

**Approved
by the Decision of the Presidium
of the ICAC at the Ukrainian CCI
dated 27 July 2023**

RECOMMENDATIONS OF THE PRESIDUM OF THE ICAC AT THE UKRAINIAN CCI ON CERTAIN ASPECTS OF THE APPLICATION OF THE SCHEDULE OF ARBITRATION FEES AND COSTS

The Presidium of the ICAC at the Ukrainian CCI pursuant to paragraph 2 of part four of Article 7 of the Rules of the ICAC at the UCCI analyzed the arbitration practice of application of the Schedule of Arbitration Fees and Costs (Appendix to the Rules) and, in order to ensure the consistency of arbitration practice, noted as follows.

1. In the practice of the ICAC at the UCCI, there have been repeated cases when, after the Arbitral Tribunal is formed, the claimant files a request to terminate the arbitration proceedings during the first hearing in the case due to the respondent's voluntary settlement of the debt and simultaneously requests to reimburse 25% of the arbitration fee paid by the claimant and recover the rest of the arbitration fee from the respondent.

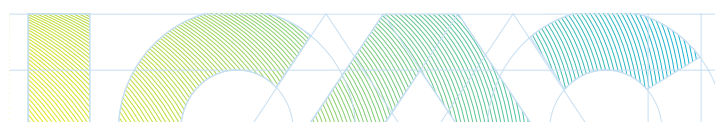
Subparagraph "b" of paragraph 2 of Section IV of the Schedule of Arbitration Fees and Costs provides that *If the Arbitral Tribunal terminates the arbitral proceedings at the first meeting without rendering an award, 25% of the amount of the arbitration fee (the registration fee is to be deducted from the amount of the arbitration fee) shall be returned to the Claimant.*

The above paragraph provides that it shall be applied when the claimant does not make claims, the satisfaction of which requires an arbitral award. In this case, the arbitration proceedings are terminated by an order issued by the Arbitral Tribunal in accordance with paragraphs two and three of Article 67 of the Rules of the ICAC at the UCCI, and based on subparagraph b of paragraph 2 of Section IV of the Schedule of Arbitration Fees and Costs, *25% of the amount of the arbitration fee (the registration fee is to be deducted from the amount of the arbitration fee) shall be returned to the Claimant.*

In case when the claimant makes a claim for partial recovery of arbitration fees from the respondent, a different legal situation arises, whose distinctive features are due to:

Firstly, the need to issue an arbitral award, since according to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, only an arbitral award can be recognized and enforced;

Secondly, the need to comply with the requirements provided by Article 60 of the Rules of the ICAC at the UCCI, in particular, the need to justify the charging of the arbitration fee to the respondent.



The claimant's demand to charge the payment of the arbitration fee to the respondent makes it *impossible to terminate the arbitration proceedings by an order and necessitates the rendering of an arbitral award, which in turn excludes a partial refund of the arbitration fee paid by the claimant.*

Therefore, if the arbitral proceedings are terminated due to the respondent's voluntary settlement of the debt and, at the same time, the claimant files a claim for recovery of the arbitration fee from the respondent, the Arbitral Tribunal, when deciding to terminate the proceedings and to charge the arbitration fee to the respondent, shall verify the validity of such charging, in particular, based on the analysis of the case file and the evidence, provided by the claimant, of debt settlement by the respondent, clarify whether the respondent had actually breached the obligations and whether the debt was settled in full after the claimant had filed the claim to the ICAC at the UCCI.

2. The practice of the ICAC at the UCCI shows that arbitration proceedings in the vast majority of cases are terminated with rendering an award on the merits of the dispute.

In such cases, as a rule, no questions on the apportionment of the arbitration fee arise, as the Arbitral Tribunals resolve them in accordance with Section VI of the Schedule of Arbitration Fees and Costs, which provides that:

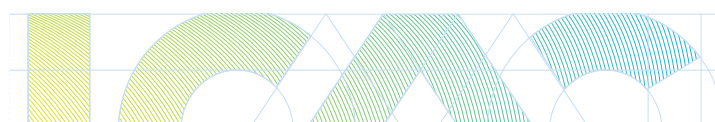
1. Unless the parties have agreed otherwise, the arbitration fees shall be charged to the party against which the award is made, if there are other rules.

2. If a claim is granted in part, the arbitration fee shall be charged to the Respondent in proportion to the amount of the granted claim, and the Claimant shall bear the arbitration fee relating to the amount of the claim that have been dismissed.

The Schedule of Arbitration Fees and Costs does not regulate the apportionment of the arbitration fee in case of voluntary partial or full settlement of the debt by the respondent during the arbitration proceedings. Arbitration practice shows that in such cases, the parties often reach an agreement on the reimbursement of the arbitration fee paid by the claimant. If there is no such agreement between the parties, the Arbitral Tribunal, taking into account the specific circumstances of the case, as a rule *charges the arbitration costs to the respondent, justifying the decision by the argument that the respondent's voluntary settlement the debt is an effective confirmation of the validity of the claim.*

At the same time, in such circumstances the grounds for charging arbitration fees to the respondent in cases where the debt is settled voluntarily (in full or in part) after filing a claim to the ICAC at the UCCI may differ. In some cases, the Arbitral Tribunals refer to paragraph one of Section VI of the Schedule of Arbitration Fees and Costs as the grounds for such decision, in other cases - to Section IX of the same Schedule.

The Presidium considers it *correct and logical* to refer to the *first paragraph of Section VI* of the Schedule of Arbitration Fees and Costs, since the situation with the apportionment of the arbitration fee, in case of voluntary settlement of the debt by the respondent after filing the claim, is legally identical to the situation when the debt is not paid on the day of the hearing and the claim is satisfied. This is confirmed by the fact that in both cases, when deciding to charge the arbitration fee to the respondent,



the Arbitral Tribunals motivate their decision by the same arguments - *the validity and legitimacy* of the claimant's demands.

Section IX of the Schedule of Arbitration Fees and Costs provides that the Arbitral Tribunal, *taking into account the circumstances of a particular case*, may determine the apportionment of the arbitration fee other than that provided for in Section VI of the Schedule of Arbitration Fees and Costs. This refers to *special* circumstances which, in the opinion of the Arbitral Tribunal, may necessitate deciding on a different apportionment of arbitration fee than that provided for in *Section VI, paragraph 1* of the Schedule of Arbitration Fees and Costs.

3. Recently, the arbitration practice of the ICAC at the UCCI has applied different approaches to resolving the issue of reimbursement of costs incurred by the claimant in connection with the payment of the arbitration fee in cases where *the claimant did not file a claim for reimbursement of such costs*.

In some cases, Arbitral Tribunals, when rendering decisions on satisfaction of the claim, *charge paying the arbitration fee to the claimant*, arguing that the claimant has not claimed reimbursement of such costs from the respondent either in the statement of claim or during the arbitration proceedings. In other cases, regardless of whether the claimant has or has not filed a claim for reimbursement of the arbitration fee, *if the claim is satisfied and if there is no agreement between the parties to the dispute on the apportionment of the arbitration fee, the Arbitral Tribunals recover the arbitration fee from the respondent* on the basis of Section VI of the Schedule of Arbitration Fees and Costs Rules.

The Presidium of the ICAC notes the peculiarities of defining the amount, terms of payment and reimbursement of the arbitration fee. Pursuant to paragraph four of Article 15 of the Rules of the ICAC at the UCCI, the arbitration fee shall not be included in the amount of the claim. The amount of the arbitration fee is strictly fixed, it depends on the amount of the claim and does not impose the burden of proof. Until the arbitration fee is paid in full, the case shall remain without progress. Section VI of the Schedule of Arbitration Fees and Costs, which is an integral part of the Rules of the ICAC at the UCCI, contains clear instructions for the reimbursement of the arbitration fee:

1) *the arbitration fee shall be charged to the party against which the award is made, unless the parties have agreed otherwise or unless there are other rules;*

2) *If a claim is granted in part, the arbitration fee shall be charged to the Respondent in proportion to the amount of the granted claim, and the Claimant shall bear the arbitration fee relating to the amount of the claim that have been dismissed.*

These instructions are mandatory and must be applied by the Arbitral Tribunals regardless of whether the claimant has or has not filed a claim for reimbursement of the arbitration fee. An exception from the instructions can be made in cases when the claimant has for any reason declared that it will bear said costs or the parties have agreed on a different distribution of the claimant's costs relating to the payment of the arbitration fee.

