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# Recoverability of In-House Counsel Costs in International Arbitration

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## Why is it relevant to discuss this topic?

Costs of the arbitration, in general

Costs with in-house counsel

in-house  
counsel



## The role of in-house counsel and other non-legal personnel in arbitration

In-house counsel are more proactive, more involved in case management. Legal departments increasingly include litigation departments and litigation counsel, which was more an exception until a decade ago, in Europe at any rate. In-house counsel at all levels in a company realize the benefits of being actively involved in the projects of their employer, of being team members, of lobbying, of being involved in policy-making, and of dealing with regulators and law-makers.

Jean Claude Najar, *A Pro Domo Pleading: Of In-House Counsel, and their Necessary Participation in International Commercial Arbitration*, 25 *Journal of International Arbitration* 2008, 623, p. 627

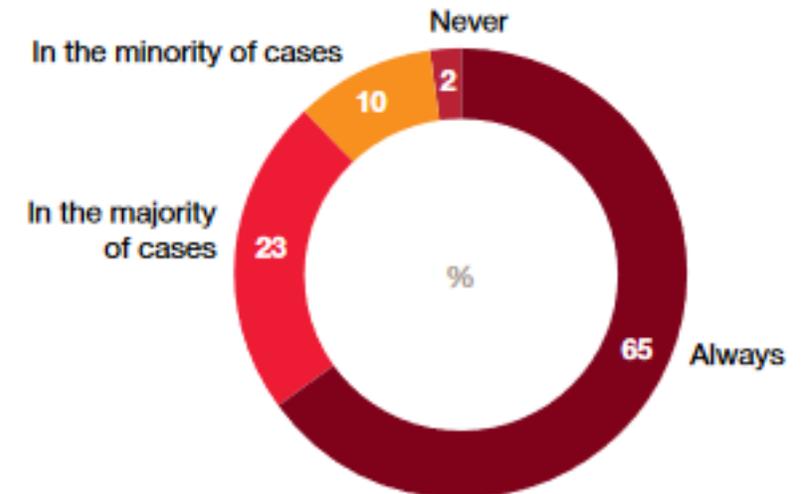
### **How often are outside counsel retained?**

The vast majority of participating corporations instruct outside counsel when they are involved in arbitration.

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#### **When your organisation is involved in an international arbitration, how often do you instruct an outside counsel?**

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# Recoverability of Costs with In-House Counsel under Arbitration Rules

SCC (2017) Article 50 Unless otherwise agreed by the parties, the Arbitral Tribunal may in the final award, at the request of a party, order one party to pay any reasonable costs incurred by another party, including costs for legal representation, having regard to the outcome of the case, each party's contribution to the efficiency and expeditiousness of the arbitration and any other relevant circumstances.

ICC (2021) Article 38(1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

LCIA (2020) Article 28.3 The Arbitral Tribunal shall also have the power to decide by an order or award that all or part of the legal or other expenses incurred by a party (the "Legal Costs") be paid by another party. The Arbitral Tribunal shall decide the amount of such Legal Costs on such reasonable basis as it thinks appropriate. The Arbitral Tribunal shall not be required to apply the rates or procedures for assessing such costs practised by any state court or other legal authority.

# Recoverability of Costs with In-House Counsel under Arbitration Rules

UNCITRAL Rules (2010) Article 40(2)(e) The term “costs” includes only: ...

The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable

ICSID Rules (2006) Rule 28(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. ...

[ICSID Rules Amendment Process, WP 4, Rule 50: *The costs of the proceeding are all costs incurred by the parties in connection with the proceeding, including:(a) the legal fees and expenses of the parties;*]

## ICC COMMISSION REPORT DECISIONS ON COSTS IN INTERNATIONAL ARBITRATION

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ICC Dispute Resolution Bulletin  
2015, Issue 2

### Recoverability of Costs with In-House Counsel in Practice

*There were differing views on whether or not the costs of in-house counsel, management and employees were reimbursable. With respect to management costs, some tribunals held that these should not be awarded as 'other' costs as managing conflicts is part of management's role and especially if outside counsel were hired to deal with other aspects of the conflict. Other tribunals took the opposite view and stated that time spent on an arbitration is time not spent on managing the company and should therefore be included in the costs awarded. Both views have also been expressed in relation to employees' costs. Proof and justification of alleged costs and the role of the in-house counsel seem to be important to tribunals. On several occasions they have found that parties failed sufficiently to substantiate and prove that the costs claimed had actually been incurred and therefore refused to order reimbursement.*

## Recoverability of Costs with In-House Counsel in Practice

**ICC case 5029** (ICC (1988)): reference in the Rules to the “normal legal costs incurred by the parties” interpreted as not including costs with in-house counsel:

*Legal costs do not include any allowance for time spent on the arbitration by the party itself or its directors, employees, representatives and agents. Arbitrations inevitably take up time of the parties themselves and their staff, but the cost of any such time is in the Arbitral Tribunal’s opinion not part of the legal costs of the proceedings. (Final Award of 1991)*

**ICC case 6564** (ICC (1988)): reference in the Rules to the “normal legal costs incurred by the parties” interpreted as including costs with in-house counsel:

*In the Arbitral Tribunal’s view in-house legal costs may well form part of a party’s normal legal cost incurred in the conduct of a case. It is for each party to decide whether it wishes to retain outside counsel or prepare and argue the case by its own staff. There is no justification to privilege a party in terms of costs for the sole reason that it retained outside counsel. (Final Award of 1993)*

**ICC case 17326** (ICC (1998)): not denying the possibility to award these costs, but the tribunal avoided the decision by noting that the interested party failed to substantiate and prove the costs claimed in the proceedings

## Quantum and Proof

### ICC case 6564 (ICC (1988)):

*There is, however, an important difference between the costs for outside counsel and those incurred in-house: the former are expenditures and can be clearly identified and evidenced; in the case of the latter this is not always the case. In view of this difference it appears justified to require some substantiation inter alia with respect to the nature of the cost, the personnel involved and the type of work performed. In the present case, neither Party satisfied these requirements. Their claims are too general to permit an assessment of the justification and reasonableness of the costs claimed. Therefore, no allowance will be made for internal costs of the Parties.*

### ICC case (reported in the ICC Commission Report on Costs):

The tribunal required a party to sufficiently substantiate and prove its in-house 'costs' and substantiate and prove the accuracy of the so-called 'benchmark rates' used to calculate its reimbursement claim. These benchmark rates needed to be reasonable. Furthermore, the party needed to identify whether the actual expenses were incurred or whether they rather reflect or include a profit which was anticipated to be achieved in due course of business with the assistance of its legal and commercial team and that it did not achieve due to the time its legal and commercial team had to give to the arbitration.



***THE FUTURE, ACCORDING TO SOME SCIENTISTS, WILL  
BE EXACTLY LIKE THE PAST, ONLY FAR MORE EXPENSIVE***

JOHN SLADEK