Arbitration in Switzerland

The Practitioner's Guide

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Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3377-9

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Printed and bound by CPI Group (UK) Ltd., Croydon, CR0 4YY

Section VI: Costs

Article 36: Advance to Cover the Costs of the Arbitration

(1) After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36.

(2) As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent.

(3) Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.

(4) Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 36, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 36(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 36(4).

(5) The amount of any advance on costs fixed by the Court pursuant to this Article 36 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.

(6) 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 shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.

(7) If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

I. Purpose of the Provision

1 The basic scheme for the costs provisions has existed for decades.[1] Art. 36 describes two of the three stages of the costs related to the commencement of the arbitral proceedings, and the failure to pay them.[2] The ICC's advance on the costs system is designed to ensure that an arbitration may proceed without

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1 Derains/Schwartz, p. 329.

2 Fry/Greenberg/Mazza, para. 3-1325.

delay as soon as the *prima facie* relevant fees and expenses of the arbitrators and the institution for the commencement of the arbitral proceeding are secured.[3] Furthermore, the parties can derive a reasonable expectation of the cost for the entire arbitration from the advance payments fixed at the end of the proceeding in accordance with Art. 37.[4]

For the revised 2012 Rules, the issue of isolated or combined fixing of costs was discussed and a hybrid form was accepted.[5] The basic scheme was not changed.[6] In ordinary two-party cases, a global amount can be levied, while multi-party cases will be assessed on an individual basis, even though global assessment remains possible. **2**

II. Derogation from the Provision

Although not a derogation *strictu sensu*, the number of discretionary decisions conferred to the ICC, the Secretary General and the arbitrators by this provision leaves considerable leeway to derogate from the costs provision. Both the ICC administrative expenses and the arbitrator's fees are fixed exclusively by the Court.[7] **3**

III. Content of the Provision

A. General Comments

The scheme includes a total of three advances: (i) a filing fee (adjusted from time to time by the ICC Court, currently USD 3000),[8] to be paid by claimant upon submission of the request for arbitration or a request for joinder,[9] (ii) a provisional advance to be paid by claimant upon request by the Secretary General to cover costs up to the signing of the terms of reference, and (iii) an advance determined by the ICC payable by all parties to cover the costs outlined below.[10] **4**

The scheme for advance costs is not to be confused with interim relief of security costs,[11] for which the ICC Rules make no provision.[12] The ICC cost system is based on an *ad valorem* calculation.[13] The underlying schedules are adjusted periodically. The figure for the basis of calculation is derived from the figure of the matter in controversy. Costs rise with increasing amount in controversy. However, the relative cost compared to the matter in controversy decreases.[14] **5**

The ICC Court calculates the amount in controversy by way of adding up the figures stated in the initial prayers for relief. Set off defenses are added as well.[15] Interest is only included in the calculation of the amount in controversy if it is capitalized.[16] When the amount in controversy is not stated in the initial prayers for relief, the ICC estimates it at its discretion.[17] For the methods of calculation see Art. 1 and 2 of Appendix III.[18] An estimate is often made if non-monetary relief is sought, or if the amount of damage cannot yet be determined.[19] Calculation of the advance is in USD and if necessary converted into **6**

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3 Bühler/Jarvin, *2009*, para. 15.1039.
4 Briner/Hömberg, para. 33; Bühler/Jarvin, *2009*, para. 15.1040.
5 Voser, *ASA Bull. 2011*, p. 810.
6 Fry/Greenberg/Mazza, para. 3-1324.
7 Fry/Greenberg/Mazza, para. 3-1316.
8 See <http://www.iccwbo.org/court/arbitration/id4088/index.html>.
9 Briner/Hömberg, para. 33;Fry/Greenberg/Mazza, para. 3-1315.
10 Bühler/Jarvin, *2009*, paras. 15.1044 to 15.10445.
11 Gu, *J.Int.Arb. 2005*, p. 167.
12 Bühler/Jarvin, *2009*, para. 15.1098.
13 Redfern/Hunter/Blackaby/Partasides, para. 1.166.
14 Bühler/Jarvin, *2009*, para. 15.1047; Craig/Park/Paulsson, p. 386.
15 Reiner/Jahnel, para. 22 at Art. 30.
16 Reiner/Jahnel, para. 8 at Art. 30.
17 Bühler/Jarvin, *2009*, para. 15.1048; Derains/Schwartz, p. 338.
18 Reiner/Jahnel, para. 9 at Art. 30.
19 Bühler/Jarvin, *2009*, paras. 15.1049 – 15.1050, with examples.

USD with the rate effective on the date of filing.[20] This does not find unanimous assent, as the foreign exchange risk is fully shifted to the arbitrators. To fully understand costs under the rules, one should refer to Art. 37 and Appendix III, which contain more details on the elements of costs and expenses.[21]

B. Scope of the Provision

7 Article 36 covers specific costs only: institutional cost, arbitrators' fees and out of pocket expenses.[22] The advances cover neither legal costs of the parties nor the fees and expenses of tribunal appointed experts.[23] Fees for the arbitrators are based on a range and ultimately determined by the Court based on the circumstances of the case at the end of the proceeding. For calculating the advance, averages for the arbitrators' fee are used,[24] taking into account the place of arbitration, arbitrators travel cost and complexity of the case.[25]

8 The filing fee is not addressed in Art. 36, but finds it basis in Art. 1(1) Appendix III. A final decision for all cost aspects of the proceedings is covered by Art. 37.

C. Paragraph 1

9 Paragraph 1 permits the Secretary General to ask for a provisional advance to be borne by claimant.[26] Although he has considerable discretion and may decide not to ask for a provisional advance,[27] it is routinely requested.[28] The Secretary General may determine it at any time after the receipt of the notice of arbitration and prior to the advance set by the ICC. He may delegate this task, which is routinely done, to the General Counsel or the Deputy Secretary General.[29]

10 The advance comprises (i) the administrative expenses resulting from the scale, (ii) the minimum on the scale of arbitrators' fees, and (iii) the expected reimbursable expenses of the Arbitral Tribunal incurred with respect to the drawing of the Terms of Reference (Appendix III, Art. 1(2)).[30] These calculations are made on the basis of claimant's claim only. Current practice indicates that the provisional advance is usually in the range of 25% to 35% of the advance as calculated for the entire arbitration.[31] The filing fee of USD 3000, paid in accordance with Art. 1(1) of Appendix III, is taken into account when calculating the provisional advance.[32] At present it is capped at USD 150'000.[33]

11 Should the Court come to the conclusion that there is no *prima facie* arbitration agreement referring to the ICC, so that the provisional advance was in excess of the fees generated, it returns unused amounts.[34]

12 The file can be transferred to the tribunal once the provisional advance has been paid, not the advance referred to in paragraph 2.[35] The deadline for payment usually coincides with Respondent's deadline for the answer.[36] Claimant will be given 30 days with a potential for extension of the limit.[37] The last sentence

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20 Bühler/Jarvin, *2009*, para. 15.1051.
21 Fry/Greenberg/Mazza, para. 3-1315.
22 Bühler/Jarvin, *2009*, para. 15.1039.
23 Reiner/Jahnel, para. 7 at Art. 30.
24 Reiner/Jahnel, para. 6 at Art. 30.
25 Derains/Schwartz, p. 338.
26 Fry/Greenberg/Mazza, para. 3-1317. Court approval is not required (Fry/Greenberg/Mazza, para. 3-1328).
27 Derains/Schwartz, p. 333. However, this is routinely done (Fry/Greenberg/Mazza, para. 3-1329).
28 Reiner/Jahnel, para. 4 at Art. 30,Fry/Greenberg/Mazza, para. 3-1334.
29 Fry/Greenberg/Mazza, para. 3-1328.
30 Fry/Greenberg/Mazza, para. 3-1333.
31 See <http://www.iccwbo.org/court/arbitration/id4088/index.html>.
32 Reiner/Jahnel, para. 3 at Art. 30.
33 Fry/Greenberg/Mazza, para. 3-1333.
34 Reiner/Jahnel, para. 4 at Art. 30.
35 Reiner/Jahnel, para. 2 at Art. 30, Fry/Greenberg/Mazza, para. 3-1338. See also Art. 16 of the ICC Rules.
36 Reiner/Jahnel, para. 2 at Art. 30.
37 Bühler/Jarvin, *2009*, para. 15.1054.

of Art. 36(1), which is new, clarifies that any payment made by claimant will be taken into account in the calculation of the claimant's advance on costs.

D. Paragraph 2

Paragraph 2 is directed at the ICC Court rather than the Secretary General. The Court sets a cost advance as soon as practicable,[38] usually as soon as the answer to the statement of claim has been received or the time for such answer expired,[39] or when the file is transferred to the tribunal.[40] An exception is made only for very high amounts in controversy.[41] **13**

The comments concerning the determination of the amount made at paras. 6 to 8 apply. Parties can estimate the cost advance by using the internet-based calculator on the ICC website.[42] Previously paid sums, such as the provisional advance or the filing fee, are taken into consideration when setting the amount of the advance on cost.[43] This means that any sums previously paid by one party are deducted from the amount to be paid by it as an advance.[44] **14**

Ordinarily the advance is set as a single payment meant to cover the entire cost of the arbitration. However, installments are possible.[45] The advance is preliminary in nature and may, if required, be readjusted during the arbitration.[46] The total cost will only be evident once the award is presented.[47] In exceptional circumstances, separate advances instead of a single one can be set.[48] Paragraph 2 (formerly Art. 30(3)), spells out that the payment of the advance should be made in equal shares. This duty derives from the need to treat the parties equally.[49] The principle is repeated in Art. 1(5) of Appendix III. **15**

The advance on costs fixed by the Court pursuant to Art. 36(2) shall be payable in equal shares by the claimant and the respondent.[50] Should separate costs be fixed for different claims, Art. 36(3) applies. **16**

Article 36(2) adds specific reference to claims under Art. 7 or 8 concerning additional and multiple parties. In such cases Art. 36(4) applies. **17**

E. Paragraph 3

Article 36(3) permits the Court to set separate cost advances for claimant and respondent. As a consequence of such separate cost assessments, the duty to pay the advance in equal shares becomes a duty to pay only the costs fixed for one's own claims.[51] The same content is found in Art. 30(3) last sentence of the 1998 Rules. **18**

The Court can prevent this occurrence and at the same time ensure that the claims advanced are not frivolous. Claims without the advance paid may be dismissed without affecting the remaining claims. **19**

Cases under Art. 7 or 8 are excluded from Art. 36(3).[52] **20**

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38 Derains/Schwartz, p. 336.
39 Fry/Greenberg/Mazza, para. 3-1317.
40 Reiner/Jahnel, para. 5 at Art. 30.
41 Reiner/Jahnel, para. 6 at Art. 30.
42 See <http://www.iccwbo.org/court/arbitration/id4097/index.html>.
43 Reiner/Jahnel, para. 5 at Art. 30.
44 Reiner/Jahnel, para. 11 at Art. 30.
45 Fry/Greenberg/Mazza, para. 3-1358.
46 Derains/Schwartz, pp. 339-340.
47 Bühler/Jarvin, *2009*, paras. 15.1073 to 15.1074.
48 Reiner/Jahnel, para. 9 at Art. 30.
49 Reiner/Jahnel, para. 10 at Art. 30; Schäfer/Verbist/Imhoos, p. 138.
50 Fry/Greenberg/Mazza, para. 3-1317.
51 Fry/Greenberg/Mazza, para. 3-1372.
52 Fry/Greenberg/Mazza, para. 3-1370.

F. Paragraph 4

21 Article 36(4) addresses the cost issues related to multi-party or multi-claim proceedings pursuant to Art. 7 and 8 separately for the first time. The default position remains to fix only one advance.[53] This is a welcome innovation, which makes the separation and the calculation of costs more fair and transparent. While the Court has discretion to assess costs and allocate them to a party, this discretion is necessary for a flexible application. Unfortunately, it reduces predictability for the parties to a certain extent. This provision forms a new power of the Court, instead of requiring the parties to pay equal shares only.[54]

22 Any costs previously assessed against a party will be replaced and superseeded by the cost assessment pursuant to Art. 36(4), should this paragraph be applicable. Previous payments to superseeded cost assessments are applied to the new cost assessment.

23 Emergence of a new party or claim must not necessarily affect the previous cost assessment. The cost assessment remains fixed as previously allocated unless the Court issues a new and superseeding cost assessment. The legal basis of the assessment however is then Art. 36(4).

24 Under Art. 30 of the 1998 Rules, when multiple parties are involved, the aligned parties will share the 50% allotted to their side.[55] In the absence of a differing agreement between aligned parties, all aligned parties owe "their" half of the advance jointly. It is, however, possible to request that separate advance payments are set.[56] When alignments cannot be determined easily, the Court may decide on alternative reapportionment for different parties, usually on the basis of claim and counterclaim.[57]

G. Paragraph 5

25 Part of Art. 30(2) of the 1998 Rules found its way into Art. 36(5). Both permit readjustment of costs.[58] The second sentence of Art. 36(6) stems from Art. 30(3) of the 1998 Rules. According to this rule, one party may, but is not required to, pay the entire sum, when the other party defaults.[59]

26 Any payment previously made will be applied to that party's obligation. Usually this will cover the preliminary advance paid by claimant. The parties are generally requested to pay within 30 days of transfer of the file to the arbitrators.[60] The latest possibility for payment is when the terms of reference are concluded.[61]

H. Paragraph 6

27 Paragraph 6 treats the case of partial or complete non-payment of the advance. The paragraph is applicable in substance to provisional advances.[62]

28 If a party defaults on its payment obligation, the ICC Court will consult with the arbitral tribunal. The Court may direct the tribunal to cease any work. In any case, the ICC sets a second appropriate deadline no shorter than 15 days.[63] If this deadline passes without payment, the Secretary General will request the non-defaulting party (if there is one) to pay the entire advance. Should the non-defaulting party be either unwilling or unable to do so, the Secretary General will set a final deadline of at least 15 days to

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53 Fry/Greenberg/Mazza, para. 3-1383.
54 Voser, *ASA Bull. 2011*, p. 810.
55 Derains/Schwartz, p. 351.
56 Reiner/Jahnel, para. 14 at Art. 30; Schäfer/Verbist/Imhoos, p. 139.
57 Derains/Schwartz, p. 351. For a detailed scenario and calculation method see: Fry/Greenberg/Mazza, para. 3-1396 to 3-1400.
58 Fry/Greenberg/Mazza, para. 3-1320. The Secreteriat constantly monitors the cost.
59 Reiner/Jahnel, para. 13 at Art. 30.
60 Reiner/Jahnel, para. 12 at Art. 30.
61 Reiner/Jahnel, para. 12 at Art. 30.
62 Reiner/Jahnel, para. 17 at Art. 30.
63 Reiner/Jahnel, para. 15 at Art. 30.

both parties. This power rests exclusively with the Secretary General and may not be delegated.[64] A party may object, which interrupts the time limit and causes the case to be referred to the Court.[65]

29 Should the non-defaulting party pay the entire sum, it can obtain an award on cost entitling it to reimbursement.[66] There is debate as to whether such an award can be rendered prior to a finding of jurisdiction.[67] Art. 37(3) empowers the tribunal to issue a decision on costs at any time. In the authors' opinion, without jurisdiction, no award on costs can be rendered validly. The current ICC practice varies.[68] Some tribunals have done so, others not and still others see such an award as emergency relief.[69]

30 If the advance is not paid in full pertaining to a claim, the Court will deem it withdrawn.[70] This applies to counterclaims as well as claimant's claims. If only one cost advance has been issued for the entire case, the entire advance must be paid or dismissal of the entire case will follow.[71] A party may object to the dismissal[72] or request additional time.

31 The sanction of dismissal only applies, however, insofar as previously paid amounts do not already cover the current procedural stage.[73] Should a preliminary advance have been paid, and the terms of reference not yet been signed, it would be disproportionate to dismiss the case. In such cases, the ICC may grant an extension. The length of the extension can be influenced by a number of circumstances. Should, e.g., a litigious proceeding be underway concerning the payment or jurisdiction for the case, the ICC will usually grant an extension until the case is decided.[74]

I. Paragraph 7

32 Set-off claims are taken into account for the calculation of the amount in controversy for the calculation of the advance, insofar as new matters are introduced.[75] As most counterclaims will not be so closely related to the case that no new matters are included, a certain increase in the amount of controversy will occur in most cases.

33 The ICC Court will determine whether a set-off or a counterclaim are to be included in the amount in dispute by considering whether the issues raised by the claim are additional to the issues already raised in the other claims. On this matter, the ICC Secretariat may refer to the arbitral.[76]

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64 Fry/Greenberg/Mazza, para. 3-1421.
65 Fry/Greenberg/Mazza, para. 3-1426.
66 Reiner/Jahnel, para. 15 at Art. 30.
67 Bühler/Webster, paras. 30-35 to 30-37.
68 Fry/Greenberg/Mazza, para. 3-1412.
69 Fry/Greenberg/Mazza, paras. 3-1413 to 3-1415.
70 Reiner/Jahnel, para. 15 at Art. 30; Bühler/Webster, para. 30-44; Fry/Greenberg/Mazza, para. 3-1364.
71 Reiner/Jahnel, para. 16 at Art. 30; Derains/Schwartz, pp. 354-355.
72 Bühler/Jarvin, *2009*, para. 15.1089.
73 Reiner/Jahnel, para. 18 at Art. 30.
74 Reiner/Jahnel, para. 19 at Art. 30. The practice of dismissing a case without prejudice is permissible in Switzerland (cf. also BGer. 4A_600/800 paras. 4-5).
75 Bühler/Jarvin, *2009*, paras. 15.1093 to 15.1094; Derains/Schwartz, pp. 356-357.
76 Fry/Greenberg/Mazza, para. 3-1436.

Article 37: Decision as to the Costs of the Arbitration

(1) The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

(2) The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.

(3) At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.

(4) The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.

(5) In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.

(6) In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

I. Purpose of the Provision

1 The provision was introduced in 1998.[1] It serves to regulate costs control, as it does not allow the arbitrators to unilaterally set their fees.[2] It is also intended to permit predictability to the costs of the proceedings.[3] In 2007, the ICC published a report on *Techniques for Controlling Time and Costs in Arbitration*.[4]

II. Derogation from the Provision

2 It is not permitted for arbitrators to have separate fee arrangements. Although the parties may agree on division of costs either in their arbitration agreement or thereafter, they cannot limit the arbitrators or the ICC's fees by agreement.

3 The only substantial change from Art. 31 of the 1998 Rules to Art. 37 is that para. 3 now allows the tribunal to order payment of costs it made a decision on and the adding of paras. 5 and 6.

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1 Derains/Schwartz, p. 332.

2 Briner/Hömberg, para. 74.

3 Bühler/Jarvin, *2009*, para. 15.1103.

4 The report is available online at: <http://www.iccwbo.org/uploadedFiles/TimeCost_E.pdf>; see also Newmark, p. 94.

III. Content of the Provision

A. Paragraph 1

Article 37(1) defines two groups of costs of the arbitration: procedural costs and parties' costs.[5] In a nutshell, the procedural costs refer to the costs required to have the arbitration, while the parties' costs are costs and expenses the parties incur in the pursuit or defense of their claim. **4**

The arbitrators' fees are calculated in accordance with a variable fee schedule, which provides only maximum – minimum range for fees.[6] Costs for administrative assistance, such as a personal secretary, or the secretary of the tribunal are not separate costs, but are included in the arbitrator's fee.[7] In a three-member tribunal, the fees of the arbitrators are usually allocated differently for party arbitrators and the chairman (e.g., in a 30 %, 30 % and 40 % split).[8] The court may, however, define another apportionment, in general after consultation of the arbitrators. **5**

The procedural costs consist of arbitrators' fees and expenses,[9] as well as administrative costs of the ICC.[10] Arbitrator expenses include, but are not limited to, room and board, transportation costs, copies, costs for telecommunication, and advances by the tribunal for, e.g., translators or reporters.[11] Arbitrators' personal expenses are allotted in a per diem calculation.[12] The Secretariat has issued guidelines relating to expenses, amended from time to time, which are typically sent to the arbitrators together with the confirmation of their appointment by the Court. The Secretariat will not reimburse expenses it deems inappropriate according to those guidelines. **6**

The Court determines the ICC's fee, which is an administration fee,[13] at the same time as the draft award is accepted,[14] in accordance with the scale in force at the time of the commencement of the arbitral proceedings. These scales are adjusted periodically.[15] ICC administrative costs are a flat fee, so that no additional costs will be thrust on the parties.[16] **7**

The ICC costs system is based on an *ad valorem* calculation.[17] The underlying schedules are adjusted periodically and serve as a benchmark.[18] The figure for the basis of calculation is derived from the figure of the matter in controversy. The costs increase with increasing amount in controversy; however, the percentage compared to the matter in controversy is digressive.[19] **8**

The court arrives at the litigious amount by way of a calculation of the figures stated in the final pleadings. Set off defenses and counterclaims are added.[20] Interest is only included in the calculation of the amount in controversy if capitalized.[21] The forecast made in the cost advance according to Art. 30 is not binding. The ICC makes a new determination at the end of the proceeding. **9**

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5 Bühler/Jarvin, *2009*, para. 15.1107.

6 Derains/Schwartz, p. 358; Fry/Greenberg/Mazza, para. 3-1445.

7 Reiner/Jahnel, para. 5 at Art. 31; Bühler/Jarvin, *2009*, para. 15.1129.

8 Derains/Schwartz, p. 358; Fry/Greenberg/Mazza, para. 3-1465. Another common variation is 25 %, 25 %, 50 %.

9 Art. 31(1), first sentence.

10 Reiner/Jahnel, para. 1 at Art. 30.

11 Reiner/Jahnel, para. 1 at Art. 30.

12 For further information, see the revised ICC notice to arbitrators: personal and arbitral tribunal expenses: <http://www.iccdrl.com/CODE/LevelTwo.asp?page=Secretariat%20Notes&tocxml=ltoc_SecretNotesAll.xml&contentxsl=insight.xsl&contentxml=arbLandingPageSecretariatNotes.xml&tocxsl=DoubleToc.xsl&Locator=12&AUTH=>.

13 Craig/Park/Paulsson, p. 385.

14 Reiner/Jahnel, para. 2 at Art. 31.

15 The last adjustment took effect in May 2010, and the costs scale also applies under the new 2012 ICC Rules.

16 Bühler/Jarvin, *2009*, para. 15.1110.

17 Redfern/Hunter/Blackaby/Partasides, para. 1.166.

18 Fry/Greenberg/Mazza, para. 3-1455.

19 Bühler/Jarvin, *2009*, para. 15.1047; Craig/Park/Paulsson, p. 386.

20 Reiner/Jahnel, para. 22 at Art. 30.

21 Reiner/Jahnel, para. 8 at Art. 30.

10 Calculation will be in USD and if necessary converted into USD with the rate effective on the date of filing.[22] Art. 2(13) of Appendix III clarifies that the amount stated is without VAT.[23]

11 Fees of experts appointed by the arbitral tribunal do not neatly fit into one of the categories, as the court does not determine them. They are procedural costs nonetheless. In cases in which an expertise is ordered by the Arbitral Tribunal,[24] the latter fixes the fees and expenses of the expert(s)[25] and is responsible for the management and payment of such fees and expenses by the parties. The advance on costs required by ICC does not cover the costs of an expertise. In general, the Arbitral Tribunal will ask the parties to advance costs for the expert.

12 Parties' costs include the *reasonable* legal and other costs incurred by the parties in the pursuit of their rights in the course of the arbitration. Costs of the parties are not subject of any specific rules and no particular tariffs. They are usually the largest cost factor in arbitration.[26] The arbitral tribunal will examine the costs submitted to them for reasonableness in light of the complexity of the case.[27] Costs of the parties include external legal fees, but not in house counsel. While many companies have internal billing so that the costs would be provable, rates are arbitrary and the in house counsels are part of the party.[28] Time of the parties and their management is not to be compensated.[29]

13 It is not against public policy in Switzerland to limit the amount of legal fees reimbursed.[30] The tribunal must give each party the right to be heard regarding the costs of the other party.[31]

14 The arbitral tribunal has to decide on both percentage of liability for the costs of the arbitration on the amount and distribution of reimbursable parties costs.[32] It is not mandatory to allot costs exactly in the percentage of victory.[33]

15 Regardless of the fees put forth, parties must have the opportunity to be heard concerning the costs of the opposing side.[34] The decision on costs is usually included in the final award.[35]

16 If the costs are less than what had been paid in the advance, the Secretary General will reimburse the parties, absent agreement otherwise between them, in the same percentage as payments were received.[36]

B. Paragraph 2

17 Article 31(2) of the 1998 Rules encompassed two concepts. First, the ICC may deviate from its costs schedules in exceptional circumstances.[37] This is determined on a case-by-case basis.[38] Factors for a deviation include difficulty of the questions, length of the proceedings, and number of issues decided. Ordinarily, the range provided suffices for any eventualities.

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22 Bühler/Jarvin, *2009*, para. 15.1051.
23 Fry/Greenberg/Mazza, para. 3-1469.
24 Bühler/Webster, para. 31-23.
25 Reiner/Jahnel, para. 3 at Art. 31.
26 Bühler/Webster, para. 31-5.
27 Reiner/Jahnel, para. 6 at Art. 31; Bühler/Jarvin, *2009*, para. 15.1150; Bühler/Webster, para. 31-8.
28 Bühler/Webster, paras. 31-18 to 31-20.
29 Bühler/Webster, para. 31-26.
30 BGer. 4P.280/2005 para. 2.2.1.
31 Reiner/Jahnel, para. 6 at Art. 31.
32 Reiner/Jahnel, para. 1 at Art. 31.
33 Lachmann, para. 3186.
34 Lachmann, para. 3187.
35 Lachmann, para. 3185.
36 Reiner/Jahnel, para. 2 at Art. 31.
37 Bühler/Jarvin, *2009*, para. 15.1157.
38 Derains/Schwartz, p. 367.

Second, interim or partial awards may contain decisions on costs as well, insofar as they concern party costs.[39] This second concept is now contained in paragraph 3. ICC administrative costs, however, are flat fees and cannot be separated for individual steps. These will only be decided on in the final award.[40] **18**

C. Paragraph 3

Article 37(3) states explicitly that a tribunal can make decisions on costs at any time during the proceedings, not only in awards.[41] This power already existed under Art. 31(2) 1998 Rules, but was rarely used. However, the tribunal is not permitted to decide on those costs that are to be fixed by the Court. This is to clarify that the Court's authority over the final costs and arbitrators' fees is not affected by the tribunal's competence to decide on costs in the interim. **19**

As an innovation, Art. 37(3) grants the explicit power to the tribunal to order payment. What effect the power stated in this provision will have is unclear. Tribunals have no means to enforce payment. In order to have any kind of enforceability, the decision would have to be in the form of an award which can be enforced or would have to be addressed to a court for enforcement. **20**

According to a 2010 decision of the Swiss Federal Supreme Court, decisions of arbitrators concerning advances on costs or costs incurred are procedural orders,[42] and as such they are not open to challenge in Switzerland.[43] Nor are they enforceable.[44] This is true even if the tribunal seeks reimbursement of fees already earned. The decision on costs is the equivalent of an invoice as it only concerns the relationship between parties and arbitrators.[45] As a result, the arbitral tribunal can not issue an enforceable order or award, unless the decision forms part of a partial award and a party seeks enforcement of that award.[46] **21**

D. Paragraph 4

Article 37(4) was contained in Art. 31(3) of the 1998 Rules. There are no substantive changes in the 2012 Rules. Costs must be decided on. Even if the arbitrator decides to be incompetent to decide the case, he has to decide on costs accrued hitherto.[47] An award is rendered to decide on costs, unless the arbitration is terminated by agreement, in which case the parties also have to include the allocation of the costs.[48] **22**

In spite of the wording of Art. 31(3) of the 1998 Rules, the award relating to costs must not necessarily be contained in the final award; costs can be awarded in partial awards as well. However, in the final award any costs not yet ascertained and allocated must be treated so as to not leave any issues unresolved.[49] **23**

The 1998 Rules do not contain guidelines on the apportionment of the costs, leaving this in the arbitrators discretion.[50] Arbitrators do not have to follow the rules applicable to the proceeding, the merits or the similar.[51] It may also be ordered that each party bear its own costs.[52] However, the criterion usually applied in international arbitration is the comparative percentage of the case won, not only in the **24**

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39 Bühler/Jarvin, *2009*, para. 15.1158.

40 Reiner/Jahnel, para. 8 at Art. 31.

41 Voser, *ASA Bull. 2011*, p. 811; as to the three different points of the proceedings at which the arbitral tribunal may make decisions on costs, cf. Fry/Greenberg/Mazza, para. 3-1485.

42 As to the distinction between procedural orders and awards, see above commentary of Arroyo on Art. 191 PILS (Chapter 2, paras. 13-15).

43 BGE 136 III 597 paras. 4.2, 5.1-5.2.

44 BGE 136 III 597 para. 5.2.2.

45 BGE 136 III 597 para. 5.2.1.

46 BGE 136 III 597 para. 5.2.2.

47 Bühler/Jarvin, *2009*, para. 15.1181.

48 Derains/Schwartz, p. 368.

49 Derains/Schwartz, p. 369.

50 Reiner/Jahnel, para. 9 at Art. 31; Bühler/Jarvin, *2009*, para. 15.1160.

51 Bühler/Jarvin, *2009*, para. 15.1169.

52 Bühler/Jarvin, *2009*, para. 15.1177.

substance but also with regard to procedural matters.[53] Yet as mentioned, arbitrators are not under a duty to follow this widespread *costs follow the event rule* under to which costs will generally be allocated according to the result of the case.[54] Under the Swiss *lex arbitri* (i.e., Chapter 12 PILS), an arbitral award which allocates the costs "in view of the circumstances" is not contrary to public policy and thus not open to challenge.[55]

E. Paragraph 5

25 Article 37(5) specifies a factor which may, but does not have to be considered by the arbitrators, in the allocation of costs. The arbitral tribunal may take into account, e.g., the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner. This provision clarifies that the relative prevailing of one party over the other should be the only factor to influence a decision on costs.[56]

26 This provision forms a part of the series of provisions intended to expedite the proceedings. It is connected to the parties duty to conduct the proceedings efficiently.[57] Clarifying the tribunal's power to take dilatory behavior into account in such a prominent manner, i.e., as only one criterion specifically mentioned, gives underlines the effort to encourage parties to refrain from using procedural tools which are only designed to slow, hinder or make the proceedings more expensive.

F. Paragraph 6

27 Paragraph 6 is an innovation of the 2012 Rules which partially reflects previous ICC practice.[58] Parties are entitled to have a decision on costs made by the Court and allocation of costs made by the tribunal. Should the issue of costs remain unresolved, the arbitration cannot be considered completed. Arbitrations which are not terminated by an award are often settled and the costs of the arbitration as well as their allocation will form part of the settlement. Only upon lack of agreement will one party have the right to demand a decision on the allocation of costs by the tribunal. This is both a sensible and reasonable rule.

28 The last sentence of Art. 37(6), however, may cause concern under certain circumstances. It addresses the situation when the arbitration is in its early stages, namely prior to the formation of the tribunal. Such may be the case if an arbitration had been filed solely to apply pressure to a recalcitrant contractual party and as a mere strategic device. It may also be possible that the respondent (or claimant) reassesses its chances or the cost-benefit balance and the case becomes moot. The rule is intended as a device to permit the Court to force payment of advances, which was not possible previously. It is also intended as a device to discourage the filing of claims for strategic purposes and as such is in line with a number of other tools used by the ICC to combat the problem of ever higher costs and lack of expediency, as well as a tendency of arbitration to become "the new litigation".

29 In Article 37(6), the last sentence permits any party to demand the formation of the tribunal for the only purpose of deciding on the allocation of costs upon termination of the arbitration without award. The drawback of this solution is, however, that the formation of a tribunal simply to decide on the allocation of costs causes additional costs. Additionally, it is unclear what happens if no party requests the formation of the tribunal. It will have to be seen how the practice of the ICC will resolve that problem.

30 The Court has developed a standard practice for administrative expenses. The filing fee is never reimbursed. After making decisions but before transmission of the file to the arbitral tribunal, USD 5000 are

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53 Reiner/Jahnel, para. 10 at Art. 31.

54 Bühler/Jarvin, *2009*, para. 15.1176.

55 BGE 116 II 373 para.7c (admittedly, the Supreme Court in this decision held that even though the arbitrators had only referred to "the circumstances" when allocating the costs, it was clear that they had based their decision on the costs follow the event rule; see BGE 116 II 373 para. 7c, last sentence); cf. also BGer. of 9 June 1998 para. 3 b/dd, *ASA Bull. 1998*, p. 660.

56 Voser, *ASA Bull. 2011*, p. 811; Fry/Greenberg/Mazza, para. 3-1488.

57 See Art. 22 ICC Rules.

58 Voser, *ASA Bull. 2011*, p. 811.

requested; after transmission of the case file, approximately 25 % of the ICC administrative expenses, which are provided by the scales. If a case is withdrawn after the terms of reference have been established, 50 %, and after the rendering of a partial award, 75 % of the ICC administrative expenses provided by the scales are requested.[59]

Arbitrators are paid (at least) 50 % of the minimum fees provided by the scales after establishing the terms of reference, and 100 % after rendering a partial award.[60] **31**

[59] Fry/Greenberg/Mazza, para. 3-1501.

[60] Fry/Greenberg/Mazza, para. 3-1502.