English Commercial Court: Article 30 of ICC Rules creates binding obligation to pay allotted share of advance on costs

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The English Commercial Court has clarified the nature of an allotted share of an advance of costs pursuant to Article 30 of the ICC Rules 1998 (in broad terms the same as Article 36 of the ICC Rules 2012).

The case is now the key decision of the English courts on this issue, confirming that Article 30 of the Rules (and therefore Article 36 of the 2012 Rules) creates a binding contractual obligation under English law to pay the allotted share and providing clarification to claimants on the options available where a defendant refuses to pay an advance on costs.

The facts

The underlying dispute in BDMS Limited v Rafael Advanced Systems concerned sums allegedly due to the claimant from the defendant by way of ‘success fees’ under a consultancy agreement. Pursuant to clause 7 of the agreement, the parties had agreed to submit any disputes arising out of or in connection with the agreement to arbitration under the rules of the International Chamber of Commerce.

Following the filing of a request for arbitration with the ICC and the appointment of a sole arbitrator, the ICC wrote to the parties fixing the advance of costs at US$27,000 pursuant to Article 30(2) of the Rules, which provides that: “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 costs for the claims and counterclaims which have been referred to it by the parties […]”.

Article 30(3) of the Rules provides:

“The advance on costs fixed by the Court shall be payable in equal shares by the Claimant and the Respondent. Any provisional advance paid on the basis of Article 30(1) will be considered as a partial payment thereof. However, any party shall be free to pay the whole of the advance on costs in respect of the principal claim or the counterclaim should the other party fail to pay its share […]”.

Article 30(4) of the 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must be not less than 15 days, on the expiry of which the relevant claims, or counterclaims, shall be considered as withdrawn […]”.

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The parties were invited to pay an equal share of this advance pursuant to Article 30(3) of the Rules. The claimant paid its share of the advance; however, the defendant made it clear that it did not intend to pay its share of the advance of costs until security for its costs was provided by the claimant.

The claimant subsequently purported to accept the defendant's refusal to pay its share of the advance on costs as a repudiatory breach of the ICC Rules and clause 7 of the Agreement and commenced proceedings in the English Commercial Court. The claimant also wrote to the ICC stating that as the defendant continued to refuse to pay the advance on costs, the ICC claim should be withdrawn pursuant to Article 30(4) of the Rules. The ICC then notified the parties of the claimant's voluntary cessation and withdrawal of the ICC claim.

The English Commercial Court had to consider, among other things, whether the defendant's failure to pay its share of the advance of costs in accordance with Article 30(3) of the Rules amounted to a breach of a legally binding reciprocal obligation between the parties to pay their share of an advance on costs.

The decision

The court acknowledged that ICC arbitration decisions and commentaries in this area differed on the issue of whether a requirement to pay an advance on costs under Article 30(3) gave rise to a contractual obligation to the other party (known as the "contractual approach") or merely to a procedural obligation owed to the ICC Court (the "interim measure approach"). The Court considered that on the former view a substantive claim arises and an interim award may be sought on that basis. However, on the latter view, the issue was one of procedure rather than substance and the only recourse would be by way of interim measures.

After consideration of the two approaches and the relevant commentary Mr Justice Hamblen held that the contractual approach was consistent with English law:

"It would therefore appear that the majority of arbitral and court decisions favour the contractual approach, as do the majority of commentators. In my judgment, as a matter of English law that approach is consistent with the contractual agreement to arbitrate under the Rules and the mandatory terms in which Article 30(3) is expressed - "shall be payable".

Mr Justice Hamblen went on to hold:

"In the present case it was expressly agreed that the arbitration "shall take place under the rules of the International Chamber of Commerce" and thereby that the parties would, as a matter of contract, comply with mandatory requirements imposed on the parties under the Rules...I accordingly conclude that a failure to pay the advance required under Article 30(3) does involve a breach of the arbitration agreement".

Mr Justice Hamblen also noted that it was accepted that an arbitral tribunal can order the defaulting party to pay the advance, either by means of an interim award or interim measure.

Ultimately, however, the court held that such breach did not go to the root of the contract such that it would constitute a repudiatory breach or deprive the claimant of its right to arbitrate. The court therefore held for the defendant and granted a mandatory stay of the English court proceedings pursuant to section 9 of the Arbitration Act 1996, on the basis that the arbitration agreement remained operative.

Conclusion

The decision in BDMS is clear authority for the proposition that, under English law, failure to pay an allotted share of an advance on costs in ICC proceedings is a breach of the arbitration agreement, although it will be a question of fact in each case as to whether such a breach is repudiatory. It is therefore open to an arbitral tribunal to order the defaulting party to pay the advance either by way of an interim award or an interim measure.

While our experience suggests that, despite the contractual analysis, there is still uncertainty as to the availability of interim relief in these circumstances, the decision is to be welcomed as bringing much needed clarification to the issue, at least under English law.

Find out more about this case by contacting Matthew Saunders or Oliver Perez.