

ARBITRAL TRIBUNALS CONTROL OF ARBITRATION COSTS IN INTERNATIONAL COMMERCIAL ARBITRATION

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Abstract

The Arbitrators/Arbitral Tribunals were made to be responsible for the costs management of arbitration cases/costs, also were given powers to help the parties in this direction. Arbitration Agreement Costs and the costs of proceedings, which consist of:-

1. Arbitrations fees,
2. Arbitrations expenses,
3. Compensation and imbursements expenses to the Secretary of the arbitration tribunal, experts, recording or steno typists, hiring rooms and other necessary costs,
4. Administrative dues and expenses,
5. Parties counsel fees.

The Arbitrators/Arbitral Tribunals are so empowered to limit costs, forms and precedents, Arbitrators' fees, taxation costs and security for costs, which is suitable for professional arbitration lawyers for the new and lay arbitrators. The New York Convention, Model Law, 1985 and the English Arbitration Act, 1996, helped to stimulate this area of the law which were enacted variously on the Costs in International Commercial Arbitration and in Domestic Arbitrations.

1.00 Introduction

The ICC Rules of Arbitration has issued guidance on controlling costs.¹ The question of costs has not attracted a great deal of academic attention; but recently it seems to have become something of a hot topic in international arbitration, with a number of recent articles expressing concern over what is seen as the escalating cost and uncertainty over the application of existing rules². There have been a number of cases on arbitral costs decided in a variety of jurisdictions see the case of *Casata Limited v General Distributors Limited*³. It is estimated that between 80% and 90% of the total costs arise from the parties' direct expenses, such as representation cost and experts costs etc⁴ and hence the rule which applies as to allocation of these

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¹ J K Goytanda, Awarding costs and attorneys' fees in international commercial arbitrations, 21 Michigan Journal of International Law (1999) 1-50; M P O'Reilly and E Ryan, Costs in international commercial arbitration, Ch. 9 in International Commercial Arbitration: Practical Perspectives (A. Berkeley & J. Mimms Eds), Centre of Construction Law & Management, King's College, London, September 2001, 121 - 135.

² R H Kreindler, Final Rulings on Costs: Loser Pays All?, Best Practice in International Arbitration, Proceedings of the ASA Conference, Zurich 27 January 2006. J M Abascal Zamora, Reducing Time and Costs in International Arbitration, Modern Law for Global Commerce, paper delivered to the Congress to celebrate the 40th annual session of UNCITRAL, July 2007.

³ [2006] NZSC 8 - whether failure to make an award as to costs leads to an incomplete award; *KH, SK and WM v Soyak International Construction & Investment Inc* [2008] Supreme Court of Sweden O-4227-06 [review of arbitrators' fees]; *VV v VW* [2008] Part 3 Case 10 High Court of Singapore [whether an award of allegedly excessive legal costs in the award was reviewable by the court].

⁴ Techniques for Controlling Time and Costs in Arbitration: estimated based on ICC arbitration awards 2003-4 that the costs were spread as follows: Costs borne by the parties to present their cases (including lawyers fees and expenses) 82%, Arbitrators' fees and expenses 16% and Administrative expenses of ICC 2%. Klaus Sachs estimates that in arbitrations in which he was part of the tribunal the

costs is one of great – and arguably growing – significance, particularly in smaller arbitrations where the costs make up an appreciable proportion of the sums in issues. I do not propose to review domestic costs rules applicable in major jurisdictions around the world⁵. Suffice it to say that there are two basic models, which we can denote respectively as the American Rule and the English Rule. Under the American Rule, parties pay their own costs irrespective of the outcome and share the costs of the tribunal/institution; this is based on the philosophy that access to justice is paramount and barriers to seeking justice should be eliminated. Under the pure English Rule, the “winner” recovers his reasonable costs from the “loser” who also pays for the tribunal/institution costs; this is based on the philosophy of indemnity – if I was right to take this action, then I should not be out of pocket for doing so. Of course, there are many modifications to these rules in practice – in the US, bad faith litigation can result in cost shifting, see the case of *Alyeska Pipeline Serv. v. Wilderness Soc'y*,⁶ and in England new rules encourage fractional costs awards to reflect partial success⁷.

The reason why people prefer to go to arbitration is based on the fact that it is more efficient than litigation, due to its advantages over litigation. Arbitration is quicker with less cost, after settlement of any differences the parties may go back to do business, unlike parties in court that would not conduct any other business thereafter. The cost of arbitration is little as the parties would want it to be. This perception has changed as parties now complain of the cost involved in arbitral proceedings. It may be correct to say that it is the responsibility of all the stakeholders to get involved and remedy the situation, it is also believed that arbitral tribunals have major role to play in remedying the situation likewise other institutions. It should be noted that the determinant of parties’ legal fees is the manner the arbitration is conducted. This work focuses on the cost generally, the role of arbitral tribunal in controlling arbitral cost. We also look into the authority granted to arbitral tribunal to control costs under the institutional rules. It will also show that arbitrators have the powers to manage cases in order to prevent excessive time waste and costs.⁸

We also state that it is important that tribunals use their powers under these rules to fulfill their responsibility to the parties and to free the parties from themselves. We also proffer suggestion on the way forward to strengthen the tribunals’ power in terms of controlling cost⁹.

1.01 Cost On Arbitration

Cost is the amount of money required to be paid for something, in this contest as it concerns cost on arbitration, it is the amount of money spent in pursuing issues/dispute settlement in arbitration cases and the legal actions that would arise there from and the monies as costs that the losing party would normally pay.

The tribunal fixes the cost of arbitration. If it is a situation where the arbitration is institutional, which means the arbitration proceedings is conducted by or under an arbitration institution which promote or administers arbitral process like the Chartered Institute of Arbitrators of Nigerian Branch, Lagos Court of Arbitration, the London Court of International arbitration (LCIA) and others fixes the fees of the arbitrators in accordance with the schedule of fees set down in their various rules.

Under the Arbitration Mediation Act (AMA) Section 49 of the Act makes provision concerning costs.

costs of representation were of the order of 81%-94% of the total – see Time and Money: Pervasive Problems in International Arbitration, L. Mistily and D M Lew, eds 2006.

⁵ See the survey in Jackson LJ’s Interim Report Vol. 2 Part 11 “Review of costs regimes in other jurisdictions”: Ch 54 Scotland; Ch 55 Germany; Ch 56 France; Ch 57 The Netherlands; Ch 58 Australia; Ch 59 New Zealand; Ch 60 The USA; Ch 61 Canada; Ch 62 Eastern Caribbean. Also see the research available on the Oxford University Centre for Socio Legal Studies which has been seeking to collect an authoritative database on costs from a variety of jurisdictions.

⁶ [1975] 421 U.S. 240 ‘A court may assess attorneys’ fees ... when the losing party has acted in bad faith.’

⁷ CPR and UNCITRAL A/CN.9/9/C.2/8R.13.

⁸ Article 38-41 Arbitration Rules.

⁹ David W. RLV kin, Samantha J. Rome. The Role of the tribunal in controlling Arbitral Cost. (2015) 81 Arbitration

The cost as provided by this section includes:

- a. Fees of the arbitral tribunal
- b. The travel and other expenses of witnesses
- c. The cost of expert advice and other assistance required by the Arbitral Tribunal
- d. Travel and other expenses of witnesses to the extent that such expenses are approved by the arbitral tribunal.
- e. The cost for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings and only to the extent that the arbitral tribunal determined that the amount of such costs is reasonable and others fees as stated in section 49 of the Arbitration Mediation Act. (AMA).¹⁰

Also article 31 of the International chamber of Commerce (ICC) Rules of Arbitration states in paragraph 1 that “the cost of the Arbitration shall include the fees and expenses of the arbitrator and the administrative expenses fixed by the court in accordance with the scale in force at the time of commencement of the arbitral proceedings as well as the fees and expenses of any expert appointed by the Arbitral Tribunal and the reasonable legal and other costs incurred by the parties for the Arbitration”.¹¹

Articles 38 of the International Chamber of commerce (ICC) Rules of Arbitration which is *impairi materia* with section 49(1) of the Arbitration Mediation Act addresses cost for domestic Arbitration.¹²

Basically there are two main costs in arbitration

1. Arbitration Costs: This cost includes the fees of arbitrator(s), hiring venue, transcribers, witnesses, administrative expenses.
2. Legal Costs: This includes the fees for legal representative and preparation of the case, and legal advice given to the parties are part of the legal cost.

Methods

It is also important to note that there exist methods used by arbitral tribunals in fixing costs. These methods includes

- (a) Ad valorem: The fees are fixed based on the amount in dispute.
- (b) Per Diem: the fees are fixed and payable per day
- (c) Fixed Fee: A fixed amount for all arbitration with regard to the amount in dispute and or the period of time in arbitration may take to complete.

This means that the cost of the Arbitration proceedings shall be paid by the unsuccessful party to the successful party. The arbitral tribunal is at liberty, as they deem it fit to award costs. The general principle is that the unsuccessful party bears the cost.

Article 40(1) and (2) of the International Chambers of Commerce (ICC Rules of Arbitration) upholds the general principle stating thus:

- 1) Except as provided in paragraph 2 the cost of Arbitration shall in principle be borne by the unsuccessful party.
- 2) With respect to the cost of legal representation and assistance referred to in Article 38 paragraph (e) of the arbitral, tribunal taken into account the circumstance of the case, will be to determine which party shall bear such cost or may apportion such costs between the parties if it determines that such apportionment is reasonable.

In America, the United States does not apply the principle that costs follow event. The parties in litigation bear their own costs including attorneys fees.

The tribunal can award costs or fees “only if the party’s contract, a specific statute, or the arbitration rules so allow”. The American Federal Arbitration Act (FAA) which applies among others to actions involving

¹⁰ Arbitration and Conciliation Act CAP A18 Laws of the Federation of Nigeria 2004

¹¹ Bello Adesina Temitayo- cost follows the event in arbitration, its paradigm and relevance journal ff Research and Development Vol. 2 No. 1, 2014. S. 49(1) Arbitration and Conciliation Act

¹² Article 31 of the International Chamber of Commerce (ICC) Rules of Arbitration

intestate, commerce and to international arbitrations does not contain any provision regarding the allocation of costs and attorneys fees. Most states have adopted this position under the Uniform Arbitration Act (UAA). That if it is not stated in the agreement, the arbitrator's expenses and fees, together with other expenses shall be paid as provided in the Award Some countries generally prohibit arbitral awards of attorneys fees in domestic arbitration. But there are states that allows them in international arbitration like in California in domestic arbitrations each party pays its own pro rata share of expenses "in making an award for cost the arbitral tribunal may include as cost of legal fees and expenses"¹³.

It is worthy of note that the American Rule has changed over time as arbitrators can award attorneys fees authorised by the parties in their agreement, the applicable law or arbitral rules may expressly authorise an award of attorneys fees. And many States have adopted international arbitration laws that authorised an arbitrator to award attorneys fees and the fees may be awarded against a party who has been found guilty of contempt of court, misconduct or acted in bad faith¹⁴.

2.0 Authority to Control Costs

By the provision of Section 49 (1) of Arbitration Mediation Act, 2023 and the Rules of Arbitration, the arbitral tribunal is empowered to fix cost of Arbitration which includes section 49 (1) Arbitration Mediation Act, 2023 and the Rules of Arbitration, the rules have changed over the years that the tribunal not the parties has control over the CONDUCT of the Arbitration. The rules adopted by most institutions and the UNCITRAL vest wider authority on the Tribunal to control cost.

Article 17 of the UNCITRAL Rules provides the Tribunal with broad powers to conduct the Arbitration before it. It states:

"Subject to these rules, the arbitral tribunal may conduct the Arbitration in such a manner as it considers appropriate provided that the parties are treated with equality and that at appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and different process for resolving the parties dispute".

2.01 Power to Order for Security for Cost

Arbitration is a consensual procedure the parties are free to confer powers on the tribunal. The parties may agree to confer an arbitral tribunal the power to order for security for costs, it may be in the agreement of the parties or through the incorporation or the procedural rules which condemn security for costs provision. Any purported powers must operate within the provisions of the Arbitration Mediation Act and the laws of Nigeria *lex arbitri*. Arbitral Tribunals are bound by the provisions of the *lex arbitri* i.e. the laws of the place of the Arbitration must be examined to make sure that there is no prohibition of the arbitrators powers to order for security for cost. The arbitrators must comply with the provision of (*Lex arbitri*) which is the law of the place of arbitration. As such any power confer on the tribunal over and above what is permitted by the applicable law is invalid.

2.02 Fixed fees for arbitrators

Arbitration is a product of contractual freedom, parties often draft their dispute resolution claims without given serious thought to the implications that such a choice may bring when the dispute arises. Mostly, they forget about the costs of the Arbitration – including the arbitrators fees most a times this occur when the contract has already been signed, and when the dispute has arisen, the first question would be how much is going to cost me. The party that initiates the Arbitration would be surprised why a clause on costs was not

13 FAA, American Federal Arbitration Act

14 Michigan journal of International Law (Vol. 21:1) J. Olakunle Orojo M. AyodeleAjomo Law and Practice of Arbitration and Conciliation in Nigeria P9 254.

included in the agreement and at that time it will be too late. To that extent the arbitral institution will apply its schedule.

The worst situation usually is that the advance costs may be set up in an amount costs providing half of the total cost of the Arbitration.

If the dispute is settled before the final award or even before the final hearing, or may be after the first exchange of submission, the tribunal or the institution will fix their fees. From the forgoing, it better to consider this lacuna especially in the context of ad hoc Arbitration of a schedule fees of any given institution hence may look at an Arbitration clause that includes a fee schedule.

2.03 General Principle of Cost following Event

In the conventional English Court system, it is trite that after parties have presented their case, the Presiding Judge delivers his Judgment. The Judgment is the decision of the Court being the outcome of the evaluation of the facts of the case and evidence led by either side. On the other hand, award is the outcome of arbitral proceedings. Again upon delivery of Judgment in the conventional English Court, judicial authorities as well as Rules of Court allow the Court to award cost of proceedings to the winning party. The rationale usually, is that Costs follows event. In other words, that the winning party having been made to embark on judicial process in order to obtain redress is entitled to be compensated by award of cost for reasonable expenses incurred¹⁵.

The practice of allocating costs and attorneys' fees between the parties to a dispute can be traced to Roman law, where the practice of requiring the losing party to pay the winning party's costs developed. Interestingly, in early ecclesiastical courts there were no fees for legal advice. However, under *legis actio sacramentum*, litigating parties deposited a sum of money in court to ensure legal proceedings were initiated with good cause. At the conclusion of the action, the deposit was refunded to the prevailing party, but the deposit of the losing party was forfeited to the temple¹⁶.

This practice is known as the principle that costs follow the event. There are several policies that support the principle that costs follow the event. These policies include (1) punishing the losing party, (2) indemnifying the winning party, and (3) deterring frivolous party for doing so is to indemnify the winning party¹⁷. *Dr. J. Gillis Wetter and Charl Priem* explained that the modern justification for the principle that costs follow the event is founded on the concept that if and to the extent that a claimant is entitled in law and justice to obtain a sum of money from another party, should not have to suffer any expense (beyond the cost of addressing a simple demand) for being awarded it. Conversely, if a respondent is exposed to a claim which at the end of the day is deemed not to be founded in law and justice and he should not suffer any expense for defending the action¹⁸. It also has been asserted that the principle that costs follow the event, advances the goal of deterring claims with little merit and bad faith litigation. This is based on the premise that a claimant, knowing that it must bear both its own costs and those of the other party should it lose, will not pursue low quality claims or institute a vexatious action. Similarly, the principle of costs follow the event discourages parties from exaggerating their claims and counterclaims and bad faith litigation. Some commentators have speculated that the principle of costs follow the event was originally penal in nature. They argue that courts awarded costs and fees in order to punish an unsuccessful plaintiff for bringing a false claim or to fine a losing defendant for unjustly refusing the plaintiff's rights.

¹⁵ Adesina Bello, 'Cost follow events in Arbitration', Journal Research and Development Vol. 2 No. 1 2014

¹⁶ Ibid

¹⁷ Thomas D. Rowe, 'The Legal Theory of Attorney Fee Shifting': A Critical Overview', 1982 DUKE L.J. 651, 653-54

¹⁸ J. Gillis Wetter & Charl Priem, *Costs and Their Allocation in International Commercial Arbitrations*, 2 Am. Rev. Int. Arb. 249, 329 (1991); see also Graham J. Graham-Green, *Taxation of Costs in the Supreme Court*, 49 Air B. 319 (1984). Fall 1999) *Michigan Journal of International Law*.

3.00 Controlling time and cost in Arbitration.

The arbitral tribunal can control the time and cost in Arbitration. This is to avoid unnecessary delays and cost, like in the ICC Rules of Arbitration- The International Chamber of Commerce has taken steps to render Arbitration more efficient, Article 22 of the rules place emphasis on both expeditiousness and cost effectiveness “conduct of the Arbitration”

In order to ensure effective cost management, the arbitral tribunal, after considering procedural measures as provided, that they are not contrary to any agreement of the parties.

Prior to 2012, the ICC rules had simply required the arbitral tribunal to set a “provisional time table” at the begging of the Arbitration, following consultation with the parties.

Article 24 in the revised rules on the other hand makes it an initial procedural conference between parties and tribunal. When drawing up the terms of reference the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted. The procedural time table and any modifications there to shall be communicated to the court and the parties.

Appendix IV of the 2012 rules list cost management techniques in relation to different phases of the Arbitration “that can be used by the arbitral tribunal and the parties for controlling time and cost”. These include “rendering one or more mere partial awards on key issues when doing so may be expected to result in a more efficient resolution of the case.

Avoiding any request for document production and cost and organising a pre hearing conference at which the “arbitral tribunal can indicate to the parties issues on which it will like the parties to focus at the hearing to ensure effective case management the tribunal may adopt further procedural measures. In settling the arbitrator fees, the arbitral tribunal take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceeding, the complexity of the dispute and timelessness of the submission of the draft award so as to arrive at a figure within the limit of the specified time. Where a defendant had denied the plaintiff's claims in bad faith, courts customarily doubled the amount of the judgment¹⁹.

In England, the rules on the awarding of cost and fees developed in law through piecemeal legislation and in equity through the exercise of the Chancellor's discretion²⁰. This practice is known as the principle, **that costs follow the event**. There are several policies that support the principle that costs follow the event. These policies include

- (1) Punishing the losing party,
- (2) Indemnifying the winning party, and
- (3) deterring frivolous party for doing so is to indemnify the winning party²¹. **Dr. J. Gillis Wetter & Charl Priem**, explained that the modern justification for the principle that costs follow the event is founded on the concept that a claimant is entitled in law and justice to obtain a sum of money from another party, that the party should not suffer any expense for another person's wrong. Conversely, if a respondent is exposed to a claim which at the end of the day is deemed not to be founded in law and justice. he should not suffer any expense for defending the action²². It also has been asserted that on the principle that costs follow the event, which advances the goal of deterring claims with little merit and bad faith litigation. This is based on the premise that a claimant, knowing that it must bear both its own costs and those of the other party should it lose, will not pursue low quality claims or institute a vexatious action. Similarly, the principle that costs follow the event discourages parties from exaggerating their claims and counterclaims and bad faith litigation. Some commentators have speculated that the principle of costs follow the event was originally

¹⁹ See John Yukio Gotanda; Awarding Cost and Attorney's Fees in International Arbitration, (1999) *Michigan Journal of International Law*. For a historical background on the practice of awarding costs and fees, see Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47 *LAW & CONTEMP. PROBS.* 37, 40-44 (1984); Arthur Engelmann, *The Roman Procedure*, in *A HISTORY OF CONTINENTAL CIVIL PROCEDURE* 239, 279-82 (Robert Wyness Millar ed. & trans., 1927

²⁰ John Yukio Gotanda; *ibid.*. See also Access to Civil Procedure Abroad (henk j. Sniijers ed. 1996.

²¹Thomas D. Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 *DUKE L.J.* 651, 653-54.

²² *ibid*

penal in nature. They argue that courts awarded costs and fees in order to punish an unsuccessful plaintiff for bringing a false claim or fine a losing defendant for unjustly refusing the plaintiff's rights.

While the rationale for the practice of allocating costs and fees may originally have been to penalize the losing party, today, it appears that the main reason for doing so is to indemnify the winning party²³.

In most jurisdictions, awarding cost in litigation often follows the principle that cost follows events. In some jurisdictions, the principle is already codified to the effect that costs are assessed against the losing party unless the Judge assesses the whole or a part of the burden against the other party in a decision with reason. Yet in some jurisdictions where there are no such legislation, Courts are endowed with discretion to determine whether to award cost to the successful party, but they often do so under the general principle that cost follows the event. While in some jurisdictions award of costs may be total against the losing party, in some others, award of cost is in proportion to the extent of success recorded by the successful party. In many countries, however, awards of costs and fees are subject to a variety of limitations. For example, in Spain, costs that may be recovered by a successful party are limited to one-third of the amount claimed in the action. In addition, in England, Germany, and Switzerland, the amount of attorneys' fees is determined by a fixed fee schedule, which may not reflect the actual fees incurred. In some countries, courts may refuse to award costs or fees, or both, if the winning party acted in bad faith in the litigation²⁴.

In our jurisdiction, the Rules of most superior Courts of record make provision for award of cost at the conclusion of litigation. The power to award or not to award cost is conferred on the Judge. It is a discretionary one. Usually the essence of awarding cost in litigation in Nigeria is never to punish the losing party. It appears to differ materially from the historical emergence of the principle of costs following events in the English Court system or to unduly enrich the winning party. There is unanimity of position on this, by judicial authorities. In *Wema Bank Plc & Anor. v. Alaran Frozen Foods Agency Nigeria Limited & Anor*²⁵ - the Court of Appeal took time to espouse on award of cost in litigation as follows -

"The law is trite that cost follows event and the Courts are empowered by the Rules to award cost, see the case of *NNPC v. CLIFCO NIG. LTD*²⁶, also in the case of *OLOKUNLADE V. SAMUEL*²⁷. It is at the discretion of the court to award cost. The ultimate requirement is that such discretion must be exercised judicially and judiciously. In the case of *NNPC v. CLIFCO NIG. LTD.* supra, *Rhodes- Vivour, J.S.C*²⁸, paras E-G postulated: "The award of cost is entirely at the discretion of the court, costs follow the event in Litigation. It follows that a successful party is entitled to costs unless there are special reasons why he should be deprived of his entitlement. In making an award of costs the court must act judiciously and judicially. That is to say with correct and convincing reasons, see the case of *Anyaeibunam v. Osaka*²⁹; also in the case of *Obayagbona v. Obazee*³⁰. The Supreme Court stated 'thus, that and since cost follow events in litigation, a party need not ask for cost before it can be awarded. That is why it is at the discretion of the court. Whether or not the award of cost is arbitrary is dependent on the peculiarity of each case. The only circumstance under which an appellate court will interfere with the award of cost is when such award is so high or low that there was an entirely extraneous estimate of damages, see the case of *Ogunsakin V. Edu*

²³ Ibid

²⁴ [1996] Elena Merino-Blanco, 'The Spanish Legal System' 155 (noting that in Spain 'if the judge makes a finding of bad faith ... all costs shall be borne by the party litigating in bad faith'; Wetter & Priem, *supra* at 271 (stating that in Sweden expenses are not recoverable where a party shows bad faith); NEW CODE OF CIVIL PROCEDURE IN FRANCE, at 143 (providing that in France 'costs are assessed against the losing party unless the judge assesses the whole or a part of the burden against the other party, in a decision with reasons given'.

²⁵ [2015] LPELR 25980 CA

²⁶ [2011] LPELR SC

²⁷ [2011] 17 NWLR (pt. 1276) 290

²⁸ [2011] LPELR SC

²⁹ (1993) 5 NWLR (pt. 294) 449

³⁰ [1972] 5 SC 247

*Local Govt. Area Kwara State & Ors*³¹. The Court awarded N600,000.00 costs to the respondents as follows - N350,000.00 in the main suit and N250,000.00 in the counterclaim. The award is supported by law because the counterclaim is a separate suit from the main claim. The award of cost is completely a matter within the discretion of the trial judge as **cost follows events**³² and such applies to Arbitral Tribunal proceedings **mutatis mutandis**.

3.01 Award of cost by the tribunal

The tribunal has the power to award cost against a losing party in arbitral proceeding. The arbitral tribunal is at liberty to apportion the cost of the Arbitration as they deem fit. The general principle is that the unsuccessful party bears the cost. Article 40(1) and (2) upholds this principle and stated thus except as provided in paragraph 2, the cost of Arbitration shall in principle be borne by the unsuccessful party, however, the tribunal may apportion each of such costs between the parties if it determines that the appointment is reasonable taking into account the circumstances of the case, with respect to the cost of legal representation and assistance referred to in Article 38³³ paragraph (e). The Arbitral Tribunal taking into account the circumstance of the case, will be free to determine which party shall bear such costs or may apportion such costs between the parties if it is determined that the appointment is reasonable³⁴.

It is worthy of note that the power of the tribunal to award cost is not total. This however varies from country to country and the arbitral institutions, that is handling the Arbitration proceedings.

Like in Nigeria in the case of *Ladega v Akiyili*³⁵ the Court was of the view that the awarding of cost is not to punish the unsuccessful party but to compensate the successful party for the expenses which he has incurred in the course of the proceedings.

3.02 Discretionary Power of Arbitral Tribunal

The arbitral tribunal can in certain circumstances exercise its discretionary powers in the course of the proceeding of the tribunal under the LCIA, Article 14 of said rules, made it clear the discretionary³⁶ “The Arbitral Tribunal shall have the widest discretion to discharge their general duties, subject to such mandatory law(s) or rules of law as the Arbitral Tribunal may decide to be applicable and at all times the parties shall do everything necessary in good faith for fair, efficient and expeditious conduct of the Arbitration, including the Arbitral Tribunal’s discharge of its general duties”

4.00 Conclusion and Recommendation

Arbitrators or Arbitral tribunal should not hesitate to use their powers to persuade parties to adopt proceedings that resolve the dispute in the most efficient manner possible like:-

- (a) Identifying issues and,
- (b) Document production.

The arbitral tribunal might perhaps, issue preliminary opinion that indicates, the tribunals provisional thoughts on a particular issue thereby provides time limit. In document production it is worthwhile for tribunals and parties to work together to render document production as cost effective as possible within the circumstances of each arbitration.

The arbitral tribunal and parties should conduct a more detailed discussion on request, cost and documents production along these lines before they are ordered or rejected.

³¹ [2011] LPELR-8816 (CA)

³²Hon Justice J.D. Peters, ‘A Discussion on the Award of Costs in Arbitration’ 4-6, nji.gov.ng/p-content/uploads/2020/11/awards-of-cost-in-arbitration.pdf accessed 07/09/2023

³³Article 38

³⁴Article 40(1) and (2)

³⁵LadegaVs. Akiyili (1975) 2 S.C 91

³⁶ LCIA, Article 14 London Court of International Arbitration

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Article 38- 41 Arbitration rules

Section 49 AMA

Article 31 of the International Chamber of Commerce (ICC) rules of Arbitration

Article 17 UNCITRAL Rules

Article 22 ICC Rules

Article 24 ICC rules

Article38, 40 ICC Rules

Article 14 LCIA

Ladega v. Akiyili

<http://www.sweet and Maxwell.co.uk>

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