ICC Case 14433

Date of procedural order: October 2008
Origins of parties: America, Europe
Place of arbitration: London, United Kingdom

Summary of issues:
- arbitral tribunal’s discretionary power to order security for costs
- factors to consider when assessing need for security for costs

'A. Power to order security for costs

40. The Sole Arbitrator has the power to make orders for security for costs under the applicable rules, including Article 23 of the ICC Rules and Section 38 of the Arbitration Act of 1996. English procedural law, although not binding on the Sole Arbitrator, also provides for the granting of security for costs under Part 25 of the Civil Procedure Rules.

41. In pertinent part, Article 23(1) of the ICC Rules states:

Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate...

42. Article 38(3) of the Arbitration Act of 1996 similarly states:

The tribunal may order a claimant to provide security for costs of the arbitration.

43. Both Parties in these proceedings have agreed that it is within the Sole Arbitrator’s discretion to order security for costs.

B. Factors to consider

44. Although it is within the Sole Arbitrator’s discretion to order security for costs, he will do so sparingly and only under limited circumstances.

45. It is generally agreed that “exceptional circumstances” must be established before an order on security for costs may be rendered. See W. Laurence Craig, William W. Park & Jan Paulsson, International Commercial Arbitration: International Chamber of Commerce Arbitration §26.05 (2000) [hereinafter “Craig, Park & Paulsson”]. In ICC practice, only 20% of the requests for security for costs are successful. See Financial Capacity of the Parties – A Condition for the Validity of Arbitration Agreements? (German Institution for Arbitration eds., 2004).

46. Various factors are considered when determining whether an order on security for costs should be rendered, however, there appears to be no “common denominator” in this determination. See Craig, Park & Paulsson at §26.05; see also Julian D.M. Lew, “Commentary on Interim and Conservatory Measures in ICC Cases” 27 (2000); Philipp Habegger (Chairman), Alexander von Ziegler, and Daniel Wehrli, Procedural Order No. 14, 27 November 2002, Ad Hoc Arbitration of the Arbitral Tribunal in Zurich, ABC AG (in prov. Nachlassstundung), Claimant, v. Mr X, Respondent, ASA Bull 23 (2005) p. 112 (requirements to be considered include: no pre-judgment of the merits, there must be urgency, and there must be a risk of irreparable or substantial harm); “Security for Costs in International Arbitration – Some Comments to Procedural Order No. 14 of 27 November 2002”, ASA Bull 23 (2005) p. 116 (requiring “a fundamental change of situation since the agreement to arbitrate was entered into which results in a clear and present danger that a future cost award would not be enforceable”).

47. The Sole Arbitrator analysed the circumstances and considered several factors in making a determination on Respondent’s Application under Article 23 of the ICC Rules for Security for Costs. These factors include, but are not limited to:

- the bona fides of the claim
- the prospect of success
- admissions or offers
- any oppressive features of the Application
- the effect of Respondent’s behaviour on Claimant’s want of means
- the timing of the Application, and whether there is a sense of urgency
- whether there is a risk of irreparable or substantial harm
- whether there has been a fundamental change of situation since the entering into of the arbitration agreement which has resulted in a clear and present danger that the future of any potential cost award would not be enforceable
- whether it is “just” to make such an order
48. The Sole Arbitrator weighed the factors above and the evidence presented by the Parties. The Sole Arbitrator is mindful that Claimant contends that Respondent’s Application for Security for Costs would stifle its claim. Nevertheless Claimant affirms that it “has a positive cash position and will be able to meet its short term liabilities and any award for costs made in these arbitration proceedings.”

49. It is within the Sole Arbitrator’s discretion to order security for costs. However, after reviewing the Parties’ submissions, the Sole Arbitrator finds that there is no evidence indicating that Claimant will be unable to cover costs involved in this arbitration. In fact, Respondent’s own expert report notes that Claimant’s cash position “is sufficient to cover short term liabilities and an additional costs award...” Further, Respondent has not demonstrated urgency, a risk of irreparable harm, or that there has been a fundamental change in circumstance. Therefore, the Sole Arbitrator denies Respondent’s Application Under Article 23 of the ICC Rules for Security for Costs.

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**ICC Case 14661**

Date of procedural order: December 2007

Origins of parties: Europe

Place of arbitration: Paris, France


Summary of issues:
- change of circumstances
- limitation to future costs

### 1.
Claimant filed with the Arbitral Tribunal a request for an interim and conservatory measure pursuant to Article 23 of the ICC Rules. Claimant requests that the Arbitral Tribunal enjoins Respondent to “provide for sufficient security for costs in respect of Claimant’s advances on costs and lawyers’ fees ... by way of a bank guarantee or similar form of security”.

### 4.
In support of its request Claimant argues as follows:

(i) The Arbitral Tribunal has the power to grant the requested measure. Indeed, pursuant to Article 23 of the ICC Rules, the Arbitral Tribunal is authorized to order any interim or conservatory measures “it deems appropriate” including orders for security for costs.

(ii) New elements concerning Respondent’s financial situation have emerged as of the time when the Arbitral Tribunal issued Order No. 2 rejecting Claimant’s previous request for security for costs. It currently appears that (a) Respondent is in a critical financial situation and is kept artificially alive for expected payments from [another arbitration] and from the present arbitration; (b) the present arbitration has completely changed its dimensions due to Respondent’s counterclaims triggering enormous expenditures of time and costs for Claimant; (c) Respondent’s counterclaims are disproportionate in the amount and it is likely that they have been filed so as to increase its “assets” vis-à-vis creditors; actually, the only assets of Respondent are the alleged claims raised in the arbitration proceedings; (d) the liquidators are trying to conceal Respondent’s real financial situation by delaying the filing of the financial statements; (e) Respondent may decide at any time to step into bankruptcy leaving Claimant to face the risks for costs of the arbitration greatly increased by Respondent’s counterclaims, without any possibility of reimbursement.