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Recovery of Attorneys' Fees in International Arbitration: the Duelling 'English' and 'American' Rules

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One of the best-known differences between the American and English legal systems is that, unlike in the UK, a successful US litigant generally 'is not permitted to recover his attorney's fees as damages or as reimbursable costs'.¹ By contrast, under the 'English Rule' – applicable in the UK, Australia, Canada, Hong Kong, New Zealand, Singapore, South Africa and many other Commonwealth countries, plus the Republic of Ireland – the rule is that 'costs follow the event', enabling recovery of attorneys' fees by the prevailing party.

America's abandonment of the English Rule apparently dates back to 'the distrust the colonists felt towards the legal profession and the individualistic spirit of the frontier society which viewed lawyers as an unnecessary luxury',² – which, if true, is somewhat ironic, given the litigious nature of modern US society. The topic has given rise to occasional transatlantic sniping. Lord Denning once famously cited the American Rule as among the reasons why '[a]s a moth is drawn to the light, so is a litigant drawn to the United States', claiming that it (combined with contingency fees) enabled a litigant to bring a claim '[a]t no cost to himself; and at no risk of having to pay anything to the other side'.³ For its part, the Warren Court once suggested that the English Rule was inequitable, imposing a 'penalty' that might 'unjustly discourage' poor litigants from 'instituting actions to vindicate their rights'.⁴

In modern international arbitration, commercial parties, having bargained for a specific arbitration process, might imagine that they are free to make similarly binding arrangements governing the future allocation of attorneys' fees. Indeed, many contracts attempt to do so, adopting either the English Rule (eg, by a 'fee-shifting' clause permitting the arbitrators to award fees to the prevailing party) or the American Rule (eg, by a clause explicitly providing that 'each party shall bear its own fees').

But such choices can sometimes be frustrated. Parties who agree to arbitrate in London might be surprised to learn that the American Rule may be abrogated by a UK statute, even where they want to apply it and do so in their contract. Conversely, a successful party to a US-venued arbitration who manages to recover fees through an express fee-shifting agreement may find its winnings sapped by expensive post-award litigation, in which US courts apply the American Rule.

This article focuses, primarily from a US standpoint, on the extent to which external laws, regulations or rules impact the ability of parties to choose the English Rule or the American Rule in international arbitration. As will be seen, certain 'trans-

atlantic traps' can frustrate the parties' ability to make their own arrangements concerning attorneys' fees.

'Default rules' in the US and UK systems

Determining which law applies to fee-shifting issues

A threshold conflict-of-laws issue arises in relation to both the English Rule and the American Rule: is the recoverability of attorneys' fees a procedural issue, governed by the law of the seat of arbitration, or is it a substantive law issue, governed by the law of the parties' contract? In the UK and other Commonwealth cases discussed in 'The ability of parties to regulate fee-shifting by contract', below, courts seem to have treated fee-allocation as being governed by the law of the seat of arbitration, with the result that an arbitral tribunal sitting in London or Singapore was expected to follow the UK's or Singapore's statutory rules concerning the award of attorneys' fees. In the US, however, debate persists over this issue. One commentator has stated that although '[m]ost countries consider awards for costs and fees to be governed by procedural law', courts in the United States 'are divided on the issue'.⁵

For example, one court has stated that New York's rules concerning the recoverability of attorneys' fees will apply as a procedural matter to all arbitrations venued in New York. See, for example, *Spector v Torenberg*,⁶ in which the court held that '[t]he arbitration took place in New York and therefore pursuant to New York's procedural rules governing arbitration', including its statutory restrictions on the award of attorneys' fees by arbitrators – but then finding that an exception to those restrictions applied. Another state court, this one located in South Carolina, held that New York's rules about attorneys' fees will apply in any arbitration governed by New York contract law, even if seated outside New York. See *Lybrand v Merrill, Lynch, Pierce, Fenner & Smith, Inc*⁷ (vacating award of attorneys' fees by South Carolina arbitration panel for manifest disregard of New York's rules restricting recovery of attorneys' fees in arbitration).

Attorneys involved in drafting a fee-shifting provision that might be reviewed by a US court or arbitrator should therefore take into account both the governing law of the contract and the arbitration law applicable in the seat of arbitration.

Default rules regarding fee-shifting for international arbitration in the UK, Commonwealth jurisdictions and Ireland

Within the UK, most Commonwealth countries and Ireland, there is a strong tradition of awarding attorneys' fees to the suc-

¹ *Grace v Ludwig*, 484 F2d 1262, 1267 (2d Cir 1973).

² *Id.* at 1267 No. 5 (citation omitted).

³ *Smith Kline & French Labs Ltd v Bloch* [1983] 1 WLR 730, 733 (Eng Ct App 1982).

⁴ *Fleischmann Distilling Corporation v Maier Brewing Co*, 386 US 714, 718 (1967).

⁵ John Yukio Gotanda, *Awarding Costs & Attorney's fees in International Commercial Arbitrations*, 21 Mich J Int'l L 1, 16-17 (1999).

⁶ *Spector v Torenberg*, 852 F Supp 201, 210 (SDNY 1994).

⁷ *Lybrand v Merrill, Lynch, Pierce, Fenner & Smith, Inc*, 467 SE 2d 745, 746 (SC Ct App 1996).

cessful party in litigation. This tradition has carried over to arbitration and is reflected in section 61 of the English Arbitration Act 1996:

Award of costs

- (1) *The tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties.*
- (2) *Unless the parties otherwise agree, the tribunal shall award costs on the general principle that costs should follow the event except where it appears to the tribunal that in the circumstances this is not appropriate in relation to the whole or part of the costs.*

Thus, an arbitration tribunal sitting in London is authorised to award attorneys' fees, even if the parties' agreement and the applicable arbitration rules are silent on the issue. (Similar statutory provisions exist in Ireland and the Commonwealth.)

In *Aasma v American Steamship Owners Mutual Protection & Indemnity*,⁸ a group of US seamen brought an arbitration in London against two insurers. They lost, and although the contract was silent on the issue of attorneys' fees, an award of attorneys' fees was nevertheless made against them. They then urged a US court to refuse recognition of the attorneys' fees award, arguing that the fees award was 'beyond the scope of the submission to arbitration' for purposes of article V(1)(c) of the New York Convention because the contract made no provision for fee-allocation. In a rhetorical flourish, they claimed the award was made by 'an unsympathetic arbitrator in a foreign land' who 'reward[ed] [the successful party] for hiring phalanxes of attorneys who ran up legal fees with unfettered abandon'.⁹ Rejecting these arguments, the court held that because the arbitration was 'conducted in accordance with the [English] Arbitration Act 1996', the arbitrators had authority to award fees by virtue of section 61's 'default provisions in the absence of an agreement between the parties as to costs'.¹⁰

Default rules regarding fee-shifting for international arbitration in the United States

The traditional position

Although the Federal Arbitration Act (FAA) does not address the recoverability of attorneys' fees, the arbitration statutes of many states still adhere to the American Rule. New York, for example, 'follows the prevailing American Rule on fee-shifting, permitting an award of fees *only* where "specifically provided for by statute or contract"' (emphasis added). The New York state arbitral statute (which reflects section 10 of the 1955 Uniform Arbitration Act) provides that '[u]nless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including attorneys' fees, incurred in the conduct of the arbitration, shall be paid as provided in the award'.¹² In *Asturiana*, a court held that an arbitrator, sitting in New York and adjudicating a contract dispute that was governed by New York contract law, was not empowered to award attorneys' fees to the prevailing party, because the contract did not expressly authorise

the award of such fees.¹³ Similar holdings have been made in other states that adhere to the 1955 Uniform Arbitration Act. See, for example, *Quick & Reilly, Inc v Zielinski*,¹⁴ (vacating arbitrator's award of attorneys' fees, where Illinois state arbitral law restricted arbitrators from doing so, absent express agreement); *D & E Construction Co v Robert J Denley Co*,¹⁵ (similar result; Tennessee equivalent); and *Bingham County Comm'n v Interstate Electric Co*¹⁶ (similar result; Idaho equivalent).

Recently, 12 states plus the District of Columbia have adopted the new Revised Uniform Arbitration Act of 2000, which, in contrast to the New York rule, provides that '[a]n arbitrator may award reasonable attorney's fees and other reasonable expenses of arbitration if such an award is authorised by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding'.¹⁷ Although this drops the 1955 Act's restrictive language concerning the award of attorneys' fees, it still does not provide an independent authorisation for the award of such fees – it only states that such an award is authorised by an agreement between the parties or otherwise 'authorised by law'. The impact (if any) of this revised statute remains to be tested in the courts.

Some courts, however, have doubted whether the state arbitration acts even apply to arbitration that involves interstate or foreign commerce. See *Ceco Concrete Construction, v J T Schrimsher Construction Co*,¹⁸ and *PaineWebber Inc v Bybyk*¹⁹ (holding that, where the arbitration agreement was broad enough to encompass claims for attorneys' fees, New York's restrictions on fee awards could not apply in light of the FAA's pro-arbitration policies). But the FAA arguably does not change the equation. Indeed, one court has stated that 'under either body of law [New York law or federal law], arbitrators lack the power to award attorneys' fees unless the parties agree to submit the issue for determination'.²⁰

State statutes authorising fee-shifting in international arbitration

California, Florida, Hawaii, North Carolina, Ohio, Oregon, and Texas have enacted 'international arbitration' statutes explicitly permitting attorneys' fees awards in international cases. See, for example, California Civil Code of Procedure ('unless otherwise agreed', an international arbitral tribunal shall have the power to award 'costs', including '[l]egal fees and expenses' of the parties);²¹ Hawaii Revised Statutes Annotated (permitting international 'arbitration center[s]' to create rules authorising attorneys' fee awards).²² Thus, recovery of attorneys' fees in international arbitration in those jurisdictions may be possible, even absent an explicit fee-shifting agreement.

8 *Aasma v American Steamship Owners Mutual Protection & Indemnity*, 238 F Supp 2d 918 (ND Ohio 2003), *aff'd* 96 Fed Appx 995 (6th Cir 2004).

9 *Aasma*, 238 F Supp 2d at 922.

10 *Id.* at 622.

11 *Asturiana de Zinc Marketing, Inc v LaSalle Rolling Mills, Inc*, 20 F Supp 2d 670, 674 (SDNY 1998) (citation omitted).

12 NY CPLR section 7513.

13 *Asturiana*, 20 F Supp 2d at 674-75.

14 *Quick & Reilly, Inc v Zielinski*, 713 NE 2d 739, 744 (Ill App Ct 1999).

15 *D & E Construction Co v Robert J Denley Co*, 38 SW 3d 513, 521 (Tenn, 2001).

16 *Bingham County Comm'n v Interstate Elec Co*, 665 P 2d 1046, 1052-53 (Idaho, 1983).

17 Revised Uniform Arbitration Act, section 21(6).

18 *Ceco Concrete Constr, v J T Schrimsher Constr Co*, 792 F Supp 109, 111 (ND Ga 1992).

19 *PaineWebber Inc v Bybyk*, 81 F 3d 1193, 1202 (2d Cir 1996).

20 *Davis v Prudential Securities Inc*, 59 F 3d 1186, 1194 n 8 (11th Cir 1995) (emphasis added).

21 California Civil Code of Procedure section 1297.318 (2009).

22 Hawaii Revised Statutes Annotated section 658D-7(d)(6) (2009).

The ability of parties to regulate fee-shifting by contract

Under US law

Parties may, by express agreement, oust the American Rule in favour of the English Rule. Thus, in *Lummus Global Amazonas, SA v Aguaytia Energy Del Peru*,²³ a contract, governed by New York law with the International Chamber of Commerce International Court of Arbitration (ICC) arbitration in Houston, stated that '[t]he arbitrators shall determine who is the prevailing party and shall award attorney fees [...] to the prevailing party'.²⁴ It was held that the clause satisfied an exception to the American Rule, namely, 'when a contract provides that in the event of litigation the losing party will pay the attorneys' fees of the prevailing party,' a tribunal has the power to award such fees, 'so long as those amounts are not unreasonable'.²⁵

The American Rule, however, still influences the interpretation of fee-shifting agreements because, in some states, 'provisions for attorneys' fees are to be construed strictly'.²⁶ Further and importantly, 'costs' are not always construed to encompass as 'attorneys' fees' in the American legal lexicon. Under many US rules of court, 'costs' are merely filing fees and minor ancillary expenses, such as token copying costs. Probably for this reason, one US court held that a clause permitting recovery of 'expenses or costs of arbitration' did not permit an award of attorneys' fees because it did not include the power to award attorneys' fees and legal expenses.²⁷ Thus, in drafting a fee-shifting clause that might someday be interpreted by a US court or tribunal, explicit reference to attorneys' fees is advisable if the intent is to confer such a power on the arbitrators.

Disputes may also arise as to which party to a dispute was actually the 'prevailing party'. In *Seagate Technology International v Alliance Computer Systems*,²⁸ an arbitrator dismissed both claims, but still awarded fees to the respondent, holding that it was the 'prevailing party'. Dismissing the plaintiff's challenge to the award, a Massachusetts federal court held that the identity of the 'prevailing party' was a classic factual question for the arbitrator, which the court would not second-guess, especially as there seemed to be some factual basis for viewing the respondent as the winner.²⁹

Disputes can also arise as to the reasonableness of fees claimed. In the US, '[f]actors for assessing the reasonableness of an award of attorney fees include: "the difficulty of the questions involved; the skill required to handle the problem; the time and labor required; the lawyer's experience, ability and reputation; the customary fee charged by the Bar for similar services; and the amount involved"'.³⁰ Nonetheless, US lawyers generally lack the vast experience their colleagues in England have in this field, and there are not as many 'hard and fast' rules concerning quantification of fees in US arbitral practice (eg, what kind of documentation should be submitted in order to quantify fees; and whether a fee application should be denied where the winning party has refused to accept a reasonable settlement offer).

Statutes blocking the parties' choice of the American Rule in UK, Commonwealth and Irish arbitration

Ordinarily, an arbitration agreement incorporating the American Rule, that is, providing that each party is to bear its own attorneys' fees, would be regarded as valid and enforceable in the US. The same may not be true in England, where section 60 of the English Arbitration Act 1996 states that '[a]n agreement which has the effect that a party is to pay the whole or part of the costs of the arbitration in any event is *only valid if made after the dispute in question has arisen*'. (Emphasis added.) Section 60 thus would appear to abrogate any contractual attempt to incorporate the American Rule (except if the agreement is made after the arbitration begins).

In *Shashoua v Sharma*,³¹ a shareholders' agreement was governed by Indian law, with ICC arbitration in London, and further provided that 'each party should bear its own costs in connection with such an arbitration'. A London ICC tribunal ruled that section 60 of the English Arbitration Act 'prevented' the contractual prohibition on costs awards 'from being valid' and issued a 'costs award' against one of the parties. In subsequent litigation, the English Commercial Court endorsed this view, remarking that 'section 60 exists for the very reason that parties agree to English arbitration with [no-fee shifting] clauses [...] in their agreement'.

Near-identical statutory rules exist in Australia, Hong Kong and Singapore. See, for example, *Fasi v Specialty Labs Asia Pte Ltd*³² (commenting that Singapore's equivalent of section 60 may render 'unenforceable' a clause stating '[t]he cost of arbitration shall be borne equally by the parties hereto'). These statutory rules create a potentially significant limitation on party autonomy and are of questionable policy value in international commercial arbitration where such party autonomy is a cornerstone of the process.

The impact of arbitration rules on the parties' ability to claim fees

International arbitration rules (other than AAA-ICDR rules)

Many international arbitration rules expressly address fee-shifting:

- United Nations Commission on International Trade Law (UNCITRAL): the UNCITRAL Arbitration Rules permit a tribunal to award '[t]he costs 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 determines that the amount of such costs is reasonable'.³³
- ICC: the ICC Rules authorise a tribunal to award 'reasonable legal and other costs incurred by the parties for the arbitration'.³⁴
- London Court of International Arbitration (LCIA): the LCIA Arbitration Rules state that '[t]he Arbitral Tribunal shall also have the power to order in its award that all or part of the legal or other costs incurred by a party be paid by another party, unless the parties agree otherwise in writing'.³⁵
- International Institute for Conflict Prevention & Resolution (CPR): the CPR Rules for Non-Administered Arbitration authorise the tribunal to 'fix the costs of arbitration in its award', including '[t]he costs for legal representation and

²³ *Lummus Global Amazonas, SA v Aguaytia Energy Del Peru, SR Ltda*, 256 F Supp 2d 594 (SD Tex 2002).

²⁴ *Id.* at 638.

²⁵ *Id.* at 644 (citing New York case law).

²⁶ *Harter v Iowa Grain Co*, 220 F 3d 544, 559 (7th Cir 2002) (Illinois law).

²⁷ *Transvenezualan Shipping Co v Czarnikow-Rionda Co*, 1982 AMC 1458, 1460 (SDNY 1981).

²⁸ *Seagate Technology Int'l v Alliance Computer Systems*, No. 00-10357-RWZ, 2002 US Dist LEXIS 57 (D Mass, 4 January 2002).

²⁹ *Id.* at *6.

³⁰ *Lummus*, 256 F Supp 2d at 644 (citation omitted).

³¹ *Shashoua v Sharma*, [2009] EWHC 957 (Eng Comm, 7 May 2009).

³² *Fasi v Specialty Labs. Asia Pte Ltd* [1999] 4 SLR 488, 494 (Singapore High Court, 1999).

³³ UNCITRAL Arbitration Rules, article 38(e).

³⁴ ICC Arbitration Rules, article 31.

³⁵ LCIA Arbitration Rules, article 28(3).

assistance and experts incurred by a party to such extent as the Tribunal may deem appropriate'.³⁶

- The International Centre for Settlement of Investment Disputes (ICSID) system: awards made under the 1965 ICSID Convention may include decisions regarding the 'cost of the proceedings' (see ICSID Arbitration rule 27). Such decisions are not subject to judicial review by national courts. The Arbitration Rules of the ICSID Additional Facility (whose decisions may be subject to review by national courts) explicitly permit awards of attorneys' fees.³⁷ ('Unless the parties otherwise agree, the Tribunal shall decide how and by whom [...] the expenses incurred by the parties in connection with the proceeding shall be borne'.)

Several US cases have held that, where a contract provides for arbitration under the ICC or UNCITRAL rules, this selection confers authority on arbitrators to award attorneys' fees. See, for example, *Willbros West Africa, Inc v HFG Engineering US, Inc*³⁸ (upholding attorneys' fees award by UNCITRAL tribunal); *Shaw Group, Inc v Triplefine Int'l Corporation*³⁹ (submission to ICC rules empowered arbitrators to award attorneys' fees).

The position under the ICDR or AAA Rules

The American Arbitration Association's international arm, the International Centre for Dispute Resolution (ICDR), has adopted rules that permit a tribunal 'to fix the costs of arbitration in the award', including 'the reasonable costs for legal representation of a successful party'.⁴⁰ In one case, it was held that these rules gave an ICDR tribunal power to award attorneys' fees. See *Apache Bohai Corporation, LDC v Texaco China BV*⁴¹ ('As far as the court can tell, the American Rule has not been incorporated into the [ICDR] International Rules').

But in *CIT Project Finance, LLC v Credit Suisse First Boston LLC*,⁴² the Supreme Court of New York (a first-instance state court) vacated an ICDR award of attorneys' fees. It held that the parties' contractual choice of New York law meant that the arbitrators were subject to the American Rule, prohibiting the award of attorneys' fees absent explicit contractual or statutory authority.⁴³ In this regard, it held that article 31 of the ICDR International Rules 'does not provide an independent ground' for the award of attorneys' fees, 'without consent by the parties for such relief'.⁴⁴

Even if this (still unresolved) split is resolved in favour of an ICDR arbitrator's authority to award arbitrators' fees, another potentially important split exists within the AAA's various rules. Unlike the ICDR International Rules, rule 43 of the AAA's Commercial Arbitration Rules merely provides that an arbitrator's award 'may include [...] an award of attorneys' fees if all

parties have requested such an award or it is authorised by law or their arbitration agreement' (emphasis added). This might not displace the American Rule.

Given this potentially critical difference, parties should be aware of the AAA's practices concerning the applicability of these rules.

The ICDR International Rules will apply where the parties agree to arbitration under the International Rules, and will also apply by default to international cases where the parties have chosen to arbitrate pursuant to American Arbitration Association Rules. The ICDR treats cases as international if they would qualify as such under the UNCITRAL Model Law (eg, a dispute involving parties of different nationality or that calls for performance in more than one country, or both).

The AAA Commercial Arbitration Rules will apply by default to certain domestic commercial disputes where the parties agree to arbitration under American Arbitration Association Rules. They may also apply to international cases, but usually only when the parties' agreement affirmatively selects the Commercial Arbitration Rules.

Thus, in an international case, a bland agreement to arbitrate under AAA Rules may catapult a party into the International Rules, and may thus arguably empower the arbitrators to award attorneys' fees – even if the agreement is silent on the issue and even if the arbitration takes place in New York.

Further exceptions to the American Rule

There remain a number of further exceptions to the American Rule that will enable a US-venued arbitral tribunal to award attorneys' fees against a losing party.

Waiver

If both parties in an arbitration request attorneys' fees, they may be deemed to have waived any objection to subsequent fee awards. See, for example, *Marshall & Co v Duke*⁴⁵ ('Since it appears clear that both parties sought an award of their fees without a jurisdictional objection from the other, the issue of who should get fees and how much was effectively submitted by agreement of the parties.'). *First Interregional Equity Corporation v Houghton*.⁴⁶

Statutory entitlements

Several US statutes permit a claimant to recover attorneys' fees in statutory claims. See 15 USC section 4304(a) ('in any claim under the antitrust laws, or any State law similar to the antitrust laws [...] the court shall, at the conclusion of the action [...] award to a substantially prevailing claimant the cost of suit attributable to such claim, including a reasonable attorney's fee'); 18 USC section 1964(c) (RICO claimant may recover 'reasonable attorney's fee [...]'); and 15 USC section 1117(a) (similar rule for Lanham Act disputes). Where these statutes apply, 'the arbitrator becomes imbued with authority to award any attorneys' fees [...] to the extent there is a statutory basis for such an award'.⁴⁷

Texas has passed a general law allowing recovery of attorneys' fees in a wide variety of cases, including contractual actions. See the Texas Civil Practice & Remedies Code Annotated, section 38.001; *Sungard Energy Systems, Inc v Gas Transmission W. Corpo-*

36 CPR Rules, rule 17.2.

37 ICSID Arbitration Rules, rule 58.

38 *Willbros West Africa, Inc v HFG Engineering US, Inc*, No. H-08-2646, 2009 US Dist LEXIS 12362, at *17-18 (SD Tex 12 February 2009).

39 *Shaw Group, Inc v Triplefine Int'l Corp*, 01 Civ 4273, 2003 US Dist. LEXIS 15578, at *8 (SDNY 5 September 2003).

40 Id. article 31(d).

41 *Apache Bohai Corp, LDC v Texaco China BV*, No. H-01-2019, 2005 US Dist LEXIS 46363, at *73-74 (SD Tex 28 February 2005), *aff'd in relevant part*, 480 F 3d 397 (5th Cir 2007).

42 *CIT Project Finance, LLC v Credit Suisse First Boston LLC*, No. 600847/03, 2004 NY Misc LEXIS 2738 (Sup Ct NY County, 17 June 2004).

43 Id. at *6.

44 Id.

45 *Marshall & Co v Duke*, 114 F 3d 188, 189-90 (11th Cir 1997).

46 *First Interregional Equity Corporation v Houghton*, 842 F Supp 105, 112-13 (SDNY 1994).

47 *In re Universal Serv Fund Tel Billing Practices Litig*, 300 F Supp 2d 1107, 1126 (D Kan 2004).

ration,⁴⁸ the judge held ‘the contract on its face purports to be governed by Texas law, and Texas law awards attorney’s fees to a party who prevails on a breach of contract claim. Therefore, the panel did not exceed its powers when it awarded [the prevailing party] its attorney’s fees’.

The ‘bad faith’ exception or sanctions

Some courts have recognised the power of arbitrators to award attorneys’ fees against parties who are guilty of ‘bad faith’ conduct during the course of a proceeding. In *ReliaStar Life Insurance v EMC National Life Co*,⁴⁹ for example, it was held that arbitrators possessed inherent authority to award attorneys’ fees against a party who had conducted itself in bad faith, even though the contractual agreement provided that both parties would bear their own costs.

In addition, courts or arbitrators occasionally order that the opposing lawyers pay attorneys’ fees, as a sanction for professional misconduct. The large body of law governing attorney sanctions is beyond the scope of this article, save to note that courts and arbitrators have displayed particular dissatisfaction with counsel who ‘disregard and flout the authority of the arbitral forum’ and who treat arbitration as a procedure where ‘anything goes’.⁵⁰

Attorneys’ fees as damages

Finally, in some cases, the courts have upheld an arbitrator’s award of attorneys’ fees as damages for a party’s past breach of a forum selection clause. See *MWN Group, Inc v MAG USA, Inc*⁵¹ (upholding arbitrator’s award of damages incurred by prevailing party arising from opponent’s actions in ‘filing suit in Michigan rather than instituting arbitration proceedings’). Thus, an arbitrator might consider an award of the fees incurred by a party in compelling a recalcitrant party to submit to arbitration.

Recovery of attorneys’ fees incurred in post-award litigation

A successful party sometimes incurs significant expense fending off challenges to the award in the national courts. In the English courts, such expenses are recoverable under the English Rule. But in the US, ‘there is no provision in the [FAA]... that awards attorney’s fees to a party who is successful in pursuing a motion to compel arbitration or in defeating a motion to compel arbitration.’⁵² Thus, even when the contract or arbitral rules might have permitted an award of attorneys’ fees in the arbitration, post-award litigation expenses may not be recoverable. Thus, in *Alcatel Space, SA v Loral Space & Comm’ns Ltd*⁵³ the court denied the French company’s application for fees incurred in seeking to confirm an ICC award by stating: ‘[t]he general rule is that each party in a federal litigation pays its own attorneys’ fees’.

Thus, to recover attorneys’ fees in post-award litigation, a litigant will need to identify an exception to the American Rule, for example:

- a contractual provision expressly permitting recovery of litigation expenses in addition to arbitration expenses – see *Olle v 5401 W Ave Residential, LLC*⁵⁴ (holding that a contract entitling a defendant to recover fees incurred in enforcing an arbitration agreement was valid);
- ‘bad faith’ or sanctions – see *Telenor Mobile Comm’ns v Storm LLC*⁵⁵ (the prevailing party in an UNCITRAL arbitration was entitled to attorneys’ fees incurred in pursuing post-award contempt proceedings, after its Ukrainian business partner refused to honour the award); *Celsus Shipholding Corporation v Pt Pelayaran Kanaka Dwimitra Manunggal*⁵⁶ (enforcing award and awarding attorneys’ fees on the ground that the ‘defendant ha[d] presented no justification or reason for its failure to abide by the [London] arbitrator’s decision’); or
- possibly under the Revised Uniform Arbitration Act of 2000 (now in force in 12 states plus Washinton, DC) permitting recovery of ‘reasonable attorney’s fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made’⁵⁷ – if this statute can be validly utilised in cases governed by the FAA.

Security for costs

Under section 38 of the English Arbitration Act, in an arbitration that takes place in England, arbitrators have the power to require a claimant to furnish ‘security for costs’, that is, to post a cash (or cash-equivalent) deposit equal to the amount of attorneys’ fees that the other party might incur in the course of the proceeding to provide security against the possibility that the claimant might lose the case. ‘Security for costs’ is available in arbitration in other Commonwealth countries as well. See, for example, *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*⁵⁸ (where Singapore is the seat of arbitration, arbitrators have power to order security for costs). Security may be warranted where ‘there is some doubt that [the claimant] will be in a position to meet the defendant’s costs should his actions fail’,⁵⁹ for example, where the claimant is a company with few or no assets.

As a general matter, the concept of ‘security for costs’ is somewhat unfamiliar to US lawyers. Nevertheless, some have argued that an application for ‘security for costs’ can be based on the arbitrator’s (or a court’s) general powers to grant interim conservatory measures⁶⁰. Moreover, LCIA rule 25.2 expressly permits arbitrators ‘to order any claiming or counterclaiming party to provide security for the legal or other costs of any other party by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate’. Thus, if a party agrees to arbitration in New York under the LCIA Rules, it may be deemed to have agreed to a system that allows its opponent to request security for costs.

48 *Sungard Energy Systems, Inc v Gas Transmission W Corp*, 551 F Supp 2d 608, 618-19 (SD Tex 2008).

49 *ReliaStar Life Insurance v EMC National Life Co*, 564 F 3d 81 (2d Cir 2009).

50 *Polin v Kellwood Co*, 132 F Supp 2d 126, 127-28, 134 (SDNY 2000) (confirming arbitrators’ award of sanctions against lawyer guilty of serious misconduct), *aff’d*, 34 Fed Appx 406 (2d Cir 2002).

51 *MWN Group, Inc v MAG USA, Inc*, No. 3:06-MC-47, 2007 US Dist LEXIS 57979, at *11 (ED Tenn, 8 August 2007).

52 *American Reliable Ins v Stillwell*, 336 F 3d 311, 320 (4th Cir 2003).

53 *Alcatel Space, SA v Loral Space & Comm’ns Ltd*, 02 Civ 2674, 2002 US Dist LEXIS 11343, at *19 (SDNY 25 June 2002).

54 *Olle v 5401 W Ave Residential, LLC*, 569 F Supp 2d 141, 146-47 (DDC 2008).

55 *Telenor Mobile Comm’ns v Storm LLC*, 587 F Supp 2d 594, 621 (SDNY 2008).

56 *Celsus Shipholding Corp v Pt Pelayaran Kanaka Dwimitra Manunggal*, 06 Civ 13598, 2008 US Dist LEXIS 12842, at *5 (SDNY 21 February 2008).

57 *Id.* section 25.

58 *Dermajaya Properties Sdn Bhd v Premium Properties Sdn Bhd*, [2002] 2 SLR 164 (Singapore High Court, 2002).

59 Robert M Merkin, 1 *Arbitration Law* 14.65 (2004).

60 See Noah Rubins, *In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*, 11 *Am Rev Int’l Arb* 307, 348 (1999).

Parties who desire to recover their attorneys' fees in arbitration are well-advised to include an express fee-shifting agreement in their contract, particularly if the contract contemplates arbitration in the US. In all events, parties should be aware of the myriad implications arising from their selection of venue, which can have a profound – and often unintended – effect on the recovery of legal fees in arbitration.

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The international litigation and arbitration group of Skadden, Arps, Slate, Meagher & Flom LLP and affiliates (Skadden) brings a vast breadth of knowledge and experience to the resolution of international disputes. Our lawyers have appeared before every major international arbitral institution, including the International Centre for Settlement of Investment Disputes (ICSID), International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for Dispute Resolution/American Arbitration Association (ICDR/AAA) and Inter-American Convention on International Commercial Arbitration (IACAC), as well as ad hoc arbitrations under UNCITRAL and other rules.

We are experienced in managing multi-jurisdictional disputes and have litigated high-profile international cases before the trial and appellate courts of the United States and England. We have represented individuals and companies in industries as varied as power and energy, metals and mining, oil and gas, construction, manufacturing, telecommunications, banking, auditing and securities.

We have handled arbitrations involving issues and parties from across the Americas, in a variety of regional venues. As part of Skadden's broad Latin American practice, we have advised clients in complex commercial disputes throughout North, South and Central America, as well as the Caribbean. We also advise clients on expropriation and investment protection issues under free trade agreements (FTAs) and bilateral investment treaties (BITs), and have represented investors in ICSID arbitration proceedings against the governments of Argentina and Venezuela.

The members of our International Litigation and Arbitration Group can share with our clients a wealth of personal experience and a wide range of national backgrounds. Members of our practice have been featured in *Chambers Global: The World's Leading Lawyers for Business* (international arbitration); *Euromoney's Guide to the World's Leading Experts in International Arbitration*; *Best Lawyers in America* and *The International Who's Who of Commercial Arbitrators*.

Many of our attorneys are bilingual or have practiced litigation and arbitration in more than one country or legal system. All are familiar with the complexities of public and private international law that bear on arbitration and cross-border disputes. Leveraging the depth and international coverage of Skadden's more than 2,000 attorneys in 25 offices worldwide, we offer clients an unrivaled advantage in planning for and resolving international disputes.



John L Gardiner
Skadden, Arps, Slate, Meagher
& Flom LLP

John L Gardiner is a New York partner of Skadden, Arps, Slate, Meagher & Flom LLP, and the co-head of international litigation and arbitration, Americas. He represents clients in commercial disputes in both federal and state courts in the United States, and before international and domestic arbitral tribunals such as the ICC and ICDR. Mr Gardiner also has acted as an arbitrator in complex international corporate disputes under the ICC, ICDR and UNCITRAL rules, and has acted as a mediator in complicated corporate and partnership separation situations. He was selected for inclusion as one of the best lawyers in the field of international arbitration by *Chambers Global: The World's Leading Lawyers for Business 2006-2007* and *Chambers USA: America's Leading Lawyers for Business 2005-2008*, and was also listed in *The Best Lawyers in America 2009*.



Timothy G Nelson
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Timothy G Nelson is a New York partner of Skadden, Arps, Slate, Meagher & Flom LLP, practicing international litigation and arbitration. He has appeared before arbitral tribunals of ICSID, the ICDR, the AAA, the ICC as well as arbitrations governed by the UNCITRAL rules, and has litigated numerous arbitration issues before US federal and state courts. His cases include contractual, corporate and accounting arbitrations as well as investment treaty claims against foreign sovereigns. He holds law degrees from the University of New South Wales and Oxford University.