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Reimbursement of Advance on Costs Paid in Substitution for Defaulting Party: a Case Study Under the ICC Rules

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It is not uncommon to encounter international arbitration cases in which one party, usually the respondent, refuses to pay the advance on costs set by the institution. This may occur when that party objects to the jurisdiction of the arbitral tribunal or there is a risk that the advance will not be recovered after the decision on costs due to, for instance, potential insolvency of the counterparty.

The rules of the leading institutions establish that, if there is a failure by one party to timely pay its share of the advance on costs, the institution itself or the arbitral tribunal may direct the other party to make a substitute payment, failing which the arbitration may be suspended or (counter)claims considered withdrawn.¹⁾ This raises a question as to what remedies are available to the paying party to obtain reimbursement from the defaulting party.

The question is tackled by the rules of some institutions, which expressly authorise the arbitral tribunal to render an order or partial award for reimbursement of the advance on costs at the request of the paying party. For instance, Article 24(5) of LCIA Rules sets forth that “*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.*” This power is also expressly regulated in the rules of other institutions, such as SIAC Rules 2016 (Article 27(g)), VIAC Rules 2018 (Article 42(4)), SCC Rules 2017 (Article 51(5)) and HKIAC Rules 2018 (Article 41(5)). A similar provision has also been included in the recently published Rules of the Madrid International Arbitration Centre, which establish in Article 9(7) that “[i]n the event that one of the parties pays the advance on costs that had been requested to its counterparty, the arbitrators, at the party’s request, may issue an award recognizing the credit that the former holds against the latter.”

The rules of other institutions, such as ICC or DIS, do not expressly grant that power. As explained in the case study below, the absence of an express provision in that regard arguably does not provide an excuse to the defaulting party nor does it necessarily imply that recovery by means of an order or partial award of the amounts paid in substitution is excluded.

Case study

The case in question involves proceedings initiated by the Claimant on the basis of an arbitration agreement that provided for arbitration administered by the ICC. The Respondent objected to the jurisdiction of the arbitral tribunal and refused to pay the advance on costs by alleging, in particular, a manifest lack of merit of the Claimant's claims and a risk of non-recovery of the amounts paid in case of a favourable award.

Eventually, the Claimant paid the Respondent's share of the advance on costs. Immediately after, the Claimant requested that the Arbitral Tribunal issue an order or partial award ordering the Respondent to reimburse the paid amounts. The Respondent argued that the arbitral tribunal did not have the power to issue such an order or partial award and opposed it on the merits.

The arbitral tribunal issued a partial award granting the request and ordering the Respondent to reimburse the amounts paid by the Claimant in substitution on the following grounds:

First, it concluded that the parties have a contractual obligation, as per the arbitration agreement, to pay their respective shares of the advance on costs. In the arbitral tribunal's view, a reference to the ICC Rules in the arbitration agreement shall be deemed an undertaking to comply with the provision providing that the parties shall pay the advance on costs in equal shares.

Second, the arbitral tribunal noted that it is undisputed that tribunals have the power to decide on all issues within the scope of the arbitration agreement. It therefore found that a dispute between the parties regarding non-compliance with the contractual obligation to pay the advance on costs is covered by the arbitration agreement and is thus within the arbitral tribunal's jurisdiction.

Third, it was pointed out that the authority of ICC tribunals to grant the reimbursement is even clearer when examining the evolution of the ICC Rules and comparing Article 31(2) of the 1998 version²⁾ with Article 38(3) of the 2017 version.³⁾ According to the arbitral tribunal, the inclusion of the wording "*order payment*" emphasises the power of tribunals not only to decide on costs at any time during the proceedings, but also to order their payment. The arbitral tribunal further understood that the wording "*other than those to be fixed by the Court*" is aimed at preserving the prerogative of the Court to fix the costs of the proceedings, but does not strip the arbitral tribunal of its power to order the payment of the advance on costs once fixed by the Court.

Fourth, the arbitral tribunal rejected that it lacked *prima facie* jurisdiction and found that there were no other grounds allowing the Respondent not to comply with its payment obligations. In particular, it found that the Claimant's claims did not manifestly lack merit and that the risk of non-recovery alleged by the Respondent was neither proved nor attributable to the Claimant.

Conclusion

The positions on the topic are not unanimous. Some scholars and ICC tribunals do not consider that the non-payment of the share of the advance on costs constitutes a breach of contract. Rather, they consider it a "*mere procedural issue*" or an issue that is "*administrative and provisional*" in nature.⁴⁾

Arguably, however, the findings of the arbitral tribunal in the case study are based on a correct understanding of the obligations stemming from arbitration agreements and the ICC Rules. They

are also in line with other awards rendered in recent years in ICC arbitrations, which have concluded that “[t]he obligation of each party to pay its share of the advance on costs is a contractual obligation resulting from the arbitration agreement”, that the arbitration agreement “is a contract nevertheless, giving rise to a procedural obligation to provide the advance on costs” and that, as a result, arbitral tribunals are authorised to issue partial awards ordering the defaulting party to reimburse to the counterparty the advance on costs paid in substitution.⁵⁾

In any case, in the absence of express regulation in the rules, the decision on this issue may vary depending on the approach taken by the arbitral tribunal on the nature of the obligation to pay advance on costs and the interpretation of the applicable rules. Therefore, an express reference in the rules to the arbitral tribunal’s authority to render a partial award ordering reimbursement of advance on costs provides certainty in this regard and is also likely to discourage parties from non-compliance with their payment obligations.


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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 one figure in the center being magnified by a magnifying glass. The background is decorated with horizontal lines in blue and green.

References

- ?1 For instance, ICC Rules, Articles 37(5) and 37(6); LCIA Rules, Article 24(4); SIAC Rules, Article 34(6); ICDR Rules, Article 36(3); SCC Rules, Article 51(5); DIS Rules, Article 35(4).
- ?2 According to Article 31(2) of the 1998 ICC Rules: “[d]ecisions on costs other than those fixed by the Court may be taken by the Arbitral Tribunal at any time during the proceedings”.
- ?3 According to Article 38(3) of the 2017 ICC Rules: “At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment”. This wording was introduced in the 2012 version of the ICC Rules, Article 37(2).
- ?4 Thomas Rohner and Michael Lazopoulos, *Respondent’s Refusal to Pay its Share of the Advance on Costs*, ASA Bulletin, Kluwer Law International 2011, Volume 29 Issue 3, p. 554; Yves Derains and Eric Schwartz, *A Guide to the ICC Rules of Arbitration*, p. 347. See also partial award rendered in ICC Case No. 12491.
- ?5 Partial awards rendered in ICC Cases Nos. 10526 and 13139. See also partial awards rendered in ICC Cases Nos. 10671 and 11330.

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