



February 2016

Costs of arbitration and apportionment of costs under the SCC Rules

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Costs of arbitration and apportionment of costs under the SCC Rules

TABLE OF CONTENTS

| | |
|--|----|
| INTRODUCTION | 2 |
| PART I | |
| COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION | 4 |
| What are the costs of arbitration? | 4 |
| How are the advance on costs calculated? | 4 |
| Looking for balance | 4 |
| Amount in dispute and number of arbitrators | 5 |
| Getting the big picture – Median values of costs of arbitration and costs for legal representation | 6 |
| DURATION OF DISPUTES | 8 |
| PART II | |
| APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION | 10 |
| Legal standard for the apportionment of costs | 10 |
| Apportionment of costs on the basis of the outcome of the case | 11 |
| Nationality of arbitrators | 17 |
| Apportionment of costs on the basis of party conduct | 18 |
| Awarding costs for legal representation | 19 |
| Considerations of tribunals when adjusting the costs for legal representation | 20 |
| CONCLUSIONS | 21 |

Costs of arbitration and apportionment of costs under the SCC Rules

INTRODUCTION

In the past years, the arbitration community has shared the perception that arbitration has become increasingly expensive.

Many parties in commercial arbitration are not aware of the costs that every stage of a dispute will entail and may not know that most of the costs incurred are within their control. On the one hand, the costs of arbitration are determined by the claims that the parties choose to raise, and, on the other hand, the costs for legal representation are to a great extent determined by the conscious decisions that parties make when choosing their case strategy. A median of over 80% of the parties' costs in an arbitration correspond to costs for legal representation.

With the aim of increasing confidence in and transparency of SCC practice, this report describes the size of disputes, their length and costs, as well as the manner in which tribunals ultimately apportion the costs of arbitration and costs for legal representation.

Costs of arbitration and apportionment of costs under the SCC Rules

Methodology

- 148 awards issued between 2007 and 2014 in domestic and international commercial disputes under the Arbitration Rules were reviewed.
- Awards lacking full information on party claims for costs for legal representation, consent awards and awards recording termination of the arbitration were excluded.
- The final data pool resulted in 80 cases, out of which 27 were decided by a sole arbitrator and 53 were decided by three arbitrators.
- 2 out of the 27 sole arbitrator cases and 7 out of the 53 three-arbitrator cases were domestic.
- 54.3% of the arbitrators deciding these cases were Swedish.

The report

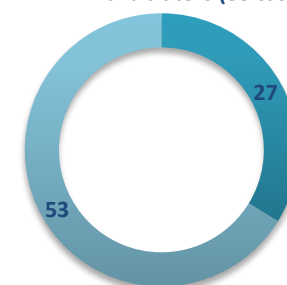
- Part I of this report presents statistical data on the costs of arbitration and on the time to render the award in cases with a sole and with three arbitrators.
- Part II presents statistical data on the recoverability of costs for legal representation; it describes how arbitrators have apportioned the costs of arbitration and costs for legal representation in the awards reviewed as well as the nationality of the arbitrators.

Definitions

- For the purposes of this report “costs of arbitration” are the aggregate value of the tribunal’s fees and the SCC administrative fee as finally set in the cost order contained in an award.
- “costs for legal representation” are the aggregate value of the costs claimed by the claimant and the respondent for legal fees only. This report excludes costs incurred for expenses by the parties, counsel, the tribunal and the SCC. The amounts presented in this report exclude VAT.

INTRODUCTION

Number of disputes decided by a sole and by three arbitrators (80 cases)



- Sole arbitrator (25 int'l; 2 domestic)
- Three arbitrators (46 int'l; 7 domestic)



Costs of arbitration and apportionment of costs under the SCC Rules

PART I COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

What are the costs of arbitration?

The costs of arbitration consist of:

- (i) the fees of the tribunal,
 - (ii) the administrative fee,
 - (iii) the expenses of the arbitral tribunal and the SCC
- (Article 43 (1) SCC Rules).

Parties are requested to pay an amount as advance on costs, which corresponds to the estimated amount of the costs of arbitration (Article 45 SCC Rules). The payment of the advance on costs is a condition necessary for the referral of the case to the tribunal (Article 18 SCC Rules).

How are the advance on costs calculated?

The fees of the tribunal, the administrative fee and a reserve for potential expenses are set on the basis of the **amount in dispute** in line with the **table of costs** contained in Appendix III of the Rules.

- The **amount in dispute** includes the aggregate value of all claims, counterclaims and set-offs raised by the parties to arbitration (Articles 2 (3) and 3 (2) Appendix III SCC Rules). With this, the SCC has adopted an **ad valorem system** to calculate the costs of the arbitration.

- The **table of costs** consists of a mathematical formula ("the formula") for disputes amounting from up to EUR 25 000 and up to EUR 100 million. The advance on costs for disputes exceeding EUR 100 million is set by the Board on a case by case basis.

The formula depends on two basic factors: the amount in dispute, which establishes the range of the table of costs within which the fees will be calculated, and the complexity of the dispute, which establishes the level at which the fees may be set.

Factors that may be considered in assessing the complexity of a dispute include whether the tribunal will have to deal with any jurisdictional objection, whether the

dispute involves multiple parties, multiple contracts, or multiple claims, the subject matter of the dispute, and whether it is likely that much documentary evidence will be submitted or several witnesses will be heard.

Looking for balance

The fees of the tribunal vary from a minimum to a maximum level. Depending on the complexity of each case, the SCC determines the fees anywhere between the two levels. In practice, these levels vary between minimum, medium and maximum and median values in-between these levels.

In exceptional circumstances the SCC may deviate from the amounts set out in the table of costs.

Costs of arbitration and apportionment of costs under the SCC Rules

PART I

COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Amount in dispute and number of arbitrators

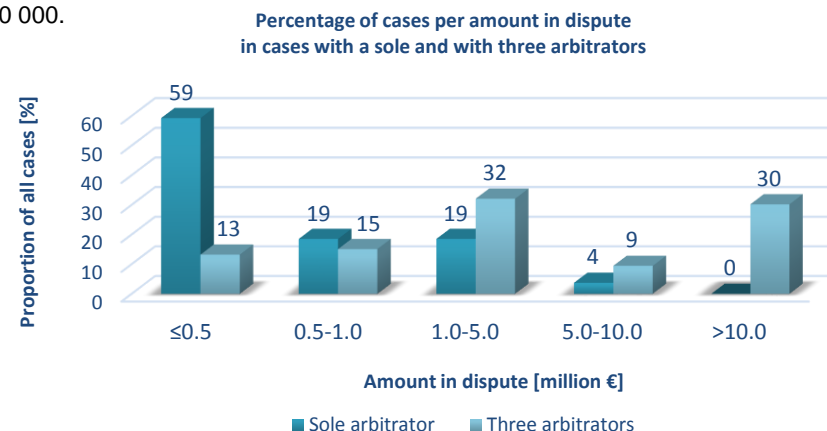
By simple logic, the costs of arbitration in disputes decided by three arbitrators are higher than those incurred in a dispute resolved by a sole arbitrator. Two additional persons deciding the dispute not only implies more fees to pay, but can also be an indication that the dispute is more complex, while higher amounts may be at stake and the dispute will require careful consideration by three experienced practitioners.

Generally, parties refer their disputes to a sole arbitrator when the dispute is of a simpler character and when the amounts at stake are relatively low.

Of course exceptions to this general rule exist, and occasionally parties may leave adjudication of high value claims to a sole arbitrator. The cases reviewed in this report are a reflection of these scenarios.

- The majority, 78% of the cases decided by a sole arbitrator, had an amount in dispute below EUR 1 million. In most cases (59%) the amounts at stake did not exceed EUR 500 000.
- 19% of cases had an amount in dispute that ranged between EUR 1 million and EUR 5 million, and only one case (4%) amounted to EUR 7.4 million.

- 32% of cases decided by three arbitrators had an amount in dispute ranging between EUR 1 million and EUR 5 million.
- 15% of cases had an amount in dispute up from EUR 500 000 to EUR 1 million and 13% had an amount that did not exceed EUR 500 000.
- 9% of cases ranged from EUR 5 to EUR 10 million and 18.8% of cases ranged between EUR 10 up to EUR 50 million. 3.7% of cases ranged up to EUR 100 million and 7.5% had an amount exceeding EUR 100 million.



Costs of arbitration and apportionment of costs under the SCC Rules

PART I

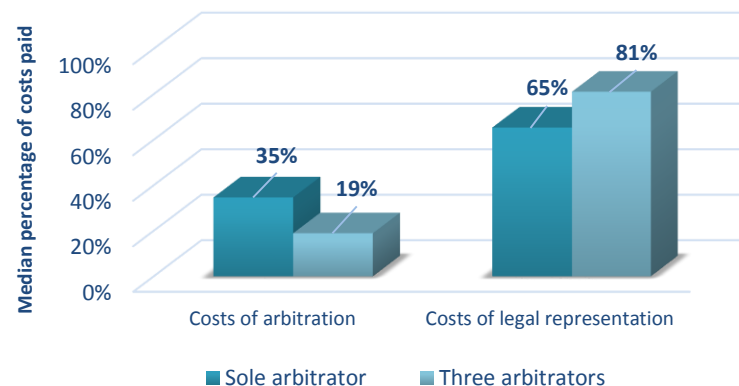
COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Getting the big picture – Median values of costs of arbitration and costs for legal representation

The costs for legal representation form the main part of the a party's costs during the dispute.

- In cases with a sole arbitrator a median percentage of 65% of the total costs paid by the parties corresponded to costs for legal representation, whereas a median percentage of 35% was paid for costs of arbitration.
- Out of the total costs spent in an arbitration, a median percentage of 81% was paid for costs for legal representation, with the remaining 19% devoted to pay the costs of arbitration.

Median percentage of arbitration and legal costs out of total costs

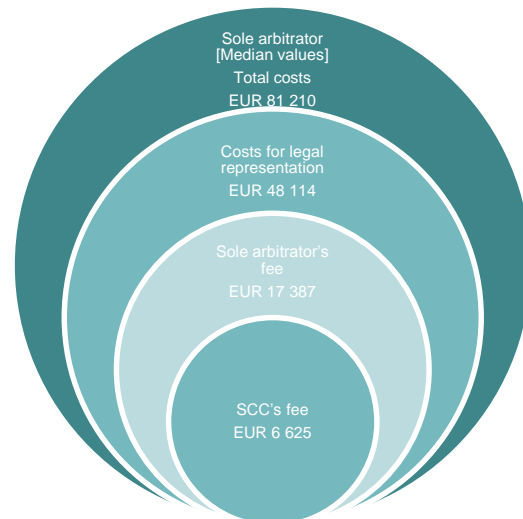


Costs of arbitration and apportionment of costs under the SCC Rules

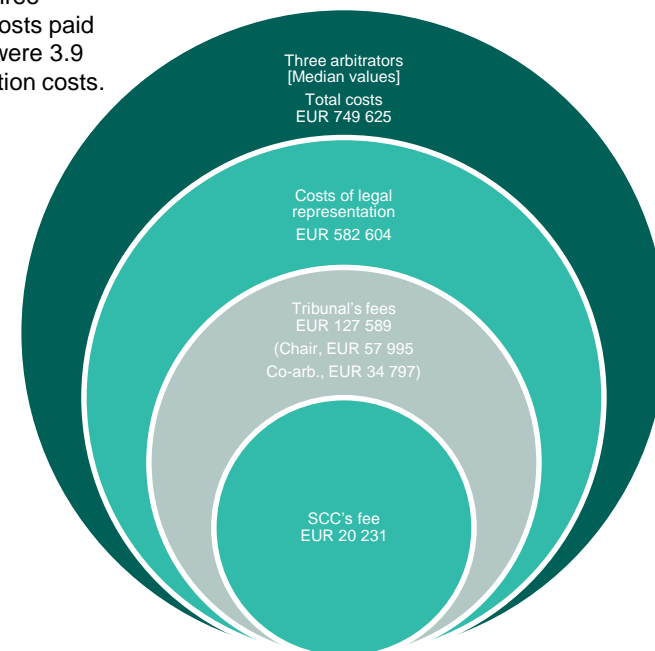
PART I

COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

- In terms of size, in disputes with a sole arbitrator the median costs for legal representation were 1.7 times higher than the median arbitration costs.*



- In disputes decided by three arbitrators, the median costs paid for legal representation were 3.9 times the median arbitration costs.



* The median value of the arbitrator's fees, SCC fee and costs of legal representation paid in sole and three arbitrators disputes were compared. Considering that the amounts in dispute in cases decided by a sole arbitrator and in cases decided by three arbitrators present a great degree of disparity; and keeping in mind that the number of cases decided by three arbitrators is larger than the number of cases decided by a sole arbitrator, the present report compared the median values between these groups, using Bonett-Price standard errors (Price and Bonett, 2002).



Costs of arbitration and apportionment of costs under the SCC Rules

PART I DURATION OF DISPUTES

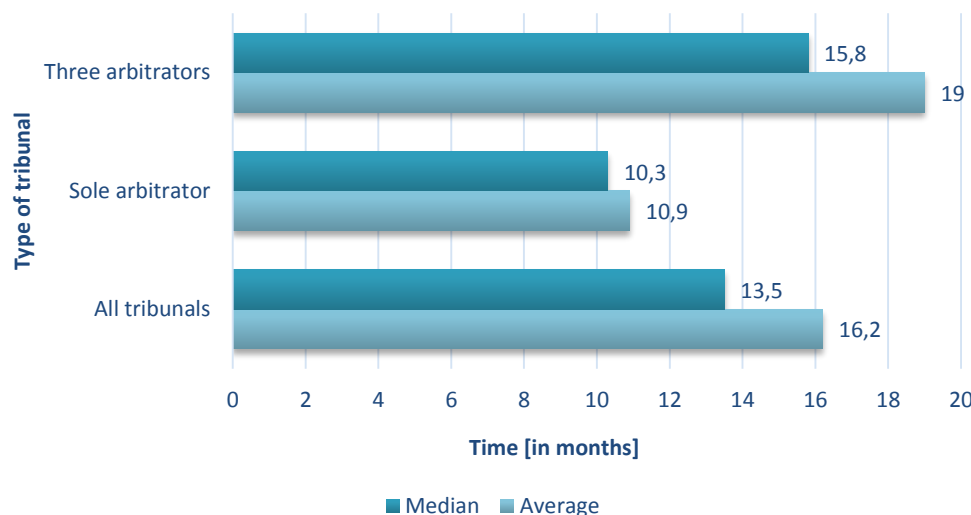
Duration of disputes

The duration of an arbitration is measured from the registration of the case by the Secretariat until the day when the tribunal renders the award.

The data shows that there is a predominance of short-duration disputes, with some outlier cases that distorts the average values for the duration of disputes. For this reason, more meaningful data on the duration of disputes is obtained by looking at the median duration of disputes decided by sole and three arbitrators.

- The report reveals that the median duration of disputes decided by sole arbitrators is 10.3 months and 15.8 months for disputes decided by three arbitrators. Looking at all cases, the median duration was 13.5 months.

Average and median time to render award from registration

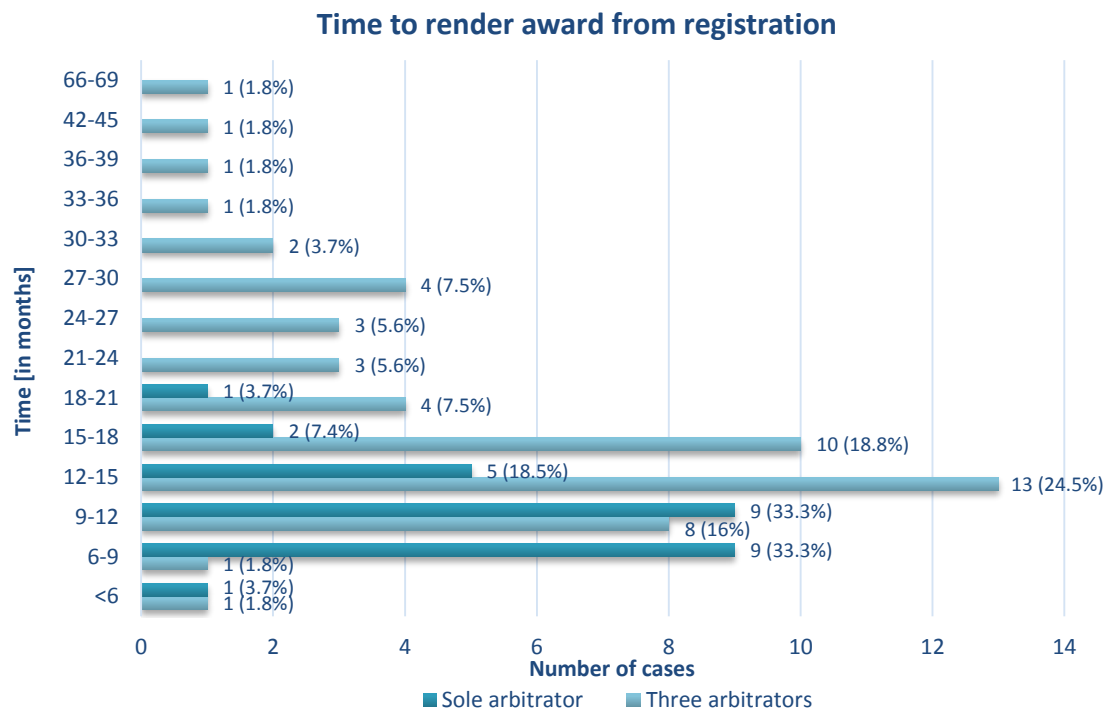


Costs of arbitration and apportionment of costs under the SCC Rules

PART I DURATION OF DISPUTES

While median values give a “big picture” of disperse data, looking at the percentage of cases decided within a specific time span provides more accurate information on the duration of sole and three-arbitrator disputes.

- Looking at sole arbitrator cases in more detail, the data indicates that 66.6% of these cases were decided within 6-12 months from registration (33.3% within 6-9 months and 33.3% within 9-12 months).
- 43.3% of three-arbitrator tribunals rendered the award within 12-18 months from registration (24.5% within 12-15 months and 18.8% within 15-18 months).



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Legal standard for the apportionment of costs

Parties are jointly and severally liable to the arbitrators and to the SCC for the costs of the arbitration (Article 43 (6) SCC Rules).

As to the internal cost liability between the parties, the tribunal decides which party will finally bear the costs of the arbitration, as well as the costs for legal representation (Article 43 (5) and Article 44 SCC Rules).

The SCC Rules take a simple and flexible approach to the apportionment of costs and do not contain any express presumption in favour of the loser-pays approach.** Instead, Article 43 (5) and Article 44 of the SCC Rules provide tribunals with general authority to apportion costs with

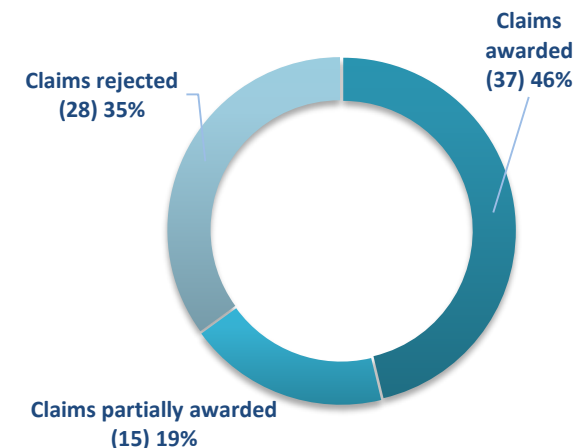
the **outcome of the case** as the primary factor to consider in their decision.

However, the SCC Rules provide tribunals with the flexibility to weigh other factors when deciding who will bear the costs. The Rules state that tribunals should also **have regard to other relevant circumstances** when apportioning costs. As explained further below, the cases examined reveal that from the outcome of the case as starting point, most tribunals are inclined to consider the conduct of the parties as a secondary factor in adjusting their costs decisions.

Depending on the substantive outcome, this report classified the final pool of 80 cases in three different categories. For the purpose of this report success was measured on the basis of the quantum obtained.

- “Claims awarded” includes 37 cases where the claimant was awarded all or almost all of its claims;
- “Claims partially awarded” includes 15 cases where the claimant and/or respondent was awarded approximately half of their respective claims; and
- “Claims rejected” includes 28 cases in which the claimant obtained substantially less than it claimed.

Substantive outcome in commercial disputes SCC Rules 2007-2014 (80 cases)



** The 1999 SCC Rules provided: “Article 41 Costs Incurred by a Party. Unless the parties have agreed otherwise, the Arbitral Tribunal may, at the request of a party, in an Award or other order by which the arbitral proceedings are terminated, order the losing party to compensate the other party for legal representation and other expenses for presenting its case.”



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

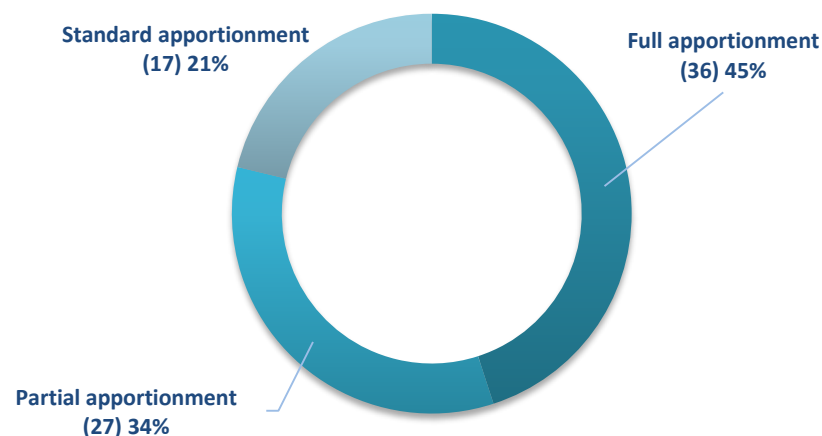
APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Apportionment of costs on the basis of the outcome of the case

SCC tribunals apportioned the costs in three ways, deciding:

- To order one party (usually the losing party) to bear all the costs of arbitration and costs for legal representation ("Full apportionment");
- To apportion the costs based on the relative success of the parties, ordering one or both parties to bear part of the costs of the arbitration and costs for legal representation in a proportion that mirrors each party's relative success ("Partial apportionment"); and
- To order the parties to bear the costs of arbitration in equal shares and to bear their own costs for legal representation and other expenses ("Standard apportionment").

General overview - Apportionment of costs in commercial disputes 2007-2014 (80 cases)



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Apportionment of costs on the basis of the outcome of the case

- **Tribunals order full apportionment when there is a clear winner, and overwhelmingly, when that winner is the claimant**

SCC tribunals ordered full apportionment, instructing a party to bear all the costs of arbitration and all costs for legal representation, in 45% of all cases reviewed.

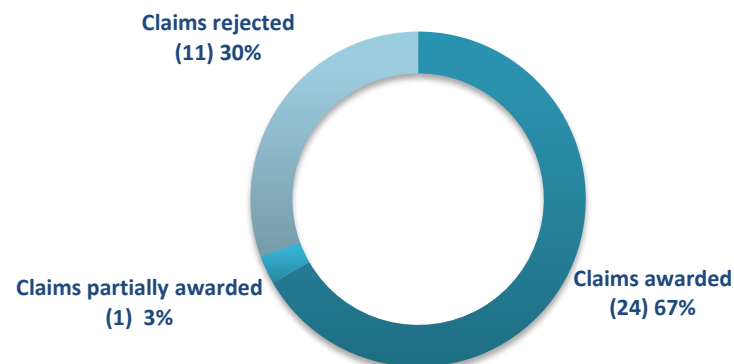
The report demonstrates that the dominant trend, with 97% of these tribunals, is to order full apportionment when there is a clear winner/loser.

Tribunals ordered costs in full either against the losing respondent (24 cases), or against the losing claimant (11 cases).

Full apportionment was ordered in 3% of cases (one case) where the claims were partially awarded and there was no clear winner/loser. Possible reasons that explain why the tribunal deviated in this case from the dominant approach (i.e. shifted the costs to the respondent, although the respondent was, to some extent, successful in its defence), are twofold.

First, as regards the outcome of the case, the tribunal did not measure success on the basis of the quantum of the claims awarded,

Full apportionment



but on the basis of the issues decided. The tribunal considered that the claimant was “*to be regarded as the winning party*” (emphasis added), although it recognized that the claimant had not prevailed in full in its claim

for damages. Secondly, as regards other relevant circumstances, the tribunal considered “that the original claim in the arbitration became moot only when the respondent returned claimant’s assets.”***

*** SCC Arbitration 2010/047, case not publicly available.



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

The latter consideration also reveals that admitting claims, even in cases of the claimant's partial success, does not guarantee that the tribunal will relieve the respondent from bearing the costs.

In cases where the claimant won ("claims awarded"), 65% of tribunals ordered the respondent to bear in full both the arbitration costs and the legal fees, whereas in cases where the respondent won ("claims rejected"), tribunals were less inclined to order full apportionment against the claimant, with 39% of tribunals ordering the claimant to bear in full both the arbitration costs and costs for legal representation.

In cases where the respondent succeeded ("claims rejected") 25% of tribunals ordered standard apportionments, ordering each party to bear half the costs of arbitration and bear their own legal costs; when the claimant was the winner, 5% of tribunals ordered such standard apportionments and 30% of tribunals adjusted the costs in proportion to the parties' percentage of success.

The report shows that in cases where the respondent was the winner, tribunals were almost equally inclined to apportion the costs in full against the claimant (39%, equivalent to 11 cases), as they were to apportion the costs between the parties to mirror each

party's percentage of success (36%, equivalent to 10 cases). Standard apportionments were much more frequent when the respondent was the winner than in cases where the claimant won, where the dominant approach was full apportionment against the respondent.

It appears that when the claimant is the losing party, tribunals are more inclined to have regard to other circumstances than just the outcome of the case in reaching their apportionment decisions.

Costs of arbitration and apportionment of costs under the SCC Rules

PART II

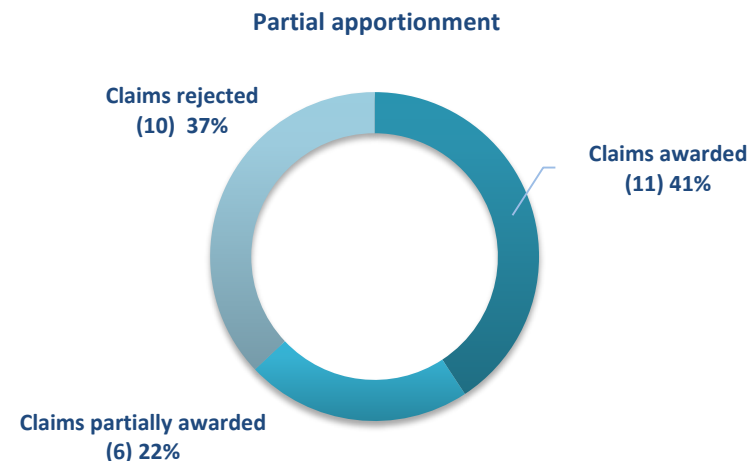
APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

- **Partial apportionments are the tribunals' second preferred approach when there is a clear winner**

The report demonstrates that 34% of tribunals ordered partial apportionments. That is, they adjusted the costs order in a proportion that reflected each party's percentage of success.

Tribunals ordered partial apportionments more frequently in cases where either the claimant or the respondent won the dispute (41% and 37%, respectively), than in cases where there was no clear winner and claimant's claims were partially awarded (22%).

In cases where claims were partially awarded, the dominant trend was for tribunals to order standard apportionments in 53% of these cases, followed by partial apportionments in 40% of these cases, with full apportionment ordered in 7% of these cases.



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

- **Standard apportionments are almost equally preferred when there is no clear winner as when the respondent is the winner**

Standard apportionments were issued by 21% of tribunals. SCC tribunals ordered standard apportionments more often in cases where claims were partially awarded (47%) than in cases where the claims were rejected and where the claims were awarded.

Tribunals were inclined to order each party to bear its own costs when they considered that parties had been more or less equally successful or unsuccessful.

For example, in a case where the claims were partially awarded, the tribunal considered that both parties had been equally successful in their claims, so that each should bear their own costs. The tribunal further explained that the claimant had revised its claims during the arbitration, thus increasing the costs of the defence. In that regard, the tribunal found that, by their conduct, both parties had equally influenced the time and costs involved, ordering them to share the arbitration costs and bear their own legal costs.

In another case where the claimant won, instead of ordering full apportionment against the

losing respondent, the tribunal ordered each party to bear half the arbitration costs and to bear their own legal fees. The tribunal noted that “claimant’s principal claim has been granted for the most part. However (...) the goods sold by claimant were defective, albeit not to such extent as respondent has contended (...) [and] respondent did have the right to withhold part of the purchase price (...) and claimant is partly to be blamed for respondent’s difficulties in evaluating the root cause of the quality problems in the delivered [goods] (...).” ****

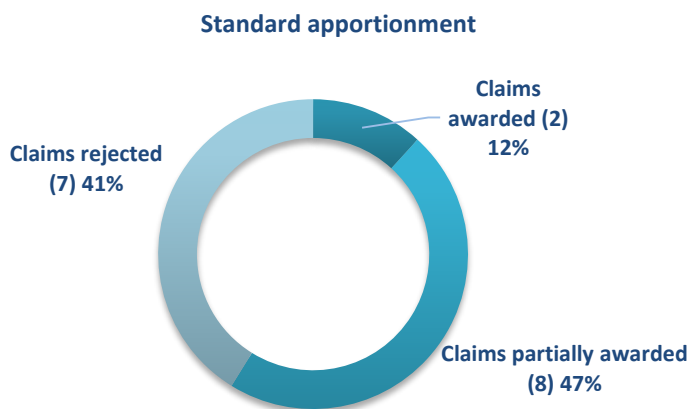
****SCC Arbitration 2010/114, case not publicly available

Costs of arbitration and apportionment of costs under the SCC Rules

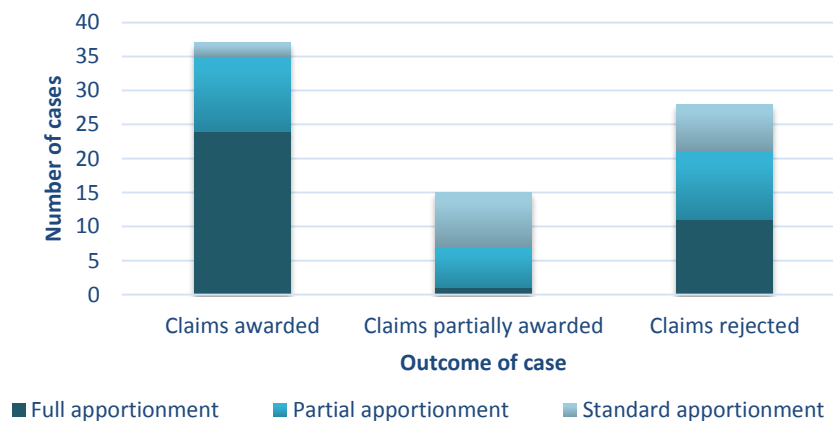
PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

- Standard apportionments were relatively frequent in cases where claims were rejected (41%), resulting in the respondent as the successful party. Tribunals ordered standard apportionments less frequently in cases where the claimant succeeded (12%).



Apportionment of costs according to outcome of the case



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

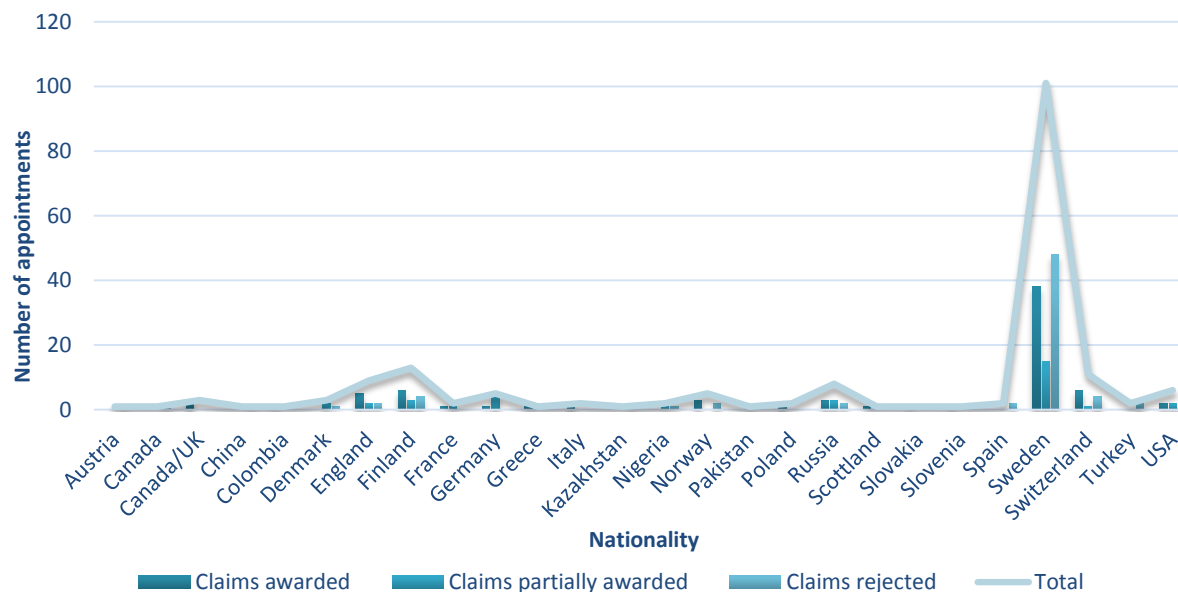
APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Nationality of arbitrators

- The chart to the left shows the nationality of the arbitrators classified in accordance with the outcome of the case.
- Most cases were decided by Swedish arbitrators. The top 6 nationalities were:

Swedish (54.3%)
 Finnish (7%)
 Swiss (5.9%)
 English (4.8%)
 Russian (4.3 %)
 American (3.2%)

Nationality of arbitrators and outcome of the case



Costs of arbitration and apportionment of costs under the SCC Rules

PART II

APPORTIONMENT OF COSTS OF ARBITRATION AND COSTS FOR LEGAL REPRESENTATION

Apportionment of costs on the basis of party conduct

With the outcome of the case as a point of departure, the most common consideration for SCC tribunals to further adjust the costs recoverable by the winner was the parties' conduct during the proceedings.

The following common considerations were identified to adjust the costs recovered by the (relative) winner:

- If the dispute could have been avoided (frivolous claims), or whether claims were legitimate.
- Whether the parties had conducted the arbitration in an efficient manner.
- Whether a party obstructed the proceedings through, for example, late jurisdictional objections or excessive document requests.
- If party refused to comply with tribunal's orders.
- Whether much time had been addressed to an issue that was rejected in the end.
- Whether much time had been spent on issues that had not been properly framed or presented by a party.
- Whether time had been devoted to claims that were later withdrawn.

Costs of arbitration and apportionment of costs under the SCC Rules

PART II

RECOVERY OF COSTS FOR LEGAL REPRESENTATION

Awarding costs for legal representation

In cases where their claims were awarded***** (37 cases), successful claimants claimed reimbursement of costs for legal representation in 36 cases. In 4 out of these 36 cases claimants did not recover any costs. Including cases of non-recovery, claimants were awarded an average of 74% of the costs for legal representation claimed. Excluding cases of non-recovery, claimants recovered an average of 85% of costs for legal representation claimed.

The respondents claimed costs in 25 cases and failed to participate in 6 cases.

In the cases where respondents made cost claims, they were awarded costs in 2 cases. There is too little data available to draw any conclusions on the percentage of recoverability for losing respondents. It can be surmised, however, that it is only in exceptional cases that losing respondents are awarded costs for legal representation, and that generally they do not recover them.

In all cases where the claims were partially awarded (15 cases), both claimants and respondents claimed reimbursement of costs for legal representation. However, tribunals awarded costs for legal representation to claimants in 6 cases and to respondents only in 1 case (recovering in that case

93% of costs claimed). Including cases of non-recovery, claimants were awarded an average of 17.5% of the costs for legal representation claimed. Excluding cases of non-recovery, claimants recovered an average of 43.8% of the costs for legal representation claimed.

In cases where the claims were rejected (28 cases), claimants always claimed legal costs, but recovered them only in 5 cases. Including cases of non-recovery, claimants were awarded an average of 7.2% of the costs for legal representation claimed. Excluding cases of non-recovery, claimants recovered an average of 40.4%.

Tribunals awarded costs for legal representation to successful respondents in 19 cases. Including cases of non-recovery, respondents obtained an average of 52% of the costs for legal representation claimed. Excluding cases of non-recovery, respondents were awarded an average of 76% of the costs claimed, when the claimant lost.

***** Cases where claimants were awarded all or almost all of their claims.

Costs of arbitration and apportionment of costs under the SCC Rules

PART II

RECOVERY OF COSTS FOR LEGAL REPRESENTATION

Considerations of tribunals when adjusting the costs for legal representation

The most common factor in adjusting the legal costs recoverable by each party was the reasonableness of the costs claimed.

Tribunals have taken different approaches on the reasonableness of the expenses incurred by a party for costs for legal representation. While the cases examined do not allow for conclusions on any dominant trends, certain factors were repeatedly taken into account by tribunals in assessing whether claimed costs were reasonable:

- **The fees claimed by the counterparty.** When the costs incurred by one of the parties are considerably higher (twice or more), tribunals use their discretion to reduce the higher costs.
- **The work devoted to each issue, the length and complexity of the dispute.** Tribunals have assessed the reasonableness of the parties' costs claims in consideration of the complexity of the subject matter, the time spent discussing specific issues in the dispute, or the actual contribution that the costs incurred had in resolving the dispute.
- **The parties' procedural burden.**
- **Unfounded or unnecessary requests.** Requests for document production characterized as unnecessary, changing counsel at a late stage, withdrawing claims.
- **Costs not sufficiently evidenced or justified by a party.**

Costs of arbitration and apportionment of costs under the SCC Rules

CONCLUSIONS

Under the SCC Rules, the outcome of the case is the main cause for apportionment of costs. Tribunals interpret this standard in different ways. Some equate this standard with the loser-pays-all approach, dominant in Swedish litigation; whereas other tribunals translate it into costs-follow-the-event.

Tribunals measure a party's success from different points of view. Some tribunals look at the quantum of claims awarded, while others prefer making a thorough claim-by-claim analysis, and still others take a more general approach concerning the importance of the main issues in which a party prevailed.

Aside from the outcome of the case, an ancillary factor in the apportionment of costs was the conduct of the parties.

SCC tribunals see the conduct of the parties among the "relevant circumstances" to consider when finally deciding cost liability between the parties. Examples include frivolous claims, obstruction of the proceedings, unnecessary requests for document production, late jurisdictional objections, change of counsel late in the proceedings.

Tribunals take into account whether the legal fees claimed are justified in the context of the procedural issues at stake. Engaging foreign counsel in

a domestic dispute may be considered reasonable insofar as issues of foreign law are relevant, but when they are not, tribunals may refuse to award such legal costs.

Tribunals aim at maintaining economic balance in the proceedings. Disproportionate costs claims, compared to those of the other party, may be considered unreasonable and thus not recoverable.



February 2016

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Celeste E. Salinas Quero



About the author

Celeste E. Salinas Quero is a Chilean lawyer with a degree from Universidad de Chile and an LL.M. in International Commercial Arbitration Law from Stockholm University (ICAL Program). In 2006 Celeste studied European law and international commercial law at Heidelberg University.

Celeste was from 2012-2013 visiting lecturer at the Department of Law at Stockholm University and associate counsel with the SCC. Since 2014 Celeste has been working as legal counsel with the SCC, managing arbitrations and mediations conducted under the SCC Rules. Celeste is currently secretary of the Committee for the Revision of the SCC Rules.

Before joining the SCC, Celeste worked at the executive office of the Corporación de Asistencia Judicial of the Chilean Ministry of Justice, providing free legal service to the poor, assisting with the execution of court decisions. She is board member of Swedish Women in Arbitration Network (SWAN).

Celeste speaks Spanish (native) and is fluent in English, German and Swedish.



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