



# **The Role of In-House Counsel in International Arbitration**

by

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*Reprinted from  
(2009) 75 Arbitration 470-480*

*Sweet & Maxwell*

**100 Avenue Road**

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**London**

**NW3 3PF**

*(Law Publishers)*

**SWEET & MAXWELL**

## Articles

# The Role of In-House Counsel in International Arbitration

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### 1. INTRODUCTION

In discussing the role of in-house counsel in international commercial arbitration, we will only take into consideration modern and sophisticated internal legal departments of corporations, where the general counsel reports to the chief executive officer (CEO), controls the selection of and the contacts with outside counsel, and is an integral part of the management team of the company. He or she is indeed a business partner of the CEO, at the same level as those responsible for the company's other functions: finance, human resources, manufacturing, sales, engineering, etc. The general counsel manages the internal legal department, which is responsible for handling, directly or through outside resources, all the legal issues affecting the company. We know that this model, frequent in US companies, is not yet the rule in companies in continental Europe, where in-house counsel are sometimes hidden deep in the company's organisation and their role is relegated to less important legal functions, such as credit recovery or housekeeping corporate activities, while for all important legal matters, management directly selects and utilises outside lawyers, bypassing the in-house legal department.

However, the situation is also rapidly changing in continental Europe, where in-house legal departments of major corporations have little to envy in the US model of corporate counsel.<sup>1</sup> Corporate counsel with such a status play an important role in connection with the international commercial arbitrations in which their companies are involved, a role which is not always fully appreciated. Actually, corporate counsel are, in the end, those responsible to their CEO for strategising and managing an arbitration, as for all the other legal issues involving the company. Included in such responsibility is that of determining the extent to which they need collaboration from outside counsel to support and implement their arbitration strategy and of selecting and supervising them. In this respect, corporate counsel act rather as managers of the conduct of the arbitration than as "doers", as outside counsel will generally be those who actually prepare the written submissions and attend the hearings, under the in-house counsel's responsibility and supervision. In-house counsel will be evaluated by their CEO based on how well they perform this management role and their career and compensation will depend on that evaluation. The analysis which follows will focus on the role of in-house counsel in international commercial arbitrations and on their critical interaction with outside counsel.

\* The author is grateful to his colleague Mike McIlwrath for his valuable input.

<sup>1</sup> This modern role of corporate counsel, particularly in international commercial arbitration, is best described by J-C. Najar, "A *Pro Domo* Pleading: Of In-House Counsel and their Necessary Participation in International Commercial Arbitration" (2008) 25(5) *Journal of International Arbitration* 623. See also R. Gordon, "A New Role for Lawyers? The Corporate Counsel After Enron" (2003) 35 Connecticut L.R. 1185; on the role of an ideal in-house counsel, Ugo Draetta, *Dalla Parte del Legale d'Impresa* (Milan: Giuffrè, 2004).

## 2. SELECTING ARBITRATION AS A DISPUTE RESOLUTION MECHANISM AND DRAFTING THE ARBITRATION CLAUSE

Arbitration clauses are generally contained in a contract and contracts are mainly drafted by in-house counsel. They first of all have to agree with the counterpart as to whether to select arbitration as the most appropriate dispute resolution mechanism, as opposed to national jurisdiction or other forms of Alternative Dispute Resolution (ADR). If the agreement is that contract disputes should be submitted to arbitration, in-house counsel also choose whether this should be an ad hoc arbitration or an arbitration administered by an arbitral institution, in which case they identify the most appropriate institution and draft the arbitration clause.

This means that in-house counsel are the main users of arbitration and that arbitral institutions should consider in-house counsel as the key target for their promotional efforts. This is not always the case, as they often look rather at arbitrators to shape their arbitration rules or to get input on other kinds of codes of conduct or arbitration-related issues. This under-representation of in-house counsel in the life of arbitration led to the formation in November 2006 of a Corporate Counsel International Arbitration Group, which has gained influence in recent years and was granted observer status at the UNCITRAL Working Group revising the UNCITRAL Arbitration Rules.<sup>2</sup>

In order for in-house counsel to choose arbitration and select an arbitral institution, they have first of all to be confident that arbitration will give them what they need: a speedy process for solving contract disputes at reasonable cost. There are alarming signs of dissatisfaction among corporate counsel, because of their perception that arbitration proceedings are becoming too long and too expensive. This leads them in some situations to place arbitration at the bottom of the list of preferred dispute resolution mechanisms, while at the same time corporate counsel keep proposing various sets of remedies which deserve more attention than they sometimes receive.<sup>3</sup> Other practitioners, by the way, openly speak of a “crisis” of arbitration,<sup>4</sup> which to a certain extent is due to the enormous success of arbitration among its users in recent years. This perception should be kept well in mind by arbitral institutions, which should be encouraged to play a more active role in reducing the length and costs of the proceedings, as well as by arbitrators who should possibly improve their skills in managing the process more efficiently. The credibility of arbitration itself is at stake.

<sup>2</sup> For more information, see Najjar, “A *Pro Domo* Pleading” (2008) 25(5) *Journal of International Arbitration* 623, 629.

<sup>3</sup> On construction arbitration, see P. Hobeck, V. Mahnken and M. Koebke, “Time for Woolf Reforms in International Construction Arbitration” (2008) 11(2) *Int. A.L.R.* 87. The authors, senior in-house counsel at Siemens AG, see the risk that arbitration in the construction industry, because of rising costs and delays, will become marginalised by other ADR techniques, in spite of their inherent limitations; within the Siemens group arbitration is a last resort. Delays and costs in construction arbitrations arise because arbitration is not always optimal in complex international construction disputes, because of the links between the contract submitted to arbitration and other contracts: see U. Draetta, “Arbitration in International Construction Contracts: Selected Practical Problems” (2008) 4 *Les Cahiers de l'Arbitrage* 13; generally, with suggestions for remedies Mike McIlwrath, “Ignoring the Elephant in the Room: International Arbitration: Corporate Attitudes and Practices” (2008) 74 *Arbitration* 424.

<sup>4</sup> See, e.g. D.W. Rivkin, “Towards a New Paradigm in International Arbitration: The Town Elder Model Revisited” (2008) 24(3) *Arbitration International* 377: “if we continue as is, the system may eventually collapse under its own weight”; R. Davidson, “The Pressing Need to do Something About Excessive Time and Cost in Commercial Arbitration” (2008) 6 *Mealey's International Arbitration Report* 53.

### 3. LEADING AND DOCUMENTING POSSIBLE PRE-ARBITRATION SETTLEMENT EFFORTS

It is a common experience that the parties do not always exhaust all their chances to reach a settlement before resorting to arbitration, though they often try to do so. These efforts are generally led by in-house counsel. In this connection, there is a recurring issue which in-house counsel should consider carefully. Parties often document their settlement negotiations by minutes of meetings or other non-binding pre-contractual documents, such as letters of intent or memoranda of understanding. In-house counsel should first of all make sure that they are involved in drafting these documents, as non-lawyers may make all the classic mistakes generally related to letters of intent, which are intended to be non-binding but, poorly drafted, end up being binding.<sup>5</sup>

These documents are generally meant to remain confidential, but the party which has an interest in showing how much of its position the other party was ready to give away will often produce them in the ensuing arbitration. The other party may complain and raise objections—even successfully—but nonetheless the tribunal becomes aware of the negotiations and may remain influenced—consciously or unconsciously—even if negotiations failed and no agreement was finally reached.

The key message for in-house counsel is to pay special attention in documenting settlement efforts when there is the risk of arbitration if negotiations fail. Each party should ask itself whether disclosure of these documents in an arbitration would damage or benefit it. In the first case, it would be wise not to document the settlement efforts. But parties rarely pay attention to these consequences, as practice shows, and arbitrators are often confronted with the previous settlement negotiations. This may not be a desirable outcome at least for one of the parties.

### 4. ADVISING MANAGEMENT AS TO THE DECISION TO START ARBITRATION

In-house counsel should be deeply involved in the decision-making process which may lead to initiating arbitration and should try to understand—and possibly challenge—the real motivations behind management attitudes. The decision to start arbitration should in theory be taken only after having exhausted all the chances for an amicable settlement, and be based on an objective evaluation of the merits of its own claim as well as an adequate risk assessment analysis. In-house counsel can play an invaluable and unique role in this respect.

There may be interpersonal factors which affect management's decision to start an arbitration, including difficulties in understanding the other side's behaviour because of cultural and language disparities, logistical problems or aggressiveness due to the interruption of once happy commercial relations.

Parties may be also driven by considerations not strictly related to the merits of the case. An arbitration may be started simply to show the other party that a claimant is serious about its claims, in the expectation that it will then be easier to reach a settlement. In other cases, there may be emotional factors in an arbitration strategy: high level management of the two parties may have had, for example, a confrontation and they may be led by the desire to assert their "ego", to protect their reputation or to be vindicated. In other cases, management may want to assert matters which it perceives being of "principle", whatever it means by that. Similarly, individuals within an organisation may have their own jobs or reputations to protect, creating a powerful incentive against admitting any weaknesses in one's own case, and to convince other members of the organisation that blame is with the other side. All

<sup>5</sup> Ugo Draetta, "The Pennzoil case and the Binding Effect of the Letters of Intent in the International Trade Practice" (1988) 2 *Revue de Droit des Affaires Internationales/International Business Law Journal* 155.

these motivations are of dubious value and may well lead to an unfavourable outcome of the arbitration.

In fact, whatever the strategic motivations, the reality is that, once the arbitration has been initiated, and the related costs start accruing, this has the effect of antagonising the parties; and the arbitration tends to take on a life of its own. The actual decision-makers tend to become uninterested in the development of the proceedings, leaving it to the lawyers, who end up taking the most active role. Particularly, outside lawyers tend to be more litigators than settlement negotiators, with a different set of objectives and related skills. Consequently, the strategy of commencing an arbitration as a way to induce the other party to a settlement is rarely successful.

As to the so-called matters of “principle” which may lead a party to start an arbitration, though they may be understandable from an individual point of view, they rarely pay off in strict business terms. They tend to impair the objectivity of a party in making its decision, which should only be guided by the real business interest of the company acting as claimant. There are few matters of “principle” which of themselves make it worthwhile for a company to start arbitration.

In-house counsel can and should make their best efforts towards helping management to make an objective evaluation of the merits of their own claim as well as an adequate risk assessment analysis. They are much better positioned than outside counsel to perform this task, because they know the company and its management. As one author acutely observed:

“[A] treacherous dynamic ensues when the attorney is not critical enough of his/her client’s expectations and both reinforce each other in their overconfidence.”<sup>6</sup>

## 5. SELECTING OUTSIDE COUNSEL AND MANAGING THEM THROUGHOUT THE PROCESS

Occasionally large corporations handle arbitrations in-house, but much more frequently they use outside counsel. The selection of the appropriate outside counsel should be one of the most important tasks of in-house counsel. They should be guided by the following considerations, some of which are intuitive:

- when a large law firm is used, it is important to select and approve the counsel who will actually handle the case; the reputation of the law firm in general, good as it may be, is not enough to determine its selection;
- the individual outside counsel should have a set of skills which complement and not duplicate those in the in-house legal department—this is more often the case with respect to litigation skills rather than, for example, knowledge of commercial law, which is generally also possessed in-house;
- considering that the cost of outside counsel represents 82 per cent of the cost of an international arbitration,<sup>7</sup> an appropriate fee arrangement should be negotiated with outside counsel; a discount rate with respect to the regular hourly fees, a success fee or a ceiling to total fees are the solutions generally identified, when at all possible; and
- above all, in-house counsel should feel personally comfortable working as a team with outside counsel, hence there should be a good chemistry between the two.

<sup>6</sup> C. Buering-Uhle, *Arbitration and Mediation in International Business* (The Hague: Kluwer, 1996), p.175.

<sup>7</sup> Report of ICC Task Force on the Problem of Excessive Time and Cost in Arbitration, <http://www.iccwbo.org> [Accessed September 10, 2009].




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Outside counsel should also be appropriately managed by in-house counsel throughout the proceedings. In-house counsel can better appreciate the underlying business interests of the client and this becomes particularly crucial in connection with possible settlement efforts. In-house counsel should evaluate whether outside counsel, who are normally litigators, also possess the necessary negotiating skills to reach a settlement, when this should or could be negotiated. In extreme cases, outside counsel's lack of negotiating skills may be coupled with a lack of real interest in settling, as they may have a financial interest in seeing the arbitration continue. This should be kept in mind by in-house counsel, though whether this gives rise to an unconscious bias by outside counsel in favour of continuing the proceedings when a settlement might be possible, or an unprofessional (and unethical) conscious effort to keep the dispute alive, may be impossible to discern.

### **6. WORKING WITH OUTSIDE COUNSEL IN SELECTING ARBITRATORS**



An arbitration is only as good as the arbitrators, as practitioners say. Inadequate arbitrators may turn the arbitration into a gamble. A careful selection of the co-arbitrators by the parties and of the chair by the co-arbitrators (when this is the case) is strategically a key for a successful outcome of the arbitration. Such selection should not be left to outside counsel (as is often the case). In-house counsel should be intimately involved in the selection. In particular, if prospective arbitrators are interviewed (to the extent and within the limits such interviews are allowed), in-house counsel should participate and form an independent opinion, which may differ from that of outside counsel. Examples of questions that prospective arbitrators should be asked are whether they are ready to involve the parties, and thus their in-house counsel, in selecting the chair, whether they are available in view of a speedy proceeding, or whether they are prepared to act as settlement facilitators.

Due consideration must be given to impartiality, neutrality, independence, professional and language capabilities of the arbitrators, which we will not discuss further, as the literature is abundant<sup>8</sup> and there is no particular role that in-house counsel can play in this regard, other than always keeping in mind the interest in the stability of the award.



#### **Selecting co-arbitrator for claimant**

The selection of the co-arbitrator by the claimant in international arbitrations has to be made with an eye to the arbitration environment that the appointing party may prefer; and in particular its in-house counsel. It is not always the right strategy to appoint a co-arbitrator with the same nationality as the claimant. Parties have to consider that the nationality of an arbitrator (let alone the chair) may well influence the procedure of the arbitration as arbitrators tend to rely on procedures familiar to them. An arbitrator with a civil law background may prefer to rely more on documentary evidence, including written witness statements, rather than oral witness testimony, including cross-examination by counsel. Civil law arbitrators may work more actively to direct the presentation of evidence and to question witnesses themselves than would an arbitrator with a common law background. A US or UK national may be more inclined to grant requests for the disclosure of documents and may expect more of the evidence to be presented at an oral hearing rather than in advance during a written phase. In-house counsel have a key role here, since they will be mainly responsible for handling witnesses and evidentiary documentation.

<sup>8</sup> e.g. R.M. Mosk and T. Ginsburg, "Becoming an International Arbitrator: Qualifications, Disclosures, Conduct and Removal" in R. Rhoades, D.M. Kolkey and R. Chernick (eds), *Practitioner's Handbook on International Arbitration and Mediation*, 2nd edn (Huntington, NY: JurisNet, 2007), pp.357–360, with details on "suspect factors" which may raise concerns on impartiality.

### Selecting co-arbitrator for respondent

In addition to all these considerations, the respondent should approach the selection of its co-arbitrator also having in mind which kind of arbitrator it would like to see as chair. All these considerations must be weighed by in-house counsel and outside counsel together, working as a team:

- the appointment of a co-arbitrator precludes him or her from being appointed as chair and, in particularly specialised cases, the respondent may want to preserve that opportunity by appointing a different co-arbitrator;
- the appointment of a co-arbitrator with the same nationality as the other co-arbitrator may lead them to select a chair with the same nationality, which may not be desirable; and
- if the first co-arbitrator is of nationality X, and the respondent for some reason does not want a chair of nationality Y, it may appoint itself a co-arbitrator of nationality Y, in the expectation that the two (or the appointing authority) will appoint a chair of nationality Z in order not to have the chair of the same nationality as one of the co-arbitrators (though there is no specific rule which would prevent that).

### Selecting the chair

When the two party-appointed arbitrators make the selection, they usually choose a chair from lists exchanged between them. These lists are normally approved preliminarily by the parties' in-house counsel, who have the final say in the selection. Lack of agreement between the parties, which translates itself into a lack of agreement by the two co-arbitrators, has the consequences contemplated by the applicable arbitration rules, including the possible need for the arbitral institution to make the appointment. Because of the extreme importance that the appointment of the chair has for the parties, the identification of the lists of candidates to be proposed and the final approval of the individual selected (or the decision not to arrive at an agreement) are critical matters on which in-house counsel must play a predominant role.

In this connection, the chair ought to be selected on the basis of his or her qualification and experience, as for the co-arbitrators. However, the chair has also to possess unique abilities, such as to manage and control the case efficiently; to inject realism into the parties' expectations in order to induce them to a settlement; to identify at an early stage the issues which really matter and can be possibly resolved by a partial award; to conduct the hearing in the most efficient way by possibly excluding witnesses or experts when their appearance is immaterial, etc. It is a common experience that there is a relative scarcity of this kind of chair for complex international arbitrations. Moreover, those who meet these requirements are often too busy. In the end, their availability, including their ability to find space in the agenda for the hearings and to draft an award without undue delay, is a key pre-requisite to be checked before appointment. In-house counsel have a more direct interest than outside counsel in an efficient arbitration without undue cost and delay, thus it is up to in-house counsel to guide outside counsel in proposing appropriate slates of potential chairs and to approve the one finally selected.

## 7. ADVISING MANAGEMENT AS TO AMOUNTS TO BE POSTED AS RESERVES

For companies subject to accounting requirements and periodic external audits, there may be a further internal dynamic in which in-house counsel must play a key role, as it influences the conduct of an arbitration and has an impact on ability to reach a settlement.<sup>9</sup> When an

<sup>9</sup> See Hobeck, Mahnken and Koebke, "Time for Woolf Reforms" (2008) 11(2) Int. A.L.R. 86, where this role of the in-house legal department is emphasised.




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arbitration starts, and while it is pending, the financial officers of the two parties are required to insert, and periodically update, a provision in the company books which is either a contingent liability or a contingent asset depending on whether the party is respondent or claimant. This is a requirement of sound accounting practice as well as of applicable accounting standards (such as the EU International Financial Reporting Standards or the US Generally Accepted Accounting Principles<sup>10</sup>) which often have the force of law, particularly for listed companies. The determination of the amount of these provisions is a crucial management decision, which ought to be based on a realistic risk assessment, with the objective support of in-house counsel. A prudent and conservative approach with respect to contingent liabilities is appropriate, although setting aside a provision that is too conservative in good times (only to be released back to profits in a business down-cycle) may be a form of accounting gamesmanship frowned upon by auditors. As to provisions for contingent assets, prudence would dictate that these should either be avoided altogether or inserted only after a final award. However, there is some discretion in determining the amount of the provision, and the decision is often affected by considerations unrelated to the merits of the claim or counterclaim.



There may be internal management dynamics which lead to behaviour that does not meet standards of honesty. Managers may simply make a mistake in conducting the underlying business relations with their counterparts and this mistake may be at the core of the arbitration. They may then be reluctant or unable to admit their mistake. The admission might have negative effects on their career and compensation. For example a sales manager, who has to meet a budget, may tend to insist that a sale contract has been concluded when it has not. That may lead to a decision to start an arbitration and to put the entire amount of the claim as a contingent asset, or to resist an arbitration and to put an inadequate provision as a contingent liability, in both cases to cover the mistake and delay the moment of truth. In-house counsel who drafted the contract which is brought to arbitration may have made a mistake, which may be of a legal-technical nature, such as the insertion of an applicable law provision without having fully appreciated the consequences. The in-house counsel may be reluctant to admit the mistake. This may equally lead to inadequate provisions being posted in the company's books. Apart from any such mistake, however, an unrealistic amount may be inserted because of pressures on management to meet the company's goals, which management is unable or unwilling to resist.



In all these cases, the amount inserted as a contingent asset or liability may end up being determined according to considerations other than a realistic and objective risk assessment and this constitutes an obstacle to settlement. Any amount lower than the contingent asset or higher than the contingent liability would cause the company to book a corresponding loss. To avoid showing a negative result to the board or to the shareholders, management will then be inclined to resist any settlement not corresponding to the unrealistic amount reserved in the books, to wait for the award and then to blame the arbitrators for a wrong decision, if not attempting to set aside the award, thus further delaying the moment of the truth.

Conversely, an amount objectively identified in the company's books as a contingent asset or a contingent liability is the best factor which could favour a settlement. An objective determination implies of itself a predisposition to settle. Indeed, if the settlement is more or less in line with the amount provided for in the company's books, management may be inclined to close the matter and save further costs and time.

It should also be mentioned that, though arbitrators may be reluctant to accept a request from one party that the other party disclose the amounts reserved in its books, they may become publicly available, at least for listed companies.<sup>11</sup>

<sup>10</sup> The GAAP applicable standard for setting litigation risk reserves is Financial Accounting Standard 5 under which pending or threatened litigation must be disclosed on a company's financial statement if it is "reasonably possible" that there will be a loss.

<sup>11</sup> Most listed companies disclose only a general reserve fund including all pending litigations, not reserves for specific disputes but recent recommendations for accounting changes in the



The message for in-house counsel is that they have the duty to do their best in the interest of their company to make sure first that they are consulted as to the amounts to be reserved in the company's books (which is not always the case), so that the decision is not taken by the CEO and the chief financial officer alone; secondly, they must ensure that the amounts correspond to a realistic risk assessment of the outcome of the dispute. This is crucial, though it may not always be easy for in-house counsel to fight internally to ensure that this objective is achieved.

### **8. DETERMINING THE ARBITRATION STRATEGY: WRITTEN SUBMISSIONS, HEARINGS, ATTENDANCE BY MANAGEMENT**

In-house counsel should team up with outside counsel in determining the arbitration strategy, for example in deciding in favour of a comprehensive request for arbitration versus a bare one. However, if they disagree about the strategy, in-house counsel should have the final say, because they are in the end the *dominus* of the case, being responsible to the management for its outcome. Outside counsel are hired to support in-house counsel in discharging this responsibility.

Within the framework of the identified strategy, written submissions are normally prepared and filed by outside counsel; but only after the necessary review by in-house counsel. Outside counsel are the main actors at the hearings. They normally plead the case, question the witnesses and answer questions from the tribunal. However, in-house counsel should in principle attend the hearing as well. There may be issues arising with regard to the company's activity or structure, or other factual issues, on which in-house counsel are better informed. In addition, by attending the hearings, in-house counsel can form a better opinion of the abilities of outside counsel and the way the agreed strategy is implemented. This gives in-house counsel the opportunity to refine or redirect the strategy.

Finally, in-house counsel, living within their organisation, can determine better than outside counsel when it is useful for decision-makers to appear at the hearing, and which are the most appropriate.

### **9. ORGANISING INTERNAL RESOURCES: DOCUMENTS, WITNESSES, EXPERTS**

In-house counsel are crucial in organising the internal resources necessary for the successful outcome of an arbitration. Their tasks cannot be delegated to outside counsel with equal chances of success. Some practical issues for in-house counsel to consider are worth consideration.

#### **Pre-arbitration activity**

Contracts with an extended life tend to include a number of clauses regarding rights and obligations of the parties to be asserted or fulfilled over a certain period of time and within certain deadlines. Typical examples are the representation and warranty clauses in a merger and acquisition agreement, or the claims for delays, performance shortfalls, availability shortfalls, defects, extra-works, extra-time, in international construction contracts. When the implementation of this type of contract is particularly complex, normally someone like a project manager, contract manager or contract administrator is appointed to make sure that obligations are fulfilled and rights asserted in an appropriate way and within the required deadlines, failure to observe which may cause the expiration of the corresponding right or a liability for breach of the corresponding obligation. In-house counsel should assist that person, with particular respect to the need for timely and appropriately documenting of all

US (draft "Disclosure of Certain Loss Contingencies" (Financial Accounting Standards Board, June 5, 2008)) have proposed that companies disclose each dispute.



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the claims arising during the implementation of the contract. This may not be an easy task. Such persons are usually non-lawyers and often reluctant to raise these claims in the form and within the deadlines that the contract requires. They tend to prefer to wait until the contract ends in the expectation that it will be possible then to reach a friendly solution of outstanding issues. They are afraid to jeopardise good business relations with the other party by presenting formal claims which could be interpreted as a declaration of war at a stage when both parties still expect a successful conclusion. In-house counsel must challenge this attitude, which may result in claims expiring for not having been presented in due time or not having been properly formulated. In-house counsel have the difficult job of convincing contract or project managers and administrators that properly and timely formulating the claims is in the best interest of the company and crucial for the success in a possible arbitration. Such proper and timely documentation of the claims can be indeed done in a non-provocative manner and may even appear as a sign of seriousness. Drafting such claims should be a joint task of in-house counsel and the contract or project manager and administrator, which assumes, of course, that in-house counsel are involved adequately and in time.

### **Documentary evidence**

When arbitration starts, in-house counsel have to identify and review at an early stage all the documents in support of the claims brought to arbitration, keeping in mind that proceedings may last longer than anticipated and that in the meantime the relevant files may no longer be traceable or available. The documentation should address not only liability but also the quantum of damages. Too often arbitrators have little evidence on the amount of damages suffered by the winning party and have to apply equitable criteria, which are not always the most desirable.



### **Arranging for witnesses**

In-house counsel should identify at an early stage those within the company who have knowledge of the underlying facts and can be used as witnesses. This is crucial, as in the course of long arbitration proceedings they may no longer be available because, for example, they may have retired, moved to other jobs, or even be hired by the other party. Without them the case may be in jeopardy. In-house counsel have to anticipate these possible problems and find adequate solutions, including asking these witnesses to prepare written testimonies in good time, or insist with management that they remain available even if moved to other jobs and receive proper recognition for something which does not fall within their new responsibilities.

### **Arranging for technical experts**

The identification of technical experts and the issues which require their evidence is mainly the task of in-house counsel, who should consider that some hearings are only evidentiary and do not leave room for the parties to plead their cases. The arbitrators may consider their written submissions sufficient. Often, on technical issues, only one of the parties produces technical experts, while the other party either considers this unnecessary because the technical points seem undisputed or it has difficulties in finding technical experts. The result is that the tribunal hears only the experts of one party. It is mainly the task of in-house counsel to arrange for technical expertise on all the debated technical issues.

## **10. CATCHING ANY SETTLEMENT OPPORTUNITY DURING ARBITRATION**

If the parties were not able to settle the dispute before commencing the arbitration, they should try to reach, whenever possible, a mutually satisfactory settlement at any stage of

the arbitration. A settlement has obvious advantages in saving time and costs, as well as preserving good business relations. These advantages are of great appeal to in-house counsel. However, practice shows that, although settlements during arbitration are frequent,<sup>12</sup> they are not as frequent as they could be. Obstacles to settlement during an arbitration have been identified and analysed in recent empirical surveys.<sup>13</sup> Some of these factors are intuitive and include:

### **First move paralysis**

Both parties may hesitate in making the first move, fearing that it could be perceived by the other party as a sign of weakness.

### **Unrealistic expectations of outcome or costs of arbitration**

More importantly, at least one of the parties may have over-optimistic or otherwise unrealistic perceptions of its chances of winning, coupled with an unreasonably low estimation of the costs and likely length of the arbitration. In particular, parties may undervalue the amount of internal resources, other than lawyers, needed for the successful conduct of a long arbitration (in terms of employees, witnesses and experts).

### **Absence of decision-maker involvement**

Lack of involvement by senior management in settlement attempts can cause a party to overlook its real underlying long term business interests and leave it to lawyers to concentrate on reconstructing past events rather than building towards the future. This can be particularly unfortunate where the parties have the possibility of a commercial relationship that will be damaged by their adversarial positioning in arbitration.

### **Internal restrictions on settlement authority**

Parties may be under pressure not to make concessions and not to settle for less than 100 per cent of their claim for fear of being criticised by board members or shareholders. In the case of public entities (or companies controlled by state ministries) in particular, there may be the additional fear of being accused of corruption or of not having adequately protected public assets. An award is better for them than any settlement, even one which could end up being more advantageous.

### **Desire for legally-binding resolution**

In some cases a party may need a final legal resolution of a disputed issue. For example, an award, rather than a settlement, may be needed to satisfy the requirements of a loan agreement, an insurance agreement, or a bankruptcy procedure. In addition, a party may want an award at any cost to establish a precedent.

All the above obstacles to settlement are of an internal nature and can be better appreciated and, when possible, overcome by in-house counsel. They are fully aware that an acceptable settlement, with savings in cost and time, is always a desirable outcome of an arbitration

<sup>12</sup> Bucher, *ASA Bulletin 1995*, p.568, estimates the settlement rate at approximately 50%; probably an overestimation.

<sup>13</sup> See Buering-Uhle, *Arbitration and Mediation in International Business* (1996), pp.157 et seq. and C. Buering-Uhle, L. Kirchhoff and G. Scherer, *Arbitration and Mediation in International Business*, 2nd edn (The Hague: Kluwer, 2006), pp.105 et seq. reporting two empirical surveys, in 1991/1992 and 2001/2004 including the capacity of international commercial arbitration to facilitate settlement and the role of arbitrators; settlement rate estimated at 43%.



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and they are better positioned than any outside counsel to catch any opportunity to achieve this goal.

### **11. CONCLUSION**

This article has not intended to exhaust the roles which in-house counsel can and should play in international commercial arbitrations. They may even conduct the entire proceedings in-house. However, in-house counsel, in determining the extent of their role, should be aware of the issues set out above and exercise their best judgment. In the end, it is in-house counsel who will be held accountable by management for the successful conduct of the arbitration.