

Fees of the Arbitrators.

In ad hoc arbitration the fee of the arbitrators is fixed by the arbitrators themselves. They ask for deposits on the moment of their appointment and during the course of the arbitral proceedings they may require supplementary deposits from the parties. Finally they may, at the end of the arbitration and before communicating their final award to the parties when they can overlook all the work done and the efforts required from them, ask for a last payment.

Deposits may not only be asked for the fees of the arbitrators but also for travel expenses or the expenses of an expert designated by the arbitrators. It is, however, the deposit of the arbitrator's fees that needs special consideration. What is the situation when the arbitrators, for this purpose, demand excessive deposits?

From the legal point of view we are dealing here with the agreement between the parties and the arbitrators. This agreement should be distinguished from the agreement between the parties to submit differences to arbitration, i.e. the arbitration agreement. The first mentioned agreement between the parties (Claimant and respondent) and the arbitrators leaves the fixation of the salary due to the arbitrators (one party to the agreement) in ad hoc arbitration to the decision of one of the parties to the agreement, i.e. the arbitrators themselves. They should do this in accordance with the rules of good faith, but what if they don't observe these rules and fix the fees (in practice deposits asked from the parties in equal amounts) in an excessive way?

2. Schedule of Fees

The importance of the problem as described under 1. should not be overestimated. Normally the arbitrators will not ask for excessive deposits. In fact we are dealing with an exceptional case.

The desire to have a schedule of fees may be more inspired by the wish of the parties to an arbitration to have knowledge in advance what the arbitration will cost than their fear that the arbitrators, once they are appointed, will abuse their right to fix the fees.

This wish is understandable, but can it be fulfilled? We must also take into account the interest of the other party to the "arbitrators-agreement", i.e. the arbitrators themselves. Can they foresee what amount of time and work will be asked from them at the moment of their appointment?

The importance of the arbitration may be known at that moment: the amount of the claim and, when the respondent has delivered his statement of defence, the amount of the counter-claim. The time-factor (how many hearings, how many days of travelling and consultation between the arbitrators in the case of an arbitral tribunal) is however unforeseeable.

In administered arbitration the schedule of fees takes usually only into account the amount of the claim (and counter-claim, if any). The time-factor could be taken into account by fixing minimum and maximum rates based on the amount of the claim. To give an example from the schedule of the I.C.C.:

<u>Sum in Dispute</u>	<u>Fees</u>
\$ 50,000 to \$ 200,000	0.8 % to 3.0 %
\$ 200,000 to \$ 600,000	0.5 % to 2.0 %
\$ 600,000 to \$ 1,500,000	0.3 % to 1.5 %

This gives a large freedom to manouver from about four to five times.

This "masse de manoeuvre" seems inevitable in order to take account of different situations like the time-factor already mentioned ^{and} ~~and~~ the work-load. Also a possible settlement should be mentioned in this respect and the moment ~~and the moment~~ (right after the start of the arbitration proceedings, or at a later stage, e.g. after a hearing) when this settlement is reached.

This large "masse de manoeuvre" between the minimum and maximum is acceptable in administered arbitration as a third party, the administrator, decides on the amount of deposits. But does it give the necessary security to the parties who want to know what their arbitration is going to cost?

In administered arbitration the schedule may be described as giving "some indication", about the costs of arbitration. The essential point however is the decision on the amount by a third party, the administrator.

Transposed to ad hoc arbitration the schedule could introduce "some indication", but there would remain the decision to the arbitrators themselves unless, here also, a third party would be introduced.

However, by introducing a third party, the schedule giving "some indication" may be regarded as not absolutely necessary. If a third party is going to decide, why not give ~~that~~ that third party complete freedom?

3. Third party in ad hoc

Under the UNCITRAL arbitration Rules first of all the Appointing Authority may be considered as third party. The A.A. is not always there. He may be designated in the arbitration agreement or in the course of the appointment proceedings. In case the parties cooperate and also the arbitrators, appointed by both sides, agree on the choice of the presiding arbitrator, there will be no A.A. This would lead to the designation of an A.A. only for the sake of fixing the fees of the arbitrators.

Secondly it may be questioned whether an A.A. will be willing to accept this task. For the fixation of the fee the A.A. should be informed about the case itself, the work done etc. Consultation between the A.A. and the arbitrators will be necessary. Fixing a fee is quite different from the normal task of an A.A., i.e. appointment of an arbitrator. The A.A. would assume a more judicial task next to its administrative task (the appointment). Fixing a fee is giving a binding opinion on the question as to what amount the arbitrators are entitled.

4. Possible Solutions

Theoretically the following solutions seem possible.

A. Leave the fixation of the fee to the arbitrators.

In this case, in many countries, there would be a possibility to go to court in case the arbitrators (exceptionally!!) would have exaggerated.

B. Advance Agreement between the Arbitrators and the Parties.

After appointment of the sole arbitrator or of the arbitrators of the arbitral tribunal the sole arbitrator or the three arbitrators (or their chairman) would sit together with the parties to conclude an agreement on the deposits. If no agreement can be reached, the appointment would be null and void. *arbitrators are entitled to withdraw.*

C. Third Parties.

Who could be the third party? In case the A.A. would be chosen (see for possible objections under 3.), this could lead to the requirement that the UNCITRAL Arbitration Rules should require that always an A.A. would be designated. No UNCITRAL Arbitration without an advanced designation of an A.A.

Another solution would be: the UNCITRAL Secretariat. This would leave the Rules unchanged and prevent the objections from the side of the A.A.'s as mentioned under 3.

Task of the third party could be:

- only to intervene when arbitrators demand excessive deposits
- always intervene when arbitrators ask for a deposit.

Although still other solutions may be thought off, it seems that in principle a choice should be made between the three mentioned above.

SCHEDULE OF FEES

1. In their present stage the Rules provide for a fixation of the fees of arbitrators by the arbitrators themselves (Article 33, para. 1 under a.). In ad hoc arbitration this is customary. The commentary on Article 33 (under 1) states that it may be expected from the arbitrators that they "will act reasonably in setting their own fees". This also corresponds with practical experience in ad hoc arbitrations.

The desire^{of} the parties to have at their disposal a schedule of fees seems to be more inspired by their wish to have knowledge in advance what the arbitration is going to cost than their fear that the arbitrator, once appointed, will abuse their right to fix their own fees. This wish is understandable, but can it be fulfilled?

2. In administered arbitration the schedule of fees takes usually only into account the amount of the claim (and counter-claim, if any). The time factor could be taken into account by fixing minimum and maximum rates based on the amount of the claim. To give an example from the schedule of the I.C.C.:

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This "masse de manoeuvre" seems inevitable in order to take account of different situations like the time-factor already mentioned and the work-load. Also a possible settlement should be mentioned in this respect and the moment (right after the start of the arbitration proceedings, or at a later stage, e.g. after a hearing) when a settlement is reached.

In administered arbitration the schedule may be described as giving "some indication" about the costs of arbitration. The essential point however is the decision on the final amount by a third party, the administrator.

Transposed to ad hoc arbitration a schedule could also introduce "some indication", but there would remain the decision by the arbitrators themselves unless, here also, a third party would be introduced.

3. Under the UNCITRAL Arbitration Rules first of all the Appointing Authority might function as third party in order to fix the arbitrators' fees. The A.A. is not always there. He may be designated in the arbitration agreement or in the course of the appointment proceedings. In case the parties cooperate and also the arbitrators, appointed by both sides, agree on the choice of the presiding arbitrator, there will be no A.A.. This would lead to the designation of an A.A. only for the sake of fixing the fees of the arbitrators.

Secondly it may be questioned whether an A.A. will be willing to accept this task. For the fixation of the fee the A.A. should be informed about the case itself, the work done etc.. Consultation between the A.A. and the arbitrators will become necessary. Fixing a fee is quite different from the normal task of an A.A., i.e. appointment of an arbitrator. The A.A. would assume a more judicial task next to its administrative task (the appointment). Fixing a fee is giving a binding opinion of the question as to what amount the arbitrators are entitled.

Thirdly there will certainly be a loss of time before the award can be made in case the intervention of an A.A. would be incorporated in the Rules for the fixation of the arbitrators' fees. The A.A. will have to take cognizance of the complete arbitration file and might wish to consult on the amount of the fees with the arbitrators.

4. The disadvantages mentioned under 3 did lead to the abstention of introducing, in the Rules, a third party (appointing authority or other) for the fixation of the arbitrators' fees. The more so as (a) abuse by the arbitrators of their faculty to fix their own fees seems highly unlikely and (b) as, in case abuse would have been made, the arbitrators' decision on their own fees could be reviewed in court.

The decision of the arbitrators on the fees due to them, does not constitute an arbitral award, but is a party-decision to be compared by the fixation of a purchase-price by one of the parties to the contract. Those decisions have to be in accordance with the rule of good faith. If obviously contrary to bona fides they can be reviewed in court.

5. The question that remains to decide is, whether a publication of a schedule of fees, the fees themselves to be determined by the arbitrators, serves a useful purpose. The example given above shows a great "masse de manoeuvre"; the maximum differs 4 to 5 times from the minimum. This seems inevitable as the work to be done cannot be foreseen.

At the beginning of the arbitration only the amount of the claim may be known (and even this might not always be the case as the value of the claim cannot be expressed in a currency). This amount is to be increased by the amount of the counter-claim (when introduced with the statement of defence and if also the value of this claim can be estimated in currency). At the utmost the schedule would give an "indication" of minimum and maximum fees.

The absolute figures of the schedule may need, from time to time, to be adapted to changed monetary circumstances. In case inflation continues the maximum fee of \$ 3,000 for a claim of \$ 100,000 might even become unacceptable. How should amendments be made? Would ^{INDICATION} ~~indication~~ be possible?

It therefore seems doubtful whether the publication of a schedule of fees is to be recommended at all.

6. For all these reasons the Rules preferred to leave the fixation of the arbitrators' fees to the arbitrators themselves. If the parties have faith in the persons they entrust to decide on the subject matter of their dispute it does not seem unreasonable to trust them as well when it comes to the fixation of their own fees.

Introducing a third party into the Rules for the fixation of the arbitrators' fees seems not recommendable for the reasons explained under 3 and not necessary in view of the arbitral practice where abuse by the arbitrators is practically unknown. Moreover, when exceptionally this would occur, the courts will be able to review their decision (see under 4).

A schedule of fees would hardly give any guarantee against the theoretical possibility of abuse by arbitrators as it necessarily must leave a great "masse de manoeuvre". On the other hand, a schedule gives almost, for the same reason, no indication of what the parties actually will have to pay to the arbitrators (see under 5).

A schedule of fees has its meaning in administered arbitration where the schedule is applied by a third party, the administrator (an arbitration institute or arbitration association). In ad hoc arbitration, for which the UNCITRAL Rules are drafted, no such schedules exist.

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