

# “THE WINNER TAKES IT ALL”: COST ALLOCATION

ASA BELOW 40 SEMINAR - 9 NOVEMBER 2018

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**The art of claiming  
costs: practical tips  
for counsel**

Zelda Hunter  
White & Case, Geneva

**Inside the  
arbitrator’s mind:  
what costs are  
awarded and how  
are they allocated?**

Emily Hay  
Hanotiau & van den  
Berg, Brussels

# Structure of Presentation

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- **What law & rules apply to costs?**
- **What are “costs”?**
- **When are costs to be determined?**
  
- **Practical tips for counsel when claiming costs**
- **How does the tribunal exercise its discretion?**

# What law & rules apply to costs?

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- **National arbitration law of the seat**
- **Applicable arbitration or institutional rules**
- **Parties' agreement**

# How do the arbitration rules compare re defining costs?

ICC Rules 2017	LCIA Rules 2014	Swiss Rules 2012
<p><b>Article 38</b></p> <p>1. The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scales in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and <b>the reasonable legal and other costs</b> incurred by the parties for the arbitration.</p>	<p><b>Article 28</b></p> <p>3. The Arbitral Tribunal shall also have the power to decide by an award that all or part of the legal or other expenses incurred by a party (the “Legal Costs”) be paid by another party. The Arbitral Tribunal shall decide <b>the amount of such Legal Costs on such reasonable basis as it thinks appropriate</b>. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority</p>	<p><b>Article 38</b></p> <p>The award shall contain a determination of the costs of the arbitration. The term “costs” includes only:</p> <p>(...)</p> <p>(e) The costs for legal representation and assistance, <b>if such costs were claimed during the arbitral proceedings</b>, and only to the extent that the arbitral tribunal determines that <b>the amount of such costs is reasonable</b>;</p>

# How do the arbitration rules compare re allocation?

ICC Rules 2017	LCIA Rules 2014	Swiss Rules 2012
<p><b>Article 38</b></p> <p>5. In making decisions as to costs, the <b>arbitral tribunal may take into account such circumstances as it considers relevant</b>, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.</p>	<p><b>Article 28</b></p> <p>4. The Arbitral Tribunal shall make its decisions ... <b>on the general principle that costs should reflect the parties' relative success and failure</b> in the award or arbitration or under different issues, except where it appears to the Arbitral Tribunal that in the circumstances the application of such a general principle would be inappropriate ... The Arbitral Tribunal may also take into account the parties' conduct in the arbitration ...</p>	<p><b>Article 40</b></p> <p>1. ... the costs of the arbitration shall in principle be <b>borne by the unsuccessful party</b>. However, the arbitral tribunal may apportion any of the costs of the arbitration among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.</p>

# What law & rules apply to costs?

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- **Broad discretion**

# What are “costs”?

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- **Arbitration costs**
  - Institutional fees and expenses
  - Arbitrator fees and expenses
  - Tribunal Secretary fees and expenses

# What are “costs”?

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- **Legal and other costs**
  - Counsel fees and expenses
  - Hearing costs: venue, court reporting, interpreters
  - Witness fees and expenses, including travel and accommodation

# What are “costs”?

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- **Controversial types of legal and other costs**
  - In-house legal or internal management costs?
  - Success fees?
  - Third party funding costs?
  - Interest on costs?
  - Lost interest on substitute deposits made?
  - Costs incurred before the arbitration (e.g., ADR or settlement negotiations)?

# When are costs to be determined?

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- **Interim allocation via decision or order**
- **Final award together with liability**
- **Separate final award re costs**

# Claiming costs: practical tips

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## The art of claiming costs

# Claiming costs: practical tips

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- **Before drafting any costs submissions**
  - Claim costs & interest in the prayer for relief throughout the proceedings
  - Consider flagging costs consequences during the proceedings
  - Consider timing of costs submissions at an early stage
    - ✦ Second bite of the cherry?
  - Consider using sealed offer process

# Claiming costs: practical tips

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- **Before drafting any costs submissions (cont.)**
  - Consider assessing costs on an issue by issue or phase by phase basis at an early stage
    - ✦ Think about how to capture costs
  - Tell client to record time at the outset
  - Check tax position (e.g., VAT)
  - Collect client and witness costs early and often

# Claiming costs: practical tips

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- **Drafting costs submissions**
  - Pay attention to tribunal's instructions or indications
  - Level of detail?
  - If costs submissions precede the substantive award, provide for different scenarios?
  - Claimant should flag its higher cost burden
  - Be mindful of privileged information

# Awarding costs

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**How does the tribunal exercise its discretion?**

# Awarding costs: what costs?

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- **Reasonableness**
  - Proportionality with the amount in dispute
  - Comparison with other side's costs
  - “Reasonably incurred”: complexity, necessity, proportionality
  - Substantiation that costs are incurred
  - Connection to arbitration

# Awarding costs: how are they allocated?

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- **Costs follow the event/relative success or failure**
  - Recover all costs if successful in core claim?
  - Determine on a claim-by claim basis?
  - For each procedural application won or lost?
  - By proportion of damages awarded vs. amount sought?

# Awarding costs: how are they allocated?

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- **Party or counsel conduct**
  - Improper procedural conduct
  - Refusal to pay share of deposit
  - False evidence or submissions
  - Aggression, lack of professional courtesy

Thank you!

[zhunter@whitecase.com](mailto:zhunter@whitecase.com)

[emily.hay@hvdb.com](mailto:emily.hay@hvdb.com)