

# FAI Arbitral Tribunal's Separate Award on the Reimbursement of Advance on Costs

## **Kluwer Arbitration Blog**

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### **Introduction**

Article 48.1 FAI Rules provides that, in any international arbitration, FAI shall fix an advance on costs which the parties must pay in full before the case file is transmitted to the arbitral tribunal. Like under many other institutional arbitration rules, the starting point under the FAI cost regime is that FAI will fix one "global" advance on costs to be paid by the parties in equal shares. Accordingly, the respondent is normally required to contribute to the advance on costs to the same extent as the claimant irrespective of whether it has brought any claims of its own against the claimant. There is, however, a limited exception to this main rule that may apply where the respondent has raised a counterclaim or set-off claim. In such instances, FAI Rules permit FAI to fix separate advances on costs for the claims, counterclaims and set-off claims and order each of the parties to pay the advance on costs corresponding to its claims.

If a party fails to pay its share of the global advance on costs, FAI will give the other party an opportunity to pay the unpaid share on behalf of the defaulting party within a set time limit. If the other party makes such payment, the arbitral tribunal may, at the request of that party, issue a separate award for reimbursement of the payment in accordance with Article 43(a) FAI Rules and Article 2.6 of Appendix II thereof. In the event that any part of the advance on costs remains unpaid, FAI Board is vested with the power to terminate the proceedings.

As a practical matter, it is not unheard of that a respondent who objects to FAI's jurisdiction, or for some other reason does not want to participate in the arbitral proceedings, refuses to pay its part of the advance on costs as requested by FAI. Occasionally a respondent may choose to do so even though it wishes to bring its own counterclaim in the arbitration and is willing to pay the requisite filing fee for its own claims. In all of these situations, unless FAI has fixed separate advances costs, the claimant has no other alternative but to make the payment on behalf of the defaulting respondent in order to avoid the arbitration being frustrated and to have its claims adjudicated by the arbitral tribunal.

Where the claimant has discharged the full global advance on costs due to the respondent's failure to pay its part, the claimant may wish to exercise its right of redress through a separate award for reimbursement of the payment in accordance with the above-mentioned Article 43(a) FAI Rules and Article 2.6 of Appendix II. These provisions, which were introduced to the FAI Rules in 2013, are inspired by Article 45(4) of the 2010 SCC Rules (an essentially similar provision is set forth in Article 51(5) of the 2017 SCC Rules). The principal justification for such a remedy is the widespread

sentiment within the arbitration community that some form of redress should be available to the claimant in the event that the respondent breaches its contractual commitment by refusing to discharge its share of the advance on costs. While few arbitration rules expressly recognize separate awards to this effect, in practice such awards have been issued, e.g., under the ICC Rules, even in the absence of clear statutory support or any specific provisions in the applicable arbitration rules.

There are many cases concerning the rendering of separate awards for reimbursement of payment of advances on costs under the SCC Rules. In FAI arbitrations, however, the provisions governing separate awards on advances on costs have been invoked rather infrequently. To date, there are only two cases where the claimant requested such an award due to the respondent's failure to pay its share of the global advance on costs. In both instances, the arbitral tribunal granted the claimant's request. Below is a comment on the latter one of these cases.

### **Factual circumstances of the case**

A Finnish company ("Claimant") had concluded a contract with two Eastern European parties ("Respondents"). The contract was governed by Finnish substantive law and the arbitration clause provided that any disputes relating to it shall be decided in FAI arbitration seated in Helsinki. Once a dispute arose between the parties and Claimant commenced FAI arbitration proceedings, all parties expressly agreed that the case shall be referred to an arbitral tribunal consisting of a sole arbitrator. FAI Board then appointed a Danish sole arbitrator in the case and fixed the global advance on costs to be paid in equal shares by Claimant, on one hand, and Respondents, on the other.

Claimant paid its share, but Respondents failed to do so. Upon invitation of FAI Secretariat, Claimant paid Respondents' share too and the case file was subsequently transmitted to the sole arbitrator. In their Statement of Defence, Respondents raised a counterclaim and paid the requisite filing fee of EUR 3,000. However, they continued to decline to pay their part of the global advance on costs.

Meanwhile, Claimant filed a request for a separate award, asking the sole arbitrator (a) to order Respondents jointly and severally to pay to Claimant "*soonest by a date decided by the Arbitrator*" EUR 11,000, which amount represented Respondents' share of the advance on costs fixed by FAI, with interest starting on [date] at the rate provided in Section 4.1 of the Finnish Interest Act (633/1982); and (b) to order, as part of the final award, Respondents to bear the costs for rendering the separate award, including the sole arbitrator's fees and all costs and fees incurred by Claimant.

Respondents objected to Claimant's request for a separate award, stating that the issue of advance on costs should be decided only in the final award and that the claim for interest on any amount payable by Respondents as advance on costs should be dismissed as contrary to Article 2.11 of Appendix II FAI Rules. According to said provision, "*the amounts paid as advances on costs do not yield interest for the parties or the arbitrators*".

The sole arbitrator decided to issue a separate award and granted Claimant's request for the reimbursement of the advance on costs as well as the claim for interest. Below is an extract of the reasons for the sole arbitrator's separate award.

### **Reasons for the separate award**

The parties have agreed in their arbitration clause that any dispute shall be finally settled by arbitration in accordance with the FAI Rules. Pursuant to Article 3.2 FAI Rules, the Rules include Appendices I to III, which form an integral part of the Rules. Article 2.2 of Appendix II imposes an obligation on each party to pay half of the advance on costs fixed by the Institute. Article 2.6 of Appendix II provides that the arbitral tribunal may, at the request of a party, issue a separate award

for reimbursement of the payment made on another party's behalf.

Since the parties have adopted the FAI Rules by reference in the arbitration clause, they have undertaken to comply with the obligation to pay half of the advance on costs. The prevailing doctrine affirms the contractual nature of such provision. The matter in dispute is thus a matter of substance on which the arbitral tribunal may render a decision regarding the reimbursement of the advance on costs paid on behalf of another party, by way of a separate award.

Respondents have not paid their share of the advance on costs as determined by the Institute. Instead, Claimant has made the payment of EUR 11,000 on Respondents' behalf. Respondents' failure to pay constitutes a breach of a contractual condition. It lies with Respondents to prove that an exception to reimbursement should apply.

Respondents have not objected, by itself, to the obligation to pay half of the advance on costs, i.e. the principal amount of EUR 11,000. However, Respondents have argued that the issue of advance on costs should be determined only in the final award, which decides the merits of Claimant's case.

The sole arbitrator considers that the reimbursement of the advance on costs paid by Claimant is a separate matter from the sole arbitrator's ultimate decision in the final award on the allocation of costs. The FAI Rules provide an explicit legal basis for the sole arbitrator to decide Claimant's claim for reimbursement by a separate award. The sole arbitrator also finds that Claimant has a legitimate interest that Respondents reimburse Claimant given that Respondents informed the Institute on [date] that they were unable to pay their share of the advance on costs.

In their comments to Claimant's request for a separate award, Respondents have not repeated the inability to pay as grounds for relieving Respondents from the obligation to pay half of the advance on costs. Moreover, Respondents have continued to involve themselves in this arbitration and raised counterclaims/set-off claims without, however, adhering to the obligation to pay half of the advance on costs as determined by the Institute. The sole arbitrator finds that Respondents have not presented any reasonable cause for their failure to pay. Claimant's request for a separate award shall therefore be granted insofar as the principal amount of EUR 11,000 is concerned.

Claimant has also claimed interest on the amount payable by Respondents accruing from [date], which is the day Claimant paid Respondents' share of the advance on costs on their behalf. Respondents have objected to Claimant's claim for interest by arguing that Article 2.11 of Appendix II FAI Rules excludes interest on advances on costs. Claimant, for its part, has disputed Respondents' interpretation of said provision. Claimant contends that it regulates the payment of interest on any amounts paid to the Institute, but does not prevent ordering Respondents to pay interest on any amount payable to Claimant.

The sole arbitrator finds that Article 2.11 of Appendix II FAI Rules only addresses the situation where a party has in fact paid its share of the advance on costs to the Institute, in which case the amount paid does not accrue interest for the parties. Therefore, the sole arbitrator agrees with Claimant in that Article 2.11 of Appendix II does not prohibit ordering Respondents to pay interest on their share of the advance on costs to Claimant.

Further, the sole arbitrator finds that the issue of interest is governed by the laws of Finland. Under Finnish law, parties to arbitration are generally entitled to receive interest on defaulted payments.

Following the Institute's letter of [date], Claimant paid Respondents' share of the advance on costs. Respondents were aware of their payment obligation when Claimant made the payment on their behalf, but stated that they were unable to pay and ultimately chose not to reimburse Claimant.

Claimant had to pay Respondents' share of the advance on costs to ensure the continuation of the arbitration proceedings.

The sole arbitrator finds that Claimant's claim for interest on the amount in dispute constitutes an actual damage resulting from Respondents' breach of their contractual obligation set forth in Article 2.2 of Appendix II FAI Rules. On that basis, Claimant's claim for interest is justified and interest shall be awarded from the date of Claimant's payment on behalf of Respondents at the rate provided in Section 4.1 of the Finnish Interest Act.