

SCC Practice: Separate Awards for Advance on Costs 1 January 2007-31 December 2011

By Gretta Walters¹

I. Introduction

Under the Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC Rules”), as well as under the Rules for Expedited Arbitrations of the Arbitration Institute of the Stockholm Chamber of Commerce (the “Expedited Rules”), each party is required to pay half of the Advance on Costs, as fixed by the Arbitration Institute of the Stockholm Chamber of Commerce (the “SCC”). Failure to make this payment will result in the dismissal of the case by the SCC.²

In situations where one party, usually the respondent, fails to pay its half of the Advance on Costs, the SCC will give the other party an opportunity to make the payment within a specified period of time.³ If the other party makes the required payment, the arbitration will proceed and the paying party may request the arbitral tribunal to issue a separate award for reimbursement of the payment under Article 45(4) of the SCC Rules.

This article reviews the practice of SCC tribunals in granting or denying requests for a separate award for reimbursement of payment for the Advance on Cost from 1 January 2007-30 June 2011. The article is divided into five sections. The first two briefly explain the relevant SCC rule; the third presents statistics and common practice on separate awards for Advance on Costs; the fourth examines recurring issues in the separate awards; and the fifth briefly concludes with some observations on separate awards.

II. Article 45(4) of the SCC Rules

The 2010 SCC Rules include the provision in Article 45(4) that gives the tribunal the authority to issue a separate award on the Advance on Costs. The provision was first included in the 2007 amendments to the SCC Rules and applies to any arbitration commenced on or after 1 January 2007, unless otherwise agreed by the parties.⁴

The requirement that each party pay half of the Advance on Costs was not a new feature to the 2007 SCC Rules, however. Both the 1988 and 1999 versions of the rules place this obligation on the parties.⁵ In fact, one tribunal confronted with a challenge to the retroactivity of the provision on the separate award for Advance of Costs found the prior existence of this

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² SCC Rules Art. 45(4). The corresponding rule on Advance on Costs in the Expedited Rules is found in Article 44.

³ SCC Rules Art. 45(4).

⁴ 2007 SCC Rules, “Entry into Force”. An arbitration is deemed to commence under Article 4 of the SCC Rules on the date on which the SCC Institute receives the Request for Arbitration. The parties are, of course, free to decide which version of the SCC Rules to apply and whether to exclude certain provisions of the rules. 2010 SCC Rules, Preamble.

⁵ 1999 SCC Rules Art. 14 (1999); 1988 SCC Rules Art. 13 (1988).

obligation significant.⁶ In that case, the resisting party claimed that since the parties made the arbitration agreement nearly fifteen years prior to the express authority for a separate award for Advance on Costs under the SCC rules, that the tribunal could not grant the requested separate award, absent party agreement. The tribunal disagreed. Because earlier versions of the SCC Rules required parties to pay half of the Advance on Costs and generally authorized tribunals to issue separate awards, the tribunal concluded that the 2007 revision placed no new substantive obligation on the parties and affirmed the retroactivity of this provision. The right to request a separate award for Advance on Costs, therefore, applies to arbitration agreements formed under older versions of the SCC Rules, as well.

Parties do not, however, have an absolute right to a separate award for Advance on Costs under Article 45(4). Rather, granting or denying such an award is wholly within the discretionary authority of a tribunal under Article 38 of the SCC Rules. Many tribunals exercising this discretion, however, consider that separate awards should be granted as a “main rule”.⁷

III. The Separate Award for Advance on Costs in Practice

Parties have requested separate awards for Advance on Costs twenty-five times in twenty-three SCC arbitrations between 1 January 2007 and 31 December 2011.⁸ Tribunals granted the requests in all but one instance.⁹

Swedish parties have been the non-paying respondent in thirteen of these cases, and Swedish tribunals have rendered the majority of these awards. Neither statistic is entirely surprising, however, as the largest portion of SCC arbitrations are between Swedish parties.

The average time between a separate award for Advance on Costs and the expected final award is thirteen weeks and ranges from four to thirty-eight weeks (see Figure 1). In cases where a party has been ordered to pay reimbursement for the Advance on Costs, the party ultimately made payment pursuant to the award in 42% of the cases (see Figure 2). The payment is often made separately from the case administration by the SCC.

⁶ SCC Arbitration No V 032/2007, Separate Award p 15.

⁷ SCC Arbitration No 024/2009, Separate Award p 4; SCC Arbitration No V 148/2008, Separate Award p 3; SCC Arbitration No V 102/2008, Separate Award p 2; SCC Arbitration No V 165/2007, Separate Award p 5; SCC Arbitration No V 113/2007, Separate Award p 4.

⁸ Tribunals have rendered twenty-five separate awards on Advance on Costs. In two cases, the claimants requested two separate awards. SCC Arbitration No V 014/2008, Separate Award; SCC Arbitration No V 018/2007, Separate Award.

⁹ SCC Arbitration No V 083/2007, Separate Award.

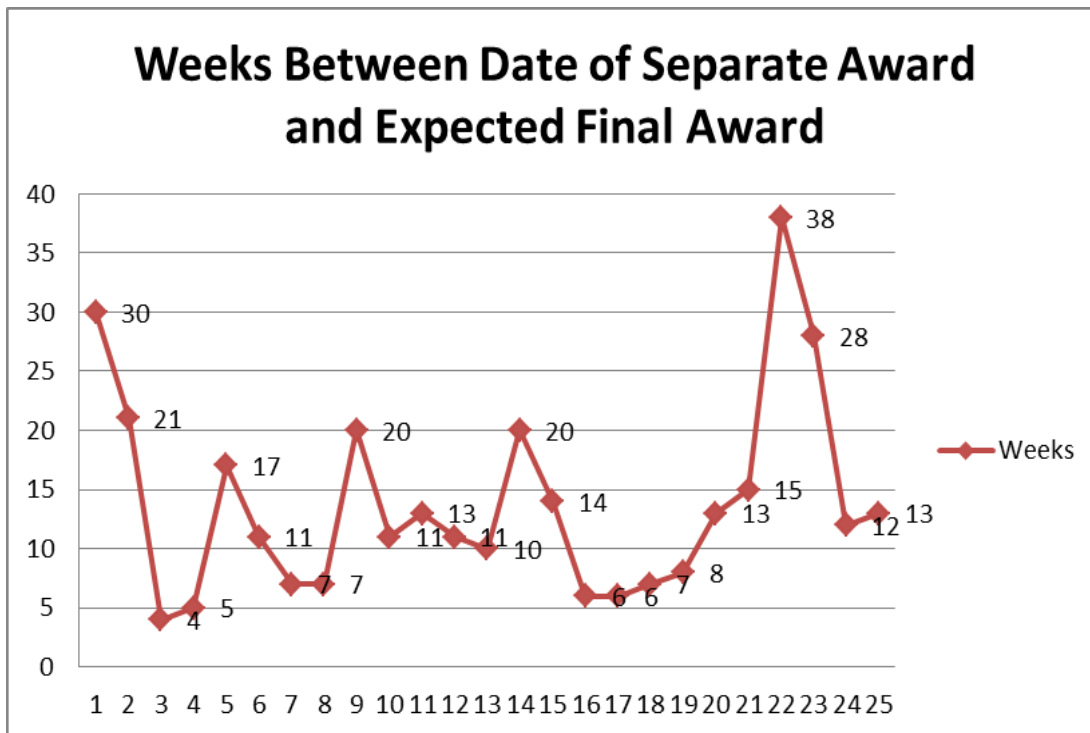


Figure 1

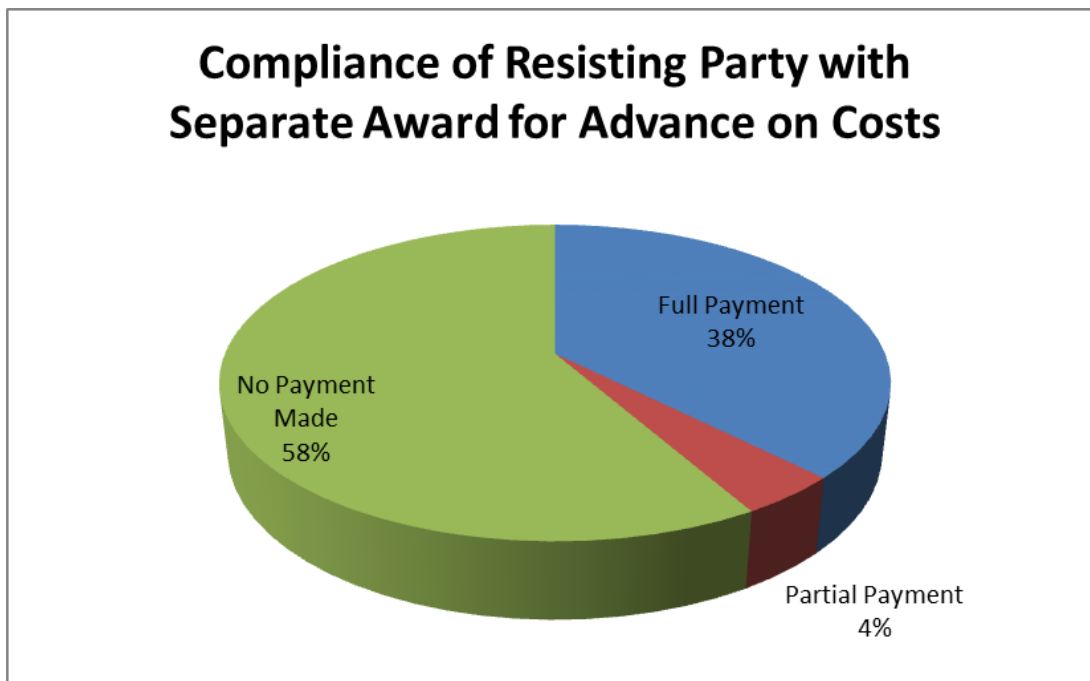


Figure 2

When requested to issue a separate award for Advance on Costs, it is common practice for tribunals to reference Article 45(4), establish that the prerequisites exist and order the reimbursement without providing extensive reasoning.¹⁰ When parties agree to the SCC Rules, the commitment to pay half of the Advance on Costs becomes a binding contractual obligation on the parties.¹¹ A refusal to pay is generally held by tribunals to constitute a breach of the contractual obligation the party undertakes by agreeing to the SCC Rules and

¹⁰ SCC Arbitration No V 146/2008, Separate Award p 5; SCC Arbitration No V 145/2008, Separate Award p 2.

¹¹ SCC Arbitration No V 135/2007, Separate Award p 7.

forces one party to pay what the other committed to pay, in order to continue the arbitration. Consequently, many SCC tribunals consider that granting these requests should be the “main rule”.¹²

A party that obtains a separate award for Advance on Costs will be able to enforce the award in Sweden.¹³ The enforceability of the award internationally is not universally accepted, however. In 2010, the Supreme Commercial Court in the Russian Federation issued Resolution No 6547/10, which overturned a lower court’s recognition of a separate award on advances in an SCC arbitration. The court explained that under Russian law such awards are provisional and not final resolutions of a dispute and therefore not enforceable under the New York Convention.¹⁴ Enforceability in other jurisdictions remains untested, as far as the author of this article has been able to ascertain.

IV. Recurring Issues in Separate Awards for Advance on Costs

This section evaluates three recurring issues that have arisen in the requests and awards for a separate award on Advance on Costs: the possible grounds for denying a party’s request for a separate award, the different principles tribunals employ to calculate interest; and the impact of the separate award on the final award and Settlement of Account.

A. *Grounds to deny a separate award for Advance on Costs*

Because SCC tribunals consider that separate awards for Advance on Costs should be granted as a “main rule”, the respondent carries the burden of providing sufficient grounds for the arbitral tribunal to deny the award.¹⁵

The most common reason for a party’s refusal to pay its share of the Advance on Costs is a reluctance to participate in the arbitral proceedings, a ground rejected as insufficient to refuse a request for a separate award.¹⁶ In some cases, the respondent resisted paying the Advance on Costs because it questioned the legitimacy of the claimant’s claims and the SCC’s consequential calculation of the Advance on Costs.¹⁷ This ground has also been rejected because the Advance on Costs is fixed and is to be paid before a case is even referred to a tribunal. The parties’ joint obligation to pay half of the Advance on Costs is therefore not affected by claims that later prove to be unfounded.¹⁸ If the parties do pay an Advance on Costs that ultimately proves too high, the excess advances will be repaid.¹⁹

Nonetheless, SCC tribunals have found three exceptions to the main rule that a request for a separate award for Advance on Costs should be granted. First, three tribunals have noted that

¹² SCC Arbitration No 024/2009, Separate Award p 4; SCC Arbitration No V 148/2008, Separate Award p 3; SCC Arbitration No V 102/2008, Separate Award p 2; SCC Arbitration No V 165/2007, Separate Award p 5; SCC Arbitration No V 113/2007, Separate Award p 4.

¹³ On 11 March 2009, the Svea Court of Appeal confirmed that such an award rendered in an SCC arbitration is enforceable. *Consafe IT Ab v Auto Connect Sweden AB*, Svea Court of Appeal judgment, Case No Ö 280-09.

¹⁴ Resolution No 6547/10.

¹⁵ SCC Arbitration No V 148/2008, Separate Award p 4; SCC Arbitration No V 146/2008, Separate Award p 5; SCC Arbitration No V 102/2008, Separate Award p 3.

¹⁶ SCC Arbitration No V 092/2010, Separate Award p 3.

¹⁷ SCC Arbitration No V 032/2007, Separate Award pp 13, 15.

¹⁸ SCC Arbitration No V 32/2007, Separate Award p 16.

¹⁹ SCC Arbitration No V 014/2008, Separate Award p 4.

a well-founded jurisdictional challenge could justify denying a request for a separate award.²⁰ Once a tribunal determines that it has jurisdiction, however, a party's jurisdictional objection no longer qualifies as a valid basis to refuse to pay its share of the Advance on Costs.²¹

Second, a party's financial inability to pay its share of the Advance on Costs may be a valid basis to deny a request for a separate award. For example, in one case, the respondent alleged that it was unable to pay the advances because its bank accounts had been frozen.²² Before rendering a decision on the separate award, the tribunal invited the respondent to submit proof of its financial state, but the respondent failed to do so. The tribunal ultimately granted the separate award, finding that the respondent failed to satisfy its burden of establishing that an exception to the main rule should apply.²³

Third, the delayed timing of a request may also create a ground to deny a separate award for Advance on Costs. While two tribunals cautioned that the mere immanency of a final award should not in itself be a reason to deny a separate award, since an element of uncertainty always exist in the future of an arbitration,²⁴ two others found the timing of the request in relation to the expected date of the final hearing or award to be a relevant factor.²⁵ In both cases, however, the tribunals also considered the certainty or uncertainty of the outcome of the case to be relevant, specifically whether the defaulting party would likely be successful.²⁶ For instance, in one of these cases, the tribunal reasoned that because the final award would not be rendered for a long time and the outcome of the case was unpredictable, a separate award on the Advance on Costs was appropriate.²⁷

In the other case, which is the one and only instance where a tribunal denied a request for a separate award for Advance on Costs, the tribunal cited close proximity to the final hearing and award as a reason for denying the award.²⁸ The time between the separate award and expected final award in that case was thirteen weeks. The claimant had paid the Advance on Costs for both parties but was also bankrupt. The sole arbitrator reasoned that the claimant would be able to recover the costs of the arbitration from the solvent respondent in the final award. On the other hand, the respondent would unlikely be able to recover its legal fees or the costs of the arbitration from the insolvent claimant. The arbitrator denied the request for a separate award for Advance on Costs and ultimately found for respondent in the final award.

While exceptions to the main rule of granting a request for a separate award for Advance on Costs do exist, the cases show that a party is rarely successful in satisfying its high burden to prove that an exception should apply.

²⁰ SCC Arbitration No V 113/2007, Separate Award p 4; SCC Arbitration No V 32/2007, Separate Award p 16.

²¹ SCC Arbitration No V 142/2008, Separate Award p 6.

²² SCC Arbitration No V 135/2007, Separate Award p 7.

²³ SCC Arbitration No V 135/2007, Separate Award pp 7-8.

²⁴ SCC Arbitration No V 024/2009, Separate Award p 5; SCC Arbitration No V 113/2007, Separate Award p 4.

²⁵ SCC Arbitration No V 028/2010, Separate Award p 4; SCC Arbitration No V 083/2007, Separate Award p 3.

²⁶ See Söderlund, Christer, "Separate Arbitral Award in SCC Arbitration V (113/2007). First Award on Advance on Costs under the New SCC Rules", *Stockholm International Arbitration Review* 2008:1, p 139 (summarizing the first separate award for Advance on Costs).

²⁷ SCC Arbitration No V 028/2010, Separate Award p 4. The final award was expected twenty-one weeks after the date of separate award for Advance on Costs was made.

²⁸ SCC Arbitration No V 083/2007, Separate Award p 3.

B. Calculating Interest on the Separate Award

When requesting a separate award for Advance on Costs, parties also routinely ask the tribunal to award interest on the costs. While Article 45(4) of the SCC Rules is silent on the tribunal's authority to award interest on these awards, one tribunal considered that the payment of Advance on Costs under the SCC Rules is a procedural matter related to the arbitration agreement to which the *lex arbitri* applies.²⁹ Accordingly, an award made in Stockholm under the SCC Rules will apply Swedish law on the duty to reimburse, even if the substantive dispute is subject to another law.³⁰ In cases where Stockholm is the seat of the arbitration, therefore, the Swedish Interest Act will apply to determine liability for compensation.³¹

Tribunals have been uniform in granting interest on separate awards for Advance on Costs. Where a party obtained a separate award and requested interest on the award, tribunals have granted the request for interest in 100% of the cases.³² Tribunals have not taken a uniform approach, however in how they calculate the interest. Tribunals have employed three primary methods to determine the relevant date on which interest on the award should begin to accrue (see Figure 3).³³ In many cases, tribunals simply award interest from the date requested by the petitioning party, but in others, the tribunals rely on general principles of law to set the accrual date.

The most frequently used date from which to calculate interest is the date of the separate award. Eight tribunals have used this date to set interest. These tribunals relied on standard practices and general principles of law regarding the obligation to pay interests on debt and concluded that interest should not be awarded retroactively.³⁴

The second most common date to begin to calculate interest from is the date that the petitioning party paid the other party's share of the Advance on Costs. This date was used in six separate awards.³⁵ In each of these awards, the tribunal referred to Swedish law in ordering interest but did not offer its reasons for calculating the interest from the date of payment.

The third means used by tribunals to calculate interest is to refer to the date that the requesting party presented its claim for reimbursement. Two tribunals calculated interest from the date

²⁹ SCC Arbitration No V 135/2007, Separate Award p 8.

³⁰ Swedish Arbitration Act s. 48 (1999); Söderlund, Christer, "Separate Arbitral Award in SCC Arbitration V (113/2007). First Award on Advance on Costs under the New SCC Rules", *Stockholm International Arbitration Review* 2008:1, p 144

³¹ Swedish Arbitration Act s. 48 (1999); *see, e.g.*, SCC Arbitration No V 122/2008, Separate Award p 2; SCC Arbitration No V 102/2008, Separate Award p 3; SCC Arbitration No V 018/2007, Separate Award II p 3.

³² Interest was awarded in all but four awards. SCC Arbitration No V 191/2009, Separate Award; SCC Arbitration No V 014/2008, Separate Award I; SCC Arbitration No V 014/2008, Separate Award II; SCC Arbitration No V 132/2007, Separate Award. In each of these cases, the petitioning party did not request interest.

³³ In two additional cases, the tribunals did not give reasons for the date used to calculate interest on the separate award. SCC Arbitration No V 122/2008; SCC Arbitration No F 006/2008.

³⁴ SCC Arbitration No V 148/2008, Separate Award p 3; SCC Arbitration No V 165/2007, Separate Award p 6; SCC Arbitration No V 135/2007, Separate Award p 8; SCC Arbitration No V 113/2007, Separate Award p 4.

³⁵ SCC Arbitration No F 084/2009, Separate Award p 2; SCC Arbitration No V 146/2008, Separate Award p 5; SCC Arbitration No V 102/2008, Separate Award p 3; SCC Arbitration No V 032/2007, Separate Award p 16; SCC Arbitration No V 018/2007, Separate Award I p 3; SCC Arbitration No V 018/2007, Separate Award II p 3.

the respondent received the request for a separate award;³⁶ one calculated from the date the claimant presented its request for reimbursement;³⁷ and one set interest to begin to accrue thirty days from the respondent’s receipt of the claim for reimbursement.³⁸

While a party is likely to be awarded interest in a separate award for Advance on Costs upon request, the date used by the tribunal to calculate could be fixed using a number of different methods.

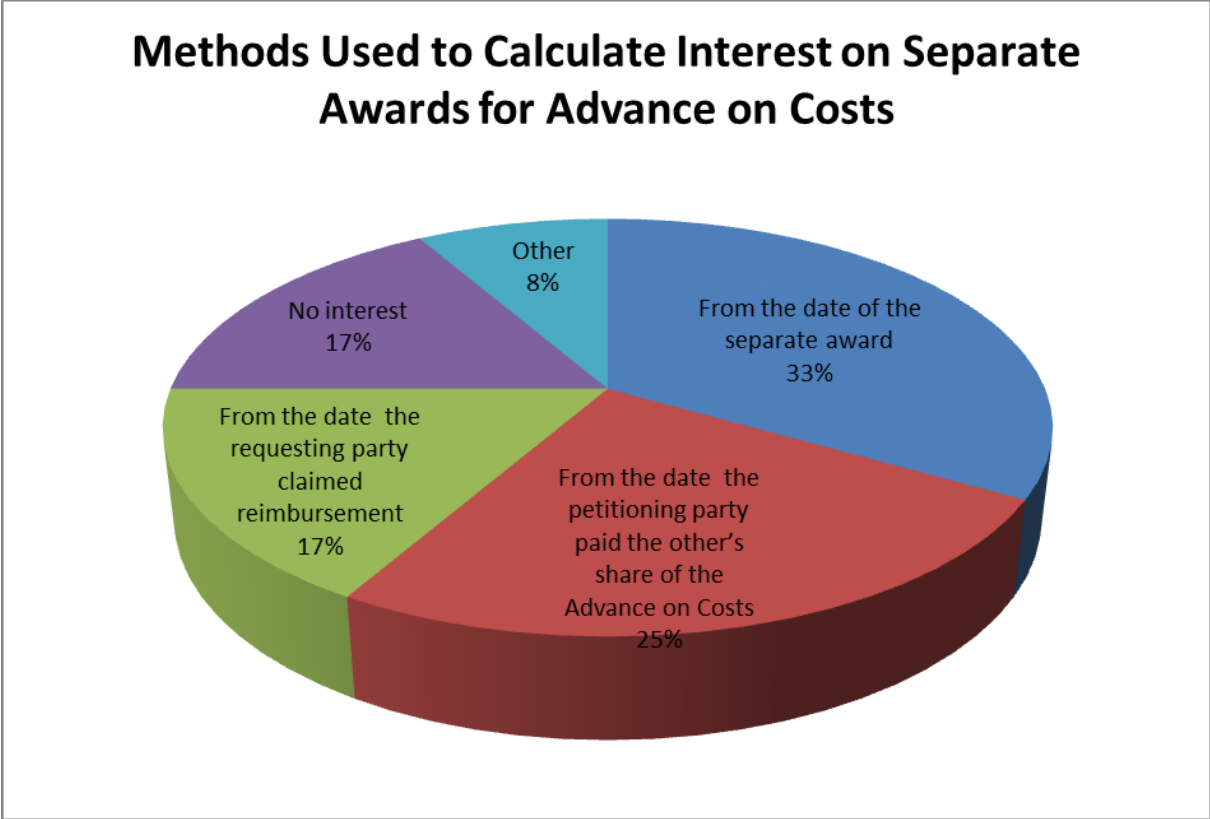


Figure 3

C. Influence on the Final Award and Settlement of Account

Most tribunals reference the separate award on Advance of Costs in the final award. For example, many tribunals summarize the separate award proceedings in the background section of the final award.³⁹ One tribunal even attached the separate award as “Appendix 1” to the Final Award.⁴⁰ The separate award is also often referenced in the section addressing arbitration costs in the final award, and the tribunal often comments upon whether the respondent paid its share of the advances in accordance with the separate award.⁴¹

³⁶ SCC Arbitration No V 045/2009, Separate Award p 2; SCC Arbitration No V018/2009; Separate Award p 3.
³⁷ SCC Arbitration No V 142/2008, Separate Award pp 6-7.
³⁸ SCC Arbitration No V 024/2009, Separate Award p 5. In two other cases, the claimants requested the tribunal to calculate interest from a specified date. In each of these cases, the tribunals granted this request without discussing the relevance of the date. SCC Arbitration No V 122/2008, Separate Award p 2; SCC Arbitration No F 006/2008, Separate Award p 3.
³⁹ SCC Arbitration No V 191/2009, Final Award p 3; SCC Arbitration No V 024/2009, Final Award p 6; SCC Arbitration No V 142/2008, Final Award p 4; SCC Arbitration No V 135/2007, Final Award p 8.
⁴⁰ Arbitration No V 045/2009 Final Award
⁴¹ Arbitration No 024/2009 Final Award p 6.

Under Article 43(5) of the SCC Rules, the tribunal must apportion the costs of the arbitration between the parties in the final award, “having regard to the outcome of the case and other relevant circumstances”. The separate award consequently must be considered in allocating the final costs of the arbitration. Since the purpose of a separate award is to restore balance to the parties’ advanced financing of the arbitration,⁴² it does not affect a tribunal’s power to reallocate all or part of those costs in the final award. For example, if either party incurred costs in connection with an application under Article 45(4), the tribunal will consider the proper allocation of those costs in the final award. In fact, one tribunal awarded the claimant 100% of the costs it incurred in relation to a separate award.⁴³ Additionally, Article 43(5) allows the tribunal to reallocate the actual advance payment on costs, and any amount paid by a party pursuant to a separate award for Advance on Costs may be set off against the balance of what that party owes under the final allocation of costs in the final award.

Upon receipt of the final award with the final allocation of costs, the SCC prepares the Settlement of Account, which reflects the actual balance of payment made by each party. While any separate award for Advance on Costs would have been registered by the SCC by this stage, the SCC is not always informed of whether a respondent made payment in accordance with a separate award, nor is the status of payment always clear from the final award or the correspondence between the parties and the tribunal.

If the status of payment is unclear at this stage, the SCC asks the parties or tribunal whether the respondent reimbursed the claimant. If so, the SCC registers the exact date of payment, since the date affects the interest, and adjusts the registered amount paid on Advance on Costs by each party. If no payment has been made in accordance with the separate award, the figures in the Settlement of Account remain unchanged and the entire Advance on Costs remains registered as paid by the claimant. Ultimately, the SCC calculates the allocation of costs as defined in the final award, computes the interest on the amounts deposited by each party and regulates the costs accordingly.

It is evident from these final awards and Settlement of Accounts that a separate award for Advance of Costs will restore balance during the pendency of the arbitration but can also have an impact on the final cost allocation in the arbitration.

V. Conclusion

The option for a party to seek a separate award for reimbursement for Advance on Costs under Article 45(4) of the SCC Rules has now been in practice for five years, and common trends in the application of this rule in SCC arbitrations have developed. For instance, tribunals recognize that a separate award should be granted as a “main rule” to remedy a party’s breach of the contractual obligations it undertook in agreeing to arbitration under the SCC Rules, and an exception to this main rule has been granted in only one instance. Moreover, parties are universally successful in obtaining interest on the separate awards, even if the means to calculate the interest varies from case to case, and in some cases, a separate award for Advance on Costs has an impact on the allocation of costs in the final award.

While the provision is still young, practice already shows that the separate award is a useful tool for a party that finds itself forced to pay another’s share of the Advance on Costs.

⁴² SCC Arbitration No V 148/2008, Separate Award p 3 (explaining that payment of the Advance on Costs is a joint obligation that the parties undertake in SCC arbitrations).

⁴³ SCC Arbitration No V 142/2008, Final Award p 25.