

# Taking a Close Look at Today's Arbitral Process and Who Pays for It: A Report from Helsinki International Arbitration Day 2017 (II)

## Kluwer Arbitration Blog

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Helsinki International Arbitration Day (HIAD) is an annual arbitration conference organized by the Arbitration Institute of the Finland Chamber of Commerce (FAI). It was held for the sixth time in Helsinki on 18 May 2017.

### **Is There a Simple Solution to Arbitration Costs Allocation?**

The afternoon of the conference was dedicated to the topic of cost allocation in international arbitration. Mr James H. Carter, Senior Counsel at WilmerHale in New York and former Chair of the Board of Directors of the American Arbitration Association, gave a highly interesting and somewhat controversial introduction to this subject with his presentation entitled "*Is There a Simple Solution to Arbitration Costs Allocation?*". Mr Carter started by acknowledging that there is a lack of transparency in how the arbitral tribunals allocate the costs of arbitration between the parties, and a lack of consensus on the principles that should govern the

apportionment of costs. He went on to identify two prevailing schools of thought as to arbitration costs allocation. According to the “American rule”, the parties split procedural costs (i.e., the arbitrators’ fees and expenses and any applicable administrative charges) and bear their own attorneys’ fees. Under the “costs follow the event” rule (also known as the “loser pays” principle), in turn, costs are apportioned based on the parties’ success on the merits of the case. Mr Carter disputed the oft-stated argument that the “costs follow the event” rule is well-suited and regularly applied in international commercial arbitration: in his experience, at least in the United States, arbitrators in international commercial disputes tend to start from the presumption of “no shifting” of either procedural costs or attorneys’ fees regardless of the outcome of the arbitration. However, when a non-prevailing party has complicated the case by improper procedural manoeuvres, arbitrators may and sometimes do shift some or all of the procedural costs against it. In Carter’s view, this should normally suffice to encourage appropriate and efficient party conduct. But shifting attorneys’ fees – which may run into the millions of dollars on each side – merely on the grounds that one party has prevailed on the merits of the dispute is probably too harsh a sanction to be adopted as a standard practice, not least because it may unduly affect the parties’ right to have their cases heard. Arbitral tribunals should therefore consider it only in the rare cases of manifestly unreasonable party conduct.

The following panel discussion built on the ideas put forth by Mr Carter under the heading *“Costs of Arbitration is Always a Hot Topic – How Are the Costs of Arbitration Allocated Between the Parties in the International Commercial Arbitration Practice and Is the Current Practice on the Right Track?”*. The session was moderated by Ms Gabrielle Nater-Bass, partner at Homburger, member of the FAI Board and President of the SCAI (Switzerland). The speakers included Ms Anja Håvedal Ipp, Legal Counsel of the SCC (Sweden); Mr Massimo Benedettelli, Professor of International Law at the University “Aldo Moro”, Bari and partner at ArbLit (Italy); Mr Philippe Cavaleros, partner at Winston & Strawn and a member of the ICC Commission on Arbitration & ADR’s Task Force on Decisions as to Costs (France); and Mr Piotr Nowaczyk, Independent Arbitrator & Mediator and former member of the ICC Court (Poland).

The panelists took issue with Mr Carter’s notion of the limited applicability of the “costs follow the event” principle in international arbitration practice. In fact, many arbitration rules contain an express yet rebuttable presumption that the successful

party will be entitled to recover its reasonable costs (e.g., the UNCITRAL, CIETAC, FAI, DIS, Swiss and LCIA Rules). Further, absent mandatory provisions of *lex arbitri* to the contrary, many arbitral tribunals seem to follow the “costs follow the event” principle as a starting point even in proceedings conducted under such arbitration rules which merely confirm the tribunal’s authority to apportion the costs of the arbitration between the parties without prescribing any guidelines as to the manner in which the costs should be allocated (e.g., the ICC, ICDR, SCC and SIAC Rules). However, not infrequently, when apportioning the costs of arbitration in a given case, arbitrators tend to exercise the wide discretion that most national laws and arbitration rules grant them in this regard by factoring in also considerations other than the parties’ success on the substantive issues in dispute, such as the effect of the parties’ procedural behaviour on the overall efficiency of the arbitral proceedings.

Ms Håvedal Ipp demonstrated the allocation of costs in SCC arbitration by presenting results of a recent study examining 80 arbitral awards rendered in SCC proceedings. According to the study, in 45% of the cases, the losing party was ordered to pay all of the costs of arbitration in full, reflecting a strict application of the “costs follow the event” principle. In 20% of the cases, the costs were split equally between the parties. Finally, in 35% of the cases, the arbitral tribunal applied a more sophisticated cost allocation analysis and apportioned the costs between the parties accordingly. To sum up, Ms Håvedal Ipp concluded that SCC arbitral tribunals seem to invoke the “costs follow the event” rule quite often in disputes which involve a clear losing party, whereas other methods of cost allocation become applicable when the outcome of the substantive dispute is less clear-cut.

The panel then proceeded to consider whether there should be more guidance available in the determination of the allocation of costs so as to increase the predictability and acceptability of final costs in international arbitral proceedings. In this context, a question was also raised as to whether the arbitral tribunal should proactively initiate a dialogue with the parties, at the earliest feasible time, with the aim of obtaining agreement on various issues related to cost recovery. Consistent with the recommendations set forth in the recent ICC Report on Decisions on Costs in International Arbitration, some of the panelists (as well as conference participants) suggested that it might be beneficial for an arbitral tribunal to discuss with the parties already in connection with the first preparatory

conference a list of issues pertaining to the apportionment of costs, including (but not necessarily limited to) the following: the recoverability of different cost items, in particular the parties' internal legal and other management costs; the method of cost allocation to be applied by the arbitral tribunal, including the assessment of the parties' relative success on the merits and the effect of their procedural conduct on the determination and apportionment of costs; what records the parties are expected to submit to the arbitral tribunal at the end of the proceedings in order to substantiate their cost claims; and the format and timing of the parties' cost submissions. – While addressing such issues at the outset of the proceedings is arguably not a common practice yet, it does have the benefit of removing uncertainty and improving predictability in relation to the arbitral tribunal's approach to any cost issues, which in turn serves to contribute to the continuing legitimacy of arbitration as the primary method of resolving international commercial disputes.

## **Final remarks**

The official conference programme ended with the closing remarks of Ms Petra Kiurunen, Vice-Chair of the FAI Board. After that, the participants enjoyed a dinner with an inspiring speech about the “bright future of international arbitration” by Mr Eric A. Schwartz, one of the world's pre-eminent experts in the law and practice of international arbitration (former Secretary General, member and Vice-President of the ICC Court; former senior partner at King & Spalding; and currently an Arbitrator member/door tenant at Fountain Court Chambers). During the dinner, the Chair of the FAI Board, Mr Mika Savola, was awarded *The Chamber of Commerce Cross* for his meritorious work for the FAI and contribution to the Finnish business and industry. The Finland Chamber of Commerce also awarded Ms Carita Wallgren-Lindholm the Finland 100 – Special Medal of Merit for her contribution to the Finnish business and industry through her work as an ambassador of Finnish arbitration abroad (read more from Press Release).

*The next Helsinki International Arbitration Day will be held on 24 May 2018 (more information will be available here). If you wish to look back at HIAD 2017, you can watch videos from the event here and photos here.*