

1 July 2013

Briefly on Advance on Costs under the SCC Rules

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I. General remarks

Under Article 43 SCC Rules, the Costs of the Arbitration consist of (i) the fees of the arbitral tribunal, (ii) the administrative fee, and (iii) the expenses of the arbitral tribunal and the SCC.

Under Article 45 SCC Rules, the SCC Board determines an amount to be paid by the parties as an advance on costs. Appendix III of the SCC Arbitration Rules contains a schedule of costs, which goes from amounts in dispute between EUR 25.000 - EUR 100.000.000. When the amount in dispute exceeds EUR 100.000.000, the SCC Board determines the advance on costs based on a case by case analysis.

The advance on costs is determined considering (i), (ii) and (iii) and also taking into account other factors such as the amount in dispute, the complexity of the dispute (complex legal question, or extensive evidence); the type of dispute; number of parties; if the parties present counterclaims or set-offs; if any jurisdictional objection is raised; if multiple languages need to be used in the procedure; the number of arbitrators.

At the Board meeting, the Secretariat proposes to the SCC Board the amount that the parties must pay as an advance on costs. The Secretariat does so based on the above criteria.

When calculating the advance on costs, the Secretariat first determines the amount in dispute. To do so, the Secretariat considers all the claims involved (claims, counterclaims, and set-offs). However, alternative claims are not considered for the calculation.

Claims are calculated in EURO at the rate prevailing on the date the request for arbitration is received at the SCC.

1 July 2013

II. Previous SCC practice in investment cases 2010-2012

During 2010-2012, eight (8) investment cases administered under the SCC Rules were subject to decisions on advance on costs.

Of these 8 investment cases, three (3) involved an amount in dispute exceeding EUR 100.000.000.

Investment cases with amounts in dispute exceeding EUR 100.000.000

Example 1

Year of registration:	2010
Type of dispute:	ECT
Applicable rules:	SCC Rules
Number of arbitrators:	3
Amount in dispute:	EUR 100.000.000 (preliminary assessment by the parties)
Advance on costs:	EUR 612.000

In making its decision, the SCC considered that the dispute was complex, originating from several agreements and that the amount in dispute was likely to later exceed the initial EUR 100.000.000.

Two years later, the amount in dispute had increased up to 2, 8 billion USD. The arbitrators requested the SCC to increase the advance on costs accordingly, also considering the number of hours of work devoted to the dispute, which was considered above average.

The SCC decided to increase the advance on costs. For this purpose, the SCC took into account the complexity of the case as demonstrated by the number of hours the arbitrators had spent working with the case, and the volume of the submissions and exhibits presented by the parties. The SCC noted that the respondent had filed a jurisdictional objection, that the case would include a 1 day preliminary hearing and 3 procedural orders, and that the case was at a stage of extensive production of documents.

1 July 2013

The SCC also considered the length of the case, noting that it had been administered by the institute for more than 2 years and was expected to continue for another year. In particular, the SCC considered the merits of the case, which were highly complex and included several claims.

Taking these circumstances into account, the SCC increased the arbitrators' fees. The administrative fee was set at the maximum of EUR 60.000 and security for expenses was set at 15% of the total costs, amounting to EUR 108.000, which increased the advance on costs up to EUR 828.000.

1 July 2013

Example 2

Year of registration:	2010
Type of dispute:	ECT
Applicable rules:	SCC Rules
Number of arbitrators:	3
Amount in dispute:	EUR 1.459.990.000
Advance on costs:	EUR 575.000

In determining the advance on costs, the SCC noted that in cases where the amount in dispute exceeds EUR 100.000.000, the SCC determines the fees for the arbitrators on a case by case basis. The SCC is not compelled to follow earlier determinations on advance on costs, but it is common that the SCC looks at similar cases for guidance. In those cases the SCC has taken into account *inter alia*, the complexity of the merits, procedural difficulty and the length of the proceedings.

In this case, the SCC noted that the proceedings were at an early stage, which made it difficult to estimate the prospective length of the proceedings as well as the complexity of the case.

The SCC further considered that although the amount in dispute was very high, a party had raised a jurisdictional objection and it was not clear how the case would develop after the jurisdictional phase.

Total arbitrators' fees plus administrative fees amounted to EUR 500.000. Security for tribunal and SCC expenses was set at 15% of that amount, at EUR 75.000.

1 July 2013

Example 3

Year of registration:	2012
Type of dispute:	BIT
Applicable rules:	SCC Rules
Number of arbitrators:	3
Amount in dispute:	EUR 1.000.000.000
Advance on costs:	EUR 425.000

The claimant's preliminary estimate of the amount in dispute was 1 billion EUR. The SCC noted that it was likely the amount would increase in the future. The administrative fee was set below the maximum of EUR 60.000, as it was not clear that the case would need extensive administration. The SCC set the advance on costs at a level which gave some room to increase the advance on costs and the administrative fee in the future, should it be necessary.

Notice

The SCC exercises its discretion in deciding on the advance on costs. The above mentioned amounts describe previous decisions by the SCC based on the specific circumstances of each case. They are not binding for future decisions on advance on costs decided by the SCC.