August, 1999

Awarding Costs and Attorneys' Fees in International Commercial Arbitrations

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INTRODUCTION

Parties in international commercial arbitrations sometimes receive rude surprises when it comes to claims for costs and attorneys' fees. In some cases arbitral tribunals award the successful party a significant amount, while in other cases tribunals award little or nothing. For example, in *Southern Pacific Properties Ltd. v. Egypt*, an International Centre for Settlement of Investment Disputes (ICSID) panel awarded the prevailing party $27.7 million in damages and $5 million for costs and attorneys' fees.[1] By contrast, in *Agip v. Congo*, an ICSID panel ordered

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1. *See* Southern Pac. Properties Ltd. v. Egypt, Award of May 20, 1992 (ICSID), *reprinted in* 19 Y.B. COM. ARB. 51, 82–83 (1994); *see also* Maritime Int'l Nominees Establishment v. Republic of Guinea, Final Award of Jan. 6, 1988 (ICSID), *reprinted in* 14

the losing party to pay FF 22.8 million in damages, fees, and expenses, but awarded the prevailing party no attorneys' fees.[2] And in *Vacuum Salt Products Ltd. v. Republic of Ghana*, an ICSID panel ruled that, although respondent prevailed on its claim that the tribunal lacked jurisdiction, each party had to bear its expenses and attorneys' fees, as well as an equal share of the fees and expenses of the tribunal.[3] Thus, even though these arbitrations were conducted under the auspices of the same institution, the panel in *Southern Pacific Properties Ltd.* awarded the prevailing party $5 million in costs and attorneys' fees, while the panels in *Agip* and *Vacuum Salt Products Ltd.* awarded the prevailing parties minimal costs and fees or none at all. These cases are not isolated incidents; awards of costs and fees in international commercial arbitration are often arbitrary and inconsistent.[4]

Today, arbitration is the method of choice for resolving disputes between transnational contracting parties.[5] But while its popularity has increased, so too has the cost of this method of resolving disputes.[6] It is not uncommon for such costs to run into the millions of dollars, some-

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Y.B. COM. ARB. 82, 90 (1989) (awarding claimant $275,000 for fees and expenses incurred in the arbitration).

2. *See* Agip v. Congo, 1 ICSID 306, 329 (1979).

3. *See* Vacuum Salt Prods. Ltd. v. Republic of Ghana, Award of Feb. 1, 1994 (ICSID), *reprinted in* 20 Y.B. COM. ARB. 11, 33 (1995); *see also* Final Award No. 7661 of 1995 (ICC), *reprinted in* 22 Y.B. COM. ARB. 149, 163 (1997) (declining to award the prevailing party legal costs and ordering the parties to bear equally the costs of the arbitration).

4. *See infra* text accompanying notes 92–120.

5. *See* L. Yves Fortier, *International Arbitration on the Eve of the Millennium*, 1 INT'L ARB. L. REV. 1, 1–2 (1997); Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, 49 DISP. RESOL. J. 12, 12 (June 1994); Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 868 (1996). One of the main reasons that arbitration is the preferred method for resolving international commercial disputes is that "it provides a neutral forum where neither party will submit to the jurisdiction of the courts of the country of the other party." John Kendall, *The Role of the Expert/Adjudicator in Support of Arbitration in International Long-Term Contracts*, 27 INT'L BUS. LAW. 201, 202 (1999). *See generally* TIBOR VÁRADY ET AL., INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 23–27 (1998); Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. ST. B.J. 22 (Mar./Apr. 1998); Richard H. Kreindler, *Arbitration or Litigation: ADR Issues in Transnational Disputes*, 52 DISP. RESOL. J. 79 (Fall 1997).

6. *See* ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 248 (2d ed. 1991) (stating that "the cost of bringing or defending a claim before an international arbitral tribunal is likely to be considerably higher than that of bringing or defending the same claim before a court"); *see also* Andrew I. Okekeifere, *Commercial Arbitration as the Most Effective Dispute Resolution Method*, 15 J. INT'L ARB. 81, 86–88 (1998) (noting that arbitration can be expensive because, unlike in court litigation, the parties pay the fees of the arbitrators in addition to the fees of their professional lawyers).

times even exceeding the amount in dispute.[7] As a result, parties now recognize that an important part of the case is allocating the costs of the proceeding itself and the costs incurred in presenting the case such as attorneys' fees.[8] Despite the significance of a claim for costs and fees, international tribunals have no uniform approach for awarding them.

When arbitral tribunals consider a claim for costs and fees, they generally consider three issues: (1) whether they have the authority to award these costs and fees; (2) if so, how should they allocate them between the parties; and (3) how much should they award. If the agreement contains a provision addressing these questions, the tribunal will abide by the terms of the agreement.[9] In many instances, however, the agreement does not address these issues or is ambiguous on how they are to be decided. In these situations, tribunals have resolved claims for costs and fees by applying the applicable substantive or procedural

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7. *See* La Pine Tech. Corp. v. Kyocera Corp. (ICC Aug. 25, 1994), *summarized in relevant part in* 10 MEALEY'S INT'L ARB. REP. 5, at 7 (May 1995) (awarding $14.5 million in arbitration costs and attorneys' fees); Southern Pac. Properties Ltd. v. Egypt, Award of May 20, 1992 (ICSID), *reprinted in* 19 Y.B. COM. ARB. 51, 82–83 (1994) (awarding $5 million in legal, audit, and arbitration costs); Compagnie des Bauxites de Guinee v. Hammermills, Inc., No. 90-0169, 1992 U.S. Dist. Lexis 8046 (D.C. Cir. May 29, 1992) (confirming an award that included $1.3 million in arbitration costs and attorneys' fees); Employers Ins. Wausau v. Banco Seguros del Estado, 34 F. Supp. 2d 1115 (E.D. Wis. 1999) (confirming arbitral award that included $930,730 in attorneys' fees and costs); Final Award No. 4975 (ICC 1998), *reprinted in* 14 Y.B. COM. ARB. 122, 136–37 (1989) (ordering claimants to pay respondents UK £500,000 for legal costs); *see also* Euroleader Shipping & Trading Corp. v. Stellar Lines, S.A., SMA Award No. 3528 (May 7, 1999) (LEXIS, Admrty Library, Usawds File) (awarding charterer, *inter alia*, approximately $99,000 for overpaid hire and $329,000 for the fees and costs of the arbitrators, witnesses and attorneys that it incurred in connection with the arbitration); August Trading Ltd. v. The Fund for Democracy & Development, SMA Award No. 3471 (Aug. 17, 1998) (LEXIS, Admrty Library, Usawds File) (awarding charterer, *inter alia*, approximately $12,000 in damages and $205,000 in costs and attorneys' fees). Costs and fees awarded in some domestic arbitrations also have been significant from a monetary standpoint. *See Arbitrators Award Lawyers for Texas, Mississippi, Florida $8.1 Billion in Fees*, 12 MEALEY'S LIT. REP.: TOBACCO 1 (Dec. 17, 1998) (stating that a "Tobacco Fee Arbitration Panel awarded private attorneys for Florida, Mississippi and Texas more than $8.1 billion").

8. *See* Eric A. Schwartz, *The ICC Arbitral Process, Part IV: The Costs of ICC Arbitration*, 4 BULL. ICC INT'L CT. ARB. 8, 8–23 (1993) ("When an international commercial dispute arises, the cost of resolving it may be as important to the parties as the merits of the claims themselves."); Francis Gurry, *Fees & Costs*, 6 WORLD ARB. & MEDIATION REP. 227, 233 (1995) (stating that "the allocation of the costs of the arbitration and of the costs incurred by the parties in respect of the arbitration are very significant matters and important elements in evaluating the overall price of the arbitration process").

9. *See, e.g.*, Final Award of Nov. 17, 1994 (Ad Hoc), *reprinted in* 21 Y.B. COM. ARB. 13, 38 (1996); Final Award No. 6320 (ICC 1992), *reprinted in* 20 Y.B. COM. ARB. 62, 108–09 (1995); Final Award Nos. 7385 & 7402 (ICC 1992), *reprinted in* 18 Y.B. COM. ARB. 68, 78–79 (1993); Final Award No. 3572 (ICC 1992), *reprinted in* 14 Y.B. COM. ARB. 111, 121 (1989).

law,[10] the arbitral rules governing the dispute,[11] or principles of fairness and reasonableness.[12]

The lack of a uniform method for resolving claims for costs and fees has resulted in similarly situated parties receiving vastly different awards. This leads to unpredictability, making a case more difficult to settle, and ultimately undermines the legitimacy of the arbitral process.

This Article examines the practice of awarding costs and fees in international commercial arbitrations. Part I reviews the history of awarding costs and fees and the approaches that countries have adopted to resolve these claims. It concludes that an overwhelming number of countries permit such awards and follow the principle that the losing party should reimburse the prevailing party for expenses incurred in connection with the arbitration, including attorneys' fees. Part II examines the approaches used by international arbitral tribunals in resolving claims for costs and fees and finds that they are inadequate. Part III proposes a new model for resolving these claims. The model provides that, in evaluating claims for costs and fees, arbitrators should first look to the parties' agreement. If the parties have agreed on rules regarding the costs of the arbitration, either directly or by reference to arbitral rules, the arbitrators should resolve the claim in accord with the agreement. However, if the agreement fails to address the issue or is ambiguous on how to resolve these claims, then the model gives the tribunal the power to award costs and fees and sets forth the rules to follow. With respect to the latter, the model states that costs and fees should be awarded on the general principle that they should be borne by the unsuccessful party. It also defines which costs and fees may be awarded. This model provides

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10. *See* Triumph Tankers Ltd. v. Kerr McGee Refining Corp., Final Award No. 2642 (SMA Mar. 28, 1990), *reprinted in* 18 Y.B. COM. ARB. 112, 120 (1993); Final Award No. 6962 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 184, 193 (1994); Final Award 6962 (ICC 1992), *reprinted in* COLLECTION OF ICC ARBITRAL AWARDS 1991–95 299, 308 (1997); Final Award No. 6248 (ICC 1990), *reprinted in* 19 Y.B. COM. ARB. 124, 139–40 (1994); Final Award No. 5946 (ICC 1990), *reprinted in* 16 Y.B. COM. ARB. 97, 118 (1991). A tribunal also may award costs and fees based on general principles of law, *see* Award No. 9246 (Paris Chamber of Arb. Mar. 8, 1996), *reprinted in* 22 Y.B. COM. ARB. 28, 34 (1997) (choosing *lex mercatoria* as the applicable law and awarding claimant FF 50,000 for costs and fees), but this option appears to have been used less frequently.

11. *See* Awards of Aug. 18, 1994 & Nov. 8, 1994 (Ad Hoc), *reprinted in* 21 Y.B. COM. ARB. 40, 45–6 (1996) (applying the arbitration rules of the United Nations Economic Commission for Europe and ruling that the costs of arbitration shall be borne equally by both parties and that each shall bear its own legal expenses); Marine Drive Complex Ltd. v. Ghana (Ad Hoc Oct. 27, 1989), *reprinted in* 19 Y.B. COM. ARB. 11, 30–32 (1994) (applying UNCITRAL Rules Article 38 and ordering respondent to pay $84,781.14 for fees and costs).

12. *See* Final Award No. 6197 (ICC 1995), *reprinted in* 23 Y.B. COM. ARB. 13, 29 (1998); Final Award No. 6752 (ICC 1991), *reprinted in* 18 Y.B. COM. ARB. 54, 57 (1993); Final Award No. 3267 (ICC 1984), *reprinted in* 12 Y.B. COM. ARB. 87, 96 (1987).

a simple and straight forward approach for tribunals to use in resolving claims for costs and fees and thus can bring much needed uniformity to the area.

I. Overview of Costs and Attorneys' Fees

A. *Background*

The practice of allocating costs and attorneys' fees between the parties to a dispute can be traced to Roman law, where the practice of requiring the losing party to pay the winning party's costs developed.[13] Today, this practice is known as the principle that costs follow the event or the English rule.[14]

There are several policies that support the principle that costs follow the event. These policies include (1) punishing the losing party, (2) indemnifying the winning party, and (3) deterring frivolous and bad faith litigation.

Some commentators have speculated that the principle of costs follow the event was originally penal in nature. They argue that courts awarded costs and fees in order to punish an unsuccessful plaintiff for bringing a false claim or to fine a losing defendant for unjustly refusing the plaintiff's rights.[15]

While the rationale for the practice of allocating costs and fees may originally have been to penalize the losing party, today the main reason

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13. Interestingly, in early ecclesiastical courts there were no fees for legal advice. However, under *legis actio sacramentum*, litigating parties deposited a sum of money in court to ensure legal proceedings were initiated with good cause. At the conclusion of the action, the deposit was refunded to the prevailing party, but the deposit of the losing party was forfeited to the temple. In addition, where a defendant had denied the plaintiff's claims in bad faith, courts customarily doubled the amount of the judgment. During the Byzantine Empire, lawyers and judicial officials began charging fees for their services and courts started requiring the losing party to pay the costs of the prevailing party in cases involving frivolous litigation or bad faith. In 486 A.D., East Roman Emperor Zenon first announced the rule that the mere fact of losing was sufficient ground to impose an obligation upon the loser to pay the winner's costs. For a historical background on the practice of awarding costs and fees, *see* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 Law & Contemp. Probs. 37, 40–44 (1984); Arthur Engelmann, *The Roman Procedure*, *in* A History of Continental Civil Procedure 239, 279–82 (Robert Wyness Millar ed. & trans., 1927).

14. In England, the rules on the awarding of costs and fees developed in law through piecemeal legislation and in equity through the exercise of the chancellor's discretion. *See* Pfennigstorf, *supra* note 13, at 42; *see also* Access to Civil Procedure Abroad § 9.9.3 (Henk J. Snijders ed., 1996).

15. *See* J. Gillis Wetter & Charl Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 Am. Rev. Int'l Arb. 249, 329 (1991); *see also* Graham J. Graham-Green, *Taxation of Costs in the Supreme Court*, 49 Arb. 319 (1984).

for doing so is to indemnify the winning party.[16] Dr. J. Gillis Wetter and Charl Priem explained that the modern justification for the principle that costs follow the event

> is founded on the concept that if and to the extent that a claimant is entitled in law and justice to obtain a sum of money from another party, [a claimant] should not have to suffer any expense (beyond the cost of addressing a simple demand) for being awarded it; conversely, if a respondent is exposed to a claim which at the end of the day is deemed not to be founded in law and justice, [a respondent] should not suffer any expense for defending the action.[17]

It also has been asserted that the principle that costs follow the event advances the goal of deterring claims with little merit and bad faith litigation.[18] This is based on the premise that a claimant, knowing that it must bear both its own costs and those of the other party should it lose, will not pursue low quality claims or institute a vexatious action. Similarly, the principle of costs follow the event discourages parties from exaggerating their claims and counterclaims.[19]

B. *Costs Follow the Event*

Most jurisdictions allocate costs and fees in litigation according to the principle that costs follow the event.[20] This principle is typically set forth in statutes, such as the French New Code of Civil Procedure which states that "costs are assessed against the losing party unless the judge assesses the whole or a part of the burden against the other party, in a decision with reason given."[21] In other countries, such as Australia and

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16. *See* Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653–54.

17. Wetter & Priem, *supra* note 15, at 330. Pursuant to this rationale, some countries hold the unsuccessful party strictly liable for the loss, while others require the losing party to pay only if it was in some way at fault. *See* Rowe, *supra* note 16, at 658.

18. *See* Jennifer F. Reinganum & Louis L. Wilde, *Settlement, Litigation, and the Allocation of Litigation Costs*, 17 RAND J. ECON. 557 (1986); David Rosenberg & Steven Shavell, *A Model In Which Suits Are Brought For Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3 (1985).

19. *See* Wetter & Priem, *supra* note 15, at 332.

20. Countries that follow the principle that costs follow the event include, among others, Australia, Austria, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Dominican Republic, France, Germany, Greece, Hungary, India, Italy, Iran, Luxembourg, Mexico, the Netherlands, New Zealand, Portugal, Romania, Switzerland, Turkey, and Yemen. *See* JOHN Y. GOTANDA, SUPPLEMENTAL DAMAGES IN PRIVATE INTERNATIONAL LAW 146–73 (1998) (containing a survey of national laws on the awarding of costs and fees).

21. NEW CODE OF CIVIL PROCEDURE IN FRANCE, art. 696, at 143 (Francoise Grivart de kerstrat & William E. Crawford trans., 1978); *see* CÓDIGO DE PROCESSO CIVIL [C.P.C.] (Braz.)

Canada, courts have broad discretion to determine whether to award costs and fees to the successful party, but typically do so under the principle that costs follow the event.[22]

With respect to allocating costs or fees, or both, the practice in some countries is simply to award all allowable costs and fees to the prevailing party.[23] Others allocate them in proportion to a party's success.[24] When a prevailing party's success is total, the costs or fees, or both, are borne completely by the unsuccessful party. However, when a party's success is less than total, their reimbursement claim is offset by the proportion of unsuccessful claims.[25]

The costs and fees that may be recovered by the prevailing party are generally those that were reasonable and necessary for the litigation.[26] They typically include filing fees, witness fees, transportation expenses, and attorneys' fees.[27]

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art. 20 (requiring the losing party to pay the winner's fees and costs in court proceedings in Brazil); Zivilprozeßordnung [ZPO] § 91(1) (F.R.G.), *translated in* SIMON L. GOREN, THE CODE OF CIVIL PROCEDURE RULES OF THE FEDERAL REPUBLIC OF GERMANY OF JANUARY 30, 1877 AND THE INTRODUCTORY ACT FOR THE CODE OF CIVIL PROCEDURE RULES OF JANUARY 30, 1877 AS OF JANUARY 1988 (1990) (stating that the "failing party shall bear the costs of the lawsuit"); Swedish Code of Judicial Procedure ch. 18, § 8, *translated in* THE SWEDISH CODE OF JUDICIAL PROCEDURE 73 (Anders Bruzelius & Krister Thelin eds., rev. ed. 1979) (1968) (awarding the winning party all costs "reasonably incurred" during the proceeding); CÓD.COM. art. 1084 (Mex.) (providing that costs shall always be imposed against the losing party and against a party that does not submit sufficient proof to support a claim).

22. *See* Cie Price Ltée v. Deniso Lebel Inc. [1996] R.J.Q. 2085 (C.A.) (Que.); Hospitality Corp. of Manitoba Inc. v. North Am. Bldg. Ltd. [1994] 70 W.A.C. 292, 95 Man. R. (2d) 292 (C.A.) (Man.); Vipond v. Sisco [1913] 14 D.L.R. 129 (Ont. S.C.); Ritter v. Godfrey (1919) 2 K.B. 47; Donald Campell & Co. v. Pollak (1927) A.C. 732; Morosi v. Mirror Newspapers Ltd. (1977) 2 N.S.W.R. 749; E.M.I. Records Ltd. v. Ian Cameron Wallace Ltd. (1982) 3 W.L.R. 245.

23. *See* Schwartz, *supra* note 8, at 21 (noting that in England the general rule is that all allowable costs shall be borne by the unsuccessful party).

24. *See id.* (stating that Germany, Switzerland and Austria allocate costs in proportion to the outcome of the case); Wetter & Priem, *supra* note 15, at 274 (explaining that Sweden allocates costs "*inter partes* on a sliding scale proportionate to the assessment by the court of the claims made by the parties").

25. Wolfgang Hahnkamper, *Austria* (Dec. 1997), *in* 1 TRANSNATIONAL LITIGATION: A PRACTITIONER'S GUIDE AUS-107 (Richard H. Kreindler gen. ed. & Judith L. Holdsworth, assistant ed., 1997) [hereinafter TRANSNATIONAL LITIGATION]; Ludmilla Neustupná, *Czech Republic* (Dec. 1997), *in* 1 TRANSNATIONAL LITIGATION CZK-88.

26. *See* Zivilprozeßordnung [ZPO] § 91(1) (F.R.G.) (stating that recoverable costs must be "necessary for purposeful prosecution or the defense of [the successful party's] rights"); Swedish Code of Judicial Procedure, *supra* note 21, at ch. 18, § 8 (allowing recovery of all costs "reasonably incurred" in the proceedings); BERNARD C. CAIRNS, AUSTRALIAN CIVIL PROCEDURE 490–91 (3rd ed. 1992) (stating costs and fees must be reasonable and necessary to the litigation).

27. *See* Henk J. Snijders ed., *supra* note 14, at § 5.9.3 (noting that in England the losing party is typically responsible for the successful party's costs, including the solicitor's disbursement fees, the barrister's fees, the expenses of the witnesses, the experts' fees and other

In many countries, however, awards of costs and fees are subject to a variety of limitations. For example, in Spain, costs that may be recovered by a successful party are limited to one-third of the amount claimed in the action.[28] In addition, in England, Germany, and Switzerland, the amount of attorneys' fees is determined by a fixed fee schedule, which may not reflect the actual fees incurred.[29] In some countries, courts may refuse to award costs or fees, or both, if the winning party acted in bad faith in the litigation.[30]

Most countries also apply the principle that costs follow the event in arbitrations.[31] For example, arbitration laws in England and Mexico specifically state that the arbitral tribunal shall award the costs of the arbitration on the general principle that costs follow the event.[32] In

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court expenses); Ernest Arendt & Théa Harles-Walch, *Luxembourg* (Sept. 1994), *in* 3 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 14–15 (Pieter Sanders & Albert Jan Van Den Berg eds., 1998) (noting that in Luxembourg the losing litigant is generally ordered to pay all court fees and attorneys' fees involving necessary steps taken during proceedings, but not the attorneys' retainer for representation) [hereinafter INTERNATIONAL HANDBOOK]; *see also* STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE § 50.7 (1989).

28. *See* FERNANDO POMBO, DOING BUSINESS IN SPAIN § 23.01[5][iv] (1996).

29. *See* O'MALLEY & LAYTON, *supra* note 27, at § 56.57 (stating that in England the successful party will rarely recovery all of its litigation costs because of cost regulations and fee scales); Henk J. Snijders ed., *supra* note 14, at § 9.9.3 (noting that in Germany there are detailed rules governing the amount of court fees, the costs of legal proceedings, and attorneys' fees); INTRODUCTION TO SWISS LAW 275 (F. Dessemontet & T. Ansay eds., 1995) (stating that in Switzerland the amount of court and party costs are determined by fixed schedule); *see also* NEW CODE OF CIVIL PROCEDURE IN FRANCE, *supra* note 21, at 143 (noting that costs awarded in France include "*[a]vocats'* fees insofar as they are regulated"); ACCESS TO CIVIL PROCEDURE ABROAD, *supra* note 14, § 8.9.3 (noting that in the Netherlands the winning party will never recover the actual costs of the litigation because costs are based on certain standard amounts for certain standard activities and the amount of the claim and that "costs for legal representation are awarded on the basis of fixed amounts which usually do not cover the real costs").

30. *See* ELENA MERINO-BLANCO, THE SPANISH LEGAL SYSTEM 155 (1996) (noting that in Spain "[if] the judge makes a finding of bad faith . . . all costs shall be borne by the party litigating in bad faith"); Wetter & Priem, *supra* note 15, at 271 (stating that in Sweden expenses are not recoverable where a party shows bad faith); NEW CODE OF CIVIL PROCEDURE IN FRANCE, *supra* note 21, at 143 (providing that in France "[c]osts are assessed against the losing party unless the judge assesses the whole or a part of the burden against the other party, in a decision with reasons given").

31. *See* GOTANDA, *supra* note 20, at 153–73 (surveying national laws on the awarding of costs and fees in arbitrations).

32. *See* Arbitration Act, 1996, § 61(2) (Eng.), *reprinted in* 2 HALSBURY'S STATUTES OF ENGLAND AND WALES 71 (4th ed. 1996) (providing that in the absence of a contrary agreement, "the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs"); CÓD.COM. art. 1454 (Mex.) (stating that, subject to exceptions, the costs of the arbitration shall be borne by the losing party).

Australia, Israel, and Turkey, arbitrators are given the power to allocate costs and fees and customarily award them against the losing party.[33]

In arbitration, costs and fees fall into two general categories: (1) the costs of the proceedings, and (2) the costs of the parties. The costs of the proceedings include the fees and expenses of the arbitral tribunal[34] and the administrative fees of the administering authority.[35] The costs of the parties are the legal costs of the claimant and respondent, which include (a) attorneys' fees, (b) various professional services fees such as those of technical advisors or experts, (c) the fees and expenses of witnesses, and (d) incidental expenses such as secretarial fees and telephone, facsimile, and copying charges.[36]

Many countries, such as Austria, the Netherlands, and Sweden, do not distinguish between the two types of costs and simply allow the arbitral tribunal to award both to the prevailing party.[37] However, in some

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33. *See* Michael C. Pryles, *Australia* (Sept. 1992), *in* 1 INTERNATIONAL HANDBOOK, *supra* note 27, at 22–23; Smadar Ottolenghi, *Israel* (Aug. 1984), *in* 2 INTERNATIONAL HANDBOOK, *supra* note 27, at 18–19; Rabi Koral, *Turkey* (June 1989), *in* 4 INTERNATIONAL HANDBOOK, *supra* note 27, at 25; *see also* Zhivko Stalev, *Bulgaria* (Aug. 1995), *in* 1 INTERNATIONAL HANDBOOK, *supra* note 27, at 18 (stating that in Bulgaria arbitrators apportion arbitral costs "according to the event"); Gustaf Möller, *Finland* (Oct. 1995), *in* 2 INTERNATIONAL HANDBOOK, *supra* note 27, at 21–22 (noting that Finland's Arbitration Act together with customary practice dictate that the losing party pay the costs of the arbitration, including legal representation); Albert Jan Van den Berg, *The Netherlands* (Apr. 1987), *in* 3 INTERNATIONAL HANDBOOK, *supra* note 27, at 25–26 (noting that in the Netherlands the losing party bears the costs of the arbitration); Fernando Cruz & Dário Moura Vicente, *Portugal* (Jan. 1991), *in* 3 INTERNATIONAL HANDBOOK, *supra* note 27, at 13 (noting that arbitrators in Portugal award costs and attorneys' fees in accordance with the Code of Civil Procedure, which provides that the losing party bears the costs); Robert Briner, *Switzerland* (Sept. 1992), *in* 3 INTERNATIONAL HANDBOOK, *supra* note 27, at 28–29 (providing that in Switzerland the losing party generally pays the costs and fees of the winning party in arbitration).

34. The fees and expenses of the arbitral tribunal include the fees and expenses of the members of the arbitral tribunal, translators, interpreters and secretaries. They also include fees and costs of experts retained by the tribunal. *See* REDFERN & HUNTER, *supra* note 6, at 406–07.

35. Administrative fees typically consist of the filing and service fees of the administering agency. *See* Steven J. Stein & Daniel R. Wolman, *International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems & Rules*, 38 BUS. LAW. 1685, 1722 (1983).

36. *See* W. LAWRENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 40 (2d ed. 1990).

37. *See* Werner Melis, *Austria* (June 1989), *in* 1 INTERNATIONAL HANDBOOK, *supra* note 27, at 12 (noting that in Austria the losing party is generally required to pay reasonable costs of legal representation); Van den Berg, *supra* note 33, at 25–26 (providing that in the Netherlands awards commonly require the losing party to pay for the legal assistance of the prevailing party); Ulf Holmback & Nils Mangard, *Sweden* (June 1989), *in* 3 INTERNATIONAL HANDBOOK, *supra* note 27, at 17 (noting that in Sweden attorneys' fees are part of the final award, recoverable by a successful, non-negligent party); *see also* O'MALLEY & LAYTON, *supra* note 27, at § 49.57 (stating that in Denmark the "losing party is normally ordered to pay . . . a proportion of the costs which a party has to pay to his *advokat*"); Möller, *supra*

countries, such as Belgium and Greece, arbitrators may award the costs of the proceedings to prevailing parties, but are prohibited from awarding legal costs, except in special circumstances.[38]

C. *The American Rule*

Unlike most countries, the United States does not apply the principle that costs follow the event. Instead, the parties in litigation must generally bear their own expenses, including attorneys' fees.[39] This practice has become known as the American rule.[40]

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note 33, at 22 (noting that Finland's common practice in arbitrations is for the losing party to pay the winning party's costs of legal representation); The Arbitration and Conciliation Ordinance, 1996 § 31(8) (Ind.) (stating that India authorizes arbitrators to allocate attorneys' fees along with other costs in the award, unless the parties have already allocated them in their agreement); Briner, *supra* note 33, at 29 (stating that Swiss Procedural rules generally grant the costs of legal assistance to the winning party).

38. *See* Lambert Matray, *Belgium* (Oct. 1995), *in* 1 INTERNATIONAL HANDBOOK, *supra* note 27, at 27 (noting that in Belgium awards of attorneys' fees are forbidden on the grounds that they violate public policy); Anghélos C. Foustoucos, *Greece* (Nov. 1985), *in* 2 INTERNATIONAL HANDBOOK, *supra* note 27, at 21 (noting that in Greece it is not customary for an arbitral award to include attorneys' fees, although arbitrators have the power to award them); *see also* Sudargo Gautama, *Indonesia* (Feb. 1998), *in* 2 INTERNATIONAL HANDBOOK, *supra* note 27, at 23 (noting that in arbitrations in Indonesia, the winning party is not awarded its attorneys' fees); Law on Commercial Arbitration, art. 31(2) (Ukraine) (providing that arbitrators in Ukraine generally are reluctant to award attorneys' fees, except where justifiable or where a party has acted inappropriately or caused a delay in proceedings).

39. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975). For a discussion of attorneys' fees in the United States, see ROBERT L. ROSSI, ATTORNEYS' FEES (2nd ed. 1995 & Supp. 1999); 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2675 (3rd ed. 1998). In addition to the United States, the practice in Japan is for the parties to bear their own expenses, including attorneys' fees. There is an exception in tort cases, in which a prevailing plaintiff can recover attorneys' fees and expenses as additional damage. *See* Masatami Otsuka, *Japan*, *in* 2 TRANSNATIONAL LITIGATION, *supra* note 25, at JAP-44.

40. The history of the American rule is somewhat unclear. Professor John Leubsdorf argues that the American rule evolved because of the collapse of attorney fee regulation in the first half of the nineteenth century. John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 LAW & CONTEMP. PROBS. 9 (1984). He notes that, in the colonial period, statutes regulated lawyers' fees and provided for the prevailing party to recover costs and fees. *Id.* at 10. However, after the American Revolution, lawyers were liberated from government control and were able to charge clients with a large degree of discretion. *Id.* at 13. Professor Leubsdorf states that "[o]nce these limits were evaded or repealed, the American rule became institutionalized because attorneys no longer had to push to recover their fees from the defeated party." *Id.* Another theory, set forth by Professors Ronald Braeutigam, Bruce Owen, and John Panzar, posits that the American rule may have been adopted to reduce lawyer fees. *See* Ronald Braeutigam, et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONTEMP. PROBS. 173 (1984). They explain:

> [L]awyers in colonial American were regarded with suspicion, as disreputable practitioners of an unnecessary trade. If so, and if early policymakers regarded the "American rule" as likely to reduce overall expenditures on lawyers, then adoption of the rule can be explained in terms of its anticipated economic effects. That is,

The United States Supreme Court, which adopted the American rule in 1796,[41] has set forth three reasons in support of it. First, in many cases the result of the litigation is uncertain and, as a result, it is unfair to penalize a losing party by assessing costs and fees for merely defending or prosecuting a lawsuit.[42] Second, if losing parties were forced to bear their opponents' costs and fees, "the poor might be unjustly discouraged from instituting actions to vindicate their rights."[43] Third, claims for costs and fees would likely increase "the time, expense and difficulties of proof" in any given case and "would pose substantial burdens for the administration of justice."[44]

The American rule also applies to arbitrations in the United States. In general, an arbitral tribunal may award costs or fees "only if the parties' contract, a specific statute, or the arbitration rules so allow."[45]

The governing federal arbitration statute is the Federal Arbitration Act (FAA),[46] which applies, *inter alia*, to actions involving interstate commerce and to international arbitrations.[47] It does not contain any provisions regarding the allocation of costs and attorneys' fees.[48]

With respect to state arbitration laws, most states have adopted the Uniform Arbitration Act (UAA),[49] which states that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees,

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> the early American attitude toward lawyers would logically have supported the adoption of the rule if it were thought that the result would be a reduction on the overall social expenditure on lawyers.

Id. at 174.

41. Arcambel v. Wiseman, 3 U.S. 306 (1796).

42. *See* Fleischman Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967).

43. *Id.*

44. *Id.* (citing Oelrichs v. Spain, 83 U.S. 211, 231 (1872)).

45. THOMAS H. OEHMKE, COMMERCIAL ARBITRATION § 123:01 (1999).

46. Federal Arbitration Act, 9 U.S.C. (1994).

47. The FAA is divided into three chapters. The first chapter focuses principally on domestic arbitrations, although it also applies to "foreign commerce." *See* 9 U.S.C. § 1. The second chapter deals with non-domestic disputes and incorporates the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). *See* 9 U.S.C. §§ 201–07. It also incorporates chapter 1 to the extent that it does not conflict with chapter 2 or the New York Convention. 9 U.S.C. § 208. Chapter 3 incorporates into the FAA the Inter-American Convention on International Commercial Arbitration and incorporates chapter 1 to the extent that it does not conflict with chapter 3 or the Inter-American Convention. *See* 9 U.S.C. §§ 301–07.

48. *See* Menke v. Monchecourt, 17 F.3d 1007, 1009 (7th Cir. 1994); *see also* In re Arbitration Between Trans Chemical Ltd. and China Nat'l Mach. Import & Export Corp., 978 F. Supp. 266, 311–12 (S.D. Texas 1997) (stating that arbitrators generally lack the authority to award attorneys' fees absent statutory authorization); Raytheon Co. v. Computer Distributors, Inc., 632 F. Supp. 553, 560 (D. Mass. 1986) (same).

49. Thirty-five states and the District of Columbia have adopted the UAA, a model law promulgated in 1955 and amended in 1956. For a list of states that have adopted the UAA, see 7 U.L.A. 1 (1997).

together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."[50] This language has been interpreted by courts to mean that attorneys' fees are not recoverable in arbitration unless the parties agreed to them or a statute otherwise provides for their award.[51] Accordingly, attorneys' fees typically are not awarded in domestic arbitrations.[52]

Although states generally prohibit arbitral awards of attorneys' fees in domestic arbitrations, some states have allowed them in international arbitrations.[53] For example, in California, in domestic arbitrations, each party pays its own pro rata share of expenses, together with the expenses of the arbitrators, not including attorneys' fees or witness fees, unless the parties otherwise agree.[54] However, in international arbitrations, California law provides that "in making an award for costs the arbitral tribunal may include as costs . . . legal fees and expenses."[55]

A number of exceptions to the American rule have developed.[56] First, arbitrators may award attorneys' fees if authorized by the parties

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50. Uniform Arbitration Act § 10, 7 U.L.A. 250 (1997).

51. *See, e.g.*, Compton v. Lemon Ranches, Ltd., 972 P.2d 1078, 1079 (Co. Ct. App. 1999); Myron Assoc., Inc. v. Obstfeld, 638 N.Y.2d 154, 155 (N.Y. App. Div. 1996), *appeal denied*, 670 N.E.2d 449 (N.Y. 1996); Canon Sch. Dist. No. 50 v. W.E.S. Constr. Co., 882 P.2d 1274, 1277–79 (Ariz. 1994); J.M. Owen Bldg. Contractors v. College Walk, Ltd., 400 S.E.2d 468, 471 (N.C. Ct. App. 1991); Bingham County Comm'n v. Interstate Elec. Co., 665 P.2d 1046 (Idaho 1983).

52. *See* MARTIN DOMKE, DOMKE ON COMMERCIAL ARBITRATION § 43.01, at 535 (1996 & Supp. 1999) (stating that as a general principle the fees of attorneys who participate in the arbitration as counsel cannot become part of the award); *see also* STUART M. SPEISER, ATTORNEYS' FEES § 12:3, at 463–4 ("It has been the consistent rule throughout the United States that a litigant has no inherent right to have [its] attorneys' fees paid by [its] opponent or opponents.").

53. *See* FLA. STAT. ANN. § 684.19(3)–(4) (West 1996); HAW. REV. STAT. ANN. § 658D-7(6) (Michie 1996); TEX. REV. CIV. STAT. ANN. art. 172.254 (West 1996).

54. *See* CAL. CIV. PRO. CODE § 1284.2 (West 1988).

55. CAL. CIV. PRO. CODE § 1297.318 (West 1988 & Supp. 1999).

56. *See generally* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1578–87 (1993). Even where an exception is present, a conflicting legal rule may prevent an award of attorneys' fees. For instance, some courts have held that certain statutes prohibit awards of attorneys' fees even where the arbitration agreement expressly authorizes the arbitrator to do so. *See, e.g.*, J.M. Owen Bldg. Contractors, Inc. v. College Walk, Ltd., 400 S.E.2d 468 (N.C. Ct. App. 1991); Victoria v. Superior Ct., 710 P.2d 833 (Cal. 1985). Other state courts have held that, because the FAA is inapplicable to state law, attorneys' fees cannot be awarded without the specific statutory guidelines. *See* S.J. Agnew v. Lacey Co-Ply, 654 P.2d 712 (Wash. Ct. App. 1982). *But see* Leaf v. State Farm Auto. Ins. Co., 544 So. 2d 1049 (Fla. Dist. Ct. App. 1989). Similarly, one court has held that, even where there is a state statute authorizing the award of attorneys' fees, such fees may not be awarded unless the parties authorize them by agreement. *See, e.g.*, Floors, Inc. v. B.G. Danis of New Eng., 401 N.E.2d 839 (Mass. 1980).

in their agreement.[57] Second, the applicable law or arbitral rules may expressly authorize an award of attorneys' fees.[58] Numerous federal and state statutes provide for some shifting of attorneys' fees.[59] In addition, as noted, a number of states have adopted international arbitration laws that authorize an arbitrator to award attorneys' fees.[60] Third, attorneys' fees may be awarded against a party who has been found guilty of contempt of court, has acted in bad faith, or engaged in other misconduct.[61]

II. TRIBUNAL AWARDS OF COSTS AND FEES

Although most countries apply the principle that costs follow the event, they do not employ a uniform method for awarding costs and fees. In general, arbitrators entertaining a claim for costs and fees consider three issues: (1) whether they have the authority to award costs and fees; (2) if so, how they should be allocated between the parties; and (3) how much should be awarded. If the parties' agreement addresses these issues, the arbitrators will usually resolve the claim for costs and fees in accord with the agreement. However, agreements frequently fail to address this issue, or are ambiguous as to how such claims should be decided. In these situations, arbitrators have resolved claims for costs and fees by relying on the applicable national law, the arbitral rules governing the dispute, or principles of fairness and reasonableness. These differing approaches are sometimes difficult to apply. Moreover, they typically result in inconsistent or arbitrary awards.

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57. *See, e.g.*, Advanced Tech. Assoc., Inc. v. Seligman, 39 F. Supp. 2d 1311 (D. Kan. 1999); *In re* Application of RAS Sec. Corp., 674 N.Y.S.2d 303 (N.Y. App. Div. 1998); Sylvester v. Abdalla, 903 P.2d 410 (Or. Ct. App. 1995); Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828 (Cal. Ct. App. 1994); *see also* Akintobi v. Phoenix Fire Restoration Co., Inc., 513 S.E.2d 507 (Ga. Ct. App. 1999) (ruling that the parties implicitly agreed to arbitrate attorneys' fee issue when they claimed such fees in arbitration).

58. *See, e.g.*, Clayton Act, 15 U.S.C. § 15 (1994); Fair Labor Standards Act, 29 U.S.C. § 216(b) (1994); Truth in Lending Act, 15 U.S.C. § 1640(a) (1994); Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000b-1, 2000e-5(k) (1994); *see also* Wetter & Priem, *supra* note 15, at 284 (noting that some 200 federal statutes authorize attorneys' fees).

59. For a discussion of federal and state statutes providing for awards of attorneys' fees, see ROSSI, *supra* note 39, at §§ 10:1–11:87.

60. *See, e.g.*, CAL. CIV. PROC. CODE § 1297.318 (West 1998); FLA. STAT. ANN. § 684.19(4) (West 1996); HAW. REV. STAT. § 658D-7(d)(6) (Michie 1996); TEX. CIV. PRAC. & REM. CODE ANN. § 172.254(i) (West 1997).

61. *See* Widell v. Wolf, 43 F.3d 1150, 1151–52 (7th Cir. 1995) (bad faith exception); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1064 (9th Cir. 1991) (same).

A. *The Parties' Agreement*

Arbitral tribunals will typically enforce a contractual provision on the awarding of costs and fees.[62] Some courts and tribunals, however, have required that such agreements specifically set forth whether the tribunal has the power to award costs and fees and, in particular, attorneys' fees.[63] For example, in *Transvenezualian Shipping Co., S.A. v. Czarnikow-Rionda Co., Inc.*, a United States district court overturned an award of costs and fees on the ground that the arbitrators exceeded their power by awarding attorneys' fees to the prevailing party.[64] The agreement provided the arbitrators with "the discretion to order that [the arbitrators'] fees and the expenses and the costs of the arbitration shall be divided between the parties on any terms which appear just."[65] The court determined that this clause did not give the arbitrators the power to award attorneys' fees and legal expenses to the prevailing party. Therefore, the award of legal costs was *ultra vires*.[66]

It also should be noted that a few countries, such as England and Australia, have statutes that provide that "an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen."[67] There is little case law interpreting these statutes and thus their scope is unclear; however, they appear to be meant to prohibit agreements that would have the effect of preventing or discouraging a party from employing proper legal representation.[68] Consequently, not all

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62. *See* Ad Hoc UNCITRAL Award of 27 May 1991, *reprinted in* 17 Y.B. COM. ARB. 11, 26–27 (1992) (enforcing the parties' agreement to equally bear all costs and attorneys' fees although the agreement provided that all disputes were to be settled under the UNCITRAL Rules, which impose costs on the losing party); *see also* Ad Hoc UNCITRAL Award of 17 November 1994, *reprinted in* 21 Y.B. COM. ARB. 13, 38–39 (1996); Final Award No. 6320 (ICC 1992), *reprinted in* 20 Y.B. COM. ARB. 62, 108–09 (1995); Final Award Nos. 7385 & 7402 (ICC 1992), *reprinted in* 18 Y.B. COM. ARB. 68, 78–79 (1993); Final Award No. 3572 (ICC 1982), *reprinted in* 14 Y.B. COM. ARB. 111, 121 (1989).

63. *See* Transvenezualian Shipping Co., S.A. v. Czarnikow-Rionda Co., Inc., 1982 A.M.C. 1458, 1460 (S.D.N.Y. 1981) (holding that a clause in an arbitration agreement that provided for an award of the "expenses and costs of arbitration" did not include the power to award attorneys' fees and legal expenses); Midland Navigation v. Equity Maritime Enters, SMA Award No. 1802 (Mar. 31, 1983) (LEXIS, Admrty Library, Usawds File) (finding that where the parties' agreement did not expressly provide for the awarding of attorneys' fees, the arbitrator lacked power to make such an award).

64. *See Transvenezualian Shipping Co.*, 1982 A.M.C. at 1458–60.

65. *Id.* at 1459.

66. *See id.* at 1460; *see* Sammi Line Co. v. Altamar Navegacion, S.A., 1985 A.M.C. 1790, 1791 (S.D.N.Y. 1985) (following *Transvenezualian Shipping Co.*).

67. Arbitration Act, 1996, ch. 23, § 60 (Eng.). *See, e.g.*, Victoria Commercial Arbitration Act, 1984, art. 34(3) (Austl.).

68. *See* MICHAEL O'REILLY, COSTS IN ARBITRATION PROCEEDINGS § 1.5, at 5 (2d ed. 1997); *see also Windvale Ltd. v. Darlington Insulation Co. Ltd.*, THE TIMES, Dec. 22, 1983

agreements on the payment of costs and fees will be enforced according to their terms.

B. *National Laws*

When a contract is silent or ambiguous on the subject of costs and fees, some tribunals apply the applicable substantive or procedural law to resolve claims for them.[69] For example, in *Triumph Tankers Ltd. v. Kerr McGee Refining Corp.*, the tribunal awarded costs and fees to claimant based on section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act (RICO),[70] which expressly permits a party prevailing under the act to recover all costs of the suit, including reasonable attorneys' fees.[71] Similarly, in *Final Award No. 6962*, the tribunal applied both the arbitral rules and the applicable procedural law to resolve the claim for costs and attorneys' fees.[72] In that case, the governing arbitral rules, the Arbitration Rules of the International Chamber of Commerce (ICC), gave the tribunal the power to award costs and fees, but did not specify the method for doing so.[73] The tribunal thus looked to French law, which was the governing substantive and procedural law.[74] Because article 696 of the French New Code of Civil Procedure adheres to the principle that costs follow the event, the panel ordered the losing party to bear all of the arbitral costs.[75]

Using national law to resolve a claim for costs and fees can be a complicated, time consuming, and expensive process. Here, the arbitrator must determine whether substantive or procedural law governs the awarding of costs and fees. In many instances, the tribunal will apply the procedural law of the seat of the arbitration[76] and select the

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(Chancery Div.) (striking down as invalid an agreement in which one party agreed in advance to pay the costs of the arbitration).

69. *See* Triumph Tankers Ltd. v. Kerr McGee Refining Corp., Final Award No. 2642 (SMA Mar. 28, 1990), *reprinted in* 18 Y.B. COM. ARB. 112, 120 (1993); Final Award No. 6962 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 184, 193 (1994); Final Award No. 6248 (ICC 1990), *reprinted in* 19 Y.B. COM. ARB. 124, 139–40 (1994); Final Award No. 5946 (ICC 1990), *reprinted in* 16 Y.B. COM. ARB. 97, 118 (1991).

70. *See* 18 U.S.C. § 1964(c) (Supp. I 1996).

71. *See* Triumph Tankers Ltd., 18 Y.B. COM ARB. at 120.

72. *See* Final Award No. 6962, 19 Y.B. COM. ARB. at 193.

73. Arbitration Rules of the International Chamber of Commerce art. 31 (1998), *reprinted in* 22 Y.B. COM. ARB. 345, 361 (1997).

74. *Final Award No. 6962*, 19 Y.B. COM. ARB. at 185, 192. The tribunal stated that it was applying French procedural law "as a gap filler to the ICC Rules of Arbitration . . . ." *Id.* at 192.

75. *Id.* at 193.

76. *See* F.A. Mann, *Lex Facit Arbitrum*, *reprinted in* 2 ARB. INT'L 241, 245 (1986) ("The *lex arbitri* cannot be the law of any country other than that of the arbitration tribunal's seat.").

substantive law through a choice-of-law analysis.[77] The latter method entails deciding on a choice-of-law rule that will in turn make it possible to select a substantive law to apply to the merits of the dispute. The choice-of-law rule governing the arbitrator's selection can be that of the jurisdiction of (1) the seat of arbitration, (2) the arbitrator's home country, (3) the country where the award will be enforced, (4) any state having a connection with the parties' dispute, (5) an international treaty, or (6) an international arbitral institution.[78] Currently no consensus exists on which of these choice-of-law rules the arbitrator should apply in a given case. The lack of uniformity makes it problematic to specify and predict which country's law will be applied to the dispute.[79]

The process of selecting a national law to govern the awarding of costs and fees is particularly complex because it may not be clear whether the claim for them should be governed by substantive or procedural law. Most countries consider awards for costs and fees to be governed by procedural law.[80] However, in the United States, courts are divided on the issue.[81] In addition, some fee-shifting laws and rules in the United States may be viewed as procedural, while others may be characterized as substantive.[82] It is also possible that a single fee-shifting

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77. *See* W. MICHAEL REISMAN ET AL., INTERNATIONAL COMMERCIAL ARBITRATION 706–08 (1997).

78. *See generally* Ole Lando, *The Law Applicable to the Merits of the Dispute*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 101 (Julian D. M. Lew ed., 1987); CRAIG ET AL., *supra* note 36, at 285. In designating a set of choice-of-law rules, tribunals are not limited to the above list. For example, some tribunals have selected a set of choice-of-law rules at random. *See* Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW 613, 620 (1982). Other tribunals have selected a substantive law without regard to any choice-of-law rule. *See* Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 268 (1986).

79. *See* Hans Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 24 (1986).

80. *See, e.g.*, NEW CODE OF CIVIL PROCEDURE IN FRANCE, *supra* note 21, at art. 696; SWEDISH CODE OF JUDICIAL PROCEDURE, *supra* note 21, at ch. 18, § 8; *see also* Wetter & Priem, *supra* note 15, at 333 (stating that "universally, the allowability of costs and their allocation is regarded as a matter of procedural law"); ALBERT A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 125, at 357 (1962) (noting that the *lex fori* is often applied "both to grant and to deny claims for counsel fees").

81. *Compare* Bill's Coal Co. v. Board of Public Utilities, 887 F.2d 242, 246 (10th Cir. 1989) (considering the awarding of costs and fees to be governed by substantive law), *and* Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1194 n.8 (11th Cir. 1995) (same) *and* L. Ross, Inc. v. R.W. Roberts Const. Co., 481 So. 2d 484, 485 (Fla. 1986) (same) *with* Whiteside v. New Castle Mut. Ins. Co., 595 F. Supp. 1096, 1100 (D. Del. 1984) (ruling that the awarding of costs and fees is governed by procedural law), *and* Nitchals v. Williams, 590 P.2d 582, 588 (Kan. 1979) (same) *and* Bensen v. American Ultramar Ltd., No. 92 CIV. 4420 KMW NRB, 1997 WL 317343, at *13 (S.D.N.Y. June 12, 1997) (same).

82. One commentator explained the difference between procedural and substantive fee-shifting laws in the U.S.:

law may contain both procedural and substantive elements.[83] As a result, an arbitrator may have to spend a significant amount of time examining fee-shifting laws to determine whether they are substantive or procedural, which may ultimately be unclear.

The complexity involved in selecting a law to apply to a claim for costs and fees may cause parties and arbitrators to spend considerable resources to resolve the issue.[84] Further, the process may lead to arbitrary and unpredictable results.[85] Thus, it is not surprising that, in light of these difficulties, "arbitrators in international cases routinely award

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> Procedural fee-shifting laws typically govern conduct during litigation, often by permitting recovery of fees from those who abuse the judicial process. Substantive fee-shifting laws typically relate to the remedies available for certain claims, often encouraging assertions of these claims by providing that prevailing complainants are entitled to recovery of fees.

Jeffrey A. Parness, *Choices About Attorney Fee-Shifting Laws: Further Substance/Procedure Problems Under Erie and Elsewhere*, 49 U. PITT. L. REV. 393, 401 (1988). Based on this characterization, the following fee-shifting rules would be considered procedural, *see* FED. R. CIV. P. 68 (providing that if a complaining party rejects a settlement offer and the judgment is no greater than the amount offered, the complaining party must pay the costs incurred after the offer was made); FED. R. CIV. P. 11 (providing for sanctions, including attorneys' fees, if an attorney or unrepresented party signs a pleading, written motion or other paper in bad faith), and the following would be considered to be substantive, *see* Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1964(c) (1994) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter . . . shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."); MISS. CODE ANN. § 27-105-329 (1972) (providing that if a county depository fails to pay warrants drawn on public funds, the depository must pay the county's collection expenses, including counsel fees). Under Professor Parness' view, however, fee-shifting laws such as article 696 of the New Code of Civil Procedure in France would be considered substantive, *see* Parness, *supra*, at 434 n.235, which would be contrary to the prevailing practice. *See* Final Award No. 6962 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 184, 193 (1994); Final Award No. 5946 (ICC 1990), *reprinted in* 16 Y.B. COM. ARB. 97, 118 (1991).

83. *See* Parness, *supra* note 82, at 400 n.39 (noting that 42 U.S.C. § 1988 has both substantive and procedural elements).

84. *See generally* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 98–100 (1994).

85. For example, assume an arbitration takes place in a U.S. jurisdiction that considers the awarding of costs and fees to be governed by substantive law but, through a choice-of-law analysis, the substantive law to be applied to the dispute is Swedish law, which considers the awarding of costs and fees to be procedural. Sweden, under its own choice-of-law rules, would presumably treat the question as subject to the law of the U.S. jurisdiction, resulting "in an endless cycle of searching for the appropriate body of substantive law to apply." Douglas I. Wood, Note, *Conflicts-Insurance-Environmental Law-Limited Renvoi Exception Will Be Utilized When Lex Loci Contractus Indicates that Foreign Jurisdiction Would Apply Maryland Law to Substantive Issue: American Motorists Insurance Co. v. Artra Group, Inc.*, 26 U. BALT. L. REV. 247, 270 (1995). This cycle is ultimately broken by an arbitrary choice. *See* EHRENZWEIG, *supra* note 80, at 335 (stating that such an "infinite circle of two laws referring to each other has been cut in several equally arbitrary ways").

[costs and] attorneys' fees, usually without discussing questions of applicable law."[86]

C. *Arbitral Rules*

Tribunals often award costs and fees based on arbitral rules that give them the authority to do so.[87] The rules of the most widely used arbitral institutions, as well as the ad hoc arbitration rules set forth by the United Nations Commission on International Trade Law (UNCITRAL), provide the tribunal with the authority to award costs and fees.[88] However, the

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86. BORN, *supra* note 84, at 626.

87. *See* Awards of Aug. 18, 1994 & Nov. 8, 1994 (Ad Hoc), *reprinted in* 21 Y.B. COM. ARB. 40, 45–46 (1996) (applying the arbitration rules of the United Nations Economic Commission for Europe and ruling that the costs of arbitration shall be borne equally by both parties and that each shall bear its own legal expenses); Award of Feb. 20, 1988 (AAA), *reprinted in* 14 Y.B. COM. ARB. 73, 81 (1989) (holding that "under the [AAA Rules] governing this arbitration, each party is to bear its own costs, and the expenses of the arbitration are to be shared equally"); Award of Jan. 4, 1980 (AAA), *reprinted in* 8 Y.B. COM. ARB. 166, 170 (1983) (applying the AAA Rules and ordering the parties to bear their own legal costs and share equally the costs of the arbitration); Marine Drive Complex Ltd. v. Ghana (Ad Hoc Oct. 27, 1989), *reprinted in* 19 Y.B. COM. ARB. 11, 30–32 (1994) (applying UNCITRAL Rules article 38 and ordering respondent to pay $84,781.14 for fees and costs); Final Award No. 6829 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 167, 183 (1994) (applying article 20 of the 1988 ICC Rules (permitting allocation and award of costs) and ordering respondent to pay the fees and costs of arbitration, but requiring each party to bear its own legal costs).

It is unclear whether arbitral tribunals are subject to national laws on the awarding of costs and fees when the governing arbitral rules give the tribunal the authority to do so. Some commentators have argued that, in ICC and ICSID arbitrations, the rules give complete discretion to award costs and fees and arbitrators operating under those rules are not subject to national laws on costs and fees. *See* CRAIG ET AL., *supra* note 36, § 19.07, at 338; Lester Nurick, *Costs in International Arbitrations*, 7 ICSID REV. 57, 58 (1992).

88. American Arbitration Association International Arbitration Rules art. 31, *reprinted in* 22 Y.B. COM. ARB. 303, 317 (1997) (stating that "[t]he tribunal shall fix the costs of arbitration in its award" and "may apportion such costs between the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case"); London Court of International Arbitration (LCIA) Rules art. 28.4 (1998) ("Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should follow the result of the award or arbitration except where it appears to the Arbitral Tribunal that in the particular circumstances this approach is inappropriate."); International Centre for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings, R. 28 (1984) (giving the tribunal the discretion to allocate costs and fees between the parties); ICC Rules, *supra* note 73, at art. 31 ("[T]he final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."); World Intellectual Property Organization (WIPO) Arbitration Rules art. 71, *reprinted in* 20 Y.B. COM. ARB. 340, 367 (1995) (providing that the "Tribunal shall fix the costs of the arbitration" and "shall, subject to any agreement of the parties, apportion the costs of the arbitration"); United Nations Commission on International Trade Law Arbitration Rules art. 40, *reprinted in* 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Rules] (providing that "the costs of arbitration shall in principle be borne by the unsuccessful party" and, with respect to the costs of legal representation, the tribunal "shall be free to determine which party shall bear such costs or

rules use different methods to determine the amount and allocation of such costs and fees. Some rules simply give arbitrators broad discretion to allocate costs and attorneys' fees in the award.[89] Other rules state that the losing party should in principle reimburse the winning party for its costs and fees incurred in the action, but give the tribunal discretion to deviate from the general rule in light of the circumstances of the case.[90] Because arbitral rules generally give the tribunal broad discretion in awarding costs and fees, awards of cost and fees pursuant to such rules have varied widely.[91]

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may apportion such costs between the parties if it determines that apportionment is reasonable"); Rules of Arbitration and Conciliation of the International Arbitral Centre of the Federal Economic Chamber of Vienna art. 19, *reprinted in* 18 Y.B. COM. ARB. 206, 215 (1993) (stating that the costs of the arbitration shall be "fixed by the Secretary" and not the tribunal and providing that the tribunal "shall decide the proportions in which these costs as well as the costs duly incurred by the parties in respect to legal representation and any further expenses for due prosecution of legal claims shall be borne by the parties").

89. *See, e.g.*, ICC Rules, art. 31, *supra* note 73, at 362 ("The final Award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties."); AAA International Arbitration Rules, *supra* note 88, at art. 31 (stating that "the tribunal shall fix the costs of arbitration in its award" and "may apportion such costs between the parties if it determines that apportionment is reasonable taking into account the circumstances of the case"); WIPO Arbitration Rules, *supra* note 88, at art. 71 (providing that the "tribunal shall fix the costs of the arbitration" and "shall, subject to any agreement of the parties, apportion the costs of the arbitration"); *see also* Chamber of Commerce and Industry of Geneva (CCIG) Arbitration Rules art. 36.1, *reprinted in* 18 Y.B. COM. ARB. 195, 205 (1993) ("At the end of the proceeding, the CCIG shall determine the final amount of the costs of arbitration."); Rules of Arbitration and Conciliation of the International Arbitral Centre of the Federal Economic Chamber of Vienna art. 19, *reprinted in* 18 Y.B. COM. ARB. 206, 215 (1993) (the tribunal "shall decide on the proportions in which these costs as well as the costs duly incurred by the parties in respect of legal representation and any further expenses for due prosecution of legal claims shall be borne by the parties").

90. *See* LCIA Rules, *supra* note 88, at art. 28.4 ("Unless the parties otherwise agree in writing, the Arbitral Tribunal shall make its orders on both arbitration and legal costs on the general principle that costs should follow the result of the award or arbitration except where it appears to the Arbitral Tribunal that in the particular circumstances this approach is inappropriate."); Rules of the Arbitration Institute of the Stockholm Chamber of Commerce § 29 (stating that the "losing party shall be ordered to pay such compensation and costs as well as the costs of the other party unless the circumstances call for a different result"); International Arbitration Rules of the Zurich Chamber of Commerce art. 56, *reprinted in* 1 ARB. MAT'L 215, 225 (1989) (providing that the "costs of the proceedings are, as a rule, borne by the losing party" but allowing the tribunal "for special reasons" to "depart from this rule, especially if the proceeding became without object or if a party caused unnecessary costs"); *cf.* UNCITRAL Rules, *supra* note 88, at art. 40 (providing that "the costs of arbitration shall in principle be borne by the unsuccessful party" and, with respect to the costs of legal representation, the tribunal "shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.").

91. One commentator who undertook a study of ICC awards noted that the ICC Rules, which give wide discretion to arbitrators in assessing and allocating costs and fees, ultimately may not serve the interests of the arbitrators or the parties:

Some tribunals have awarded successful parties both costs and attorneys' fees.[92] Other tribunals have awarded successful parties costs, including the tribunal's fees, but not attorneys' fees.[93] Still others have required each party to bear its own costs and fees and share equally the fees and expenses of the tribunal regardless of the outcome of the case.[94]

> For an arbitrator, there is little guidance in the ICC Rules to assist [him or her] in reaching a decision on costs. The lack of a precise rule in this respect has meant the absence of a system of precedents or explanations in awards, which would be necessary to justify the manner in which such a rule might be applied. Consequently, the arbitrator is potentially open to an indeterminate number of rules and factors from outside the ICC system, which [he or she] may apply at [his or her] will.
>
> As matters stand, it is not surprising that perhaps the most disappointing features of the ICC cost system are the failure of arbitrators to rationalize the exercise of their discretion in making the apportionment of costs and that allocations vary enormously without apparent justification from one arbitration to another.
>
> For the parties, this means that in any given arbitration such allocations are unpredictable and uncertain.

Michael Bühler, *Costs in ICC Arbitration: A Practitioner's View*, 3 AM. REV. 116, 151–52 (1992).

92. *See* Southern Pac. Properties Ltd. v. Egypt, Award of May 20, 1992 (ICSID), *reprinted in* 19 Y.B. COM. ARB. 51, 82–83 (1994) (awarding legal, audit, and arbitration costs to the claimant that substantially prevailed on its alternative claims for damages); Maritime Int'l Nominees Establishment v. Republic of Guinea, Final Award of Jan. 6, 1988 (ICSID), *reprinted in* 14 Y.B. COM. ARB. 82, 90 (1989) (awarding claimant $275,000 for fees and expenses incurred in the arbitration); Final Award No. 6363 (ICC 1991), *reprinted in* 17 Y.B. COM. ARB. 186, 211 (1992) (ordering the losing party to pay all of the prevailing party's attorneys' fees and 85% of the arbitration costs, including arbitrators' fees); Final Award No. 4975 (ICC 1988), *reprinted in* 14 Y.B. COM. ARB. 122, 136–37 (1989) (denying claimants' claims, awarding respondents damages on its counterclaims, and ordering claimants to pay respondents UK £500,000 for legal costs); Award of May 30, 1979 (ICC), *reprinted in* 7 Y.B. COM. ARB. 87, 95 (1982) (ordering respondent to bear all arbitral costs and legal expenses totaling $100,000 where claimant had prevailed fully on its claims); Award of Oct. 26, 1979 (ICC), *reprinted in* 7 Y.B. COM. ARB. 119, 124 (1982) (ordering respondent to pay all arbitral costs and $60,000 for claimant's legal costs where respondent wrongfully refused to satisfy claimant's security guarantee); Award of July 13, 1981 (ICC), *reprinted in* 7 Y.B. COM. ARB. 134, 136 (1982) (ruling where claimant had prevailed fully on its initial claims, respondent should bear all costs of the arbitration); Deepsea Tankers, Inc. v. Westport Petroleum, Inc., SMA Award No. 3093 (Jun. 30, 1994), *reprinted in* 7 WORLD TRADE & ARB. MAT'L 189, 190–97 (1995) (awarding the successful party a portion of costs and attorneys' fees).

93. *See, e.g.*, Agip v. Congo, 1 ICSID 306, 329 (1979) (awarding arbitration costs but not attorneys' fees to the party prevailing on all claims); *see also* Monte Mabu Shipping Corp. v. World Trade Group, Inc., SMA Award No. 1239 (June 19, 1978) (LEXIS, Admrty Library, Usawds File) (denying Owner's claim for attorneys' fees and awarding Owner 75% of the arbitrator fees even though Owner prevailed on almost all of its claims).

94. *See, e.g.*, Scanfleet A.S. v. Compania Anonima Venezolana de Navegacion, SMA Award No. 2464 (Mar. 15, 1988) (LEXIS, Admrty Library, Usawds File) (ordering each party to bear its own costs and finding no grounds for awarding attorneys' fees); *see also* Kuwait Petroleum Corp. v. Westport Petroleum, Inc., SMA Award 3244 (Jan. 19, 1996) (LEXIS, Admrty Library, Usawds File) (ruling that even though the owner prevailed, both

Three maritime arbitration decisions illustrate the arbitrariness that can occur in awarding costs and fees even when a party is wholly or substantially successful.[95] In *Euroleader Shipping and Trading Corp. v. Stellar Lines, S.A.*, the tribunal rejected the claimant's contention that faulty bunkers supplied by the respondent had damaged the claimant's vessel and ruled for respondent on its unpaid hire claim.[96] With respect to the parties' claims for costs and fees, the tribunal denied the claimant's claim and awarded the respondent all of the attorneys' fees sought, which amounted to $194,513.99.[97]

By contrast, in *ARAMCO Services Co. v. EAC Bulk Transport (N.A.), Inc.*, the claimant completely prevailed on its claims that the respondent improperly transported and damaged the claimant's cargo.[98] While the tribunal awarded the claimant all requested damages plus interest, it awarded only $97,000 out of the $658,143 that claimant requested for attorneys' fees and costs. Further, the tribunal ordered the parties to share equally the cost of the stenographic transcripts for the hearing.[99]

An altogether different result was reached in *Kuwait Petroleum Corp. v. Westport Petroleum.*[100] There, the tribunal ruled in favor of Kuwait Petroleum on its claim for payment of monies owed by Westport Petroleum for the charter of its ship, but denied Kuwait Petroleum's claim for costs and fees. The panel stated that "while finding in favor of [Kuwait Petroleum,] . . . the circumstances of the case do not warrant an

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parties were to bear their own costs and to share the arbitration costs, with the owner paying 40% and the charter paying 60%). A study of ICC cases rendered between 1989 and 1991 found that where claimant won all or most of what it claimed, the arbitrators ordered in 80% of the cases the respondent to pay "all or most . . . of the arbitrators fees and expenses, although the arbitrators occasionally split the costs between the parties in such circumstances." Schwartz, *supra* note 8, at 21–22. In half of the cases surveyed, the arbitrators order the losing party "to pay all or part of the claimant's 'normal legal costs.'" *Id.* at 22.

95. The rules of the Society of Maritime Arbitrators, Inc. (SMA) give the tribunal broad discretion to award costs and fees. *See* Maritime Arbitration Rules of the Society of Maritime Arbitrators, Inc. § 30, *reprinted in* WORLD TRADE & ARB. MAT'L 227, 233 (Jan. 1995) (stating that "the Panel, in its Award, shall assess arbitration expenses and fees . . . and shall address the issue of attorneys' fees and expenses or costs incurred by the parties" and that it is "empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case").

96. Euroleader Shipping and Trading Corp. v. Stellar Lines, S.A., SMA No. 3528, at 8 (May 7, 1999) (LEXIS, Admrty Library, Usawards File).

97. *Id.*

98. *See* SMA No. 3118 (Nov. 1, 1994), *reprinted in* 7 WORLD TRADE & ARB. MAT'L 129 (1995).

99. *See id.* at 136.

100. Kuwait Petroleum Corp. v. Westport Petroleum Corp., SMA No. 3244 (Jan. 19, 1996) (LEXIS, Admrty Library, Usawards File).

award of legal costs to either party" and, as a result, "[e]ach party will bear its own costs of bringing this matter to arbitration."[101]

While in all three cases one party completely prevailed, the tribunal in each case reached a different result with respect to the claims for costs and fees: the *Euroleader* tribunal awarded the successful party all costs and fees claimed; the *ARAMCO* tribunal awarded the prevailing party a small portion of its costs and fees; and the *Kuwait Petroleum Corp.* tribunal awarded the successful party no costs and fees. The result is the same when a party is only partially successful.

When a party has prevailed on some but not all of its claims, tribunals have taken a variety of approaches. Some tribunals have awarded a party who has partially prevailed a portion of the costs and fees claimed.[102] Others have awarded a partially successful party only a part of the costs claimed, but no attorneys' fees.[103] A number of tribunals have ordered the parties to bear their own costs and to share equally the costs and expenses of the tribunal.[104]

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101. *Id.* at 5.

102. *See* Final Award No. 6752 (ICC 1991), *reprinted in* 18 Y.B. COM. ARB. 54, 57 (1993) ("charging the first respondent for the costs of this arbitration [and ordering that party] to pay a fair part of the fees of claimant's counsel"); Award of Feb. 16, 1983 (ICC), *reprinted in* 9 Y.B. COM. ARB. 111, 123–24 (1984) (ruling that where claimants only partially succeeded on their claims, respondents bore 80% of the costs of the arbitration and owed claimants $730,704 for legal costs).

103. *See* Final Award No. 6573 (1991), *reprinted in* 20 Y.B. COM. ARB. 110, 125 (1995) (holding that respondent shall bear 80% and claimant 20% of the arbitration costs and that each party shall bear its own legal fees); Final Award No. 6829 (1992), *reprinted in* 19 Y.B. COM. ARB. 167, 183 (1994) (ordering respondent to pay fees and expenses of the arbitrators and the administrative costs of the ICC, and requiring each party to bear its own legal costs); Final Award No. 5649 (1987), *reprinted in* 14 Y.B. COM. ARB. 174, 179 (1989) (ordering that claimant pay three fourths of the ICC's administrative fees and arbitrators' fees, and that respondent pay one fourth); Final Award No. 3267 (1984), *reprinted in* 12 Y.B. COM. ARB. 87, 96 (1987) (ordering claimant to pay one third of the costs of the arbitration and respondent to pay two thirds of the costs, and that each party bear its own legal costs); Final Award No. 2090 (1976), *reprinted in* 5 Y.B. COM. ARB. 131, 132–133 (1981) (ruling that where claimant recovered FF 250,000 of FF 1,325,910 that it originally sought from respondent, respondent should bear two thirds of the arbitration costs and claimant one third).

104. *See* Kemoil, Ltd. v. K/S Bertina, SMA No. 3144 (Feb. 17, 1995), *reprinted in* 7 WORLD TRADE & ARB. MAT'L 241, 260 (1995) (ordering the parties to bear their own fees and costs and to share equally the cost of the hearing transcripts where each party was partially successful on their respective claims); Award of July 23, 1981 (Ad Hoc), *reprinted in* 8 Y.B. COM. ARB. 89, 94 (1983) (same); Great Beluga Shipping Inc. v. Bayoil Inc., SMA Award No. 3033 (Dec. 21, 1993) (LEXIS, Admrty Library, Usawds File) (ordering each party to bear their own costs where claimant did not fully prevail on its claim); Société Ouest-Africaine des Bétons Industriels (SOABI) v. Republic of Senegal, Award of Feb. 25, 1988 (ICSID) (same), *reprinted in* 17 Y.B. COM. ARB. 42, 69 (1992); Amco Asia Corp. v. Republic of Indonesia, Final Award of Jun. 5, 1990 (ICSID), *reprinted in* 17 Y.B. COM. ARB. 73, 105 (1992) (same); Final Award No. 7181 (ICC 1992), *reprinted in* 21 Y.B. COM. ARB. 99, 112 (1996); Award of Feb. 17, 1984, *reprinted in* 10 Y.B. COM. ARB. 52, 60 (ICC 1985) (same).

Tribunals also differ on how to allocate costs and fees between the parties. Some tribunals award costs and fees in proportion to the parties' level of success on their claims.[105] For example, in *Final Award No. 5759*, the partially successful claimant requested that the respondent pay all costs incurred by the claimant during the arbitration.[106] The tribunal held that, because the claimant prevailed on 75% of the claims it raised in the arbitration, it was entitled to have 75% of its arbitration costs paid by the respondent.[107]

Other tribunals offset the reimbursement claims. In *Final Award No. 7047*, the tribunal determined that the claimant prevailed on 50% of its claims.[108] As a result, it was entitled to be reimbursed for 50% of its costs and fees less its obligation to reimburse respondents for 50% of their costs and fees, because respondents "had the same proportional success with their defence." The claims offset each other and thus each party was required to bear its own legal costs, and to split the costs of the tribunal.[109]

In sum, while arbitral rules may provide the tribunal with the authority to award costs and fees, they typically fail to provide sufficient guidance on how to do so. As a result, tribunal awards of costs and fees pursuant to arbitral rules have often been arbitrary and inconsistent.

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105. *See, e.g.*, Final Award No. 6998 (ICC 1994), *reprinted in* 21 Y.B. COM. ARB. 54, 78 (1996) (awarding claimants 75% of the costs of the arbitration and legal expenses); Award of Aug. 13, 1981 (ICC), *reprinted in* 9 Y.B. COM. ARB. 124, 130–31 (1984) (ruling that, where respondent was three fifths at fault and claimant two fifths, respondent should pay three fifths of the costs of the arbitration and claimant two fifths); *see also* Final Award No. 7047 (ICC 1994), *reprinted in* 21 Y.B. COM. ARB. 79, 98 (1996) (ordering, where claimant and respondents each succeeded on 50% of their respective claims, claimant was responsible for 50% of the costs and that each of the two respondents were responsible for 25%, and that each of the parties bear their own legal costs). *But see* Final Award No. 2795 (ICC 1977), *reprinted in* 4 Y.B. COM. ARB. 210, 212 (1979) (awarding claimant damages but also ordering claimant to pay 90% of the costs of the arbitration).

106. Final Award No. 5759 (ICC 1989), *reprinted in* 18 Y.B. COM. ARB. 34, 42–43 (1993).

107. *Id. But cf.* ICC Nos. 3099 and 3100 (May 30, 1979), *reprinted in* 7 Y.B. COM. ARB. 87, 95 (ruling that, although claimant sought $13 million in damages and recovered only $1.35 million, respondent should "bear not only all of the costs of the arbitration, but also the normal legal costs of claimant").

108. Final Award No. 7047 (ICC 1994), *reprinted in* 21 Y.B. COM. ARB. 79, 98 (1996).

109. *Id. See also* Final Award No. 1250 (ICC 1964), *reprinted in* 5 Y.B. COM. ARB. 168, 170 (1980) (awarding claimant damages for one year of lost profit under the disputed contract, although claimant had claimed two years, and ruling that "each party had to pay the costs it had incurred for the arbitration, and that they each had to pay half of the fees and expenses of the arbitrators").

D. *Fairness and Reasonableness*

Some tribunals do not apply a particular law to a claim for costs and fees, but instead rely on principles of fairness and reasonableness.[110] The advantage of applying principles of fairness is that it allows arbitrators to tailor awards of costs and fees to the circumstances of each case. However, this flexibility makes it possible that awards will vary substantially from case to case because individual perceptions of what is fair or reasonable can differ significantly.

In *SPP Ltd. v. Arab Republic of Egypt*, for example, the claimant sought $42.5 million in damages, but the tribunal awarded it $12.5 million.[111] Although the tribunal recognized that the sum awarded was "significantly less than what was requested," it determined that the "right course to follow" was to award the claimant 80% of its arbitration and legal costs.[112]

In *Final Award No. 6527*, another tribunal faced with similar circumstances came to a different conclusion.[113] There, the tribunal determined that the claimant's cause of action was justified. However, because the tribunal believed that the damages sought were excessive,[114] it ruled that under the circumstances it was "appropriate [that] each party . . . bear its own legal costs and for the parties to share equally the other costs of the proceedings."[115]

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110. *See* Bonair Trading N.A., Ltd. v. Bessie Compania Naviera, S.A., SMA Award No. 2226 (Sept. 30, 1985), *reprinted in* 12 Y.B. COM. ARB. 162, 164–65 (1987); Final Award No. 5649 (ICC 1987), *reprinted in* 14 Y.B. COM. ARB. 174, 179 (1989); Final Award No. 6197 (ICC 1995), *reprinted in* 23 Y.B. COM. ARB. 13, 29 (1998); Final Award No. 7301 (ICC 1993), *reprinted in* 23 Y.B. COM. ARB. 42, 48 (1998). Related to this approach is the concept of *amiable compositeur*, which allows the arbitrator to decide the dispute on the basis of equity and fairness, rather than the strict application of a given law. Most institutional rules do not permit this option unless specifically so agreed by the parties. *See* REDFERN & HUNTER, *supra* note 6, at 92; BORN, *supra* note 84, at 135. *See also* Final Award No. 3267 (1984), *reprinted in* 12 Y.B. COM. ARB. 87, 89–96 (1989) (discussing the scope and nature of the powers of arbitrators acting as *amiable compositeurs*).

111. SPP (Middle East) Ltd. v. Arab Republic of Egypt, ICC No. YD/AS No. 3493 (Feb. 16, 1983), *reprinted in* 9 Y.B. COM. ARB. 111, 122–23 (1984).

112. *Id.* at 123. Similarly, in *Award of May 30, 1979*, an ICC panel awarded claimant all its arbitration and legal costs although the claimant claimed $13 million in damages and was only awarded $1.4 million. *Award of May 30, 1979* (ICC), *reprinted in* 7 Y.B. COM. ARB. 87, 95.

113. Final Award No. 6527 (ICC 1991), *reprinted in* 18 Y.B. COM. ARB. 44, 53 (1993).

114. *Id.*

115. *Id. But see Bayway Refining Co. v. SeaRiver Maritime Inc.*, SMA Award No. 3489 at 7–8 (Dec. 4, 1998) (LEXIS, Admrty Library, Usawds File). There, Bayway Refining Co. claimed that SeaRiver Maritime, Inc.'s vessels had damaged its cargo during transportation. SeaRiver counterclaimed that it was entitled to damages for detention, fuel costs and dead-freight amounting to approximately $184,000. Each side also claimed attorneys' fees and costs pursuant to a clause that gave the arbitrators the authority to award reasonable fees and

By contrast, in *Norse Management Co. (PTE) Ltd. v. ATI Int'l Ltd.*, the claimant prevailed entirely on its claim for monies owed under its charter agreement with respondent and the tribunal awarded claimant all damages sought. With respect to attorneys' fees, however, the tribunal deemed it reasonable to award the claimant only 60% of the fees sought.[116]

These cases illustrate that doctrines of fairness and reasonableness allow the arbitrators to exercise wide discretion in awarding costs and fees. This ultimately leads to a lack of uniformity.

* * *

This survey of tribunal decisions reveals that "[i]t is impossible to identify any general practice as to the treatment of costs in international commercial arbitrations."[117] Moreover, the methods used by arbitrators to award costs and fees have led to inconsistent and arbitrary awards. In similar cases, arbitrators have reached different conclusions on whether costs and fees should be awarded and, in cases where they are awarded, there is no consensus on the amount of costs and fees that should be paid to the prevailing party.

This diversity in practices and rules has led to similarly situated parties receiving vastly different amounts for costs and fees.[118] In addition, it has made it difficult, if not impossible, for parties to predict with any degree of certainty the outcome of a claim for costs and fees, which may be financially significant. The lack of predictability and certainty

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costs. The arbitrators denied Bayway's cargo damage claim and awarded SeaRiver $122,000 in damages, or 66% of the amount it claimed. With respect to SeaRiver's claim for costs and fees, which amounted to $47,000, the panel awarded it $31,000, or 66% of the fees sought.

116. Norse Management Co. (PTE) Ltd. v. ATI International Ltd., SMA Award No. 1691 (June 10, 1982) (LEXIS, Admrty Library, Usawds File) (finding it reasonable to award Charterer 60% of its attorneys' fees although Charterer prevailed almost entirely on its claim); *see Bonaire Trading N.A., Ltd.*, 12 Y.B. COM. ARB. at 164–65 (awarding respondent less than 50% of the legal costs requested even though respondent had participated in four hearings before the tribunal and claimant's claims were dismissed with prejudice for failure to prosecute); *cf.* Monte Mabu Shipping Corp. v. World Trade Group, Inc., SMA Award No. 1239 (June 19, 1978) (LEXIS, Admrty Library, Usawds File) (denying Owner's claim for attorneys' fees and awarding Owner 75% of the arbitrator fees even though Owner prevailed on almost all of its claims).

117. *See* REDFERN & HUNTER, *supra* note 6, at 407; *see* Nurick, *supra* note 87, at 58 (stating "there is no uniform pattern in the cases" awarding costs and fees).

118. Bühler, *supra* note 91, at 152 (stating that "perhaps [the] most disappointing features of the ICC Cost system are the failure of arbitrators to rationalize the exercise of their discretion in making the apportionment of costs and that allocations vary enormously without apparent justification from one arbitration to another").

on this issue makes it difficult for parties to evaluate their case and settle the dispute.[119] It also undermines the legitimacy of the arbitral process.[120]

III. A Model Approach for Awarding Attorneys' Fees and Costs

The problems associated with the current way that arbitral tribunals evaluate claims for costs and fees could be remedied by adopting the following model.[121] The model could apply to an international arbitration in a variety of ways. The model could be included in a country's laws governing international arbitrations, becoming applicable through a choice of law analysis.[122] This form of the model is set forth below and will be discussed in the following sections. With minor revisions, the model also could be inserted as a provision in the parties' agreement[123] or incorporated into a set of arbitral rules.[124]

In general, the model recognizes any agreement between the parties as the primary authority for resolving claims for costs. In the absence of an agreement to the contrary, it explicitly empowers the arbitral tribunal to adjudicate claims for costs and fees and sets forth guidelines for the tribunals to follow in evaluating such claims. The model states:

> Costs and Fees
>
> (1) The parties shall be free to agree on rules regarding the costs of the arbitration either directly or by reference to arbitral rules.
>
> (2) Unless the agreement of the parties provides otherwise, either directly of by reference to arbitral rules, the following rules apply:

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119. *See id.* (noting that for parties "in any given arbitration such allocations [of costs and fees] are unpredictable and uncertain").

120. *See* Born, *supra* note 84, at 5–8 (discussing neutrality and predictability as essential aspects of arbitration).

121. Neither the model nor the text of this article address the issue of security for costs as it is beyond the scope of the article and is, in itself, a complicated issue affected by the variety of approaches utilized by different countries.

122. In the United States, this model language may be adopted into either state statutes or a federal statute. In addition, the model language is designed to apply only to international arbitrations and does not apply in domestic disputes.

123. *See* Appendix A.

124. *See* Appendix B.

(a) *Authority to Award Costs of the Arbitration.* The arbitral tribunal shall have the authority to make an award allocating the costs of the arbitration between the parties.

(b) *Allocating Costs of the Arbitration.* The costs of the arbitration shall in principle be borne by the unsuccessful party. However, at its discretion, the tribunal may (i) apportion such costs, in whole or in part, between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, or (ii) otherwise depart from this rule for special reasons.

(c) *Defining Costs of the Arbitration.* The costs of the arbitration shall be reasonable in amount and shall include but not be limited to:

(i) the fees and expenses of the arbitral tribunal;

(ii) any fees and expenses of the appointing authority;

(ii) the costs of expert advice and of other assistance required by the arbitral tribunal;

(iii) the travel and other expenses of witnesses; and

(iv) the legal or other costs of the parties.[125]

A. *Enforcing the Parties' Agreement*

The model requires tribunals to enforce any agreement by the parties on the payment of costs and fees. Such an agreement can be explicitly

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125. The model does not explicitly provide that the arbitrators must state the reasons for an award of costs and fees because many national laws as well as the most widely used international arbitration rules provide for reasoned awards and it is the settled practice for arbitrators to issue reasoned awards in international arbitrations. *See* Donald Francis Donovan & David W. Rivkin, *International Arbitration & Dispute Resolution*, P.L.I. COMMERCIAL L. & PRAC. COURSE HANDBOOK SER. 23 (Mar. 1999); REDFERN & HUNTER, *supra* note 6, at 84; BORN, *supra* note 84, at 94; HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY & COMMENTARY 837–38 (1989). To explicitly require the tribunal to set forth the reasons for awarding costs and fees, the following provision may be added to the model after section 2(c)(iv): (3) In any order for costs of the arbitration, the tribunal shall state the reasons for the award.

For a discussion of reasoned awards in arbitration see, Thomas E. Carbonneau, *Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L L. 579 (1985); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between reasoned Awards and Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443 (1998).

set forth by the parties or it can be incorporated by reference to arbitral rules that provide the tribunal with the authority to award costs and fees. This approach would create predictability and certainty for transnational contracting parties who agree to arbitrate any disputes. Moreover, it protects party autonomy by giving parties the freedom to choose and be bound by procedures to which they mutually agree.[126]

It is a well recognized principle that "parties to an international contract have the power to define the process by which any future contract dispute will be settled."[127] They may define, among other things, the scope of issues for arbitration,[128] the situs of the arbitration,[129] the substantive law to be applied,[130] and the procedural rules to govern the dispute.[131] Accordingly, parties should be free to agree upon the rules for the payment of costs and fees in the event of arbitration, and these agreements should be enforced by courts and tribunals.[132] In fact, this

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126. *See* Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY? 3, 5 (Richard B. Lillich & Charles N. Brower eds., 1993); Karl-Heinz Böckstiegel, *Public Policy and Arbitrability*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 177, 178 (Pieter Sanders ed., 1986); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 HASTINGS INT'L & COMP. L. REV. 235, 268 (1985); Craig M. Gertz, Comment, *The Selection of Choice of Law Provisions in International Commercial Arbitration: A Case for Contractual Dececage*, 12 NW. J. INT'L L. & BUS. 163 (1991).

127. John Y. Gotanda, *Awarding Punitive Damages in International Commercial Arbitrations in the Wake of Mastrobuono v. Shearson Lehman Hutton, Inc.*, 38 HARV. INT'L L.J. 59, 88 (1997).

128. *See* Bernard G. Poznanski, *The Nature and Extent of an Arbitrator's Powers in International Commercial Arbitration*, 4 J. INT'L ARB. 71, 84 (Sept. 1987).

129. *See* REISMAN ET AL., *supra* note 77, at 172 (1997).

130. *See* Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 227, 254 (Pieter Sanders ed., 1986); *see also* UNCITRAL Model Law at art. 28(1), *reprinted in* HOLTZMANN & NEUHAUS, *supra* note 125, at 746 ("The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.").

131. *See* Act on the Reform of the Law Relating to Arbitral Proceedings of 22 December 1997, § 1042, Bundesgesetzblatt part I, at 3224 (1997) (unofficial translation by the German Institution of Arbitration and the German Federal Ministry of Justice 1998) [hereinafter German Arbitration Law of 1998] (stating that "subject to the mandatory provisions of this Book, the parties are free to determine the procedure themselves or by reference to a set of arbitration rules"); Swiss Private International Law Statute of 18 December 1987, 182(1) (stating that "the parties may directly, or by reference to arbitration rules, determine the arbitral procedure"); Geneva Protocol of 1923 art. 2 (providing that "the arbitral procedure . . . shall be governed by the will of the parties"); *see also* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(d) (permitting nonrecognition of an arbitral award if "the arbitral procedure was not in accordance with the agreement of the parties"), June 10, 1958, 17 U.S.T. 1270, 575 U.N.T.S. 159 (codified at 22 U.S.C. §§ 201–09 (1998) [hereinafter New York Convention].

132. *See supra* note 57 and accompanying text.

position is already in accord with the practice of tribunals in international commercial arbitrations. Arbitrators typically honor express agreements allocating costs and fees.[133] They also generally assume the power to award costs and fees if the arbitral rules agreed on by the parties give the tribunal this authority.[134]

In some cases, an express provision contained in the parties' agreement may conflict with the arbitral rules on the awarding of costs and fees. In these circumstances, the general rule is that the express provision controls.[135] This principle is illustrated by the tribunal's decision in *Final Award of May 27, 1991*.[136]

There, the arbitration agreement stated that all of the costs of the arbitration, including attorneys' fees, were to be borne equally by the parties, except in the event of a willful default.[137] However, the agreement also stated that all disputes were to be settled by arbitration under the United Nations Commission on International Trade Law Arbitration Rules, which provide that the costs of arbitration shall in principle be borne by the losing party.[138] In resolving the claim for costs and fees, the tribunal held that the relevant provisions of the UNCITRAL Rules were inapplicable, since the parties had expressly provided for an alternative method of cost allocation in their agreement.[139] The tribunal found no

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133. *See, e.g.*, Final Award Nos. 7385 & 7402 (ICC 1992), *reprinted in* 18 Y.B. COM. ARB. 68, 78–79 (1993) (requiring that costs be equally divided between buyer and seller as provided in the parties' contract); Final Award No. 3572 (ICC 1982), *reprinted in* 14 Y.B. COM. ARB. 111, 121 (1989) (awarding costs and fees to the non-defaulting parties as provided for in the operating agreement); Final Award of Nov. 17, 1994 (Ad Hoc), *reprinted in* 21 Y.B. COM. ARB. 13, 38 (1996) (ruling that the parties shall bear the costs equally and stating that in determining who shall bear the costs of the arbitration, the tribunal will not look beyond the express and clear words of the parties agreement); Final Award No. 6320 (ICC 1992), *reprinted in* 20 Y.B. COM. ARB. 62, 108–09 (1995) (requiring that each party pay their own costs as provided by the explicit language of the parties' contract).

134. *See, e.g.*, Awards of Aug. 18, 1994 & Nov. 8, 1994 (Ad Hoc), *reprinted in* 21 Y.B. COM. ARB. 40, 45–46 (1996) (applying the arbitration rules of the United Nations Economic Commission for Europe and ruling that the costs of arbitration shall be borne equally by both parties and that each shall bear its own legal expenses); Marine Drive Complex Ltd. v. Ghana (Ad Hoc Oct. 27, 1989), *reprinted in* 19 Y.B. COM. ARB. 11, 30–32 (1994) (applying UNCITRAL Rules article 38 and ordering respondent to pay $84,781.14 for fees and costs); Final Award No. 6829 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 167, 183 (1994) (applying article 20 of the 1988 ICC Rules (permitting allocation and award of costs) and ordering respondent to pay the fees and costs of arbitration, but requiring each party to bear its own legal costs).

135. *See* Szuts v. Reynolds, 931 F.2d 830, 831–32 (11th Cir. 1991); Final Award of May 27, 1991 (Ad Hoc), *reprinted in* 17 Y.B. COM. ARB. 11, 26 (1992).

136. *Id.*

137. *Id.*

138. *See* United Nations Commission on International Trade Law Arbitration Rules art. 40, *reprinted in* 15 I.L.M. 701 (1976) [hereinafter UNCITRAL Rules].

139. *See* Final Award of May 27, 1991, 17 Y.B. COM. ARB. at 27.

willful default and ordered the parties to share the arbitration costs equally and to bear their own costs for attorneys' fees, experts, travel, and other expenses.[140]

It is important to note that deference to the agreement of the parties is not absolute. Arbitrators are not bound by the parties' agreement if there is a compelling reason to disregard it.[141] This exception typically "is narrowly limited to those situations where upholding the provision would violate some fundamental public policy, be clearly against the parties' true intentions, or manifest some extreme prejudice or injustice to one party."[142]

In general, the American rule does not amount to a fundamental United States public policy that would require an arbitrator sitting in the United States or applying American law to disregard a contractual provision on the payment of costs and fees.[143] Indeed, as noted in section I(c), most states permit arbitrators to award costs and fees if the parties' agreement provides the arbitrator with the power to do so.[144]

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140. *Id.* An agreement by the parties on the awarding of costs and fees also may conflict with national law if the model is not adopted by the relevant country but the parties incorporate the model into their agreement (either by express provision or by agreeing to apply arbitral rules that adopt the model). Here again, courts and tribunals should give effect to the parties' agreement on the awarding of costs and fees notwithstanding national law to the contrary unless to do so would violate a fundamental public policy. *See generally* Clarendon Mktg., Inc. v. CT Chem. (USA) Inc., No. 93 Civ. 0285 [PKL], U.S. Dist. LEXIS 10796 (S.D.N.Y. Aug. 4, 1993) (confirming an award of attorneys' fees to the prevailing party when the agreement stated that arbitration would be governed by New York law, which does not allow for the awarding of attorneys' fees unless provided in the agreement, and the Maritime Arbitration Rules (SMA), which allow for the discretionary award of fees); *see also infra* text accompany notes 143–148.

141. *See, e.g.*, Partial Award No. 3267 (ICC 1979), *reprinted in* 7 Y.B. COM. ARB. 96, 105 (1982) (stating that "it is a generally accepted principle in international arbitration that the paramount duty of the arbitrator . . . is to apply the contract of the parties, unless it is shown that the provisions relied on are clearly against the true intent of the parties, or violate a basic commonly accepted principle of public policy"); *see also* Marc Blessing, *Mandatory Rules of Law Versus Party Autonomy in International Arbitration*, 14 J. INT'L ARB. 23 (Dec. 1997).

142. John Y. Gotanda, *Awarding Interest in International Commercial Arbitration*, 90 AM. J. INT'L L. 40, 57 (1996); *see* R.J. Reynolds Tobacco Co. v. Iran, 7 Iran-U.S. Cl. Trib. Rep. 181, 192 (1984); 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1981, 1990 (1943).

143. *See* OEHMKE, *supra* note 45, at §§ 123:08–123:09 (noting that "public policy does not prohibit parties from agreeing to an award of attorneys' fees"); *see also* Hope Assoc., Inc. v. Marvin M. Black Co., 422 S.E.2d 918, 919 (Ga. Ct. App. 1992).

144. *See supra* note 57. *See also* In re Application of RAS Sec. Corp., 674 N.Y.S.2d 303, 303 (N.Y. App. Div. 1998) (holding that arbitrators were empowered to award attorneys' fees pursuant to the parties' agreement); *accord* Advanced Tech. Assoc., Inc. v. Seligman, 39 F. Supp. 2d 1311, 1317 (D. Kan. 1999); Sylvester v. Abdalla, 903 P.2d 410, 412 (Or. Ct. App. 1995); Rifkind & Sterling, Inc. v. Rifkind, 33 Cal. Rptr. 2d 828, 831 (Cal. Ct. App. 1994).

The rationale for enforcing agreements on the awarding of costs and fees was explained by the Georgia Court of Appeals in *Hope & Assoc., Inc. v. Marvin Black Co.*[145] At issue in that case was whether a contract clause giving the arbitrator the authority to award attorneys' fees was prohibited by statute or public policy. The court initially noted that the state's arbitration statute provided that "[u]nless otherwise provided in the agreement to arbitrate, the arbitrator's expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award."[146] This statute, the court ruled, did not prohibit parties from contracting for the recovery of attorneys' fees in arbitration. According to the court, to construe the statute to preclude parties from being able to contract for the recovery of attorneys' fees would amount to a "'restraint on the common-law right of the freedom to contract."[147] The court also ruled that a contract for the recovery of attorneys' fees in arbitration would not violate public policy. The court explained:

> There is no general public policy against contracting for the recovery of attorneys' fees. . . . Indeed, the public policy of this state favors enforcement of the terms of an arbitration agreement. . . . If the parties contract for attorneys' fees, that agreement will be enforced."[148]

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145. *Hope Assoc. Inc.*, *supra* note 143, at 918.

146. *Id.* at 919 (quoting GA. CODE ANN. § 9-9-17 (Supp. 1999)). This statutory provision is similar to section 10 of the Uniform Arbitration Act, which has been adopted by most states. *See supra* notes 49–50.

147. Fireman's Fund Ins. Co. v. Pehor, 31 S.E. 779 (1898), *quoted in* Hope & Assoc., Inc., 422 S.E.2d at 919.

148. *Id.* As noted, a few countries, such as England and Australia, have statutes which provide that "an agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is only valid if made after the dispute in question has arisen." Arbitration Act, 1996, ch. 23, § 60 (Eng.). *See, e.g.*, Victoria Commercial Arbitration Act, 1984, art. 34(3) (Austl.). It appears that these statutes are narrowly construed and would not conflict with the model if it were adopted by agreement of the parties. These statutes prohibit agreements that prevent or discourage a party from employing proper legal representation. *See* John Uff, *The Predictability Factor in International Arbitration, in* COMMERCIAL DISPUTE RESOLUTION 156 (Odams & Higgins eds., 1996); *see also* Windvale Ltd. v. Darlington Insulation Co. Ltd., THE TIMES, 22 December 1983 (Chancery Div.) (striking down as invalid an agreement in which one party agreed in advance to pay the costs of the arbitration). These laws have not been applied, nor should they be applied, to agreements on costs and fees which promote cost-effective dispute resolution. *See* Uff, at 156; O'REILLY, *supra* note 68, § 1.5, at 5. Because the rules set forth in the model will create a more equitable and efficient dispute resolution process and do not effectively discourage a party from acquiring legal representation, an agreement by the parties adopting the model should not violate such laws.

The model also would not prevent arbitral decisions awarding costs and attorneys' fees from being enforced by state parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[149] Under the New York Convention, which has been adopted by over 100 countries, arbitral awards rendered in signatory countries are enforceable in all other signatory countries, subject to a narrow list of defenses.[150] The most relevant exception is that an award need not be enforced if it "would be contrary to the public policy of that country."[151] In general, however, these public policy exceptions are minimal and a domestic law prohibiting awards of costs or fees would not justify the nonrecognition of the award.[152] For example, United States courts have generally enforced foreign arbitral awards of costs and attorneys' fees despite adhering to the American rule in domestic cases.[153]

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149. New York Convention, *supra* note 131. For discussions of the New York Convention, see ALBERT VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 (1981); Peter D. Trooboff & Corinne A. Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in U.S. Courts*, 17 VA. J. INT'L L. 469 (1977); Robert B. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORD. 343 (1983).

150. New York Convention, *supra* note 131, at art. V.

151. *Id.* at art. V(2)(b). The scope of the New York Convention's public policy exception is unclear. Some countries believe it applies to national public policy. Others, such as France, Lebanon and Italy, believe that it applies to international public policy. Unlike domestic public policy, which includes all of the imperative rules of the State in which enforcement is sought, international public policy encompasses only those basic notions of morality and justice accepted by civilized countries. *See* Pierre Lalive, *Transnational (or Truly International) Public Policy*, *in* COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION 257, 257–318 (Pieter Sanders ed. 1986); Mark A. Buchanan, *Public Policy and International Commercial Arbitration*, 26 AM. BUS. L.J. 511, 513–31 (1988); *see also* Robert A.J. Barry, *Application of the Public Policy Exception to the Enforcement of Foreign Arbitral Awards Under the New York Convention: A Modest Proposal*, 51 TEMP. L.Q. 832 (1978); Jay R. Sever, Comment, *The Relaxation of Inarbitrability and Public Policy Checks on U.S. and Foreign Arbitration: Arbitration Out of Control?*, 65 TUL. L. REV. 1661 (1991).

152. *See* BORN, *supra* note 84, at 627 ("The 'American rule' does not rise to the level of U.S. public policy. . . ." The author further notes that a U.S. court asked to recognize an award of costs and attorneys' fees under the New York Convention should do so.).

153. *See* Compagnie des Bauxites de Guinee v. Hammermills, Inc., Civ. A. No. 90-0169 (JGP), 1991 WL 122712, at *1–*9 (D.D.C. May 29, 1992) (confirming and enforcing an ICC award, which included $993,220.60 for normal legal costs and $145,441.78 for arbitration costs); *see also* Employers Ins. Wausau v. Banco Seguros del Estado, 34 F. Supp. 2d 1115, 1118–22 (E.D. Wis. 1999) (confirming under the Inter-American Convention on International Commercial Arbitration an award that included $930,730 in attorneys' fees and costs).

B. *Default Rules*

In the absence of an agreement by the parties on the awarding of costs and fees, either directly or by reference to arbitral rules, the model sets forth a framework under which the tribunal may evaluate claims for costs and fees. The framework would also apply when the parties' agreement or the applicable arbitral rules fail to address any of the matters in the model. In such a case, the provisions of the model would operate as a set of default rules, unless they are excluded by or are otherwise inconsistent with a provision of the parties' agreement or the arbitral rules selected by the parties.

1. Authorizing the Tribunal to Award Costs and Fees

The model makes clear that, in the absence of an agreement by the parties, the arbitral tribunal has the power to allocate costs and fees. To a large extent, arbitrators already have such authority. The most widely used arbitral rules provide arbitrators with the authority to award costs and fees, either through specific guidelines or through the grant of broad discretion.[154] As a result, in most cases a tribunal will possess the power to issue such an award.[155] In addition, statutes in many countries authorize arbitrators to award costs and fees.[156] Moreover, even where there is no explicit authority, some courts have held that arbitrators have the implied power to do so.[157] As noted, however, some courts have held that arbitrators lack the authority to award costs and fees, and in particular attorneys' fees, unless the agreement of the parties explicitly provides them with the authority to do so.[158] Thus, the model is needed to ensure an arbitral tribunal's ability to award costs and fees.

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154. *See supra* notes 87–90 and accompanying text.

155. *See, e.g.*, Marine Drive Complex Ltd. v. Ghana (Ad Hoc—UNCITRAL Oct. 27, 1989), *reprinted in* 19 Y.B. COM. ARB. 11, 30–32 (1994) (applying UNCITRAL Rules and ordering respondent to pay $84,781.14 for fees and costs); Final Award No. 6829 (ICC 1992), *reprinted in* 19 Y.B. COM. ARB. 167, 183 (1994) (applying art. 20 of the 1988 ICC Rules (permitting allocation and award of costs) and ordering respondent to pay the fees and costs of arbitration).

156. *See supra* notes 31–37 and accompanying text.

157. *See* Painewebber Inc. v. Bybyk, 81 F.3d 1193 (2nd Cir. 1996); MCT Shipping Corp. v. Sabet, 497 F. Supp. 1078 (S.D.N.Y. 1980); J.R. Snyder Co. v. Soble, 226 N.W.2d 276 (Mich. Ct. App. 1975); Commercial Metals Co. v. International Union Marine Corp., 1973 A.M.C. 515 (S.D.N.Y. 1972). *But see* Floors, Inc. v. B.G. Danis of New Eng., Inc., 401 N.E.2d 839 (Mass. 1980) (ruling that, in order for an arbitrator to have the authority to award costs and fees, the agreement must expressly grant the tribunal the power to do so).

158. *See supra* notes 56–57.

2. Allocating Costs and Fees

The model provides a framework for allocating costs and fees. It first states that the tribunal should require the losing party to pay the "costs of the arbitration," which include the attorneys' fees of the prevailing party. However, the model gives the tribunal the flexibility to deviate from this principle. The tribunal can either: (1) apportion the costs of the arbitration "between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case," or (2) "otherwise depart from [the model] for special reasons."

a. Presuming that the Unsuccessful Party Will Bear the Costs of the Arbitration

The model adopts a presumption in favor of the losing party reimbursing the prevailing party for its costs and fees. Accordingly, it would bring the awarding of costs and fees in arbitration in accord with the practice followed by most countries with respect to allocation of litigation costs. In addition, it would further the goals of fully compensating injured parties and deterring parties from pursuing nonmeritorius claims. It would also bring uniformity and predictability to allocating costs and fees in international arbitrations.

As noted in section I, the principle that costs follow the event is almost universally recognized.[159] Indeed, it is so well-accepted that it may be viewed as a general principle of international law.[160] Thus, the model's adoption of the costs follow the event principle in arbitration simply codifies the prevailing practice in the international arena.[161]

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159. *See supra* notes 20–38 and accompanying text.

160. Comparative law is a fundamental source of general principles of international law. *See* Emmanuel Gaillard, *Use of General Principles of International Law in International Long-Term Contracts*, 27 INT'L BUS. LAW. 214, 216–20 (1999). To identify a general principle, it is necessary to establish that national laws converge on the issue, here the awarding of costs and attorneys' fees. This convergence suggests that the rule or practice may qualify. While convergence is necessary, unanimous support is not required. *Id.* at 216; *see* Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 ARB. INT'L 133, 146 (1990) (stating "lex mercatoria does not depend on proof of universality"). In the case of costs and attorneys' fees, since an overwhelming majority of countries award costs and fees to the prevailing party, this convergence suggests that this practice constitutes a general principle of international law. *See id.* at 146. As such, the model allocates costs and fees in a manner consistent with this generally accepted principle.

It should also be noted that some commentators have argued that arbitrators may choose to apply general principles of law in the absence of any choice of law agreement by the parties. *See* Gaillard, *supra*, at 219–20. This practice may be extended to situations where the agreement leads to ambiguity as to whether the parties intended the arbitrator to have authority to award attorneys' fees.

161. This provision of the model is also consistent with the LCIA Rules, *supra* note 88, at art. 28.4. The UNCITRAL Rules also state that the costs of the arbitration, except for the

Awarding costs and fees to the prevailing party additionally indemnifies the winning party and deters claims with little merit and vexatious actions.[162] The Swedish Procedural Law Commission explained:

> The purpose of the litigation to provide legal protection would be achieved only in incomplete measure unless the winning party also obtained compensation of the costs incurred in enforcing [its] rights. And the knowledge that the losing party generally must bear both [its] own costs and those of the other party is destined to make the parties abstain from unnecessary litigation.[163]

The proposition that the principle deters parties from pursuing weak claims is supported by an empirical study of litigation and settlement under the English and American rules.[164] According to the study, a rule requiring unsuccessful claimants to reimburse respondents for their costs and fees caused claimants to anticipate higher legal expenditures. In turn, this anticipation raised the "expected value threshold below which they will not file their claims."[165] Because claimants expect higher legal costs, the study determined, they refrained from filing speculative claims. This increased the relative frequencies of higher-probability and high-award claims.[166] Accordingly, the principle of costs follow the

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costs of legal representation, shall in principle be borne by the unsuccessful party. UNCITRAL Rules, *supra* note 88, at arts. 38, 40. Thus, there is no presumption in the UNCITRAL rules that legal costs be borne by the unsuccessful party. Instead, the UNCITRAL Rules state "tribunal shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable." *Id.* at art. 40(2). Unlike the UNCITRAL Rules, the model contains a presumption that the losing party would bear the legal costs of the prevailing party. As more fully explained above, this would provide a more uniform and predictable approach for awarding legal costs. Furthermore, the model gives the tribunal the flexibility to depart from costs follow the event when the circumstances warrant deviating from the general principle. *See infra* notes 186–91 and accompanying text.

162. *See* Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 LAW & CONTEMP. PROBS. 37, 42 (1984).

163. Procedural Law Commission, 231 (Swed.), *reprinted in pertinent part in* Wetter & Priem, *supra* note 15, at 330.

164. *See* James W. Hughes & Edward A. Snyder, *Litigation and Settlement Under the English and American Rules: Theory and Evidence*, 38 J.L. & ECON. 225 (1995) [hereinafter *Empirical Study of English & American Rules*]; *see also* James W. Hughes & Edward A. Snyder, *The English Rule for Allocating Legal Costs: Evidence Confronts Theory*, 6 J.L. ECON. & ORG. 345 (1990).

165. *See Empirical Study of English & American Rules*, *supra* note 164, at 230.

166. *See Empirical Study of English & American Rules*, *supra* note 164, at 248–49. *But cf.* A. Michael Polinsky & Daniel L. Rubinfeld, *Does the English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?*, 27 J. LEGAL STUD. 519, 519 (1998) (concluding through an economic study that when "a standard asymmetric-information model of litiga-

event encourages claimants "to proceed more cautiously and to proceed only with higher-quality claims."[167]

To be sure, the principle that costs follow the event is no panacea. Economic literature and empirical studies of the principle that costs follow the event and the American rule indicate that, in theory, the former is more likely to increase the costs of resolving the dispute.[168] In addition, some commentators, such as Judge Richard Posner and Professor Steven Shavell, have argued that costs follow the event reduces the likelihood of settlement.[169]

In theory, the principle that costs follow the event causes parties to increase their legal expenditures. It

> encourages litigants to spend more in cases that they do bring, because the stakes of the lawsuit are higher when costs of legal services are included in the award, and because each litigant will

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tion [is used], . . . the English rule results in more low-probability-of-prevailing plaintiffs going to trial than under the American rule").

167. *Empirical Study of English & American Rules*, *supra* note 164, at 244.

168. *See generally* Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and Their Resolution*, 27 J. ECON. LIT. 1067 (1989); Avery Katz, *Measuring the Demand for Litigation: Is the English Rule Really Cheaper?*, 3 J.L. ECON. & ORG. 143 (1987); Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404 (1984); Ronald Braeutigam et al., *An Economic Analysis of Alternative Fee Shifting Systems*, 47 LAW & CONT. PROBS. 173 (1984); Robert Cooter et al., *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); Philip J. Mause, *Winner Takes All: A Re-examination of the Indemnity System*, 55 IOWA L. REV. 26 (1969).

169. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.10, at 629 (5th ed. 1998); Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 65 (1982).

Some commentators have argued that costs follow the event reduces the overall stock of legal precedents. *See* William M. Landes & Richard A. Poser, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976). This criticism of costs follow the event is less of a concern in international commercial arbitrations because tribunal awards in international arbitrations typically are private and not subject to public scrutiny, see BORN, *supra* note 84, at 94, and arbitral tribunals generally are not bound by decisions of other tribunals. *Id.*; *see* TIBOR VÁRADY ET AL., *supra* note 5, at 61–82 (discussing the sources of relevant norms in international arbitrations).

It also has been asserted that costs follow the event discourages indigent parties from filing claims, see *supra* text accompanying note 43. This also may be less of a concern in international commercial arbitrations where agreements between parties located in different countries often involve substantial sums of money and sophisticated business entities that are represented by counsel. *See* WILLIAM F. FOX, JR., INTERNATIONAL COMMERCIAL AGREEMENTS: A PRIMER ON DRAFTING NEGOTIATING AND RESOLVING DISPUTES 14 (2d ed. 1992); CRAIG ET AL., *supra* note 36, §§ 1.03-.05, at 6–10. Moreover, as more fully explained *infra*, the model's "special reasons" exception may be used by tribunals to prevent undue hardship on indigent parties, thereby reducing the possibility that costs follow the event will be unfair to indigent parties.

discount the expected marginal costs of legal services by the probability that he or she will prevail.[170]

In practice, however, the principle should not result in significantly higher legal expenditures than under the current system. The current system leaves the parties in an uncertain state as to whether the arbitral tribunal will apply the principle of costs follow the event and, because most countries follow that principle, it is likely that parties in international arbitrations already operate under the assumption that it will apply. The model thus will not likely change most parties' expectations. Moreover, the model limits excessive legal costs by requiring that reimbursable costs be "reasonable" in amount.[171]

Whether the principle that costs follow the event leads to fewer settlements than under the American rule has been the subject of much academic debate, and there appears to be no definitive answer to this question.[172] However, it is clear that parties are more likely to settle disputes under the model than under the current system. Because the current system leaves parties without any guidance as to whether the

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170. Clinton F. Becker III & Avery Katz, *The Incentive effects of Litigation Fee Shifting When Legal Standards are Uncertain*, 15 INT'L REV. L. & ECON. 205, 206 (1995). Professors James Hughes and Edward Synder add:

> [Under the English rule,] [l]itigants expect, with some positive probability, that their legal fees will be paid by their rival. The higher the litigant's subject probability of winning at trial, the lower is the party's expected marginal cost of potentially compensable expenditures. The English rule also increases the stakes – the difference between winning and losing – in litigated cases by the amount of legal costs subject to the fee-shifting rule. The greater stakes encourage efforts to influence the trial's outcome.

Hughes & Snyder, *supra* note 164, at 227.

171. *See infra* text accompanying notes 192–201 discussing allowable costs. It is important to note that the study conducted by Professors Hughes & Snyder found that higher legal costs resulting from the use of costs follow the event "[did not] disadvantage plaintiffs at trial, causing them to win fewer cases and receive smaller judgments." Hughes & Snyder, *supra* note 164, at 244.

172. *Compare* POSNER, *supra* note 169, at 629 (contending that the English rule makes litigation, not settlement, more likely than the alternative of bearing one's own costs) *and* Shavell, *supra* note 169, at 65–66 (arguing that, once a plaintiff has brought suit, settlement is less likely under the English system than under the American system) *and* Gary M. Fournier & Thomas W. Zuehlke, *Litigation and Settlement: An Empirical Approach*, 71 REV. ECON. & STAT. 189, 193 (1989) (finding that the English rule leads to lower rate of settlement) *with* Don L. Course & Linda R. Stanley, *Pretrial Bargaining Behavior Within the Shadow of the Law: Theory and Experimental Evidence*, 8 INT'L REV. L. & ECON. 161, 170–71 (1988) (finding that the rate of settlement under the English rule is higher than under the American rule). *See also* John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1119 (1991) (finding that applying the Coase theorem to the Posner/Shavell model "reveal[s] that the parties should make the same decision regarding settlement whether they live in a jurisdiction that adheres to the British rule or one that follows the American rule").

tribunal will award costs and fees, parties are often unable to predict with any degree of certainty the outcome of a claim for costs and fees. This lack of predictability ultimately impairs the ability of the parties to fully evaluate the case and consequently settle the dispute.[173] By contrast, the model provides parties with a uniform and predictable approach that in most cases costs would follow the event. As a result, parties would be able to more accurately assess their total monetary claim or exposure, which will facilitate settlements.

b. Apportioning Costs and Fees Between the Parties

The model gives the tribunal the discretion to apportion the costs and fees between the parties if it determines that it is reasonable to do so. This provides the tribunal with the flexibility to depart from a strict application of costs follow the event when the circumstances warrant apportionment.

The model does not set forth the situations that justify apportioning costs and fees between the parties nor mandate that the tribunal follow a specific method for doing so. The circumstances that may justify apportioning costs and fees between the parties vary according to the particular facts of the case. The separate opinion in *Sylvania Technical Sys. v. Iran*[174] elucidated some circumstances in which it may be appropriate for a tribunal to apportion costs:

> [W]hen one party wins a claim and another wins a counterclaim, apportionment is warranted. Similarly, some cases involve quite separate and independent causes of action, such as where a contractor claims under two separate contracts involving different building projects. If such a claimant were to be successful as to one project but lose as to the other, an apportionment of its total legal fees would be appropriate.[175]

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173. One commentator explained:

> [I]t must be a prerequisite to any international arbitration that the parties know well in advance what to budget for costs, and that the cost system of the administering institution is fully transparent from the outset, so that clients and their counsel know how their money will be spent, and if they can expect to recoup it fully or in part. Furthermore, a party should be in a position to reasonably predict the level of financial risk that it will incur in an arbitration, and the conditions it needs to satisfy to make a good claim for costs. . . . Knowing the mechanisms of a given arbitration cost system, and the impact of its application . . . may . . . help a party decide in a particular case whether it should file counterclaims, advance the arbitration costs in lieu of the other party, or simply discontinue the proceedings.

Bühler, *supra* note 91, at 117–19.

174. 8 Iran-U.S. Cl. Trib. Rep. 298, 333 (1985) (Holtzmann, J., separate opinion).

175. *Id.*

There are numerous ways for tribunals to apportion costs and fees between the parties.[176] As noted, tribunals often apportion costs based on the parties' level of success on their claims. For example, if claimant wins 80% of its claims, some tribunals will require respondent to pay its own costs and fees and 80% of claimant's costs and fees.[177]

By contrast, when a party prevails only partially some other tribunals will offset the reimbursement claims. To illustrate, assume that claimant has prevailed on 80% of its claims. Thus, claimant was unsuccessful on 20% of its claims. To determine the award of costs and fees, the tribunal would offset the portion by which claimant was successful by the portion that respondent prevailed, and, as a result, claimant would be entitled to be reimbursed for 60% of its costs and fees. Respondent would also be required to bear its own costs and fees.

This apportionment method is also known as the Welamson doctrine, named after its principle advocate, Professor Lars Welamson.[178] The Welamson doctrine appears to be the more theoretically sound approach and has been applied in many countries in both arbitration and civil litigation.[179] It is designed to allocate costs *inter partes* in proportion to the success of the parties. It also encourages both parties to make their claims as realistic as possible and thus facilitates settlements.[180]

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176. *See supra* notes 105–09 and accompanying text.

177. *See, e.g.*, Final Award No. 5759 (ICC 1989), *reprinted in* 18 Y.B. COM. ARB. 34, 42–43 (1993) (holding that because claimant prevailed on 75% of the claims it raised in the arbitration, it was entitled to have 75% of its arbitration costs paid by respondent).

178. Lars Welamson, *Principer om rattegangskostnader under debatt*, FESTSKRIFT TILL OLIVECRONA 684–709 (1964).

179. *See* Hahnkamper, *supra* note 25, at AUS-107 (providing that where a party prevails only partially, the reimbursement claims are offset by the percentage that the party was not successful); Neustupná, *supra* note 25, at CZK-88 (stating that courts allocate costs of litigation according to the principle of success in the action); *see also* RICHARD H. KREINDLER, TRANSNATIONAL LITIGATION: A BASIC PRIMER 294 (1997).

180. Professor Welamson believed that a system that awarded claimant a percentage of costs and fees based solely on the extent to which it prevailed (without offsetting it by the percentage by which it was unsuccessful) unduly favored claimant. Under Welamson's view, a claimant who prevails on only 20% of its claims should not receive 20% its fees because it lost 80% of its claims. J. Gillis Wetter and Charl Priem explained the background and theory of the Welamson doctrine as follows:

> Professor Welamson started with the proposition that strict liability for costs was a principle which was inspired by the desire to afford the creditor/plaintiff full legal protection of his legitimate claims; no person should be made to suffer from the failure of another person to discharge his lawful obligations. However, before litigation is instituted, one party (the plaintiff/creditor) claims a certain amount from another (the defendant/debtor) who is prepared to pay only a lesser amount. Both parties are then in an equal position in the sense that litigation is equally necessary for the protection of both parties' rights if they cannot settle voluntarily. On that basis, . . . it would be impossible to justify preferential treatment as to the allocation of costs of the plaintiff/creditor unless one maintained either that it was more

To apply the Welamson doctrine, the tribunal determines the "reimbursement claim," which is the percentage derived from dividing the monetary award by the monetary sum originally sought by claimant. This percentage equals the amount by which claimant is deemed to have prevailed in the dispute. The tribunal next must determine the claimant's "reimbursement obligation," if any, which is the percentage of the dispute for which claim did not prevail. To determine the amount of costs and fees that the losing party must pay to the prevailing party, the tribunal offsets the reimbursement claim by the reimbursement obligation and multiplies the final percentage by the amount of costs and fees sought. The unsuccessful party is also responsible for 100% of its own expenses.[181] The following three examples illustrate this doctrine.[182]

> important that a creditor obtained all that was due to him then that a debtor did not have to pay too much or that a creditor had a weaker position in settlement negotiations which should be compensated if litigation ensued. Both lines of reasoning were rejected as untenable, on the ground that the allocation of costs doctrines which were criticized essentially meant that lesser demands were made upon the creditor in assessing whether his claim for compensation was reasonable than upon his adversary in assessing whether the latter's offer of compensation was reasonable.... [T]he principle of strict liability for costs would dictate that each party be made to bear the consequences of his determination as to quantum in the claim....

Wetter & Priem, *supra* note 15, at 273–74.

181. The Welamson doctrine also can be stated in terms of a mathematical formula:

$x - (1 - x) = y$

If $y > 0$, then yw determines the costs and fees that respondent owes claimant.

If $y = 0$, then each party bears their own costs and fees.

If $y < 0$, then $-1yv$ determines the costs and fees that claimant owes respondent.

Definitions:

x = percentage by which claimant is deemed by the tribunal to have prevailed in the dispute.

y = reimbursement obligation (If y is greater than zero, then y is the reimbursement obligation of respondent. If y is less than zero, then y must be multiplied by -1 to determine the reimbursement obligation of claimant.)

w = claimant's costs and fees.

v = respondent's costs and fees.

182. The following is a graphical representation of the Welamson doctrine:

Percentage that Claimant Prevails	Percentage that Respondent Prevails	Percentage of Costs and Fees Claimant Recovers/Owes
100%	0%	Claimant Recovers 100%
75%	25%	Claimant Recovers 50%
50%	50%	Claimant Recovers 0; Parties Bear Their Own Costs and Fees
25%	75%	Claimant Owes Respondent 50% of Respondent's Costs and Fees
0%	100%	Claimant Owes Respondent 100% of Respondent's Costs and Fees

Case 1. Assume that claimant seeks $100,000 in a breach of contract action and the tribunal awards it $100,000 in damages. Because claimant prevailed entirely, its reimbursement claim is 100% and its reimbursement obligation is 0. Accordingly, respondent must pay all of claimant's costs and fees. Conversely, if the tribunal had awarded claimant nothing, claimant would have been responsible for all of the respondent's costs and fees.

Case 2. Assume that claimant seeks $100,000 in a breach of contract action and the tribunal awards claimant $50,000 in damages. In this case, the reimbursement claim is 50% and that claim is offset by its reimbursement obligation of 50%. As a result, the claimant is not entitled to be reimbursed for its costs and fees; each party bears its own costs.

Case 3. Assume the amount in dispute is $100,000 and claimant is awarded $70,000. Here, claimant receives 40% of its costs and fees, which is equal to the difference between the reimbursement claim of 70% and the reimbursement obligation of 30%.[183]

While the Welamson doctrine, in theory, provides tribunals with a logical method to allocate costs and fees where a party is partially successful and results in a fair distribution of expenditures between the parties, the model can be extremely difficult to apply. It appears to work well in simple cases containing a single claim for damages. However, applying the doctrine becomes difficult in complicated cases dealing with multiple claims and counterclaims, as well as cases involving both claims for damages and equitable relief.[184] In fact, commentators have pointed out that in complex cases the doctrine can become so unwieldy that it may be necessary to develop computer models to allocate costs and fees correctly.[185] Therefore, the difficulty in applying the Welamson doctrine limits its utility.

Despite the doctrine's shortcomings, its main proposition—that costs and fees should be allocated on a sliding scale proportionate to the assessment by the tribunal of the claims made by the parties—arguably

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Lars Welamson, *Svensk rättspraxis: Civil-och straffprocessrätt 1980–1987*, 74 SVENSK JURISTTIDNING 497, 531 (1989).

183. In the alternative, the amount owed to the claimant could be calculated by taking 70 percent of the claimant's costs and fees and subtracting 30 percent of the defendant's costs and fees. This approach is possible if the tribunal knows the expenditures of both parties. While an approach similar to this alternative is used to calculate damages in admiralty cases, see also THOMAS J. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 12-4, at 220–24 (2d ed. 1994), requiring that all parties submit costs probably unduly complicates the resolution of the claim for costs and fees and thus it has not been adopted by courts or tribunals. *See* O'REILLY, *supra* note 68, at 53–54.

184. Welamson himself excluded cases in which the claim was predominately related to liability and only partially to money damages. Wetter & Priem, *supra* note 15, at 273.

185. *Id.* at 275.

should be the most important factor that a tribunal should consider in deciding whether and how to apportion costs and fees between the parties under the model. This would compensate parties for legal costs expended to the extent that their claims were found to be justified by the tribunal. It would also deter parties from asserting unrealistic claims, facilitate settlements, and ultimately lead to a more efficient dispute resolution system.

c. Departing from the Model for Special Reasons

The model gives the tribunal the flexibility to depart from its provisions for awarding costs and fees for "special reasons." Special reasons may include preventing undue hardship or punishing wrongful conduct.

In certain cases, tribunals may not desire to apply the model because it will cause an indigent party undue hardship. Such a case may arise when an individual does not possess significant financial resources and must resort to international arbitration pursuant to the terms of its contract with respondent to settle a dispute. This individual may not prevail on his or her claim but nevertheless raise claims possessing an adequate legal basis and involving unsettled questions of law.[186]

The special reasons exception also may be invoked when a party has acted in bad faith or engaged in other misconduct. These are well-recognized exceptions to the costs follow the event principle[187] and are illustrated by the following two ICC decisions.

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186. *Cf. Empirical Study of English & American Rules*, *supra* note 164, at 234 (noting that when Florida adopted a mandatory fee-shifting rule for medical malpractice cases the relevant statute relieved losing indigent parties of the obligation to pay the winner's fees); Edward F. Sherman, *From "Loser Pays" to Modified Offer of Judgment Rules: Reconciling Incentives to Settle with Access to Justice*, 76 TEX. L. REV. 1863, 1868 n.27 (1988) (noting that past tort reform efforts to adopt the English rule included provisions authorizing courts to reduce or eliminate an award of attorneys' fees if doing so was necessary to "avoid undue hardship").

187. *See* Final Award No. 4629 (ICC 1989), *reprinted in* 18 Y.B. COM ARB. 11, 33 (1993) (ordering respondent to pay 90% of the costs of the arbitration because its attitude during the proceedings had delayed the resolution of the dispute); Final Award No. 7006 (ICC 1992), *reprinted in* 18 Y.B. COM ARB. 58, 67 (1993) (requiring respondents to pay the costs of the arbitration because they "unjustifiably denied liability" and refused to enter into "discussions with claimant with a view to compensating it for its loss on some realistic basis"); Bonaire Trading, N.A., Ltd. v. Bessie Compania Naviera, S.A., Award No. 2226 (SMA Sept. 30, 1985), *reprinted in* 12 Y.B. COM. ARB. 162, 164–65 (1987) (awarding costs to respondent because of claimant's unreasonable conduct during the litigation); Case Numbers 213/215 (567-213/215-3) of 7 Nov. 1995 (Iran-U.S. Cl. Trib.), *reprinted in* 22 Y.B. COM. ARB. 505, 529 (1997) (awarding additional costs to claimant because respondents had unnecessarily disrupted the arbitral process by asserting unfounded allegations).

In *Final Award No. 6527*, an ICC panel held that the respondent had wrongfully withdrawn from its contract with the claimant.[188] Nevertheless, the panel denied the claimant's claim for costs and attorneys' fees because it had requested excessive compensation.[189]

In *Final Award No. 6248*, an ICC panel denied claimant's contention that respondent breached its payment obligations under certain consulting agreements, because the agreements were "offensive secret commission agreement[s]" contrary to *bonos mores* and, therefore, null and void under applicable law.[190] The panel ruled that because the claimant had failed entirely in its claim, it must bear the costs of the fees and expenses of the arbitral tribunal and the administrative costs. However, the panel required each party to bear its own legal costs, although normally the prevailing party would be entitled to compensation for attorneys' fees. The panel concluded that "[i]t would not be fair and just if the prevailing [party] which cooperated in the conclusion and performance of the immoral agreements would be awarded its legal cost."[191]

In short, the special reasons exception gives the tribunal the ability to take into account unusual circumstances that justify deviations from the model's framework. This will prevent injustices that may arise from rigid application of the model and enable the tribunal to respond to wrongful conduct.

3. Determining Allowable Costs and Fees

The model provides a list of costs and fees falling under the costs of the arbitration that may be awarded by the tribunals. The costs and fees for which a prevailing party may be entitled to reimbursement include:

(i) the fees and expenses of the arbitral tribunal;

(ii) any fees and expenses of the appointing authority;

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188. *See* Final Award No. 6527 (ICC 1991), *reprinted in* 18 Y.B. COM. ARB. 44, 52 (1993).

189. *See id.* at 53.

190. *See* Final Award No. 6248 (ICC 1990), *reprinted in* 19 Y.B. COM. ARB. 124, 125–39 (1994).

191. *Id.*; *see* Award of 1982 (ICC), *reprinted in* 9 Y.B. COM. ARB. 105, 107–08 (1984) (holding that where the parties deliberately concluded a fictitious contract, each was to pay one half of the arbitration costs); Liberian Easter Timber Corp (LETCO) v. Liberia, ICSID Case No. ARB/83/2 (Award of Mar. 31, 1986 and Rectification of May 14, 1986), *reprinted in* 26 I.L.M. 647 (1987) (awarding LETCO costs and fees "based largely on Liberia's procedural bad faith" (i.e., "fail[ing] to partake in these arbitral proceedings, contrary to its contractual agreement," and instituting "judicial proceedings in Liberia in order to nullify the results of this arbitration")).

(iii) the costs of expert advice and of other assistance required by the arbitral tribunal;

(iv) the travel and other expenses of witnesses; and

(v) the legal or other costs of the parties.

The model additionally mandates that the amount of the award of costs and fees must be reasonable. This section of the model is designed to provide a predictable method to determine reimbursable costs and fees.

The model's list of allowable costs and fees is in conformity with the general practice in international arbitration. It is well established that the fees and expenses of the arbitral tribunal, any institutional fees and other administrative costs, are expenditures that may be included in an award of costs and fees.[192] Similarly, tribunals often award to the prevailing parties amounts spent on outside experts, travel, and witnesses.[193] Tribunals also generally allow the costs of legal representation.[194] These

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192. *See* Final Award No. 1110, 21 Y.B. COM. ARB. at 53; Final Award No. 6829, 19 Y.B. COM. ARB. at 183; Final Award No. 6248, 19 Y.B. COM. ARB. at 139; Amco Asia Corp., 17 Y.B. COM. ARB. at 105; Asian Agric. Prods. Ltd., 17 Y.B. COM. ARB. at 142; *see also* REDFERN & HUNTER, *supra* note 6, at 406–07 (listing the costs normally included as costs of the arbitral tribunal); ICC Rules, *supra* note 73, at art. 31 ("The costs of the arbitration shall include the fees and *expenses* of the arbitrators and the ICC administrative costs fixed by the Court, in accordance with the scale in force at the time of commencement of the arbitral proceedings, as well as the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.") (emphasis added); UNCITRAL Rules, *supra* note 88, at art. 38 (stating that costs include, *inter alia*, the fees of arbitral tribunal, travel, and other expenses of arbitrators).

193. *See* COB Shipping Canada, Inc. v. Trans Mktg. Houston, Inc., SMA No. 2935 (Dec. 30, 1992) (LEXIS, Admrty Library, Usawds File) (awarding *inter alia* $13,167.72 for expert witnesses and $3,067.75 for travel costs); Triumph Tankers Ltd. v. Kerr McGee Refining Corp., Final Award No. 2642 (SMA Mar. 28, 1990), *reprinted in* 18 Y.B. COM. ARB. 112, 120 (1993) (awarding *inter alia* $16,880 for expert fees); *see* REDFERN & HUNTER, *supra* note 6, at 407 (listing other professional fees that are commonly awarded).

194. *See* BORN, *supra* note 84, at 626. It should be noted that, while awarding of the costs listed above is relatively uncontroversial, arbitral tribunals have differed over whether the costs of a party's own in-house counsel qualify as allowable costs. *See* Sun Refining & Mktg. Co. v. Sheffield Trading Ltd., SMA No. 3173, 1008, 1014 (1995) (ruling that although the SMA Rules allow awards of attorneys' fees, since the prevailing party's case was handled by in-house counsel, no such fees would be allowed); Final Award No. 5759 (ICC 1989), *reprinted in* 18 Y.B. COM. ARB. 34, 43 (1993) (ruling that "Claimant's internal costs for management, employees, [and] travel . . . cannot be qualified as arbitration costs"). The rationale for refusing to award the prevailing party costs of in-house counsel is that they are salaried employees who are compensated out of the company's profits and will be paid regardless of whether they have worked on the arbitration. *See* Derin Shipping & Trading Ltd. v. Delphi Petroleum, SMA No. 3064 (Nov. 10, 1993) (LEXIS, Admrty Library, Usawds File). This view seems incorrect. As one commentator pointed out, "[l]ogically, it is hard to distinguish between the costs of outside counsel and inside counsel." Nurick, *supra* note 87, at 69. In

costs include the fees of outside counsel and disbursements such as costs of copies, telephone calls, faxes, and investigation.[195]

By requiring that the costs of the arbitration be reasonable, the model limits excessive claims for costs and fees. In general, the costs must be incurred in activities that are normal and necessary for the arbitration.[196] Judge Holtzmann adeptly explained the test of reasonableness as follows:

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addition, if a claimant uses an in-house lawyer instead of outside counsel to pursue legitimate claims before an arbitral tribunal, valuable company resources have been expended (the time of the in-house lawyer) that could have been used on other company business but for the wrongful conduct of the other party. It thus should be entitled to be reimbursed for costs of the in-house lawyer, provided that costs and fees claimed can be identified and evidenced. *See* O'REILLY, *supra* note 68, § 5.10.3, at 73; Schwartz, *supra* note 8, at 21 n.50; *see also* In re Eastwood, decd., 1975 Ch. 112 (Eng. C.A.) (awarding successful party costs of in-house lawyers).

195. *See* Asia N. Am. Eastbound Rate Agreement v. Sun Lee, Inc., SMA No. 2932 (Jan. 6, 1993) (LEXIS, Admrty Library, Usawds File) (ordering respondent to pay the fees and disbursements of claimant's outside counsel and the fees of two judges who submitted expert witness affidavits); COB Shipping Canada, Inc., SMA No. 2935 (awarding $131,391.80 for legal costs, which included attorneys' fees ($93,000), transcript fees ($6,183.75), expert witness fees ($13,167.72), costs of copies, phone calls, faxes and investigation ($15,972.58), and travel costs ($3,067.75)); Triumph Tankers Ltd., 18 Y.B. COM. ARB. at 120 (awarding the prevailing party $111,544.55 for legal fees and disbursements of counsel); *Final Award No. 4975*, 14 Y.B. COM. ARB. at 136 (denying claimants' claims, awarding respondents damages on their counterclaims and ordering claimants to pay UK £500,000 for respondents' legal costs and expenses and the cost of experts). *See also* ICC Rules, *supra* note 73, at art. 31 (stating that the costs of the arbitration include, among other things, "the fees and expenses of any experts appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the arbitration"); UNCITRAL Rules, *supra* note 88, at art. 38 (providing, *inter alia*, that costs include "the costs of expert advice and of other assistance required by the arbitrators . . . [and] [t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable"); REDFERN & HUNTER, *supra* note 6, at 407 ("The costs of the parties include not only the fees and expenses of the lawyers engaged to represent the parties in the arbitral proceedings, but also money spent in the preparation and presentation of the case.").

196. *See* Final Award No. 6752, *reprinted in* 18 Y.B. COM. ARB. 54, 57 (1993) (ordering respondent "to pay a fair part of the fees of claimant's counsel"); Final Award No. 6998, *reprinted in* 21 Y.B. COM. ARB. 54, 77–78 (1996) (stating the general principle that prevailing parties "are entitled to be fully compensated for all normal costs incurred by them in this arbitration"); *Sylvania Technical Sys., Inc.*, 8 Iran-U.S. Cl. Trib. Rep. 298, 323 (1985) (stating that the Claims Tribunal has the authority to fix the legal costs of the successful party " '*only* to the extent' that it deems them reasonable"); *see also* ICC Arb. Rules, *supra* note 73, at art. 31 (stating that the costs of the arbitration include, among other things, "reasonable legal and other costs incurred by the parties for the arbitration"); UNCITRAL Arbitration Rules, *supra* note 88, at art. 38 (providing, *inter alia*, that costs include "[t]he costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable").

> A test of reasonableness is not . . . an invitation to mere subjectivity. Objective tests of reasonableness of lawyers' fees are well known. Such tests typically assign weight primarily to the time spent and complexity of the case. In modern practice, the amount of time required to be spent is often a gauge of the extent of the complexities involved. Where the Tribunal is presented with copies of bills for services, or other appropriate evidence, indicating time spent, the hourly billing rate, and a general description of the professional services rendered, its task need be neither onerous nor mysterious. The range of typical hourly billing rates is generally well known . . . . Just how much time any lawyer reasonably needs to accomplish a task can be measured by the number of issues involved in the case and the amount of evidence requiring analysis and presentation. While legal fees are not to be calculated on the basis of pounds of paper involved, the Tribunal by the end of a case is able to have a fair idea, on the basis of submissions made by both sides, of the approximate extent of the effort that was reasonably required.[197]

The party seeking an award of costs and fees must provide sufficient proof to substantiate its claim.[198] The tribunal's decision in *Final Award No. 6962* illustrates this requirement.[199] There, the prevailing claimant submitted a statement of legal costs accompanied by its attorneys' official fee schedule in support of its claim for attorneys' fees and expenses.[200] The tribunal awarded claimant its legal costs, noting that

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197. *Sylvania Technical Sys., Inc.*, 8 Iran-U.S. Cl. Trib. Rep. 298, 333 (1985). In the United States, many courts determine the amount of reasonable attorneys' fees using the lodestar figure, which is the number of hours reasonably spent on the matter multiplied by a reasonable hourly rate. *See generally* 7 Am Jur. 2d *Attorneys at Law* § 306 (1997). After determining the lodestar figure, the court may adjust it based on the following factors:

> 1) the time and labor required in a particular case; 2) the novelty and difficulty of the questions involved; 3) the skill requisite to perform the legal services properly; 4) preclusion of other employment by undertaking a particular case; 5) the customary fee in the relevant community for similar work; 6) whether the fee was fixed or contingent; 7) the time limitations imposed by the client or circumstances; 8) the amount involved and results obtained; 9) the experience, reputation, and ability of the attorneys involved; 10) the undesirability of the case; 11) the nature and length of professional relationship with the client; and 12) fee awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974).

198. *See* Final Award No. 8032 (ICC 1995), *reprinted in* 21 Y.B. Com. Arb. 113, 121 (1996) (denying award of costs and fees even though claimant prevailed because it failed to support its claim with any evidence).

199. Final Award No. 6962 (ICC 1992), *reprinted in* 19 Y.B. Com. Arb. 184, 193 (1994).

200. *See id.* at 192–93.

"[s]ince this statement results from the application of an official fee schedule and is therefore representative of the amount of fees which the claimant has, or will have, paid to its attorney, observing also that, whenever the fee schedule offers any leeway, the solution retained is objectively reasoned, it shall be held that such statement fits the concept of 'normal legal costs incurred.' "[201]

* * *

The model provides a predictable framework for tribunals to follow and for parties to rely on in evaluating claims for costs and fees. The model makes clear that agreements on costs and fees will be enforced according to their terms. In the absence of such an agreement, the model provides a straightforward approach for awarding costs and fees. It gives the tribunal the power to award them, states that in principle they should be borne by the unsuccessful party, and defines what costs and fees may be awarded. It also provides the tribunal with the flexibility to apportion costs and fees between the parties or otherwise depart from the model when warranted by the circumstances of the case. The model thus gives tribunals a workable method for resolving claims for costs and fees, which ultimately should result in more uniform and predictable awards.

Conclusion

While the practice in most countries, except in the United States, is for the losing party to bear the costs and fees of the prevailing party, there is no consensus on what costs may be awarded to the prevailing party and whether and how costs should be apportioned when a party only partially prevails. Furthermore, there is no uniform approach for deciding claims for costs and fees. Tribunals may resolve a claim for costs and fees by applying one of a variety of laws, rules, or principles. This has resulted in awards of costs and fees being arbitrary, inconsistent, and difficult to predict.

The current problems associated with the awarding of costs and attorneys' fees could be resolved by adopting the proposed model. It presumes that if the parties have entered into an agreement on the payment of costs and fees or if they have designated arbitral rules to govern their dispute that address this issue, the tribunal will award costs and fees accordingly. In the absence of either or in the presence of an ambiguous agreement or arbitral rules, the international tribunal would

201. *Id.* at 193.

follow the model's guidelines for resolving the claim for costs and fees. The model states that the tribunal shall have the authority to award costs and fees and that they shall in principle be borne by the losing party. It also provides the tribunal with the ability to apportion costs and fees based on the circumstances of the case, such as when a party prevails on some but not all of its claims. Lastly, the model sets forth a list of allowable costs and fees.

Because it is grounded in generally accepted principles, the model would provide tribunals with a practical approach for awarding costs and fees that maintains the flexibility necessary to account for the differences of individual cases and differing legal systems. If adopted, the model will provide much needed uniformity and predictability to arbitral awards of costs and fees, while also ensuring that similarly situated parties are treated equally and fairly.

APPENDIX A

MODEL CLAUSE ON THE AWARDING OF COSTS AND FEES (TO BE INSERTED INTO THE PARTIES' AGREEMENT)

Costs and Fees.

(1) *Authority to Award Costs of the Arbitration.* The arbitral tribunal shall have the authority to make an award allocating the costs of the arbitration between the parties.

(2) *Allocating Costs of the Arbitration.* The costs of the arbitration shall in principle be borne by the unsuccessful party. However, at its discretion, the tribunal may (i) apportion such costs, in whole or in part, between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, or (ii) otherwise depart from this rule for special reasons.

(3) *Defining Costs of the Arbitration.* The costs of the arbitration shall be reasonable in amount and shall include but not be limited to:

(a) the fees and expenses of the arbitral tribunal;
(b) any fees and expenses of the appointing authority;
(c) the costs of expert advice and of other assistance required by the arbitral tribunal;
(d) the travel and other expenses of witnesses; and
(e) the legal or other costs of the parties.

APPENDIX B

MODEL RULE ON THE AWARDING OF COSTS AND FEES (TO BE INCORPORATED INTO A SET OF ARBITRAL RULES)

Costs and Fees.

(1) The parties shall be free to agree on rules regarding the costs of the arbitration.

(2) Unless the agreement of the parties provides otherwise, these rules apply:

(a) *Authority to Award Costs of the Arbitration.* The arbitral tribunal shall have the authority to make an award allocating the costs of the arbitration between the parties.

(b) *Allocating Costs of the Arbitration.* The costs of the arbitration shall in principle be borne by the unsuccessful party. However, at its discretion, the tribunal may (i) apportion such costs, in whole or in part, between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case, or (ii) otherwise depart from this rule for special reasons.

(c) *Defining Costs of the Arbitration.* The costs of the arbitration shall be reasonable in amount and shall include but not be limited to:

(i) the fees and expenses of the arbitral tribunal;
(ii) any fees and expenses of the appointing authority;
(iii) the costs of expert advice and of other assistance required by the arbitral tribunal;
(iv) the travel and other expenses of witnesses; and
(v) the legal or other costs of the parties.