

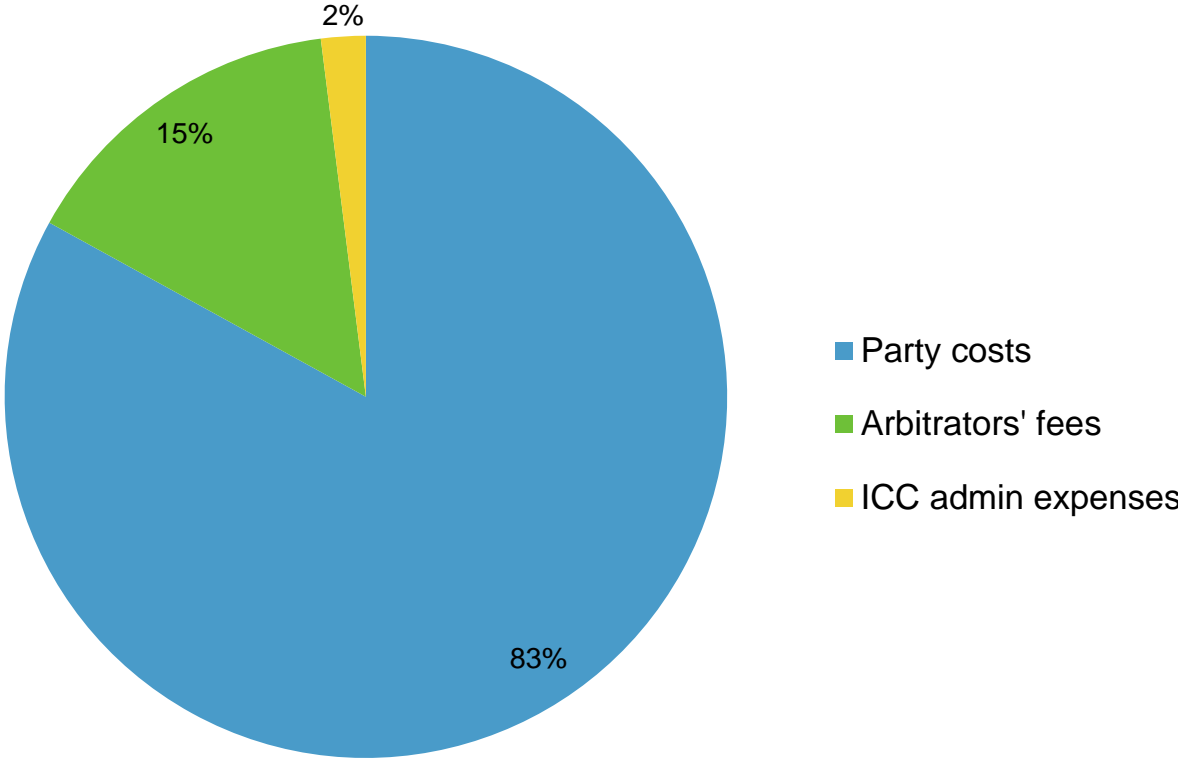
# IN HOUSE COSTS

# IN INTERNATIONAL ARBITRATION

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**Dr. Hélène van Lith, Secretary to the ICC Commission on Arbitration and ADR**

# IN HOUSE COSTS IN INTERNATIONAL ARBITRATION



Art 38 ICC Arbitration Rules as revised in 2017

# Examples of tribunal findings

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not recoverable:

1. *‘such costs are not part of the costs of arbitration but part of the normal costs for running a business enterprise. Arbitrations inevitably take up time of the Parties themselves and their staffs, but the costs of any such time are not part of legal costs of the proceedings.’*



## Examples of tribunal findings

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*Tribunal considered reimbursement of in house counsel costs:*

- 1. ‘it is controversial especially when party already hired (and claimed) the services of an external counsel. Rationale behind this is that where a party obtains legal assistance from external legal counsel, the internal case management should normally not exceed expenditures of time that would have to be considered as being beyond the ordinary course of business of an in house legal department’.*

*The tribunal was convinced by that rationale and rejected the in-house costs.*



# Examples of tribunal findings

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## Positive:

- ▶ *'the claimant's argument that the employees would have been paid anyway irrespective of the existence of the arbitration (i.e. paying the salary) failed, tribunal held that the employees could have been employed by the respondent on other projects had they not done work in connection with the arbitration.'*
- ▶ *'the time of management is an important cost factor caused by an arbitration and that in a number of cases these costs have been taken into consideration by Tribunals'.*

# Examples of tribunal findings

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## Substantiating the in house costs

- ▶ *‘[T]he difficulty with in-house costs is their substantiation. Claimant has not presented any information of evidence for the time spent and other factors of the quantification of these in house costs.’*
- ▶ *‘if well documented by bills etc. hourly rates, proof of when and why those hours were related to the arbitration proceedings, they shall be accepted by the Arbitral Tribunal, otherwise they have been rejected.’*



# Dealing with (in house) costs AT THE OUTSET of the arbitration

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## PARTIES WILL BE

- ▶ fully informed as to the tribunal's approach to costs, which alleviates uncertainty and improves predictability;
- ▶ fully informed what cost items the tribunal considers potentially to be recoverable, e.g. in-house counsel and other staff costs and expenses;
- ▶ fully informed as to the tribunal's expectations on costs submissions, to properly record time spent and costs incurred, particularly with respect to internal legal and other costs;

# The 2016 UNCITRAL NOTES

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- ▶ § 40. While it is widely accepted that costs incurred by the parties in respect of legal representation, witnesses and experts are recoverable, most arbitration rules are silent on internal legal, management and other costs (referred to as “in-house costs”) that parties may incur in pursuing or defending arbitral claims, leaving the issue of their recoverability to the discretion of the arbitral tribunal. Such in-house costs may represent a large portion of a party’s total costs when in-house counsel, managing directors, experts and other staff members take a proactive role before and during the arbitral proceedings. There is no principle prohibiting the recovery of in-house costs incurred in direct connection with the arbitration. Some arbitral tribunals have awarded such costs insofar as they were necessary, did not unreasonably overlap with external counsel fees, were substantiated in sufficient detail to be distinguished from ordinary staffing expenses and were reasonable in amount.
- ▶ § 41. If not adequately addressed by the agreement between the parties, the applicable arbitration law or arbitration rules, it may be useful for the arbitral tribunal to identify whether in-house costs incurred by the parties will be recoverable and, if so, what records will need to be submitted to substantiate such cost claims.