

COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION

By

Aleksandar Ugljevarovic

Submitted to

Central European University

Legal Department

In partial fulfillment of the requirements for the degree of Masters of Law

Supervisor: Professor Tibor Várady

Budapest, Hungary

2010

ABSTRACT	ii
LIST OF ABBREVIATIONS	iii
INTRODUCTION	1
CHAPTER 1 – OVERVIEW OF COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION	3
1.1 Comparative analysis of various dispute resolution methods	3
1.2 Institutional vs. Ad hoc arbitration.....	6
1.3 Legal sources	8
1.3.1 Arbitration agreement and arbitration rules	8
1.3.2 National laws	10
1.3.3 International standards and principles.....	11
1.3.4 UNCITRAL	12
CHAPTER 2 –ELEMENTS OF ARBITRATION COSTS	16
2.1 Institutional Costs	16
2.1.1 Registration fees	16
2.1.2 Administrative expenses	17
2.2 Tribunal costs	18
2.3 Counsel costs.....	22
2.4 Witnesses and experts	23
2.5 Other related costs	25
CHAPTER 3 – ISSUES REGARDING ARBITRATION COSTS	27
3.1 Advance deposit.....	27
3.2 Security for costs.....	29
3.3 Allocation of costs	32
3.4 Role of courts in determining costs	35
CHAPTER 4 – POSSIBLE SOLUTIONS WITH REGARD TO REDUCTION OF COSTS	37
4.1 Analysis of Possible Reduction of Costs of Each Element	37
4.2 Solutions Recommended by the ICC	38
CONCLUSION	41
BIBLIOGRAPHY	43

ABSTRACT

The thesis focuses on the topic of cost–effectiveness of arbitration. Arbitration has reputation for being cheaper method of settling dispute when comparing to others. Purpose of the analysis is to reveal all cost-related issues and provide a complete list of cost elements in order to give assistance to both, arbitral practitioners and scholars when evaluating methods of settling dispute.

Research is based on national related legislation, case law of national courts and international arbitral institutions, international documents, extensive scholarly work analysis and rules and practice of prominent arbitral institutions.

Legal analysis demonstrates that one can not in advance claim that arbitration is less costly than other methods of settling disputes. While parties are not aware of expenses which might incur in arbitration, final analysis shows that at the end of proceedings they are mostly unsatisfied with decision on costs. This paper proposes close cooperation of all participants in arbitral proceedings. Arbitrators should draw attention to all cost related issues, parties should in advance clarify all counsel's costs and finally, parties should be actively involved in whole procedure.

LIST OF ABBREVIATIONS

AAA	American Arbitration Association
ADR	alternative dispute resolution
ASA	<i>Association Suisse de l'Arbitrage</i>
Co.	company
D.C.N.Y.	District Court of New York
DIS	<i>Deutsche Institution für Schiedsgerichtsbarkeit</i> - German Institution for Arbitration
ed.	editor
<i>e.g.</i>	<i>exempli gratia</i> (for example)
<i>Et al.</i>	<i>et alia</i> (and others)
IBA	International Bar Association
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
<i>Id.</i>	<i>idem</i> (previously mentioned)
Inc.	incorporated
LCIA	London Court of International Arbitration
Mr.	Mister
Ms.	Mistress
No.	number
NY	New York
Rep.	reporter
SCC	Stockholm Chamber of Commerce
UK	United Kingdom

UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
U.S.	United States
WIPO	World Intellectual Property Organization
Y.B. Com. Arb.	Year Book Commercial Arbitration
ZPO	<i>Zivilprozeßordnung</i> - German Civil Procedure Code

INTRODUCTION

Primary intent of parties when entering into agreement is to complete their affair. Prudent businessmen shall insert provision on method of settling eventual disputes – they have option to go before national courts, arbitration, mediation or other alternative dispute resolution method, but in this stage they rarely consider issue of costs.¹ Even in the moment when dispute arises, parties will be primarily concentrated on how to win the case and issue of costs will be in most cases omitted. However, prior evaluation of costs can help when deciding on adequate method. It is argued that on one hand lawyers tend to select litigation, but on the other hand businessmen's option is arbitration². *Ratio* for such selection is that litigation has reputation as being long and expensive, while main characteristics of arbitration perceived to be neutrality, confidentiality and cheaper method of settling disputes.³ However, this paper will demonstrate that arbitration is not cost efficient as it is reputed to be.

Arbitral scholars do not have unanimous opinion on that question. On one hand, Ms. Li⁴ and Mr. Stipanowich⁵ emphasize cost-effectiveness of arbitration. On the other hand, scholars like Mr. Bühler⁶ and Ms. Hsu⁷ claim that costs of arbitration

¹ Tibor Várady, *Remuneration of Arbitrators as a Threshold Issue: Economic Sense and Procedural Realities*. In Corporations, Capital Markets and Business in the Law 585, ed. Theodor Baums, Klaus J. Hopt and Norbert Horn (Great Britain: Kluwer Law International, 2000) [hereinafter Várady]; Michael E. Schneider, *Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services*, Volume 10 Issue 2 Arbitration International 119 (Kluwer Law International, 1994) [hereinafter Schneider]

² Roy Goode, *Commercial Law* 1177 (London: Penguin Books, Second Edition 1995) [hereinafter Good]

³ James H. Carter, "Dispute Resolution and International Agreements". In *International Commercial Arbitration* 4th Edition 23-24, Tibor Várady, John J Barceló III, Arthur T. von Mehren (U.S: Thomson Reuters, 2009)

⁴ Catherine Li, *Evaluating the Various Non-Litigation Processes for Resolving Disputes: The Cost-Effectiveness Approach*, Volume 18 Issue Journal of International Arbitration 435 (Kluwer Law International 2001) [hereinafter Li]

⁵ Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 Indiana Law Journal 425, 433-434 (Trustees of Indiana: 1988)

⁶ Michael Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, Volume 22 Issue 2 ASA Bulletin 249 (Kluwer Law International 2004), [Hereinafter Bühler]

⁷ Locknie Hsu, *Public Policy Considerations in International Arbitration: Costs and Other Issues*, Volume 26 Issue 1 Journal of International Arbitration 101 (Kluwer Law International, 2009)

are very high, sometimes exceeding the amount of dispute. There is no final conclusion on this debate. However, all scholars agree that confidentiality and neutrality are still advantages of arbitration. Still, issue of costs is of importance for parties, e.g. in order to decide between institutional and *ad hoc* arbitration, decision on final allocation of costs may influence parties' final choice.

In order to analyze cost-effectiveness of arbitration this paper will be based on scholarly work analysis and on case law of arbitral institutions and national courts. Issue of costs is subject to many controversies and both tend to give exhaustive solutions. Furthermore, paper will consult arbitral institution rules, national laws and international documents.

As it is presented above, issue of costs is of big importance for arbitration practitioners. However, scholars and students may also find that issue of costs is interesting topic. Sometimes, absence of agreement on arbitrators' fees may even influence viability of arbitration agreement. Such problem may cause agreement to be "incapable of being performed"⁸, which finally may lead to denial of arbitration.

Even though, issue of costs seems like pure practical problem, arbitral practice and doctrine show that it may cause many difficulties in arbitral procedure. In order to present all the circumstances which must be taken in consideration, before deciding whether arbitration is acceptable procedure for parties, this paper shall try to elaborate in details specific cost issues (e.g. comparative analysis of institutional and *ad hoc* costs, elements of costs, role of courts in determining costs). It starts with general overview of costs in international commercial arbitration, followed by the specific elements and issues regarding costs. At the end, paper provides some solutions for cost saving.

⁸ Under Article II (3) of NY Convention, court shall disregard arbitration agreement which is "incapable of being performed".

CHAPTER 1 – OVERVIEW OF COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION

Parties have alternative to bring their dispute before national courts, arbitration, mediation or other alternative dispute resolution method. Main advantages of arbitration when compared to ordinary litigation are neutrality, competence, predictability and enforceability.⁹ However, issue of costs is also of big importance. Parties should, before deciding on dispute resolution method, know what the costs and expenses for each of them are.

If parties opt for arbitration, they can either submit their dispute to organized arbitral institution or by themselves create and organize procedure which will reflect their needs (*ad hoc* procedure). Both possibilities have advantages and disadvantages, and it is on parties to evaluate which will fit them better.

Finally, parties should include issue of costs in their agreement. This provision would in great portion save their time and eventually money. However, in the absence of such provision, rules of arbitral institutions and national laws shall be applied. These rules in details regulate this issue.

1.1 *Comparative analysis of various dispute resolution methods*

Arbitration is said to be “innovative” method of settling disputes, an institution which gives solutions to some problems and unsatisfactory matters which occur in litigation. However, both way of settling dispute has same pattern – third party adjudication. As alternative methods of settling dispute to both previous options, parties are allowed to bring their dispute to mediation, conciliation, technical expertise or to combination of some of them (hereinafter “**ADR Methods**”). However,

⁹ Tibor Várady, John J Barceló III, Arthur T. von Mehren, International Commercial Arbitration 23-26 (U.S: Thomson Reuters, 4th Edition 2009) [hereinafter Várady, Barceló & von Mehren]

main difference between latter methods and former is that the role of third party in latter is to help parties to make compromise, rather than to make decision.¹⁰ This paper will compare firstly, cost-effectiveness of arbitration and litigation and secondly, arbitration and other methods of settling dispute.

One of the mostly cited arguments in favor of arbitration is that it is less costly than ordinary litigation.¹¹ Nowadays, most authors and practitioners agree that cost-effectiveness of both methods depends on circumstances of the case and that one can not make generalizations on that question.¹² Further analysis of every cost element confirms previous conclusion.

Regarding fees for conducting arbitration and court litigation one might say that former are higher since parties are obliged to bear several types of costs such as fees for institution, arbitrators' fees, costs for hiring rooms, travel costs. On the other hand court has modest fees¹³, but litigation in most cases is subject to appeals which may lead to multi-stage proceedings.¹⁴ National laws generally allow for three-step procedure which comparing to arbitration's one-step process is likely to produce more costs. Mr. Pickl and Mr. Stippl analyzed arbitration costs (arbitrators' and administrative fees) and court fees (assuming regular three instances) in Austria. Survey showed that use of sole arbitrator is the most costly efficient. What is more interesting is that use of three member tribunal is significantly less costly when

¹⁰ *Id.* at 1

¹¹ Li, *supra* note 4, at 435; Explanatory Note to UNCITRAL Model Law, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, last visited on 23 March 2010; *Diapulse v. Carba*, 626 f.2d 1108, 1110 (2d. Cir 1980)

¹² Gary B. Born, *International Commercial Arbitration* 85, (Kluwer Law International, 2009) [Hereinafter Born]; Pierre A. Karrer, *Arbitration Saves! Costs: Poker and Hide-and-Seek*, Volume 3 Issue 1 *Journal of International Arbitration* 35, at 45 (Kluwer Law International, 1986) [Hereinafter Karrer]; Goode, *supra* note 2, at 1177

¹³ Goode, *supra* note 2, at 1177

¹⁴ Karrer, *supra* note 12, at 36

disputed amount is above EUR 2 million. Below that sum litigation seemed to be better option.¹⁵

Costs for legal representation (please refer to Section 2.3) are substantial but there are no data that one method draws more counsel expenses than the other. In litigation party employs representative for several instances, while most arbitration cases party employs expensive international law firms.

While parties can not reduce court fees, in arbitration they are free in cooperation with arbitrators to create procedure which fits best to their case. This possibility may produce time efficiency and consequently less costly process. Court procedure has rigid rules and parties can not modify them.¹⁶ Finally, award rendered by arbitral tribunal has greater chance to be enforced due to broad enactment of New York Convention.¹⁷

ADR Methods are essentially not alternative to arbitration, since they don't lead to final decision.¹⁸ However, role of ADR Methods is not diminished by that fact. ADR Methods require cooperation of both sides.¹⁹ By selecting wise and experienced mediator parties may more easily come to result which will be acceptable for both of them. These methods may save parties' costs on arbitral institution, arbitrators' fees and extensive counsel fees. Furthermore, final settlement in mediation is basis for continuance of business relationship between parties. Taiwan is good example of efficiency of mediation. Survey showed that in disputes arising from the performance of contracts relating to government procurement business people are more satisfied

¹⁵ Christoph Stippl and Gunnar Pickl, "Chapter II: The Arbitrator and the Arbitration Procedure - Limiting Costs in Arbitration" in Austrian Arbitration Yearbook 2009 214, Christian Klausegger Peter Klein, et al. (eds), (C.H. Beck, Stämpfli & Manz, 2009) [Hereinafter Stippl & Pickl]

¹⁶ *Id.* at 215

¹⁷ Goode, *supra* note 2, at 1177-1178; Julian Lew, Loukas Mistelis, Stefan Kroß, Comparative International Commercial Arbitration 694 (the Hague; New York: Kluwer Law International, 2003) [Hereinafter Lew, Mistelis & Kroß]

¹⁸ Schneider, *supra* note 1, at footnote no. 5

¹⁹ Várady, Barceló & von Mehren, *supra* note 9, at 3

with mediation than with arbitration. Main reasons for that are following: (i) mediation costs are in high proportion lesser than arbitration costs and (ii) mediation process conducted by Taiwan mediation institution - Complaint Review Board for Government Procurement has proved to be effective.²⁰ On the other hand, surveys of in-house counsel from leading corporations around the world conducted together by Queen Mary School of International Arbitration and PricewaterhouseCoopers showed that almost $\frac{3}{4}$ of corporations preferred arbitration in conjunction with ADR Methods. Moreover, big percentage of corporations was satisfied and almost all expected to continue to use arbitration.²¹

As a conclusion one may not say which method of settling dispute is more costly efficient than others. It is on parties to take in consideration all circumstances of the dispute, evaluate all possible costs and expenses and finally select proper method.

1.2 *Institutional vs. Ad hoc arbitration*

“The choice between institutional and *ad hoc* arbitration is a delicate one.”²² As a first impression one might say that *ad hoc* arbitration is more attractive than institutional because parties do not bear the administrative costs and fees. Evaluation of advantages and disadvantages of both arbitration modalities shows that there is no final conclusion on this matter. It is on the parties to decide which modality fits better to their case.

First advantage of *ad hoc* arbitration is that the parties should not bear any administrative costs. However, this advantage is not anymore of that importance since arbitral institutions are competing among themselves and consequently lower

²⁰ Li, *supra* note 4, at 441-445

²¹ Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, Volume 25 Issue 4 *Arbitration International* 515, 516 (Kluwer Law International, 2009) [Hereinafter Najar]

²² Várady, Barceló & von Mehren, *supra* note 9, at 35

their fees.²³ Secondly, flexibility in procedure - parties are free to create procedure which will fit to every individual case.²⁴ This also opens option for parties to negotiate with arbitrators on their fees. However, this freedom may lead to procedural problems and delays if chosen procedure is ambiguous or if it is not complete. Such problem arose in *Norjarl* case where, in *ad hoc* arbitration, procedure stopped because commitment fee (please refer to Section 2.2) was disputed by one of the parties due to incomplete arbitral procedure.²⁵ In order to prevent this kind of problems all participants in procedure should cooperate closely.²⁶ In addition, UNCITRAL enacted UNCITRAL Arbitration Rules which are specially drafted for *ad hoc* arbitration and which may help parties in conducting *ad hoc* arbitration. Since UNCITRAL has no fees, parties are able to save administrative costs. Finally, since arbitrators are directly appointed by the parties, initiation of the procedure should be theoretically faster than it is in institutional setting.²⁷

Even though parties are paying for administrative fees of the arbitral institutions, they get in return comfort that the whole procedure will go “smoothly”. Procedure is predictable, well established arbitral institutions are efficient in resolving procedural problems and parties may rely on their administration.²⁸ As a second advantage, arbitral institutions determine fees for arbitrators in order to avoid inconvenient discussion and negotiation between parties and arbitrators on their remuneration. Moreover, institutions have mechanisms to collect money for

²³ *Id.* at 29

²⁴ Li, *supra* note 4, at 437

²⁵ *Norjarl v. Hyundai Heavy Industries Co.*, Queens Bench Division (Commercial Court), 1990. 1 Lloyd's Law Rep. 260 (1991), in Várady, Barceló & von Mehren, *supra* note 9, at 355 [Hereinafter *Norjarl* case]

²⁶ Várady, Barceló & von Mehren, *supra* note 9, at 28

²⁷ Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman and John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration 212 (The Hague; Boston: Kluwer Law International, 1999) [Hereinafter Fouchard, Gaillard, Goldman]

²⁸ Várady, Barceló & von Mehren, *supra* note 9, at 32; Li, *supra* note 4, at 437

arbitrators' remuneration (see Section 3.1).²⁹ Finally, award rendered by the prominent arbitral institutions are hardly to be set aside.³⁰

As a conclusion one may not say that one model of arbitration may prevail over another. If parties are willing to cooperate, arbitrators are experienced procedural lawyers and with selection of UNCITRAL Arbitration Rules one may say that *ad hoc* arbitration is better solution. On the other hand if parties are not willing to communicate, institutional arbitration would better fit their case. However, it is on the parties to take in consideration all the facts of the case, evaluate advantages and disadvantages and finally select best solution.

1.3 Legal sources

Legal sources which apply to international commercial arbitration also apply to issue of costs in arbitration: parties' agreement, rules of institutional arbitration and national laws (*lex arbitri*). Furthermore, United Nation Commission on International Trade Law adopted several documents which might assist when dealing with this issue.

1.3.1 Arbitration agreement and arbitration rules

In arbitration agreement parties are free to allocate costs and fees in manner which best fits their needs.³¹ This certainly helps in order to avoid latter unpleasant disputes and to assess in advance all cost risks.³² Moreover, they can authorize by agreement arbitral tribunal to render award on costs.³³ This right derives from general principle of party autonomy and arbitral tribunals generally enforce such provision.

²⁹ Lew, Mistelis & Kroll, *supra* note 17, at 37

³⁰ Li, *supra* note 4, at 437

³¹ ICC Final Award of 1990, Case No. 5946, in Volume XVI Yearbook Commercial Arbitration 118, Albert Jan van den Berg (ed) (Kluwer Law International, 1991)

³² Lew, Mistelis & Kroll, *supra* note 17, at 177

³³ Born, *supra* note 12, at 2489; Gotanda, Awarding Costs and Attorneys' Fees in International Commercial Arbitrations, 21 Michigan Journal of International Law 1, at 17 (1999) [Hereinafter Gotanda]

However, England has one exception to this freedom – parties are precluded, prior to the dispute arise, to make an agreement which will burden one party “to pay the whole or part of the costs of the arbitration in any event”.³⁴

If parties in their agreement do not draft provision on costs, but select application of rules of some arbitral institution, selected rules in most cases will provide tribunal with power to render decision on costs. This power derives from the arbitration agreement which point to such arbitral institution and its rules. Arbitrators generally exercise these powers in relation to the degree of a party's success in dispute and the reasonableness of a party's legal expenses. All leading institutional rules also explicitly give arbitrators authority to “apportion” legal costs, “allowing awards of less than 100% of a party's reasonable costs”.³⁵

ICC Rules authorize arbitral tribunal to render decision on arbitration costs and “decide which of the parties will bear them or in what proportion they shall be borne by the parties”.³⁶ Decision on costs include fees and expenses of arbitrators, administrative expenses of ICC, expenses of experts (these costs are fixed by ICC) and reasonable legal costs incurred by parties (arbitral tribunal has discretion with regard to determination of these costs).³⁷

LCIA Rules similar to ICC Rules allow to arbitral tribunal to determine “the proportions in which the parties shall bear all or part of such arbitration costs” with reference to parties’ success in dispute.³⁸ Administrative costs and arbitrators’ fees are determined by the LCIA Court, while arbitral tribunal has discretionary right to determine fees for legal representation on reasonable basis.³⁹

³⁴ English Arbitration Act, Section 60 (1996)

³⁵ Born, *supra* note 12, at 2498

³⁶ ICC Rules, Article 31 (1) (1998)

³⁷ ICC Rules, Article 31 (1) and (3) (1998)

³⁸ LCIA Rules, Article 28.2 and 28.4 (1998)

³⁹ LCIA Rules (1998), Article 28.3

1.3.2 National laws

In situation where parties do not allocate costs in their agreement (which parties rarely do)⁴⁰ arbitral tribunal should pay attention to provisions of *lex arbitri*.⁴¹ Many national laws contain provisions which regulate allocation of costs. These provisions give power to tribunal to decide on procedural costs and costs for legal representation. On the other hand, even though some national laws are silent on this matter it is still recognized that arbitral tribunals are authorized to render award on costs.

England legislation is explicit and very detailed on this matter. Parties' agreement has priority but in absence of such agreement, arbitral tribunal is authorized to render award on costs. Award on costs should be based on general principle that costs should follow the event.⁴² This provision is mandatory for all tribunals seated in England absent different agreement of parties. However, arbitral tribunal may bypass this general principle if according to circumstances of the case and to the conduct of the parties, application of this principle is not appropriate.⁴³ German legislation also authorizes arbitral tribunals to render award on costs. However, arbitral tribunals have wide discretion when deciding on allocation of them.⁴⁴

Several legislations like French, Swiss and U.S. are silent on the topic of award of costs. However, it is recognized that arbitral tribunals seated in France and Switzerland are authorized to decide on legal costs⁴⁵, based on principle that arbitral

⁴⁰ Bühler, *supra* note 6, at 253

⁴¹ Gotanda, *supra* note 33, at 15; Alan Redfern, Martin Hunte et al., *Law and Practice of International Commercial Arbitration* 8-97 (Thomson Sweet & Maxwell, 2004) [Hereinafter Redfern & Hunter]; ICC Final Award of 1990 in Case No. 6248, Volume XIX Yearbook Commercial Arbitration 124, 139-140, Albert Jan van den Berg (ed), (Kluwer Law International, 1994) [Hereinafter ICC 6248]

⁴² English Arbitration Act (1996), Section 61

⁴³ *Id.* section 61 (2); Born, *supra* note 12, at 2491

⁴⁴ German Arbitration Act (1998), Section 1057

⁴⁵ Fouchard, Gaillard, Goldman, *supra* note 27, at 685-686

tribunals should be presumed to render awards on costs in absence of parties' agreement.⁴⁶ Case law of both legislations confirms this power.⁴⁷ U.S. courts are not consistent on this question. Following "American rule" (please refer to Section 3.3) in absence of agreement or institutional rules, U.S. courts didn't recognize power of arbitral tribunal to render award on costs.⁴⁸ On the other hand, some courts concluded that arbitral tribunals have implied power to decide on costs.⁴⁹

1.3.3 International standards and principles

Some authors suggest that issue of costs in absence of agreement should be regulated by non-national standards instead of *lex arbitri*. Mr. Born is of opinion that arbitral tribunals should base their decision on international *sui generis* standards.⁵⁰ On the other hand, Mr. Gotanda refers to principles of fairness and reasonableness.⁵¹

Mr. Born concludes that present national provisions on costs are design for domestic needs, without taking in consideration international element of arbitration. It is on arbitral tribunals to develop international standards which will in efficient way deal with the issue of costs. However, these standards typically provide that " (a) the prevailing party is presumptively entitled to a costs award; (b) only reasonable costs will be reimbursed; and (c) expenses that were inefficient or unnecessary will not be reimbursed, while costs resulting from the need to respond to unreasonable or uncooperative actions will be recoverable."⁵²

⁴⁶ Born, *supra* note 12, at 2491

⁴⁷ ICC Final Award of 1992 in Case No. 6962, Volume XIX Yearbook Commercial Arbitration 184, 192-193, Albert Jan van den Berg (ed), (Kluwer Law International, 1994); ICC 6248, *supra* note 41, at 139-140

⁴⁸ United States District Court, Southern District of Texas, Houston Division Nos. H-95-4114, H-95-5553, H-96-0166 (7 July 1997) in Albert Jan van den Berg (ed), Volume XXIII Yearbook Commercial Arbitration 995, 1018 (Kluwer Law International, 1998)

⁴⁹ MCT Shipping Corp. v. Sabet, 497 F.Supp. 1078, D.C.N.Y., 1980., September 04, 1980, at 1084

⁵⁰ Born, *supra* 12, at 2495

⁵¹ Gotanda, *supra* note 33, at 24

⁵² Born, *supra* 12, at 2495

Mr. Gotanda on the other hand suggests that tribunal should apply principles of fairness and reasonableness when deciding on costs in arbitration. This solution gives arbitral tribunals broad powers to take in consideration all the facts of the case before making decision. ICC arbitral tribunals based their decision on costs on fairness and reasonableness.⁵³ In ICC Final Award of 1995 in case No. 6197 arbitral tribunal basing on principle of fairness rendered decision which obliged each party to bear half of the costs of arbitration and their own costs for legal representation. Explanation was that “neither party has totally won their case”. Tribunal also added that it has wide discretion when deciding on this matter. On the other hand, in ICC Final Award of 1993 in case No. 7301 arbitral tribunal decided that even though claimant claim was dismissed, each party is to bear its on costs for legal representation (claimant was obliged to bear costs of arbitration). Even though principles of fairness and reasonableness give wide discretion to arbitral tribunals, allowing them to take all circumstances in consideration, application of these principles leads to inconsistency. At the end, decision depends on discretionary tribunals’ interpretation of principle of fairness and reasonableness.⁵⁴ ICC awards confirm this notion.

1.3.4 UNCITRAL

This paper will further analyze documents enacted by the United Nations Commission on International Trade Law (hereinafter “**UNCITRAL**”)⁵⁵. Three major documents are of great importance for issue of costs in arbitration: UNCITRAL

⁵³ ICC Final Award of 1995 in Case No. 6197, Volume XXIII Yearbook Commercial Arbitration 13, 29, Albert Jan van den Berg (ed), (Kluwer Law International, 1998); ICC Final Award of 1993 in Case No. 7301, Volume XXIII Yearbook Commercial Arbitration 42, 48, Albert Jan van den Berg (ed), (Kluwer Law International, 1998); ICC Final Award of 1987 in Case No. 5649, Volume XIV Yearbook Commercial Arbitration 174, 179-180, Albert Jan van den Berg (ed), (Kluwer Law International, 1989); ICC Final Award of 1991 in Case No. 6527, Volume XVIII Yearbook Commercial Arbitration 44, 53, Albert Jan van den Berg (ed), (Kluwer Law International, 1993)

⁵⁴ Gotanda, *supra* note 33, at 24-25

⁵⁵ UNCITRAL is a legal body of UN in the field of international trade law, with the purpose of the harmonization and unification of the law of international trade.

Arbitration Rules of 1976, UNCITRAL Model Law on International Commercial Arbitration of 1985 (amended in 2006) and UNCITRAL Notes on Organizing Arbitral Proceedings of 1996.

While UNCITRAL Arbitration Rules regulate issue of costs in details, UNCITRAL Model Law is silent on that matter. It should be added that UNCITRAL Notes on Organizing Arbitral Proceedings may help arbitration practitioners when dealing with issue of costs.

UNCITRAL Arbitration Rules contain set of rules which in extensive manner regulate issue of costs. Arbitral tribunal has wide discretion when making decision. Firstly, tribunal is explicitly authorized to fix the costs in its award. These costs include fees of arbitral tribunal, travel and other expense incurred by the arbitrators, costs of experts, expenses of witnesses, costs for legal representation and fees and expenses of appointing authority.⁵⁶ Secondly, arbitral tribunal is authorized to fix its own fees which must be reasonable (please refer to Section 2.2).⁵⁷ Thirdly, UNCITRAL Arbitration Rules follow principle that unsuccessful party should bear the procedural costs. However, arbitral tribunal is authorized to apportion these costs between the parties if it thinks that this is reasonable.⁵⁸ On the other hand, arbitral tribunal has full discretion on awarding costs of legal representation (parties' costs), taking in consideration facts of the case.⁵⁹ Finally, arbitral tribunal is authorized to request for deposit as advance for costs. If deposit is not paid in full arbitral tribunal may suspend or terminate arbitral proceedings.⁶⁰ Detailed regulation approach shows that the drafters were aware of the fact that parties in arbitration and especially in *ad hoc* setting do not devote much attention to cost-related issues.

⁵⁶ UNCITRAL Arbitration Rules (1976), Article 38

⁵⁷ *Id.* at Article 39

⁵⁸ *Id.* at Article 40 (1)

⁵⁹ *Id.* at Article 40 (2)

⁶⁰ *Id.* at Article 41

“UNCITRAL Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration”.⁶¹ However, UNCITRAL Model Law is silent on issue of costs. There were proposals to adopt provisions on costs⁶², but drafters decided not to enact them due to different approaches to this issue.⁶³

Purpose of UNCITRAL Notes on Organizing Arbitral Proceedings (hereinafter “**Notes**”) is to help arbitration practitioners when conducting arbitral procedure by providing list of important issues which might be decided by arbitral tribunal. They are not binding and may be used in *ad hoc* and institutional arbitration.⁶⁴ Notes contain several guidelines on costs. Firstly, Notes deal with issue of deposit. Arbitral tribunal should be authorized to request deposit for costs which might include “travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and fees for the arbitrators”.⁶⁵ Secondly, Notes give following guidelines in order to reduce costs by: (i) presenting voluminous and complicated evidences in summary form⁶⁶, (ii) determining efficient order in which witnesses will be called⁶⁷ and (iii) arranging when and how to hold hearings⁶⁸.

It can be concluded that UNCITRAL documents provide efficient approach to the issue of costs in international commercial arbitration. Rules in details regulate this issue but on the other hand they give certain discretion to tribunals by providing them

⁶¹ Introductory note to UNCITRAL Model Law, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html, last visited on 24 March 2010)

⁶² Born, *supra* note 12, at 2488-2489

⁶³ Bühler, *supra* note 6, at 252

⁶⁴ INTRODUCTION of UNCITRAL Notes on Organizing Arbitral Proceedings, paragraphs 1-2

⁶⁵ UNCITRAL Notes on Organizing Arbitral Proceedings at Heading 5, paragraphs 28-30

⁶⁶ *Id.* at Heading 13, paragraph 54

⁶⁷ *Id.* at Heading 15, paragraph 66

⁶⁸ *Id.* at Heading 17, paragraph 75

with power to take in consideration all the circumstances of the case before making a decision.

CHAPTER 2 –ELEMENTS OF ARBITRATION COSTS

Costs in arbitration may be categorized in two groups: procedural costs and parties' costs.⁶⁹ Procedural costs include fees and expenses of arbitral institution (in case of institutional arbitration), arbitrators' fees, expenses in conducting the procedure and expenses of experts. Parties' costs include, in general costs for preparation and presentation of the case (e.g. counsel fees and expenses, expenses of witnesses, fees and expenses of non-legal services, translation and interpretation costs).⁷⁰ "These costs are often substantial and frequently exceed those of the procedure."⁷¹

2.1 *Institutional Costs*

Institutional costs are fees which are paid to arbitral institution in return for services rendered with regard to conducting of arbitral procedure. Two categories of institutional costs are (i) registration fees, and (ii) administrative expenses. Registration fee is non-substantial sum which is paid before commencement of arbitral procedure. Administrative expenses are higher amount of money paid to arbitral institution for service of administering the procedure.

2.1.1 Registration fees

Registration fee is amount of money paid to arbitral institution in the moment when request for arbitration is submitted.⁷² Some rules provide for payment of registration fee as a precondition for commencement of arbitration.⁷³ Purpose of this

⁶⁹ Bühler, *supra* note 6, at 250; Schneider, *supra* note 1, at 120

⁷⁰ Redfern & Hunter, *supra* note 41, at 8-93

⁷¹ Schneider, *supra* note 1, at 120

⁷² Schedule of Arbitration Fees and Costs of LCIA Rules, Section 1; Appendix B: Schedule of the Costs of Arbitration of Swiss Rules, Section 1.

⁷³ *Id.*

fee is (i) security for institution, since handling the request will cause certain costs (such as employing staff to administer the claim, constituting arbitral tribunal, sending the claim and other documents to respondent), which in case of settlement of parties or withdrawal of claim would leave the institution to bear these costs - in order to secure initial expenses, arbitral institution provide for non-refundable registration fee⁷⁴, and (ii) prevention of purely nuisance claims.⁷⁵

Registration fee may be fixed in two ways. While, Swiss Rules determine registration fee in relation to the amount of dispute⁷⁶, LCIA Rules adopted approach which is not dependable on the amount of dispute. In latter institution registration fee is fixed on £ 1,500.⁷⁷

ICC adopted different approach to this issue. Claimant is obliged to pay sum of US\$ 2,500 along with request for arbitration. This sum is also non-refundable, but it differs from registration fee in fact that this sum shall be accredited to claimant's portion of the advance costs (e.g. fees of arbitrators, administrative expenses).⁷⁸

2.1.2 Administrative expenses

Administrative expenses are more substantial fees which are paid to institution with purpose to cover expenses which occur in arbitral procedure. Arbitral institutions differently determine their administrative fees depending on number and level of services. WIPO Arbitration Center gives detailed list of services which is providing and they might be good example of services provided: "processing of the initial written statements prior to the establishment of the tribunal; exercise of the power to extend certain time limits; appointment of arbitrators in circumstances where the

⁷⁴ *Id.*; Karrer, *supra* note 12, at 40

⁷⁵ Julian William Laurence Craig, William W. Park, Jan Paulsson, International Chamber of Commerce Arbitration 35, (Oceana Publications, 2000)

⁷⁶ Appendix B: Schedule of the Costs of Arbitration of Swiss Rules, Section 1.

⁷⁷ Schedule of Arbitration Fees and Costs of LCIA Rules, Section 1

⁷⁸ Appendix III (Arbitration Costs and Fees) of ICC Rules, Article 1 (1)

parties themselves either do not appoint the arbitrators or fail to exercise a right to appoint an arbitrator within the prescribed time limits; determination of the fees of arbitrators; determination of the amount of, and the administration of, the deposits of costs from each party; determination of the place of arbitration, where the parties themselves do not agree upon it; monitoring of certain time limits; processing of the award; provision, where the arbitration takes place at WIPO in Geneva, of a hearing room, party rooms and an arbitrators room; and telephone and telefax outgoings of the Center in respect of the arbitration.”⁷⁹

Administrative costs are fixed in similar way as tribunal fees (please refer to section 2.2). *Ad valorem* approach (determination of fees with the reference to the amount of dispute) is more common and widely accepted by arbitral institutions.⁸⁰ LCIA adopted hourly rate approach.

Even though one might say that institutional fees are substantial, advantages of arbitral institution justify such expenses (please refer to Section 1.2). These expenses businessmen may perceive as investment, especially in situation when dispute resolution methods are not of their primary interest.

2.2 Tribunal costs

Costs of arbitral tribunal are one of the most debated issues in both, arbitration practice and doctrine. Tribunal costs include costs related to remuneration of arbitrators and costs related to arbitrators' expenses. Latter are not substantial and they consist of costs for traveling and accommodation (if arbitrator is not situated in

⁷⁹ Francis Gurry, Fees and Costs, Conference on Rules for Institutional Arbitration and Mediation, 20 January 1995, Geneva, Switzerland, available at <http://www.wipo.int/amc/en/events/conferences/1995/gurry2.html>, last visited on 25 March 2010 [Hereinafter Gurry]

⁸⁰ E.g. ICC Rules, AAA International Rules, Swiss Rules

the place of hearing), costs related to conduct of proceedings (such as room rental, recording), expenses for telephone conversation.⁸¹

Basic right of arbitrator is right to be remunerated.⁸² Arbitrators should be enumerated equally, but sometimes chairman of arbitral tribunal has higher fees due to his additional duties and responsibilities.⁸³ Parties' obligation to financially remunerate arbitrators is *quid pro quo* for following arbitrators' duties: to behave impartially, to diligently perform job and to respect confidentiality of the arbitration.⁸⁴ Some national laws⁸⁵ and most institutional rules⁸⁶ provide for this arbitrator's right. Right on remuneration derives from the contract between parties and arbitrator.⁸⁷ This contractual relationship is confirmed by national courts.⁸⁸

Arbitrators' fees may be calculated in two ways – on hourly or daily rate or depending on the amount of dispute.⁸⁹ Main advantage of former system is that remuneration is in relation to actual work done – meaning that complexity of case, responsibility and other factors may be properly assessed in higher or lower hourly or daily rates.⁹⁰ This system has also several disadvantages:

- (i) hourly rate may be different for each member of tribunal due to fact that they belong to different professions or come from different countries. This difference may lead to situation where lesser paid arbitrator will expect from higher paid to perform bigger portion of work;

⁸¹ Schneider, *supra* note 1, at 122

⁸² Lew, Mistelis & Kroll, *supra* note 17, at 283

⁸³ Born, *supra* note 12, at 1649; Swiss rules, Article 39 (3)

⁸⁴ Várady, Barceló & von Mehren, *supra* note 9, at 338-340

⁸⁵ English Arbitration Act, Section, 28 (1); Swedish Arbitration Act, Section 37

⁸⁶ ICC Rules, Section 31; AAA International Rules, Article 31; LCIA Rules, Article 28.1

⁸⁷ Fouchard, Gaillard, Goldman, *supra* note 27, at 600-602; Várady, Barceló & von Mehren, *supra* note 9, at 337; Born, *supra* note 12, at 1646

⁸⁸ Norjarl case, *supra* note 25

⁸⁹ Lew, Mistelis & Kroll, *supra* note 17, at 284

⁹⁰ Gurry, *supra* note 79

- (ii) time management of work is different for each arbitrator. Some arbitrator can finish their job more quickly than others;⁹¹
- (iii) finally, parties are not able to predict fees of arbitrators. Furthermore, arbitrators may in bad faith use delay tactics to earn higher fees.

One of interesting solutions for hourly fees is provided by the Japan Commercial Arbitration Association. Rule is that the hourly fee is reduced for 10% for every fifty hours in excess of initial sixty hours.⁹² This solution may in some extent prevent arbitrators to act in bad faith.

Second and more common solution is that fees are calculated in accordance with the amount of dispute. This way of calculation is also known as *ad valorem* calculation. Main advantage of this method is greater predictability, since both, parties and arbitrators may evaluate fees before beginning with procedure. However, sometimes case with smaller disputed amount may be much more difficult than other with bigger amount.⁹³

Arbitrators' fees are differently determined in institutional and *ad hoc* arbitration. In former, institution fixes arbitrators' fees and party by signing arbitration agreement which refers to that institution also accepts its fee schedule. For example, ICC accepts *ad valorem* calculation - arbitrators' fees are fixed in relation to the amount of dispute. However, ICC has certain discretion since fees are determined in wide range. ICC should before fixing fees within that range, take in consideration diligence of the arbitrator, time spent, and complexity of case.⁹⁴ Swiss rules also

⁹¹ Lew, Mistelis & Kroll, *supra* note 17, at 284

⁹² Várady, Barceló & von Mehren, *supra* at 354

⁹³ Lew, Mistelis & Kroll, *supra* note 17, at 284

⁹⁴ Appendix III (Arbitration Costs and Fees) of ICC Rules, Articles 2 and 4

accept *ad valorem* calculation but decision to decide on fees is on tribunal and not on institution.⁹⁵ On the other hand, LCIA determines arbitrators' fees on hourly basis.⁹⁶

In *ad hoc* arbitration fees are agreed between the arbitrators and parties in advance.⁹⁷ Parties should in their agreement either determine fees or at least give guidelines how to determine them. If parties select UNCITRAL Arbitration Rules to administer their procedure, issue of arbitrators' fees shall be covered in details. UNCITRAL Arbitration Rules authorize tribunal to fix its own costs in reasonable amount. Before making decision, tribunal should take in consideration amount in dispute, complexity of case, time spent on case and any other relevant circumstance. If tribunal is appointed by institutional appointing authority, tribunal should also take in consideration schedule of arbitrators' fees of that institution.⁹⁸ In case of absence of any agreement or fee schedule, tribunal is free to fix its own fees in reasonable manner.⁹⁹

Arbitrators are also authorized to negotiate "commitment fee" - advance amount of money for reserving arbitrators' availability for hearings for certain period of time. This fee is remuneration for not taking in consideration and not accepting other business during that period, if hearing or whole procedure is cancelled. "Commitment fee" is recognized by courts¹⁰⁰. This is not implied right but rather arbitrators must agree on it before appointment or after but only with the consent of parties and without using its stronger position.¹⁰¹ In Sea Container case, the New South Wales Court of Appeal removed arbitrators because they were "applying

⁹⁵ Swiss Rules, Article 38 and Appendix B: Schedule of Costs of Arbitration of Swiss Rules

⁹⁶ LCIA Rules, Article 28 and Schedule of Arbitration Fees and Costs of LCIA, Point 4.

⁹⁷ Born, *supra* note 12, at 1648; Jenny W. T. Power and Christian W. Konrad, Chapter IV: The Award - Costs in International Arbitration - A Comparative Overview of Civil and Common Law Doctrines: Determination of Costs in Austrian Arbitration Yearbook 2008 401 – 430, Christian Klausegger, Peter Klein, et al. (eds), (Beck, Stämpfli & Manz: 2008) (Hereinafter Power & Konrad]

⁹⁸ UNCITRAL Arbitration Rules, Articles 38-39

⁹⁹ Power & Konrad, *supra* note 97, at 406; Born, *supra* note 12, at 1649; Norjarl case, *supra* note 25

¹⁰⁰ Norjarl case, *supra* note 25

¹⁰¹ Born, *supra* note 12, at 1650-1651; Lew, Mistelis & Kro□ll, *supra* note 17, at 284

improper pressure on the parties to accept cancellation fees not part of the initial agreement for fees".¹⁰²

2.3 Counsel costs

The most important and substantial part of all costs incurred during international commercial arbitration are counsel costs.¹⁰³ Party is free to select its counsel or team of counsels - it may be represented by in-house lawyer, but in complex and important cases it is likely that the party shall employ counsel which is versed in particular field. It is not rare for party to engage expensive international law firm to handle the dispute. On the other hand, counsel does not need to be person with legal qualification, since there are cases where help of technical profession is required.¹⁰⁴

Counsel fees are not determined by rules and party and counsel are free to arrange this issue in manner which fits them. In Serbia counsel fees are determined on hourly basis or in accordance with the Tariff on Rewards and Expenses of Attorneys (*Tarifa o Nagradama i Naknadi Troškova za Rad Advokata*, the "**Tariff**")¹⁰⁵ issued by the Serbian Bar Association. The Tariff contains scale of fees for every specific act before tribunal e.g. submitting claim, hearings. Practice of the Serbian Foreign Trade Court of Arbitration is to award counsel fees in the amount of maximum double fees determined by the Tariff.

In final decision tribunal is free to award counsel costs. Main criteria when assessing these costs in several countries (e.g. Germany and Austria) is "reasonableness". However, this criterion is broad and may cause many difficulties.

¹⁰² Sea Containers v. ICT Pty., New South Wales Court of Appeal in *Renegotiating Arbitrators' Terms of Remuneration*, Gavan Griffith and Rodrigo Pintos Lopez, Volume 19 Issue 6 Journal of International Arbitration 581 - 590 (Kluwer Law International, 2002)

¹⁰³ Karrer, *supra* note 12, at 44; Power & Konrad, *supra* note 97, at 408

¹⁰⁴ Power & Konrad, *supra* note 97, at 408

¹⁰⁵ Official Gazzete of Yugoslavia, no. 24/98

Ms. Power and Mr. Conrad give following guidelines which should be taken in consideration with regard to this problem: complexity of case, amount of dispute, comparison of costs of one party with the costs of other party, showing that some action may not be accomplished with lesser efforts or expenses.¹⁰⁶ A further difficulty is that counsel fees differs from country to country.¹⁰⁷ To conclude, arbitral tribunal should always take in consideration all the facts of the case before deciding on costs for representation.

One of the most controversial issues regarding counsel fees is permission of agreeing on success fees (also known as contingent fees or *pactum de quota litis*). “By “*pactum de quota litis*” is meant an agreement between a lawyer and the client entered into prior to final conclusion of a matter to which the client is a party, by virtue of which the client undertakes to pay the lawyer a share of the result regardless of whether this is represented by a sum of money or by any other benefit achieved by the client upon the conclusion of the matter.”¹⁰⁸ Some common law countries (e.g. the United States) accept and support this type of arrangement.¹⁰⁹ On the other hand most civil law countries (e.g. Germany, Austria, and Switzerland) strictly prohibit this arrangement.¹¹⁰ Such agreement is invalid *ex tunc*. Reason for such prohibition is that party is not in position to predict costs of future dispute and experienced lawyers may use this weakness of client to impose high and disproportionate fees.¹¹¹

2.4 Witnesses and experts

¹⁰⁶ Power & Konrad, *supra* note 97, at 407-411

¹⁰⁷ Karrer, *supra* 12, at 38

¹⁰⁸ Code of Conduct for European Lawyers (2006), Article 3.3, available at http://www.ccbe.org/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf, last visited on 25 March 2010

¹⁰⁹ Born, *supra* note 12, at 2312

¹¹⁰ Code of Conduct for European Lawyers, Article 3.3.1

¹¹¹ Power & Konrad, *supra* note 97, at 412-413 and 427

Costs related to witnesses and experts are costs which belong to the parties. Witnesses' expenses include airplane ticket, accommodation and boarding costs. Sometimes, a party who is willing to call and examine witnesses must take in consideration that they are in most cases business people with a little free time. That means that party must also compensate that witness for the absence from their professional engagement. Furthermore, party must take into consideration fact that parties, counsels, arbitrators, witnesses and seat of arbitration may be and in most cases are located in different countries. This is likely to affect the amount of costs and time efficiency.¹¹² One of the questions which arose in practice is whether parties are free to call and examine witness irrespective of the circumstances of the case. However, logic answer should be negative since that kind of freedom may result in presenting of irrelevant evidence and consequently exaggerate arbitration costs.¹¹³ On the other hand tribunal should also take in consideration basic due process right - parties' opportunity to present their case.

There are two categories of expert witnesses. First, witness which is appointed by the parties and second, witness which is appointed by the tribunal.¹¹⁴ In latter case fees and expenses of the expert shall be usually paid from the advance on costs of arbitration, while party-appointed expert shall be paid by that party directly. Parties' expenses regarding experts are remuneration for their services, as well as compensation for their travel and accommodation expenses. Experts are mostly called in situation when there is need for some technical opinion. Expert should "be genuinely independent and not taking instructions from the counsel representing the

¹¹² Bernardo M. Cremades, *The Oral Presentation of Fact Witnesses*, Volume 13 International Commercial Arbitration 645 - 649, in Albert Jan van den Berg, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 2006 Montreal (Kluwer Law International, 2007)

¹¹³ Lew, Mistelis & Kropp, *supra* note 17, at 570

¹¹⁴ *Id.* at 575

party that retained them”.¹¹⁵ If the task of the expert is broadly defined, costs of experts may be considerable. Moreover, since there is no scale for their fees parties are not able to predict them.¹¹⁶

International Bar Association enacted IBA Rules on Taking Evidence in International Commercial Arbitration (hereinafter referred as the “**IBA Rules on Evidence**”). Their purpose is to help parties and arbitrators in conduct with the evidence in efficient and economical manner. Parties may include the IBA Rules on Evidence in their procedure and by that reduce problems which may arise during taking and presenting evidence. The IBA Rules on Evidence is giving detailed procedure for witnesses, experts (party-appointed and tribunal-appointed), on site inspection and guidelines for tribunals for admissibility and assessment of evidence.¹¹⁷

2.5 Other related costs

Other costs that might result during arbitral procedure are costs of the appointing authority, translation costs and costs related to the enforcement of arbitral award.

Appointing authority is person or a body authorized by the parties to appoint one or more arbitrators in case that original method of appointment fails to do so. Parties will employ appointing authority in case when they can not agree on a sole arbitrator, when two arbitrators can not agree on third and in situation when arbitrators can not agree on a chairman of tribunal. In institutional setting its administration shall act as appointing authority and this service will be covered by the administrative fee (please refer to Section 2.1). On the other hand, in *ad hoc*

¹¹⁵ Martin Hunter, *Expert Conferencing and New Methods*, International Arbitration 2006: Back to Basics?, Volume 13 ICCA Congress Series 820, 822 (Albert Jan van den Berg ed., Kluwer Law International, 2007)

¹¹⁶ Li, *supra* note 4, at 439

¹¹⁷ IBA Rules on Evidence (1999), Articles 4-9

arbitration parties will bear the costs of appointing authority. Many arbitral institutions such as ICC and LCIA are offering this service. ICC enacted the Rules of ICC as Appointing Authority which provide for detailed procedure of appointment of arbitrators. These rules may be applied in *ad hoc* arbitration under UNCITRAL Arbitration Rules and in other *ad hoc* procedure. Parties shall pay fixed non-refundable amount and administrative expenses of ICC for rendered services. Administrative expenses shall be fixed by discretion of ICC depending on the task.¹¹⁸

Since in international commercial arbitration parties, counsels, arbitrators and witnesses are speaking different languages, costs of translating intercommunication may be extensive.¹¹⁹ In order to reduce such costs parties should select counsels and arbitrators who can speak several languages.

Costs of enforcement of arbitral award mostly depend on the procedure determined by the national laws. Sometimes, party must employ local counsel in order to be successful. However, broad acceptance of NY Convention in large proportion reduces efforts and costs for enforcement.

¹¹⁸ Rules of ICC as Appointing Authority in UNCITRAL or other *Ad Hoc* Proceedings, Articles 1-2

¹¹⁹ Karrer, *supra* note 12, at 45

CHAPTER 3 – ISSUES REGARDING ARBITRATION COSTS

During arbitral procedure tribunal is authorized to render diverse decisions on costs. Firstly, it may order parties to submit advance deposit as security for arbitrators' fees and expenses which might occur in procedure. Secondly, it may on request of respondent, order claimant to submit certain amount of money as security from which respondent will recover his expenses in case that claim fails. Thirdly, tribunal is authorized to finally allocate costs of arbitration. However, sometimes national courts are allowed to interfere in arbitral procedure and change final decision on costs.

3.1 *Advance deposit*

In order to proceed with the case, arbitral tribunal (in *ad hoc* arbitration) or arbitral institution (in institutional arbitration) is authorized to ask parties to submit certain amount of money as a deposit. Purpose of advance deposit is security for costs which will arise during proceeding and guarantee that the arbitrators shall be paid.¹²⁰ In institutional setting, rules of each institution determine parties' obligation to advance costs.¹²¹ In *ad hoc* arbitration parties may rely on the rules specially created for *ad hoc* arbitration (UNCITRAL Arbitration Rules)¹²² on advancing costs or arbitrator may require such payment before commencement of procedure.¹²³

Basis for payment of advance deposit depends on existence of agreement. If parties explicitly agree with the arbitrators on advance of costs, basis for payment is their agreement. In the absence of such agreement, basis is different for institutional

¹²⁰ Anna-Maria Tamminen, in Austrian Arbitration Yearbook 2009 281, 284, Christian Klausegger, Peter Klein, et al. (eds), (C.H. Beck, Stämpfli & Manz, 2009) [Hereinafter Anna-Maria Tamminen]

¹²¹ ICC Rules, Article 30; Vienna Rules, Article 34; Swiss Rules, article 41

¹²² UNCITRAL Arbitration Rules, Article 41

¹²³ Anna-Maria Tamminen, *supra* note 120, at 281-282

and *ad hoc* arbitration. In institutional setting parties' obligation to pay advance deposit derives from the arbitration agreement. By selecting institution and institutional rules, they are also accepting provisions on payment of advance deposit which are incorporated in those rules. On the other hand, in *ad hoc* arbitration situation is different. UNCITRAL Arbitration Rules are basis for payment of advance for costs if parties select them. In the absence of such selection basis for this parties' obligation is their duty to arbitrate in good faith. Acting in good faith includes duty of parties to cooperate in arbitral process and consequently duty to reimburse arbitral tribunal for their engagement.¹²⁴

It is not uncommon for one of the parties (mostly respondent) to refuse to deposit advance on costs. ICC Rules provide that in case of non-payment of advance on costs, secretariat shall direct arbitral tribunal to suspended proceedings until payment. The secretariat shall also impose time limit until when the advance on costs should be paid, and in case parties don't respect it the claim shall be considered as withdrawn.¹²⁵ However, any party is free to pay whole amount of advance.¹²⁶ On the other hand DIS Rules provide that "arbitral tribunal is responsible for collecting arbitrators' fees"¹²⁷ and consequently for cost advance.¹²⁸ It is on arbitral tribunal, and not on administration to ask for advance on costs.

Prof. Emmanuel Gaillard suggests four solutions to problem of non-payment of advance on costs. Firstly, courts may on request from the party who advanced deposit, by decision for reimbursement, force reluctant party to do the same. This is

¹²⁴ *Id.* at 282-284

¹²⁵ ICC Rules, Article 30 (4)

¹²⁶ *Id.* at Article 30 (3)

¹²⁷ Jörg Risse, *Part III – Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Section 25 – Advance on Costs of Arbitral Tribunal*, Karl-Heinz Böckstiegel, Stefan M. Kröll, et al. (eds), *Arbitration in Germany: The Model Law in Practice* 748, (Kluwer Law International, 2008) [Hereinafter Risse]

¹²⁸ DIS Rules, Article 25

the case in Germany.¹²⁹ Disadvantage of this solution is that there will be parallel proceedings which will allow reluctant party to bring new challenges. Secondly, a party who paid may refuse to arbitrate and go before national courts. This solution is not proportionate to its cause, since one party would have right to seek for arbitration agreement to be null just because other party didn't pay advance costs. Thirdly, and most common solution is for party who wants to proceed with the arbitration to advance full deposit and latter request from tribunal to add this to final award on costs. Party will do that only in case that is pretty sure that it will win the case and finally be recovered.¹³⁰ Fourthly, non-payment of advance deposit would preclude non-paying party to present defense. This sanction would be too harsh for that party.¹³¹

SCC Rules give prudent solution to problem of non-payment of advance deposit. Arbitral tribunal is allowed to render a separate award for reimbursement of half of the advance costs which one of the parties paid in full.¹³² That party is afterwards free to enforce that award before national courts and consequently reimburse from reluctant party.

3.2 Security for costs

Security for costs is instrument by which respondent may demand from claimant some sort of security from he could recover his expenses and costs in case that claimant's action before tribunal fails and claimant needs to bear all arbitration

¹²⁹ Anna-Maria Tamminen, *supra* note 120, at 293

¹³⁰ *Id.* at 290

¹³¹ Howard M. Holtzmann, Emmanuel Gaillard, et al., "Working Group I - Preventing Delay and Disruption of Arbitration - I Conduct by a Party to Disrupt Establishing the Tribunal and Starting the Arbitral Proceedings - Topic 2: Refusal by a party (a) to make advance deposits for the costs of the arbitration, and (b) to submit a statement of defence", in Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases, Albert Jan van den Berg (ed), Volume 5 ICCA Congress Series 103, 105 (Kluwer Law International, 1991)

¹³² SCC Arbitration Rules (2010), Article 45 (4); Várady, Barceló & von Mehren, *supra* note 9, at 354

costs.¹³³ It can take form of bond, payment on escrow account or bank guarantee.¹³⁴

Security for costs is based on *cautio iudicatum solvi* – a measure, which is enacted in some national legislation, providing for duty of the plaintiff, if foreign citizen, to deposit security for his claim before national courts from which defendant may reimburse his expenses in case that plaintiff's claim fails.¹³⁵ Purpose of security before national courts is protection of defendant, since plaintiff's financial and legal situation may drastically change from the moment of signing agreement until the moment when dispute arise. Plaintiff in most cases does not have assets in the country where defendant is domiciled, and security for costs is one of the solutions to protect defendant from plaintiff's "non-meritorious" and abusive claims.

In arbitral proceedings situation is different. Parties are more cautious (examination of other parties' financial situation is always stricter), economical stakes are higher and financial status of parties is hardly to be changed.¹³⁶ There is also view that security in arbitration is not appropriate due to special characteristics of arbitration.¹³⁷ This issue is subject to debate and it opens two main questions. Whether national rule on security of costs may be applied on arbitration and who is competent to order security for costs – arbitral tribunal or courts?¹³⁸ Answers to these questions follow through analysis of national laws and arbitration rules. However, parties are free to import provision on security in their agreement, but they rarely do so.

¹³³ Otto Sandrock, *The Cautio Iudicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant*, Volume 14 Issue 2 Journal of International Arbitration 17 (Kluwer Law International, 1997) [Hereinafter Sandrock]; Weixia Gu, *Security for Costs in International Commercial Arbitration*, in Volume 22 Issue 3 Journal of International Arbitration 167 (Kluwer Law International, 2005) [Hereinafter Gu]

¹³⁴ Gu, *supra* note 133, at 199

¹³⁵ German Code of Civil Procedure (ZPO), Section 110; Serbian Conflict Law, Article 82

¹³⁶ Sandrock, *supra* note 133, at 27-28

¹³⁷ Lew, Mistelis & Kroll, *supra* note 17, at 601

¹³⁸ Gu, *supra* note 133, at 171-172; Sandrock, *supra* note 133, at 21-22

England is clear and precise on this matter. England Arbitration Act provides for possibility of the arbitral tribunal to order claimant to deposit security for costs. It also provides that application of this possibility is not dependable on the fact that the claimant is foreign citizen or foreign company.¹³⁹ England clearly took position that security for costs is not the same as in national laws and that right to order security is vested with arbitral tribunals. Hong Kong legislation followed England solution.¹⁴⁰

Germany accepted solution by which both arbitral tribunal and national court may order this measure.¹⁴¹ However, respondent shall be successful only if it shows that financial status of claimant had “substantially deteriorated”.¹⁴²

Even though, U.S. legislation does not have provisions on *cautio iudicatum solvi*, U.S. federal courts are vested with right to issue interim measures which include order for security of costs. This power is also vested with arbitral tribunals. It is on both bodies to take all circumstances of the case and decide on the security for costs.¹⁴³

Regarding arbitration rules, LCIA enacted rules which clearly provide possibility for arbitral tribunals to order security for costs. Unambiguously, these rules exclude power of national courts to issue this order.¹⁴⁴

ICC Rules do not contain provision on security for costs. However, some scholars¹⁴⁵ and awards rendered by ICC¹⁴⁶ confirm that arbitral tribunals are vested with such power. It is based on power of tribunal to issue any interim or conservatory

¹³⁹ English Arbitration Act, Section 38 (3)

¹⁴⁰ Gu, *supra* note 133, at 175

¹⁴¹ German Civil Procedure Law (ZPO), Sections 41 (1), (2) and 1033

¹⁴² Sandrock, *supra* note 133, at 32

¹⁴³ *Id.* at 33

¹⁴⁴ LCIA Rules, Article 15

¹⁴⁵ A. Schwartz, *The Practices and Experiences of the ICC Court*, Conservatory and Provisional Measure in International Arbitration 45 (Paris: International Chamber of Commerce, 1993)

¹⁴⁶ ICC case No. 6697 published in *Revue de l'Arbitrage*, 1992; ICC case No. 7047, published in *Bulletin de l'Association Suisse de l'Arbitrage* ASA 1995

measure.¹⁴⁷ However, in one ICC case where arbitral tribunal refused to grant security, it is stated that this measure should be “exercised with considerable restraint” and only when respondent may prove that present situation is substantially different than it was when the parties was entering into agreement.¹⁴⁸

In any case, scholars are suggesting that arbitral tribunals should apply high standards when ordering security for costs.¹⁴⁹ Weixia Gu suggest that tribunals should take in consideration following facts:

- “degree of connection” with the seat of arbitration and the arbitral proceedings that party selected. This criteria is applied in UK;
- “fundamental change of circumstance” meaning that financial standing of claimant is substantially decrease during period of signing the agreement and submitting the claim. This criteria is applied in Germany and by ICC;
- conduct of respondent – respondent should show good faith by paying his proportion of costs and by not seeking security for costs in order to put financially weak claimant in unenviable position;
- conduct of claimant – evasive or dilatory acts of claimant should be considered as bad faith;
- fact that the claimant is foreign citizen should not be taken in consideration.¹⁵⁰

3.3 Allocation of costs

Allocation of costs in international commercial arbitration is of high concern for the parties and in most cases this issue is important as it is decision on the merits of

¹⁴⁷ ICC Rules Article 23

¹⁴⁸ ICC case No. 10032, in Gu *supra* note 133, at 187-188

¹⁴⁹ Lew, Mistelis & Kroll, *supra* note 17, at 601

¹⁵⁰ Gu, *supra* note 133, at 184-197

the dispute.¹⁵¹ In majority of the arbitration cases costs incurred during arbitration are substantial and parties are inclined to evaluate and project costs in relation with the success in the main proceedings. However, this is not always the case. Tribunals are not consistent in deciding on the costs¹⁵², e.g. in some cases tribunals are very generous in awarding prevailing party¹⁵³ while in others party may not get anything. Moreover, this issue is regulated in general terms, giving tribunals large discretionary rights.

The issue of allocation of costs opens further many doubts, such as who will finally bear the costs of arbitration, timing in which this issue should be decided, what costs should tribunal award and whether tribunal may award costs in case of negative jurisdictional award.

As a solution to the question who will finally bear the costs there are two opposite principles: (1) the rule "cost follow event" meaning that the prevailing party shall be reimbursed by the losing party and (2) the "American rule" which provides for each party to bear its own costs regardless of the decision on the merits.¹⁵⁴ "Cost follow event" principle is widely accepted both in civil law¹⁵⁵ and common law countries¹⁵⁶. This principle is justified on several policies - that the losing party should be punished, that the prevailing party should be indemnified and as deterrence for bad faith litigation.¹⁵⁷ However, this principle is receiving critiques because tribunals are predominantly awarding costs automatically, without assessing all the

¹⁵¹ Gotanda, *supra* note 33, at 3

¹⁵² Bühler, *supra* note 6, at 249

¹⁵³ Southern Pac. Properties v. Egypt, Award of May 20, 1992 (ICSID), reprinted in 19 Y.B. Com. Arb. 51 82-83 (1994)

¹⁵⁴ Gotanda, *supra* note 33, at 6; Bühler, *supra* note 6, at 249; Charles Price and Yves Stans, *Using Costs as a Case Management Tool in International Arbitration*, in Volume 25 Issue 4 ASA Bulletin 704, 707-708 (Kluwer Law International 2007) [Hereinafter Price & Stans].

¹⁵⁵ Final Award of 1992 in ICC Case No. 6962, in Albert Jan van den Berg (ed), Volume XIX – 1994 Yearbook Commercial Arbitration 184, 192-193 (Kluwer Law International 1994)

¹⁵⁶ English Arbitration Act, Section 61(2)

¹⁵⁷ Gotanda *supra* note 33, at 5

circumstances of the case, even though national legislation provide for such possibility¹⁵⁸.

In the United States basic rule of litigation and arbitration states that each party is to bear its own costs regardless of decision on the merits of dispute. This principle is also applied outside of the United States, particularly in Japan, Indonesia and Philippines.¹⁵⁹ Although, courts and tribunals respect this traditional principle, through practice they developed following exceptions - counsel fees may be awarded in case (1) where parties by the agreement authorize the tribunal to do so, (2) where national legislation allows for such possibility and (3) where one of the parties is acting in bad faith.¹⁶⁰

English and Wales Civil Procedure Rules¹⁶¹ may serve as guidance how to avoid problems on final allocation of costs. These rules in details regulate what court should take in consideration when assessing the allocation of costs – e.g. assessment of all the circumstances of the case, conduct of the parties before proceedings and during proceedings, compliance with the orders of the court, counsels' acts, and reasonableness of incurred costs.

Regarding moment of assessment of costs, tribunal has choice – either it may decide on the costs in separate final decision (after the decision on the merits of dispute is rendered) or it may ask parties on details of incurred costs and expenses before rendering final award and include them in the final award.¹⁶² However, this freedom given to tribunals also opens further uncertainties.

It is widely recognized that costs for the representation of the party should be recoverable, but under condition that they are “reasonable”. Reasonableness of the

¹⁵⁸ English Arbitration Act, Section 61(2); German Arbitration Act, Section 1057

¹⁵⁹ Bühler, *supra* note 6, at 250

¹⁶⁰ Gotanda, *supra* note 33, at 12-13; also Price & Stans, *supra* note 154, at 708

¹⁶¹ English and Wales Civil Procedure Rules (1999), Parts 43-48

¹⁶² Redfern & Hunter, *supra* note 41, 8-95

expenses should be based on objective criteria, and tribunals should be able to assess how much effort is needed to involve in each dispute. On the other hand executive time – time that managers of the companies devote to the arbitration is hardly recoverable.¹⁶³

Final question is whether tribunals are authorized to award costs to respondent in case of denial of jurisdiction. This is especially important when denial of jurisdiction is based on invalidity of the arbitration agreement. It may be argued that because there is no valid agreement between the parties the tribunal lacks authority to decide on costs.¹⁶⁴ However, tribunals should accept claim of the respondent to award costs, since their jurisdiction - *Kompetenz-Kompetenz* right can be derived from the conduct of the claimant – submission of a dispute for resolution.¹⁶⁵

3.4 Role of courts in determining costs

General rule is that court may interfere in arbitral procedure in two situations: (i) when it is expressly allowed to do so by national arbitration act or (ii) when some issue is not regulated by the law.¹⁶⁶ However, regarding costs main question is whether national courts are allowed to review arbitrators' fees and consequently adjust them.

In legal system such as France this option is available to courts, based on power of courts to “reduce excessive levels of remuneration fixed unilaterally by agents or contractors”.¹⁶⁷ Case law of French courts confirms that practice.¹⁶⁸ On the

¹⁶³ Bühler, *supra* note 6, at 250; Redfern & Hunter, *supra* note 41, at 8-93

¹⁶⁴ Bühler, *supra* note 6, at 258

¹⁶⁵ Born, *supra* note 9, at 2501

¹⁶⁶ Lew, Mistelis & Kroll, *supra* note 17, at 359

¹⁶⁷ Fouchard, Gaillard, Goldman, *supra* note 27, at 625

¹⁶⁸ *Société VRV v. Pharmachim*, 25 novembre 1997 - *Cour d'appel de Paris (1re Ch. C)*, Volume 1998 Issue 4 *Revue de l'Arbitrage* 684,688 (Comité Français de l'Arbitrage 1998); *Société Adidas v. André Fresco et société*

other hand, some modern arbitration acts explicitly provide for option of courts to adjust arbitrators' fees. New arbitration acts enacted in England, Sweden and Italy clearly determine right of party to request from national courts to reduce excessive arbitrators' fees.¹⁶⁹ Other legislations provide court intervention in limited manner. In Mexico, tribunal is free to determine its' fees but in case that party request from court to review it, the arbitral tribunal is obliged to consult court before that determination. Even though, most legal system lacks explicit provision on adjustment of arbitrators' fees, national courts should have that power.¹⁷⁰

Some scholars suggest that in institutional arbitration, courts should not have power to review and eventually reduce arbitrators' fees. Justification is based on fact that the parties are aware of the arbitrators' fees before accepting jurisdiction of an arbitral institution since they are included in the arbitration rules.¹⁷¹ However, Swedish Supreme Court has different position on that issue. It ruled that provision of national law which allow for courts to review and adjust arbitrators' fees is applicable not just in situation where fees are fixed by arbitrators themselves, but also in situation where arbitrators' fees are determined by an arbitral institution.¹⁷² This possibility may prevent arbitrators to accept arbitration when seat of arbitration is in Sweden.

Ventex, 16 décembre 1999 - *Cour d'appel de Reims (ord. 1 prés.)*, Volume 2000 Issue 2 *Revue de l'Arbitrage* 316, 324 (*Comité Français de l'Arbitrage*, 2000)

¹⁶⁹ English Arbitration Act Section 28; Sweden Arbitration Act (1999), Section 41; Italian Arbitration Act, Article 814

¹⁷⁰ Várady, Barceló & von Mehren, *supra* note 9, at 352; also Li, *supra* note 4, at 435-436

¹⁷¹ Fouchard, Gaillard, Goldman, *supra* note 27, at 624-625

¹⁷² Case Ö 4227-06, Melis, Hobér, Kraus v. Soyak International Construction & Investment Inc., on December 3, 2008, *Swedish Court Decisions on Arbitration, 1999 to 2008*, Sigvard Jarvin, Volume 26 Issue 6 *Journal of International Arbitration* 873, 880-883 (Kluwer Law International, 2009)

CHAPTER 4 – POSSIBLE SOLUTIONS WITH REGARD TO REDUCTION OF COSTS

As it is described in previous chapters, one of the primary concerns of the parties to an arbitration procedure, besides winning the case, is reduction of costs. There have been attempts to save costs through several methods, but however there are limits to efficiency of such attempts. Taking into consideration elements of the arbitration costs, this paper will further analyze possibility of reduction of costs of each separate element and some possible solutions recommended by the ICC.

4.1 Analysis of Possible Reduction of Costs of Each Element

Institutional fees which include the registration fee and administrative fees are fixed by institution itself. They are not changeable and subject to negotiations and parties may only opt to submit their dispute to an arbitral institution under designated institutional fees. However, parties are free to submit their dispute to an *ad hoc* arbitration and avoid paying these fees, but this option may fabricate other difficulties (please refer to Section 1.2).

Attempt to save costs by reducing the arbitrators' fees is hardly to be possible. The fees at which an arbitrator is prepared to supply his or her services are in relations with the efforts and work required for the case. Arbitrator will not accept assignment if offered fees are not in proportion with the alternative sources of remuneration. This method of reduction of costs would lead to restriction of choice of arbitrators and at the end would threaten the quality of arbitration.¹⁷³

It can be concluded that parties may efficiently influence and reduce costs only by reducing their own costs - counsel costs, witnesses and experts costs. Practice of

¹⁷³ Schneider, *supra* note 1, at 121

the arbitration showed that time delays and extensive costs are in most cases caused by the conduct of counsels.¹⁷⁴ Counsels' efforts to get higher amount of fees through tactics of delays are more a rule than exception. Final task should be on parties – prudent selection of versed counsels and control over counsels' acts through whole procedure.

4.2 *Solutions Recommended by the ICC*

Analysis of the ICC cases from 2003 and 2004 confirms conclusion that parties are able to reduce their own cost. This statistic shows following result:

- “Costs borne by the parties to present their cases: 82%

(including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than those set forth below),

- Arbitrators' fees and expenses: 16%,
- Administrative expenses of ICC: 2%.”¹⁷⁵

It follows that it is on the parties to simplify the procedure as much as they can and to engage counsels who will advise them how to accomplish that objective.

ICC Commission on Arbitration enacted in 2007 guidelines and techniques how to reduce and avoid unnecessary costs (hereinafter referred as the “**ICC Guidelines**”).¹⁷⁶ The ICC Guidelines are based on two principles – firstly, parties and tribunal shall as early as possible determine procedure which fits their case and secondly, the tribunal shall act “proactively” with the parties in order to efficiently manage the procedure. The ICC Guidelines are not mandatory but rather their

¹⁷⁴ *Id.* at 126

¹⁷⁵ Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration, available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf, last visited on March 8, 2010. [Hereinafter ICC Techniques]

¹⁷⁶ *Id.*

purpose is to assist parties in order to control time and reduce costs. Even though, they give broad and detailed instruction to parties, this paper will only present those which author thinks that are of most importance:

- Arbitration clause should be simple. Ambiguous or complex clauses may latter in the procedure cause disputes and take very important time. The ICC Guidelines suggest to parties to choose standard ICC arbitration clause in order to avoid this problem.
- Parties should take in consideration fast-track procedure with shorter time limits and time limits for rendering award. However, application of this possibility strongly depends on the circumstances of each case.
- Parties should engage versed counsels and decide on either sole arbitrator or tribunal. While sole arbitrator is less costly and timely efficient, circumstances and complexity of the case may demand tribunal.
- Arbitral tribunal should use right to inform the parties, that in case of obstruction of the procedure such acts may be taken into consideration when deciding on final allocation of costs.¹⁷⁷
- Parties should before initiation of arbitral procedure take in consideration other means of settling disputes. Mediation before effective and wise body may satisfy needs of the parties in higher degree than expensive and mostly lengthy arbitral procedure (please refer to Section 1.1). Good example is the Complaint Review Board for Government Procurement under the Public Construction Commission in Taiwan where parties were more satisfied with

¹⁷⁷ ICC Rules, Article 31 (2)

the mediation than arbitration (please refer to Section 1.1).¹⁷⁸ However, tribunal should also inform parties on this possibility.

- Issues regarding hearings, witnesses and experts. Parties should take in consideration usage of IT in communication. Also, they should limit number of witnesses and expert witnesses.¹⁷⁹

In order to reduce costs parties should be very well informed about the circumstances of the dispute. Basic principles for their conducts should be good faith and mutual understanding. However, role of a tribunal is also very important. Only where communication between the parties on one hand and between the parties and the tribunal on the other hand is on high and productive level, arbitral procedure may be timely and costly efficient.

¹⁷⁸ Li, *supra* note 4, at 444

¹⁷⁹ Najjar, *supra* note 21, at 519

CONCLUSION

Disputes between businessmen are likely to arise. Even though, their primary interest is complete realization of business within time limits, they must be prepared to eventual dispute. Nowadays, parties have many options when it comes to dispute. Lawyers invented several alternatives to ordinary litigation (e.g. mediation, technical expertise, arbitration). In assessing characteristics of each alternative, issue of costs should be among priorities. One of the most commonly accepted and used method in international business setting is arbitration. It is perceived that arbitration is costly and timely effective. However, before their final choice on dispute resolution method, parties are able in certain measure to anticipate costs and expenses of each alternative.

Today, more than ever companies tend to reduce their costs, including reduction of expenses of legal departments. Legal departments function within determined budget and paying greater attention to future costs of eventual arbitration would be of great help.¹⁸⁰ Furthermore, practice of arbitral tribunals shows that parties may not rely on tribunal's wisdom when deciding on final allocation of costs. Arbitral decisions on costs are often arbitrary and inconsistent and they rarely provide pattern for future decisions.¹⁸¹ Beside strictly financial aspect, issue of costs may influence viability of arbitration agreement and consequently lead to denial of arbitration.

Analysis of existing practice and policies reveals following cost-related findings. Firstly, one can not give general answer on question whether arbitration or ordinary litigation is cheaper. Both methods of settling disputes could be expensive

¹⁸⁰ *Id.* at 518

¹⁸¹ Gotanda, *supra* note 33, at 2

and it is on parties to take in consideration all the facts of the case before making choice. It is recommended, especially if disputed parties stay in amicable relation, firstly to bring dispute before mediator since this method could in great portion save their money and time. Secondly, if parties decide to arbitrate, it would be wise to import provision on costs in the agreement. Agreeing on cost issues (e.g. what costs should be recoverable and what method of costs allocation should be used) would prevent arbitrary decision of tribunals. Arbitral tribunals have wide discretionary right which leads to inconsistent award on costs. Furthermore, explicit agreement on costs would reduce risk of non-enforcement of award for the reason of agreement's "incapability of being performed". Finally, parties should, as much as they could, be involved in arbitral procedure. This is especially important when the question of costs is discussed. In arbitral proceedings, neither arbitral institutions nor arbitral tribunals shall try to manage and save the costs. Furthermore, practice showed that parties rarely control expenses and costs incurred by their counsels.¹⁸² These costs are however, substantial. Parties should be engaged in every step of procedure. International documents and national laws give guidelines to parties in order to efficiently organize costs and time. Continuous communication with both, counsel and tribunal should be of great assistance in reducing costs.

There is no final conclusion when the question of arbitration cost-effectiveness arises. However, party should prudently approach to this question. It should take in consideration all the facts of specific case, assess all cost elements and finally make decision. Furthermore, party should be active during procedure, meaning that communication with arbitral tribunal and directing counsel for the purpose of reducing costs should be of its primary interest.

¹⁸² Price & Stans *supra* note 154, at 709

BIBLIOGRAPHY

I Normative Legal Acts

1. English Arbitration Act (1996)
2. German Arbitration Act (1998)
3. Swedish Arbitration Act (1999)
4. Serbian Attorney Tariff (1998)
5. German Code of Civil Procedure (ZPO) (1877)
6. Serbian Conflict Law (1982)
7. English and Wales Civil Procedure Rules (1999)
8. Italian Arbitration Act (1994)
9. Federal Arbitration Act (1925)

II International Conventions and Documents

1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention (1958)
2. UNCITRAL Model Law on International Commercial Arbitration (1985)
3. UNCITRAL Notes on Organizing Arbitral Proceedings (1996)
4. Code of Conduct for European Lawyers (2006)
5. IBA Rules on Taking Evidence in International Commercial Arbitration (1999)

III Arbitral Institution Rules

1. International Chamber of Commerce 1998 Arbitration Rules (ICC Rules)
2. Rules of ICC as Appointing Authority in UNCITRAL or Other Ad Hoc Arbitration Proceedings (2004)

3. Arbitration Rules of the London Court of International Arbitration of 1998 (LCIA Rules)
4. American Arbitration Association International Rules of 2008 (AAA International Arbitration Rules)
5. Swiss Rules of International Arbitration (Swiss Rules), 2004
6. Rules of Arbitration and Conciliation of the International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna Rules), 2006
7. Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC Arbitration Rules), 2010

IV Books

1. Roy Goode, Commercial Law (London: Penguin Books, Second Edition 1995)
2. Tibor Várady, John J Barceló III, Arthur T. von Mehren, International Commercial Arbitration (U.S: Thomson Reuters, 4th Edition 2009)
3. Gary B. Born, International Commercial Arbitration (Kluwer Law International, 2009)
4. Julian Lew, Loukas Mistelis, Stefan Kroß, Comparative International Commercial Arbitration (the Hague; New York: Kluwer Law International, 2003)
5. Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman and John Savage, Fouchard, Gaillard, Goldman on International Commercial Arbitration (The Hague; Boston: Kluwer Law International, 1999)
6. Alan Redfern, Martin Hunter, et al., Law and Practice of International Commercial Arbitration (Thomson Sweet & Maxwell, 2004)

V Scholarly Journals and Law Review Articles

1. Tibor Várady, *Remuneration of Arbitrators as a Threshold Issue: Economic Sense and Procedural Realities*. In *Corporations, Capital Markets and Business in the Law*, ed. Theodor Baums, Klaus J. Hopt and Norbert Horn (Great Britain: Kluwer Law International, 2000)
2. Michael E. Schneider, *Lean Arbitration: Cost Control and Efficiency Through Progressive Identification of Issues and Separate Pricing of Arbitration Services*, Volume 10 Issue 2 *Arbitration International* (Kluwer Law International, 1994)
3. James H. Carter, "Dispute Resolution and International Agreements". In *International Commercial Arbitration 4th Edition*, Tibor Várady, John J Barceló III, Arthur T. von Mehren (U.S: Thomson Reuters, 2009)
4. Catherine Li, *Evaluating the Various Non-Litigation Processes for Resolving Disputes: The Cost-Effectiveness Approach*, Volume 18 Issue *Journal of International Arbitration* (Kluwer Law International 2001)
5. Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 *Indiana Law Journal* (Trustees of Indiana: 1988)
6. Michael Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, Volume 22 Issue 2 *ASA Bulletin* (Kluwer Law International, 2004)
7. Locknie Hsu, *Public Policy Considerations in International Arbitration: Costs and Other Issues*, Volume 26 Issue 1 *Journal of International Arbitration* (Kluwer Law International, 2009)
8. Pierre A. Karrer, *Arbitration Saves! Costs: Poker and Hide-and-Seek*, Volume 3 Issue 1 *Journal of International Arbitration* (Kluwer Law International, 1986)

9. Christoph Stippl and Gunnar Pickl, "Chapter II: The Arbitrator and the Arbitration Procedure - Limiting Costs in Arbitration" in *Austrian Arbitration Yearbook 2009*, Christian Klausegger Peter Klein, et al. (eds), (C.H. Beck, Stämpfli & Manz, 2009)
10. Jean-Claude Najar, *Inside Out: A User's Perspective on Challenges in International Arbitration*, Volume 25 Issue 4 *Arbitration International* (Kluwer Law International, 2009)
11. Gotanda, *Awarding Costs and Attorneys' Fees in International Commercial Arbitrations*, 21 *Michigan Journal of International Law* 1 (1999)
12. Jenny W. T. Power and Christian W. Konrad, Chapter IV: The Award - Costs in International Arbitration - A Comparative Overview of Civil and Common Law Doctrines: Determination of Costs in *Austrian Arbitration Yearbook 2008* Christian Klausegger, Peter Klein, et al. (eds), (Beck, Stämpfli & Manz: 2008)
13. Bernardo M. Cremades, *The Oral Presentation of Fact Witnesses*, Volume 13 *International Commercial Arbitration*, in Albert Jan van den Berg, *International Arbitration 2006: Back to Basics?*, ICCA Congress Series, 2006 Montreal (Kluwer Law International, 2007)
14. Martin Hunter, *Expert Conferencing and New Methods*, *International Arbitration 2006: Back to Basics?*, Volume 13 ICCA Congress Series (Albert Jan van den Berg ed., Kluwer Law International, 2007)
15. Anna-Maria Tamminen, in *Austrian Arbitration Yearbook 2009*, Christian Klausegger, Peter Klein, et al. (eds), (C.H. Beck, Stämpfli & Manz, 2009)
16. Jörg Risse, *Part III – Commentary on the Arbitration Rules of the German Institution of Arbitration (DIS Rules), Section 25 – Advance on Costs of*

Arbitral Tribunal, Karl-Heinz Böckstiegel, Stefan M. Kröll, et al. (eds), *Arbitration in Germany: The Model Law in Practice* (Kluwer Law International, 2008)

17. Howard M. Holtzmann, Emmanuel Gaillard, et al., "Working Group I - Preventing Delay and Disruption of Arbitration - I Conduct by a Party to Disrupt Establishing the Tribunal and Starting the Arbitral Proceedings - Topic 2: Refusal by a party (a) to make advance deposits for the costs of the arbitration, and (b) to submit a statement of defence", in *Preventing Delay and Disruption of Arbitration/Effective Proceedings in Construction Cases*, Albert Jan van den Berg (ed), Volume 5 ICCA Congress Series (Kluwer Law International, 1991)
18. Otto Sandrock, *The Cautio Judicatum Solvi in Arbitration Proceedings or The Duty of an Alien Claimant to Provide Security for the Costs of the Defendant*, Volume 14 Issue 2 *Journal of International Arbitration* (Kluwer Law International, 1997)
19. Weixia Gu, *Security for Costs in International Commercial Arbitration*, in Volume 22 Issue 3 *Journal of International Arbitration* (Kluwer Law International, 2005)
20. A. Schwartz, *The Practices and Experiences of the ICC Court, Conservatory and Provisional Measure in International Arbitration* (Paris: International Chamber of Commerce, 1993)
21. Charles Price and Yves Stans, *Using Costs as a Case Management Tool in International Arbitration*, Volume 25 Issue 4 *ASA Bulletin* (Kluwer Law International 2007)

VI Cases

1. Diapulse v. Carba, 626 f.2d 1108, 1110 (2d. Cir 1980)
2. Norjarl v. Hyundai Heavy Industries Co., Queens Bench Division (Commecial Court), 1990. 1 Lloyd's Law Rep. 260 (1991), in Várady, Barceló & von Mehren,
3. ICC Final Award of 1990, Case No. 5946, Volume XVI Yearbook Commercial Arbitration 118, Albert Jan van den Berg (ed), (Kluwer Law International, 1991)
4. ICC Final Award of 1990 in Case No. 6248, Volume XIX Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1994)
5. ICC Final Award of 1992 in Case No. 6962, Volume XIX Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1994)
6. United States District Court, Southern District of Texas, Houston Division Nos. H-95-4114, H-95-5553, H-96-0166 (7 July 1997) in Albert Jan van den Berg (ed), Volume XXIII Yearbook Commercial Arbitration (Kluwer Law International, 1998)
7. MCT Shipping Corp. v. Sabet, 497 F.Supp. 1078, D.C.N.Y., 1980., September 04, 1980
8. ICC Final Award of 1995 in Case No. 6197, Volume XXIII Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1998);
9. ICC Final Award of 1993 in Case No. 7301, Volume XXIII Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1998);

10. ICC Final Award of 1987 in Case No. 5649, Volume XIV Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1989)
11. ICC Final Award of 1991 in Case No. 6527, Volume XVIII Yearbook Commercial Arbitration, Albert Jan van den Berg (ed), (Kluwer Law International, 1993)
12. Sea Containers v. ICT Pty., New South Wales Court of Appeal in *Renegotiating Arbitrators' Terms of Remuneration*, Gavan Griffith and Rodrigo Pintos Lopez, Volume 19 Issue 6 Journal of International Arbitration (Kluwer Law International, 2002)
13. ICC case No. 6697 published in *Revue de l'Arbitrage*, 1992
14. ICC case No. 7047, published in *Bulletin de l'Association Suisse de l'Arbitrage ASA* 1995
15. Southern Pac. Properties Ltd. v. Egypt, Award of May 20, 1992 (ICSID), reprinted in 19 Y.B. Com. Arb. 51 (1994)
16. Final Award of 1992 in ICC Case No. 6962, in Albert Jan van den Berg (ed), Volume XIX – 1994 Yearbook Commercial Arbitration (Kluwer Law International 1994)
17. *Société VRV v. Pharmachim, 25 novembre 1997 - Cour d'appel de Paris (1re Ch. C)*, Volume 1998 Issue 4 *Revue de l'Arbitrage* 684,688 (Comité Français de l'Arbitrage 1998)
18. *Société Adidas v. André Fresco et société Ventex, 16 décembre 1999 - Cour d'appel de Reims (ord. 1 prés.)*, Volume 2000 Issue 2 *Revue de l'Arbitrage* (Comité Français de l'Arbitrage, 2000)

19. Case Ö 4227-06, Melis, Hobér, Kraus v. Soyak International Construction & Investment Inc., on December 3, 2008, *Swedish Court Decisions on Arbitration, 1999 to 2008*, Sigvard Jarvin, Volume 26 Issue 6 Journal of International Arbitration (Kluwer Law International, 2009)

VII Internet Sources

1. Francis Gurry, *Fees and Costs*, Conference on Rules for Institutional Arbitration and Mediation, 20 January 1995, Geneva, Switzerland, available at <http://www.wipo.int/amc/en/events/conferences/1995/gurry2.html>, last visited on 25 March 2010
2. Techniques for Controlling Time and Costs in Arbitration, Report from the ICC Commission on Arbitration, available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf