

In-House Counsel Costs and Other Internal Party Costs in International Commercial Arbitration

by PHILIPPE CAVALIEROS *

ABSTRACT

Philippe Cavalieros, a former General Counsel at a multinational company considers the extent to which internal party costs may be recovered in international arbitrations, after having analysed the nature of such costs from a company perspective, and in the light of the concerns often expressed by users regarding time and costs.

I. INTRODUCTION

Controlling time and costs in international commercial arbitration is a paramount necessity. A number of tools and guidelines have been published to help achieve this¹ and new sets of Rules² have been adopted to tackle a concern often raised by the users themselves (for instance, through groups such as the Corporate Counsel International Arbitration Group (CCIAG)) that arbitration has become too costly and time-consuming.

While it is instructive to note that in an enlightening article from 1986 on ‘The Manager and Arbitration’,³ no mention whatsoever was made of the arbitration

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¹ *Techniques for Controlling Time and Costs in Arbitration*, Report from the ICC Commission on Arbitration, ICC Publication No. 843, ICC Bull. Vol. 28 No. 1, (2007).

² For instance, the 2012 ICC Rules now require an early Case Management Conference, during which the parties and the tribunal can establish an appropriate time and cost-effective procedure.

³ André Beyly, *The Manager and Arbitration*, 3 J. Intl Arb. 7–18 (1986).

costs incurred by a company, today times have changed and scrutiny is exercised from the outset and at all levels.⁴

Indeed, at a very early stage, when deciding whether to file a request for arbitration or responding thereto, the first question asked by managers of any given sound company is how much it will cost,⁵ often before the merits are even addressed and considered.

Hence, given their magnitude, the costs of arbitration are now an integral part of the arbitration process, and not merely a consequence thereof.

Traditionally, the costs of arbitration are divided into two categories: the costs of the arbitration itself, and the costs of the parties. The first category comprises procedural costs, i.e., the costs actually incurred for the organization of the arbitration process itself, whereas the second category includes lawyers' fees and expenses, as well as expenses related to witnesses, and expert evidence. But little is said about the Party's internal costs.

Nowadays, especially in a post-financial crisis context, in light of the need for companies to better control outside counsel costs and to tackle an ever-increasing complexity of disputes, both from a technical and legal perspective, in-house counsel, senior officials, and in-house specialists increasingly are taking a strategic role, before, during, and after the arbitration process.

And the time that in-house counsel, managers, internal experts, and other employees involved need to dedicate to the arbitration translates into costs.

Unlike (i) procedural costs which – assuming the parties opted for institutional arbitration – can be relatively easily estimated through costs calculators available online⁶ and (ii) outside counsel fees that can be anticipated or negotiated, (i.e., the direct or external costs), internal party costs are difficult to assess (i.e., the indirect or internal costs).

And, as pointed out by one author, *'there is nothing more embarrassing for an in-house lawyer than to be unable to tell his directors how much the arbitration will cost (or how long it will last) when these are key factors in deciding whether to come to an agreement or write off a case'*.⁷

Moreover, as pointed out by distinguished authors,⁸ the overall costs of an arbitration *'rarely include any allowance for the time spent on the case by senior officials, directors or employees of the parties themselves and the indirect costs of disruption of their ordinary business'*. *'The hidden costs of such "executive" or "management" time may be very high. Indeed, it may occasionally exceed the direct costs'*.

⁴ Jorge Perez-Vera, *The transactional side of the International Arbitration and the role of corporate counsel*, 6 Intl. In-house Couns. J. 1 (2012).

⁵ Jean-Claude Najjar, *The Inside View: Companies' Needs in Arbitration*, 12 Arb. Intl. 359–372 (1996).

⁶ <http://www.wolfttheiss.com/index.php/Calculator.html>; <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/cost-and-payment/cost-calculator/>; <http://apps.finra.org/ARbitrationMediation/ArbFeeCalc/1/Default.aspx>; <http://www.voldgiftsinstitutet.dk/en/Menu/Costs>; <http://www.sccinstitute.com/?id=23725>; <http://www.crcica.org/eg/feescalculator.html>.

⁷ Eric Robine, *What Companies Expect of International Commercial Arbitration*, 9 J. Intl. Arb. 31–44 (1992).

⁸ Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration* 8–93 (Sweet & Maxwell 2004).

Even more embarrassing, therefore, is for an in-house counsel not to be in a position to indicate to its management whether internal costs may in principle be recoverable should the Arbitral Tribunal decide to award costs.

What is the nature and extent of these internal costs? (II), and are such costs recoverable? (III)

II. THE NATURE AND EXTENT OF INTERNAL COSTS

One author has distinguished three main tasks of in-house counselling: (i) *follow and disseminate legal knowledge*, (ii) *provide appropriate advice and assistance*, and (iii) *assist in litigation*.⁹

The role and influence of legal departments has been continually evolving, particularly in major companies, where in-house advice is no longer viewed as the last recourse, but rather as an integral part of the decision-making process.

In-house lawyers are now also involved in the strategy, negotiation, and implementation of the company's activities. Obviously, in-house counsel also have always held a decisive role when the question of litigation or arbitration arises.

Executives will naturally be asked to decide upon a strategy on the basis of their own in-house counsel's preliminary advice. Notably, particularly in the field of international arbitration, '[w]hether or not to negotiate is one of the more difficult issues for companies and in-house counsels to resolve'.¹⁰

Once the arbitration has started, in-house counsel are also coordinators between the several departments of the company. With their involvement and knowledge both within the company and in the legal field, '*in-house counsel are the only persons who can apprehend all facets of a given issue*'.¹¹

If outside counsel are representing the parties in the arbitration, inside counsel will be the link between them and the other departments of the company. In summary, in-house counsel will compile documents, elaborate a strategy, and monitor the proceedings from the start. Particularly, at the very outset, in-house counsel should:

"reconstruct the facts of the case and (...) establish, as far as possible, the foundation of the decisions taken by the company at the time of occurrence. Such reconstitution must be undertaken in the most exhaustive and objective manner possible. To this end, in-house counsel needs the input of other employees of the company".¹²

The respective roles of in-house and outside lawyers may of course vary depending upon the size of the legal department, the internal resources available, and the general politics of the company regarding externalization. Although outside counsel's role is crucial, some legal departments can even afford to waive hiring

⁹ Nicolas David, *Le Directeur Juridique, Quelle Place et Quel Rôle?* (Le Manuscrit 2006), at 259.

¹⁰ Jorge Perez-Vera, *id.*

¹¹ Jean-Claude Najjar, *A Pro Domo Pleading: Of In-House Counsel, and their Necessary Participation in International Commercial Arbitration*, 25 J. Intl. Arb. 626 (2008).

¹² Jorge Perez-Vera, *id.*

outside counsel in certain particular, albeit limited, circumstances. Certain major multinationals even seem to have set up fully integrated in-house dispute teams.¹³

In all cases, in-house counsel should take a proactive role in international arbitration, by controlling the procedure,¹⁴ and may – and even perhaps should – sign Terms of Reference, or participate in hearings.

In terms of costs, and beyond the specific role of in-house counsel, expenses unrelated to the representation of the parties can encompass the following:¹⁵

- (1) executive time and disbursements;
- (2) administrative costs, i.e., salary costs, fees, and out-of-pocket expenses for:
 - (i) factual research;
 - (ii) in-house legal advice;
 - (iii) outside experts on factual or non-legal issues;
 - (iv) processing the arbitration;
 - (v) witnesses who are employees.

Indeed, alongside in-house counsel, other employees are involved in the arbitration process.¹⁶ Whether they have to produce witness statements, explain the technical and factual issues that gave rise to the dispute, or search for information, many employees may spend time assisting in-house or/and outside counsel.

In certain highly technical cases, internal experts tend to play a crucial role and the time dedicated to an arbitration is often substantial. Such employees are often highly skilled and highly paid, and cannot as a result devote the necessary time to their usual business. To put it simply, an engineer, for example, who must explain technical difficulties to counsel or to an arbitral tribunal is losing time for improving the company's technology.

From a managerial standpoint, the time spent on an arbitration is not spent on day-to-day matters and the resulting loss must be taken into account.

The same holds true for executives, since the time dedicated to an arbitration of a certain magnitude usually encompasses studying the case, giving instructions to the company's various departments, participating in hearings, and more broadly, spending time on matters which may be considered disruptions of their normal

¹³ <http://www.globalarbitrationreview.com/news/article/30505/shell-unveils-new-disputes-team>

¹⁴ Jean-Claude Najjar, *A Pro Domo Pleading*, *op.cit.* at 625 (“in-house counsel should at the very least control the work that their outside lawyers are doing in arbitral proceedings, and preferably be involved in managing these proceedings”).

¹⁵ J. Gillis Wetter and Charl Priem, *Costs and their allocation in international commercial arbitrations*, 2 *Am. Rev. of Int'l Arb.* 249 (1991).

¹⁶ *Guidelines for Arbitrators on Making Orders Relating to the Costs of the Arbitration*, The Journal of the Chartered Institute of Arbitrators (2003), 69 *Arbitration* 2 at 139 (“The staff of a company or firm involved in an arbitration often dedicate substantial time to the case, including the generation of figures and attendance at the hearing”).

business activity.¹⁷ And, '[i]n general, the larger the case the more the executive time that must be spent on it'.¹⁸

With the rising complexity of international arbitrations and the ever-increasing amounts in dispute, executive or management time spent on these matters will likely also increase. And it is quite legitimate for companies to want to know whether the time spent by their employees and executives may in principle be recoverable.

III. THE RECOVERABILITY OF IN-HOUSE COUNSEL AND MANAGEMENT COSTS

In assessing whether in-house counsel costs and management costs may be recovered, one ought to consider whether arbitration, and litigation in general, should be considered an ordinary part of a company's business, or should be treated differently from its day-to-day activities.

Traditionally, in-house counsel activity was considered 'as part of the normal cost of running a government department or a business enterprise'¹⁹ and as 'part of the risk and cost of doing business'.²⁰

If one were to follow this approach, it could be argued nonetheless that the situation may be slightly different depending on whether a party acts as claimant or respondent.²¹ When acting as claimant, a company could be considered to be running its normal course of business, since it chose to file a request, after having performed, as explained above, a risk/benefit analysis. On the contrary, when acting as respondent, the company's own business could be considered disrupted since for instance the associated costs may not have been really anticipated or debated internally.

However, this distinction ought to be considered with great caution. First, in practice, a large-scale arbitration is often the result of lengthy, unsuccessful negotiations, and the parties will have had ample opportunities, on both ends of the scale, to think through their strategies. Second, a claimant sometimes has no choice other than to have recourse to arbitration in order to protect its interests. Third, and perhaps most importantly, practice shows that the distinction between claimant or respondent is relatively meaningless, at least once the request for arbitration has been filed and the first arbitrator appointed,²² and no particular benefit or adverse consequence should be drawn from such a distinction without running the risk of a breach of equal treatment of the Parties.

¹⁷ Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *Law and Practice of International Commercial Arbitration op. cit.*, at 8–93.

¹⁸ *Ibid.*, at 8–93.

¹⁹ Nigel Blackaby, Constantine Partasides, et al. *Redfern and Hunter on International Arbitration*, Oxford U.Press 2009, at 545–549 (quoting John Y. Gotanda, *Supplemental Damages in Private International Law* 191 (Kluwer L. Intl. 1998).

²⁰ P.M. Patocchi, *Deciding on the costs of the arbitration – Selected topics*, ASA Special Series No. 29 (Sep. 2007).

²¹ Jean-Claude Najar, *A Pro Domo Pleading, op. cit.*, at 627.

²² Provided that a three-member arbitral tribunal is appointed.

Another proposal considers whether a difference should be drawn between a party that decides to retain outside counsel and a party that decides to be self-represented. It is indeed clearly established that '*arbitration is private and consensual and there is no presumption that a party will be represented by lawyers*'.²³

According to the Chartered Institute of Arbitrators, '*[r]easonable compensation may normally be allowed for a person who represents himself or his employer in an arbitration*'.²⁴

However, the question of whether any privilege should be drawn from choosing external counsel comes into play.

Practitioners consider that a '*party has the right to choose between external counsel and in-house counsel; no privilege should be attached to the choice of external counsel*' and '*[d]eciding otherwise would amount to an interference with and an inroad into each party's right to retain in-house counsel rather than external counsel*'.²⁵

Therefore, such second proposal should be also struck out, and the issue of whether in-house counsel costs and management costs are to be considered as ordinary costs of business or differently for the purpose of recoverability, should be analysed from a different angle, i.e., from the perspective of the arbitration itself, notably the Arbitral Tribunal.

It has been said that these management costs, '*except for reasonable out-of-pocket expenses necessarily incurred in the arbitration, are normally irrecoverable on the general principle that the lay client's time in instructing those who conduct the proceedings is not allowable*'.²⁶ Still, in all instances, '*the arbitrator may determine that internal costs are to be included as part of the other costs of the parties*'.²⁷

If it can indeed be shown to the Arbitral Tribunal that costs are, from an objective standpoint, reasonable or necessary and directly related to the arbitration, they may open the door to recoverability.²⁸

Indeed, the '*current although modestly implemented trend is to treat in-house lawyers in a similar fashion to outside lawyers provided that their costs are provable and that they are incurred in connection with the arbitration*'.²⁹

The '*first precondition for the allowability of party costs may be so obvious that it is rarely spelled out in arbitration rules (or laws): the costs must have been incurred by a party for the specific purpose of the arbitration*'.³⁰ Although a company cannot hide its own regular staffing costs in claims for costs, the costs that are incurred for the specific purpose of the arbitration should be recoverable.

The second condition is that the costs must be reasonable or necessary.³¹ For instance, the ICC Rules refer to the '*reasonable legal and other costs incurred by the*

²³ Michael O'Reilly, *Costs in Arbitration Proceedings*, (2d ed., LLP Professional Publishing 1997).

²⁴ *Guidelines for Arbitrators on Making Orders Relating to the Costs of the Arbitration*, The Journal of the Chartered Institute of Arbitrators (2003), 69 Arbitration 2, at 139.

²⁵ P.M. Patocchi, *op. cit.*

²⁶ *Guidelines for Arbitrators on Making Orders Relating to the Costs of the Arbitration*, *op. cit.*

²⁷ *Guidelines for Arbitrators on Making Orders Relating to the Costs of the Arbitration*, *op. cit.*

²⁸ Michael O'Reilly, *op. cit.*

²⁹ Michael W. Bühler and Thomas H. Webster, *Handbook of ICC Arbitration; Commentary, Precedents, Materials* 31–77 (Sweet & Maxwell 2005).

³⁰ Michael O'Reilly, *op. cit.*

³¹ Michael Bühler, *Awarding Costs in International Commercial Arbitration: an Overview*, 22 ASA Bull. 249–279 (2004).

parties'.³² The reasonableness test is also required by the UNCITRAL arbitration rules.³³

There is indeed no reason to forbid a party to allocate work between in-house and external counsel and to recover for both '*where there is no unreasonable overlap*'.³⁴

Available arbitral precedents tend to show that ordinarily, arbitrators however appear relatively reluctant to include in their decisions on costs a party's own internal management time and costs.³⁵

However, there have been cases in which the costs of in-house counsel were included in the costs award in addition to outside lawyers' fees and expenses.³⁶ In a number of ICC cases, arbitral tribunals have admitted the possibility of recovering in-house counsel costs while not allowing them in specific instances because they were '*too general to permit an assessment of the justification and reasonableness of the costs claimed*'.³⁷

The Secretariat of the ICC International Court of Arbitration considers that:

Arbitral tribunals are increasingly recognizing such costs as legitimate and reimbursable. However, the issue is still heavily debated. Certain arbitral tribunals may point to the practical concern that it is often difficult accurately to substantiate these costs and provide evidence thereof. In contrast, outside counsel will usually provide parties with detailed invoices. Other arbitral tribunals will deny such costs as a matter of principle, arguing that they fall within the parties' normal operating expenses.³⁸

Therefore, a close connection between the cause of the costs and the claims or defence raised before the arbitral tribunal is at a minimum required,³⁹ and companies should keep from the outset a very precise report on time spent and costs incurred.

To our knowledge this is rarely done today. It is in fact considered that:

[m]anagement time spent on arbitration is difficult to quantify, difficult to cost and difficult to allocate. In most cases, the review of this type of claim for costs will therefore be difficult to make.

³² Article 37.1 of the ICC Rules of Arbitration (2012): "*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 arbitral proceedings, 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*".

³³ Article 40.2 of the UNCITRAL arbitration rules (2010): "*The term "costs" includes only: (e) 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.*"

³⁴ Jeff Waincymer, *Procedure and Evidence in International Arbitration*, 1246–1247 (Kluwer L. Intl. 2012) (quoting ICC Case No. 6564 (1993), 4 ICC Intl. C. of Arb. Bull. 46 (1993)).

³⁵ ICC Case No. 6293 (1990), 4 ICC International Court of Arbitration Bull. 43 (1993).

³⁶ Eric A. Schwartz, *The ICC Arbitral Process-Part IV: The Costs of ICC Arbitration*, 4 ICC Intl. C. of Arb. Bull. 21 (1993).

³⁷ Cited by Eric A. Schwartz, *The ICC Arbitral Process-Part IV: op. cit.* Footnote 51 ("*In the Arbitral Tribunal's view in-house legal costs may well form part of a party's normal legal costs incurred in the conduct of a case*"). See also Jeff Waincymer, *op. cit.* at 1246–1247 (quoting ICC Case No. 6564 (1993), 4 ICC Intl. C. of Arb. Bull. 46 (1993); ICC Case No. 8787 (1997), ASA Vol. 20 No. 1 (2002), at 68).

³⁸ Jason Fry, Simon Greenberg, Francesca Mazza, *The Secretariat's Guide to ICC Arbitration*, ICC Publication No. 729E, at 3-1491.

³⁹ Michael Bühler, *op. cit.* at 249–279.

As time of witnesses who are in the employment of a party, these type of costs are generally not recoverable, even in England.⁴⁰

Nevertheless, as companies tend to increasingly control how their time is valued, authorities wrote some time ago, *'it is to be expected that claims for "executive" or "management" time will be made more regularly, whether as part of the parties' legal costs or as part of a claim for damages'*.⁴¹

In order to succeed, such claims, like all other claims, should be justified, detailed, and substantiated.

In-house counsel should, therefore, keep track of their and other representatives' involvement in an arbitration.

As a result, and paradoxically perhaps, the recovery of such additional costs may alleviate criticisms associated with running an international arbitration.

⁴⁰ Michael W. Bühler and Thomas H. Webster, *Handbook of ICC Arbitration*, *op.cit.* at 31–84.

⁴¹ Alan Redfern, Martin Hunter, Nigel Blackaby and Constantine Partasides, *op. cit.*, at 8–93.