

The Allocation of Costs in International Arbitration: When Mandatory Law Overrides Party Agreement

Legal Briefing, 24.09.2026

Introduction

The allocation of costs is often treated as a relatively straightforward provision in an arbitration agreement. Parties may agree that costs will be borne equally, that each party will bear its own costs, or that the unsuccessful party will bear the costs of the proceedings. Having negotiated and expressly agreed on such a provision, parties would naturally expect it to determine their respective financial exposure if a dispute arises.

That expectation, however, is not necessarily absolute. Although arbitration is founded on party autonomy, that autonomy operates within the limits imposed by the law applicable to the arbitration agreement and other mandatory provisions of the relevant arbitration legislation. As a result, an agreed contractual allocation of costs may, in certain circumstances, have a different effect from that anticipated by the parties when the contract was signed.

The issue can have significant financial consequences, particularly in international arbitrations where legal fees, tribunal and institutional costs, expert fees and other expenses can be substantial. The key position, however, is the non-uniformity across jurisdictions i.e., the extent to which a party's agreed allocation of costs will ultimately be given effect may depend on the

applicable arbitration law and procedural framework. For parties negotiating arbitration clauses, understanding these interactions at the outset is therefore essential to ensuring that the contractual allocation of costs reflects the outcome they ultimately expect. This is particularly significant given the prevalence of English law in cross-border commercial contracts / governing cross-border disputes, which indicate that the English position on costs is directly relevant to a substantial proportion of international arbitrations.

This article examines the interplay between contractual costs provisions, party autonomy and mandatory arbitration law, focusing on the English law position and its implications for international arbitration. It also compares the English and UAE legal frameworks, highlighting key differences and practical considerations for parties when drafting or reviewing arbitration clauses.

1. The English Law Position: Limits on Contractual Costs Arrangements

English law gives substantial effect to the parties' agreement on costs. Section 61(2) of the Arbitration Act 1996 ("Act") makes the tribunal's award of costs expressly subject to any agreement of the parties, and a tribunal will ordinarily give effect to an allocation the parties have chosen. However, a qualification lies not in the principle of agreement but in its

timing. Section 60 provides that an agreement under which a party is to pay all or part of the costs of the arbitration is valid only if made after the dispute has arisen. As a mandatory provision within the meaning of section 4(1) and expressly listed in Schedule 1 of the Act, section 60 cannot be excluded by agreement.

The practical significance of this provision was illustrated in *Shashoua and Others v Sharma* [2009] EWHC 957 (Comm). The parties' shareholders' agreement, which was governed by Indian law and provided for ICC arbitration seated in London, expressly stated that each party would bear its own costs. Despite this provision, the tribunal awarded costs against one of the parties. The English Commercial Court upheld the application of section 60, confirming that the pre-dispute agreement on costs could not prevent the tribunal from determining costs in accordance with the applicable statutory framework.

Shashoua demonstrates the distinction between the parties' contractual expectations and the legal framework governing arbitration. Although the parties had expressly agreed how their costs would be borne, that agreement was subject to the mandatory requirements of the law applicable to the arbitration. Under section 61 of the Act, the tribunal has the power to determine the costs of arbitration and, subject to the circumstances of the case, the general position is that costs follow the event.

For parties, the implication is significant: an express costs provision in an arbitration agreement does not necessarily determine the eventual allocation of costs where English arbitration law applies. The applicable arbitration legislation must therefore be

considered alongside the wording of the cost provision when assessing the financial consequences of an arbitration.

2. The UAE Position: Greater Scope for Party Autonomy

The position under UAE arbitration law is materially different. Federal Law No. 6 of 2018 on Arbitration expressly recognizes the parties' ability to agree on the allocation of arbitration costs. Article 46(1) provides that, **unless the parties agree otherwise**, the arbitral tribunal may determine the arbitration costs, including the fees and expenses of the tribunal and the expenses of tribunal-appointed experts. Article 46(2) further permits the tribunal to order one party to bear all or part of those costs.

The distinction is not that UAE law recognises party autonomy while English law does not. English arbitration law likewise gives considerable weight to party agreement on costs under section 61 of the Arbitration Act 1996. The important difference is that English law imposes a specific statutory limitation through section 60 on certain **pre-dispute agreements** concerning the payment of arbitration costs. The UAE Federal Arbitration Law contains no equivalent restriction. Instead, Article 46 provides a default power for the tribunal to determine costs where the parties have not agreed otherwise.

This can give an agreed costs provision significant weight in an arbitration governed by UAE law. Article 46(3) further provides that, where the parties have agreed the amount of costs, an application cannot be made to the court to reconsider that amount. The statutory framework therefore gives parties meaningful scope to determine their financial exposure through their arbitration agreement.

There is, however, an important drafting distinction. Article 46 principally addresses the costs of the arbitration, including tribunal fees and expenses and tribunal-appointed experts. The treatment of parties' own legal and expert costs may additionally depend on the applicable institutional rules and the wording of the arbitration agreement. Parties should therefore consider carefully what they intend their costs provision to cover rather than relying on a general reference to "arbitration costs".

The UAE position ultimately reinforces the importance of drafting the costs provision alongside the chosen seat, applicable arbitration law and institutional rules. The same contractual wording may produce different financial consequences depending on the mandatory framework governing the arbitration

3. Other Factors That Shape the Costs Outcome

As a focal point of this article, the applicable arbitration law is the most conspicuous variable, but it is not the only one. Several other features of an arbitration can determine who ultimately pays, and how much, often in ways that a single line on costs in the contract does not begin to capture.

The first is the **institutional framework**. The rules of the chosen institution whether the ICC, the LCIA, DIAC or another body, contain their own provisions on costs, and these operate alongside the applicable arbitration law. Most leading rules adopt, as a starting point, the principle that costs follow the event, and they also govern what is treated as a recoverable cost and how tribunal and administrative charges are fixed. A costs clause that sits comfortably with one set of

rules may produce a very different result under another.

The second is the **scope of the costs provision** itself. There is an important difference between the costs of the arbitration which comprises the tribunal's fees and expenses, institutional charges and the costs of tribunal-appointed experts and the parties' own legal and expert costs. A clause drafted by reference to "costs" in general terms may not achieve what the parties intended once these categories are separated out. Parties are therefore well advised to specify precisely which costs their provision is meant to capture rather than relying on a broad, undefined reference.

The third is the **breadth of the tribunal's discretion**. Even where costs follow the event, that principle is a starting point rather than a fixed rule. Tribunals routinely adjust their costs awards to reflect the parties' relative degree of success, the reasonableness of the positions taken, and each side's conduct during the proceedings. A party that succeeds overall but pursues exaggerated claims or causes unnecessary delay may recover less than it expects or find a portion of costs awarded against it. Separately, the amount that is actually recoverable remains subject to the tribunal's own assessment.

Taken together, these factors make the same point from different directions: the eventual allocation of costs is the product of the seat, the applicable arbitration law, the institutional rules, the drafting of the provision and the tribunal's exercise of its discretion - not of the costs clause read in isolation.

Conclusion

For most parties, a costs provision in an arbitration agreement feels like settled ground. It is negotiated, drafted, signed and the parties assume - binding. While this is largely true, where English arbitration law applies, the timing of the parties' agreement plays a significant role in how costs are awarded. A clause stating that each side will bear its own costs, or that costs will be shared equally, may therefore give way to the tribunal's statutory power to award costs against the unsuccessful party - a result that can be very welcome to the party that prevails, and a considerable surprise to the party that does not.

Our dedicated international arbitration team has extensive experience of advising and successfully representing clients in arbitral disputes. Whether you are drafting a new arbitration clause or weighing how your costs provision will operate, we provide strategic guidance and robust representation at every stage. We also offer robust representation in arbitral proceedings across other leading institutions and sectors, ensuring strategic and effective advocacy at every stage.

SCHLÜTER GRAF Legal Consultants LLC

A7 Building, Offices 304-306, Dubai Digital Park, P.O. Box 29337

Dubai / United Arab Emirates

Tel: +971 / 4 / 431 3060

Fax: +971 / 4 / 431 3050

Anja Christine Adam, Partner (a.adam@schlueter-law.de)Usama Munir, Co-Head International Arbitration (usama.munir@schlueter-graf.com)Thishani Fernando, Trainee Lawyer (thishani.fernando@schlueter-graf.com)