THE CONFLICTING LANDSCAPE RELATING TO COSTS IN INVESTOR-STATE ARBITRATION

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Abstract

Cost, speed and efficiency are commonly perceived as major advantages of arbitration compared to litigation. Practice, however, shows that legal fees in international arbitrations may add up to millions of dollars for the parties. For the users of the system, costs therefore are a pivotal issue. Against this background, it is surprising that cost allocation neither plays a key role in the institutional arbitration rules nor in the decisions on costs, which arbitral tribunals render on the basis of these rules. It is hoped that arbitral institutions and arbitrators will devote more attention and time to developing rules of costs to ensure that justice is done in a fair and efficient manner.

I. Introduction

Much can be said in favour of arbitration as a cost-efficient method of resolving high profile disputes.[1] However, international arbitrations have a reputation of producing high costs, especially in legal fees for the parties.[2] In fact, in some cases, cost allocation is said to be as controversial as the dispute on the merits,[3] because claims for legal fees and other costs can add up to millions of dollars.[4]

Considering the economic importance of cost allocation for the parties, one may be surprised that institutional arbitration rules provide only little guidance for the arbitral tribunal on how to render a decision on costs. Accordingly, many arbitral awards rely on a discretionary standard or grant a "*reasonable*" or "*appropriate*" amount.[5] One very experienced arbitrator even asserts a "*general lack of analysis*"[6] with regard to cost allocation.

This note aims to give an overview of the most commonly used investment arbitration rules regarding cost allocation. Further, the authors analyze how arbitral tribunals allocate costs in practice.

II. Investment Arbitration Rules on Cost Allocation

In order to assess how arbitral tribunals allocate costs in practice, the authors will first consider the institutional rules that are most commonly applied in investor-state arbitrations.

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1 *See*, e.g., Jörg Risse & Heiko Haller, *'Investment: Arbitration!' or Why International Arbitrations Promise a Solid Return of Investment*, GLOBAL ARB. NEWS (Apr. 14, 2016), *available at* http://globalarbitrationnews.com/investment-arbitration-or-why-international-arbitrations-promise-a-solid-return-of-investment-20160413/.

2 *Cf.* JUAN PABLO HUGUES ARTHUR, WHERE DO WE STAND? WHERE SHOULD WE GO? AN ASSESSMENT OF RECENT COSTS ALLOCATION TRENDS IN INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 2 (2015); ICC REPORT ON DECISIONS AS TO COSTS IN INTERNATIONAL ARBITRATION, ¶¶ 2-3 (Dec. 1, 2015), *available at* http://www.iccwbo.org/Data/Policies/2015/Decisions-on-Costs-in-International-Arbitration/ (finding that the vast majority [83% on average] of costs in commercial arbitrations are party costs including lawyers' fees and expenses) [*hereinafter* "ICC REPORT"].

3 Markus Altenkirch & Maria Tereza Borges, *To the victor, the spoils?*, GLOBAL ARB. NEWS (Aug. 10, 2015) *available at* http://globalarbitrationnews.com/to-the-victor-the-spoils-20150810/.

4 In the Yukos case, legal fees and costs added up to USD 124 Million, *see* Sebastian Perry, *The cost of Yukos*, GLOBAL ARB. REV. (Aug. 15, 2014), *available at* http://globalarbitrationreview.com/article/1033686/the-cost-of-yukos.

5 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3094 (2d ed., 2014).

6 *Id.*

A. ICSID

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States [the "**ICSID Convention**"] is typically applied in investment disputes between states, respectively the states' governments, and private investors from another state.[7] ICSID proceedings are usually less expensive than proceedings under alternative investment arbitration rules.[8] This can be attributed to lower administrative costs and the determination of the arbitrators' fees,[9] whose service on an ICSID tribunal is said to be considered a "*public service*".[10]

The ICSID Convention provides the arbitral tribunal with great discretion regarding cost allocation. The ICSID Convention merely states that the tribunal shall decide how and by whom the costs of the arbitration shall be paid.[11] There is no specific guidance in the ICSID Convention as to any principles that the arbitral tribunal should use to allocate costs between the parties (e.g., equal sharing of costs).[12]

The costs to be allocated by the ICSID tribunal include:

- Charges for the use of the ICSID facilities, to be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council,[13]
- Fees and expenses of the members of the arbitral tribunal, to be determined by the tribunal within certain limits established by the Administrative Council and after consultation with the Secretary-General,[14] and
- Expenses of the parties for legal representation.[15]

In practice, arbitral tribunals do not require the parties to present detailed evidence of the incurred costs, but prefer the parties to present summary statements of their costs only; the tribunal may then demand more detailed statements.[16]

The arbitral tribunal's decision on costs forms part of the award.[17] ICSID awards are binding and enforceable in all signatory states.[18]

B. ICC

The ICC International Court of Arbitration [the "**ICC Court**"] administers the resolution of disputes in accordance with the ICC Arbitration Rules.[19]

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7 Kabir Duggal et al., *Allocating Costs in Investment Arbitration*, P.L.A. U.S. (July 2016), *available at* http://us.practicallaw.com/w-002-5451.

8 CHRISTOPH H. SCHREUER, THE ICSID CONVENTION: A COMMENTARY art. 59, ¶ 3 (2d ed., 2009).

9 *Id.*

10 SCHREUER, *supra* note 8, art. 60, ¶ 9.

11 Convention on the Settlement of Investment Disputes, art. 61(2), March 18, 1965, 575 U.N.T.S. 159 [*hereinafter* "ICSID Convention"].

12 *See* SCHREUER, *supra* note 8, art. 61, ¶ 17 (*see* below III.A for a discussion of the principles of cost allocation in practice).

13 ICSID Convention, *supra* note 11, art. 59.

14 *Id.* art. 60(1).

15 *Id.* art. 61(2).

16 BORN, *supra* note 5, at 3096.

17 ICSID Convention, *supra* note 11, art. 61(2).

18 *Id.* art. 54(1).

19 ICC Arbitration Rules (2012), art. 1(2).

The ICC Arbitration Rules provide little guidance with regard to cost allocation. The ICC Arbitration Rules simply require that the final award shall fix the costs of the arbitration and decide which of the parties must bear the entire costs or in what proportion the parties must bear the costs.[20] In making such decision on costs, the tribunal may take into account any circumstances it finds to be relevant, "*including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner*".[21]

The costs of the arbitration to be fixed in the final award include:

- Fees and expenses of the arbitrators, to be fixed by the ICC Court in accordance with the relevant scale;
- ICC administrative expenses, to be fixed by the ICC Court in accordance with the relevant scale;
- Fees and expenses of any experts appointed by the tribunal; and
- Reasonable legal and other costs incurred by the parties.[22]

The ICC Court may adjust the arbitrators' fees due to "*exceptional circumstances of the case*".[23] Costs for legal representation under the ICC Arbitration Rules may only be fixed insofar as they are "*reasonable*". Other rules such as the ICSID Convention[24] do not contain such express limitation; in practice, however, the lack of this limitation is not likely to make any difference.

C. UNCITRAL

The United Nations Commission on International Trade Law ["**UNCITRAL**"] first adopted Arbitration Rules in 1976 and has since then revised them twice, most recently in 2013.

With regard to cost allocation, the 2013 UNCITRAL Arbitration Rules provide a default rule: the losing party is to bear the costs of the arbitration. However, in the alternative, the tribunal may also apportion each of the costs (see below) between the parties as it finds reasonable, considering the circumstances of the case.[25] Unlike the ICC Rules, the UNCITRAL Rules do not explicitly mention the parties' conduct of the arbitration as a factor in this analysis.[26] The amount payable by one party to another shall be fixed in the final award or any other award.[27]

The arbitration costs under the UNCITRAL Arbitration Rules include:

- Fees of the arbitral tribunal, to be fixed by the tribunal in accordance with Art. 41 UNCITRAL Arbitration Rules, and the reasonable expenses of the arbitral tribunal;
- Reasonable costs of any experts the arbitral tribunal appoints;
- Reasonable expenses of witnesses, subject to approval by the arbitral tribunal;

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20 *Id.* art. 37(4).

21 *Id.* art. 37(5).This addition was introduced to "encourage greater control of time and costs", *See* ICC REPORT, *supra* note 2, ¶ 4.

22 *Id.* art. 37(1).

23 *Id.* art. 37(2).

24 Convention on the Settlement of Investment Disputes art. 61(2), March 18, 1965, 575 U.N.T.S. 159.

25 UNCITRAL Arbitration Rules, art. 42(1), U.N. Doc. A/RES/31/98.

26 NIGEL BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 9.93 (6th ed., 2015) (finding the UNCITRAL approach "more conservative").

27 UNCITRAL Arbitration Rules (2010), art. 42(2), U.N. Doc. A/RES/31/98.

- Legal and other costs incurred by the parties, to the extent the arbitral tribunal finds such costs reasonable; and
- UNCITRAL fees.[28]

D. SCC

The Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce [the "**SCC Rules**"] entered into force in 2010.

Cost allocation under the SCC Rules happens in a two-step process: First, the arbitral tribunal must ask the SCC Board of Directors to finally determine the costs of the arbitration. Second, unless the parties otherwise agree, the arbitral tribunal shall, upon request of one party, apportion the costs of the arbitration in the final award, "*having regard to the outcome of the case and other relevant circumstances*".[29]

The costs of the arbitration under the SCC Rules include:

- Fees and expenses of the arbitral tribunal, and
- Administrative fees and expenses of the SCC.[30]

Similarly, unless the parties otherwise agree, the arbitral tribunal may, upon request of one party, in the final award order one party to pay any reasonable costs incurred by the other party, "*having regard to the outcome of the case and other relevant circumstances*". These costs include the costs for legal representation.[31]

E. Overall Chart of Rules Regarding Cost Allocation

The following chart gives a summary overview of the above findings:

	ICSID	ICC	UNCITRAL	SCC
Standard for cost allocation	• Discretion of tribunal – no specific guidance • Tribunal must decide how and by whom costs are paid	• Discretion of tribunal – no specific guidance • Tribunal must fix costs, can take into account any relevant circumstances, including parties' conduct of arbitration	• Standard rule: Loser pays costs of arbitration • Alternatively, tribunal can apportion costs as it finds reasonable, considering circumstances of case	• Determination of costs (SCC Board of Directors) • Tribunal apportions costs upon request of one party, unless parties otherwise agree • Tribunal considers outcome of case and other

28 *Id.* art. 40(2).
29 Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2010), arts. 43(2), (4), (5).
30 *Id.* art. 43(1).
31 *Id.* art. 44.

	ICSID	ICC	UNCITRAL	SCC
				relevant circumstances
Allocated costs	• Administrative fees (Secretary General) • Arbitrators' fees and expenses • Parties' expensesfor legal representation	• Administrative fees (ICC Court) • Arbitrators' fees and expenses (ICC Court) • Parties' reasonable expenses, legal and otherwise • Experts' fees and expenses, if any	• Administrative fees • Arbitrators' reasonable fees and expenses • Parties' reasonable expenses, legal and otherwise • Experts' reasonable fees and expenses, if any • Witnesses' reasonable expenses (approval by tribunal)	• Administrative fees • Arbitrators' fees and expenses • Parties' reasonable expenses, legal and otherwise
Time of cost allocation	• Final award	• Any time during proceedings (other than those costs fixed by ICC Court)[32] • Final award must fix costs	• Final award	• Final award

III. Cost Allocation in Investment Arbitration Practice

The above discussion shows that most of the investment arbitration rules do not provide much guidance on cost allocation.[33] It comes as no surprise then that investor-state tribunals do not follow a uniform approach in allocating costs.[34] In practice, tribunals decide on the issue of costs in different ways and with different objectives. Tribunals may:

32 *See* BLACKABY, *supra* note 26, ¶ 9.95 (under the ICC Rules, the arbitral tribunal has a choice of dealing with the costs in the final award or in a separate award, reducing the "final" award to a "partial" award).

33 *Cf.* SCHREUER, *supra* note 8, art. 61, ¶ 17.

34 *Id.* art. 61, ¶ 19; HUGUES ARTHUR, *supra* note 2, at 3, 11, 21 *et seq.* (also discussing current methods and other proposals of cost allocation); *See also* LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶ 112; *see* ICC REPORT, *supra* note 2, ¶¶ 6-7 (Report considers cost decisions in commercial arbitrations, finding "a lack of clarity as to prevailing [cost allocation] approaches and practices").

- order the parties to share the costs of the arbitration equally (see below III.A.i);
- order the losing party to bear all costs of the arbitration (see below III.A.ii);
- order one party to bear costs as a sanction for procedural misconduct (see below III.B);
- require the parties to provide security for costs (see below III.C.); and
- require the parties to advance costs (see below III.D).

A. Approaches to Cost Allocation

The different approaches to cost allocation discussed below are based on two basic principles: the "*American rule*" and the "*English rule*".[35] Under the American rule, both the claimant and the respondent pay for their own legal costs regardless of which party prevails on the merits of the case. In other words: "*The costs lie where they fall*". Under the English rule, the losing party must reimburse the prevailing party for (all or part of) its costs. Here, "*the costs follow the event*". The discussions below shows the diverse approaches taken in investor-state arbitration with regard to cost allocation.

i. Equal Sharing of Costs

Under this approach, investor-state tribunals decide that the parties equally share the costs of the arbitration.[36] This means that each party is ordered to pay half of the administrative fees as well as half of the arbitrators' fees and expenses. In addition, each party is ordered to pay for its own expenses, including the costs for legal representation.

For example, in *Alasdair Ross Anderson* v. *Costa Rica*, the tribunal recognized that "*most ICSID tribunals*" ordered the equal sharing of costs, while tribunals in commercial arbitrations tended to follow the "*loser pays*" principle.[37] The tribunal thus ordered equal sharing of costs, because it did not find "*special circumstances that justify a departure from the accepted and rational practice*".[38] Similarly, in *Noble Ventures* v. *Romania*, the tribunal noted that the "*loser pays*" principle was neither stated in the ICSID Convention and Arbitration Rules, nor was it common to all national laws and international law; considering the claimant's success on certain issues, the tribunal therefore ordered equal sharing of costs.[39]

While one practitioner complains about a "*general lack of analysis*"[40] in cost allocation, tribunals which resort to the equal sharing of costs based their decision on the fact that both claimant and

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35 For a detailed discussion *see* David P. Riesenberg, *Fee Shifting in Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 Duke L. J. 977, 989 (2011).

36 *Cf.* SCHREUER, *supra* note 8, art. 61, ¶ 33 ("large number of cases"); HUGUES ARTHUR, *supra* note 2, 6 (discussing the objectives of this "common law tradition").

37 Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010), ¶ 62 [*hereinafter* "Alasdair Ross"].

38 Alasdair Ross, ICSID Case No. ARB(AF)/07/3, Award (May 19, 2010), ¶¶ 62-64 ("no special circumstances that justify a departure from the accepted and rational practice that each party shall bear its own legal costs and expenses and share equally in the costs and charges of the Tribunal and the ICSID Secretariat"); *but see* Azinian, Davitian and Baca v. The United Mexican States, ICSID Case No. ARB(AF)/97/2, Award (Nov. 1, 1999), ¶¶ 125-126 (tribunal orders equal sharing of costs despite claims failing entirely, because of special circumstances of the case, including the novelty of the dispute resolution mechanism and Claimants' efficient conduct of proceedings).

39 Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶¶ 234-236.

40 BORN, *supra* note 5, at 3094, 3098 ("[I]t is unsatisfactory that awards of legal costs, which can entail millions or tens of millions of dollars or Euro in some cases, be unpredictable and based purely on discretion.").

respondent prevailed on some issues or that the case was not clear-cut.[41] For example, in *Venezuela Holdings* v. *Venezuela*, the respondent won on jurisdictional grounds with regard to one claim, but lost on other substantial claims, resulting in an order of equal sharing of costs.[42] In another recent case, *Poštová banka and Istrokapital* v. *Greece*, the respondent prevailed on jurisdictional grounds, but the tribunal found the issue to be complex with regard to both facts and law and therefore ordered equal sharing of costs.[43]

In many cases, tribunals look at the parties' conduct of the arbitration when deciding how to allocate costs: tribunals ordered equal sharing of costs where they found that the conduct of both parties was appropriate and efficient under the circumstances of the case and did not produce undue delay.[44] Of the arbitration rules analyzed above, only the ICC Rules explicitly mention the "*expeditious and cost-effective*" conduct of the arbitration as a factor in the cost allocation analysis.[45] In practice, however, tribunals sitting under other rules also employ this analysis. For example, in the ICSID case of *Emmis and MEM* v. *Hungary*, the respondent won on jurisdictional grounds, but the tribunal ordered equal sharing of costs, because the claimants prosecuted their claims appropriately and did not – as the respondent had alleged – adopt "*highly aggressive and dilatory litigation tactics*".[46] The tribunal in *Poštová banka and Istrokapital* v. *Greece* reached the same conclusion with regard to cost allocation, holding that "*[e]ach side presented valid arguments in support of its respective case and acted fairly and professionally*".[47] In the recent case of *PNG Sustainable Development* v. *Papua New Guinea*, the respondent prevailed entirely, but had requested equal sharing of costs instead of a "*loser pays*" cost allocation. The tribunal decided it could not go

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41 *See generally* SCHREUER, *supra* note 8, art. 61, ¶ 33 (with further references to cases).

42 Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014), ¶¶ 403-404; *see*, *e.g.*, LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc .v. Argentine Republic, ICSID Case No. ARB/02/1, Award (July 25, 2007), ¶¶ 112-114; Noble Ventures, Inc. v. Romania, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005), ¶¶ 234-235 ("In particular, [the tribunal] notes that, although all the claims ultimately failed, the Claimant succeeded on certain issues […]"); Firemen's Fund Insurance Company v. The United Mexican States, ICSID Case No. ARB(AF)/02/01, Award (July 17, 2006), ¶¶ 220-222.

43 Poštová Banka, a.s. and Istrokapital SE v. Hellenic Republic, ICSID Case No. ARB/13/8, Award (Apr. 9, 2015), ¶¶ 377-378 [*hereinafter* "Poštová Banka"] ("Although the Tribunal has concluded that it lacks jurisdiction rationemateriae and ruled in favor of Respondent, the jurisdictional issue was not clear-cut and involved a complex factual and legal background. Each side presented valid arguments in support of its respective case and acted fairly and professionally. In light of these circumstances, the Tribunal decides that both sides shall bear the costs of arbitration equally, and that each side shall bear its own legal and other costs.").

44 *Cf.* BORN, *supra* note 5, at 3098 *et seq.* ("Where one of the parties was uncooperative or inefficient, it was less likely to recover its costs."); ICC REPORT, *supra* note 2, ¶ 17 (referring to commercial arbitrations).

45 Rules of Arbitration of the International Chamber of Commerce (Jan. 1, 2012) [*hereinafter* "ICC Rules"], art. 37(5); *See supra* II.B.. *Cf.* BLACKABY, *supra* note 26, ¶ 9.93.

46 Emmis International Holding, B.V., Emmis Radio Operating B.N., and MEM Magyar Electronic Media Kereskedelmiés Szolgáltató Kft. v. Hungary, ICSID Case No. ARB/12/2, Award (Apr. 16, 2014), ¶ 259 ("In the present case, the Tribunal considers that [the equal sharing of costs] is the proper order for costs. It does not accept Respondent's submission that Claimants adopted highly aggressive and dilatory litigation tactics. On the contrary, it finds that Claimants acted in good faith in bringing and prosecuting their claim for alleged breaches of the Treaties.") (emphasis added); *see further* Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. v. The Bolivarian Republic of Venezuala, ICSID Case No. ARB/07/27, Award (Oct. 9, 2014), ¶ 403 ("Taking into account the conduct of both Parties, the Tribunal decides that each of them shall bear its own costs and counsel fees, and that the fees and expenses of the Tribunal, as well as the costs of the ICSID Secretariat, shall be equally shared between them.") (emphasis added).

47 Poštová Banka, ICSID Case No. ARB/13/8, Award (Apr. 9, 2015), ¶ 377.

beyond this request and order the claimant to bear all costs. More importantly, the tribunal did not find any procedural misbehavior, unfounded or frivolous claims by any party or other special circumstances, which would justify a departure from equal sharing of costs.[48]

ii. Loser Pays

In a growing number of cases, tribunals follow the "*loser pays*" – or "*costs follow the event*" – principle, awarding costs against the losing party.[49]

In these cases, tribunals rarely decide that the losing party owes full reimbursement of costs to the prevailing party.[50] In *ADC* v. *Hungary*, Hungary was ordered to fully reimburse the claimants, even though the claimants' costs were significantly higher. The tribunal held that "*Hungary acted throughout with callous disregard of the Claimants' contractual and financial rights*" and added to the costs through its conduct of the arbitration.[51] In determining that the high legal costs incurred by the claimants were reasonable, the tribunal relied on a well-known comment by Judge Howard Holtzmann:

A test of reasonableness is not, however, an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well-known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexity involved. Where the Tribunal is presented with copies of bills for services or other appropriate evidence, indicating the time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally known and, as evidence before the Tribunal in various cases including this one indicates, it does not greatly differ between the United States and countries of Western Europe, where both claimants and respondents before the Tribunal typically hire their

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48 PNG Sustainable Development Program Ltd. v. Independent State of Papua New Guinea, ICSID Case No. ARB/13/33, Award (May 5, 2015), ¶¶ 407-409 ("First, in this case, the Respondent has not requested that the Tribunal allocate costs in its favor. Rather, the Respondent asked that the Tribunal apply the 'costs lie where they fall' principle by ordering that each Party bear its own Legal Costs and half of the Costs of the Arbitration. In the circumstances, the Tribunal considers that it would generally be inappropriate to go beyond the relief requested by the prevailing Party – the Respondent – and order costs in a different manner. Second, the Tribunal has not found any evidence of 'special circumstances' or procedural misbehavior by either Party that would influence the Tribunal's decision on the allocation of costs. Neither Party has behaved in a procedurally improper manner in this proceeding. On the contrary, from the moment of the constitution of the Tribunal, both Parties contributed to the efficiency of this proceeding. Both Parties' behavior was exemplary in complying with the deadlines set by the Tribunal {with minor exceptions} and with the Tribunal's directions in this proceeding. And, as noted above, both Parties' counsel have been of particular assistance to the Tribunal. Third, both Parties have submitted reasonable applications and carefully articulated the grounds for those applications. Neither Party's claims, arguments nor applications were manifestly unfounded, frivolous or otherwise improper.") (emphasis added).

49 *Cf.* SCHREUER, *supra* note 8, art. 61, ¶¶ 19, 34 ("This principle seems to be gaining ground in ICSID practice, but is still far from generally accepted."); HUGUES ARTHUR, *supra* note 2, at 5, 12 *et seq.* ("evolution towards shifting the costs to a losing party"); Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 380 ("newly established and growing trend"); ICC REPORT, *supra* note 2, ¶ 13 ("[I]t appears that the majority of [commercial] arbitral tribunals broadly adopt that [loser pays] approach as a starting point."). *But see* BORN, *supra* note 5, at 3096 *et seq.* (referencing authorities questioning existence of "loser pays" principle).

50 *See, e.g.*, Telenor Mobile Communications A.S. v. Hungary, ICSID Case No. ARB/04/15, Award (Sept. 13, 2006), ¶ 107 ("The Tribunal has concluded that […] Telenor should be ordered to pay Hungary's costs. […] In any event, the Tribunal agrees with Hungary's criticisms of Telenor's approach to this case, which has undoubtedly caused difficulties both for Hungary and for the Tribunal and has added substantially to the costs incurred."); *see further* SCHREUER, *supra* note 8, art. 61, ¶ 20.

51 ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award (Oct. 2, 2006), ¶¶ 525-542.

outside counsel. Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in a case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of the pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of the submissions made by both sides, of the approximate extent of the effort that was reasonably required.

Nor should the Tribunal neglect to consider the reality that legal bills are usually first submitted to businessmen. The pragmatic fact that a businessman has agreed to pay a bill, not knowing whether or not the Tribunal would reimburse the expenses, is a strong indication that the amount billed was considered reasonable by a reasonable man spending his own money, or the money of the corporation he serves. That is a classic test of reasonableness.[52]

Most tribunals that follow the "*loser pays*" principle, however, only award parts of the costs against the losing party.[53] For example, in *Hochtief* v. *Argentina*, the tribunal ordered Argentina to reimburse 75% of the claimant's costs, holding that the claimant did not prevail on substantial parts of its claim and that"*it would not be fair to impose the entire costs upon Respondent*".[54] Similarly, in *Lemire* v. *Ukraine*, the claimant recovered only parts of the incurred costs, because – despite being the overall prevailing party – the claimant had not "*completely prevailed in a single issue*" and had abandoned some of its initial claims.[55] In *PSEG* v. *Turkey*, the tribunal ordered Turkey to pay 65% of the arbitration costs, because the claimants prevailed on jurisdiction and certain aspects of the claim, and had no other option but to initiate arbitration proceedings to obtain justice.[56]

Other tribunals apply a somewhat mitigated "*loser pays*" principle, awarding only the common costs of the arbitration against the losing party, while ordering both parties to bear their own legal costs ("*costs lie where they fall*"). In *Impregilo* v. *Argentina*, Argentina's application for an annulment of the award was rejected. However, the tribunal noted that the application was not frivolous, and therefore ordered Argentina to bear the administrative and arbitrators' fees and expenses, and each party to bear their own legal costs.[57] In *Levy de Levi* v. *Peru*, Peru prevailed on the merits, while both parties lost on their claims for moral damages; the tribunal thus ordered the claimant to bear the administrative and arbitrators' fees and expenses, leaving the legal costs "*where they fell*".[58] In the recent case of *Philip Morris* v. *Uruguay*, the tribunal acknowledged that both parties had raised "*weighty arguments*" in support of their case while the parties' conduct in arbitration was not "*such that it should be taken into account when apportioning costs*". On this basis, the tribunal decided to follow a mitigated "*loser pays*" principle: Because the respondent prevailed to a large extent, the tribunal ordered the claimant to bear all administrative and arbitrators' fees and

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52 Separate opinion of Judge Holtzmann, reported in 1985 Iranian Assets Litigation Reporter 10, 860, 10, 863; 8 Iran-US C.T.R. 329, 332-333; *cf.* BLACKABY, *supra* note 26, ¶ 9.96 (finding that most tribunals relied on the criteria advanced by Judge Holtzmann and adopted a "broad approach in assessing the amount to be paid").

53 SCHREUER, *supra* note 8, art. 61, ¶ 20.

54 Hochtief AG v. Argentine Republic, ICSID Case No. ARB/07/31, Decision on Liability (Dec. 29, 2014), ¶ 331.

55 Lemire v. Ukraine, ICSID Case No. ARB/06/18, Award (March 28, 2011), ¶ 381.

56 PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Electrik Üretimve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 19, 2007), ¶ 352.

57 Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Decision of the Ad Hoc Committee on the Application for Annulment (Jan. 24, 2014), ¶ 221.

58 Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award (Feb. 26, 2014), ¶ 517.

expenses. Further, the claimant was ordered to reimburse the respondent for a major part of its costs in the amount of USD 7 million.[59]

B. Costs as Sanction for Procedural Misconduct and Failure to Meet Evidentiary Standards

As analyzed above, many tribunals take into account the parties' conduct of the arbitration when allocating costs, and order the equal sharing of costs where that conduct is appropriate under the circumstances of the case.[60] On the other hand, tribunals award costs against a party as a sanction for a particular procedural misconduct.[61] For example, in *Phoenix Action* v. *Czech Republic*, claimant was ordered to bear all costs: The tribunal found that not only did the claimant lose on its claim, but also abused the Bilateral Investment Treaty and the ICSID Convention by initiating the arbitration in the first place.[62] In *Generation Ukraine* v. *Ukraine*, the tribunal found very blunt words in awarding costs against the losing claimant, holding that the claimant's position was "*notably inconsistent*" and "*reposed on the flimsiest foundation*", while the written presentation of the case was "*convoluted, repetitive, and legally incoherent*" and "*lacked the intellectual rigour and discipline one would expect of a party seeking to establish a cause of action before a [sic] international tribunal*".[63]

In the recent case of *CEAC* v. *Montenegro*, the tribunal awarded costs against the losing claimant, because the claimant did not meet the evidentiary standards to prove its case.[64]

C. Security for Costs

Although the analyzed arbitration rules do not explicitly provide for security for costs, all of them allow the tribunal to order interim measures, which include such orders for security for costs.[65] For example, under the UNCITRAL Rules, the tribunal may order a party to "*provide a means of preserving assets out of which a subsequent award may be satisfied*".[66] Under exceptional circumstances, tribunals held that the ICSID Rules also allow an order for security for costs.[67] The tribunal must determine that

- a right in need of protection exists; and

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59 Philip Morris Brands Sàrl, Philip Morris Products S.A., and AbalHermanos S.A. v. Republic of Uruguay, ICSID Case No. ARB/10/7, Award (July 8, 2016), ¶¶ 582-589. For a critical analysis of the cost decision in this case, *see*, e.g. KENNETH B. REISENFELD AND JOSHUA M. ROBBINS, THE ACHILLES' HEEL OF INVESTOR-STATE ARBITRATION AWARDS, LAW360 (Dec. 6, 2016), *available at* https://www.bakerlaw.com/webfiles/Litigation/2016/Articles/12-07-2016-Law360-Robbins-Reisenfeld.pdf (calling the tribunal's discussion "a fairly slender reed on which to rest a multimillion dollar cost-shifting decision, particularly when countervailing factors are considered").

60 *See supra* III.A.i.

61 *See* SCHREUER, *supra* note 8, art. 61, ¶ 22 et seq. (with further references to cases).

62 Phoenix Action, Ltd. v. Czech Republic, ICSID Case No. ARB/06/5, Award (Apr. 15, 2009), ¶¶ 151-152 ("The Tribunal has concluded not only that the Claimant's claim fails for lack of jurisdiction, but also that the initiation and pursuit of this arbitration is an abuse of the international investment protection regime under the BIT, and consequently, of the ICSID Convention. […] The Respondent has been forced to go through the process and should not be penalized by having to pay for its defense.") (emphasis added).

63 Generation Ukraine, Inc. v. Ukraine, ICSID Case No. ARB/00/9, Award (Sept. 16, 2003), ¶¶ 24.2-24.6.

64 CEAC Holdings Limited v. Montenegro, ICSID Case No. ARB/14/8, Award (July 26, 2016), ¶ 221.

65 ICC Arbitration Rules, Jan. 2012, art. 28(1); Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2010), art. 32(1). *See also* Kabir Duggal et al., *Allocating Costs in Investment Arbitration*, P.L.A. U.S., July 2016, *available at* http://us.practicallaw.com/w-002-5451.

66 UNCITRAL Arbitration Rules, art. 26(2)(c), U.N. Doc. A/RES/31/98.

67 Convention on the Settlement of Investment Disputes art. 47, March 18, 1965, 575 U.N.T.S. 159.

- the circumstances require that the provisional measures be ordered to preserve such right, which necessitates a showing that the situation is urgent and the requested measures are necessary to prevent irreparable harm to the party's right to be protected.

Further, the tribunal must not prejudge the dispute on the merits by ordering security for costs.[68]

In the exceptional case of *RSM Production Corporation* v. *Saint Lucia*, the tribunal ordered the claimant to provide security for costs, because the tribunal found that the claimant – which had third-party funding – was unable or unwilling to pay the expenses.[69] One arbitrator, who concurred in the result with different reasons, was later (unsuccessfully) challenged,[70] because he suggested that security for costs should generally be required where one party has third-party funding.[71] Not surprisingly, this view was criticized by the litigation financing industry.[72]

D. Advance Payments on Costs

All of the analyzed arbitration rules require the parties to provide an advance on costs. Differences exist with regard to the scope of the advance payments and the consequences if the parties fail to pay their share.

	ICC	SCC	UNCITRAL	ICSID
Scope of advance payments	• Arbitrators' fees and expenses • Administrative costs[73]	• Arbitrators' fees and expenses • Administrative fees and expenses[74]	• Arbitrators' fees and expenses • Costs for experts and other assistance[75]	• Arbitrators' fees and expenses • Costs for witnesses and experts • Administrative and other direct expenses[76]
Consequences of non-compliance with advance payment order	• Secretary General may direct the tribunal to suspend the	• Board of Directors shall dismiss the case[78]	• Tribunal may order the suspension or termination of the	• Secretary-General may move that, after set limits, the tribunal stay,

68 RSM Production Corporation v. Saint Lucia, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (Aug. 13, 2014), ¶ 58.

69 *Id.* ¶ 82 *et seq.*

70 *Id.* ¶ 61 *et seq.*

71 *Id.* ¶ 18 (Assenting reasons of Gavan Griffith: "My determinative proposition is that once it appears that there is third party funding of an investor's claims, the onus is cast on the claimant to disclose all relevant factors and to make a case why security for costs orders should not be made.").

72 *Cf.*, e.g., Christopher Bogart, *RSM v St Lucia: Why Griffith was Wrong on Security for Costs*, GLOBAL ARB. REV. (Sept. 2014), *available at* http://globalarbitrationreview.com/news/article/32964/rsm-v-st-lucia-why-griffith-wrong-security-costs (calling the arbitrator's reasoning a "preposterous overreaction").

73 ICC Rules, *supra* note 45, art. 36(2).

74 Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2010), art. 45(1).

75 UNCITRAL Arbitration Rules, art. 43(1) U.N. Doc. A/RES/31/98.

76 Regulation 14(2), (3) ICSID Administrative and Financial Regulations;*See further* SCHREUER, *supra* note 8, art. 61 ¶ 46 *et seq.*

	ICC	SCC	UNCITRAL	ICSID
	proceedings, and after a set time limit, consider the claims to be withdrawn[77]		proceedings[79]	and ultimately discontinue the case[80]

IV. Cost Allocation under the 2015 EU Proposal for an Investment Court System

In November 2015, the European Commission submitted to the United States a proposal for the establishment of an Investment Court System [the "**EU Proposal**"], which the EU suggests to be the dispute resolution mechanism under the Transatlantic Trade and Investment Partnership ["**TTIP**"].[81] The EU Proposal follows considerable debate – particularly in Europe – as to how investor-state disputes under TTIP should be resolved.[82] Similar discussions took place before the signing of the new Trans-Pacific Partnership ["**TPP**"] in November 2015.[83]

The Investment Court System comprises a Tribunal of First Instance and an Appeal Tribunal.[84] With regard to costs, the EU Proposal suggests that Judges of the Tribunals shall be paid a monthly retainer fee, which the EU and the US shall bear equally.[85] Additionally, the EU and the US shall bear the administrative costs of the arbitrations.[86] Interestingly enough, the EU Proposal suggests a different default rule for all other costs: the other fees and expenses of the Judges and the parties' reasonable legal costs and expenses shall be allocated among the disputing parties according to the "*loser pays*" principle.[87] However, the Tribunal may apportion the costs differently, if it considers a "*loser pays*" solution to be "*unreasonable in the circumstances of the case*".[88]

Alternatively, upon decision by a Committee, the retainer fees and other expenses of the Judges may be transformed into a regular salary.[89]

The Tribunal of First Instance may order the claimant to post security for costs if there are reasonable grounds to believe that the claimant risks not being able to honor a possible cost

78 Arbitration Institute of the Stockholm Chamber of Commerce, Arbitration Rules (2010), art. 45(4).
77 ICC Rules, *supra* note 45, art. 36(6).
79 UNCITRAL Arbitration Rules 2010, art. 43(4) U.N. Doc. A/RES/31/98.
80 ICSID Administrative and Financial Regulations (2006), reg. 14(3)(d).
81 *Available at* http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf.
82 *See generally* Stephan W. Schill, *The European Commission's Proposal of an 'Investment Court System' for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law?*, 22(9) A.S.I.L. Insights (Apr. 22, 2016), *available at* https://www.asil.org/insights/volume/20/issue/9/european-commissions-proposal-investment-court-system-ttip-stepping#_edn1.
83 *Cf., e.g.* Todd Tucker, *The TPP has a provision many will love to hate: ISDS. What is it, and why does it matter?*, WASH. POST, Oct. 6, 2015, *available at* https://www.washingtonpost.com/blogs/monkey-cage/wp/2015/10/06/the-tpp-has-a-provision-many-will-love-to-hate-isds-what-is-it-and-why-does-it-matter (critical position).
84 EU Proposal, arts. 9, 10.
85 *Id.* arts. 9(12), (13), 10(12), (13).
86 *Id.* arts. 9(16), 10(15).
87 *Id.* arts. 9(14), 28(4).
88 *Id.* art. 28(4).
89 *Id.* arts. 9(15), 10(14).

decision against it.[90] The Tribunal may order the suspension or termination of the proceedings if security for costs is not fully posted within 30 days of the Tribunal's order.[91]

V. Conclusion

Cost, speed and efficiency are typically the most common reasons given by participants who choose arbitration over domestic courts. However, the costs in an investor-state arbitration can hardly be characterized as cheap, particularly in the case of the ICSID Convention, as the negotiating history confirms that it was intended to protect small and medium scale businesses. The lack of guidance in the arbitral rules is therefore surprising. Further, arbitral tribunals tend to deal with costs issues as an afterthought; there are usually only a few paragraphs that address costs in a cursory manner. However, for the users of the system, costs are a pivotal issue. It is hoped that arbitral institutions and arbitrators will devote more attention and time to developing rules of costs to ensure that justice is done in a fair and efficient manner.

90 *Id.* art. 21(1).
91 *Id.* art. 21(2).