting, and Combining The "American Rule" and "English Rule"' (2005) 15(3) Indiana international & Comparative Law Review 583 at 590 DOI: 10.18060/17849.
52. The Civil Procedure Rules (England & Wales) 1998 section 44.3.

in England is a 'semi-automatic rule' that is usually the default principle in cost allocation but can be guided by the courts when deemed appropriate.[53]

According to Gotanda, one rationale for this approach to cost allocation has been that making the unsuccessful party pay costs was a punishment for violating their counterpart.[54] However, in modern times, the English approach is more commonly viewed as a way to indemnify the winning party.[55] Eisenberg and Miller argue that the English approach deters 'frivolous or non-meritorious' litigation, in contrast to the American approach because parties do not have to fear accruing additional legal costs.[56] On the other hand, it is noted that the English approach forces the parties to take a greater risk when pursuing a case while the American approach at least rewards parties for taking a 'gamble' when seeking justice.

The same cost follows the event rules apply under Egyptian law where the unsuccessful party will be expected to pay the final court fees. However, the legal fees are only a 'negligible' part of the award.[57] In Ghana, the costs follow the event, and the losing party is expected to pay the costs of the hearing, court fees and legal costs. The Ghanaian court has the power to manage and assess fees and will assess the conduct of the parties, the complexity of the case, and the total incurred costs when allocating costs.[58] However, in South Africa, while it is generally expected that the costs follow the event, cost allocation is primarily at the 'discretion of the judicial officer'.[59] The same applies in Nigeria where the losing party bears the cost but such costs are determined by the discretion of the court and do not generally reflect the costs of the successful party.[60]

The American rule mandates that each party to the dispute is responsible for covering their own legal fees regardless of the party that was successful.[61] The 'loser pays' principle is sometimes referred to as 'fee shifting' and is uncommon in the United States. The American approach is internationally less popular than the English approach. Bühler notes that outside of the United States, this approach is adopted primarily in China, Indonesia, Japan and the Philippines.[62]

For Vargo, the development of the American approach can be linked to an interest in controlling how much lawyers could charge their clients rather than an

53. David Root (2005) *supra*, at 591.
54. John Yukio Gotanda 'Awarding Costs and Attorney's Fees' (1999) 21(2) Michigan Journal of International Law, 1 at 5.
55. *Ibid.*, at 5.
56. Theodore Eisenberg and Geoffrey Miller, 'The English Versus the American Rules on Attorney Fees: An Empirical Study of Public Company Contracts' (2013) 98(2) Cornell Law Review 327, 335.
57. See Khaled El Shalakany, Shalakany Law Office, *Litigation and Enforcement in Egypt: overview, Thomson Reuters Practical Law* [July 2015] para. 22.
58. Melisa Amarteifio and Isaac Aburam Lartey, Sam Okudzeto & Associates, *Litigation and Enforcement in Ghana: Overview*, Thomson Reuters Practical Law [December 2019] para. 22.
59. *Ferreira v. Levin NO and Others* 1996 (1) SA 621 (CC).
60. Fadesike Salu and Safiat Akande, *Africa Law Practice, Litigation and Enforcement in Nigeria: Overview*, Thomson Reuters Practical Law [December 2019] para. 22.
61. See for example, James Maxeiner, 'Cost and Fee Allocation in Civil Procedure' (2010) 58 American Journal of Comparative Law 1 DOI: 10.5131/ajcl.2009.0027.
62. Micha Bühler (2004) *supra*, 249 at 251.

interest to fairly apportion costs between the parties.[63] According to Goodhart, lawyers in colonial America were initially viewed as untrustworthy characters whose legal fees the losing party should not have to pay. As the perception of lawyers improved, people were more willing to employ lawyers which contributed to an increase in statutory regulation of the profession, including regulation of attorney fees.[64] These legislations considered how much a lawyer could charge and fixed the fees they could retain.[65]

A key case in the development of the American rule is *Arcambel v. Wiseman*[66] where it was held that attorney fees could not be included in the final awarded damages. The court in this case simply stated that cost shifting simply was not the general practice of the United States and would remain so unless amended by statute. This principle was later reaffirmed in *Fleischmann Distilling Corp. v. Maier Brewing Co*,[67] where the court stated that 'attorney fees are not ordinarily recoverable ... because litigation is at best uncertain, one should not be penalized merely for defending or prosecuting a lawsuit'.

The basic principle of equality before the law is still a commonly cited reason for maintaining the American Rule. In summary, it can be argued that the American Rule is supposed to protect and assure access to justice for the parties as they will not be deterred from seeking court remedy due to the fear of losing and being liable to pay unpredictably high legal costs.[68]

As has thus far been established, matters of costs fall within what Julian Lew has described as *the autonomy of the arbitrator* where the ability to decide how costs should be allocated and apportioned falls within the powers of the arbitral tribunal.[69] Such determination will be subject to the agreement of the parties, provisions of any applicable arbitration rules and any mandatory requirements of the law of the seat (or of any possible places of enforcement, if known). This is expressed in the Preamble of the CIArb Costs Guidelines which states:

> Arbitrators powers to make costs awards derives from the terms of the arbitration agreement including any arbitration rules and or the law of the place of arbitration.

Although the arbitral tribunal has the power to decide on matters of costs, it is still encouraged to initially consult with the parties on the allocation of such costs. This suggests that this matter of the allocation of costs also falls under the ambit of party autonomy. The arbitral tribunal will decide when the parties have not or are unable to agree how to allocate the costs of the arbitration. Where the parties agree on how the

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63. John F Vargo, 'The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice' (1993) 42 Am U L Rev 1567, 1571.
64. For example, the Revised Statute of New York 1829 Chapter 10 Title III section 4 on the Regulation of Counsel Fees.
65. Arthur L. Goodhart, 'Costs' (1929) *supra*, 849, 873.
66. *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1796).
67. *Fleischmann Distilling Corp v. Maier Brewing Co*, 386 U.S. 714 (1967).
68. Mohamed Abdel Wahab, 'Costs in International Arbitration: Navigating Through the Devil's Sea', in Jean Engelmayer Kalicki and Mohamed Abdel Raouf (eds), *Evolution and Adaptation: The Future of International Arbitration* (Kluwer Law International 2019), 465, 492.
69. Julian D.M Lew, 'Achieving the Dream: Autonomous Arbitration' (2006) 22(2) Arbitration International 179 DOI: 10.1093/arbitration/22.2.179B.

costs of the arbitration will be allocated, the arbitral tribunal will usually endorse such agreement and allocate the costs as agreed by the parties.

The CIArb Costs Guideline in defining the costs of the arbitration splits this into two categories: the procedural costs and the party costs.[70] It defines procedural costs to 'include the arbitrators' fees and expenses and the administrative charges of any arbitral institution' and party costs to 'include legal costs and other expenses incurred by a party in respect of the arbitration, including the fees and expenses of outside counsel, experts and witnesses'.

The main and most obvious area of convergence in arbitral laws and rules on this matter is in the types of cost issues. The costs of arbitration are generally divided into procedural costs and party costs. Procedural costs could be further distinguished into a subcategory of 'expenses'. Many rules make a distinct provision stating that the parties can be held jointly or severally liable for the travel expenses and accommodation expenses of the arbitral tribunal, witnesses and or experts.[71] Overall, there is still a test of 'reasonableness' to be applied by the arbitral tribunal to any costs that the parties claim for the prosecution of the arbitration.

It is important to explore what this reasonableness of costs means and how arbitral tribunals have applied this test. Most arbitration rules have reasonableness as a basic and expected standard in cost allocation, however, most of these rules do not provide a description or definition for reasonable costs.[72] An example of the test for reasonableness can be seen in Article 52 of the CIETAC Rules. Here, the arbitral tribunal is expected to assess the reasonableness of the successful party's costs by considering factors such as the final outcome, the complexity of the dispute and the amount in dispute.[73]

The ICC also has some description of reasonableness, for 'cases of low complexity and low value' and emphasises the importance of the arbitral tribunal ensuring that the costs are proportionate to the amount in dispute.[74] In the 2015 ICC Commission Report on Costs, it is argued that the 'common-sense approach' to testing reasonableness is to compare the costs with the amount in dispute and consider if the parties could have been more efficient in their dealing with the case.[75]

The CIArb Costs Guidelines, apply the same principles, stating:

70. The text of the CIArb Cost Guidelines is available at: https://www.ciarb.org/media/4210/guideline-12-drafting-arbitral-awards-part-iii-costs-2016.pdf [accessed 22 June 2020].
71. *See*, for example, section 43, Ghana ADRA, Article 82 CIETAC Rules, Article 34 HKIAC Rules, Article 54 AAA Rules.
72. SCC 2017 Article 50, LCIA Article 23, CRCICA Article 42 and HKIAC 2018 Article 34 which states the tribunal may apportion costs that are reasonable by '... taking into account the circumstances of the case'.
73. CIETAC Article 52(2).
74. ICC Rules of Arbitration 2021, Appendix IV – Case Management Techniques. *See also* Appendix III, Arbitration Costs and Fees.
75. ICC Commission Report: Decision on Costs in International Arbitration (2015) Dispute Resolution Bulletin 2015, Issue 2, para. 63.

> 'Once the arbitrators have determined what costs are recoverable, they should consider whether, in light of all of the circumstances of the case, the costs claimed have been reasonably incurred and are proportionate to the matters in issue.'[76]

The test for reasonableness is discussed in the accompanying commentary to the CIArb Guidelines which recommends the arbitral tribunal to compare the disparity in the costs of each party while taking into account the complexity, duration and skill level required to defend the case. For example, arbitrators are asked to consider if the number of representatives utilised in a party's defence was necessary and to assess the hourly rates and skills levels of the costed representatives.[77] The reasonableness test under the CIArb Guidelines has two parts.[78] The first requires arbitrators to decide if the activities costed by the legal counsel match the complexity of the case. The second test is to consider if the amounts claimed were reasonable from an objective point of view. This second part could be conducted by comparing the claimed costs of each party.

The ICC Commission Report on Costs also has a similar approach and invites the tribunal to consider factors such as the rates and number of fee earners, the level of specialist knowledge required by considering the legal qualifications and seniority of the representatives, or the difference in costs claimed by the parties.[79]

For proportionality, the CIArb Cost Guidelines require arbitrators to consider if the claimed costs are 'proportionate with the sums in dispute'[80] by looking at the complexity of the dispute and the amount at stake. The High Court of Singapore stated that proportionality is not just limited to the amount in dispute in comparison to the costs claimed. Instead, the court notes that the proportionality principle is about considering and assessing all of the relevant circumstances of the arbitration, not just the disputed amount.[81] The ICC Commission Cost Report also notes that arbitrators should not only look at the amount at stake because although the damages may be relatively small, the underlying principle of the relationship between the parties may also be at stake.[82] The CIArb Guidelines, therefore, adopt these general suggestions as guides for the tribunal.

After receiving the accounting of costs, the arbitral tribunal is frequently invited to examine the reasonableness of the claims when awarding the costs. This can be seen in the increased focus on the context of the arbitration. Highly complex cases that may require several expert witnesses and highly experienced counsel and arbitrators will be more likely to have the claimed high costs deemed as reasonable. This is also the presumption for high-value cases. Furthermore, there is growing interest in arbitrators

76. CIArb Costs Guidelines Article 3(2).
77. CIArb Costs Guidelines Commentary on Article 3, para. 1 *Legal Costs*.
78. CIArb Costs Guidelines Commentary on Article 3, para. 2 *Reasonableness and Proportionality*.
79. ICC Commission Report: Decision on Costs in International Arbitration (2015) Dispute Resolution Bulletin 2015, Issue 2, para. 65.
80. CIArb Costs Guidelines Commentary on Article 3, para. 2 *Reasonableness and Proportionality*.
81. *VV and Another v. VW* [2008] SGHC 11 [2008] section SLR 929, 33.
82. ICC Commission Report: Decision on Costs in International Arbitration (2015) Dispute Resolution Bulletin 2015, Issue 2, para. 67.

examining the conduct of the parties during the arbitration.[83] Parties that deploy time-wasting measures such as pursuing weak and frivolous arguments that result in inflated legal costs will be held more responsible for the costs, such wastage of time accrues even if in the end such party is more successful in the arbitration.[84]

As part of the tests of proportionality and reasonableness, some arbitration laws and rules refer to the need for the arbitral tribunal to take account of the relative success of the parties, in the allocation of the costs of the arbitration.[85] This requirement may support the assertion that efficiency in the prosecution of the arbitration is almost as important as being successful as it relates to recouping the costs of the arbitration.[86] Thus, the unsuccessful party may not have to pay the full or most of the costs of the successful party who did not prosecute the arbitration with diligence. This is especially so for parties that work efficiently and help to conclude the arbitration expeditiously. It is therefore expected that the arbitral tribunal will consider the conduct of the parties in apportioning the costs of the arbitration.

Under the cost follows the event approach to costs allocation, costs of the arbitration may be determined on the basis of the number of issues in dispute won and lost by each party. This principle accounts for the fact that the unsuccessful party may win some of the issues in dispute and this will be reflected in the costs allocated to it (as the unsuccessful party) to pay to the successful party. In some cases, such costs remission may be significant.

The arbitral tribunal includes the order as to costs either in the final award or in a separate award or final order on costs of the arbitration. Generally and to better support the parties, arbitration institutions use a scale or schedule of fees, and as already mentioned, some provide a cost calculator on their website.[87] This costing tool assists disputants in planning their dispute resolution process and is to be encouraged.

5 CONCLUSION

The CIArb Costs Guideline was drafted to provide guidance to arbitrators as they determine issues of costs of the arbitration as explored above. This guidance contributes as soft law to the convergence of the law on costs as it relates to international arbitration and brings some much-needed consistency and predictability of practice to the issue of costs allocation in international arbitration. The evidence from the provisions of national laws and arbitration rules on costs has been distilled into the CIArb Guidelines with commentaries to assist with its uniform interpretation and

83. *See* for example Article 11 of the Prague Rules which provides, provides 'the arbitral tribunal may take into account the parties' conduct during the arbitral proceedings, including their co-operation and assistance (or the lack thereof) in conducting the proceedings'.
84. *See* for example, Article 9 (7) IBA Rules of Taking Evidence in International Arbitration.
85. Examples include, Article 38.5 ICC Rules, Article 40 Swiss Arbitration Rules, Article 28(4) LCIA Rules. *See also* discussion by Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (2012) *supra*, at 1120-1122.
86. For example, the 2015 ICC Task Force on Decisions as to Costs Report, *supra*, affirmed the linkage between efficiency, time and cost of the arbitration.
87. See *supra* n. 19.

application by arbitrators. Though a soft law, the CIArb Guidelines set out the emerging and accepted practice in international arbitration that successfully harmonises common and civil law cost principles and practices in international arbitration.