INTERNATIONAL COMMERCIAL ARBITRATION COURT

Approved
by Decision of Presidium of ICAC at Ukrainian CCI
dated 2 August 2022

RECOMMENDATIONS OF INTERNATIONAL COMMERCIAL ARBITRATION COURT AT THE UKRAINIAN CHAMBER OF COMMERCE AND INDUSTRY (ICAC) REGARDING COMPENSATION TO PARTIES FOR LEGAL ASSISTANCE COSTS WHEN CONSIDERING DISPUTES AT ICAC

According to Paragraph 2 of the fourth part of Article 7 of the ICAC Rules, the ICAC Presidium analyzed the arbitration practice regarding the application of the Rules in terms of compensation to parties for legal assistance costs.

As the analysis shows, the Arbitral Tribunals mainly uses balanced, reasonable, and substantiated approaches when deciding the issue to compensate to parties for legal assistance costs. At the same time, there were some cases of ambiguity on this issue, which even became a basis for the arbitrator to express a separate opinion on this matter to the arbitration award.

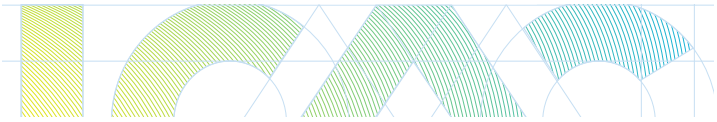
In the absence of clear instructions in the arbitration agreement of the parties, the Arbitral Tribunal - when deciding on the issue to compensate to parties for legal assistance costs - shall be guided by the law regulating procedural issues of arbitration, which includes the national legislation of the place of arbitration (*lex loci arbitri*), as well as the applicable agreed arbitration rules.

According to Paragraph 2 of Section VIII of the Schedule on Arbitration Fees and Costs (Appendix to the ICAC Rules), expenses incurred by the successful party in connection with the protection of its interests in proceedings conducted at the ICAC (travelling expenses of the parties' representatives, lawyers' fees, and so on) may be charged to the other party to the extent that the Arbitral Tribunal determines that the amount of such costs is reasonable.

According to the first and seventh parts of Article 52 of the ICAC Rules, each of the parties must prove the circumstances that it refers to as the basis of its claims or objections. The Arbitral Tribunal determines the relevance, admissibility, authenticity and sufficiency of evidence submitted by the parties. Evaluation of evidence shall be carried out by arbitrators according to their inner conviction.

The analysis of Paragraph 2 of Section VIII of the Schedule on Arbitration Fees and Costs indicates that costs are to be reimbursed to the successful party. It may be the Claimant, as well as the Respondent – if there is a case of filing an unsubstantiated lawsuit against him/her and the Arbitral Tribunal decides to reject the lawsuit. At the same time, the Arbitral Tribunal shall be guided by the following criteria: reasonableness and efficiency of these costs. Also, these costs must be actually incurred by the party.

Thus, based on these criteria, the specified expenses must be properly justified and confirmed by evidence (contracts, invoices, bank documents, etc.) that testify to the reality of incurring these expenses, namely



their payment. The amount of costs for payment of legal services must be reasonable and commensurate with the complexity of the case and the work performed (services provided), the time spent on the relevant work (services rendered), the amount of services provided, the work performed, the price of the claim and/or the importance of the case for the party considering the specific circumstances of the case. It must also be assessed whether these services were qualitatively performed, whether the amount of work performed was reasonable in relation to the specific case, and whether the circumstances of the specific case really required the performance of such work and the submission of certain statements, motions, or documents, that is, whether the parties acted economically and efficiently, and whether they contributed to the quick and efficient consideration of the case.

The Arbitral Tribunal must assess the reality of incurring costs for legal assistance, their justification and reasonableness even in those cases, if the failed party did not object to this.

There are decisions with the result of "*relative success*", when, for example, the plaintiff in the arbitration proceedings refuses part of the claims, realizing their groundlessness, or when the Arbitral Tribunal, due to the groundlessness of part of the claims, concludes that the claims are partially satisfied.

In such cases, in addition to the above-mentioned criteria, one should also consider the "*volume of achieved success*". The Arbitral Tribunal, taking into account the circumstances of the case, if only part of the claims were satisfied, may also offset the costs or divide them proportionally, or recognize that both parties were "*equally unsuccessful*" and each of them independently bears its own costs of the arbitration process, including legal assistance.

At the same time, Section IX of the Schedule on Arbitration Fees and Costs stipulates that, taking into account the circumstances of a particular case, it may order a different apportionment of the arbitration fees, additional costs of the arbitration proceedings and expenses of the parties than that specified in Sections VI-VIII of this Schedule, in particular, it may order one party to reimburse any additional expenses incurred by the other party through inappropriate or bad faith acts of such party, including acts causing unjustified delay in the arbitral proceedings.

These may be repeated groundless objections or challenges to jurisdiction, submission of manifestly unfounded statements and motions, intentional misleading of the arbitration panel, concealment or falsification of evidence, groundless denial of the circumstances of the case, initiation of parallel legal proceedings with the aim of disrupting the arbitration, any other actions or bad faith behaviour aimed at destabilizing the arbitration proceedings. However, the provisions of Section IX of the Schedule on Arbitration Fees and Costs shall be applied in exceptional circumstances and with caution.

The Arbitral Tribunal, in the cases provided for by the second part of Article 67 of the ICAC Rules, shall issue an order for the termination of the arbitration proceedings. If there are grounds for terminating the arbitration proceedings regarding the main claim (claims) and filing a claim for the reimbursement of legal assistance costs, the Arbitral Tribunal must issue an arbitral decision terminating the proceedings in the case regarding the main claim (claims) and deciding the matter of reimbursement of legal assistance costs.

The above-mentioned criteria regarding the validity and reasonableness of legal assistance costs also meet international standards. Thus, paragraphs 63 and 64 of the Report of the ICC Commission on Arbitration and Alternative Dispute Resolution on costs awards in international arbitration state that the

common-sense approach is to assess whether the costs are reasonable and proportionate to the amount in dispute or the value of the property in dispute and/or whether these costs are proportionately and reasonably incurred. At the same time, it is proposed to take into account, depending on the circumstances of the case, in particular, the following criteria for determining the reasonableness of costs: (i) reasonableness of rates, number and level of fees when assessing whether the scope of work performed was reasonable; (ii) reasonableness of the level of specialized knowledge, including the legal qualifications of representatives, their level of experience and the participation of a group of specialists or team members; (iii) reasonableness of the amount of time spent at the various stages of the arbitration, and (iv) any disparity between the costs incurred by the parties as an overall measure of reasonableness, but not as a separate factor in itself.

Paragraph 76 of the above-mentioned Report states that the court may award such reasonable costs that have been incurred and paid or to be paid by the party claiming them. And the court must verify the reality of these costs through proper verification.

As stated in paragraph 79 of this ICC Commission Report, the procedural conduct that is taken into account when apportioning costs between the parties may include, in particular: (i) pre-arbitration conduct of the party, and namely improper conduct that did not give an opportunity to avoid arbitration; (ii) *"partisan tactics"* where the parties deliberately interfere with the course of the arbitration proceedings in order to influence the ability of the arbitrator to resolve the dispute; (iii) conflicts aimed at destabilizing the arbitration proceedings and the Arbitral Tribunal; (iv) repeated groundless objections and challenges to jurisdiction; (v) initiating groundless parallel legal proceedings to frustrate the arbitration process; (vi) intentionally subverting the arbitration process to force the arbitrator to recuse himself or to jeopardize the enforceability of the arbitral award. In addition, according to paragraphs 81 and 84 of the said Report, the Arbitral Tribunal may consider the extent to which a party has failed to conduct itself in an efficient, economical, or fair manner or has otherwise engaged in improper or unconscionable conduct, in particular, wilfully failed to comply with requests for production of documents, their preservation, falsified evidence, misled the arbitration.

Similar approaches are used by state courts. The relevant legal position on this issue is set out in the decision of the Grand Chamber of the Supreme Court dated 7 July 2021 in case No. 910/12876/19, which states that "*when determining the amount of compensation, the court shall proceed from the criterion of the reality of attorney's fees (establishing their validity and necessity), as well as the criterion of reasonableness of their size, taking into account the specific circumstances of the case and the financial condition of both parties"*.

The European Court of Human Rights, awarding court costs based on Article 41 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, also proceeds from the fact that the legal assistance costs must be actually incurred and substantiated. Thus, the decision of the European Court of Human Rights as for the case *"East/West Alliance Limited" against Ukraine"* states that the applicant has the right to compensation for legal and other costs only if it is proved that such costs are actual and unavoidable, and their amount is justified. And the decision of the European Court of Human Rights as for the case *"Lavents against Latvia"* indicates that the court only reimburses the expenses, in respect of which it is established that they are necessary, and amount makes a reasonable sum.

Recently, there have been more frequent cases of claims for the collection of a *"success fee"* of lawyers - legal representatives of the parties.

Today, the issue of awarding a "s*uccess fee"* in international arbitration practice is one of the most controversial among other aspects of compensation for costs incurred by the parties.

A "s*uccess fee"* is a subject of an agreement between a party to the arbitration proceedings and its attorney, which provides for the payment of a fee, usually as a percentage of the amount, in the event of an award to the party in arbitration. Obligations arising from such agreements relate exclusively to the party of the arbitration proceedings and its attorney and shall not be taken into account by the Arbitral Tribunal. The party has a right to "*thank his/her lawyer for success"* by paying additional fees, but reimbursement of these costs shall not be made at the expense of the party against whom the judgment was rendered.

The Arbitral Tribunal, guided by Paragraph 2 of Section VIII of the Schedule on Arbitration Fees and Costs, must assess the costs to be compensated at the expense of the other party based solely on whether they are actually incurred, reasonable, justified, and whether they are necessary for protection of the interests of the party in arbitration.