Kluwer Arbitration Blog

Allocation of Costs in ICSID Arbitration

Inna Uchkunova (International Moot Court Competition Association (IMCCA)) · Wednesday, December 3rd, 2014

and Oleg Temnikov

1. Approaches to cost allocation

There are, generally, two approaches to costs allocation ("CA"), namely:
(1) pay your own way ("PYOWA") whereby the parties share the costs of the proceedings and bear their own legal costs;
(2) loser pays or also called "costs follow the event" approach ("CFTEA") under which the losing party bears the costs of the proceedings and the legal costs of the winning party. In case the winning party has lost on some procedural events or a number of its claims, the tribunal will make an adjustment downwards in proportion to the relative success of the parties (costs follow the event *pro rata*).

In addition to the above approaches, the tribunal may take into account the procedural conduct of the parties and would shift the costs to a party which has misbehaved in the proceedings thereby contributing to the increase of costs or in case the claimant has filed a fraudulent claim (conduct-based approach).

Below we will argue, as do some previous researches (e.g. Mr. Hodgson), that there is a tendency of boarder application of the CFTEA, but in its *pro rata* variant. This post does not address costs in annulment proceedings or the reasonableness of costs.

2. Comparison

Allegedly, the **traditional approach** in ICSID arbitration has been the PYOWA. The tribunal in *Tza Yap Shum v. Peru* has explained that PYOWA represents a remnant from public international law, given that in state-to-state disputes the costs are split. (ARB/07/6, Award 7 July 2011, para. 296) However, investment arbitration operates in a different setting – between an individual and a State. Moreover, in contrast to Article 61(1) of the ICSID Convention which deals with conciliation and explicitly provides that costs "shall be *borne equally* by the parties", no such rule exists with regard to arbitration proceedings, suggesting that the tribunal shall apportion the costs rather than split them. (*Togo Electricité v. Togo*, ARB/06/07, Decision on annulment 6 September 2011, para. 257) Even tribunals strictly applying the PYOWA have recognized that it would be unfair to leave the winning party to bear all of its costs. (*Nations Energy v. Panama*, ARB/06/19, Award 24 November 2010, para. 709)

It has also been argued that tribunals have shifted the costs to the losing claimant only if the latter's claim was **fraudulent**. Our study shows that in the majority of cases dealing with fraudulent claims this fact did not serve as the main reason for CA, rather the tribunal's reasoning was based on a default CFTEA. (E.g. *Cementownia "Nowa Huta" S.A. v. Turkey*, ARB(AF)/06/2, Award 17 September 2009, para. 177)

Other arguments cited in support of PYOWA include the fact that BITs give investors a **unilateral right to sue**, that is, if their claim fails this does not amount to a violation for which the State deserves compensation in the form of costs recovery. A powerful counter-argument is contained in the *Piero Foresti et al. v. South Africa*:

> "if one party is entitled to withhold something, and is obliged to defend itself in arbitral proceedings against a demand for that thing, it should not have to bear the costs of defending its right to withhold the thing." (ARB(AF)/07/1, Award 4 August 2010, para. 110)

Given that the right to reimbursement of costs is a procedural right, arguments relating to party equality support the application of a CFTEA even in case the respondent wins.

It has also been claimed that a default CFTEA affects the investor's **access to justice**. A default PYOWA however works in the same direction since it "could leave claimants with unrecoverable costs that are prohibitive for initiating arbitration." (Stephan Schill, *Cost-Shifting in Investment Treaty Arbitration*, 7 J.W.I.T. 653 (2006) at 685)

As to arguments such as **impecunious** party, these considerations are subjective, extraneous and have not been consistently applied. Thus, in *CDC v. Seychelles* the tribunal shifted the costs to the losing Respondent despite the fact that it was virtually impecunious. (ARB/02/14, Decision on the application for annulment 29 June 2005, para. 89) Moreover, the lack of financial means has not prevented tribunals from issuing an award, consequently, it shall not be taken into account in terms of CA.

Some tribunals have cited the **novelty of the issues** involved as a reason not to shift the costs to the losing party. In this regard, the tribunal in *International Thunderbird v. Mexico* has stated:

> "investment arbitration… [has] become so well known… Thus, this factor is no longer applicable…" (UNCITRAL Rules, Award 26 January 2006, para. 218)

A number of tribunals have, on the basis of the States' **substantive conduct** preceding the arbitration, refused to shift the costs to the losing claimant even though the latter has failed to prove that this conduct was a breach of the BIT. Such an approach disregards the fact that the burden of proof is on the Claimant and even tends to shift the onus to the Respondent. Importantly, the tribunal in *S.D. Myers, Inc. v. Canada* has stated that "[t]he purpose of an award of costs is not to punish a respondent for the conduct that made it liable to the claimant." (UNCITRAL Rules, Final Award 30 December 2002, para. 45) Consequently, only the procedural conduct of the parties should be relevant in terms of CA.

3. The majority of tribunals have decided on the basis of the relative success of the parties

We have made a study of ICSID awards rendered in the period 2000-September 2014. The awards are split according to who won the case. The two **tables** may be viewed here and here.

The study shows that in the majority of cases previous tribunals have applied the CFTEA *pro rata*, that is, according to the relative success of the parties. This means that the costs of the winning party are not automatically shifted to the losing party on the mere basis of its overall success in the case, rather the tribunal will subtract those *issues, claims or events* on which the winning party is itself the loser – in most cases, for example, States fail on their counterclaims.

Thus, in e.g. *Spyridon Roussalis v. Romania* in view of the fact that the claimant lost on the merits and the Respondent did not succeed in the presentation of its counterclaim, the tribunal decided that "Claimant be ordered to pay 60% of the costs of the arbitration and of Respondent's legal costs and fees." (ARB/06/1, Award 7 December 2011, para. 882)

The CFTEA *pro rata* approach could lead to non-allocation if neither party makes a strong win – for example, in *Meerapfel Söhne v. the CAR* given that the respondent failed in its objections to jurisdiction and its counter-claim, while the claimant did not succeed in all of its claims, the tribunal made no order on costs. (ARB/07/10, Award 12 May 2011)

Nevertheless, as noted by the tribunal in *GEA Group v. Ukraine* "[i]n circumstances where no part of the Claimant's endeavour in commencing these proceedings has been successful… the Respondent ought to recover its reasonable costs." (ARB/08/16, Award 31 March 2011, para. 365)

Similarly, in our opinion, decisions in which past tribunals have made no CA based on the fact that the respondent won the merits but lost on jurisdiction, deserve criticism since it cannot be true that the time and efforts spent on the merits is lest the time and efforts spent on jurisdiction, consequently the respondent should be compensated for part of its costs.

4. Conclusion

In their pleadings, States, as well as investors, typically refer to CFTEA, meaning that it is supported in practice and this could even amount to an agreement between the parties as to CA. (E.g. *Piero Foresti et al. v. South Africa*, para. 109; *Telenor Mobile Communications A.S. v. Hungary*, ARB/04/15, Award 13 September 2006, para. 105) Additionally, some tribunals have drawn analogy from the UNCITRAL rules and there is even a tendency to convergence. (*Cargill v. Mexico*, ARB(AF)/05/2, Award 18 September 2009, para. 545; *International Thunderbird v. Mexico*, para. 214) Significanlty, the UNCITRAL rules were revised in 2010 and were aligned to the CFTEA. This may be viewed as another signal for the change in attitude as to the "traditional" PYOWA.

In view of the above, it may be stated that the CFTE *pro rata* approach is best suited to the needs of international arbitration and finds support in the majority of cases.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Wednesday, December 3rd, 2014 at 7:10 am and is filed under Costs, Costs in arbitral proceedings, ICSID Arbitration, ICSID Convention, UNCITRAL
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.