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## **Navigating the Costs of Arbitration: 10 Financial Tips for Business Owners Considering Arbitration**

The Queen Mary International Arbitration Survey consistently rates ‘costs’ as one of the major concerns for parties contemplating arbitration.<sup>1</sup> With the escalation of international commercial transactions in both size and complexity, arbitrations have become more intricate and expensive.

What, then, can business owners do to financially plan and prepare for a cost-efficient arbitration? This e-Alert highlights financial strategy tips for parties contemplating arbitration proceedings. We will first explore the different types of costs commonly seen in arbitration proceedings (collectively referred to as “**Costs**”), before discussing whether parties to an arbitration can recover these Costs. Lastly, we will examine 10 financial tips corresponding to each stage of the arbitration proceedings.

### **Costs Involved in Arbitration Proceedings.**

There are two major categories of expenditure for a party involved in arbitration proceedings:

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<sup>1</sup> “2021 International Arbitration Survey: Adapting arbitration to a changing world”, The School of International Arbitration of Queen Mary University of London, Page 13, [https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021\\_19\\_WEB.pdf](https://arbitration.qmul.ac.uk/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf) ; see also Pinsent Masons' 2019 International Arbitration Survey on “International Arbitration in Construction” in partnership with the School of International Arbitration at Queen Mary University of London, page 3, <https://www.pinsentmasons.com/thinking/special-reports/international-arbitration-survey>

Category of Expenditure	Fees Included in this Category (Non-exhaustive)	Estimated Percentage within Total Costs
<b>Arbitration Costs</b>	(i) Fees of the arbitral tribunal; (ii) Rental fees for an arbitration hearing venue; (iii) Transcription fees for the arbitration hearing; (iv) Fees for the expert(s); (v) Expenses incurred by factual witnesses (eg., travel and accommodation for the arbitration hearing); and (vi) Administrative fees. <sup>2</sup>	Around 30% of the party's costs.
<b>Legal Costs</b>	(i) Fees for legal representation; and (ii) Fees for legal advice.	Around 70% of the party's costs.

In general, the fees payable to an arbitral tribunal will be determined in one of the following manners:

Method	How Does This Method Work?	Arbitral Institutions Which Use This Method (Non-exhaustive)
<b>Ad Valorem</b>	Fees are fixed proportionate to the amount in dispute. <sup>3</sup>	Asian International Arbitration Centre (AIAC) <sup>4</sup> , Singapore International Arbitration Centre (SIAC) <sup>5</sup> , Hong Kong International Arbitration Centre (HKIAC) <sup>6</sup> , and International Chamber of Commerce (ICC). <sup>7</sup>
<b>Hourly Rate</b>	Fees are fixed payable based on the amount of work done.	London Court of International Arbitration (LCIA) <sup>8</sup> , and HKIAC. <sup>9</sup>

<sup>2</sup> Do note that the SST rate from 01.03.2024 will be 8% instead of 6%, which applies to fees paid to the AIAC. See Panduan Peralihan Perubahan Kadar Cukai Perkhidmatan, 26 Februari 2024

<https://mysst.customs.gov.my/assets/document/Specific%20Guides/PANDUAN%20PERALIHAN%20PERUBAHAN%20KADAR%20CUKAI%20PERKHIDMATAN.pdf>

<sup>3</sup> Commonly, there is a pre-determined "Schedule of Rates" by the relevant institute according to the value in dispute.

<sup>4</sup> AIAC Frequently Asked Questions, Question 11, <https://www.aiac.world/Frequently-Asked-Questions->, pertaining to the arbitral tribunal's fees and the AIAC's administrative costs

<sup>5</sup> SIAC General FAQs, Question 37, <https://siac.org.sg/faqs/siac-general-faqs>

<sup>6</sup> Ad Valorem is not frequently used in HKIAC. Instead, hourly rates are more frequently used. See HKIAC's webpage on Costs and Duration, <https://www.hkiac.org/arbitration/costs-duration>

<sup>7</sup> ICC webpage entitled "Costs and Payment" at section entitled "Costs of the arbitration" <https://iccwbo.org/dispute-resolution/dispute-resolution-services/arbitration/costs-and-payment/>

<sup>8</sup> See Schedule of Arbitration Costs (2023), section 2 in [https://www.lcia.org/dispute\\_resolution\\_services/schedule-of-arbitration-costs-2023.aspx](https://www.lcia.org/dispute_resolution_services/schedule-of-arbitration-costs-2023.aspx)

<sup>9</sup> HKIAC's 2018 Schedule of Fees, <https://www.hkiac.org/content/2018-schedule-fees>

<b>Fixed Fee</b>	Parties and the tribunal may come to an agreement on a fixed amount.	AIAC. <sup>10</sup>
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### **Can a winning party recover their arbitration costs from the losing party?**

In principle, the starting point is ‘costs follow the event’ or ‘the losing party will pay for the winning party’s costs’.<sup>11</sup> Thus, a party who succeeds entirely will recover all costs incurred from the losing party; conversely, a party who succeeds partially will only be able to recover its costs invested in the winning portion of the case.

However, from this starting position, the arbitral tribunal may allocate the arbitration costs<sup>12</sup> (known as “**Costs Allocation**”) at its *discretion* in light of the circumstances of the case, which includes, among others, the following two factors:

1. Reasonableness
  - a. If a particular head of expenditure is deemed unreasonable, the tribunal may order that such expenditure is unrecoverable or scrutinise and reduce the quantum of the expenditure in question.<sup>13</sup>
  - b. The tribunal will consider the reasonableness of, among other factors:<sup>14</sup>
    - i. the rates, number, and level of the legal team/representatives in evaluating legal fees;
    - ii. the level of specialist knowledge and seniority of the legal representatives or experts used for the hearing; and
    - iii. the amount of time spent on the various phases of the arbitration.
  - c. The following are real-life examples of a tribunal’s deliberation on the reasonableness of arbitration costs:
    - i. An arbitrator found this scenario to be unreasonable: overtime charges at double the normal hourly rates; for days spent by the party’s lawyers out of the country, to allocate only five hours a day were to be charged at normal hourly rates, with the remaining working hours per day considered as overtime.<sup>15</sup>

<sup>10</sup> AIAC Rules 2023, Rule 18(3)

<sup>11</sup> Article 42(1) AIAC Rules 2023

<sup>12</sup> Section 44(1)(a)(i) Arbitration Act 2005, Article 40(1) AIAC Rules

<sup>13</sup> Article 42(1) AIAC Rules 2023, Article 42(2) AIAC Rules 2023

<sup>14</sup> ICC Dispute Resolution Bulletin 2015 No.2 entitled “Commission Report: Decision on Costs in International Arbitration (Report)” [65]  
<https://jsumundi.com/en/document/publication/en-commission-report-decision-on-costs-in-international-arbitration-report>

<sup>15</sup> VV and Another v W [2008] SGHC 11 [14]

- ii. In Case A,<sup>16</sup> 50% of the costs of the expert report of the winning party were disallowed for recovery as a portion of the expert report was found to be unhelpful in deciding the case.
- iii. In Case B,<sup>17</sup> a distinction of approximately 1 million between the total costs incurred by both parties demonstrated that the party incurring the lower amount of costs was reasonable in its expenditure.
- iv. In Case C,<sup>18</sup> the arbitrator considered the distinction between the size, experience, and hourly rates of the legal team hired by both parties to determine the reasonableness of the legal fees charged by the legal representatives.

## 2. Conduct of the parties

- a. To encourage good behaviour, tribunals may penalise parties that have conducted themselves in an uncooperative, obstructive, or unreasonable manner during the arbitration proceedings by way of adverse costs.
- b. Penalisation by way of adverse costs may result in a winning party recovering less than the amount it would have recovered under the starting position, and may also lead to a losing party paying more than it would be required to pay under the starting position.
- c. Examples of the types of conduct that may warrant penalisation.
  - i. Frivolous claims or defences, excessive legal argument,<sup>19</sup> or excessive claims.<sup>20</sup>
  - ii. Unreasonable behaviour such as unnecessary delays, disruptive conduct, dilatory tactics,<sup>21</sup> failure to conduct oneself in good faith in the taking of evidence,<sup>22</sup> or unjustified applications for interim relief.<sup>23</sup>

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<sup>16</sup> A real-life arbitration dispute

<sup>17</sup> A real-life arbitration dispute

<sup>18</sup> A real-life arbitration dispute

<sup>19</sup> ICC Commission Report “Controlling Time and Costs in Arbitration”, March 2018, Paragraph 82

<sup>20</sup> ICC Commission Report “Controlling Time and Costs in Arbitration”, March 2018, Paragraph 82

<sup>21</sup> ICC Commission Report “Controlling Time and Costs in Arbitration”, March 2018, Paragraph 82

<sup>22</sup> IBA Rules on the Taking of Evidence in International Arbitration, 17 December 2020, Article 9 (8), <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>

<sup>23</sup> ICC Commission Report “Controlling Time and Costs in Arbitration”, March 2018, Paragraph 82

- iii. Failure to follow procedural orders or the procedural timetable.<sup>24</sup>

In the event the disputing parties are able to agree on costs (i.e., who pays and how much), the exercise of Costs Allocation by the tribunal may be avoided.<sup>25</sup> However, this situation is rare and usually only occurs (if ever) in situations when the disputed amount is not substantial or when parties are able to reach a settlement of dispute, which may be subsequently recorded in a consent award.

It is worth noting that for interim measures, the applicant may be liable for costs incurred by the opposing party if the tribunal later determines that, in the circumstances then prevailing, the measure should not have been granted.<sup>26</sup>

### **The 10 Financial Tips**

We have set out 10 tips to assist commercial parties in the process of financial planning for an arbitration.

<b>BEFORE</b> commencement of arbitration proceedings		
Tip 1	Ask your lawyer for an estimate of costs based on the various stages in the arbitration hearing.	<p>The various stages that should be considered include:</p> <ul style="list-style-type: none"> <li>i. Notice of Arbitration and Response to Notice of Arbitration</li> <li>ii. Pleadings</li> <li>iii. Disclosure / discovery application</li> <li>iv. Exchange of issues and evidential documents</li> <li>v. Oral/Written submissions in the Hearing</li> <li>vi. Costs Submissions</li> <li>vii. Enforcement (potential)</li> </ul> <p>Heads of expenses that should be considered include:</p> <ul style="list-style-type: none"> <li>i. Arbitrator Fees</li> <li>ii. Arbitration Institution Administrative Fees</li> <li>iii. Legal Fees</li> <li>iv. Other Disbursements</li> </ul> <p>Expenses for interlocutory hearings or interim measures (if any) may not be captured within the usual quote, hence contingencies should be built in for budgetary purposes. Common interim / interlocutory applications include an application for:</p>

<sup>24</sup> ICC Commission Report “Controlling Time and Costs in Arbitration”, March 2018, Paragraph 82

<sup>25</sup> Section 44(1), (2) Arbitration Act 2005, implied by wording “unless otherwise agreed by the parties”

<sup>26</sup> PART II, Uncitral Arbitration Rules (as revised in 2021), Section III, Article 26(8) AIAC Rules 2023

		<ul style="list-style-type: none"> <li>i. Bifurcation; and</li> <li>ii. Interim measures to maintain or restore the status quo pending the determination of the dispute.<sup>27</sup></li> </ul>
Tip 2	Conditional Fee arrangement.	<p>Malaysian law permits a “Conditional Fee arrangement” between a party and its legal representative.<sup>28</sup> This is where a legal representative enters into a payment arrangement with the represented party comprising of (i) basic fees regardless of the litigation outcome; and (ii) success fees in the event of success. This “success fee” is known as the “conditional fee”. Entering into such an arrangement may save business owners finances in the event that the outcome of the case is not successful.</p> <p>“Conditional Fees” must be contrasted with “Contingency Fees”, which are fees paid to the lawyer only in the event of success, rendering complete non-payment in the event of failure. Contingency fees are illegal in Malaysia.<sup>29</sup></p>
Tip 3	Third Party Funding (TPF).	<p>TPF is the provision of financial support from a party not directly involved in a legal dispute (“the funder”) to one of the parties involved in the dispute (“the litigant”) for purposes of arbitration proceedings. Commonly, the funder will receive a portion of winnings or benefits resulting from the legal proceedings in return.</p> <p>Although TPF is currently not permissible in Malaysia, it was legalised in Singapore in 2017 and expanded in scope in Hong Kong in 2017. Therefore, it would be prudent for business owners to bear this in mind as it is possible that TPF will be legalised in Malaysia in the near future.</p> <p>You may learn more about TPF through our recent e-Alert entitled “Balancing Desire and Danger: Regulating Third-Party Funding in a Global Context” here: <a href="https://lh-ag.com/international-arbitration-special-alert-balancing-desire-and-danger-regulating-third-party-funding-in-a-global-context/">https://lh-ag.com/international-arbitration-special-alert-balancing-desire-and-danger-regulating-third-party-funding-in-a-global-context/</a></p>

<sup>27</sup> AIAC Rules 2023, Article 26(2)(a)

<sup>28</sup> *Lua & Mansor (suing as a firm) v Tan Ah Kim* [2017] 3 MLJ 371

<sup>29</sup> Section 112(1) of the Legal Profession Act 1976



Tip 4	Bear in mind the “reasonableness” of your cost decisions.	As the “reasonableness” of the arbitration costs is a major consideration for arbitrators in deciding Costs Allocation, parties are advised to consider the reasonableness of any amount incurred or to be incurred for each head of expense in relation to the arbitration proceedings.
<b>DURING</b> the arbitration proceedings		
Tip 5	Consider making a Separate Advance Deposit shortly after the commencement of arbitral proceedings.	<p>Shortly after arbitration proceedings commence, parties may request a Separate Advance Deposit to be made to the relevant arbitral institution. Funds paid under this deposit will go towards the administrative fees, tribunal fees, and other tribunal expenses as and when these fees are required.</p> <p>Making a Separate Advance Deposit may be a relevant consideration for claimants facing respondent(s) who are submitting higher counterclaim sums. This is because under a Separate Advance Deposit arrangement, a claimant will only be required to bear the cost of its claim, as opposed to the whole amount in dispute (which may have been increased or inflated due to the inclusion of the respondent’s high counterclaim sum).<sup>30</sup></p>
Tip 6	Consider making a Calderbank Offer.	<p>What is a Calderbank offer?</p> <ol style="list-style-type: none"> <li>i. A Calderbank offer is a settlement offer made by one party to another before the conclusion of proceedings. Calderbank offers generally come in the form of an offer to receive payment of a certain sum (if made by the Claimant), or an offer to pay a certain sum (if made by the Respondent).</li> <li>ii. If the party to which the offer was extended rejects the offer, and the arbitral award is found to be less favourable than the offer, then the tribunal may take the offer into consideration when awarding costs and expenses.<sup>31</sup> Specifically, the party who rejected the Calderbank offer will pay at least a portion of the costs of the party extending the offer.</li> <li>iii. This Calderbank offer shall not be communicated to the tribunal before the</li> </ol>

<sup>30</sup> AIAC Arbitration Circular 02 on 26<sup>th</sup> January 2021

[https://admin.aiac.world/uploads/ckupload/ckupload\\_20210126064946\\_11.pdf](https://admin.aiac.world/uploads/ckupload/ckupload_20210126064946_11.pdf)

<sup>31</sup> Section 44(2) Arbitration Act 2005

		<p>final determination of all aspects of the dispute other than costs and expense,<sup>32</sup> commonly referred to as ‘without prejudice save as to costs’. This will prevent the terms of the Calderbank offer from influencing the arbitrator in his decision regarding the substantive merits of the dispute.</p> <p>Therefore, an offeror can have a degree of control over the expectation of the monetary sum it will be receiving/paying at the end of proceedings through making a Calderbank offer. This is because if the tribunal’s award turns out to be more favorable to the offeror (less favorable to the offeree), the offeror will be able to recover at least a portion of his costs on top of the arbitral award that is already more favorable than the Calderbank offer it made. In this way, a Calderbank offer acts as a financial “safety net”.</p> <p>The Calderbank offer has proven especially beneficial in resolving less complex, lower-value construction disputes.</p>
Tip 7	Get assistance from the arbitrator(s) if caught in delay tactics by the opposing party.	<p>In the event that a party finds itself entangled in unconscionable tactics by the opposing party, it may seek assistance from the tribunal. In these circumstances, the tribunal may:</p> <ul style="list-style-type: none"> <li>i. Set timelines and deadlines that the defaulting party must abide by;</li> <li>ii. Hold case management conferences to address the defaulting party’s conduct;<sup>33</sup></li> <li>iii. Impose cost consequences on defaulting parties; or</li> <li>iv. Limit the number and length of extensions granted to the defaulting party.</li> </ul>
Tip 8	Maintain good conduct.	Throughout the proceedings, party conduct that is unreasonable or disruptive from the perspective of the arbitrator may invite adverse costs. Hence, it is imperative that good conduct is maintained throughout, including adherence to procedural timelines, tribunal orders, and conducting the proceedings in good faith.
Tip 9	After the substantive matters have	After the conclusion of the arbitration hearing, parties will be invited to submit statements about their incurred costs, and the arbitrator will

<sup>32</sup> Section 44(3) Arbitration Act 2005

<sup>33</sup> AIAC Rules 2023, Schedule 4, Clause 7



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	been decided, present a complete and adequate Costs Submission to the Tribunal.	conduct a review of parties' statements on Costs. These statements will provide a basis for the tribunal to make its decision on Costs Allocation.  Bearing in mind that the central consideration of the tribunal would be the factor of "reasonableness", in making Costs Submissions, parties are advised to:  i. Be detailed in listing out the particulars of heads of expenses as well as its reasons. ii. Attach relevant documentary evidence to substantiate the heads of expenses claimed, such as timesheets. iii. Prepare justification for the reasonableness of the amount disbursed under each head of expense.
<b>AFTER</b> conclusion of arbitration proceedings		
Tip 10	Seek enforcement from the courts if your opponent refuses to comply with the Costs Order.	The Costs Order will be made by the tribunal as part of the arbitral award at the conclusion of proceedings. In the event that a paying party refuses to comply with the Costs Order, the receiving party is advised to carry out the following:  i. Timely issue a letter of demand following receipt of the favourable arbitral award from the tribunal. In the letter of demand, the winning party is advised to clearly set out the awarded costs, interest, the final figure payable, as well as the relevant bank account details. ii. Register the award with the High Court. <sup>34</sup>

**Concluding Remarks**

Prudence calls for all business owners contemplating arbitration or engaged in contracts that contain an arbitration clause of any sort, to stay well-informed regarding the financial options available in the event that arbitration proceedings are commenced. Financial strategising in advance will aid parties in managing cash flow and conducting the arbitration in a cost-efficient manner.

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<sup>34</sup> Arbitration Act 2005, Section 38(1)