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The Advance on Costs in Construction Arbitration: Strategy Where There is Refusal to Pay a Deposit

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Each of the major arbitral institutions requires that parties furnish some form of advance on costs before an arbitration can proceed. The advance on costs is a deposit paid by the parties to cover fees and expenses of the tribunal and the institution's administrative expenses ("**Advance**").

Whilst payment of an Advance is often perceived as one of the more perfunctory steps in an arbitration, in practice it can give rise to strategic considerations, and can have the effect of bringing an arbitration to a standstill. A summary of the main institutional rules addressing the Advance is set out below:

Institution	Rule	Name	Timing for payment	Consequences of non-payment
International Chamber of Commerce (ICC)	Article 37	Advance on Costs	Article 37(2): *"As soon as practicable…"*.	Article 37.6: The Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn.
Hong Kong International Arbitration Centre (HKIAC)	Article 41	Deposit for Costs	Article 41.1 *"As soon as possible…"* Article 41.4 but *"within 30 days after receipt of the request"*.	Article 41.4: The arbitral tribunal may order the suspension or termination of the arbitration or continue with the arbitration on such basis and in respect of such claim or counterclaim as the arbitral tribunal considers fit.
Singapore International Arbitration Centre (SIAC)	Rule 34.2	Deposit (previously known as Advance on Costs)	No specific timing.	Article 34.6: The Tribunal may suspend its work and the Registrar may suspend SIAC's administration of the arbitration, in whole or in part. The Registrar may set a time limit on the expiry of which the relevant claims or counterclaims shall be considered as withdrawn.

London Court of International Arbitration (LCIA)	Article 24	Advance Payment for Costs	Article 24(1): *"The LCIA Court may direct the parties, in such proportions and at such times as it thinks appropriate…".*	Article 24.6: Payment by substitution. Article 24.8: Failure to pay the Advance is treated by the LCIA Court or the Arbitral Tribunal as a withdrawal from the arbitration of the claim, counterclaim or cross-claim.

Approach in the Middle East

In the Middle East, international arbitration is the preferred form of dispute resolution, particularly for resolving construction disputes. With that said, arbitration is still in its relative infancy compared with more sophisticated markets in the US, UK, Europe and Asia. Accordingly, parties to arbitration agreements in the Middle East still occasionally grapple with the notion that the process is binding.

Certainly in the United Arab Emirates and the Kingdom of Saudi Arabia, respondents tend to treat the payment of the Advance as the claimant's financial burden to discharge if the claimant wishes to obtain a final award. As such, it is not unusual to encounter a respondent who is unwilling to pay its share of the Advance, a strategy usually only reserved, in other parts of the world, for fervent jurisdictional challenges.

The option of simply waiting for the defaulting party to pay its share of the Advance should be approached with caution. The arbitration will not proceed where the Advance remains unpaid. Aside from causing delays to the timetable and frustrating busy arbitrators, the Court will eventually dismiss the reference without prejudice to either party's right to bring fresh proceedings concerning the same claims at a later stage. Whilst this may sound superficially appealing to some respondents, thought should be given to the consequences of having a reference dismissed without any conclusion. Where disputes really do need to be fully and finally resolved (such as where the employer is withholding certificates and/or performance security after completion), this uncertainty may not be a satisfactory outcome for either party.

Breach of contract without sanction?

The parties' obligations to make payment of the Advance are an extension of the parties' obligations in the arbitration agreement. Accordingly, a refusal by either party to pay the Advance will constitute a breach of contract. The usual remedies for breach of contract are available against a party failing to pay its portion of the Advance.

However, the Court or tribunal will not levy any sanction against a party for failing to pay its portion of an Advance. The Court is, at that stage, concerned only with securing payment of its own costs and the costs of the tribunal. Usually, the Court will ask the compliant party whether it wishes to pay in substitution for the defaulting party. A party that elects to pay in substitution has the option of seeking reimbursement, and this is encouraged in the Rules of some of the leading institutions. For example, Article 24(5) of the LCIA Rules provides: *"the party effecting the substitute payment may request the Arbitral Tribunal to make an order or award in order to recover that amount as a debt immediately due and payable to that party by the defaulting party,*

together with any interest."[1] These provisions are consistent with the failure to pay the Advance being a breach of contract.

Separating the Advance

In some Rules,[2] either party may request the Court to issue separate Advances. That means the Court will split the Advance – quantifying one Advance for the claimant's claims, and one Advance for the respondent's counterclaims, and each party will pay the Advance corresponding to its own claims.

In practice, the Court may be reluctant to fix separate advances on costs. An order separating the Advances tends to impose a greater financial burden on both parties. The aggregate amount of separate Advances will generally exceed the original amount of a single Advance.

Nevertheless, there might be some strategic advantages in seeking separate Advances where one party's claims are disproportionately higher (or perhaps even inflated) when compared with the other party's claims, or where there is some material benefit to be derived from having the other party's claims dismissed.

In construction disputes, the distinction between claims and counterclaims (and the separate Advance that should apply to each) is not always clear. For example, a contractor's claims for extensions of time will arise from the very same factual matrix as an employer's claim for delay damages. It is likely to be difficult to separate these claims for the purposes of splitting the Advance and dismissing some claims. As such, in construction disputes arising from the same common nucleus of facts, parties should give thought to the consequences of requesting separate Advances.

Relationship with security for costs application

Where one party refuses to pay its share of an Advance, it can be indicative of cash-flow or liquidity issues. This may raise concerns about whether the party in default holds sufficient assets to satisfy an adverse costs judgment.

Parties might wish to consider whether one party's failure to pay its share of the Advance on time could be raised in a security for costs application as an example of impecuniosity. Security for costs is a form of discretionary relief in most jurisdictions, and accordingly, the tribunal may be inclined to give some weight to one party's failure to pay its share of the Advance within a reasonable time.

Declaratory or unquantified relief

Where one party seeks declaratory relief, it can be difficult for the Court to quantify readily the value of the claim or counterclaim, and accordingly, assess the amount of Advance to levy. The same can be said of monetary claims where it is impossible to quantify the value of the claims.

This is particularly the case where the proceedings have been bifurcated, where issues of liability will be determined before quantum (often arising in large construction arbitrations).

Under Article 34.3 of the SIAC Rules, where the claim or counterclaim is not quantifiable, a *"provisional estimate"* of the costs of the arbitration will be made by the Registrar.[3)] The estimate will be based on the nature of the dispute and the circumstances of the case.

Timing

Unlike in litigation, where public resources are finite and there is less tolerance for non-compliance, institutional Courts and tribunals often demonstrate more patience to parties who fail to satisfy their obligations to pay the Advance.

It is not uncommon to receive reminders from the Court for several months to make payment, and the parties will usually be given multiple warnings before the tribunal is finally instructed to suspend work. It may therefore fall to the parties, rather than to the Court or tribunal, to be proactive in ensuring the expeditious resolution of disagreements about payment of the Advance, where this is achievable.

Conclusion

It is not uncommon in the Middle East to encounter a party who refuses to pay its portion of the Advance.

Parties arbitrating in the Middle East should be prepared for non-paying respondents, and should be aware of the important strategic considerations of the options available under the relevant institutional rules – whether paying by substitution, splitting the Advance, or raising the issue in a related security for costs application.

References

?1 The HKIAC Rules contain a similar provision at Article 41.4.

?2 Article 37(3) of the ICC Rules, Article 41.2 of the HKIAC Rules and Article 34.2 of the SIAC Rules. The LCIA Rules do not expressly permit separate deposits.

?3 Appendix III Article 1(2) of the ICC Rules and Schedule 1 Article 2(6) of the HKIAC Rules.

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