

# 31

## ARTICLE 31—COSTS

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### ARTICLE 31

*The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.*

*Such costs may include:*

- a) the fees and expenses of the arbitrators;*
- b) the costs of assistance required by the tribunal, including its experts;*
- c) the fees and expenses of the administrator;*
- d) the reasonable costs for legal representation of a successful party; and*
- e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.*

### I. Introduction

Users of international arbitration know all too well that it can be a costly process. **31.01** There is no shortage of commentaries decrying the 'cost conundrum' afflicting arbitration practice.<sup>1</sup> Article 31, which empowers the tribunal to fix the 'costs of the

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<sup>1</sup> See N Ulmer, 'The Cost Conundrum', 26(2) *Arb Intl* (2010) 221. See also K Sachs, 'Time and Money: Cost Control and Effective Case Management', in LA Mistelis and JDM Lew QC (eds)

arbitration’ and to apportion those costs between the parties, is therefore highly relevant. As with most sets of arbitration rules, Article 31 identifies what kinds of costs may be recoverable, but leaves the tribunal a broad discretion to decide what costs are ‘reasonable’ and how recovery of those costs should be apportioned between the parties. Of course, the parties’ agreement, the applicable national laws, and the legal cultures of the respective parties and the tribunal may also play a role in this determination.<sup>2</sup>

**31.02** Article 31 has its roots in the 1976 UNCITRAL Rules. Most of the text can be traced to Article 38 of those rules, with some additional language drawn from Article 40.<sup>3</sup> On the whole, Article 31 takes a less prescriptive approach to identifying the types of costs than is found in those Rules or, for example, in the LCIA Rules.<sup>4</sup> The AAA Commercial Rules take an even more ‘bare bones’ approach to defining the scope of the tribunal’s power to award costs.<sup>5</sup> In considering Article 31, it is also important to bear in mind that US domestic litigation practice provides very few opportunities for any cost-shifting with respect to a party’s ‘attorney fees’ or otherwise.<sup>6</sup> This so-called ‘American Rule’, at least to some extent, remains the practice in domestic arbitration. Therefore the AAA’s adoption in the ICDR Rules of the UNCITRAL-sanctioned approach of making a broad award of the ‘costs of arbitration’ signals a clear break from domestic practice to embrace international norms.

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*Pervasive Problems in International Arbitration* (Kluwer Law International, The Hague, 2006) 101; ICC, *Report of the ICC Commission on Techniques for Controlling Time and Costs in Arbitration* (ICC Publication No 843, 2007); V Reichert and J Hope, ‘Costs: The Sting in the Tail’, 1 *Global Arb Rev* (2006) 30.

<sup>2</sup> For a discussion of costs of arbitration in general, see GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 1,872–73, 2,488–2,502; N Blackaby, C Partasides, A Redfern, and M Hunter, *Redfern and Hunter on Law and Practice of International Commercial Arbitration* (5th edn, Oxford University Press, Oxford, 2009) paras 9-89–9-100; E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,253–56.

<sup>3</sup> Except as discussed below, these provisions remain largely unchanged in the 2010 UNCITRAL Rules as Arts 40 and 42, respectively.

<sup>4</sup> See LCIA Rules, Art 28.

<sup>5</sup> See AAA Commercial Rules, s R-43(c).

<sup>6</sup> See generally Born, op cit, 2,491–94.

## II. Textual commentary

### A. Tribunal's power to fix the costs of arbitration

Article 31 requires that the tribunal 'shall fix the costs of arbitration in its award'. **31.03** This is expressed in mandatory terms, because it is necessary that, at a minimum, the tribunal fix the terms for distribution of the deposit on costs, which will have been collected under Article 33 to cover arbitrator fees and administrative costs. As discussed further below, unlike some rules, Article 31 uses the term 'costs of the arbitration' to include not only arbitrator fees and administrative costs, but also costs incurred by the parties in putting on their cases.<sup>7</sup> Article 31 refers to the tribunal fixing such costs 'in its award'. However, there is no reason why an order as to costs cannot be made in more than one award over the course of the proceeding. It is also common for an award on the merits to be followed by a separate final award as to costs.<sup>8</sup> An award of costs may also be made where the arbitration is terminated pursuant to Article 29.<sup>9</sup>

As already noted, the arbitrators' power to award costs, and the exercise of their discretion in relation thereto, may also be impacted by applicable arbitration laws. **31.04** In this respect, difficult choice-of-law issues may arise. However, in most cases, one would assume that the power to award costs will be governed by the procedural law of the arbitration. The substantive standards for determining the costs award might also be drawn from the procedural law, could be governed by the law applicable to the contract (especially to the extent the contract makes specific provisions on costs), or might in fact be premised on international standards applicable to international arbitration. As one commentator notes, an international approach is justified because 'domestic rules regarding legal costs are designed with domestic litigation systems and legal professions in mind'.<sup>10</sup> The ICDR Rules' costs provisions are *different* from those found in any of the AAA's other, domestic-focused, sets of arbitration rules. As such, while national laws and legal cultures cannot be

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<sup>7</sup> Compare LCIA Rules, Art 28.1 (excluding from the term 'costs of the arbitration' the 'legal or other costs incurred by the parties themselves' and leaving that to be addressed separately in Art 28.3).

<sup>8</sup> See 2010 UNCITRAL Rules, Art 40(1) (amending the old Art 38 to refer to fixing the costs of the arbitration 'in the final award and, if it deems it appropriate, in any other award'). See UNCITRAL, *Note by the Secretariat*, UN Doc No A/CN.9/W.G.II/WP.157/Add.2 (10 December 2009), para 18.

<sup>9</sup> While not explicitly stated in the ICDR Rules, this must be so in order to settle any outstanding issues regarding liability for costs and expenses. It is explicitly stated to be the case in Art 40(3) of the 1976 UNCITRAL Rules (this is incorporated into the general power to award costs in any award or other decision under Art 40(1) of the 2010 UNCITRAL Rules).

<sup>10</sup> See Born, *op cit*, 2,495. For a discussion of choice-of-law issues generally in the context of costs, see *ibid*, 2,494–95.

ignored, the ICDR provisions should be understood as falling within this uniquely international context.

- 31.05** Nevertheless, it is interesting briefly to review domestic practice the analogous AAA Commercial Rules, section R-40(c). That provision simply states that the arbitrator will assess the ‘fees, expenses, and compensation’, and may apportion them among the parties ‘in such amounts as the arbitrator determines is appropriate’. This broad discretion granted to the tribunal specifically includes the power to award attorneys’ fees in certain circumstances (discussed below). Awards of costs made in reliance on the AAA Commercial Rules have generally been respected by the courts in enforcement actions in the US.<sup>11</sup>
- 31.06** Similar deference to arbitrators is shown by courts asked to review costs awards made under the ICDR Rules. A US federal court recently upheld all but one portion of an award of costs in an arbitration under the ICDR Rules.<sup>12</sup> The court noted that the arbitration clause in question incorporated ‘the rules and practices of the [AAA]’ and was determined in accordance with the ICDR Rules.<sup>13</sup> The court cited the broad language of Article 31 and the arbitrator’s reliance thereon in deciding to make an award of attorneys’ fees, expenses, and arbitration costs, despite the fact that the parties’ agreement stated that ‘the costs of such arbitration shall be borne equally by the parties’.<sup>14</sup> The tribunal enforced the award, because the ‘arbitrator’s authority to award attorneys’ fees, expenses, and costs depended upon his interpretation of the contract and there is no question that his right to interpret the contract is rationally inferable from the wording of the parties’ Agreement and its arbitration clause’.<sup>15</sup>

## B. Tribunal may apportion costs

- 31.07** Article 31 provides that the tribunal ‘may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the

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<sup>11</sup> See *Chase v Cohen*, 519 FSupp2d 267, 270 (D Conn 2007). But cf *Bacardi Corp v Congreso de Uniones Industriales de Puerto Rico*, 692 F2d 210 (1st Cir 1982) (vacating award of attorney’s fees); *Sammi Line Co v Altamar Nav SA*, 605 FSupp 72 (SDNY 1985) (relying on ‘traditional American rule’ to conclude that agreement not addressing power to award attorneys’ fees did not permit such award); *Transvenezuelan Shipping Co v Czarnikow-Rionda Co*, 1981 US Dist LEXIS 10059 (SDNY 1981) (vacating award of attorneys’ fees as exceeding arbitrators’ authority where parties’ agreement provided for discretion to apportion ‘expenses and costs of the arbitration’, but was silent as to attorneys’ fees).

<sup>12</sup> See *Millmaker v Bruso and Sovereign Oil and Gas Company II, LLC*, Civ No H-07-3837, 2008 WL 4560624 (SD Texas, 9 October 2008) (vacating portion related to costs against a non-party).

<sup>13</sup> *Ibid*, \*3 (and see also n 3 concerning the ICDR).

<sup>14</sup> *Ibid*, \*4–5 (concluding that this meant that costs were to be borne equally only during the course of the arbitration).

<sup>15</sup> *Ibid*, \*6.

circumstances of the case'. This language appears to be drawn from Article 40(1) of the 1976 UNCITRAL Rules, but with an important difference:<sup>16</sup> the broad discretion granted to the tribunal under Article 31 is not coupled with any explicit expectation that the unsuccessful party shall bear the costs of the arbitration.<sup>17</sup>

Even though an ICDR tribunal may therefore not feel constrained to apply the 'loser pays' approach, it is likely to consider this as an important factor in determining the apportionment of costs.<sup>18</sup> The reference to 'taking into account the circumstances of the case', which also appears in the 1976 and 2010 UNCITRAL Rules, has been interpreted to refer to the relative success or failure of each of the parties, the conduct of the parties during the arbitration, and the nature of the parties (such as whether an individual, corporation, or sovereign entity). However, in reality, this will be a very fact-specific determination and the tribunal can take into account whatever other 'circumstances of the case' it determines relevant. The fact that the 'apportionment' is to be 'reasonable' also permits the tribunal to consider whether the amount of costs claimed is reasonable and to adjust it accordingly. **31.08**

### C. Components of the costs of arbitration

As to what constitutes 'costs', Article 31 states that the 'costs *may* include' the items enumerated. Particularly given that the list of costs found in the UNCITRAL Rules provision is explicitly exhaustive,<sup>19</sup> it is reasonable to conclude that, in choosing different language, the AAA was seeking to give ICDR arbitrators full discretion in identifying applicable costs. Determining what are 'costs' for purposes of Article 31 is also important because it will impact the deposit on costs required under Article 33.<sup>20</sup> **31.09**

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<sup>16</sup> 1976 UNCITRAL Rules, Art 40(1) ('Except as provided in paragraph 2 [relating to legal fees], the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case'). This language remains in the revised Art 42 of the 2010 UNCITRAL Rules, except that the exclusion for legal fees has been removed.

<sup>17</sup> See LCIA Rules, Art 28.4 (unless otherwise agreed, the award of costs 'should reflect the parties' relative success and failure in the award or arbitration' unless the tribunal considers such approach inappropriate).

<sup>18</sup> See GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,498–2,500 (identifying the 'prevailing party' as one of the general factors affecting the award).

<sup>19</sup> Compare 1976 UNCITRAL Rules, Art 38 ('The term 'costs' includes only . . . '); 2010 UNCITRAL Rules, Art 40(2) (same). See also D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 932.

<sup>20</sup> See discussion of Art 33 in Chapter 33 below.

**31.10** Unsurprisingly, the Article 31 list includes: in paragraph (a), the fees and expenses of the arbitrators (which will have been determined in accordance with Article 32);<sup>21</sup> in paragraph (b), the costs of assistance required by the tribunal (such as tribunal-appointed experts);<sup>22</sup> and in paragraph (c), the ICDR administrative fees and expenses (determined according to the Schedule to the Rules).<sup>23</sup> While none of these costs are explicitly premised by the word ‘reasonable’, the language at the beginning of the Article and general arbitral practice demand that the tribunal consider whether the costs claimed are reasonable in the circumstances.

**31.11** Article 31(d) permits recovery of ‘the reasonable costs for legal representation of a successful party’. Whether and to what extent so-called ‘attorney fees’ should be recoverable as part of an award of costs in an arbitration is hotly debated.<sup>24</sup> The ICDR provision has certain textual limitations that bear mention.

- (1) On its face and consistent with the ‘prevailing party’ approach, only a *successful* party may seek an award of its legal costs. This presumably also applies where a party is successful as to certain aspects of its claims or defences, and therefore evidence may be required of how much of its total legal costs were spent on those arguments.
- (2) The tribunal’s duty to award ‘reasonable’ apportionment of costs is repeated in stating that it is only ‘reasonable costs’ that will be considered for an award. This implies some kind of quantitative and qualitative review that, in practice, is unlikely to happen in other than broad-brush terms.<sup>25</sup>
- (3) Curiously, the provision refers only to the costs for ‘legal representation’ and, arguably, does not include other third-party costs incurred by the parties, such as party-appointed expert witness fees and expenses. In contrast, the 1976 UNCITRAL provision refers to costs for ‘legal representation *and assistance*’ and also mentions ‘the travel and other expenses of witnesses’;<sup>26</sup> the LCIA Rules

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<sup>21</sup> Discussed in Chapter 32 below.

<sup>22</sup> Discussed in Chapter 22 above.

<sup>23</sup> Discussed at para 2.40 ff above. Note that the Schedule refers only to administrative fees, but that the ICDR will, on a case-by-case basis, also seek recovery of hearing room fees for ICDR/AAA facilities, certification fees, and other extraordinary expenses (interview with ICDR senior management, October 2010).

<sup>24</sup> See generally GB Born, *International Commercial Arbitration* (Kluwer Law International, The Hague, 2009) 2,488–502; P Turner and R Mohtashami, *A Guide to the ICDR Rules* (Oxford University Press, Oxford, 2009) paras 8-23–8-31. For a discussion of the position in the US in *domestic* arbitration, see J Nonna and C Santos, ‘The Power of Arbitrators to Grant Attorneys’ Fees and Interest’, 11(1) *Arias US Quarterly* 10 (2004).

<sup>25</sup> Note that the drafters of the UNCITRAL Rules had considered and rejected, as unduly interfering with the parties’ rights to choose their counsel, an additional limitation that the legal assistance for which recovery is sought was ‘necessary under the circumstances of the case’. See D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 931–32.

<sup>26</sup> See 1976 UNCITRAL Rules, Art 38(e) and (d), respectively. The 2010 Rules have adopted, in Art 40(2)(e), the phrase ‘legal and other costs’. See UNCITRAL, *Note by the Secretariat*, UN Doc No A/CN.9/W.G.II/WP.157/Add.2 (10 December 2009), para 18 (explaining change).

refer to ‘legal *or other costs* incurred by a party’.<sup>27</sup> However, this seems nonsensical, and given the non-exclusive nature of the list of costs in Article 31, the better interpretation is that non-legal costs associated with a party’s representation and prosecution of its case can be considered as part of a claim for costs under Article 31.<sup>28</sup>

As noted, the inclusion of paragraph (d) in Article 31 marks a break with the traditional ‘American Rule’ of each side bearing its own legal fees. It is interesting to note the narrower provision in the AAA Commercial Rules, section R-40(c), which states that attorney’s fees may be awarded if they are requested by all parties, or are authorized by applicable law, or are authorized by the arbitration agreement. Thus, for example, a US court upheld an award of attorney’s fees because both parties requested recovery of such fees as required by section R-40(c).<sup>29</sup> Another court upheld an award of attorney’s fees even though all parties did not request them, but on the grounds that the applicable law—California state law—authorized such an award of costs.<sup>30</sup> **31.12**

Paragraph (e) of Article 31’s list refers to costs ‘incurred in connection with any application for interim or emergency relief pursuant to Article 21’. Since Article 21(3) expressly mentions applications for interim relief to judicial authorities, this language needs to be read as encompassing not only costs associated with seeking interim relief from the tribunal, but also any such application to the courts.<sup>31</sup> **31.13**

Finally, it is worth noting that the non-exclusive nature of the list of costs and the wide discretion given on apportionment may give ICDR arbitrators latitude for including within the ‘costs of arbitration’ costs that are used as a ‘sanction’ for procedural misconduct or taking positions that caused unnecessary cost and delay.<sup>32</sup> However, as noted in a recent case concerning an award under the ICDR Rules, while the arbitrator may order ‘costs paid as a sanction for ‘dilatatory or bad faith conduct’, it could not order such costs against a non-party.<sup>33</sup> **31.14**

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<sup>27</sup> See LCIA Rules, Art 28.3.

<sup>28</sup> This is also in accordance with common arbitral practice. See G Petrochilos, *Procedural Law in International Arbitration* (Oxford University Press, Oxford, 2004) 222 (‘It is for the tribunal to apportion the costs of the proceedings, in a reasonable manner and taking account of all the legal and other costs’).

<sup>29</sup> See *RP Industries, Inc v S and M Equip Co, Inc*, 896 So2d 460, 467 (Ala 2004) (holding also that the parties had therefore waived the right to object to the power to award attorney fees).

<sup>30</sup> See *Taylor v Van-Catlin Const*, 130 Cal App 4th 1061, 1067 (Cal App 6 Dist 2005).

<sup>31</sup> See also ICDR Rules, Art 37(9) (costs associated with an application for emergency relief are to be initially apportioned by the emergency arbitrator or special master, but are subject to final determination by the tribunal). See discussion at para 37.24 below.

<sup>32</sup> See generally N Ulmer, ‘The Cost Conundrum’ 26(2) *Arb Intl* 221, 244–46 (and authorities cited therein); N DiGiovanni and T Duckett, ‘Sanctions and Punitive Damages in Arbitration’ 11(1) *Arias US Quarterly* 5, 6 (2004).

<sup>33</sup> See *Millmaker v Bruso and Sovereign Oil and Gas Co II, LLC*, Civ No H-07-3837, 2008 WL 4560624 (SD Texas, 9 October 2008) (vacating award as to that portion of the award of costs entered against the President and CEO of the defendant party), \*3–\*4.

## D. Logistics for making award of the costs of arbitration

**31.15** Article 31 does not address any of the practical logistics of how a party proves its claim for costs, whether costs should be part of the final award or made in a supplemental award, and how to handle disbursement of any amounts paid on deposit.<sup>34</sup> These matters are left to the arbitral tribunal. An ICDR award of costs will not be subject to the same level of institutional scrutiny as would be the case under the ICC Rules,<sup>35</sup> however it is reviewed by the case administrator. Article 31 must also be considered in the context of the immediately following Article 32 ('Compensation of Arbitrators') and Article 33 ('Deposit of Costs').

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<sup>34</sup> See generally E Gaillard and J Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) 1,253 ff; D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (Oxford University Press, Oxford, 2006) 954–56; JY Gotanda, 'Awarding Costs and Attorneys' Fees in International Commercial Arbitrations', 21 *Mich J Intl L* 1, 42 [1999].

<sup>35</sup> See paras 1.98 ff and 27.02 above (discussing the role of the ICDR administrator).