



## ICC RUSSIA

**1. The right to recover legal fees/costs where lawyers have worked under some form of conditional fee/contingency/upgrade arrangement. Are these rules the same for both litigation before the national courts and arbitration? Are these arrangements contrary to the ethical or professional rules of lawyers in your jurisdiction?**

Provisions on the recovery of legal representation costs in litigation do not specify particular types of the fees, referring to legal costs that "a party has incurred."<sup>1</sup> Russian court interpret this provision literally and allow for reimbursement only the costs which were actually paid. In practice when awarding actually incurred litigation costs Russian court take into account their reasonableness.<sup>2</sup>

Arbitration laws are silent on the issue of recovery of legal fees incurred in arbitration.

The International Arbitration Court at the Russian Chamber of Commerce and Industry Rules ("ICAC Rules") provide for compensation of costs that "a party has incurred."<sup>3</sup> There are no other restrictions in the ICAC Rules and a party could submit for reimbursement the attorney's fees irrespective of the form of arrangement with the counsel.

ICAC Tribunals normally take more liberal approach than Russian state courts and allow reimbursement not only of the amounts that the parties actually paid to their counsel, but also the costs which the party should pay in the future according to the contract with its counsel, once the tribunal finds them reasonable and arising out of a valid obligation.

The above arrangements are in line with professional rules of advocates<sup>4</sup>, i.e. members of the collegium of advocates acting in accordance with Russian law on advocacy<sup>5</sup>.

---

<sup>1</sup> Article 110(2) of Arbitrazh Procedure Code.

<sup>2</sup> Para. 6 of Information Note of the Supreme Arbitrazh Court #121 "Overview of court practice on issues related to allocation between parties of litigation costs in the form of payment for services of advocates and other legal representatives in arbitrazh (state commercial) courts".

<sup>3</sup> ICAC, Schedule of Arbitration Fees and Costs, Para.9.

<sup>4</sup> Article 16(3) of Advocates' Professional Ethics Code: "An advocate is entitled to include in agreement for legal assistance the provisions whereby the payment of remuneration is conditional on a favourable outcome of a dispute of proprietary nature".

<sup>5</sup> At the same time, membership in the local collegium of advocates is not a pre-requisite for representing clients in the state or arbitration courts, therefore, major part of practicing lawyers are no members of the local bars.



From that perspective a conditional fee arrangement (where the counsel fees are contingent upon the outcome of the case) by itself does not contradict Russian laws and there is no formal restriction for using it.

At the same time, because such arrangements sometimes are used to "legitimize" reimbursement of the counsel's illegal payments to the judiciary, the Russian courts took a view that such arrangements were not enforceable.

Thus, Russian Constitutional Court stated in 2007 that any "success fees arrangements" were unenforceable.<sup>6</sup> The formal reasoning was that the funds were to be paid were not designated to cover the costs of work performance, but for obtaining a favourable decision from the respective authority, and it is contrary to Russian law, whereby a court decision can not be a subject-matter of any contract or any other object of civil law rights.

However, in the recent years the practice has slightly changed and courts were awarding contingency legal fees.

Thus, the Supreme Arbitrazh Court<sup>7</sup> in one of the recent cases refused to reconsider the judgment of the lower courts where the increase of counsel's fees occurred after the judgment granting the claim was issued.<sup>8</sup>

2

In some other judgments the courts allowed contingency fees where the amount of fees was based on the actually performed work and the price for it was in line with the market rates.<sup>9</sup>

Thus, the Supreme Arbitrazh Court directed the lower courts to assess the reasonable character of legal fees in deciding whether the contingency fee costs should be awarded.<sup>10</sup>

<sup>6</sup> Resolution of RF Constitutional Court of 23 Jan 2007 No 1-P.

<sup>7</sup> Supreme Arbitrazh Court was the name of the highest judiciary authority in the system of Russian Arbitrazh Courts, i.e. state courts resolving economical disputes.

<sup>8</sup> See Ruling of the Supreme Arbitrazh Court №VAS - 12252/11 in case A40-35715/10-141-305, case file at: <http://kad.arbitr.ru/Card/4c6e41e7-ab3e-428e-bc55-b9b89b51bf44>.

<sup>9</sup> See, for ex., Resolution of Western-Siberian Circuit of 17 December 2013 in case N A81-2317/2012.

<sup>10</sup> Supreme Arbitrazh Court Presidium highlighted the following in its resolution of 4 February 2014 № 16291/10 in case № A40-91883/08-61-820: "In considering the issue of whether the litigation costs that include contingency fees are reasonable, the court is entitled, in addition to verifying that the legal services have in fact been rendered by the representative, to assess the quality of the services rendered, including the knowledge and skills demonstrated by the representative, based, inter alia, on such criteria as the knowledge of laws and court practice, legal theories, being aware of the current trends in legal regulation of the disputed issue in Russian legal system and legal systems of foreign countries, trends in international law on the disputed issue, which contributes to the improvement of the quality of professional representation in courts and the efficiency in protecting the breached rights. It also ensures that persons who render legal representation services in case



It should be noted that in 2014 the Supreme Arbitrazh Court was absorbed by Supreme Court and ceased its existence.

The Supreme Court of Russia took more conservative position on contingency fee arrangements.<sup>11</sup>

The ICAC tribunals usually take more liberal approach in awarding contingency fees once they found that they are reasonable.<sup>12</sup>

## ***2. What information is relevant for the recovery of costs provided by a third party funder, and how should the role of third party funders be taken into account?***

Reimbursement of third party funder costs is not allowed as they are not parties to the arbitration proceedings.

At the same time, if a third party funder had incurred costs in lieu of the party to the proceedings, such party could recover these costs subject to the requirements stated above. The issue whether the party should provided the details of its arrangement with the third party funder has not been tested yet, at least there is no publicly available information about it.

3

## ***3. Is there any national law/experience on contracting parties agreeing, in advance of the dispute and/or in the arbitration agreement (e.g. to protect the weaker from the stronger party), how costs should be divided, such as each party to pay its own costs in any event, or costs to be paid by the unsuccessful party? Are there any mandatory laws in respect of allocation of costs?***

---

*they meet the conditions, are able to receive bonus payments when they render high quality services on a par with persons who work under an employment contract or state servant contract and being in principle entitled to a bonus payment for successfully performing the tasks".*

<sup>11</sup> Decision taken 18 April 2015. Case file at: <http://kad.arbitr.ru/Kad/Card?number=A60-11353%2F2013>

<sup>12</sup> Thus, ICAC award in case 104/2014 granted a claim of USD 200,000.00 of outstanding payments under contract, as well as all claimant's costs, inclusive of USD 20,000 of legal representation costs. As at the time of rendering the award USD 10,000 of the above amount of costs were not actually paid, as their payment was conditional on the claimant's winning of this case.

In another ICAC award (case 250/2013) 60% of claimant's claims were granted (USD 3,891,000), as well as legal representation costs of USD 200 000. Part of the costs was not actually paid and was conditional on winning the case. In granting the recovery of success fees, the arbitral tribunal reasoned that ICAC was an arbitration court and not a judiciary body, and its competence stems from the expression of will of the parties to an arbitration agreement. Therefore, one may determine the remuneration for the work done based on a particular economic effect of the work, as this economic effect is not related to administration of justice or any function of authority."



Russian Law on International Arbitration does not have any mandatory provisions regarding recovery the costs of proceedings.

Therefore, the parties are free to include in their arbitration agreement any provisions on the allocation of costs.

ICAC Rules gives priority to the parties' agreement on the allocation of arbitration costs<sup>13</sup> and additional expenses<sup>14</sup>.

According to Russian procedural laws state courts should awards costs (which are different than legal fees) to the winning party in proportion to the amount of the claims granted.<sup>15</sup> However, in case the parties agreed to allocate the costs in a different manner, the court respect such an agreement.<sup>16</sup>

#### **4. Also, is it possible for a tribunal to cap the amount of costs being incurred/expended by the parties? What is the form for such a rule, how is it implemented and/or applied?**

The main criteria usually used by the tribunals is reasonableness of the costs.<sup>17</sup>

4

By awarding reasonable amounts arbitrators do not aim at reducing the costs to any average amounts paid for such services but refuse to compensate the costs that are not reasonable.<sup>18</sup>

<sup>13</sup> Para.6 of the ICAC (Russia) Regulations on Arbitration Fees and Costs.

<sup>14</sup> Para. 8 of the ICAC (Russia) Regulations on Arbitration Fees and Costs.

<sup>15</sup> Article 110(1) of Arbitrazh Procedure Code.

<sup>16</sup> Article 110(4) of Arbitrazh Procedure Code.

<sup>17</sup> In deciding on whether the costs are reasonable, the tribunal will take into account the scope and complexity of the work performed, the time that a high-qualified professional would have spent on preparing such materials, the duration of the case and the number of hearings, the amount of lawyers' fees for similar cases, the quality and scope of arguments submitted by a party, the percentage of claims that were granted. At that, account is taken not only of figures but also the outcome on key issues.

<sup>18</sup> In ICAC case №186/2003 the claims of USD 1,350,000 were granted at 50%, but the legal representation costs of USD 61,000 were granted in full.

In ICAC case №86/2004 only half of the claimed payment for construction works was granted, as well as half of the legal costs claimed. Account was taken of the amount and complexity of the legal work, substantiation and reasonable level of the costs.



***5. Specific experience of how with reasoning, arbitrators have allocated costs where there has been a disparity between “expensive” and “less expensive” lawyers or major international law firms and law firms from developing countries or smaller and less expensive firms.***

The disparity between the legal costs of parties due to their choice of legal counsel in arbitration will be resolved by resolving the issue whether the costs are reasonable.<sup>19</sup>

The same principle is also applied in litigation where in assessing the reasonable character of legal representation costs, the courts are also looking into the comparable costs of legal services in a particular region.<sup>20</sup>

---

<sup>19</sup> In ICAC case # 19/2004 the claimant sought recovery of USD 126,000 in legal costs (with the amount of the claims granted USD 137,000). The respondent challenged the amount of costs, and the tribunal awarded only USD 30,000, as the rest in its view was not connected to arbitration proceedings and were not substantiated.

<sup>20</sup> Case file at: <http://kad.arbitr.ru/Kad/Card?number=A60-11353%2F2013>