

# Cost Control Mechanisms – What Can the Tribunal Do?

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## The Costs of Arbitration

- ICC (2003–2004)
  - parties' costs 82%
  - arbitrators' fees and expenses 16%
  - administrative expenses 2%
- CIArb Costs of International Arbitration Survey (2011)
  - no comparable figures
- Rising costs in arbitration a genuine concern for the industry
  
- → What can the tribunal do to control costs?

# What can the Tribunal do to Control Costs?

- Procedural Considerations
- Taking of Evidence
- Cost Sanctions

## Procedural Considerations

- Procedural Timetable
  - “horses for courses” thinking
  - oral witness testimony and closing statements
  - post-hearing submissions?
  
- Preliminary determination of issues
  - IBA Rules Art. 2.3
    - “The Arbitral Tribunal is encouraged to identify to the Parties, as soon as it considers it to be appropriate, any issues:
      - (a) that the Arbitral Tribunal may regard as relevant to the case and material to its outcome; and/or
      - (b) for which a preliminary determination may be appropriate.”

## Procedural Considerations (cont.)

- Bifurcation
- Active case management
- The Tribunal's availability

## Taking of Evidence

- IBA Rules Art. 2.1
  - “The Arbitral Tribunal shall consult the Parties at the earliest appropriate time in the proceedings and invite them to consult each other with a view to agreeing on an efficient, economical and fair process for the taking of evidence.”
  
- Document Production
  
- Multiplication of Evidence
  
- Written Witness Statements

## Taking of Evidence

- IBA Rules Art. 9.2 (g)
  - “The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons:  
  
(g) considerations of procedural economy, proportionality, fairness or equality of the Parties that the Arbitral Tribunal determines to be compelling.”

## Cost Sanctions

- For obstructive tactics
  
- In addition to / instead of adverse inferences concerning evidence
  - IBA Rules Art. 9.7
    - “If the Arbitral Tribunal determines that a Party has failed to conduct itself in good faith in the taking of evidence, the Arbitral Tribunal may, in addition to any other measures available under these Rules, take such failure into account in its assignment of the costs of the arbitration, including costs arising out of or in connection with the taking of evidence.”



## Conclusions

- An arbitrator who manages the case actively from the start can make a difference in the ultimate costs.
- Arbitrators should not be afraid to use cost sanctions.

## Additional Reading

- Techniques for Controlling Time and Cost in Arbitration (ICC Publication 843)
- IBA Rules 2010 and the official commentary (available online at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx))
- Debevoise Plimpton's Protocol to Promote Efficiency in International Arbitration (available online at <http://www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf>)
- CI Arb Costs of International Arbitration Survey 2011 (available online at <http://www.ciarb.org/conferences/costs/2011/09/28/CIArb%20costs%20of%20International%20Arbitration%20Survey%202011.pdf>)

**Thank you!**

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