

A Study on the Determination and the Allocation of the Costs of Arbitration in ICC Rules of Arbitration(1998)

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I. Introduction

The ICC International Court of Arbitration(ICC Arbitration) is the most important institution for the arbitral settlement of International trade disputes, Besides ICC Arbitration, The London Court of International Arbitration(LCIA), The American Arbitration Association (AAA), The International Center for Settlement of Investment Disputes (ICSID) and The World Intellectual Property Organization(WIPO) are the major institutions handling international arbitration. Among them, The ICC Arbitration has enjoyed the best reputation in number of the cases and the confidence of the award.

The ICC Arbitration has three distinctive features from other institutions ; drawing up the terms of reference, scrutiny of the award by the Court and advance deposit in equal parts by parties, among which the third characteristic is concerned with the costs of the arbitration.

Apart from the ultimate outcome of the award, there is no aspect of the arbitration process which is of greater concern to the parties than the arbitration costs. As for the costs, the "Article 30 of ICC Rules of Arbitration" provides for payment of the cost in advance in several stages, while the article 31 provides for the decision and allocation of the costs.

The purpose of this paper is to examine the determination of the cost of arbitration and their allocation between the parties through the analysis of the "Article 31 of ICC Rules of Arbitration". To do this, the matters regarding the composition of the costs, the criteria of the decision and allocation should be examined beforehand.

Regarding the allocation of the arbitration costs between parties, this author will compare the related provisions with those of LCIA, AAA or UNCITRAL Arbitration Rules.

Through this study, this author aims at enhancing the understanding of ICC Arbitration, which will result in its active use in the resolutions of international commercial disputes.

As this author can't find the related Korean papers or books for the costs of ICC Arbitration, several foreign papers or books, "ICC Rules of Arbitration"(Arts 30 & 31) and the arbitration rules of other institution including the Arbitration Rules of "KCAB(Korean Commercial Arbitration Board)" were used as references.

II. Composition and Determination of Arbitration Costs

1. Composition of Arbitration Costs

The costs of the arbitration consist of the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Count, in accordance with the scale in force at the time of the commencement of the arbitral proceeding, 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.

Among them, the arbitrator's fees are of the nature of personnel expenses for the time and efforts devoted in arbitration proceedings. For the arbitrator's expenses, the Article31(1) does not define them nor explain how they are to be determined. The guidelines concerning the reimbursement of the arbitrator's expenses are published from time to time by the Secretariat.

1)

The items covered concern such matters as expenses for transportation, meals and lodging as well as expenses relating to the rental of meeting

1) The most recent such guidelines are contained in the "Revised Notice to Arbitrators : Personal and Arbitral Tribunal Expenses" (January 1. 2005), as reproduced in "ICC Rules of Arbitration, Appendix III Article 4(1)".

rooms, clerical assistance and the use of telephones and faxes for tribunal business.

The ICC administrative expenses cover not only the services rendered by the Court, but all disbursement of the Court in connection with a particular case ; for example for postage, international courier services, telephone, telexes or photocopies. Like the fees of the arbitrators, the ICC administrative expenses are fixed by the Court in accordance with the scale in force at the time of commencement of the arbitral proceedings.

The expenses of experts referred in Article31(1) only cover experts "appointed by the Arbitral Tribunal" pursuant to Article20(4) and they do not cover the expenses of experts designated by the parties. They are determined by the arbitrators, rather than the Court. By referring specifically only to Tribunal-appointed experts, Article31(1) does not mean to exclude the cost of experts hired by the parties from the costs of the arbitration. Such expenses may be included in the parties' costs as.

Article31(1) includes "the reasonable legal and other costs incurred by the parties for the arbitration". The Rules do not contain a definition of such costs, the manner in which the relevant language of Article31(1) should be construed is left to the discretion of the arbitrators in each case.²⁾ The parties' costs include such items as the fees and expenses of legal counsel, the costs of experts, consultant, and witnesses, other costs associated with the production of documents or attendance at hearings and the costs of interpreters and translators.³⁾

2) The broad definition of costs in Article31(1) is to be contrasted with the more restrictive language contained in some other arbitration rules(e.g., UNCITRAL Arbitration Rules, Article 38)

3) M, Bühler, "Chartered Institute of Arbitrators : Guidelines for Arbitrators on marking Orders Relating to the Costs of the Arbitration", *Arbitration*, Vol.69, No.2(2003), p.130.

2. Determination of Arbitration Costs

1) Arbitrator's Fees

The arbitrator's fees are to be fixed by the court in accordance with the arbitrator fee scale, subject to the possibility of a derogation under Article31(2). In this regard, Article31(1) makes it clear that the applicable fee scale is the "scale in force at the time of the commencement of the arbitral proceedings."

The fee scale provides for the minimum and maximum fees that are payable to each arbitrator according to the sum in dispute. In the case of a tribunal composed of three arbitrators the Court normally fixes separately the fees of a chairman and co-arbitrators. Regarding the allocation of fees among arbitrators, although nowhere written in either the ICC Rules or Appendix, it has been the Court's general practice for many years to allocate 40% of the total fees to the chairman and 30% to each of the co-arbitrators in recognition of the chairman's greater burden of work in arbitral proceedings.

Although the Rules provide that the arbitrators' fees are fixed by the Court, neither article31(1) nor Appendix III states when the Court fixes them. In practice, the fees of the arbitrators are fixed by the Court upon the conclusion of the arbitration, either following the approval of the arbitrators' draft Award pursuant to Article27 or, if the arbitration is withdrawn without an Award being rendered, following such withdrawal.

When the arbitrators' draft Award is approved, the arbitrators' fees are fixed at the same time. When fixing the fees, the Court has before it a recommendation of the Secretariat based on the sum in dispute and an evaluation of the various criteria listed in Article2(2) of Appendix III, i.e., "the diligence of the arbitrator, the time spent, the rapidity of the proceedings, and the complexity of the dispute"

Although the most of the arbitrators' fees are normally payable only upon the conclusion of the arbitration, following the notification of the Award (or in the absence of an Award, following the arbitration's withdrawal).

For example, if the sum in dispute is U.S.\$1,000,000 one arbitrator's remuneration is from minimum U.S.\$11,250 to maximum U.S.\$53,500 according to the Scale of Arbitrator's Fees effective as of July 2003. If the number of arbitrator is three, the Court shall have the right to adjust the total fees within the limit of three times of one arbitrator's maximum fees.⁴⁾

The Court may derogate from the Scale in exceptional cases. As these circumstances are very rare, arbitrators can be expected for their fees to be fixed at middle point between the maximum and the minimum

The ICC Arbitration, in which arbitrator's fees are fixed in accordance with the Scale based on the sum in dispute, is different from the other institutions. In cases of AAA, ICSID and LCIA, arbitrator's fees are fixed in accordance with hours or days devoted or by the arbitrators or the institution. Especially in ad hoc arbitration, the arbitrators have discretion of a considerable degree on the assumption that both parties agree.⁵⁾

2) Arbitrator's Expenses

The arbitrator's expenses, contrary to what is suggested by Article31(1), are not actually fixed by the Court, nor are they the subject of a scale. They are reimbursed to the arbitrators by the Secretariat, upon the arbitrator's application, on the basis of the Secretariat's determination of their reasonableness. They are paid out of the advance on costs fixed by the

4) "ICC Rules of Arbitration, Appendix II Article 2(3)" ; "When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not to exceed three times the fees of one arbitrator".

5) For example, there have been accounts of arbitrators charging the fees of several million U.S. dollars in ad hoc proceedings with substantial sums in dispute. The largest fee to date ever awarded to an ICC arbitrator was U.S.\$1 million when the sum in dispute is U.S.\$15 billion. (R. Ostrager, R. Thomas and Smit, "Andersen v. Andersen : The Claimant's Perspective", Am. Rev. Int. Arb. (1999), p.443.

Court. In deciding whether to adjust the advance during the course of the arbitration and when fixing the fees of the arbitrators, the Court should inevitably review the amounts required by the arbitrators as expenses. Thus the total sum payable to the arbitrators, whether as fees or expenses, can be said to be determined by the Court.

3) ICC administrative expenses

The ICC administrative expenses, like the fees of the arbitrators, are fixed by the Court in accordance with the scale⁶⁾ in force at the time of commencement of the arbitral proceeding. However the applicable scale, unlike in the case of the arbitrator's fees, does not allow for the exercise of any discretion of the Court. The amount of the administrative expenses is normally the product of a simple arithmetic calculation.

According to "Article 2(5) of Appendix III of ICC Rules of Arbitration" the Court may fix the administrative expenses at a lower or higher figure than that which would result from the application of such scale in exceptional circumstances.

As the administrative expenses will remain unchanged so long as the amount in dispute does not vary, the parties may assess in advance the likely amount of the ICC's administrative charge, unlike LCIA system under which the amount of such expenses may fluctuate quite considerably.⁷⁾

In the event that an arbitration is withdrawn prior to a final Award, the

6)		A Administrative Expenses
Sum in dispute (in US Dollars)		Administrative expenses
up to 50 000		\$ 2 500
from 50 001	to 100 000	3.50%
from 100 001	to 500 000	1.70%
from 500 001	to 1 000 000	1.15%
from 1 000 001	to 2 000 000	0.70%
from 2 000 001	to 5 000 000	0.30%
from 5 000 001	to 10 000 000	0.20%
from 10 000 001	to 50 000 000	0.07%
from 50 000 001	to 80 000 000	0.06%
over 80 000 000		\$ 88 800

7) This would be the case under the Schedule of Arbitration Fees and Costs of the LCIA.

amount of the administrative expenses will normally be reduced based on an assessment of proceeding stage and the work carried out by the Court. As the administrative work of the Court and Secretariat is usually heavy in the early stages of the arbitration, the Court's general practice has been to assess at least 50% of the administrative expenses when the Terms of Reference have been established.

However, the only amount that the parties are required to pay to the ICC prior to the constitution of the Arbitral Tribunal is the sum that is to accompany the Request for Arbitration (presently U.S. \$ 2500)

The ICC's administrative expenses have the reputation of being high in comparison to those of other arbitral institutions. But the functions of the Court and its Secretariat are also unique.

4) Expenses of experts

As the expert referred in Article 31(1) is not designated by the parties, but designated by the Arbitral Tribunal, the costs of such expert are determined by the arbitrators, rather than the Court, and are the subject of a separate advance fixed by the Arbitral Tribunal.

The Appendix III, Art. 1(11) provides that "Before any expertise ordered by the Arbitral Tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the Arbitral Tribunal sufficient to cover the expected fees and expenses of the expert as determined by the Arbitral Tribunal. The Arbitral Tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.

5) Parties' Costs

Article 31(1), in addition to the items described above, includes "The reasonable legal and other costs incurred by parties for the arbitration". This wording is intended to permit the arbitrators the greatest possible discretion in fixing the costs of the arbitration pursuant to Article 31(3). The items of

the costs include the fees and expenses of legal counsel, consultants and witness, as well as costs associated with ancillary judicial proceedings or the costs of the time of the parties' personnel. But there also does not appear to be any consensus as to the allowability.

A further issue that may arise is whether the costs claimed, in fact, are the costs of a party to the arbitration if they have been borne by another person, such as, an insurer or other indemnifier not itself a party to the arbitration. In the only reported instance in which an ICC Arbitral Tribunal considered this question, it concluded that such costs were properly recoverable in the arbitration.⁸⁾

3. Derogations from the Arbitrator Fee Scale

Article 31(2) provides as follows : "The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case. Decisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings."

This provision consists of two parts. The first permits the Court to derogate from the arbitrator fee scale. The second concerns the time when decisions on costs may be made.

1) Derogations from the Scale

The Rules do not indicate what circumstances may be regarded as "exceptional circumstances". This is, thus, left to the Court. In practice, however, the Court is extremely reluctant to derogate. Nevertheless, the Court may consider it appropriate to derogate from the scale if the arbitrators would be grossly under-compensated, in consideration of the

8) The Award in ICC Case No. 7006, ICC Ct. Bull., Vol. 4, No. 1(1993), p. 49.

time when they devoted to the arbitration or if they would receive an excessive windfall.

There have been few, if any, cases in which the Court has fixed the fees of the arbitrators below the minimum figure set forth in the scale. To the contrary it is very common that the Court increases the fees above the maximum. Its objective is to accord the arbitrators reasonable compensation in light of all of the circumstances, including the amounts at issue, the time spent by the arbitrators and the conduct of the parties.

In order to be able to award the arbitrators fees in excess of the maximum figure in the scale, the Court is usually required to increase the amount of the advance. Before the Court does so, the Secretariat usually informs the parties that the Court anticipates that it may be appropriate to derogate from the scale in the circumstances of the case.

2) Decisions on costs by the Arbitral Tribunal

As set forth in Article 31(3), the general rule is that the costs of the arbitration are fixed in the final Award, unless the arbitration is terminated earlier. The final Award contains the arbitrators' decision on the allocation of those costs between the parties. In deciding how the costs of the arbitration ought to be allocated, the arbitrators normally wish to be able to take account of the arbitration's ultimate outcome.

The arbitrator's powers under Article 31(2) do not extend, however, to the costs fixed by the Court, even though these costs are not fixed until the end of the arbitration.

There may nevertheless be circumstances in which it is appropriate for the arbitrators to decide upon the allocation of costs prior to the final award. Occasionally, for example, the arbitrators may wish to include a decision on costs in a partial award. The arbitrators may also decide in a partial award that they have no jurisdiction over one of the parties to the arbitration and that, accordingly, the party in question should recover its

costs from the party that improperly included it in the proceedings. The second sentence of Article 31(2) has therefore been added to the Rules in order to provide the arbitrators with explicit authority in this regard.

III. Allocation of Arbitration Costs

1. Background

Article 31(3) provides as follows : "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.

This Article imposes an obligation on the Arbitral Tribunal to set forth the costs of the arbitration in the final award and, at the same time, to decide upon their allocation.

While there has been controversy concerning the question of whether a Tribunal which declines jurisdiction is competent to award costs, ICC arbitrators have nevertheless not hesitated to award costs. Indeed, in ICC arbitration, the existence of an agreement conferring such authority on the Arbitral Tribunal should normally be found in the Terms of Reference.⁹⁾ In addition, there should be no obstacle to an ICC arbitrator awarding costs upon the request of a party following the withdrawal of the other party's claims.

9) S. Greenberg and M. Secomb, "Terms of Reference and Negative Jurisdictional Decisions : A Lesson from Australia", *Art. Int.*, Vol.18, No.2 (2002), p.125.

2. Fixing of the Costs

Although Article 31(3) states that the final award shall fix the costs of the arbitration, the only costs that are actually fixed by the arbitrators are the fees and expenses of Tribunal-appointed experts and the costs of a parties. Moreover, it is not actually necessary for the arbitrators to fix the costs of a party except to the extent that they are to be borne by another party.

The fees and expenses of the arbitrators and the ICC administrative costs, meanwhile, are independently determined by the Court and are than communicated by the Secretariat to the arbitrators for inclusion in their award following the approval of the draft submitted to the Court pursuant to Article 27.

Insofar as the costs of the arbitration are a subject of the award, the arbitrators' related decisions could be affected in the event that the award were subsequently set aside. However, as the fees and expenses of the arbitrators and the ICC are the subject of a distinct decision of the Court, the arbitrators' and the ICC's entitlement to the same pursuant to that decision should not depend upon the fate of the award.¹⁰⁾

3. Allocation of the Costs

As the arbitrators are required to decide in what proportion the costs of the arbitration are to be borne by the parties, they should normally give the parties an opportunity to submit whatever comments they may have in this regard.

Increasingly, claims for the reimbursement of costs constitute a substantial part of the relief requested in ICC arbitrations. Indeed, in large arbitrations,

¹⁰⁾ Mustill and Boyd, *The Law and Practice of commercial Arbitration in England*, Butterworths, 2nd ed. 1989, pp.253-256.

it is not uncommon for the cost claims to total several million U.S. dollars.

Under Article 31(1), the arbitrators have complete jurisdiction to allocate the costs as they think fit. LCIA or AAA has the same position.¹¹⁾ The UNCITRAL seems to take little bit different position, but same in principle.¹²⁾ Nor is the arbitrators' discretion necessarily limited by any related legal requirements.¹³⁾ Not surprisingly, however, the treatment of costs by arbitrators is often influenced by their national backgrounds.

In this regard, there are three different approaches from country to country. One is to order that all of the costs be borne by one of the parties(i.e., the losing party). It is, thus, for example, the usual rule in England that the successful litigant is entitled to an Award of costs. Another approach, prevalent in Germany, Switzerland and Austria, in particular, is the allocation of the costs in proportion to the outcome of the case, taking into account the relative success of the claims and defenses. A further possibility is to require that the costs be shared equally by the parties or that they bear their own costs. Arbitral Tribunals may also consider that administrative costs and arbitrators' fees and expenses, on the one hand, should be treated differently than legal and other possible expenses, on the other.

In 1991, the ICC Court's Secretarian undertook the study of the final awards rendered in ICC arbitrations between March 1989 and September 1991 in order to assess the manner in which arbitrators have dealt with the allocation of arbitration costs in ICC cases.¹⁴⁾ In summary, the Secretariat's

11) "LCIA Arbitration Rules", Art. 28. 2 ; "the tribunal shall specify "the proportions in which the parties shall bear or part of arbitration costs"; AAA International Arbitration Rules, Art. 31 ; "The tribunal shall fix the costs of arbitration in its award. The tribunal may apportion such costs among the parties if it determines that such apportionment is reasonable, taking into account the circumstances of the case.

12) UNCITRAL Arbitration Rules, Art. 40(1) ; "Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case"

13) Bühler, "Awarding Costs in International Commercial Arbitration: An Overview", ASA Bull. (2004), pp.253-256.

findings were as follows:

First, in those cases where the Claimant won all or most of what it claimed (as in 48 of the Award surveyed), the arbitrators most commonly (in 39 cases) ordered the Respondent to bear all or most (usually in proportion to the success of the claim) of the arbitrators' fees and expenses and the ICC administrative expenses, although the arbitrators occasionally split the costs between the parties in such circumstances.

Second, in those cases where the Claimant was a decisive winner, the arbitrators also often (in 24 cases out of 48) ordered the Respondent to pay all or part of the Claimant's "normal" (now "reasonable") legal costs, thus demonstrating that arbitrators will not necessarily treat in the same manner the costs of the arbitration proper and the legal costs of the parties.

Third, in those cases (9) where the Claimant was awarded approximately half of the amount claimed or the Claimant and Respondent won approximately equal amounts, the arbitrators most frequently (in 7 cases) ordered that the arbitration costs be shared equally and (in 8 cases) that the parties bear their own legal costs.

Fourth, out of 36 Awards in which the Claimant obtained substantially less than half of the amount claimed or less than the amount awarded to the Respondent, the arbitrators most frequently either split the arbitration costs equally (in 13 cases) or had the Claimant pay them all (12 cases). In some cases, where the claim failed entirely, the arbitrators nevertheless decided that the arbitration costs should be shared rather than borne entirely by the Claimant. In those cases where the Claimant was awarded a relatively low percentage of the amounts claimed, the arbitration costs were usually ordered to be shared equally or on a proportional basis.

Finally, the parties were most frequently (in 24 cases) ordered to bear their own legal expenses in the 36 Awards just mentioned. Three Awards

14) Y. Derains and E. A. Schwartz, *A Guide to the ICC Rules of Arbitration*, Kluwer Law Int'l., 2005, pp.371-373.

allocated normal legal costs proportionately to the outcome of the case. In five cases (in every one of which the claim was either dismissed or withdrawn), the Claimant was ordered to pay all of the Respondent's normal legal costs and in two others a substantial proportion.

From the above, it can be seen that arbitrators have adopted a variety of approaches in allocating costs in ICC arbitrations, often depending on their own national biases, the substantive outcome of the arbitration and also the behavior of the parties, e.g., in some cases allowing for honest differences of opinion over difficult issues in others penalizing bad faith or uncooperative behavior. Whatever the ultimate decision, however, the arbitrators have normally been expected by the Court to provide reasons from their decisions.¹⁵⁾

Also the final award may decide which of the parties shall bear them or in what proportion they shall be borne by the parties. According to Article 31(3), the arbitrators have complete jurisdiction or discretion to allocate the costs. The three common approaches are as follows ;

First, all of the costs are borne by the losing party or

Second, all of the costs are allocated in proportion to the outcome of the case.

Third, all of the costs determined by the Court are shared equally by the parties and both parties bear their own costs.

But, both parties may include their intentions in accordance with the principle of party autonomy. If the parties wish to ensure that the arbitration costs be shared equally and that the arbitrators make no allocation of costs or fees, the following sentence could be added to the arbitration clause.¹⁶⁾

"All costs and expenses of the arbitrators [and the arbitral institution] shall be borne by the parties equally; each party shall bear the costs and

15) ICC Rules of Arbitration, Art. 25(2) ; "The Award shall state the reasons upon which it is based."

16) P. D. Friedland, *Arbitration Clauses for International Contracts*, Juris Publishing Inc. 2000, p.71.

expenses, including attorneys' fees, of its own counsel, experts, witnesses and preparation and presentation of its case."

If the parties wish to empower the arbitrators to allocate costs but not attorneys' fees, the following sentence could be added to the arbitration clause.

"The arbitrators may include in their award an allocation of the costs and expenses of the arbitration, but they shall not have the power to allocate or award attorneys' fees."

If the parties wish to give the arbitrators discretionary power to allocate both costs and fees, the following could be added to the arbitration clause.

"The arbitrators are authorized to include in their award an allocation to any party of such costs and expenses, including attorneys' fees, as the arbitrators shall deem reasonable."

Finally, if the parties wish expressly to link any allocation of costs and fees to the result of the award, the following could be added to the arbitration clause.

"The arbitrators may award to the prevailing party, if any, as determined by the arbitrators, its costs and expenses, including attorneys' fees.

IV. Conclusion

The arbitration costs provide in Article 31 consist of arbitrator's fees, arbitrators' expense, ICC administrative expense, expense of experts appointed by the Arbitral Tribunal, and parties' costs. Among them the first three items are determined by the Cost, while another two items are determined by the arbitrators.

Even the fee and expense of the arbitrators and the ICC administrative costs are independently determined by the Court in accordance with the Scale and than are communicated by Secretariat to the Arbitral Tribunal for inclusion in the award following the approval of the draft submitted to the Court.

Than the final award shall fix the costs of the arbitration. But the costs which are actually fixed by the arbitrators are the fees and expense of the experts appointed b the Tribunal and parties' costs.

While the arbitration costs determined by the Court are based on the Scale in force at the time of Commencement of the arbitral proceeding, the costs determined by the Arbitral Tribunal may be decided at any time during proceedings. The Court has a authority to derogate from the Scale if it should be deemed necessary due to the exceptional circumstance.

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ABSTRACT

A Study on the Determination and the Allocation of the Costs of Arbitration in ICC Rules of Arbitration(1998)

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The purpose of this paper is to analyze the composition of the arbitration costs in ICC Rule of Arbitration and to examine how each item of the costs is determined. Furthermore this author tried to find the principles or criteria deciding which of the party should bear them or in what proportion they shall be borne by the parties in Article 31.

Thus this author could find three common approaches.

First, all of the costs are borne by the losing party, or

Second, all of the costs are allocated in proportion to the result of award in each case.

Third, all of the costs determined by the Court as shared equally by the parties and both parties bear their own costs.

But, both parties may include their intention in accordance with the principle of party autonomy. For example if the parties wish to ensure that the arbitration costs be shared equally and that the arbitrator make no allocation of costs and fees, the following sentence could be added to the arbitration clause.

"All costs and expenses of the arbitrators [and the arbitral institution] shall be borne by the parties equally; each party shall bear the costs and expenses, including attorneys' fees, of its own counsel, experts, witnesses and preparation and presentation of its case."

Key words : Determination, Allocation, Arbitration Costs.
