

ICC Case 12732

Date of procedural order: January 2006

Origins of parties: Africa, Europe

Place of arbitration: London, United Kingdom

ICC Rules of Arbitration: 1998

Summary of issues:

- exceptional nature of remedy
- timing
- inappropriateness in ICC arbitration

'Reasons for decision

6. Claimant referred the Tribunal to ICC Case No. 7047 (1994). In that decision, the tribunal denied the Defendants' motion for security for costs in circumstances very analogous to those in the present case. We find the reasons given by that ICC tribunal persuasive and compelling.

7. The tribunal in that case held as follows:

Nor do the special circumstances of the case, in the opinion of the Arbitral Tribunal, justify to grant the Defendant's motion. The Defendants knew that Claimant is a corporation domiciled in Panama on conclusion of the Agreement. The Defendants were also aware, or should have been, that there is no bilateral convention securing the costs of arbitral procedures between Yugoslavia and Panama. Defendant 1 is a large state-owned Yugoslav enterprise, whose director is appointed directly by the President of the Republic of Yugoslavia. Defendant 2 is a bank who is also owned by the Yugoslav State. The Defendants signed the Agreement voluntarily, thereby accepting the arbitration clause in Art. 9 of the Agreement. If the Defendants were concerned about the enforceability of potential claims against the Claimant awarded to them in an arbitration procedure, it was up to them to ascertain this possibility before signing the Agreement. Having omitted this examination on conclusion of the Agreement, this determines their position in the ensuing arbitration procedure.

8. As was the case there, Respondents here voluntarily signed the ... Agreement with Claimant, thereby accepting the ICC arbitration clause in Article 13.3 thereof.

9. Although an order for security for costs is, in principle, available under Article 23 of the ICC Rules, it is very rarely granted, absent exceptional circumstances. As explained in the leading text on ICC Arbitration by Messrs. Craig, Park and Paulsson:

The remedy is considered by many to be inappropriate in most circumstances for ICC arbitration, where specific provisions are made for the funding of arbitration costs by advances to be made by the parties in equal shares.¹

10. Finally, Respondents' Application comes too late in this proceeding. This arbitration was commenced in ... 2003. The Terms of Reference were signed in ... 2004. Relatively speaking, this Application was made at the eleventh hour, just prior to the final hearing on the merits. There is no reason it could not have been made earlier, and it should have been made in time to have been considered by the Tribunal prior to its first procedural order. At the latest, it could and should have been made during the procedures leading up to, or immediately after, the Partial Award dated ... 2005 determining jurisdiction.

11. For all of these reasons, Respondents' Application for Security for Costs is denied.

¹ W.L. Craig, W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed. (Oceana) at p. 468.