



# COMMERCIAL ARBITRATION

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## *Managing Costs*

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## INTRODUCTION



- Costs of the parties (e.g., counsel costs) make up the largest % of total costs spent in arbitration.
- Contrary to common belief, arbitration is not always cheaper than litigation
  - This is especially the case when dealing with complex or cross-border disputes involving foreign elements
  - In fact, filing/institutional fees for arbitration are often more expensive than the scale of fees applied by the Vietnamese court
- Costs are closely linked with time – in general, the longer the arbitration, the greater the costs incurred
  - Therefore, there is incentive to apply appropriate case management techniques to minimise unnecessary delays in the proceedings.

## COST MANAGEMENT BEGINS WITH THE ARBITRATION AGREEMENT



- Managing costs begin at the stage of drafting an arbitration agreement, as this determines the process by which disputes will be resolved. Below can have significant impact on costs, and can be adjusted according to the scale or complexity of the parties' commercial agreement:
  - Arbitral institution (*e.g., VIAC is more cost-friendly compared to SIAC, HKIAC, etc.*)
  - 1 sole arbitrator or a tribunal 3 arbitrators (*this also affects the speed of the arbitration*)
  - Application of expedited procedures, to fast-track the arbitration
  - Language
- Keep the arbitration agreement simple, to avoid arguments on its application or validity. Worse case scenario, it does all the way to the court!
  - Use model clauses for avoidance of doubt. Often available on the arbitral institution's website

## PRE-FILING ASSESSMENTS



- At the pre-claim, there are cost considerations when assessing the merits of your claims because:
  - fees of arbitration institutions are directly (e.g., VIAC) or indirectly (e.g., ICC) calculated based on the value of the claim
  - the extent of claims raised or pursued in arbitration can impact the timing at which the arbitration can be completed
  - making claims without merit can come back to bite you, when the Tribunal orders you to pay the other side's costs for resisting them
- For complex or large-scale claims, formal legal and factual assessment should be carried out to identify appropriate claims to pursue or to consider dropping.

## ARBITRATORS



- Many institutional arbitrations apply a scale of fees (often calculated on the dispute value), rather than hourly rates of the arbitrators.
- Using “big name” arbitrators is tempting, as they are experienced and almost always prominent/senior practitioners in their field. However:
  - In the context of ad-hoc arbitrations, they are expensive.
  - They often have a large case load = less time flexibility. This can prolong the case due to schedule conflicts and more time needed for reviewing documents or issuing decisions/awards.
- Before selecting an arbitrator, check their availability and capacity to act in advance.
  - This includes checking whether there may be potential conflict of interest, to avoid procedures for addressing future objections during appointment stage

## PROCEDURAL TIMETABLES



- Some institutional rules (e.g., ICC) will see the Tribunal and parties reach a *procedural timetable*, setting out the timing of milestones in the arbitration.
- Number of rounds of submissions required and timing of submissions.
  - No Tribunal wants to receive a last-minute submission, which results in either (i) the Tribunal disregarding or not having an opportunity to properly read it or (ii) postponing certain milestones
- If hearing is necessary, consider fixing the hearing date in advance. The procedures for submissions, etc. can then be arranged to fit within the period leading up to the hearing.
- Consider a pre-hearing conference, to coordinate the logistics, translation, and other matters regarding the hearing.

## SUBMISSIONS



- Consider setting out the case in full early in the proceedings
  - Avoid the tactic of keeping submissions overly brief in an attempt to “bait” the counterparty to reveal their cards. If the counterparty thinks the same thing, it only result in the parties exchanging insufficient submissions.
  - The Tribunal wants to know the full case as early as possible, as opposed to receiving everything in the middle or towards end of the proceedings.
- Avoid repeating arguments. Tribunal does not need to see it more than once.
- Parties may agree to limit the length (pages) of submissions for brevity.
  - Any pages in excess of the limit will be disregarded!
- Parties may agree to limit the number of rounds of submissions
  - Avoid continuous toing and froing, as each party wants to have the last word!

## WITNESSES AND EXPERTS



- Every witness and expert called is an additional cost
  - Need to prepare witness/expert statement(s) and then prepare for their attendance at hearing for cross-examination
  - Experts are also often not cheap
- Identify key witnesses, and avoid having multiple witnesses that cover the same issue or irrelevant issues
- Consider whether it is appropriate to use a single expert appointed by the Tribunal or jointly appointed by the parties
  - Avoiding a battle of experts, leading to multiple reports and cross-examination



## HEARING



- Is a hearing required?
  - If the matter is simple, it may suffice to have the matter resolved without a hearing, and Tribunal will issue award based on submissions and documents.
- Location of hearing – where is the most convenient venue, having regard to the participants' locations?
  - Tribunal, parties, lawyers, witnesses, experts, etc.
  - Hearings by teleconference or video conference can be explored
- Have a cut-off date for evidence and submissions, to avoid last-minute submissions that can frustrate the Tribunal or, worse, postpone the hearing date if the submissions are voluminous
- Hearing bundles



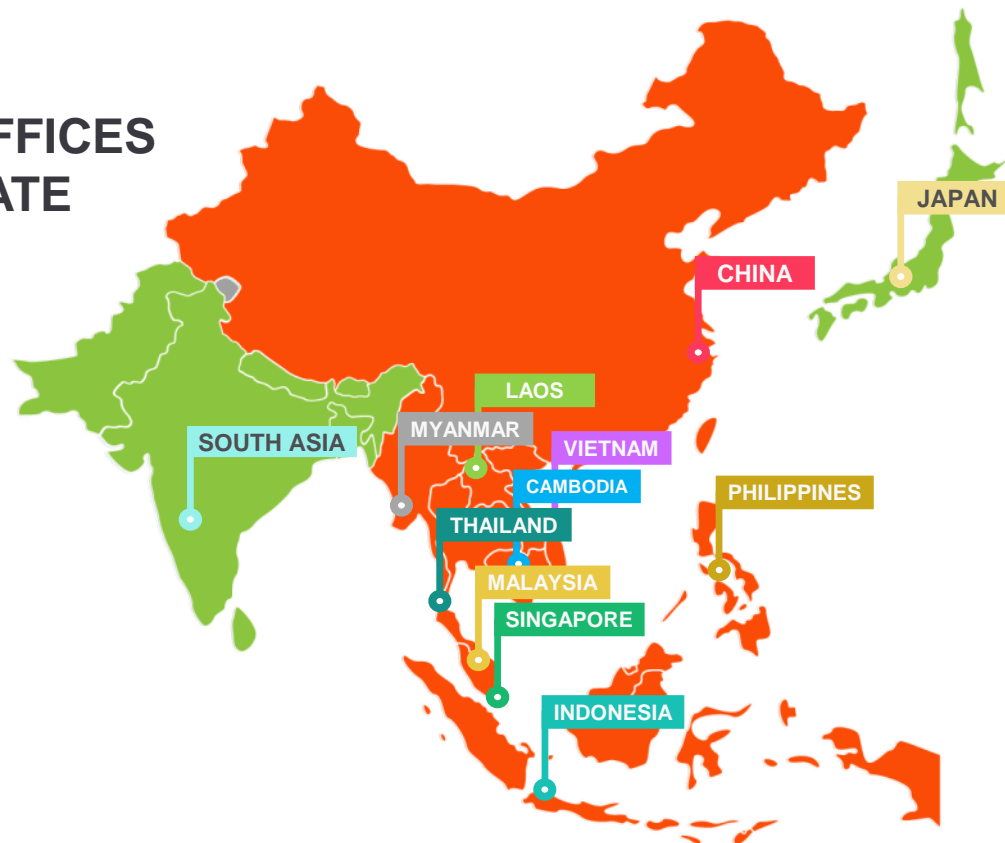
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Q&A