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Aims & Scope:
Switzerland is generally regarded as one of the World's leading sites for arbitration proceedings. The membership of the Swiss Arbitration Association (ASA) is graced not only by Swiss arbitrators but also by many of the world's best-known arbitration practitioners. The Statistical report of the International Chamber of Commerce (ICC) has repeatedly ranked Switzerland first for place of arbitration, origin of arbitrators and applicable law.

The ASA Bulletin is the official quarterly journal of this prestigious association. Since its inception in 1983, the Bulletin has carved a unique niche for its detailed focus on arbitration case law and practice worldwide as well as for its judicious selection of scholary and practical writing in the field. Its regular contents include:

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- Leading cases of the Swiss Federal Tribunal
- Other leading cases of other Swiss Courts
- Selected landmark cases from jurisdictions worldwide
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- Forthcoming conferences
- Notices of publications and reviews
- An annual index in English, French and German

Each case and article is published in its original language with a comprehensive head note in English, French and German.

Books for Review:
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Non-payment of the advance on costs by the respondent party – is there really a remedy?

Introduction

1) The fact that arbitration, as a private procedure for dispute resolution, relies on private funding is no revelation, but it increasingly gives rise to another dispute to be decided. Arbitration is a 'pay-as-you-go' concept: the parties are required to pay the expected costs of the arbitrations in advance. The deposit helps to ensure that the arbitrators or the arbitral institution, if any, do not become involved in proceedings for which costs are not covered. The arbitral tribunal will not hear the case as long as the initial advances are not paid and it will suspend the arbitration until the payment of additional advances if they are needed to cover the costs of continuing the proceedings.

2) Advances on costs are, as a general rule, paid by the parties in equal shares. However, from the perspective of the arbitrators and the arbitral institution, it does not matter which party pays the advance as long as it is paid. If one party fails to pay its share of the advance, the other party is free to pay the whole of the advance. In practical terms, the non-defaulting party has no choice other than to pay in lieu of its opponent if it wants the proceedings to progress.

3) In practice, respondent parties quite frequently default on their obligation to advance their share of the costs.[1] In some cases the respondent may have legitimate reasons for its default[2], but in the majority of the cases the refusal to pay the advance is perceived as a manoeuvre to delay the proceedings and to render the prosecution of the claim more difficult for the claimant. Hence, there has been a growing sentiment that, in order to restore a level playing field, the non-defaulting claimant must be able to compel its recalcitrant opponent, during arbitration, to advance costs or to reimburse the claimant for any

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1 S. Jarvin, *Wenn die beklagte Partei ihren Anteil des Kostenvorschusses nicht bezahlt* in 'Festschrift Ottoarndt Glossner' (1994) at 155; P. Karrer, *Arbitration saves! Costs: Poker and Hide-and-Seek* [1986] 3 J. Int'l Arb. 35, no. 13.

2 *E.g.* inability to meet costs; lack of jurisdiction; insolvency of claimant; see also the partial award of 17 June 2002 in ICC case 1130 and the partial award of 8 April 2002 in ICC case 10439, excerpts of these unpublished cases are found in M. Secomb, *Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems* (2003) 14:1 ICC ICArb. Bull. 59, at paragraphs 20 and 21.

payment it has made to cover the respondent's share of the advance on costs.

4) It is important to note that the payment of the advance is a separate matter from the arbitral tribunal's ultimate decision on the allocation of costs between the parties. The purpose of the advance on costs is limited to financing the proceedings up to the final award and to ensuring the payment of the accrued fees and expenses of the arbitrators and the institution. The deposit is requested independent from the likelihood that a party will be required to pay a final award of costs. The deposit also is not designed to give security for any future cost claim by one party against the other. The advance of costs is therefore only provisional in nature. In the end, only the final apportionment of the costs in the tribunal's cost award will matter.

Background

5) Most arbitration laws and rules do not explicitly grant a remedy in favour of the non-defaulting party to compel the defaulting party to pay its share of the advance payment of costs.[3] In the absence of counter-claims, the mechanism provided by most arbitration rules is that the non-defaulting party may pay the other party's share of advanced costs. Given the absence of an express sanction, parties have regularly invoked the arbitration agreement itself as a basis for a cause of action against a defaulting party.

6) Indeed, it is often held that a party entering into an arbitration agreement has thereby given an undertaking to its contractual partner to make the necessary advance payments towards the costs of the arbitration.[4] This

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3 See, however, the following exceptions: Article 24.3 of the LCIA Arbitration Rules, stating: '... the party paying the substitute payment shall be entitled to recover that amount as a debt immediately due from the defaulting party', and § 598(2) of the Proposal for the Revision of the Austrian Code of Civil Procedure (Schiedsrechts-Änderungsgesetz 2005) which provides: 'Leistet eine Partei den ihr auferlegten Kostenvorschuss nicht, so kann die andere Partei den gesamten Kostenvorschuss erlegen. In diesem Falle kann die Partei beim Schiedsgericht beantragen, dass der Gegner mit Schiedsspruch zur Erstattung seines Anteils an sie verpflichtet wird'.

4 See, *e.g.*, W. Wenger in S. Berti, ed., *International Arbitration in Switzerland*, (2000), Art. 178 no. 71; C. Reymond, *Notes sur l'avance des frais de l'arbitrage et sa répartition*, in 'Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret', (1999), at 498 ; P. Schlosser in F. Stein & M. Jonas, eds., *Kommentar zur Zivilprozessordnung*, vol. 9 (2002), § 1029 no. 30; O. Sandrock, *Claims for Advances on Costs and the Power of Arbitral Tribunals to Order their Payment* in 'Global Reflections on International Law, Commerce and Dispute Resolution, Liber Amicorum in honour of Robert Briner', (2005) at 709 *et seq.* (in particular with respect to the position under German, Austrian

implicit obligation is said to stem from the parties' procedural duty of good faith which requests both parties to further the proceedings and to abstain from any actions designed to hamper the arbitration.[5] From that perspective, the payment of the advance is effectively a contractually agreed procedural duty.

7) If the applicable arbitration rules provide that the advance on costs shall be paid by both parties, the non-defaulting party's claim has been put firmly on an exclusively contractual basis. The first sentence of Article 30(3) of the Rules of Arbitration of the International Court of Arbitration ('ICC Rules'), for instance, states:

> 'The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent.'

According to this so-called contractual approach, both the legal basis of the claim and the arbitral tribunal's competence are based on two elements: (i) that Article 30(3) ICC Rules (or a similar provision in other arbitral rules) gives rise to reciprocal contractual obligation between the parties to pay the advance of costs because this contractual term was made part of the arbitration agreement by reference to the relevant rules; and (ii) that a dispute with respect to this obligation falls within the scope of the arbitration agreement between the parties.[6] The contractual approach has been followed by – what seems to be – the majority of arbitral[7] and court[8] decisions on the subject and has been endorsed by most authors[9]. The proponents of this approach consider the non-payment of the advance on costs a breach of a contractual obligation

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and Swiss Law); A. Reiner, *Les Mesures provisoires er conservatoires et L'Arbitrage international, notamment l'Arbitrage CCI* [1998] J.D.I. 853, at 891.

5 See W. Wenger, *supra* note 4; P. Schlosser, *supra* note 4; O. Sandrock, *supra* note 4 at 709, 710.

6 M. Secomb, *supra* note 2, at paragraph 14.

7 Partial award of 27 March 2001 in ICC Case 10671, [2001] ASA Bulletin 285; Partial award of 2 December 2000 in ICC Case 10526, [2001] J.D.I. 1179 (Annot. S. Jarvin); Partial Award of 10 August 1998 in ICC Case 9667, [2000] J.D.I. 1096 (Annot. D. Hascher); Partial award of 17 June 2002 [unpublished] and Partial award of 8 April 2002 [unpublished], see the extracts from these decisions in M. Secomb, *supra* note 2, at paragraphs 19 - 21; see also Preliminary Award of 2 September 1996 in ICC Case 7289, [2002] Rev.arb. 1001.

8 *Fertalage v Kaltenbach*, Tribunal de grande instance de Beauvois (9 April 1998), [2002] Rev.arb. 993; Amtsgericht Düsseldorf, Judgment of 17 June 2003, [2003] SchiedsVZ 240.

9 See, *inter alia*, S. Jarvin, *supra* note 1, at 155; W.L. Craig, W.W. Park & J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed., (2000) at 267-270; O. Sandrock, *supra* note 4, at 708; I. Fadlallah, *Payment of the Advance to Cover Costs in ICC Arbitration: the Parties' Reciprocal Obligations* (2003) 14:1 ICC ICArb. Bull. 53; J. Rouche, *Le paiement par le défendeur de sa part de provision sur les frais d'arbitrage: simple faculté ou obligation contractuelle?* [2002] Rev.arb. 841.

giving raise to a substantive claim. W.L. Craig, W.W. Park and J. Paulsson stated in this respect[10]:

> 'All of the conditions for an interim award seem fulfilled: immediate harm has been done on the non-defaulting party, the breach of the contractual obligation raises simple issues, the amount of damages [is] known and the claim is for a liquidated amount.'

Starting from the view that the matter in dispute is one of substance on which the arbitral tribunal is called upon to render a definitive decision, the contractual approach accordingly calls for an arbitral decision in the form of a partial award.

8) There is, however, another way to look at this problem. According to the so-called interim measure approach, the issue is one of procedure rather than substance.[11] The advocates of this approach emphasise that any decision by an arbitral tribunal ordering a party to pay an advance on costs is a procedural decision of administrative nature and is therefore not subject to review by state courts. In the ICC system, there is a further argument which supports this position: the ICC Rules make the administration of all financial aspects, including in particular the advance on costs, the exclusive responsibility of the ICC Court of Arbitration ('ICC Court'). The arbitral tribunal, in contrast, is only competent to decide which of the parties shall bear the costs of the arbitration (including the fees of the arbitrators as determined by the ICC Court) and in what proportion. Accordingly, it is argued that the agreement to submit a dispute to ICC arbitration also entrusted all questions regarding the advance on costs to the ICC Court.[12] Similarly, it is argued that Article 30(3) ICC Rules only aims to define the relationships between the parties and the ICC Court, not the reciprocal relationship between the parties.[13] The proponents of the provisional measure approach therefore deny that an arbitral tribunal is competent to render a decision on substantive law and, accordingly, to render a partial award against the defaulting party. Even the proponents of this view agree that arbitral tribunals are entitled to order the defaulting party to

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10 W.L. Craig, W.W. Park & J. Paulsson, *supra* note 9, at 268.

11 X. Favre-Bulle, *Les conséquences du non-paiement de la provision pour frais de l'arbitrage par une partie* [2001] ASA Bulletin 227.

12 X. Favre-Bulle, *supra* note 11, at 238; the same argument is found in the Partial Award No. 2 of 1 June 2004 in ICC case 12491.

13 D. Mitrovic, *Advance to Cover Costs of Arbitration* (1996) 7:2 ICC ICArb. 88, at 89.

pay the advance, however, only by way of an interim measure of protection, and provided that the applicant is able to establish convincing grounds which make such protection indispensable.[14] It is argued that the tribunal's competence to give such interim measures is inherent in its power to decide the final allocation of the costs of arbitration.

9) As pointed out by M. Secomb[15], the distinction between the two theoretical approaches has an important practical impact. The legal test that the non-defaulting party must satisfy in order to obtain an award or order in its favour is fundamentally different depending on the approach adopted. If the contractual approach is followed, the respondent's non-payment of the advance will normally be tantamount to liability for breach of contract, and the dispute will be limited primarily to the amount of damages or the availability of the remedy of specific performance. If, in contrast, the interim measure approach is applied, the non-defaulting party must satisfy stringent requirements for interim measures of protection.

The Partial Award No. 2 of 1 June 2004 in ICC case 12491

10) The Partial Award No. 2 of 1 June 2004 in ICC case 12491 ('the Partial Award'), reprinted in this edition of the ASA Bulletin 2/2006, p. 281, departs from a string of recent decisions in which arbitral tribunals ordered the immediate reimbursement of the advance.[16] In this case, the claimant sought an award from the arbitral tribunal ordering the defaulting respondent to reimburse the part of the advance paid by the claimant in lieu of the respondent. The arbitral tribunal denied this application.

11) The significance of the Partial Award lies not so much in its conclusion, as in the reasons given for its refusal of the relief sought. In fact, the tribunal did not endorse either of the two approaches mentioned above as a valid legal basis for the relief sought by the claimant. The tribunal's avoidance of the debate about whether such remedies are substantive or procedural in nature may explain why the Partial Award makes no

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14 X. Favre-Bulle, *supra* note 11, at 238 *et seq.*; Interim Award of 26 March 2002 in ICC case 11405, [2003] ASA Bulletin 802; Preliminary Award of 2 September 1996 in ICC Case 7289, [2002] Rev.arb. 1001; Partial Award of 25 October 2002 in ICC case 11392 [unpublished], see the extracts in M. Secomb, *supra* note 2, at paragraph 29.

15 M. Secomb, *supra* note 2, at paragraphs 7 and 59.

16 See *supra* note 7.

reference at all to published arbitral decisions addressing this issue or the abundance of legal writing on this subject.[17]

12) The respondent in ICC case 12491 did not challenge the tribunal's jurisdiction to grant the relief sought by the claimant. This allowed the arbitral tribunal to assert jurisdiction over the application on the basis of Article 186(2) of the Swiss Private International Law Act. Nonetheless, the tribunal examined the scope of its authority under the ICC Rules. It emphasised the distinction made by the ICC Rules between the financial aspects of an arbitration entrusted to the ICC Court and those left for decision by the arbitral tribunal. It then concluded that granting the claimant's application it would interfere with the financial aspects of the arbitral proceedings which are the province of the ICC Court, a result 'the ICC Rules exactly seek to exclude'.[18]

13) The Partial Award further stated that the relief sought, i.e. the reimbursement of the advance paid in lieu of the respondent, did not relate to the substance or the merits of the dispute. Nor could the order sought be considered a conservatory measure because it was neither designed to ensure the effectiveness of a subsequent award on the merits of the dispute, nor intended to provide security for an award of costs.[19]

14) There is considerable force in the arbitral tribunal's argument that the reimbursement of an advance cannot be ordered as a conservatory or interim measure. It is, however, suggested here that the situation is different if a substitute payment has not yet been made and the claimant is able to show that it lacks the financial means to cover the opponent's half of the advance. The wording of Article 23 ICC Rules seems sufficiently broad to order interim measures if the effectiveness of a subsequent award on the merits or a cost award is not at risk, but rather the arbitral proceedings leading to such an award. Nevertheless, such an application seems to be difficult to make: if the claimant has to establish, in order to obtain an interim measure, that its financial situation does not allow it to deposit all expected costs of the arbitration, then the claimant will, in all likelihood, neither be able to honour any cost claim against it at the end of the arbitration. This, however, would pave the way for a request for security of costs by the respondent.[20] Moreover, as long as

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17 See the cases and authors mentioned *supra*.
18 Translated from the original French.
19 In the same sense: I. Fadlallah, *supra* note 9, at paragraph 13.
20 See I. Fadlallah, *supra* note 9, at paragraph 13.

the defaulting party's share of the advance remains unpaid, there is the risk that the claimant's substantive claim becomes deemed withdrawn pursuant to Article 30(4) ICC Rules.[21] The ICC can be expected to invoke Article 30(4) ICC Rules notwithstanding any order of the arbitral tribunal requesting the respondent to pay if the full advance on costs has not been paid.[22]

15) The arbitral tribunal also dismissed the claimant's argument that Article 30(3) ICC Rules gives rise to a reciprocal contractual obligation between the parties to pay their respective advances on costs. In its view, the provision of the advances by the parties is considered in Article 30 ICC Rules exclusively from the point of view of its procedural consequences: as a condition precedent to the implementation of the arbitration. The Partial Award emphasised that the ICC Rules only provide for two results if a party fails to pay its share of an advance on costs. Either the non-defaulting party pays the entire amount of the advance on costs or, if such payment is not made, the claim becomes deemed withdrawn pursuant to Article 30(4) ICC Rules. Given that the ICC Rules do not provide for a claim for reimbursement of the advance, the claimant cannot, according to the arbitral tribunal, have acquired such right by agreeing on ICC arbitration. One may point out here that in the partial award of 27 March 2001 in the ICC case 10671 the arbitral tribunal took exactly the opposite view and dismissed the claimant's suggestion that Article 30(3) and (4) ICC Rules provides an exhaustive list of the consequences of a party's refusal to pay the advance on costs.[23]

16) It is interesting to note that in another recent ICC partial award[24], the sole arbitrator also concluded that Article 30(3) ICC Rules does not create a binding obligation between the parties to each pay half of the advance, although based on different reasoning. There, the sole arbitrator observed that if a respondent raises a counterclaim the ICC Court may, according to Article 30(2) ICC Rules, avoid requiring the parties to each pay half of the global advance by setting separate advances for each claim. According to the sole arbitrator this implies

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21 Article 30(4) ICC Rules provides: 'When a request for an advance on costs has not been complied with, and after consultation with the Arbitral Tribunal, 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, or counterclaims, shall be considered as withdrawn. [...]'.

22 M. Secomb, *supra* note 2, at paragraph 51.

23 Partial award of 27 March 2001 in ICC Case 10671, *supra* note 7, paragraphs 15 and 16.

24 Interim Award of 26 March 2002 in ICC case 11405, *supra* note 14.

that there is no reciprocal obligation between the parties to pay half of the advance on costs in these circumstances. He then stated:

> 'The Arbitrators considers that Article 30(3) first sentence cannot have a different nature (contractual or administrative), depending on the presentation by the respondent of a counterclaim. It results that Article 30(3) first sentence of the ICC Rules does not create a contractual obligation of the parties to each pay half of the advance on costs.'

17) It should be noted that the Partial Award here did not go so far to state that parties in ICC arbitration may not otherwise agree on an obligation to pay the advance on costs in equal shares, which is enforceable through ICC arbitration. Rather, it expressly mentioned that the claimant had not invoked any other contractual basis for its claim. Nevertheless, a discussion of the widely shared view, that such mutual undertaking is implicit in the agreement to arbitrate as such, is somewhat missing in the Partial Award.[25]

18) The arbitral tribunal then considered whether the claimant's reimbursement claim could be based on the rules of subrogation. The subrogation of the non-defaulting party to the rights of the ICC against the defaulting party presupposes that the ICC has a right to require an advance payment from the parties. The tribunal held, inter alia, that the ICC Rules do not intend to create an actionable claim for the payment of the advance on costs because in case of a non-payment of the advance on costs. Indeed, the 'ultimate enforcement mechanism' of the ICC is Article 30(4) ICC Rules which provides for the discontinuation of the arbitral services.[26] The arbitral tribunal also observed that the substitute payment provided for in the third sentence of Article 30(3) ICC Rules is considered to be made for the account of the payor and not for the account of the party in default. In our view, the reasons given for denying subrogation seem convincing, at least in an ICC setting[27], and therefore it was not necessary for the arbitral tribunal to address the thorny question of the law applicable to a potential right of recourse.

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25 See the authors *supra* note 4; compare, however, *3S Swedish Special Supplier AB v. Sky Park AB* where the Swedish Supreme Court found that such undertaking is not implicit to an arbitration clause; and Article 33(1) of the International Arbitration Rules of the American Arbitration Association which provides that the advance on costs is payable by the party which files a claim.

26 M. Secomb, *supra* note 2, at paragraph 51.

27 See I. Fadlallah, *supra* note 9, at paragraph 9.

19) The Partial Award then gave an alternative reason for its rejection of the application. It held that the claimant did not suffer any damage as a result of its payment of the entire advance. The rationale given was that the question who will have to bear the costs of the arbitration will only be known upon the arbitral tribunal's cost award, and consequently whether the defaulting party must reimburse the claimant for any part of the deposit it has paid will be decided only at that time. According to the arbitral tribunal the payment of a deposit could not result in a damage claim considering that a deposit paid to the ICC first becomes a claim against the ICC (which holds such funds in escrow for the payee), and later, when the deposit is applied to the payment of the compensation owed to the arbitrators and the ICC, it becomes a cost claim subject to the arbitral tribunal's cost award.

20) The reasons given in the Partial Award on the issue of damages are, in our view, compelling. It seems difficult to argue that the claimant's substitute payment of the advance immediately results in damages in the same amount or that damages are independent from the out-come of the final cost decision. In line with the above rationale, the Supreme Court of Sweden, deciding on an appeal in connection with a domestic arbitration, held in a judgment in 2000[28] that a substitute payment of the advance only could give rise, if at all, to a 'temporary right of recourse' given that the final allocation of the arbitration costs between the parties remains uncertain until the decision on the merits of the case. The Swedish Supreme Court refused, however, to create such a rule of law in light of the legal uncertainties such a 'temporary right of recourse' would entail.

21) Moreover, under the ICC Rules the party which has paid its own share of the advance may post a bank guarantee to cover the remainder of the advance owed by the defaulting party (Article 1(6) of Appendix III to the ICC Rules). As a consequence, damages would be incurred, if at all, only once the ICC draws on the guarantee.[29] A claimant in an ICC arbitration, who paid the defaulting party's half of the deposit in cash rather than by delivering a bank guarantee, could therefore even be criticised for neglecting its duty to mitigate damages.

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[28] *3S Swedish Special Supplier AB v. Sky Park AB*, judgment of the Supreme Court of Sweden rendered in 2000 in case T 5119-99, 2001:2 Stockholm Arbitration Report 75 (Annot. T. Jingzhou, A. Vincent, M. Polkinghorne)

[29] See the Preliminary Award of 2 September 1996 in ICC Case 7289, [2002] Rev.arb. 1001

22) M. Secomb and I. Fadlallah have rightly emphasised that an application based on the aforementioned contractual approach should be viewed as a claim for specific performance and not as a claim for damages for a breach of contract.[30] In the Partial Award discussed here, the possibility of enjoining the respondent to pay its share of the advance to the claimant or the ICC in performance of its contractual obligation, rather than paying such amount as damages, was not considered. In fact, the claimant had expressly framed his claim as a damage claim. Arguably, the arbitral tribunal – had it found a contractual obligation of the respondent to pay the advance, which it did not – should nonetheless have examined the possibility of ordering actual performance, rather than damages, given that the claimant's prayers for relief simply asked for the payment of the sum of the deposit paid in lieu of the respondent.

23) Whether such remedy of specific performance, absent express language in the arbitration clause or the applicable rules, is available to the non-defaulting party is to be examined under the law governing the asserted obligation. One would therefore have to apply the law governing the arbitration agreement or the law applicable to the contract.

24) In principle, a claim for specific performance may be made if the initial obligation is still capable of being performed. This is clearly the case where the non-defaulting party has not yet made a substitute payment. However, as pointed out by I. Fadlallah[31], the claimant in an ICC arbitration will here be faced with a practical problem: the time-limit set by the ICC Court for payment will usually expire before an award enjoining the respondent to make the payment to the ICC can be obtained and enforced. In light of Article 30(4) ICC Rules, a claimant will therefore be well advised to avail himself of the possibility to pay the entire advance to the ICC.

25) If the claimant already has paid the respondent's share of the advance, it is arguable whether the initial obligation is still capable of being performed. From the perspectives of either the arbitral institution or the arbitrators, the obligation of the parties, if any, to pay the advance as initially ordered, is extinguished upon its payment by the non-defaulting party. This, however, should not be seen to exclude any relief per se. If one accepts that each party has a contractual obligation to pay its share of the advance, it would be wrong to allow the defaulting party to take

30 M. Secomb, *supra* note 2, at paragraph 18; I. Fadlallah, *supra* note 9, at paragraph 13.
31 I. Fadlallah, *supra* note 9, at paragraph 14.

advantage of the fact that its opponent paid in its stead. Then again, consideration must be given to the fact that the claimant who paid for the respondent thereby acquired a claim against the escrow holder, i.e. against the institution or the arbitrators, as applicable. This suggests that a defaulting respondent should, if at all, only be compelled to directly reimburse the claimant in exchange for the assignment of the claimant's rights vis-à-vis the escrow holder resulting from the substitute payment. Although this may give rise to certain additional complications, an unconditional order to make such payment to the claimant may not restore, but rather tilt the balance in the opposite direction, and might result in an unwarranted penalty.[32]

26) If the non-defaulting party has posted a bank guarantee for the defaulting party's share of the advance on costs, similar considerations also apply. Again, an award unconditionally ordering the defaulting party to reimburse the claimant risks to be overreaching. If the initial obligation is an obligation to make a deposit, a claim for specific performance cannot result in an obligation to make a final payment. Hence, this suggests that an order for a direct payment to the arbitral institution (or, depending on the applicable rules, the arbitrators respectively) is appropriate if the non-defaulting party posted a bank guarantee. Under those institutional rules which entrust the financial administration of the arbitration to the arbitral institution, e.g. the ICC Rules, the release of the bank guarantee upon receipt of the respondent's payment will be a matter for the institution; the arbitrators are not competent to give any directions in this respect to the institution; nor should they even be concerned with this question.

Conclusion

27) The Partial Award in ICC case 12491 shows that applications for an order requiring a defaulting party to pay its advance on costs or to obtain the reimbursement of a substitute payment continue to be fraught with difficulties. The existence of an enforceable reciprocal obligation between the parties to each pay half of the advance on costs remains controversial. Moreover, even if an arbitral tribunal should find the existence of such an obligation and follow the aforementioned contractual approach, this will not necessarily lead to a claim for reimbursement being upheld. First, there may be legitimate reasons for a

[32] *E.g.*, in case of a decrease of the amount of the advance on costs; if the final arbitration costs are lower than the advance on costs and the claimant is ordered to bear the costs of the arbitration.

refusal to pay. Second, the temporarily nature and purpose of an advance creates considerable uncertainty which remedy could and should be available to the non-defaulting party. The Partial Award persuasively argues that there is no room for allocating damages for breach of contract.

28) In addition, the non-defaulting party seeking to enjoin the defaulting party to pay its advance on costs or to obtain the reimbursement of a substitute payment already paid, must be aware of the many practical difficulties which remain even if it obtains a partial award or an interim order in its favour. Even a partial award for the reimbursement of the advance paid in lieu of the defaulting-party cannot be expected to be of great practical value unless complied with voluntarily. Presumably, a respondent which fails to comply with its duty to pay half of the advance of costs is, however, not the party most likely to readily comply with a subsequent partial award. Yet, enforcement proceedings usually take time, and may well be pending when the award on the merits is finally rendered. Hence, a cost award made against the claimant could then make these enforcement proceedings redundant.

29) As a concluding remark it can be said that a claimant, when bringing an arbitration claim, should anticipate the possibility that it will have to finance the proceedings by itself and may only recoup such costs at the end of arbitration. An application to enjoin a defaulting party to pay its advance on costs or to obtain the reimbursement of a substitute payment may have a certain tactical value because the respondent risks appearing to be uncooperative, if not unfair. However, the prospects of such applications to achieve their primary goal, i.e. to restore the financial balance between the parties during the arbitral proceedings, remain uncertain. Respondent parties would, however, be mistaken to think that these practical difficulties are tantamount to a free ticket to default on the payment of their share of the advance on costs. As Y. Derains & E.A. Schwartz[33] noticed, the concern 'to be perceived, in the eyes of the arbitrators, as 'good citizens' who respect their contractual commitments' should be sufficient motivation for each party to comply with its duty to pay half of the advance on costs.

Micha Bühler*

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[33] Y. Derains & E.A. Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed. (2005), at 343.

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