

The background image shows a blurred office setting. In the foreground, a person wearing a light blue shirt has their hands raised in a gesture, possibly explaining something. In the background, another person is partially visible, and a computer monitor is on a desk. The overall scene suggests a professional meeting or presentation.

Getting the figures right: how to create reliable cost estimates for your client?

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Agenda

I. Introduction

II. Arbitration and representation costs

III. Some elements affecting arbitration costs

IV. The lawyers' fees

I. Introduction

- **The cost of arbitration is a primary concern**

“Managing an arbitration means also managing a client’s expectations, including the client’s costs in pursuing its case in arbitration.” MICHAEL W. BÜHLER, *HANDBOOK OF ICC ARBITRATION*, 2005

- **The cost of arbitration can be substantial... but often the stakes are high.**

“Awards on costs in excess of \$1 million are unremarkable in the biggest cases.” CRAIG/ PARK/ PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION*, (2000), p. 395

II. Arbitration and representation costs

Arbitration costs

Common costs not attributable to a specific party

- Arbitrators' fees
- Arbitrators' expenses
 - Travel and accommodation expenses
 - Per diem indemnity (possibly)
 - Costs for meetings, mail services, telecommunication services and photocopies
- Ancillary common expenses relating to the organisation of the hearings
 - Hearing room charges
 - Costs of court reporters and interpreters
- Fees and expenses of a secretary to the arbitral tribunal
- Fees and expenses of any expert(-s) appointed by the arbitral tribunal
- Administrative fees of the arbitration institution

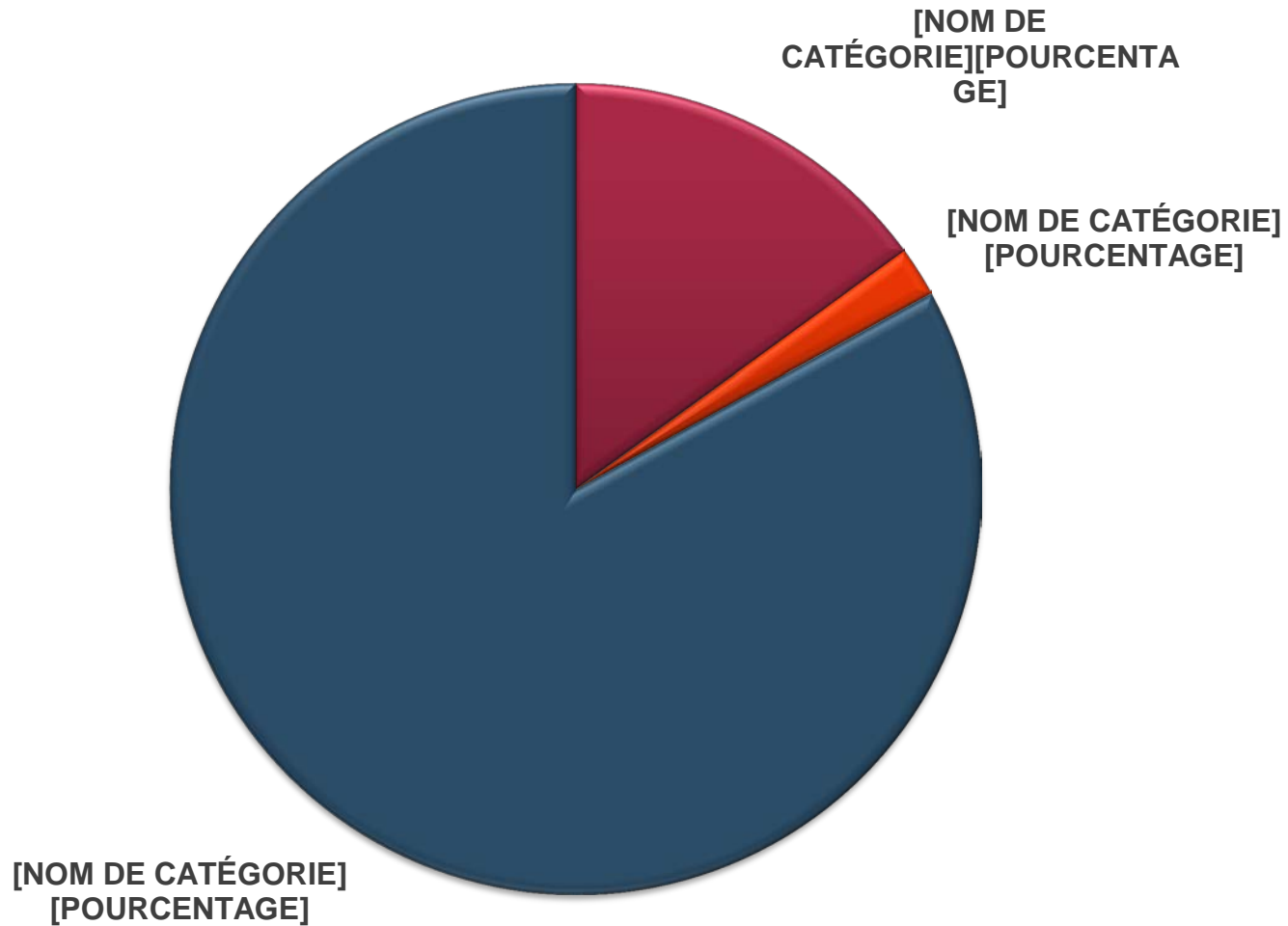
Representation costs

Any costs incurred by a specific party in respect of the arbitration

- Costs of a party's legal representation
 - Lawyers' fees
 - Lawyers' expenses
 - (In-house lawyers' costs)
- Costs of party-appointed (factual and/or legal) experts
 - Fees
 - Expenses
- Travel and accommodation costs of witnesses
- Translation costs

II. Arbitration and representation costs

Example: ICC Arbitration Costs^(AVERAGE)



III. Some elements affecting arbitration costs

1. Value in dispute
 - a. *Claimant (partial claim)*
 - b. *Respondent (counterclaim)*
2. Number of arbitrators
3. Number of parties
 - a. *Co-claimants*
 - b. *Co-respondents*
4. Rounds of written submissions
5. Number of witnesses and experts
6. Ordinary procedure vs expedited procedure

III. Some elements affecting arbitration costs

1. Value in dispute

INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Value in dispute	USD 500'000	USD 5'000'000	USD 10'000'000	USD 30'000'000	USD 50'000'000
SOLE ARBITRATOR	from USD 25'092 to USD 59'225	from USD 77'782 to USD 186'915	from USD 96'682 to USD 244'915	from USD 129'482 to USD 313'115	from USD 159'282 to USD 376'715

III. Some elements affecting arbitration costs

1. Value in dispute

SWISS CHAMBERS' ARBITRATION INSTITUTION (SCAI)

Value in dispute	USD 500'000	USD 5'000'000	USD 10'000'000	USD 30'000'000	USD 50'000'000
SOLE ARBITRATOR	from USD 20'486 to USD 56'479	from USD 57'363 to USD 180'876	from USD 88'338 to USD 267'745	from USD 143'273 to USD 362'629	from USD 173'222 to USD 412'590

III. Some elements affecting arbitration costs

1. Value in dispute

a. Claimant

Partial claim?

a. Respondent

Counterclaim?

III. Some elements affecting arbitration costs

2. Number of arbitrators

SOLE ARBITRATOR'S FEES* VS THREE ARBITRATORS' FEES* INTERNATIONAL CHAMBER OF COMMERCE (ICC)

Value in dispute	USD 500'000	USD 5'000'000	USD 10'000'000	USD 30'000'000	USD 50'000'000
SOLE ARBITRATOR'S FEES	USD 26'924	USD 87'334	USD 113'284	USD 143'784	USD 172'484
THREE ARBITRATORS' FEES*	USD 80'772	USD 262'002	USD 339'852	USD 431'352	USD 517'452

* AVERAGE AMOUNT

ICC <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>

III. Some elements affecting arbitration costs

2. Number of arbitrators

SOLE ARBITRATOR'S FEES* VS THREE ARBITRATORS' FEES* SWISS CHAMBERS' ARBITRATION INSTITUTION (SCAI)

Value in dispute	USD 500'000	USD 5'000'000	USD 10'000'000	USD 30'000'000	USD 50'000'000
SOLE ARBITRATOR'S FEES	CHF 34'080	CHF 103'351	CHF 150'345	CHF 210'345	CHF 240'393
THREE ARBITRATORS' FEES*	CHF 85'202	CHF 258'379	CHF 375'863	CHF 525'863	CHF 600'984

* AVERAGE AMOUNT

SCAI <https://www.swissarbitration.org/Arbitrage/Frais-arbitrage>

III. Some elements affecting arbitration costs

2. Number of arbitrators

- Decided at the time of drafting the arbitration clause
- Decided at the time of the dispute

*“As a rule, **the Court shall refer the case to a sole arbitrator, unless the complexity of the subject matter and/or the amount in dispute justify that the case be referred to a three-member arbitral tribunal.**” ART. 6.2 SWISS RULES (2012)*

*“If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, and this appears inappropriate in view of the amount in dispute or of other circumstances, **the Court shall invite the parties to agree to refer the case to a sole arbitrator.**” ART. 6.3 SWISS RULES (2012)*

III. Some elements affecting arbitration costs

3. Number of parties

- a. Co-claimants
- b. Co-respondents (intervention?)

III. Some elements affecting arbitration costs

4. Rounds of written submissions

- In general, two rounds of written submissions after the Request for arbitration/Notice of arbitration.

- A single round of written submissions can be agreed on.

III. Some elements affecting arbitration costs

4. Rounds of written submissions

▪ ICC

Options available:

- A. no subsequent written submissions at all if the Request for arbitration and Answer suffice;
- B. one round of written submissions;
- C. two or more rounds of written submissions;
- D. post-hearing briefs (provided there was a hearing).

ICC GUIDE ON EFFECTIVE MANAGEMENT OF ARBITRATION (P. 31)

III. Some elements affecting arbitration costs

4. Rounds of written submissions

*“Each round of written submissions increases the length and **cost** of the arbitration (...)*

*Additional submissions may be particularly useful in certain cases, e.g. where there are complicated issues of fact or law or issues of strategic importance for a party. **In such cases, it is very common to have two rounds of pre-hearing written submissions after the initial submissions.**”* ICC GUIDE ON EFFECTIVE MANAGEMENT OF ARBITRATION (P. 31)

III. Some elements affecting arbitration costs

4. Rounds of written submissions

“The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost.

(...)

*e) **Limiting the length and scope of written submissions** and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.”* APPENDIX IV, ICC RULES (2017)

III. Some elements affecting arbitration costs

4. Rounds of written submissions

▪ SCAI

“The arbitral tribunal shall decide which further written statements, in addition to the Statement of Claim and the Statement of Defence, shall be required from the parties or may be presented by them and shall set the periods of time for communicating such statements”. ART. 22 SWISS RULES (2012)

III. Some elements affecting arbitration costs

5. Number of witnesses and experts

The more witnesses and experts, the more costly.

III. Some elements affecting arbitration costs

6. Ordinary procedure vs expedited procedure

▪ Expedited procedure under the Swiss Rules (2012)

*“The following provisions shall apply to all cases in which the amount in dispute, representing the aggregate of the claim and the counterclaim (or any set-off defence), **does not exceed CHF 1,000,000** (one million Swiss francs), unless the Court decides otherwise, taking into account all relevant circumstances:*

(a) The arbitral proceedings shall be conducted in accordance with the Expedited Procedure set forth in Article 42(1);

*(b) The case shall be referred to a **sole arbitrator**, unless the arbitration agreement provides for more than one arbitrator;*

*(c) If the arbitration agreement provides for an arbitral tribunal composed of more than one arbitrator, **the Secretariat shall invite the parties to agree to refer the case to a sole arbitrator**. If the parties do not agree to refer the case to a sole arbitrator, the fees of the arbitrators shall be determined in accordance with Appendix B (Schedule of Costs), but shall in no event be less than the fees resulting from the hourly rate set out in Section 2.8 of Appendix B.” ART. 42 PAR. 2 SWISS RULES (2012)*

III. Some elements affecting arbitration costs

6. Ordinary procedure vs expedited procedure

- **Expedited procedure under the Swiss Rules (2012)**
- ***Only a Statement of Claim, a Statement of Defence (and counterclaim) and, where applicable, a Statement of Defence in reply to the counterclaim.***
- ***A **single hearing** unless the parties agree that the dispute shall be decided on the basis of documentary evidence.***
- ***The award is rendered within six months from the date on which the Secretariat transmitted the file to the arbitral tribunal.***
- ***Reasons given in summary form unless the parties have agreed that **no reasons** are to be given.***

III. Some elements affecting arbitration costs

6. Ordinary procedure vs expedited procedure

▪ Expedited procedure under the ICC Rules (2017)

“1. By agreeing to arbitration under the Rules, the parties agree that this Article 30 and the Expedited Procedure Rules set forth in Appendix VI (collectively the “Expedited Procedure Provisions”) shall take precedence over any contrary terms of the arbitration agreement.

2. The Expedited Procedure Rules set forth in Appendix VI shall apply if:

*a) **the amount in dispute does not exceed** the limit set out in Article 1(2) of Appendix VI (i.e. **US\$2,000,000**) at the time of the communication referred to in Article 1(3) of that Appendix; or*

*b) **the parties so agree.**” ART. 30 PAR. 1 AND 2, ICC RULES (2017)*

III. Some elements affecting arbitration costs

6. Ordinary procedure vs expedited procedure

- **Expedited procedure under the ICC Rules (2017)**

- *The are no Terms of Reference.*
- *A case management conference is held within 15 days after the date on which the file was transmitted to the arbitral tribunal.*
- *The arbitral tribunal may decide on documents only.*
- *The arbitral tribunal may limit the number, length and scope of written submissions and written witness evidence.*
- *The final award is rendered within six months from the case management conference.*

III. Some elements affecting arbitration costs

6. Ordinary procedure vs expedited procedure

TOTAL COSTS*: ORDINARY PROCEDURE VS EXPEDITED PROCEDURE
INTERNATIONAL CHAMBER OF COMMERCE (ICC)

	USD 300'000	USD 500'000	USD 1'000'000	USD 2'000'000
ORDINARY PROCEDURE (SOLE ARBITRATOR)	USD 29'455	USD 42'159	USD 62'714	USD 92'059
EXPEDITED PROCEDURE	USD 25'711	USD 36'774	USD 54'838	USD 79'890

* AVERAGE AMOUNT

ICC <https://iccwbo.org/dispute-resolution-services/arbitration/costs-and-payments/cost-calculator/>

IV. Representation costs

- 1. The underlying tension
- 2. Some elements to consider
- 3. Assessing the lawyers' fees at the outset

IV. Representation costs

1. The underlying tension

▪ **Client's side**

1. Will to go to arbitration and claim its due
2. Need to assess the lawyers' fees

▪ **Lawyers' side**

1. Will/need to accommodate the client
2. Difficulty of properly assessing their fees

IV. Representation costs

2. Some elements to consider

- The lawyers' fees are directly related to the complexity of the dispute.
- Procedural aspects may have a direct impact on the lawyers' fees (number of submissions, number of witnesses/experts, co-claimants/respondents with common interests but represented by other lawyers, requests for interim relief...) -> procedural strategies can help limit the lawyers' fees.
- Proper assistance of the lawyers by the client is meaningful in terms of cost-effectiveness.
- Quality comes at a certain price.

IV. Representation costs

3. Assessing the lawyers' fees at the outset

- What can the lawyers do at the outset?
 1. Give a free preliminary analysis of the chances of success of arbitration.
 2. Prepare procedural scenarii and assess the related fees.
 3. Agree at the outset on different rates depending on the (anticipated) procedural development of the arbitration.
 4. Cap the fees, notably to what the client will be awarded in case of success.
 5. Agree on a success fee.
 6. Offer payment facilities (payments deadlines, reduction for early payments).
 - ...

Thank you for your attention.

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