

Costs in Arbitration – Vietnam's Position and Practice

October 2022 | [Vietnam](#)



Introduction

The costs of legal proceedings is a major consideration influencing a party's choice of dispute resolution in Vietnam – both in terms of the costs of proceedings and whether they can be recovered from the counterparty. While Vietnamese law regulates certain types of costs incurred during arbitration such as tribunal fees, it does not regulate party-incurred costs such as the costs of legal representation and remuneration of experts.

In this article, we look into:

1. how costs are regulated under Vietnamese law;
2. the Vietnam approach to the recovery of party-incurred costs in commercial arbitrations in Vietnam, including requirements to be met; and
3. the implications for foreign arbitral awards that are to be recognised in Vietnam.

Regulation of Costs under Vietnamese Law

The Law on Commercial Arbitration (2010) in Vietnam regulates "arbitration fees", which is the revenue arising from the provision of dispute resolution services through arbitration. The law prescribes an exhaustive list of these fees:

1. remuneration, travel and additional expenses incurred by the tribunal;
2. charges for expert consultation and other assistance at the request of the tribunal;
3. administrative fees;
4. charges for appointment of ad hoc arbitrators of the arbitral institution at the request of the disputing parties; and

5. charges for the use of other services provided by the arbitral institution.

These arbitration fees are fixed by the arbitral institution (or the tribunal, for *ad hoc* arbitrations). These cost items are also reflected as "arbitration fees" (or costs of arbitration) in the 2018 Rules of Arbitration of the Vietnam International Arbitration Centre ("**VIAC Rules**").

Vietnamese law expects the losing party to bear arbitration fees unless (i) otherwise agreed by the parties, (ii) stipulated otherwise in the rules of the arbitration, or (iii) allocated otherwise by the tribunal. While the law adopts a relatively black-and-white approach to cost allocation (e.g., it does not account for partial loss/wins), it confers the tribunal with discretion as to how these arbitration fees can be allocated, as evinced in the last-mentioned exception.

Vietnam Approach to Party-Incurred Costs

While Vietnamese law regulates "arbitration fees", the same cannot be said for legal and other party-incurred costs (e.g., for experts). These are typically the largest cost components of arbitration. Little guidance can be derived from Vietnam's rules of civil procedure because, save for limited categories of disputes (e.g., intellectual property), the court typically does not award these costs to a litigant (with each party bearing its own costs). Instead, for arbitration, allocation of such costs has been incorporated into institutional rules – not as costs of arbitration (the categories of which are already prescribed by law), but as "*legal costs or other reasonable expenses*".

Article 36.2 of the VIAC Rules, for instance, empowers the tribunal to decide that one party shall bear "*all or part of the legal costs or other reasonable expenses incurred by the other party*". This is not dissimilar to other major institutional rules, such as the Arbitration Rules of the Singapore International Arbitration Centre (2016). As such, the arbitral tribunal has discretion in allocating these costs. While the VIAC Rules provide broad discretion to the tribunal, the "costs follow the event" approach is commonly applied, where the losing party will be liable for party-incurred costs.

Nevertheless, the question of *how* these costs are determined remains open. As a result of a lack of clear guidance, the predominant practice has seen domestic arbitral tribunals demand a high standard of proof of costs. This is likely derived from the longstanding principles of compensation under Vietnamese law (including the Law on Commerce), in which an aggrieved party may only recover actual and direct losses that it has suffered. For instance, tribunals often require evidence of actual payment of those costs by the party seeking costs (through, for instance, tax invoices and remittance slips) and documents to establish the legitimacy of the costs (e.g., timesheets and in some cases, the legal service agreement signed with the law firm). This may create issues as it is not typical in Vietnam for service providers to issue tax invoices prior to completion of an engagement.

Combined with the fact that, typically, no further evidence can be admitted after the final hearing, this has resulted in a practice of frontloading or settling all of their fees related to the arbitration prior to the hearing, to ensure the availability of proof of costs. It is not usual practice in Vietnam for separate costs submissions to be considered.

This practice has also called into question whether success or contingent fees – being a widely used fee structure in Vietnam and only payable post-arbitration – are recoverable in Vietnamese arbitrations.

Impact on Foreign Arbitral Awards

What also remains to be seen is whether the above expectation in domestic arbitrations will also extend to foreign arbitral awards if they are put before a Vietnamese court for recognition. The courts have been known to refuse to recognise foreign awards on the basis that the damages awarded by a tribunal were not reflective of a party's "actual and direct loss" (e.g., in *Toepfer v. Sao Mai* (2011)).

If this same expectation were applied to costs, it arguably sits inconsistently with the approach in international arbitration, in which the standards that govern awards of legal costs can be said to be grounded on "international practice" that has

been developed over time. Such practice does not always see the tribunal require detailed, or even any, supporting "proof of costs". Therefore, while the authors are not aware of relevant precedents concerning costs in Vietnam, the risk of a foreign award being refused for recognition on such grounds cannot be discounted.

Concluding Remarks

Parties involved in Vietnamese arbitrations would do well to align with their counsel and experts on the settlement of costs at the outset, lest they face the risk of these sums being excluded from any resultant award.

In a similar vein, counsel in domestic arbitrations in Vietnam should be wary of approaching costs claims in the same manner as they would in international arbitrations. This is all the more critical as the complexity of the dispute increases, when preparing and compiling evidence of costs is often a secondary concern as parties approach the hearing.

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