

period [a much larger sum] had been paid by promoters compared to the sum ... paid in by debtors ... The Claimant added that its current share valuation was €7.800.000 and that although still supervised by [the state agency] its financial state was sound ...

9, As for the burden of proof, the Tribunal paid particular attention to the test suggested in Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (3rd edition) namely, has the Respondent shown convincingly that the Claimant (if it proves to be a losing party) "will almost certainly be unable to meet an award of costs against it" (paragraph 7.32)? Having carefully considered the parties' submissions and weighed up the evidence, the Tribunal decided by a majority that the Respondent had not discharged its burden of proof. In the circumstances, it is not necessary for the Tribunal to consider whether the amount of security requested was reasonable or whether any order or award would be enforceable at law.

## ICC Case 13620

Date of procedural order: May 2006

Origins of parties: Africa, Europe

Place of arbitration: London, United Kingdom

ICC Rules of Arbitration: 1998

Summary of issues:

- arbitral tribunal's discretionary power to order security for costs
- impact of failure to pay ICC advance on costs
- provisional nature of decision

### '1. First Respondent's application for security for costs – procedural aspects

1.1. The First Respondent's proposed application for security for costs ("the application") was discussed at the Preliminary Conference ... The Tribunal issued directions at paragraph 5.3 of the Directions and Timetable, which provided that the First Respondent and the Claimant should exchange submissions in relation to the application and that a hearing on the application would be held ... The Directions allowed each side to file supporting affidavits and also required the production of documents by the opposing party. ...

1.2. The parties' submissions were duly received. The First Respondent also made an application for the disclosure of certain financial information from the Claimant. ... the Tribunal ordered the production of certain financial records. In part satisfaction of this order, the Claimant supplied its 2004 financial statements ... Both parties agreed the Tribunal should proceed to determine the application despite the fact that the Claimant's 2005 financial statements were not yet prepared. The Tribunal also ordered supplementary submissions concerning the financial information ... These supplementary submissions were duly received.

1.3. ... The Claimant submitted that an oral hearing was unnecessary and that the Tribunal should determine the matter "on the papers". The Tribunal ... requested the parties' comments. The First Respondent confirmed ... its position that the application could be determined on the papers. ... the Tribunal confirmed that it would determine the First Respondent's application for security for costs "on the papers".

## 2. Applicable principles - security for costs

### 2.1. Article 23(1) of the ICC Rules provides:

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. The Arbitral Tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an Award, as the Arbitral Tribunal considers appropriate.

### 2.2. Since London, England is the place of arbitration, the Arbitration Act 1996 is also relevant. Section 38 of the Arbitration Act 1996 (UK) provides in part, as follows:

(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

(3) The Tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the grounds that the claimant is –

(a) an individual ordinarily resident outside the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

### 2.3. It is widely accepted that the power to issue interim or conservatory measures under Article 23(1) of the ICC Rules includes the power to order security for costs: see *International Chamber of Commerce Arbitration*, 3rd ed., Craig, Park and Paulsson at p. 467 and *A Guide to the ICC Rules of Arbitration*, 2nd ed., Y. Derains and E. Schwartz at p. 297, which the First Respondent cited.

### 2.4. As to the actual grant of the remedy the First Respondent noted that both Derains and Schwartz, and Craig, Park and Paulsson observe that the grant of security for costs is an extraordinary remedy, the grant of which is rare and is generally disfavoured in ICC arbitrations. On the other hand, the Claimant cited an alternative view by Noah Rubins, "In God We Trust, all others pay cash: Security for Costs in International Commercial Arbitration", *American Review of International Arbitration*, Vol. 11 (2000), p. 341, fn. 190, which expressed some perceived beneficial aspects to be gained from a greater willingness to order security for costs.

2.5. It is the Tribunal's view that the grant of security for costs in international commercial arbitration is an extraordinary remedy and should only be granted in clear cases. Rather than starting from a neutral standpoint, as asserted by the First Respondent, the Tribunal considers it appropriate to determine the application against this background.

## 3. Discussion - Tribunal's views

3.1. From the outset the Tribunal identified as a critical issue the First Respondent's failure to pay its share of the advance on costs under Article 30 of the ICC Rules. [In a letter] the Tribunal requested the parties to pay particular attention to the impact the First Respondent's failure to pay its share of the advance on costs had on the Tribunal's consideration of the application for security for costs.

3.2. The Claimant submitted that the First Respondent's failure should act as a bar to the First Respondent's application. The First Respondent conceded that it was a factor that the Tribunal was entitled to take into account in the exercise of its discretion but did not result in a lack of jurisdiction to order interim measures in favour of the First Respondent.

3.3. The First Respondent submitted that an order for security for costs in its favour would be fair and meet the justice of the case. The power to order security for costs under Article 23(1) of the ICC Rules is discretionary. The Tribunal finds that it has jurisdiction to make an order for security for costs despite the First Respondent's failure to pay its share of the advance on costs.

3.4. However, the First Respondent's failure to pay is a highly relevant factor to be taken into account in the overall exercise of the Tribunal's discretion. The parties entered into a concession agreement, which contained a binding arbitration agreement submitting disputes to arbitration under the ICC Rules.

3.5. An important facet of the arbitral procedure under the ICC Rules is the undertaking by the parties to pay the advance on costs determined by the ICC Secretariat under Article 30. The First Respondent is in breach of contract since it has failed to pay its share in breach of the ICC Rules. It has received the benefit of Article 30(3) of the ICC Rules, whereby the Claimant has, in substitution, paid the share of both Respondents in order to ensure that the arbitration proceeds.

3.6. The Tribunal does not agree with the First Respondent's contention that the effect of taking into account the failure to pay its advance on costs of USD 60,000 would be disproportionate in the context of the case. It is the Tribunal's view that the failure of the First Respondent to abide by the ICC Rules, although not automatically disqualifying the First Respondent from seeking interim relief from the Tribunal, does create a substantial obstacle to the success of the application.

3.7. The Tribunal also notes the argument advanced by Claimant that First Respondent should be the party posting security. First Respondent has repeatedly argued that it is a poor country with limited resources (according to World Bank one of the 20 poorest countries in the world), and is facing a claim that is over a quarter of the Government's entire budget for 2005. It signed an ICC arbitration clause, but now defaults on its contractual obligation to pay its share of the advance on costs set by the ICC Secretariat.

3.8. In summary, in the present circumstances, the Tribunal, in the exercise of its discretion is unwilling to make an order for security for costs.

#### 4. Conclusion - ruling on First Respondent's application

4.1. The Tribunal having carefully considered the documentary evidence and the written submissions of the parties and given due weight thereto, and rejecting all submissions to the contrary, hereby rules as follows:

(a) The First Respondent's application for security for costs is denied.

(b) Such denial is without prejudice to First Respondent's right to renew its application at a future time on the basis of a submission that circumstances have changed to such an extent that the grant of the extraordinary remedy of security for costs would then be warranted.

(c) If such an application is made the Tribunal will then reconsider the application based on the existing submissions of the parties, the relevant documentary evidence, and the overall circumstances then prevailing.

### ICC Case 14020

**Date of procedural order:** November 2006

**Origins of parties:** Caribbean

**Place of arbitration:** London, United Kingdom

**ICC Rules of Arbitration:** 1998

**Summary of issues:**

- source of arbitral tribunal's power to order security for costs (*lex arbitri*/ICC Rules)
- timing
- change of circumstances
- arbitral tribunal's power to order security for claims

#### 'I. Respondent's request for security for costs

1. In light of the fact that this arbitration has its seat in London, England, it is appropriate to have regard to the English Arbitration Act 1996 (the "Arbitration Act"), to determine whether an arbitrator sitting in England has the power to enter an order requiring any party to post security for costs. The Arbitration Act expressly addresses the issue of security for costs in Section 38. Section 38 provides, in pertinent part as follows:

38(1) The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.

(2) Unless otherwise agreed by the parties the tribunal has the following powers.

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

This power shall not be exercised on the ground that the claimant is –

(a) an individual ordinarily resident in the United Kingdom, or

(b) a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

... (Arbitration Act, Section 38)

2. Section 38.3, on its face, empowers an arbitrator to order "a claimant to provide security for the costs of the arbitration" unless the parties have agreed otherwise (see Section 38.2) In the instant case, it is thus appropriate to have regard to the parties' agreement, as well as the Rules of Arbitration of the International Chamber of Commerce (the "ICC Rules") in order to ascertain whether the parties have agreed (either expressly, or by reference) to limit the powers of the