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## ICC Rules: What Do You Do When the Respondent Refuses to Pay its Portion of the Advance on Costs? An Alternative Approach

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It is interesting to consider how to handle the situation when a party refuses to pay its portion of the advance on costs. I have previously published an article on this matter and, looking to the ICC Rules, would recommend an alternative route to the traditionally referenced ones. I will consider the options that exist when the Respondent fails to pay its portion and what theories, if any, apply. The two most common theories are what I refer to as the Contract Theory Approach and the Interim Measure Approach. I do not intend to discuss in length these respective approaches – looking to articles published by leading arbitral scholars adequately covers this area. Instead, I want to suggest an alternative approach when the ICC Arbitration Rules are in play, which I covered in an article published a few years back. In all the floating commentaries I have seen, I have not noticed any mention of an alternative approach such as this one.

I will first give a quick description of what I mean by the Contract Theory Approach and the Interim Measure Approach. Under the Contract Theory Approach, proponents argue a binding agreement arose between both the parties when they chose in their arbitration agreement to submit their dispute to arbitration. When the Respondent fails to pay its portion of the advance on costs, it has effectively breached the arbitration agreement. In contrast, under the Interim Measure Approach, the paying party requests that the arbitral tribunal issue a provisional measure requesting the non-paying party to cover their portion of the advance on costs or refund the paying party. This last approach can be difficult because it is often challenging to get the provisional measure claim in front of the arbitral tribunal before the entire arbitral claim is dismissed for lack of paying the entire advance on costs; otherwise, the Claimant is forced to pay the entire advance on costs itself.

I suggest considering an alternative route, which I name the Provisional Amount Approach. This approach is designed to operate under the ICC Arbitration Rules, specifically the ICC Arbitration Rules Article 30(1) which states, “After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of arbitration until the Terms of Reference have been drawn up.”

Looking to Article 30(1), the Claimant may request that the Secretary General determine a provisional amount which Claimant can pay in lieu of the entire advance on costs, to get the case through the Terms of Reference stage. This ensures the formation of the arbitral tribunal. At this point, the Claimant may then request a provisional measure to force the Respondent to pay its

portion of the advance on costs under the ICC Arbitration Rules Article 23(1).

This alternative route is an interesting route to consider as it accomplishes four objectives: The Claimant has managed to (1) pay less than the entire advance on costs, (2) work around any procedural issues, (3) get the merits before the arbitral tribunal, and (4) reserve the argument for the final award in case the provisional measure request fails. Moreover, the Claimant may invoke some sympathy from the arbitral tribunal who will no doubt realize the strategic games the Respondent is trying to play!

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The graphic features a black background with white text and a circular icon. The icon depicts a group of stylized human figures, with a magnifying glass positioned over one of the figures, suggesting a search or analysis function. The text is arranged in a clean, modern layout, with the main title in a large, bold font and the company logo at the bottom left.

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