

Journal of International Arbitration



Wolters Kluwer
Law & Business

Published by *Kluwer Law International*

P.O. Box 316

2400 AH Alphen aan den Rijn

The Netherlands

Sold and distributed in North, Central and South

America by *Aspen Publishers, Inc.*

7201 McKinney Circle

Frederick, MD 21704

United States of America

Sold and distributed in all other countries

by *Turpin Distribution*

Pegasus Drive

Stratton Business Park, Biggleswade

Bedfordshire SG18 8TQ

United Kingdom

ISSN 0255-8106

© 2014, Kluwer Law International

This journal should be cited as (2014) 31 J. Int. Arb. 5

The *Journal of International Arbitration* is published six times per year.

Subscription prices for 2014 [Volume 31, Numbers 1 through 6] including postage and handling:

Print subscription prices: EUR 885/USD 1180/GBP 651

Online subscription prices: EUR 820/USD 1093/GBP 603

This journal is also available online at www.kluwerlawonline.com.

Sample copies and other information are available at www.kluwerlaw.com.

For further information please contact our sales department at +31 (0) 172 641562 or at sales@kluwerlaw.com.

For Marketing Opportunities please contact marketing@kluwerlaw.com.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior written permission of the publishers.

Permission to use this content must be obtained from the copyright owner.

Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th floor, New York, NY 10011, United States of America.

E-mail: permissions@kluwerlaw.com. Website: www.kluwerlaw.com.

The *Journal of International Arbitration* is indexed/abstracted in the European Legal Journals Index.

Printed on acid-free paper

General Editor

Dr. Michael J. Moser

Notes and Current Developments Editor

Dominique Hascher

Assistant Editor

Friven Yeoh

Advisory Board

Dominique Brown-Berset
Professor Dr. Bernard Hanotiau
Michael Hwang S.C.
Professor Dr. Gabrielle Kaufmann-Kohler
Dr. Wolfgang Kühn
Toby Landau Q.C.
Ramon Mullerat
Dr. Horacio A. Grigera Naón
Lucy Reed
Samir A. Saleh
Audley Sheppard
Abby Cohen Smutny
Dorothy Udeme Ufot
V.V. Veeder Q.C.

All correspondence should be addressed to:

Dr. Michael J. Moser

Journal of International Arbitration

c/o Hong Kong International Arbitration Centre

38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China

Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com

For subscription queries please see copyright page overleaf.

© Kluwer Law International

All rights reserved

ISSN 0255-8106

Mode of citation: 31 J.Int.Arb. 5

No One's Credit Is As Good As Cash: Awards and Orders for the Payment of the ICC Advance on Costs

Nadia DARWAZEH & Simon GREENBERG^{*}

When a party agrees to arbitrate, it agrees to pay its share of the deposit on arbitration costs. In practice, however, parties sometimes refuse to pay or fail to participate in the arbitration at all. In such cases can the defaulting party be compelled to contribute towards the advance on costs? In recent years, there has been a significant increase in the number of applications for ICC arbitral tribunals to intervene and order the defaulting party to pay its share. This article explores the basis for and consequences of such applications following the review of 28 ICC arbitral awards and procedural orders rendered in the last ten years.

1 INTRODUCTION

When a party agrees to arbitrate, it agrees to pay its share of the deposit on arbitration costs. In practice, however, parties sometimes refuse to pay or fail to participate in the arbitration at all. In such cases can the defaulting party be compelled to contribute towards the advance on costs?

In recent years, there has been a significant increase in the number of applications for ICC arbitral tribunals to intervene and order the defaulting party to pay its share.

This article explores the basis for and consequences of such applications following the review of twenty-eight ICC arbitral decisions. These decisions include twenty-five awards and three procedural orders, all rendered in the last ten years.

We first set out the relevant provisions of the ICC Rules¹ and practices of the ICC Court (section 2), then consider how to characterize requests for the

^{*} Nadia is a Counsel with Curtis Mallet in Paris and a former Counsel of the ICC Court. Simon is a Partner at Clifford Chance in Paris, a Court Member (for Australia) of the ICC Court and a former Deputy Secretary General of the ICC Court. Any views expressed in this paper are the authors' own and do not under any circumstances bind the ICC Court or its Secretariat. Thanks are due to Mr Thomas Fearis, a former intern with the ICC Secretariat, for his assistance in the research for this paper.

¹ All references in this article to the ICC Rules are to the 2012 version, unless stated otherwise. However, all of the arbitral decisions we discuss were made in arbitrations conducted under the 1998

reimbursement of advances on costs (section 3), before discussing the form an order to pay the advance on costs should take (section 4). The focus of sections 5–7 is more practical. We consider a party's possible options when arbitrating against a party that refuses to pay its share of the advance on costs (section 5), then whether jurisdictional objections will affect a tribunal's power to order a party to pay its share of the advance on costs (section 6), and whether defaulting parties are jointly and severally liable for payment (section 7). The article ends by offering a practical roadmap of considerations for parties and arbitrators faced with a party that refuses to pay its share of the advance on costs.

2 BACKGROUND: RELEVANT ICC RULES AND PRACTICES

At the start of an arbitration, the ICC Court fixes a cost deposit, called the advance on costs, to cover the fees and expenses of the arbitrators and the ICC's administrative expenses. The ICC Secretariat requests each side to advance half of this deposit.

Like virtually all other arbitration rules, the ICC Rules provide for the parties to pay the advance on costs in "equal shares."²

To prevent the arbitration from stalling where one party fails to pay its share of the advance, Article 36(5) allows any other party to pay instead of the defaulting party. In practice, the Secretariat routinely invites the other party or parties to pay in substitution for a party that has failed to pay or indicated that it will not pay its share.

A party that elects to pay in substitution for a defaulting party's share of the advance on costs is taken to have done so without prejudice to its right to claim this cost back from the defaulting party.

The Rules do not provide for a sanction against a party that does not pay its share of the advance on costs.

If none of the parties pays in substitution for the defaulting party, the ICC will ultimately apply Article 36(6) of the Rules and fix a final time-limit for payment, failing which the relevant claims (or the whole arbitration, as the case may be³) will be deemed as withdrawn. In any event, the ICC has no obligation to

ICC Rules. There were no changes introduced in the 2012 Rules which impact on the main questions addressed in this article. For a full explanation of the changes made to the costs provisions in the ICC Rules, see Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* 360 et seq. (ICC Publishing 2012).

² Art. 36(2) of the Rules. Where there are more than two "sides" in an arbitration, or where the circumstances of the case otherwise call for a different split of the advance on costs, Art. 36(4) of the Rules and special practices apply. See Fry, Greenberg & Mazza, *supra* n. 1, at 377 et seq.

³ Whether the entire arbitration or only one side's claims will be withdrawn following a party's non-payment of its share of the advance on costs depends on whether the ICC Court has fixed

administer a case where the full advance on costs has not been paid, and very rarely accepts to do so.

In summary, the following principles are clear from the ICC Rules and their application by the ICC Court and Secretariat:

- Save in exceptional circumstances (usually with the agreement of all arbitrators), the ICC Court will not allow an arbitration to proceed with respect to any claims for which the full advance on costs has not been paid by someone.
- The ICC Court and Secretariat have no power to force a defaulting party to pay its share of the advance on costs. They have no obligation to entertain requests to intervene in this respect. The ICC's practice is to provide the other parties with an opportunity to pay in substitution for the defaulting party so that the arbitration may proceed.
- Only the arbitral tribunal is empowered to order a party to pay its share of the advance on costs.
- A party that has paid in substitution for another who refused to pay its share of the advance on costs has two basic options to seek recovery of the amount it advanced. It can either: (i) proceed with the arbitration and claim these costs as part of its cost claims at the end of the arbitration, or (ii) ask the arbitral tribunal to order the defaulting party to pay its share.
- Alternatively, in a small number of cases, parties have requested the arbitral tribunal to order the defaulting party to pay its share of the advance on costs directly to the ICC.

3 THE NATURE OF THE OBLIGATION TO PAY THE ADVANCE ON COSTS

Practitioners and academics are divided about how to characterize an arbitrating party's obligation to pay the advance on costs.⁴ This legal characterization can

separate advances on costs. See Art. 36(3) of the Rules; see also Fry, Greenberg & Mazza, *supra* n. 1, at 374–377.

⁴ See generally, Ibrahim Fadlallah, *Payment of the Advance to Cover Costs in ICC Arbitration: the Parties' Reciprocal Obligations*, 14(1) ICC International Court of Arbitration Bulletin 53 (2003); Xavier Favre-Bulle, *Les conséquences du non-paiement de la provision pour frais de l'arbitrage par une partie. Un tribunal arbitral peut-il condamner un défendeur au paiement de sa part de l'avance de frais?* 2 ASA Bulletin 227–245 (2001); Dobrosav Mitrovic, *Advance to Cover Costs of Arbitration*, 7(2) ICC International Court of Arbitration Bulletin 88–91 (1996); Matthew Secomb, *Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems*, 14(1) ICC International Court of Arbitration Bulletin 59 (2003); Matthias Scherer, *Introduction to the case Law Section*, 24(2) ASA Bulletin 266–280 (2006); Jean Rouche, *Le paiement par le défendeur de sa part de provision sur les frais d'arbitrage: simple faculté ou obligation contractuelle?* 2002(4) Revue de l'arbitrage 841–855 (2002); Claude Reymond, *Note sur l'avance des frais de l'arbitrage et sa repartition*, in *Etudes de procédure et d'arbitrage en l'honneur*

impact whether an arbitral tribunal is or is not inclined to order a party to pay its share of the advance on costs immediately, as opposed to reserving its decisions on costs for the end of the arbitration.

There are two main approaches to characterizing the parties' obligations to pay the advance on costs. The most pervasive is based on contract and the other is based on interim measures or a procedural obligation.⁵ The proponents of the contractual approach assert that the first sentence of Article 36(2)⁶ creates a 'substantive legal obligation between the parties'⁷ that can be enforced just like any other term of a contract'.⁸ In contrast, those who support the interim measures approach argue that Article 36(2) ought to be considered as a *procedural* provision rather than containing any contractual undertaking.

3.1 CONTRACTUAL APPROACH

International arbitration practitioners and scholars alike have argued that the ICC Rules are incorporated into the parties' agreement by reference: they become part of the contract and therefore constitute inter-party contractual obligations.

For example, Craig, Park and Paulsson explain that "the defaulting party's refusal to pay its advance would ordinarily constitute a breach of contract since by agreeing to arbitration under the [ICC Rules] it has agreed to respect its provisions regarding advance on costs."⁹ Fadlallah argues that "[t]he parties' obligation under [Article 36(2)] [...] is not just an obligation toward the Court. It forms part of the arbitration agreement."¹⁰ Similarly, Derains and Schwartz assert that:

[T]here have been several instances in which ICC arbitrators, usually by partial or interim Awards, have accepted to order parties to pay their shares of the ICC advances on costs. Such Awards have been founded on the dual propositions that: (i) [Article 36(2)] gives rise to a contractually-binding obligation of the parties to pay the advance on costs in accordance with that provision; and (ii) a dispute between the parties with respect to a party's non-compliance with that provision falls within the scope of the parties' arbitration agreement.¹¹

de Jean-François Poudret 495–503 (J. Haldy et al., eds., Faculté de droit de l'université de Lausanne 1999).

⁵ Secomb, *supra* n. 4, para. 6.

⁶ The equivalent provision in the 1998 Rules is Art. 30(3).

⁷ As opposed to an obligation between the parties and the ICC.

⁸ Secomb, *supra* n. 4, para. 6.

⁹ W. Lawrence Craig, William W. Park & Jan Paulsson, *International Chamber of Commerce Arbitration* 267 (3rd ed., Oceana Publications, Inc. 2000).

¹⁰ Fadlallah, *supra* n. 4, para. 7.

¹¹ Yves Derains & Eric A. Schwartz, *A Guide to the ICC Rules of Arbitration* 347 (2nd ed., Kluwer Law International 2005).

Finally, Fry, Greenberg and Mazza note that “[t]he most common justification for ordering this kind of relief is that the parties have a contractual obligation under the Rules to effect payment. Failure to pay is, therefore, a breach of contract.”¹²

The majority of ICC decisions that the authors studied for this article similarly characterize Article 36(2) as a reciprocal contractual obligation between the parties.

In Case No. 16812, for example, the arbitral tribunal decided that Article 36(2)’s predecessor was a contractual obligation which the parties undertake when signing the arbitration clause. The refusal to pay the advance on costs constitutes a breach of contract. As such, the usual remedies for breach of contract are open to the party which has paid its share of the advance on costs.¹³

Similar reasoning was used in Case No. 15506: “[t]he arbitral tribunal considers that the Claimant rightly points out that since the Rules were adopted by reference in the Contract through the adoption of the arbitration clause, they have contractual value and bind the parties. Thus, [the parties] undertook to comply with them, including the obligation imposed on them by Article [36(2)] to each pay half of the advance on costs.”¹⁴

This view was again adopted in Case No. 15072: “[i]n the Arbitral Tribunal’s view, [Article 36(2)] does not only place a duty upon each party to pay its half of the advance on costs to the ICC. Rather, [Article 36(2)] also expresses a contractual commitment of each party towards the other party to bear half of the advance on costs. [...] This view is broadly supported in international arbitral practice as well as scholarly writing.”¹⁵

In Case No. 13290, the tribunal noted that the claimant was effectively forced to pay the respondent’s share of the advance on costs so that the arbitration would

¹² Fry, Greenberg & Mazza, *supra* n. 1, para. 3-1413.

¹³ ICC Case No. 16812, Year: 2011, applicable law: Ivorian, place of arbitration: Paris (“Il s’agit [au titre de l’article 36(2)] d’une obligation contractuelle à laquelle chacune des Parties a souscrit par la signature de la clause compromissoire. [...] Le refus de payer la provision pour frais constitue une violation contractuelle de la part des Défenderesses. A ce titre, les recours contractuels ordinaires sont ouverts à la partie ayant payé sa part de la provision.” “There is [under Article 36(2)] a contractual obligation to which each party agreed by signing the arbitration clause. [...] The refusal to pay the advance on costs is a breach of contract on the Defendant’s part. For this reason, ordinary contractual remedies are available to the party who paid its part of the advance.”)

¹⁴ ICC Case No. 15506, Year: 2009, applicable law: French, place of arbitration: Paris (“Le Tribunal Arbitral estime que la Demanderesse souligne à juste titre que dès lors que le Règlement a été adopté par référence dans le Contrat par le biais de l’adoption de la clause d’arbitrage, il a valeur contractuelle et ses dispositions lient les parties. Elles se sont donc engagées à les respecter, en ce compris l’obligation qui leur est imposée à l’Article 30 de payer chacune la moitié de la provision d’arbitrage”).

¹⁵ ICC Case No. 15072, Year: 2008, applicable law: German, place of arbitration: Düsseldorf, Germany (internal citation omitted). The ‘scholarly writing’ that the tribunal refers to was Ibrahim Fadlallah’s article on advance on costs. See Fadlallah, *supra* n. 4, and Peter Schlosser, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, para. 778 (2nd ed., 1989).

proceed. It found that the amount thus paid by the claimant equated to the damage that it suffered.¹⁶ Furthermore, the tribunal reasoned, the fact that the claimant paid the amount due by the respondent did not “cure” the respondents’ breach of contract. The tribunal highlighted “[t]hat the Rules are binding as a matter of contract is made clear by the leading treatise on the ICC Rules.”¹⁷

3.2 THE PROCEDURAL APPROACH

The parties’ obligations to pay their respective shares of the advance on costs are sometimes characterized by arbitrators as a procedural obligation, i.e., “[t]he arbitration agreement is a separable contract giving rise to a procedural obligation to provide the advance on costs.”¹⁸ In a 2008 case, the arbitral tribunal explained that “the agreement to arbitrate is a separate contract which differs in its nature from a contract on the merits inasmuch as it is a contract of a procedural nature, but it is a contract nevertheless, giving rise to a procedural obligation to provide the advance on costs.”¹⁹

Proponents of this approach believe that there is a distinction in the ICC Rules between those financial aspects of arbitration for which the arbitral tribunal is competent and responsible (e.g., deciding on the final liability for costs) and those for which the ICC Court has exclusive competence (i.e., administering the advance on costs).²⁰ In comparison to the contractual approach, Article 36(2) (or its predecessor) is treated as an obligation owed by the parties *to the ICC* rather than *to each other*.²¹

This view is shared by an experienced international arbitrator, counsel and academic who has argued against the concept of ordering a party to pay its share of the advance on costs:

In ICC arbitration, it appears to us that the parties’ agreement seeks to distribute the powers relating to arbitration costs: while the arbitral tribunal is empowered to decide which party must ultimately bear what proportion of the costs, the question of the advance is dealt with solely by the ICC.

[...]

¹⁶ ICC Case No. 13290, Year: 2008, Applicable law: Philippines, place of arbitration: Makati City, Philippines.

¹⁷ *Ibid.* para. 6.3 citing Craig, Park & Paulsson, *supra* n. 9, Schlosser, *supra* n. 15.

¹⁸ ICC Case No. 17185, Year: 2011, applicable law: Egyptian, place of arbitration: Cairo, Egypt (internal citation omitted) (emphasis in original).

¹⁹ ICC Case, Year: 2008, applicable law: Swiss, place of arbitration: Geneva, Switzerland (emphasis in original).

²⁰ Secomb, *supra* n. 4, para. 23.

²¹ *Ibid.*

If this question is raised with the arbitrators they cannot, in our opinion, render a decision in substantive law, by way of a partial award on the merits, ordering the respondent to make a contractual payment, since they have no authority to rule in the ICC's stead on a question of an administrative nature.²²

In this vein, the arbitral tribunal in a 2004 ICC case decided that the consequences for non-payment of the advance on costs were strictly procedural, reasoning that a request for arbitration could be withdrawn under Article 30(4) of the 1998 ICC Rules²³ due to non-payment of the advance on costs.²⁴

3.3 GOOD FAITH APPROACH

A minority of arbitral tribunals or commentators from civil law backgrounds have characterized the duty to pay the advance on costs as a good faith obligation. Fadlallah argues that “[t]he parties cannot agree to refer their dispute to arbitration and at the same time retain the freedom not to do whatever needs to be done to make arbitration possible, as they would then be in breach of their obligation to act in good faith.”²⁵ This view was confirmed in Case No. 16812, where the arbitral tribunal held that the reciprocal obligation of the parties to pay half of the advance on costs each does not only result from the application of the Rules, to which the parties are contractually bound. It also results from the parties’ obligation to execute their agreements in good faith.²⁶

The arbitral tribunal in Case No. 15072 considered the obligation to pay under the Rules as “a contractual commitment of each party towards the other party to bear half of the advance on costs. This contractual duty has its basis in the parties’ general duty towards each other – arising out of the arbitration agreement

²² Favre-Bulle, *supra* n. 4, at 238 (translated from the original French: “En arbitrage CCI, il nous semble que l’accord des parties tend à répartir les compétences de manière assez claire en matière de frais de l’arbitrage : alors que le tribunal arbitral est compétent pour décider quelle partie doit finalement supporter quelle part de frais, la question de la provision est de la seule compétence de la CCI. [...] Si les arbitres sont saisis de cette question, ils ne peuvent pas à notre avis rendre une décision de droit matériel, par une sentence partielle sur le fond, condamnant le défendeur à un paiement de nature contractuelle, puisqu’ils ne sont pas compétents pour statuer, à la place de la CCI, sur une question de nature administrative”).

²³ Currently, Art. 36(5) of the 2012 Rules.

²⁴ ICC Case No. 12491, Year: 2004, applicable law: Spanish, place of arbitration: Geneva, Switzerland.

²⁵ Fadlallah, *supra* n. 4, para. 7.

²⁶ ICC Case No. 16812, Year: 2011, applicable law: Ivorian, place of arbitration: Paris, France. (“Cette obligation réciproque de payer la moitié de la provision ne résulte pas uniquement du Règlement CCI auquel les Parties se sont soumises contractuellement. Il résulte également de l’obligation qu’ont les Parties d’exécuter de bonne foi leurs conventions.” “This reciprocal obligation to pay half of the provision does not only result from the ICC Rules to which the Parties are subject by contract. It also follows from the Parties’ obligation to fulfill their conventions in good faith.” (English translation)).

– to further the arbitration proceedings in good faith. This view is broadly supported in international arbitral practice as well as scholarly writing.”²⁷

4 PROCEDURAL ORDER OR AWARD?

An arbitral tribunal that decides to order a party to pay its share of the advance on costs will need to decide whether that decision should take the form of a procedural order or an award. Both forms are contemplated by the ICC Rules and recognized by the ICC Court.²⁸

Procedural orders can generally be issued more quickly than awards, few, if any, formalities or legal requirements. The primary advantage of an award over a procedural order is that an award can generally be enforced more easily in domestic courts than a procedural order. The 1958 New York Convention applies only to awards not to procedural orders (although it defines neither) and most other domestic enforcement regimes similarly apply to awards only. An arbitral tribunal’s characterization of a decision as an award or procedural order is not necessarily determinative of whether a domestic court will characterize it the same way. There are domestic court decisions in various jurisdictions that focus on the substance of the decision, not on its title or form, when determining whether it is an award for legal purposes. It is conceivable that an award ordering payment of the advance on costs could be considered as unrelated to the substance of the parties’ dispute. Therefore, even if it is described as an award, it may still not be considered as such.

All of the above caveats aside, issuing the decision in the form of an award rather than a procedural order will increase the chances of it being enforceable in a state court. In preparing an award the Tribunal must comply with the usual formalities for awards, thus making the overall decision more award-like. Finally, under the ICC Rules awards are scrutinized by the ICC Court, which is an advantage of the decision being in the form of an award.

Despite the better chances of enforcing an award as compared to an order, there are situations where an arbitral tribunal will consider it more appropriate to grant a procedural order for payment of the advance on costs.

In ICC Case No. 17233, for example, the arbitral tribunal reasoned that the question of the form of the decision depended on how the relevant relief was characterized. The tribunal decided that, due to the special circumstances of the

²⁷ ICC Case No. 15072, Year: 2008, applicable law: German, place of arbitration: Düsseldorf, Germany (internal citations omitted). The “scholarly writing” referred to was Ibrahim Fadlallah’s article on advance on costs and Schlosser, *supra* n. 15, para. 778.

²⁸ For an explanation of what kinds of decisions should be rendered in the form of an award as compared to an order, see Fry, Greenberg & Mazza, *supra* n. 1, at 3–1185 et seq.

case and the late stage of the proceedings, it was not prepared to rule on whether the respondent had violated a procedural or contractual obligation (thus warranting a procedural order or award, respectively) by failing to pay its share of the advance on costs. The tribunal asked itself: "*how should the tribunal exercise its discretion to decide whether to render an award that puts the respondent under immediate obligation to pay its share, given the dispute in question, the planning of the arbitration and its present status?*" The tribunal took into account that the arbitration was only two months away from the main hearing and that, having paid the respondent's share of the advance on costs, the claimant was not deprived of having its claims heard by the tribunal. The tribunal found that the possible detriment to the claimant of rendering an order rather than an award at this point was, therefore, minimal.

In a 2011 ICC case, the sole arbitrator had to decide whether to issue a procedural order or an interim or partial award ordering a party to pay its share of the advance on costs. The sole arbitrator ruled out using an award for three reasons: first, he felt the decision would amount to a final disposition regarding the obligation of the respondent to pay its share of the advance on costs; second, issuing an award would mean the decision becomes enforceable, which was not the case with a procedural order; and finally, the sole arbitrator concluded that only a definitive order for the payment of a sum of money should be by way of an award.

The arbitral tribunal in Case No. 15072 also had to determine the form of its decision. After noting that some ICC tribunals had, in the past, considered claims for the reimbursement of part of the advance on costs as matters of interim relief (i.e., warranting a procedural order), the arbitral tribunal recognized that the claimants' request for reimbursement was not aimed at a provisional or conservatory measure.²⁹ Rather, the request for reimbursement was aimed at the fulfillment of a contractual duty which the respondent had undertaken by agreeing to ICC arbitration. The claimants' request essentially being a breach of contract claim, the arbitral tribunal's ruling would constitute "a final decision on a separate claim that is independent of the other claims raised in [the] arbitration."³⁰ The arbitral tribunal concluded that, as it was a final decision on a respondent's obligation to pay half of the advance on costs, the decision should take the form of a partial award.

Similar reasoning, linking the contractual characterization of the claim for payment of the advance on costs to the justification for issuing the decision as an award rather than a procedural order, is found in several other awards reviewed for the purpose of this article. In Case No. 15354, after finding that the obligation to

²⁹ ICC Case No. 15072, Year: 2008, applicable law: German, place of arbitration: Düsseldorf, Germany.

³⁰ *Ibid.* (internal citation omitted).

pay the advance on costs is “based on the arbitration agreement” (i.e., a *contractual* obligation), the tribunal held that the claimant had a “legitimate interest” in obtaining an award instead of a procedural order.³¹ The claimant in that case had specifically argued that only an award would be enforceable in national courts.

There are also cases where tribunals have found an award to be the appropriate form for their decision even though they characterized the underlying decision as an interim measure. The majority of the arbitral tribunal in Case No. 11392, for example, decided that the remedy for non-payment of a party’s share of the advance on costs is found in Article 23 of the 1998 Rules,³² relating to interim or conservatory measures issued by the tribunal. Yet the arbitral tribunal ordered the respondent to pay its share of the advance on costs by way of an interim award.

Many if not most parties voluntarily comply with procedural orders and awards rendered in ICC arbitrations. But some do not. Secomb argues that if a party fails to comply with its obligation to pay its share of the advance on costs, it might well not comply voluntarily with any procedural order or award rendered in that regard.³³ This fact, together with the benefits of an award being scrutinized by the ICC Court, might be a compelling argument for these kinds of decisions to take the form of an award. A procedural order, which can be issued faster, may be preferable where there is real urgency, which would seem unusual where a party is seeking reimbursement of advances on costs paid on behalf of another.

5 OPTIONS WHEN A PARTY REFUSES TO PAY ITS SHARE OF THE ADVANCE ON COSTS

When a party is faced with an opponent that refuses to pay its share of the advance on costs, it has three options.

It can pay the defaulting party’s share and apply to recuperate the money at the end of the proceedings in the final award (*option 1*). This first option is the most common in ICC arbitrations.

It may alternatively choose to pay the defaulting party’s share and seek a partial award or procedural order requiring the defaulting party to reimburse its share immediately (*option 2*). This option is increasingly being used, especially by parties that are more familiar with ICC practice.

Such an award or order will require the defaulting party to pay the substituting party directly.

³¹ ICC Case No. 15354, Year: 2008, applicable law: German, place of arbitration: Stockholm, Sweden.

³² Currently, Art. 28(1) of the 2012 Rules.

³³ Secomb, *supra* n. 4, para. 52.

For example, in Case No. 17185, the arbitral tribunal found that the claimant had a right to be reimbursed by the respondent for the amount that the claimant paid in substitution of the respondent's share of the advance on costs.³⁴ The tribunal rendered a partial award ordering the respondent to pay the claimant what it had paid in substitution of respondent.

The third option is for the party not to pay the defaulting party's share but to seek, instead, a partial award or procedural order requiring the defaulting party to pay its share to the ICC (*option 3*). This option is conceptually and practically the least attractive. Indeed, under this scenario, one question which arises is whether the party that made the application has standing or a legitimate interest to enforce the award or procedural order, considering that the requesting party will not be the direct beneficiary of the award.

In Case No. 12948, the arbitral tribunal held that it did not have the power to order the respondent to make a payment to the ICC as the latter had already received the advance on costs in its entirety.³⁵ The tribunal further held that it did not have jurisdiction to order payment in favor of the ICC because the ICC was not a party to the dispute.

The arbitral tribunal in Case No. 12700 considered that complications may arise where the claimant does not make the substitute payment to the ICC and instead seeks an award ordering the payment to a third party (i.e., the ICC).³⁶ The tribunal reasoned that questions might arise as to: (i) who would be entitled to seek enforcement of such an award, and (ii) the arbitral tribunal's powers to render an award in favor of a third party. However, the tribunal concluded that these types of complications did not arise in the case at hand since the claimant had paid respondent in substitution and was out of pocket for that amount.

In Case No. 11866, the arbitral tribunal took the view that it had the authority under Article 23 of the 1998 Rules³⁷ to order the respondent to remedy its breach of the arbitration clause during the arbitration proceedings.³⁸ Consequently, using its discretion, and without prejudice to its ultimate decision on costs, the tribunal ordered the respondent to pay the ICC the amount corresponding to its share of the advance on costs within fifteen days of the notification of the award, and "to do whatever is necessary to obtain the release by the ICC of the bank guarantee" which had been opened by the claimant to cover the respondent's unpaid share of the advance on costs.

³⁴ ICC Case No. 17185, Year: 2011, applicable law: Egyptian, place of arbitration: Cairo, Egypt.

³⁵ No. 12948, Year: 2004, applicable law: Swiss (exclusive of the United Nations Convention on Contracts for the International Sale of Goods), place of arbitration: Geneva, Switzerland.

³⁶ ICC Case No. 12700, Year: 2004, applicable law: Tanzanian, place of arbitration: Paris, France. Art. 28(1) of the 2012 Rules.

³⁸ ICC Case No. 11866, Year: 2002, applicable law: Polish, place of arbitration: Warsaw, Poland.

6 EFFECT OF JURISDICTIONAL OBJECTIONS ON ORDERS FOR PAYMENT OF THE ADVANCE

Let us assume that a respondent in an ICC arbitration has raised jurisdictional objections. It also refuses to pay its share of the advance on costs, because it does not consider itself to be bound by the ICC arbitration clause on the basis of which the arbitration has been commenced. The claimant seeks an order from the arbitral tribunal requiring the defaulting party to pay its share of the advance on costs. In such a scenario, can the arbitral tribunal order the defaulting party to pay its share of the advance on costs before it has ruled on the jurisdictional objections?

In Case No. 11392, the arbitral tribunal observed that parties might have reasonable grounds not to pay their share of the advance on costs when, for example, the non-paying party has challenged jurisdiction or when it is clear that the reimbursement of the expense is unlikely or impossible.³⁹ However, the tribunal reasoned that the case in question was “not an exception to the rule that each party must bear one half of the advance on costs, as respondent has provided no serious reasons to justify its failure to pay its share.” The tribunal concluded by ordering the respondent to pay its share of the advance on costs by way of an interim award.

In a 2008 ICC case, the arbitral tribunal took a different view. In that case there were five respondents, all of whom refused to pay towards the advance on costs. Respondents 1–3, that were non-signatories of the contract containing the arbitration clause, also raised jurisdictional objections. The claimants applied to the arbitral tribunal for an order that the respondents pay their share of the advance on costs. Respondents 1–3 argued that “[a]s long as the question on jurisdiction over [them] was still pending, it could not be asserted that Respondents 1–3 agreed contractually with [Claimant] to honour any part; including the arbitration clause of the [contract]...”⁴⁰ The arbitral tribunal decided without prejudging at this stage the question of jurisdiction over respondents 1–3, that it would only issue the award against respondents 4–5. It held that the claimant was entitled to the requested remedy from respondents 4 and 5 since they did not contest the arbitral tribunal’s jurisdiction. The tribunal considered that it was not “procedurally expedient to issue at this stage an award against all Respondents, including Respondents 1–3.” It explained that “[t]he position is different with respect to Respondents 1–3 which entered a plea of lack of jurisdiction and may at a later date be ordered to pay the same amount as joint and several debtors amongst themselves and along with Respondents 4 and 5, unless the point concerning Respondents 1–3 becomes moot in the meantime because of payment by

³⁹ ICC Case No. 11392, Year: 2002, applicable law: Polish, place of arbitration: Paris, France.

⁴⁰ ICC Case, Year: 2008, applicable law: Swiss, place of arbitration: Geneva, Switzerland.

Respondents 4 or 5 or somebody else, because of lack of jurisdiction over Respondents 1-3 or some other reason.”

7 JOINT AND SEVERAL LIABILITY OF DEFAULTING PARTIES TO PAY THE ADVANCE?

Approximately 30% of ICC cases involve more than two parties. A given case might, therefore, involve several respondents who do not necessarily have the same interests. While one respondent may be inclined to pay its own share of the advance on costs, it may not wish to pay another respondent's share. The question has arisen in the past whether the defaulting parties are jointly liable for the payment of their share of the advance. The Secretariat's practice under both the 2012 Rules and the 1998 Rules indicates that respondents are jointly and severally liable to pay half of the advance on costs, unless the ICC Court has fixed separate or individual advances. In the 2008 case discussed immediately above, the arbitral tribunal ordered respondents 4 and 5, which had not raised jurisdictional objections, to pay the respondents' entire share of the advance on costs. The arbitral tribunal also stated that if it was to uphold its jurisdiction with regard to respondents 1-3, all of the respondents would be jointly and severally liable for the payment of the advance on costs.

In the more recent case 16812, the arbitral tribunal rendered a partial award ordering the respondents to pay to the ICC Secretariat their share of the advance on costs but holding that the respondents were not jointly liable for this amount. The arbitral tribunal found that the ICC Rules did not specifically provide for joint liability and the ICC Secretariat merely asked the respondents, collectively, to pay “their share” without any further details. Since the claimant had not cited a legal basis, whether under the applicable law or any other law, for its assertion that the respondents were jointly liable, it rejected the claimant's claim for joint liability for lack of evidence.⁴¹

The question of joint and several liability may arise less frequently under the 2012 Rules in view of Article 36(4). That provision specifically allows the ICC Court to calculate each individual party's share of the advance on costs separately. In cases where one respondent does not want to contribute towards the other respondent's share, it could request the ICC Court to split the advances between the parties. The Court's power to do so is, however, discretionary.

⁴¹ ICC Case No. 16812, Year: 2011, applicable: Ivorian, place of arbitration: Paris.

8 CONCLUSION: A ROADMAP FOR PARTIES AND ARBITRATORS

Below we set out a roadmap for a party faced with an opponent that does not pay its share of the advance on costs:

Step 1. Is it important to you that the arbitration proceeds quickly?

If **YES**, pay the ICC promptly (in cash or by bank guarantee) and see step 2.

If **NO**, consider proceeding pursuant to step 3 OR step 4. Which of these two options you choose may depend on your cash-flow and other practical considerations, as discussed below.

Step 2. Do you urgently need the money that you paid on behalf of the defaulting party? Or are you concerned about that party's ability to satisfy a costs award later on?

If **YES**, go to step 3.

If **NO**, reserve your right to seek reimbursement of the full payment with interest as part of your cost claim, which you will be submitting to the arbitral tribunal later in the proceedings.

Step 3. Is it to your advantage to ask the arbitral tribunal to order the defaulting party to reimburse you immediately rather than at the end of the arbitration?

If **YES**, see step 5. If **NO**, reserve your right to seek reimbursement of the full payment with interest as part of your costs claim.

The advantage of seeking such an order is that, if successful, the defaulting party will be required to reimburse you promptly, *i.e.* sooner than if you had to wait for the final award. This will have several benefits including a positive impact on your cash flow, security that you will have the money faster, and an increase in pressure on the respondent.

However, there is a lot to be said for not seeking a decision from the arbitral tribunal for immediate reimbursement of costs by the defaulting party. Such an application might be unsuccessful and may, in any event, cause delays in the resolution of the main issues. In addition, an application for the immediate reimbursement of the advance on costs will almost certainly increase the overall costs of the arbitration. The application will entail additional legal fees and possibly also arbitrators' fees and expenses.

Step 4. Is it to your advantage to ask the arbitral tribunal to order the defaulting party to pay its share of the advance on costs to the ICC directly?

If **YES**, go to step 5. If **NO**, consider step 3.

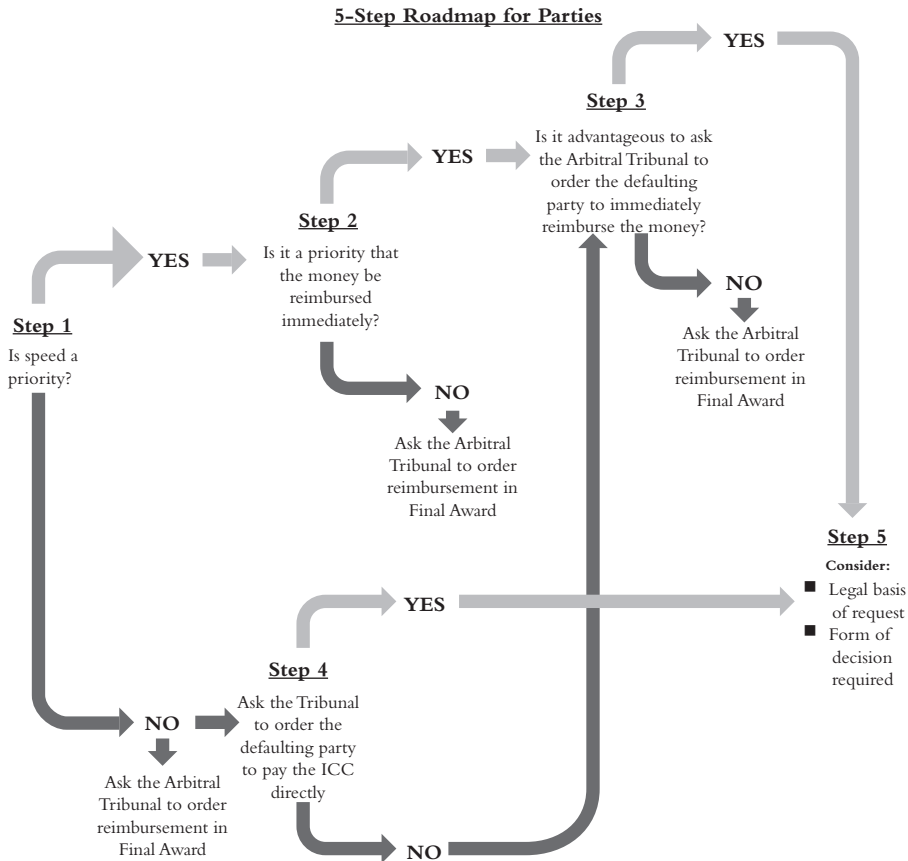
Asking for the advance on costs to be paid directly to the ICC means you do not need to advance any funds on behalf of the defaulting party. Consider this option only if advancing those funds would seriously impact your cash-flow, you do not mind if the arbitration is delayed and you are prepared to accept the potential practical difficulties set out below.

Requests that the defaulting party pay the ICC are less likely to succeed than the requests described at step 3 above because the arbitral tribunal and ICC will usually prefer or require that you first pay the balance of the advance on costs to the ICC and then seek reimbursement. Even if the application is allowed, there are other potential practical problems. First, if the defaulting party refuses to comply voluntarily with the order or award, will you have standing to enforce the award against it considering that the order is made in favor of the ICC? Indeed, the ICC is neither a party to the arbitration nor to the award and has no obligation to get involved in enforcement proceedings. Second, the arbitration will not proceed until the ICC receives full payment of the advance on costs. Third, if the defaulting party does not comply with the order, you may still end up having to pay if you want the arbitration to proceed. If you do end up paying the ICC, it may have become more difficult to claim reimbursement of such an amount since the defaulting party could argue that there is already an order requiring it to pay the same amount to the ICC. Finally, delays in the ICC receiving full payment might trigger its application of Article 36(6) of the Rules, ultimately leading to the withdrawal of the arbitration. It is therefore important to request that the ICC suspend any such procedure pending the arbitral tribunal's decision and the defaulting party's payment of the costs to the ICC.

Step 5. If you are adopting either steps 3 or 4, consider the legal basis for your request (i.e., contractual, procedural and/or good faith). Also, in what form will you seek the decision, award or procedural order?

Please refer to sections 3 and 4 above respectively.

If you are an **arbitrator**, below is a roadmap of the issues to consider when faced with an application to order a party to pay its share of the advance on costs.



Step 1. Ensure that the ICC is aware of the application and request the ICC not to start the withdrawal procedure foreseen in Article 36(6) of the Rules.

Step 2. Clarify what kind of order is sought.

Is the applicant seeking: (i) an order that the defaulting party reimburse it for an amount it has already paid to the ICC on the defaulting party's account or (ii) an order that the defaulting party pay the ICC directly.

In general, parties should be discouraged from seeking the latter for the reasons set out in section 5 above.

Step 3. Determine what legal basis to adopt for your decision (i.e., contractual, procedural and/or good faith).

The decision in this respect may be influenced by the manner in which the applicant has framed its request. The arbitral tribunal should, of course, avoid surprising the parties by grounding its decision on a legal basis that the parties did not discuss.

Step 4. Determine what form the decision should take (i.e., an award or procedural order).

See section 4 above.

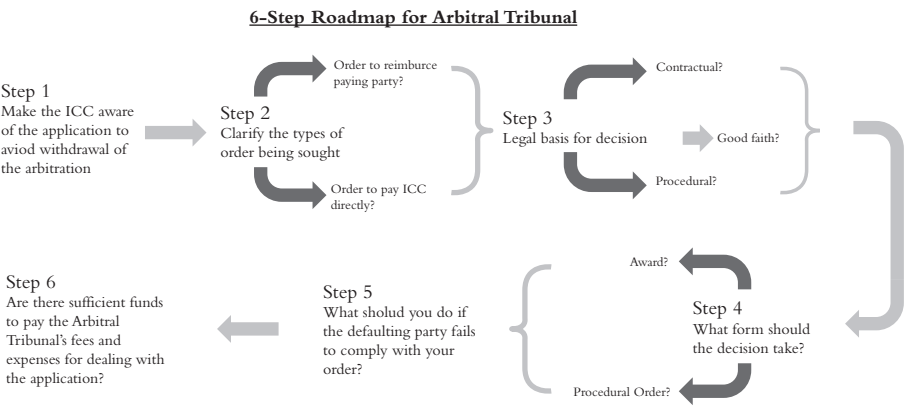
Step 5. If the defaulting party fails to comply with an order to pay its share, what should you do?

If the order was for the defaulting party to reimburse the applicant, the non-payment should not affect the arbitral process. The enforcement of the payment order is a matter for the parties and, where appropriate, state courts. However, if the defaulting party still has not paid by the time the arbitral tribunal is deciding on the parties' cost claims, the tribunal will need to take into account its prior decision when allocating costs.

If the order was for the defaulting party to pay the ICC, then the tribunal will usually need to wait for the ICC to confirm receipt of the payment before proceeding with the arbitration. This may require you to suspend the arbitration pending payment.

Step 6. Consider the impact on the arbitral tribunal's fees.

By definition, the order is being sought because the full advance on costs has not yet been paid to the ICC. Therefore, you should check with the ICC whether there are sufficient funds to pay your fees and expenses for dealing with the application.



[A] Aim of the Journal

Since its 1984 launch, the Journal of International Arbitration has established itself as a thought provoking, ground breaking journal aimed at the specific requirements of those involved in international arbitration. Each issue contains in depth investigations of the most important current issues in international arbitration, focusing on business, investment, and economic disputes between private corporations, State controlled entities, and States. The new Notes and Current Developments sections contain concise and critical commentary on new developments. The journal's worldwide coverage and bimonthly circulation give it even more immediacy as a forum for original thinking, penetrating analysis and lively discussion of international arbitration issues from around the globe.

[B] Contact Details

Manuscripts as well as questions should be submitted to the Editor at EditorJOIA@kluwerlaw.com.

[C] Submission Guidelines

- [1] Final versions of manuscripts should be sent electronically via email, in Word format; they must not have been published or submitted for publication elsewhere.
- [2] The front page should include the author's name and email address, as well as an article title.
- [3] The article should contain an abstract of about 200 words.
- [4] Heading levels should be clearly indicated.
- [5] The first footnote should include a brief biographical note with the author's current affiliation.
- [6] Special attention should be paid to quotations, footnotes, and references. All citations and quotations must be verified before submission of the manuscript. The accuracy of the contribution is the responsibility of the author. The journal has adopted the Association of Legal Writing Directors (ALWD) legal citation style to ensure uniformity. Citations should not appear in the text but in the footnotes. Footnotes should be numbered consecutively, using the footnote function in Word so that if any footnotes are added or deleted the others are automatically renumbered.
- [7] For guidance on style, see the House Style Guide available on this website: <http://www.kluwerlaw.com/ContactUs/>

[D] Review Process

- [1] After review by the Editor, manuscripts may be returned to authors with suggestions related to substance and/or style.
- [2] The author will also receive PDF proofs of the article, and any corrections should be returned within the scheduled dates.

[E] Publication Process

- [1] For accepted articles, authors will be expected to execute a Consent to Publish form.
- [2] Each author of an accepted article will receive a free hard copy of the journal issue in which the article is published, plus an electronic version of the article.