

nion as to the level of document production that should be allowed.

I particularly want to be sure that the arbitrator proactively manages the case⁸ and limits the taking of evidence to the relevant issues.

In Germany, we are used to such an approach in court proceedings. The judge actively manages the case and determines the relevant legal and factual issues right from the beginning. Only if a fact is disputed by the other party and in the opinion of the judge relevant to the outcome of the case, the judge should – by way of a court order (“Beweisbeschluss”) – decide to hear the evidence⁹.

I have observed a few cases in which arbitrators demanded a “settlement bonus” if the arbitration was not terminated by an award but instead by mutual agreement between the parties. As the arbitrators, in this case, are relieved from the task of producing an award, there is no justification for such a fee.

4. Self evaluation: Lessons learned

A very important step towards more efficiency is regular self evaluation that is followed by necessary adjustments. Parties should review tactical decisions made during the entire proceedings and obtain feedback.

III. Siemens’ major expectations from the “others”

1. Arbitrators:

Parties expect from arbitrators pro-active case management. Arbitrators should foster a front-loaded procedure by early fleshing out relevant issues and restricting the gathering of evidence and arguments to these issues.

2. Outside counsel

Parties expect from counsel effectively to promote their goals regarding time and cost and to contribute to a front-loaded procedure by addressing the relevant legal and factual issues already in the early stages of the proceeding.

3. Institutions

Arbitral institutions should train and certify arbitrators in relation to case management skills. Furthermore, arbitral institutions should promote front-loaded and fast-track proceedings¹⁰ in their arbitration rules.

8) See also *Hobeck/Mahnken/Koebke*, Time for Woolf Reforms in International Construction Arbitration?, *International Arbitration Law Review* 2008, p. 92 and ICC Publication 843: Techniques for Controlling Time and Costs in Arbitration, 2007 available at http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf, para 32 f.

9) So called “Relationsmethode”. See *Gerstenmeier*, “German Advantage” – Myth or Model?, *SchiedsVZ* 2010, p. 21 and *Semler*, Schnelligkeit und Wirtschaftlichkeit in Schiedsverfahren, *SchiedsVZ* 2009, 149.

10) A growing number of arbitration rules provide for fast track or expedited proceedings. See i. a. DIS Supplementary Rules for Expedited Proceedings (2008), Expedited Rules of the Stockholm Chamber of Commerce (2010), Art. 42 Swiss Rules of International Arbitration (2006), Rule 5 of the Arbitration Rules of the Singapore International Arbitration Centre (2010).

By Ulrike Gantenberg, Düsseldorf*

Methods of Reducing Costs in International Commercial Arbitration¹

Vor dem Hintergrund der in den letzten Jahren stetig gestiegenen Kosten internationaler Schiedsgerichtsverfahren versucht dieser Artikel die Möglichkeiten und Schwierigkeiten aufzuzeigen, die sich bei dem Versuch, die Kosten internationaler, wirtschaftlicher Schiedsgerichtsverfahren zu senken, ergeben. Besonderes Augenmerk wird dabei auf die Rolle und die Verantwortung der einzelnen Teilnehmer des Schiedsgerichtsverfahrens hinsichtlich der Kostensenkung gelegt. Dazu versucht die Autorin zunächst, die Hauptursache der Kosten zu konkretisieren. In einem nächsten Schritt untersucht sie die Möglichkeiten der Parteien, ihrer Anwälte und der Schiedsrichter auf eine Reduzierung der Kosten hinzuwirken. In diesem Zusammenhang hebt sie besonders die Rolle der Schiedsrichter als vorausschauend agierende Leiter hervor. Schließlich legt sie die Möglichkeit dar, die Kostentragung der jeweiligen Partei von der Verursachung von Verzögerungen und höherer Kosten abhängig zu machen.

As the average costs of international arbitration proceedings have continuously increased in recent years, this article aims to provide a summary of the opportunities and difficulties when attempting to reduce costs in international commercial arbitration. It mainly focuses on the role and responsibilities of the individual participants regarding the reduction of costs. To begin with, the author analyses the actual source of the costs in arbitration proceedings. Subsequently, she examines the role of the parties, their counsel and the arbitrators regarding the reduction of party costs and arbitrators’ fees. In this context she points out the importance of the arbitrators, which have to act as pro-active case managers. Finally, she describes the possibility of allocating the costs dependent on delays or higher costs caused by the parties.

I. Introduction

The advantages of arbitration proceedings over state court proceedings to resolve commercial disputes are a much discussed topic in the international legal and commercial world. One of the arguments most commonly made is that arbitration proceedings are more time and cost efficient. In recent years, this argument has lost its strength as the average costs of international arbitration proceedings have continuously increased.

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1) This article reflects a speech held at the occasion of the 11th IFCAL Biennial International Conference on Costs in Arbitration, in Berlin, Germany, on 18 May 2011. Thanks to Lotte Reddemann, Solicitor at Heuking Kühn Lüer Wojtek, for assisting me to turn my three handwritten notes into this article.

The arbitration community is aware of this issue and measures to reduce costs and increase the efficiency of arbitration proceedings have recently been high up on the agenda. In the past year, numerous practitioners and scholars for example discussed best practice examples from different jurisdictions at various forums organised by national and international arbitration institutions and organisations².

The rising awareness of the increasing costs and efficiency issues has also led to the publishing of a great number of articles, studies, blog entries and guidance notes on the matter. The *Report on Techniques for Controlling Time and Costs in Arbitration* by the ICC Commission on Arbitration for example provides a step by step guide for all parties involved and makes recommendations regarding each actor's role in reducing costs³.

There is general agreement among the arbitration community that the parties, their counsel and the arbitrators involved share the responsibility for costs. Conducting time and cost efficient arbitration proceedings is hence a matter of "teamwork". Such "teamwork" however comes to an end if, for tactical reasons, one of the parties is particularly interested in complex (long and expensive) proceedings.

This article aims to provide a summary of the opportunities and difficulties when attempting to reduce costs in international commercial arbitration. The following observations do not aim to provide a full and complete overview of the topic as particular emphasize is put on the role and responsibilities of the individual participants to an arbitration in reducing costs.

II. What Does it Cost?

The suitability and effectiveness of measures to reduce the costs of arbitration will depend on the actual source of the costs. In arbitration proceedings, a single source of costs is however difficult to identify due to the varying composition and allocation of costs depending on the nature of the dispute and the form of arbitration.

Despite the notable difference between different countries and their legal systems in hourly rates for legal services, costs for travelling and accommodation and institutional fees, it would be short-sighted to limit the question of costs to the choice of the seat of arbitration. Depending on the attitude of the parties involved and the nature of the dispute, costs may be higher or lower irrespective of the seat of arbitration.

Similarly, one cannot draw any conclusions as to the costs of arbitration from the mere length of an arbitration. While the CI Arb Costs of International Arbitrations Survey⁴ found that the average arbitration takes about twelve to seventeen months it is still arguable whether time is indeed money. In this context, it is expected that the fast track proceedings or expedited procedures now available at most arbitration institutions may reduce costs as the parties have to focus on key issues only, due to the limited time available. Also, if the arbitration does not drag on indefinitely but proceeds in a time efficient manner, counsel and the

tribunal will not have to "double" work to refresh their memories. Nevertheless, limited time available for submissions may require more manpower to compensate for the lack of time, which in turn may not save any costs in the end.

At the same time, spending more time on conducting an arbitration may at times also be turned into "real" money. If parties for example drag on proceedings in an attempt to delay payment obligations they may face, the timing and cost aspect gets challenging.

The mere fact that arbitration proceedings can, for whatever reason, be a costly exercise remains undisputed. In an attempt to discuss the opportunities and difficulties in the process of reducing the costs of arbitration, it appears to be useful to look at the actual allocation of costs in arbitration proceedings. The ICC Commission on Arbitration for example reported that 82% of the total costs of an ICC arbitration are the party costs for their counsel, witnesses or experts. At the same time, only 16% of the overall costs relate to the arbitrators' fees and 2% to the administrative costs⁵.

The relatively small proportion of administrative costs suggests that reverting to ad hoc arbitration is unlikely to save the parties any costs. In particular, as the tribunal will have to deal with the administrative tasks which are usually dealt with by the institution. Often, the tribunal appoints a secretary to deal with such administrative work which will again increase the costs⁶. Regarding the reduction of costs the focus must hence be on the different players in an arbitration.

III. Who is Responsible?

As the parties, their counsel and the arbitrators are all responsible for the conduct of an arbitration, their role regarding the reduction of party costs and arbitrators' fees needs to be considered.

1. Parties

The issue of costs is one of the first things on the parties' mind when faced with a dispute. In this context, a study of the Corporate Counsel International Arbitration Group found that in-house counsel consider arbitration proceedings to be too lengthy and costly⁷. Parties must therefore be made aware at the earliest opportunity that cost-efficient arbitration proceedings can only be conducted with their help and

2) 11th IFCAL Biennial International Conference "Costs in Arbitration", 16. to 18. May 2011; APRAG Conference 2011: International Arbitration in a Challenging Region, 9. to 10. July 2011; CI Arb International Conference: Costs in International Arbitration, 27. to 28. September 2011; Kiev Arbitration Days 2011, 17. to 18. November 2011, etc.

3) ICC Publication 843 – Report on Techniques for Controlling Time and Costs in Arbitration.

4) CI Arb Costs of International Arbitrations Survey, 2011, p. 12.

5) ICC Publication 843 – Report on Techniques for Controlling Time and Costs in Arbitration, Introduction; *Bühler/Webster*, Handbook of ICC Arbitration^{2nd} ed., para. 31-5; The recent CI Arb Costs of International Arbitration Survey also confirmed that 74% of party costs were spent on external legal costs (p.2).

6) *Redfern/Hunter*, *Redfern and Hunter on International Arbitration*, § 1.100.

7) *Reed*, More on Corporate Criticism of International Arbitration, *Kluwer Arbitration Blog*, Entry of 16 July 2010, available at <http://kluwerarbitrationblog.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/>

will largely depend on their own agenda. It is even more important that parties realise that instructing their counsel to take all available procedural tools (of which there are plenty in arbitration), while at the same time complaining about rising costs will lead nowhere. If parties want to save costs, they must ensure that they are an available and active sparring partner for their counsel, provide all information required for the preparation of the case and, at times, be prepared to take a few risks.

a) Pre-Contractual Considerations

The parties' awareness of costs must start as early as the drafting phase of their contracts. Not every contract is a suitable subject matter for arbitration. State court proceedings may turn out to be a cheaper alternative if the dispute is of smaller value or more likely to be settled⁸.

Another question parties need to ask themselves is whether they could live with the result of arbitration proceeding⁹. If each party thoroughly considers the inclusion of an arbitration clause, they should face fewer surprises. This also concerns the choice of the place of arbitration and its impact on factors increasing costs such as travel and accommodation costs or procedural surprises¹⁰.

Finally, if and when parties decide to include an arbitration clause into the contract, they are well-advised to choose the standard arbitration clauses made available by institutions. An arbitration is likely to cost substantially more if the parties involved must already spend time and effort on preliminary issues caused by a pathological arbitration clause which was "home-made" by the parties.

b) Procedural Considerations

If a dispute is to be decided by arbitration, parties usually instruct external counsel. The choice of external counsel depends on a variety of factors such as the background, type, volume and complexity of the dispute but also the language and applicable law. Spending money on experienced counsel is usually good money spent. In practice, proceedings with inexperienced parties (counsel) are often substantially longer, more complicated and expensive. Inexperienced parties (counsel) are less aware of the particularities of arbitration proceedings and the applicable procedural rules. This often leads to misunderstandings and delays.

The choice of an arbitrator is another factor that depends on the parties (counsel) and may have an impact on costs. It is crucial for any party (and their counsel) to properly assess the dispute and find a perfectly matching arbitrator to the dispute, with regard to his availability, pragmatism, experience, languages etc. The chosen arbitrator should then be able to find an even better colleague as chair of the tribunal.

Not only in high profile arbitrations and complex disputes, parties (counsel) mostly want to appoint well known arbitrators with great experience. One should however not forget that often the most wanted names may have little free time available and proceedings may drag on for excessive lengths of time. There are surely sufficient cases where it is more time and cost

efficient not to choose the overbooked "Gorilla", but a young "Chimpanzee" that can more easily give the case his or her full attention¹¹.

2. Counsel

The procedural tools often used in international (multi-lingual) arbitration proceedings such as the submission of written witness statements, document production, verbatim transcripts and (simultaneous) translations can have a significant impact on the length and costs of arbitration. The choice of the "adequate" procedural tools is a job easier said than done as counsel has to satisfy its client's desire to make any argument possible while at the same time dealing with the issues put forward by the other side and simultaneously getting the tribunal on its side, and all this while possibly saving costs. In this context, the combination of a sound knowledge of the law and the facts of the dispute with experience in arbitration helps counsel to defend its case while being aware of the costs at the same time.

Counsel will have to decide which one (or more) of the almost endless variety of procedural tools available it will apply. It is a matter of strategy and, above all, of costs, how counsel runs the proceedings. A fully-fledged request for arbitration and a corresponding substantial answer will help to inform the tribunal about the relevant issues of the dispute right from the start of the proceedings. This allows the arbitrators to tailor the proceedings accordingly and strictly limit them to the relevant aspects at the beginning of the arbitration. However, as long as the institutional rules do not set out such obligations for the parties' to submit sufficiently detailed requests and answers, it is left to the discretion of the parties and their counsel how and when which information shall be introduced into the proceedings.

A clarification of the minimum requirements for submissions, an explanation and interpretation of deadlines etc. in the (institutional) rules, may for example assist the tribunal to "lead" the proceedings and the parties' to understand their obligations from the beginning.

Counsel may sometimes be overwhelmed by their task to choose and apply the appropriate procedural tools or even deliberately fail it for tactical reasons. After all, it will depend on the parties' agenda whether costly proceedings are desirable or not. At times the prospect of settling a dispute may for example justify further costs and/ or delay of the proceedings. In these circumstances, it is for the parties and their counsel to weigh any tactical measures against the potentially higher costs that may be incurred.

8) *Bühler/Webster*, Handbook of ICC Arbitration^{2nd} ed. para. 31-1; *Kessler/Berger*, *Recht und Praxis des Schiedsverfahrens*, p. 26; *Redfern/Hunter*, *Redfern and Hunter on International Arbitration*, § 1.101.

9) *Orcoran/Landry*, *Considering Arbitration's Costs and Dangers*, Entry of 24 August 2007, available at <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1187558904359>

10) *Karrer*, *Naives Sparen birgt Gefahren – Kostenfragen aus Sicht der Parteien und des Schiedsgerichts – SchiedsVZ 2006*, 113, 114.

11) *Uhmer*, *Some Cost Consensus?* *Kluwer Arbitration Blog*, Entry of 04 May 2011, available at <http://kluwerarbitrationblog.com/blog/2011/05/04/some-cost-consensus/>.

While it is counsel's right to exhaust all procedural tools available on behalf of its client, it is a slippery slope for the arbitrators to differentiate between the parties' fundamental right to be heard and a potential abuse of process. If counsel for example continuously files unreasonable requests in an attempt to delay the proceeding for mere tactical reasons or requests the interrogation of irrelevant witnesses, it requires a courageous tribunal to ensure that the proceedings continue in ordinary pace.

3. Arbitral Tribunal

While counsel and their party have to carefully weigh any tactical decisions against potential additional costs, the role of the arbitrators as pro-active case managers is also crucial for the efficiency of the proceedings and the reduction of costs of the arbitration.

There is no "golden rule" for a tribunal on how to pro-actively manage the proceedings as it will largely depend on the parties' individual agenda and the issues in dispute. Obviously, the tribunal will have to work with the parties, not against them. Even more so as the parties' autonomy to set the tone and the speed and cost of the arbitration proceedings, generally takes priority. However is there not an obligation for the tribunal to ensure and protect parties and counsel from spending time and money on irrelevant issues?! Can a tribunal prevent counsel from what they want to do for the sake of the proceedings, or is any tribunal doing so already biased?! Whatever the limits are for the tribunal to actively intervene in the proceedings, it is of fundamental importance that the tribunal closely monitors the proceedings. Only a tribunal that reads the submissions shortly after receiving them is effectively in a position to give indications as to the continuance of the proceedings which can save the parties and their counsel costs for "straying around" and effectively save them time and money.

A number of rules and techniques that may assist the arbitrators in their attempt to increase the cost efficiency of proceedings have been developed over time¹². For example, Article 19.3 LCIA Rules allows the tribunal to submit to the parties a list of questions which it wishes them to answer in advance of any hearing. Article 22.1(c) LCIA Rules further grants the tribunal the power to identify issues and ascertain all relevant facts and applicable laws. Similarly, Article 16.3 AAA Rules allows the tribunal to direct the parties' focus to certain issues. The role of the institution and its proceduralists should hence not be underestimated.

On the basis of these provisions and in order to keep the parties' and their counsel on track, a tribunal could for example clarify the key issues in dispute at an early stage of the proceedings. This may help the parties to focus their submissions on the relevant facts and evidence. The tribunal then has the option to interfere immediately if the parties make irrelevant requests or attempt to introduce unsubstantiated facts. In practice, any interference requires to be well thought through as the parties' right to be heard must always be respected. The arbitrators are therefore

well advised to carefully examine any request of the parties on its own merits¹³.

In any event, even the most active and well organised tribunal is no guarantee for "cheap" proceedings. In addition to being active, the tribunal should take matters in their hands and truly "lead" the proceedings. Without doubt, it requires courage and a healthy degree of assertiveness for the tribunal to exercise its role as a case manager when faced with misbehaving and/or disrespectful parties.

In the end, what is the benefit for a tribunal that is always up-to-date, stays on top of the matter as it proceeds and is actively involved in managing the proceedings effectively? After all it involves lots of hard work, requires great time-management and sometimes even the acceptance of insults from parties and counsel who follow a different time and cost-agenda (for whatever reason). Regarding the remuneration of arbitrators there should hence be some incentive (premium) for arbitrators that actively encourage and enable cost efficient proceedings – if such incentive is properly applied and calculated this will allow the proceedings to be concluded within a reasonable time and will, in the end, save the parties costs!

IV. The Winner Takes it All?

It is not unusual for the tribunal to take into account the success of a party's claim when allocating the costs of the proceedings¹⁴. This does not necessarily mean that the party causing delays and higher costs (for whatever tactical or other reason) goes unpunished as the tribunal may always decide to allocate the costs of the arbitration differently.

As discouragement of any delays and irresponsible increase of costs from the outset, the tribunal may for example inform the parties at the beginning of a proceeding, that failure to comply with agreed procedures or any truly unreasonable conduct may result in the allocation of the relevant increase in costs to the responsible party¹⁵. This way, the autonomy of the parties is preserved, as they may still decide to take certain cost increasing steps as a matter of tactic, but they will have to bear the increase of costs.

This approach may also help to avoid any "guerrilla tactics" which involve the exploitation of the document production process by requesting overly broad document production, making documents disappear or finding fault with a party's attempt to meet a document production request¹⁶.

12) *cf. Ulmer*, *The Cost Conundrum*, *Arbitration International*, Vol. 26 Nr. 2, p. 233 et seq.

13) *Supreme Court of Austria*, 30 June 2010, 7 Ob 111/10i; a different approach was taken in *Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAFFA)*, 508 F.2d 969 (2nd Circuit 1974), para. 17.

14) See for example § 35 DIS-SchO, Article 37 ICC Rules 2012 (Article 31 ICC Rules 1998) and Article 40 Swiss Arbitration Rules

15) see § 35 (2) DIS-Rules and Article 37 (5) ICC Rules 2012; also *cf. ICC Cases 8486 and 11670; Böckstiegel/Kröll/Nacimiento*, *Arbitration in Germany*, p. 780; *cf. Bühler/Webster*, *Handbook of ICC Arbitration*, para 31-92

16) *Pinkston*, *The Case for a Continental European Arbitral Institution to Limit Document Production*, In: *Austrian Yearbook on International Arbitration 2011*, p.87 (*Klaussegger, Klein, Kremlechner, Peitsche, Pitkowitz, Power, Welser & Zeiler* eds., 2011); Example of guerrilla-arbitration: ICC Case 13209/DK/RCH.

In order to avoid that unreasonable requests disadvantage one of the parties, the tribunal may also opt for an Instant Cost Order for the costs of a specific procedure or application such as interim measures applications and production of document requests¹⁷. The ICC Rules allow the tribunal to make such decisions at any time during the proceedings¹⁸. If the applicable institutional rules do not provide for such discretion, it should be agreed for example in the terms of reference at the beginning of the proceedings.

V. Conclusion

Reducing the cost of arbitration is a team effort and can only be achieved by the joint effort of all parties involved in an arbitration proceeding. However, there is no “golden rule” and the costs of each case will depend on the underlying dispute, the applicable laws and procedures and the agenda of the parties involved.

It is unlikely that a change of the allocation of costs will reduce the overall costs of the proceedings. Instead, the reduction of the individual slices of the “cost-cake” must be a priority – in particular the slice of the party costs.

As a starting point, the ICC Report on Techniques for Controlling Time and Costs in arbitration for example provides a helpful overview of available cost-saving measures at all levels of an arbitration. In reality however, any requests and submissions made may have a tactical purpose and it is for the parties and their counsel to consider the costs and benefits of such measures.

Notwithstanding the above, the role of the arbitrators as pro-active case managers is of particular importance. The arbitrators can shape and influence the direction of the arbitration proceedings from the start without sacrificing the parties’ autonomy. Institutions could assist the tribunal by clarifying the minimum requirements for submissions, the interpretation of procedural deadlines and further procedural issues in their rules. This way, responsible arbitrators who are “on top” of their case and truly “lead” the proceedings may succeed in increasing the parties’ and their counsels’ awareness of their responsibilities regarding the cost and time efficiency of the proceedings.

Even when faced with delaying tactics or other cost increasing requests by the parties and their counsel, a tribunal which is not afraid to truly “lead” the proceedings will be able to take appropriate cost control measures that ensure that the arbitration proceeds as cost efficiently as possible.

In reality however, the unsuccessful party will – irrespective of the cost cutting achieved – complain about the high costs of the proceedings – „außer Spesen nichts gewesen“.

17) Bassiri, *The Instant Cost Order*, Kluwer Arbitration Blog, Entry of 19 October 2010, available at <http://kluwerarbitrationblog.com/blog/2010/10/19/the-instant-cost-order/>.

18) *rt.* 31(2) ICC- Rules reads: “[...] Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings.”