

Cornell Law School
Cornell Law School LL.M. Papers Series

Year 2004

Paper 5

Contract Law and Decisions on Costs

Marco Stacher *

*Cornell Law School, ms483@cornell.edu

This content in this repository is hosted by The Berkeley Electronic Press (bepress) and may not be commercially reproduced without the permission of the copyright holder.

<http://lsr.nellco.org/cornell/lps/papers/5>

Copyright ©2004. Posted with permission of the author.

Contract Law and Decisions on Costs

Marco Stacher

Abstract

The national statutes on international commercial arbitration, the *leges arbitri*, do, as a rule, not contain provisions on costs. In the final award, an arbitrator has to determine the costs of the arbitration (the fees of the arbitral tribunals, of expert witnesses mandated by the arbitral tribunal etc.), which cost incurred by the parties during the arbitration are recoverable and which party has to bear what share of the costs. A decision on these issues forms part of the ordinary course of an arbitration. Further cost-related issues may arise due to the peculiarities of the case, such as a refusal of one of the parties to contribute to the financing of the arbitration. Resorting to agreements may provide a satisfactory means for certain decisions on costs in arbitration proceedings; this is by making use of the contractual nature of these agreements; by asking whether these agreements can be interpreted in a way that gives an answer to the issue at stake or - as in the case of security for costs - whether the contract may be amended to grant a motion for security for costs. It is submitted that the reasoning so achieved is at least as convincing and consistent as other approaches solicited by doctrine. Therefore, it is further submitted that this approach should be considered when an issue arises that is not addressed in the *lex arbitri* or the institutional arbitration rules .

Marco Stacher, Esq.

Contract Law and Decisions on Costs

On the Relevance of Arbitration Agreements and Arbitrator's Agreements for Decisions on Cost-related Issues in International Commercial Arbitration - a Swiss Perspective

A. Introduction

1. In the final award, an arbitrator has to determine the costs of the arbitration (the fees of the arbitral tribunals, of expert witnesses mandated by the arbitral tribunal etc.), which cost incurred by the parties during the arbitration are recoverable and which party has to bear what share of the costs. A decision on these issues forms part of the ordinary course of an arbitration. Further cost-related issues may arise due to the peculiarities of the case, such as a refusal of one of the parties to contribute to the financing of the arbitration.
2. The national statutes on international commercial arbitration, the *leges arbitri*, do, as a rule, not contain provisions on costs.¹ The arbitration rules² the parties may choose usually will. Moreover, the parties sometimes expressly agree on some cost issues in the arbitration agreement or in subsequent agreements. Given the variety of cost-related issues, which might arise during an arbitration, it is however very well possible that neither of these three possible sources for rules on costs provides guidelines for the arbitrator on how to rule on certain cost-related issues. This is in particular true for those cost issues that are neither related to general questions regarding the deposits for the costs of the arbitration and the decision on costs in the final award.

¹ An exception is, for instance, the English Arbitration Act of 1976 (for a concise treatise of the section on costs in this act refer to Michael O'Reilly, *Costs in Arbitration Proceedings*, second edition, London/Hong Kong, 1997).

² Institutional arbitration rules like those of the ICC or the Swiss Chambers of Commerce, which detail the proceedings and provide, to a certain degree, for the support and monitoring of the arbitration by the institution, and rules like the UNCITRAL Arbitration Rules of 1976, which are not linked to a certain institution and thus lack the second of the aforementioned elements of institutional arbitration rules.

3. The starting point is thus a posture where the arbitrator has to make a decision on a cost-related issue which is neither considered by the *lex arbitri*, nor the arbitration rules, nor the express wording of the arbitration agreement. In such a case, one of the possible results may seem fit and fair. However, in order to get to this end, the arbitrator must have a legal basis, the means he can base the end on. Or, from the other perspective, counsel must give reasons why there is - or is not - ground for such an end.
4. On the following pages, several cost-related issues that may arise during an arbitration will be addressed. The focus is not on the end that is appropriate in these cases;³ it is rather on the means to get to the end. More specifically, it will be examined whether resorting to the arbitration agreement or the arbitrator's agreement may present a viable solution in these cases; put more broadly, whether basic contract-law considerations may be of relevance to decide cost-related issues the arbitrator may have to decide during the arbitration.

B. Security for Costs

a) Introduction

5. In international commercial arbitration, the successful party may recover its costs from the losing party.⁴ The losing party thus has to pay the attorneys' fees, the fees of the expert witnesses and other costs of the winning party. This may ease the decision whether to file a notice of arbitration. It does not, however, when the potential respondent is in bad financial shape and the potential claimant therefore doubts whether the respondent will be able to honor an award - voluntarily or by way of enforcement. At least, the claimant has a choice whether it wants to accept this risk, that is to incur costs and not to be able to recover them. A respondent, which faces a claimant that might not be able to honor an award (on costs and the merits) does not

³ For at least some of these issues, there seems to be a consensus on what end is fit and fair.

⁴ In the U.S., costs are not awarded (cf. Micha Bühler, Awarding Costs in International Commercial Arbitration: an Overview, 22 ASA Bull 2/2004, p. 249 et seq., 250; John Y. Gotanda, Awarding Costs and Attorneys' Fees in International Commercial Arbitrations, 21 Michigan Law Journal 1999, p. 1 et seq., 11) unless otherwise agreed by the parties (cf. Thomas H. Oehmke, Commercial Arbitration, Deerfield/New York/Rochester 1999, § 123:01).

have this choice. It cannot but spend money to properly defend itself - if it does not, the arbitral tribunal will render its award based on a one-sided presentation of the facts and the law.⁵ The situation is therefore imbalanced.⁶ The respondent might in such a case file a motion for security for costs; that is it will request that the arbitral tribunal order the claimant to deposit an amount that corresponds to the respondent's estimated costs. At the end of the proceedings the respondent could then collect this amount if it is successful.

6. When filing a motion for security for costs, the respondent will have to give a legal basis for its motion. The starting point of this analysis, that neither the *lex arbitri* nor the arbitration rules nor the express wording of the arbitration agreement provides that awarding security for costs is admissible, will often be the situation the respondent, and the arbitrators who have to decide on this motion, face.⁷ The respondent will thus have to point out that awarding security for costs is admissible despite the absence of an express rule. In doing so, it can resort to different theories developed by doctrine.

b) Present Approaches

7. The predominant approach considers the power of an arbitral tribunal to order interim measures as legal basis for awarding security for costs.⁸ A motion for security for costs, is, however, not related to the substance of the dispute so that it is - at least when the UNCITRAL Arbitration Rules⁹ are applicable or when this issue must be

⁵ cf. Bernhard Berger, Prozesskostensicherheit (cautio iudicatum solvi) im Schiedsverfahren, 22 ASA Bull 1/2004, p. 4 et seq., 6; Karrer/Desax, Security for Costs in International Arbitration - Why, when, and what if ..., in: Briner/Fortier/Berger/Bredow (ed.), Liber amicorum Karl-Heinz Böckstiegel, Köln/Berlin/Bonn/München 2001, p. 339 et seq., 340; Redfern/Hunter, Law and Practice of International Commercial Arbitration, third edition, London 1999, N 7-29.

⁶ comp. Karrer/Desax, op. cit. in fn. 5, p. 340.

⁷ However, as long as these possible sources do not expressly exclude the admissibility of awarding security for costs either, the absence of an express rule does not entail that there is *per se* no ground for security for costs.

⁸ cf. Berger, op. cit. in fn. 5, p. 10; Otto Sandrock, The Cautio Judicatum Solvi in Arbitration Proceedings, handout of a speech held at the ASA Conference on Costs of January 1997, p. 28; Markus Wirth, Interim or Preventive Measures in Support of International Arbitration in Switzerland, 18 ASA Bull 1/2000, p. 31 et seq. 36.

⁹ cf. Art. 26(1) UNCITRAL rules specifying that "*the arbitral tribunal may take any interim measures it deems necessary in respect of the subject matter in dispute*" (emphasis added).

analyzed under the Swiss *lex arbitri*¹⁰ - doubtful whether security for costs may be awarded under this approach. Also, the fact that security for costs secures a possible future monetary claim raises doubts whether it can be awarded as an interim measure: Because, again from a Swiss perspective, an interim measure can only be ordered if the applicant otherwise suffers irreparable harm.¹¹ As already the provisional awarding of a monetary in an interim measure, which would present an immediate relief to the applicant, is handled restrictively,¹² it seems unlikely that an order for security for costs would be granted, which would transfer the security only at the date of the final request.

8. Another theory sees the basis for an order for security for costs in the power of the arbitral tribunal to conduct the arbitration in a way it considers appropriate.¹³ Again, it is submitted that an order for security for costs relates to the costs, and not to the proceedings - at least not to that part of the proceedings that is necessary to conduct the arbitration in a well-regulated way, such as orders on the taking of evidence, the number of hearings, etc. The arbitration can very well be finished without an order for security for costs. The principle of good faith is also referred to as a ground for orders for security for costs. This is certainly a valid argument where, for instance, the claim that is the matter in dispute was assigned to an impecunious party with the very

¹⁰ cf. Andreas Bucher, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*, Basel 1989, N 204; Alain Gloor, *Vorsorgliche Massnahmen im Spannungsfeld von Bundesrecht und kantonalem Zivilprozessrecht*, Zürich 1982, p. 71; Claude Reymond, *Security for Costs in International Arbitration*, 110 *The Law Quarterly* 1994, 501 et seq., 504; Oscar Vogel, *Probleme des vorsorglichen Rechtsschutzes*, in: *Schweizerische Juristen-Zeitung*, vol. 76 (1980) p. 89 et seq., 94; Gerhard Walter/Wolfgang Bosch/Jürgen Brönnimann, *Internationale Schiedsgerichtsbarkeit in der Schweiz*, Bern 1991, p. 131.

¹¹ For this criterion cf. Stephen V. Berti, *Basel Commentary*, N 7 to Art. 183 PILS; Donald Francis Donovan, *The Scope and Enforceability of Provisional Measures in International Commercial Arbitration*, p. 25; Walther Habscheid, *Einstweiliger Rechtsschutz durch Schiedsgerichte nach dem schweizerischen Gesetz über das Internationale Privatrecht (IPRG)*, *IPRax* 1989, p. 134 et seq., 135; Julian D.M. Lew, *Commentary on Interim and Conservatory Measures in ICC Arbitration Cases*, 11 *ICC Court of Arbitration Bulletin*, 1/2000, p. 27; Reiner, Andreas Reiner, *Les mesures provisoires et conservatoires et L'Arbitrage international, notamment l'Arbitrage CCI*, in: *Journal du Droit International*, 1998 No. 4, p. 853 et seq., 888).

¹² cf. Berti, op cit. in fn. 11, N 10 to Art. 183 PIL; Reiner, op. cit. in fn. 11, p. 889; decision no. 125 III 460 of the Swiss Federal Tribunal).

¹³ cf. Andreas Reiner, *Handbuch der ICC-Schiedsgerichtsbarkeit*, Wien 1989, p. 164.

intention to prevent the respondent from recovering its costs or in similar circumstances.¹⁴

c) Contractual Approach

9. The arbitrator could also resort to the arbitration agreement when considering whether to grant a motion for security for costs: If the parties had included a provision on security for costs in the arbitration agreement - in the positive or in the negative - the arbitrator were able to decide based on the parties' agreement. Still, even if security for costs was not addressed, the contractual nature of the arbitration agreement may be a starting point for the decision whether security for costs can be awarded; that is by an analysis whether an adaptation of the arbitration agreement, to the effect that security for costs is awardable under the arbitration agreement is possible - although it is not referred to in the arbitration agreement. An arbitration agreement is a contract and should therefore be adaptable like other contracts. A basis for such an adaptation is the *clausula rebus sic stantibus* - a concept providing for an adaptation of contracts to changed circumstances.¹⁵ The main conditions that must be satisfied for this concept to apply are that the change is material and that it was not foreseeable. In such a case, that is when the risk of the respondent not to be reimbursed its costs has substantially and unforeseeably risen,¹⁶ the circumstances at the date of the request, for instance the claimant's financial situation, are not a risk the Respondent accepted when

¹⁴ cf. Berger, op. cit. in fn. 5, p. 16.

¹⁵ Of course, there is one more issue to be addressed. Before it is possible to determine the specific conditions that must be satisfied for an adaptation of the arbitration agreement, it must be decided which law is applicable to the adaptation of the arbitration agreement, that is which law is applicable to the arbitration agreement. In the absence of (i) a choice of law by the parties and (ii) a statutory provision, this is the law of the seat of the arbitration as the law with the closest connection to the arbitration agreement (cf. Berger, *International Economic Arbitration*, Deventer/Boston 1993, p. 233; Bernd von Hoffmann, *Der internationale Schiedsrichtervertrag - eine kollisionsrechtliche Skizze*, Plantey/Böckstiegel/Bredow (ed.), *Festschrift für Ottoarndt Glossner zum 70. Geburtstag*, Heidelberg 1994, 143 et seq., 151; comp. Poudret/Besson, *Droit comparé de l'arbitrage international*, Zurich/Basel/Geneva 2002, N 297). For the purpose of the present analysis, Swiss law is deemed to be applicable.

¹⁶ comp. Karrer/Desax, op. cit. in fn. 5, p. 45 and, in particular, Sandrock, op. cit. in fn. 8, referring to such changes in the circumstances, but considering an order for security for costs nonetheless to be based on an arbitral tribunal's power to order interim measures, (p. 20 and 36).

entering into the arbitration agreement.¹⁷ In such a case the arbitration agreement may be adapted to reflect the new circumstances. In its adapted form it then includes a provision that security for costs may be granted, if there is an objective need for it. So the fact that the arbitration agreement is an agreement and that it may therefore be adapted to changed circumstances, provides an alternative legal basis for why it is admissible to award security for costs.

10. That it is necessary that the change in the circumstances occurs after the signing of the arbitration agreement allows to distinguish between cases where the risk not to recover its costs was accepted when signing the arbitration agreement, for instance when entering into an agreement with an offshore company that does not have significant capital, and cases where the risk comes as a surprise, for instance when the seat is moved to a country where the New York Convention does not apply.
11. That the change in the circumstances must moreover be substantial would, if this approach were applied, probably have the effect that security for costs would not be awarded more often than under the other approaches. It is to be expected that an arbitral tribunal would take guidance from earlier published decisions, which were rendered based on the other approaches referred to in paras. 7/8 hereinabove. The mere initiation of bankruptcy proceedings would then probably not suffice.¹⁸ Therefore, by applying this approach the same end would be achieved by another means.¹⁹

C. Failure of the Respondent to pay the Advance on Costs

a) Introduction

¹⁷ comp. Poudret/Besson, op. cit. in fn. 15, N 610; Decision of a Zurich Chamber of Commerce arbitral tribunal, published in 54 Schweizerische Juristenzeitung 1958, p. 92.

¹⁸ cf. Berger, op. cit. in fn. 5, p. 15/16; Poudret/Besson, op. cit. in fn. 15, N 610); rather, it must be assessed pursuant to the applicable debt enforcement law, whether a claim of the respondent for reimbursement is actually endangered (under Swiss bankruptcy law, e.g., the costs of a pending arbitration which have not yet been finally allocated at the date of bankruptcy are qualified as obligations of the estate, if the administration continues the arbitration. A claim for reimbursement will then be satisfied with priority; cf. Jaeger/Walder/Kull/Kottmann, Bundesgesetz über Schuldbetreibung und Konkurs, Band II, Art. 159-292, Zürich 1997/1999, N 4 to Art. 207).

¹⁹ In particular, it would not be necessary to enter into considerations on the likelihood of the applicant's success as under the interim-measures approach (cf. Gloor, op. cit. in fn. 10, p. 73; Lew, op. cit. in fn. 11, p. 27).

12. To make sure that he gets paid at the end of the day, an arbitrator will order the parties to pay deposits. As a rule, the parties have to advance an equal amount. If one party, usually the respondent, does not pay its deposit, the arbitrator will not enforce his request for an advance; he will simply not proceed with the arbitration, if the deposit is not fully paid. So, the claimant will have to pay the full deposit if it wants the arbitration to continue. Its share and the respondent's share. The question arises whether the claimant has some sort of a remedy in such a case.
13. A part of the doctrine answers this question in the affirmative. According to this opinion, the non-defaulting party has in such a case a claim for reimbursement of the deposit paid on the defaulting party's behalf.²⁰ Some scholars also affirm a claim of the non-defaulting party that the other party pay its share of the deposit to the arbitral tribunal without being forced to first advance the latter's share.²¹ Sometimes, such a decision is labeled as an order for interim measures.²² Again, the end seems to be fair, but the means is insofar questionable as the issue at stake, a claim for reimbursement or payment of the respondent's deposit, is not related to the merits of the case.

b) Contractual Approach

²⁰ cf. Craig/Park/Paulsson, *International Chamber of Commerce Arbitration*, third edition, 2000, 267/268; Ibrahim Fadlallah, *Payment of the Advance to Cover Costs in ICC Arbitration: the Parties' Reciprocal Obligations*, 14 ICC Bulletin 1/2003, 53 et seq., 55 and 57; Reiner, op. cit. in fn. 13, p. 152; Claude Reymond, *Note sur l'avance des frais de l'arbitrage et sa répartition*, in: Haldy et al. (ed.), *Etudes de procédure et d'arbitrage en l'honneur de Jean-François Poudret*, Lausanne 1999, p. 495 et seq., 498 and 502; Werner Wenger, *Basel Commentary*, N 71 to Art. 178 PILS; contra Markus Knellwolf, *Zur materiellrechtlichen Bedeutung der Schiedsabrede*, in: Berti et al., *Beiträge zu Grenzfragen des Prozessrechts*, Zurich 1991, p. 45 et seq., 59; Rüede/Hadenfeldt, *Schweizerisches Schiedsgerichtsrecht*, second edition., Zurich 1993, 225). The basis for such a decision is rarely discussed.

²¹ Fadlallah, op. cit. in fn. 20, p. 57; Favre-Bulle, op. cit. in fn. 20, p. 239; cf. Wenger, op. cit. in fn. 20, N 71 to Art. 178 PILS; comp. Craig/Park/Paulsson, op. cit. in fn. 20, fn 26 on p. 269; Matthew Secomb, *Awards and Orders Dealing with the Advance on Costs in ICC Arbitration: Theoretical Questions and Practical Problems*, 14 ICC Bulletin 1/2003, p. 59 et seq., 67-68.

²² cf. Xavier Favre-Bulle, *Les conséquences du non-paiement de la provision pour frais de l'arbitrage par une partie*, 19 ASA Bull 2/2001, 227 et seq., 242; comp. Craig/Park/Paulsson, op. cit. in fn. 20, p. 268; Matthew Secomb, op. cit. in fn. 21, p. 61-65; contra: Ibrahim Fadlallah, op. cit. in fn. 20, p. 56-57.

14. It is submitted that resorting to the arbitration agreement may again provide the same end as the interim-measures approach. Of course, the basic consequence of an arbitration agreement is that claims must be brought to arbitration instead of filing suit in state-run courts. However, an interpretation of the arbitration agreement shows that this primary duty entails further duties. A party that agrees to arbitration must know that it will have to enter into an agreement with the arbitrator, that the arbitrator must be paid a fee for his services and that the arbitrator will request advances in equal shares. A party that signs an agreement that refers disputes to international commercial arbitration may be expected to be aware of the fact that it will have to pay a deposit.²³ Therefore, it is submitted that the arbitration agreement itself contains a duty of each party to pay its share of the advance for the costs of the arbitration. The question arises if this duty is an obligation or mere procedural duty.
15. To answer this question, the effects of the non-payment must be taken into account. If a party refuses to pay its share of the deposit, the rules may expressly allow the claimant to pay both shares and thus to continue the arbitration. The main interest of the claimant is thus taken into account. However, that the claimant also has to pay the deposit of the respondent, which can be a substantial amount, shows that the interests of the claimant are not fully considered by this possibility. This allows the conclusion that paying its deposit to the arbitral tribunal is to be qualified as an obligation and not as a mere procedural duty.^{24, 25} So, the duty to pay advances is not only one towards the arbitrator, based on the arbitrator's agreement, but also one towards the other party - based on the arbitration agreement. A party may therefore request the arbitral tribunal²⁶ to order the defaulting party to pay its deposit or, if it paid the latter's deposit - in order to prevent a delay in the arbitration - to be reimbursed.²⁷ Again the arbitration agreement may provide a basis for what seems to be a fair result. This opinion is, however, not undisputed. It is for instance submitted that arbitration agreements are of

²³ Fadlallah, op. cit. in fn. 20, p. 55; Rüede/Hadenfeldt, op. cit. in fn. 20, p. 222; Reymond, op. cit. in fn. 20, 498; Wenger, op. cit. in fn. 20, N 71 to Art. 178 PILS.

²⁴ Or its substantive equivalent, an *Obliegenheit*, i.e. a duty of substantive nature which is not enforceable since the interests of the entitled party are already, *de lege lata*, considered by allocating an inconvenience to the other party in case of non-fulfillment.

²⁵ comp. Wenger, op. cit. in fn. 21, N 71 to Art. 178 PILS and Art. 112(3) of the Swiss Code of Obligations.

²⁶ The arbitral tribunal has jurisdiction for such a decision (Berger, op. cit. in fn. 14, p. 389; Fadlallah, op. cit. in fn. 19, 56; Reiner, op. cit. in fn. 12, p. 152-153).

²⁷ comp. Rolf H. Weber, *Berne Commentary*, Bern 2002, N 141 to Art. 112 CO.

purely procedural nature, so that it is not possible to base a claim for the payment of money on it.²⁸

16. A claimant facing the problem that the respondent refuses to pay its share of the deposit might also try to resort to the arbitrator's agreement. The argument being that the paying party fulfils an obligation of the defaulting party and that it must thus be awarded a claim for reimbursement.²⁹ Under Swiss law, this approach does, however, not work since the arbitrator's agreement does not vest in the arbitrator a claim to be paid an advance: Indeed, the interests of the arbitrator are fully considered by the fact that he may simply terminate the procedure if the advance is not paid.³⁰ Of course, here again, if this approach were pursued, the question would arise which law is applicable to the arbitrator's agreement. In this respect, the theory that the law of the seat of the arbitration is applicable seems to be the most appropriate.³¹

²⁸ comp. Knellwolf, *op. cit.* in fn. 20, p. 59; Rüede/Hadenfeldt, *op. cit.* in fn. 20, p. 225. Under the qualification of the arbitration agreement as procedural agreement, it would neither be possible to claim the expenses a party incurs in court proceedings - because the other party brought suit instead of initiating arbitration - as damages (Rüede/Hadenfeldt, *op. cit.* in fn. 20, p. 89). Here, it is submitted that this is possible in case these expenses are neither recoverable in the court proceedings (as costs in the court proceeding) nor in the arbitration (as costs of the arbitration) (cf. Wenger, *op. cit.* in fn. 20, N 69 to Art. 178 PILS; Markus Wirth, in: Müller/Wirth, *Gerichtsstandsgesetz*, Zürich 2001, N 20 to Art. 41 GStG). Indeed, a party that refers to state courts instead of arbitration not only violates the procedural aspects of the arbitration agreement but also the substantive duties contained therein (like the duty to enter into an arbitrator's agreement, which is under Swiss law considered to be subject to private law; cf. Poudret/Besson, *op. cit.* in fn. 15, N 437; Reymond, *op. cit.* in fn. 20, p. 496; Rüede/Hadenfeldt, *op. cit.* in fn. 20, 225, p. 151; comp. Berger, *op. cit.* in fn. 15, p. 233).

²⁹ Either (i) under the rules applicable to joint liability (comp. Art. 148(2) of the Swiss Code of Obligations) since the parties are jointly liable for the fees of the arbitrator (Berger, *op. cit.* in fn. 15, p. 234; Poudret/Besson, *op. cit.* in fn. 15, N 443; Rüede/Hadenfeldt, *op. cit.* in fn. 20, p. 163) or - if joint liability of the parties is denied (cf. Berger, *op. cit.* in fn. 15, p. 223; Franz Hoffet, *Rechtliche Beziehungen zwischen Schiedsrichtern und Parteien*, Zurich 1991, p. 264; Rüede/Hadenfeldt, *op. cit.* in fn. 20, 223) (ii) based on the rules applicable to the procurement of services without mandate (comp. Art. 68 in connection with 422 of the Swiss Code of Obligations and decision no. 123 III 161 et seq., 164 of the Swiss Federal Tribunal).

³⁰ cf. Franz Hoffet, *op. cit.* in fn. 29, p. 262; contra: Rüede/Hadenfeldt, who, however acknowledge that bringing suit against the defaulting party would deteriorate the trust of the parties in the arbitrator necessary for conducting the arbitration (*op. cit.* in fn. 20, p. 223).

³¹ cf. Berger, *op. cit.* in fn. 15, p. 233; Lalive/Poudret/Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne 1989, N 6 to Art. 179 PILS; Rüede/Hadenfeldt, *op. cit.* in fn. 20, p. 152.

D. Payments on account of the Fees of the Arbitral Tribunal

17. The arbitrators are entitled to receive a fee for their services. The amount of the fees can only be assessed with certainty at the end of the arbitration. This raises the question whether the arbitrators shall only be paid at the end of the arbitration or whether they can make payments on account of their fees from the deposits furnished by the parties.
18. If the applicable rules do not confer such a right upon the arbitrator, the only possible basis for on-account payment seems to be the arbitrator's agreement with the parties. Indeed, like any other agreement, the contents of the arbitrator's agreement must be determined by interpretation. Under Swiss law, an agreement is interpreted by determining the contents of the agreement by assessing what the parties could reasonably expect when entering into the agreement. Now, an arbitration may take several years. So, applying this test to the matter at issue, it seems adequate that an arbitrator, when entering into his agreement with the parties may expect to receive certain payments in the course of the proceeding.³² Of course, the payments made during the arbitration should never exceed the fees the arbitrators would be entitled to if the arbitration were settled at the time of the payment.

E. Conclusion

19. Resorting to agreements may provide a satisfactory means for certain decisions on costs in arbitration proceedings; this is by making use of the contractual nature of these agreements;³³ by asking whether these agreements can be interpreted in a way that gives an answer to the issue at stake or - as in the case of security for costs - whether the contract may be amended to grant a motion for security for costs. It is

³² contra: O'Reilly, op. cit. in fn. 1, p. 12.

³³ Apart from the arbitration agreement and the arbitrator's agreement, further agreements may be of importance, e.g. agreements the parties impliedly make during the arbitration. The latter can for instance be assumed when both parties claim recovery of the fees of their expert witnesses although these costs are not recoverable under UNCITRAL Arbitration Rules, which are applicable to the arbitration (Wetter/Priem, Costs and their Allocation in International Commercial Arbitrations, 2 Am. Rev. Int'l Arb., 3/1991, p. 249 et seq., 315). Under these circumstances it is appropriate to conclude that the parties impliedly entered into a procedural agreement to amend the UNCITRAL Arbitration Rules to that effect.

submitted that the reasoning so achieved is at least as convincing and consistent as other approaches solicited by doctrine. Therefore, it is further submitted that this approach should be considered when an issue arises that is not addressed in the *lex arbitri* or the institutional arbitration rules .