

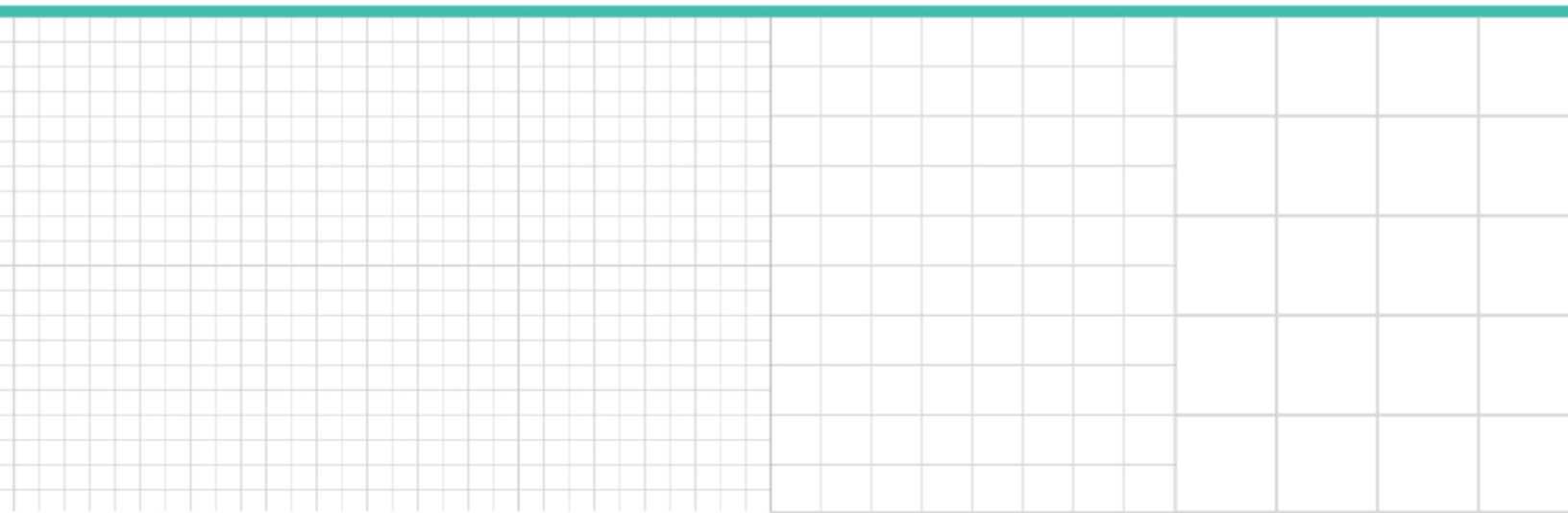


Professional Perspective

# A Primer on International Arbitration Costs

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# A Primer on International Arbitration Costs

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## Introduction

This primer provides guidance on the costs regimes of leading arbitral institutions, with a particular focus on the features that distinguish each regime. Although administrative and tribunal costs represent only a fraction of a party's expenditure in arbitration proceedings, an understanding of the differential treatment of costs by arbitral institutions can facilitate informed choices and may even offer an avenue for easy, if marginal, savings.

The rising popularity of arbitration has sparked reform in some arbitral institutions and the establishment of other institutions across the world. Several of these newer arbitral institutions have already proved to be significant players to watch in the arbitration landscape, such as CEITAC in Beijing, DIAC in Dubai, MIAC in Mumbai, and ICAC in Moscow. A few, however, such as ICC, LCIA, HKIAC, SIAC, and AAA/ICDR are widely regarded among the premier arbitral institutions, and we have, for the purposes of this guidance, restricted our analysis to these five institutions.

## Components of Arbitration Costs

Costs incurred during arbitration proceedings may be broadly classified into two categories. The first category may be said to include the expenses parties incur, such as costs of legal representation, witnesses, and party-appointed experts. These expenses embody the lion's share of a party's arbitration expenses. For example, a 2015 ICC Commission Report records that this category of expenses averages a mammoth 83% of the overall costs of ICC arbitration proceedings.

These expenses are beyond the scope of this piece, which instead addresses a second category of procedural costs of arbitration, including arbitrators' fees and expenses, institutional administrative fees, logistical expenses of the proceedings, and costs incurred in assisting tribunals (including fees for tribunal secretaries). The same ICC Commission Report logs arbitrators' fees at an average of 15% of expenses, and ICC's average institutional expenses at a mere 2%.

Additionally, several external factors may impact the costs a party bears. Key among them is the discretion typically enjoyed by arbitral tribunals to allocate costs to a successful party, in keeping with the internationally accepted principle that costs follow the event. Costs are ordinarily apportioned as part of an award. Tribunals' power to apportion costs may be restricted by an appropriate qualification in the arbitration agreement. Third-party funders play an increasingly relevant role in international arbitration: funding arrangements variably interact with costs awards, depending among other things on the facts of the dispute, the outcome of the arbitration, and the applicable law. Funding arrangements are often a point of discussion in the apportionment of costs.

## Determination of Administrative and Tribunals' Fees

Arbitration institutions adopt one of two mechanisms in the determination of institutional and arbitrators' fees: an ad valorem scale or on an hourly fee.

Institutions using the ad valorem method ascertain costs on the basis of a predefined scale, which prescribes costs proportional to the value of the dispute. The ICC, ICDR, and SIAC use the ad valorem method for calculation of costs, albeit with minor variance in methodology and on the basis of the scales each of these institutions prescribe. The ICC and ICDR's methodology offers room for nuance because these institutions factor in the complexity of the case and the diligence or efficiency of the arbitrators, among other factors, in their calculation of costs. This feature may provide an avenue for savings when a dispute is particularly straightforward.

The HKIAC is unique for the flexibility it offers parties in their election between the ad valorem and hourly costs regimes. If parties fail to elect a regime, or are otherwise unable to agree on a choice, the HKIAC's procedure defaults to the hourly calculation of costs.

The LCIA employs an hourly fee scale and, as the term suggests, ascertains costs on the basis of the time the LCIA secretariat, administrative staff, and arbitrators spend on the proceedings. The arbitrators' hourly fees are likewise based on a predefined scale and capped to a pre-determined maximum. As with ICC and ICDR, LCIA's fees too are adjusted to account for the particularities of the case, such as special qualifications of arbitrators, the complexity of the dispute, etc.

Although the LCIA—as a result of the fee cap—appears to be economical in high value disputes, publicly available studies provide conflicting data on the impact of the fee cap on low value disputes. For instance, one survey indicates that the LCIA is often the most expensive institution for low value disputes. On the other hand, an LCIA analysis of awards rendered between Jan. 1, 2013 and June 15, 2015 challenges that premise, indicating that the LCIA was, on an average across cases of different values, cheaper than the ICC and SIAC and comparable with the HKIAC.

## Distinguishing Features of the Institutions

### ***Filing and Administrative Fees***

The ICDR's fee mechanism provides for a choice between a standard fee schedule and a flexible fee schedule. The standard fee schedule provides for the possibility of a partial refund of the filing fee in circumstances in which disputes are settled or withdrawn within a fixed period, not exceeding 60 days from the filing of the arbitration proceedings. The flexible fee schedule provides for staggered payments, which gives parties a 90-day period from the notice of arbitration or counterclaim before the ICDR proceeds with further administration of arbitration. The ICDR levies an abeyance fee upon parties seeking to keep arbitration proceedings in abeyance.

The ICC, LCIA, HKIAC, and SIAC each charge a non-refundable filing or registration fee, followed by other categories of fees at various milestones. For instance, the ICC requests a provisional advance on the basis of the notice of arbitration, to cover administrative costs until terms of reference are finalized, and a separate advance on costs, based on an ad valorem scale, when a counterclaim or answer is filed. The HKIAC and SIAC impose a challenge fee upon parties seeking to challenge the appointment of an arbitrator, which is another example of a milestone-based fee.

### ***Deposits***

Ordinarily fees are payable by both parties and are collected by way of advances or deposits prior to proceeding with the arbitration. The registrars or administrators at the institutions may request further advances or supplementary deposits if required. In the event of a party's failure to make timely payment of deposits, an arbitral tribunal may require any of the other parties to make payment, failing which the institution may suspend proceedings. The SIAC exceptionally allows tribunals to pass an order or award for reimbursement of unpaid deposits at any time during the proceedings at the request of a party making payments pursuant to the default of another party. The ICC too allows payment of the advance on costs in instalments at the request of parties.

Some institutions, namely the HKIAC, ICC, and SIAC, expressly allow for separate deposits for claims and counterclaims. As a result, a defaulting respondent's counterclaim may be immediately suspended pending payment of the separate deposits. The LCIA and ICDR do not expressly permit separate deposits; the ICDR, however, has prescribed rules requiring counterclaims to be accompanied by a separate fixed fee.

As for set offs in arbitration proceedings, the ICDR and ICC provide for the separate determination of deposits or advances relating to a set off claim, much like the determination of deposits due for claims or counterclaims. The SIAC does not address set offs, except to permit set offs to the extent allowed under the applicable law. The HKIAC does not explicitly address set offs. It does however permit the Secretariat to request separate deposits when appropriate. The LCIA rules do not provide for costs relating to set offs.

In practice, all five institutions are known to return unutilized deposits to the parties. In addition, the HKIAC expressly requires tribunals to provide an account of the deposits the institutions receive in the final award.

## Emergency Arbitration

The HKIAC, ICC, LCIA, and SIAC all require the deposit of administration fees for emergency arbitration proceedings as prescribed in their respective fee schedules. The ICDR does not typically demand an additional administrative fee for emergency arbitration, but instead levies an hourly rate for the emergency arbitrator in a departure from its standard and flexible fee schedules.

## Security for Costs

Respondent parties often seek protection from the risk that the claimant parties may be unable to pay arbitration costs if directed to do so. This protection is typically sought in the form of an application for security for costs. Security for costs is expressly envisaged and permitted under the HKIAC, LCIA, and SIAC rules. Although the ICDR and ICC do not have express provisions dealing with security for costs, tribunals' power to award security for costs is widely recognized as falling within the scope of tribunals' power to grant interim measures.

Institutional costs are hardly ever determinative of the choice of institution. That said, the overall cost of institutional service has been found to be an important consideration for parties responding to a recent survey, alongside other factors such as reputation and recognition of the institution, access to high quality administration, and a wide pool of excellent arbitrators. With that concern in mind, the following annex provides guidance on the leading arbitral institutions' costs.

### Annex

#### Referencer On Leading Institutions

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
<b>Filing and Registration Expenses</b>					
<b>Registration/Filing Fees</b>	Non-refundable fee of HKD 8,000 (Article 4.4; Sch 1), shared equally by all Claimants, unless agreed otherwise.  See, <a href="#">Schedule 1</a>	Choice of <a href="#">two fee schedules</a> :  [A] <a href="#">Standard Fee Schedule</a> :  <a href="#">Initial Filing Fee</a> (payable by the filing party, i.e., includes both claim and counterclaim) of a minimum of USD 5,5750 for a tribunal of three or more. USD 600 of this USD 5,5750 remains non-refundable. A refund is not possible once	Non-refundable fee of USD 5,000  See, <a href="#">Appendix III</a> , Article 1(1)	Non-refundable fee of GBP 1,750  See, <a href="#">Schedule of LCIA Arbitration Costs</a>	Non-refundable fee of SGD 2,000 for non-Singaporean parties and SGD 2,140 for Singaporean parties. The difference in fees stems from the 7% GST levied upon Singaporeans.  See, <a href="#">Schedule of Fees</a>

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
		<p>an arbitrator has been appointed.</p> <p>A partial refund of the Initial Filing Fee (subject to the non-refundable component) is possible on a prescribed scale ranging from 100% to 25%, in cases in which disputes are settled or withdrawn within 60 days from the date the ICDR/AAA receives the notice of arbitration; and</p> <p>[B] <u>Flexible Fee Schedule:</u></p> <p><u>Initial Filing Fee</u> (payable by the filing party, i.e., includes both claim and counterclaim) of a minimum of USD 5,5750 for a tribunal of three or more. Filing fee is entirely non-refundable.</p>			

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
<b>Institutional Expenses</b> <i>(See also, Fee Schedules published by the institutions)</i>					
<b>Administration Fees</b>	<p><a href="#">Schedule 1</a>; Article 33.1(f)</p> <p>Determined ad valorem, unless qualified by the exceptional circumstances justifying a departure from the schedule (See, Articles 18.2, 27.15, 28.10, 30.2)</p> <p>If dispute is not quantified, fees to be fixed by HKIAC.</p>	<p>[A] Standard:</p> <p><u>Final Fee</u> of at least USD 7,125 for a tribunal of three or more. Final fee may be refunded provided the case is settled or withdrawn prior the first hearing and ICDR is notified at least 24 hours before the hearing date.</p> <p>[B] Flexible:</p> <p><u>Proceed Fee</u> due within 90 days of filing notice of arbitration or counterclaim, before ICDR proceeds with administration. This fee is non-refundable.</p> <p>In case of claimant's default, claimant's file will be closed, and in case of respondent's default, the counterclaim will not be presented to the arbitrators.</p>	<p>To be fixed by the ICC Court at the end of the case and taken out of the advance on costs; separate fee arrangements are contrary to ICC Rules (<a href="#">Appendix III</a>, Article 2(4), 2(5)).</p> <p><u>Provisional advance</u> (until the TOR are drawn up) as fixed by the Secretary General to be paid by Claimant, not exceeding certain limits.</p> <p><u>Advance on costs</u> fixed by the ICC Court when an Answer or Counterclaim is filed, to be paid by both parties equally. Provisional advances are credited to Claimant's share.</p>	<p>Hourly rates of GBP 225 to GBP 250/hour for a Registrar, Deputy Registrar, or Counsel and GBP 150 to GBP 175 for Secretarial Staff (for time spent on administration deciding any challenges, etc.)</p>	<p>Determined ad valorem, and charged at a minimum of SGD 3,800 for all cases and capped at SGD 95,000.</p>

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
		<p><u>Final Fee</u> of at least USD 7,125 for a tribunal of three or more is payable in all cases that proceed to a first hearing, and due in advance of a first hearing. The final fee is refundable in its entirety provided the case is settled or withdrawn prior to the first hearing and ICDR is notified at least 24 hours before the hearing date.</p>			
<b>Ad Valorem or Hourly Administration Fees</b>	Parties must elect between the ad valorem and hourly methods, failing which, HKIAC defaults to hourly charges (see, Tribunal's Fees below).	<p>Ad valorem</p> <p>Note however that the stage of proceedings becomes relevant; see, above section on Administrative Fees.</p>	<p><i>Ad valorem</i>, not exceeding a maximum of USD 150,000.</p>	Hourly fees are charged for the time spent by the Secretariat and members of LCIA Court on any challenges, etc.).	<i>Ad valorem</i>
<b>Tribunal fees</b>	<p>Choice of <i>ad valorem</i> and hourly fees</p> <p>[A] Determined as per Article 10 and <a href="#">Schedule 2</a> on an hourly basis, up to a</p>	<p><i>Ad valorem</i></p> <p>Determined by reference to time spent, tribunal's rates, size, and complexity of the case (Rule 35).</p>	<p><i>Ad valorem</i></p> <p>ICC Court may fix the fees at a higher or lower rate if deemed exceptionally necessary.</p> <p>The fees are calculated with reference to the time spent and the value of the dispute (Rule 38(1)).</p>	Hourly fees	<i>Ad valorem</i>
				Tribunal's fees are set at rates not exceeding GBP 450/hour, save in exceptional cases. The	Parties may, however, agree to alternative methods of determining the tribunal's fees, prior to constitution of

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
	<p>maximum of HKD 6,500 per hour; see, <a href="#">Practice Note</a>.</p> <p>OR</p> <p>[B] <a href="#">Schedule 3</a> on an <i>ad valorem</i> basis; see, <a href="#">Practice Note</a></p> <p>If parties fail to agree, HKIAC will default to Schedule 2 (Article 10.1).</p>		<p>Regard is also given to complexity, diligence/efficiency of and time spent by arbitrator. See, <a href="#">Appendix III</a>, Article 2(2)) if dispute is quantified. If the dispute is not quantified, the ICC Court will fix fees at its discretion (<a href="#">Appendix III</a>, Article 2(1)).</p>	<p>fees are calculated with reference to the time spent and rates fixed, along with circumstances such as complexity of the case and arbitrators' special qualifications.</p>	<p>the tribunal (Rule 34.1).</p>
<b>Tribunal's reasonable travel and other expenses</b>	Yes	Yes	Yes	Yes	Yes
<b>Tribunal secretary Expenses, expert advice, other assistance</b>	<p>Yes</p> <p>Secretarial fee is capped at HKD 2,500/hour</p>	NA	NA	Yes	<p>Yes</p> <p>Note, however, that save for reasonable expenses of the secretary, parties will not bear any fees when the value of dispute is less than SGD 15,000 at the time of request; if value is in excess of SGD 15,000, secretarial fee is capped at SGD 250/hour) (See, <a href="#">Practice Note</a>).</p>
<b>Challenge Fee</b>	Non-refundable	NA	NA	NA	Non-refundable amount of



Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
	amount of HKD 50,000				SGD 8,560 for Singaporean parties and SGD 8,000 for non-Singaporean parties; payable by challenging party.
<b>Does the Institution request deposits/Advances on Costs?</b>	Yes Payable by both parties (Articles 10, 33.1, 40)	Yes Payable by both parties and at the discretion of the tribunal (Rule 36)	Yes Payable by both parties (Rule 37, Appendix III)	Yes Payable by both parties and at the discretion of the LCIA Court (Rule 24.1 of the Rules and Article 3 of the Schedule)	Yes Payable by both parties as directed by the Board (Rule 34.3)
<b>Can the Institution request further advances?</b>	Yes, at any time during proceedings (Article 40.3)	Yes, the administrator may request supplementary deposits from parties (Article 36.2)	Yes, the amounts fixed are subject to readjustment at any time during arbitration (Article 37(5))	Yes, interim payments may be requested (Article 24.1 of the Rules and Article 3 of the Schedule)	Yes, the registrar may request further deposits (Rule 34.4)
<b>Are advances payable separately for claims and counterclaims?</b>	Yes (Article 40.2)	No express provision. However, every notice of arbitration and counterclaim must be accompanied by a fixed fee (Articles 2.4 and 3.3); fees will vary depending on whether the claim or counterclaim	Yes, the ICC Court may fix separate deposits for the claims and counterclaims; if so, each party would be required to pay the advance corresponding to its claim (Article 37.3).	No express provision	Yes, the registrar may fix separate deposits (Rule 34.2). A respondent must pay a counterclaim filing fee of SGD 2,140 for Singaporean parties and SGD 2000 for non-Singaporean parties.

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
		increases or decreases.			
<b>Are advances separately payable for set off claims?</b>	No express provision. The Secretariat may request separate deposits when appropriate (Article 40.2)	Yes, a set off must be accompanied by the appropriate filing fee (Article 3.3)	Yes, set off will be taken into account in determining the advance in the same way as a separate claim, to the extent that the advance requires the tribunal to consider additional matters (Article 37(7))	No express provision	Rules permit a set off to the extent permitted by the applicable law (Rule 28.5)
<b>Do other parties pay in the event of a default of a party?</b>	Yes Deposits must be paid within 30 days, failing which the HKIAC will inform parties so that one of the other parties may pay.  If all parties fail to pay, the tribunal may suspend, terminate, or continue proceedings as it sees fit (Article 40.4).	No express provision. The tribunal may suspend or terminate proceedings in the event of default (Article 36.3) and shall be deemed a withdrawal (Article 36.4)  If a respondent defaults, counterclaims will not be heard. The administrator however will inform all parties about a default so that one or more of the non-defaulting parties may pay the defaulter's share of advances. Such a party may claim the amount as	Yes Any party may pay a defaulting party's share of advances (Article 37(5))  Failing compliance and after consultation with the tribunal, the Secretary General may direct the tribunal to suspend proceedings, and direct that claims be deemed to be withdrawn after a fixed period of not less than 15 days. Such claims may be reintroduced in another proceeding (Article 37(6)).  Parties may bring objections before the ICC Court.	Yes  In case of default by a party, LCIA may direct another party to make payment in order to allow arbitration to proceed. This amount may be recovered under an arbitral order or award as a debt immediately due along with any interest payable (Articles 24.4, 24.5 and 3(iv) of the Schedule).	Yes  Any party may pay the defaulter's share of the advances. If a respondent defaults, counterclaims will not be heard (Rule 34.5). The tribunal may suspend proceedings, and consider the claims to be withdrawn after a fixed period (Rule 34.6).  Tribunal may issue order or award for reimbursement of unpaid deposits at any time, at the request of the complying party at any time during proceedings (Rule 27(g)).

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
		costs) (Article 36.3).			
<b>Account for costs</b>	Tribunal must account for deposits in final award	No reference	No reference	No reference	No reference
<b>Unspent amounts</b>	Returned to parties	No reference	Returned to parties	Returned to parties	No reference
<b>Arbitrations in Abeyance</b>	NA	Annual fee of USD 600, to be borne equally by parties. In case of default by one party, others may pay the entire fee. Failure to do so will result in closure of file.	NA	NA	NA
<b>Other Factors</b>					
<b>Apportioning Costs</b>	Yes, at the tribunal's discretion (Article 34.3)	Yes, at the tribunal's discretion (Rule 34)	Yes, at the tribunal's discretion (Article 38.4)	Yes, at the tribunal's discretion (Rule 28(3))	Yes, at the tribunal's discretion (Rule 35.1)
<b>Third-Party Funding (TPF) Arrangements</b>	Tribunal may take TPF into consideration (Article 34.4)	No reference	No reference	No reference	Tribunal may take TPF into consideration ( <a href="#">Practice Note on Arbitrator Conduct in Cases Involving External Funding</a> , 10, 11)
<b>Is there a costs / fees calculator?</b>	<a href="#">Yes</a>	The institution does not provide a calculator	<a href="#">Yes</a>	The institution does not provide a calculator	<a href="#">Yes</a>
<b>Emergency arbitrator</b>	Application deposit of HKD 250,000	No extra administrative fees	USD 40,000 See, <a href="#">here</a>	Fees of GBP 20,000, which may be	Non-refundable administration

Criteria	HKIAC	ICDR	ICC	LCIA	SIAC
	towards administrative expenses and the emergency arbitrator's fees (Schedule 4, 6)			increased at the discretion of the LCIA Court; a non-refundable fee for the appointment of an Emergency Arbitration is fixed at GBP 8,000	fee of SGD 5,350 for Singaporean parties and SGD 5,000 for non-Singaporean parties; deposit towards arbitrators' fees is fixed at SGD 30,000 unless otherwise determined by the Registrar (Rule 30.2 and Schedule 1)
<b>Can security for costs of a respondent be ordered?</b>	Yes (expressly in Article 24)	No express power; general power to award interim measures under Article 24	No express power; general power to award interim measures under Article 28.	Yes, at the tribunal's discretion (expressly in Article 25(2))	Yes, at the tribunal's discretion in exceptional circumstances upon request of a party (Rule 27(j))