

4. First of all, the Arbitral Tribunal does not deem it appropriate to deviate from the principle laid down in its Order No. 5 with respect to the scope of a security for costs. The scope of a security for costs is not properly to guarantee the enforcement of a final decision on costs. It is rather aimed to protect a party's right of defence against claims (raised by an impecunious party) which may prove to be unfounded at the end of the proceedings. In fact, it is procedurally unfair to force a defendant to defend itself incurring, thus, legal costs which eventually could not be recoverable. It follows that the security for costs should apply only with regard to future party's representation costs [cf. ICC Arbitration Case No. 13439 of 2004, published in *SchiedsVZ* 20081 Heft 31 page 118].

5. By its Order No. 5 the Arbitral Tribunal granted Claimant a security for costs ... covering Claimant's costs up to the submission of the post-hearing briefs. Therefore, for the purpose of the security newly requested by Claimant, the legal costs to be considered are only those incurred by Claimant subsequent to the post-hearing briefs.

6. It is true, as stated by Claimant, that Respondent's financial situation has not improved since Order No. 5, but this is not sufficient to grant Claimant the requested measure. In fact, the parties' future representation costs are not easily assessable at this stage of the proceedings. Likewise, it is not possible now to determine if and to what extent one party or the other will be held responsible for causing such costs.

For the reasons illustrated above, the Arbitral Tribunal, by majority decision, hereby denies the measure requested by Claimant.

ICC Case 14993

Date of procedural order: December 2007

Origins of parties: Europe

Place of arbitration: Vienna, Austria

ICC Rules of Arbitration: 1998

Summary of issues:

- exceptional nature of circumstances justifying security for costs
- insufficiency of mere financial difficulties

'The request of Respondents to order Claimant to provide a security for the advance of costs to be paid by Respondents is denied.

Reasons

1. ... Respondents requested from the Sole Arbitrator to impose a security on Claimant pursuant to Article 23 par. 1 of the ICC Rules for the advance of costs to be paid by Respondents.

Respondents reasoned their motion with the uncertain financial situation of Claimant. According to its annual reports of 2004 and 2005 the sales of Claimant had sharply decreased ... Claimant had debts in the amount of ... and more than 75% of its liabilities consisted of short term liabilities.

Further, Claimant had so far failed to submit its annual report of 2006 to the court maintaining the commercial register which constituted a violation of law. Apart from the fact that this raised very deep suspicions about Claimant's management and current financial position, this violation could lead to a penalty of up to 3% of Claimant's assets.

These facts would raise serious doubts that Claimant would be able to reimburse Respondents for the paid advance on costs. Since it was common practice in ICC arbitration to provide security, Respondents moved to grant their request.

2. ... the Sole Arbitrator invited Claimant to submit its comments to this request.

3. Claimant objected to the request of Respondents ... and argued that contrary to Respondents Claimant had paid all advances imposed by the ICC duly and completely. Therefore, there could be no doubts about the financial situation of Claimant.

Further, Claimant had submitted its financial statement for 2006 ... Therefore, no breach of law had been caused and the doubts of Respondents deemed unreasonable, unfounded and unjustified. Under Article 30 par. 3 of the ICC Rules both parties should contribute to the advance on costs equally even when Respondents did not have any claims.

Although it was general practice of the ICC Court to provide security, such security could only be imposed under special circumstances which made reimbursement of the costs incurred by Respondents unlikely from the outset, if not impossible. Since Claimant had not filed for bankruptcy or receivership such circumstances were not at hand.

Claimant requested the Sole Arbitrator not to order Claimant to provide security.

4. In a further submission ... Respondents argued that the annual report of 2006 had brought even more suspicion about the financial situation of Claimant since Claimant had generated an uncovered loss [twice as large as its share capital]. In case a company generated a loss in a financial year which was higher than half of its share capital, a general meeting had to be called and it had to be decided if the company should be liquidated or if other solutions could be proposed.

According to the figures in Claimant's annual report 2006 it was possible that this legal condition had been fulfilled.

Based on this Respondents were convinced that Claimant was in a financial position which made reimbursement of their costs unlikely, if not impossible, and upheld their request.

5. Arbitral Tribunal's right to order security for costs

The wording of Art. 23 and its amendment are interpreted to not have expressly mentioned the arbitral tribunal's authorization to order security for costs because such applications are generally disfavoured in ICC arbitration, while nevertheless possibly justified in exceptional cases.¹³

Some authors¹⁴ have concluded from the change in law and the introduction of Art. 23 ICC that the power to order security is now expressly reserved to the arbitral tribunal. The change in law followed the controversial decision of the House of Lords in *Coppee-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd*¹⁵ (in liquidation) in which the majority held that the High Court has power to order a claimant to provide security for costs in respect of an arbitration being conducted under the ICC Rules of Arbitration.¹⁶

This decision has been highly criticized.¹⁷

6. Arbitral Tribunal's restrictions to order security for costs

The only restriction that might apply to the arbitral tribunal's jurisdiction in respect to conservatory and interim measures are mandatory national provisions.¹⁸

According to the *lex arbitri* (Austrian Procedural Rules), it is not excluded that the arbitral tribunal grants a security for costs.

7. Exceptional circumstances

Berger/Kellerhals¹⁹ list the following reasons to order security for costs:

- The opening of bankruptcy itself was found to be insufficient for as long as the bankruptcy assets are sufficient for the financing of potential legal costs. However, serious insolvency is suspected in cases where bankruptcy is suspended for the lack of assets or due to the fact that the defendant owns a temporal or definite certificate of loss.
- In cases where the claimant acts as a special purpose vehicle and the suspicion is that the claim was only assigned for the purpose to litigate through an entity which in comparison to the former contractual partner does not have funds or significantly less funds (an empty shell company).
- When the claim is filed after the claimant has gotten rid of a big amount or its entire funds and suspicion cannot be averted that the claimant wanted to elude its possible liability for a future award of cost if he lost.
- In situations where the claimant moves its residence to a state where the execution of arbitral awards is not warranted, or when the suspicion cannot be averted that the claimant

¹³ Derains/Schwartz, *A Guide to the ICC Rules of Arbitration*, 297.

¹⁴ E.g. Sutton/Gill, *Russell on Arbitration*, 7-142; Bond/Seppala, *Hong Kong Lawyer*, 1998, 32.

¹⁵ Exceptional circumstances appear to have been present in *Ken-Ren*. At the time of the arbitration, the claimant, Ken-Ren, was insolvent. Its share of the advance on costs, which had to be made to the ICC so that the arbitration could proceed, was paid by a majority shareholder, which stood to gain if Ken-Ren won the arbitration, but would not be liable to meet any award of costs which might be made against Ken-Ren if Ken-Ren lost. See Redfern/Hunter, *Law and Practice of International Commercial Arbitration*, 357.

¹⁶ Sutton/Gill, *Russell on Arbitration*, 7-142.

¹⁷ Redfern/Hunter, *Law and Practice of International Commercial Arbitration*, 357.

¹⁸ Compare Schäfer/Verbist/Imhoos, *ICC Arbitration in Practice*, 115; such national provisions might contradict European High Court decisions relating to non-discrimination, compare Schwab/Walter, *Schiedsgerichtsbarkeit*, 169.

¹⁹ Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 518.

only moved its residence in order to extricate itself from liability for a future award of cost if it lost.

None of these circumstances are present here.

Veit commented Procedural Order No. 14 of 2002, ASA Bull. (2005)²⁰ and came to the conclusion that "the common denominator in international arbitration practice for ordering security for costs is the requirement of a fundamental change of situation since the agreement to arbitrate was entered into which results in a clear and present danger that a future costs award would not be enforceable".²¹

8. Sole Arbitrator's decision

The Sole Arbitrator agrees with the parties that an interim measure pursuant to Article 23 par. 1 of the ICC Rules only can be ordered if it is unlikely, if not impossible, that one party can reimburse its costs due to the ill financial situation of the other party which is obligated to reimburse the costs.

Contrary to Respondents arguments the above-outlined legal aspects on the permissibility to order security for costs clearly show that a situation in which doubts in relation to a party's solvency is insufficient for an arbitral tribunal to order security for costs. Moreover, exceptional circumstances are required.

Respondents have based their request solely on the fact that Claimant has generated material losses in the last two business years according to its annual reports. However, this alone cannot be significant since an annual report does not reveal the entire financial situation of an undertaking, for example hidden reserves or possible future business opportunities.

Since Respondents have not submitted evidence for a clear and present danger that a future costs award would be enforceable, their request was not to be granted.²

²⁰ Procedural Order No. 14 of 27 November 2002 (ASA Bull. 2005) deals with a case in which the claimant was evidentially and obviously insolvent at the initiation of the ICC trial. Compare Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 518.

²¹ Derains/Schwartz, *A Guide to the ICC Rules of Arbitration*, 297 quoting Veit, "Security for Costs in International Arbitration - Some Comments to Procedural Order No. 14 of 27 November 2002", ASA Bull. (2005), p. 116.

ICC Case 15218

Date of procedural order: July 2008

Origins of parties: Europe, Middle East

Place of arbitration: Bern, Switzerland

ICC Rules of Arbitration: 1998

Summary of issues:

- change of circumstances
- degree of insolvency justifying security for costs
- impact of applicant's conduct on outcome of application
- determination of amount to be secured

I. Introduction

1. Respondent ... filed a Request for Security for Costs and sought an order from the Arbitral Tribunal that "Claimant be ordered to provide a security for Respondent's costs in appropriate form and for an adequate amount ...

2. The Tribunal ... acknowledged receipt of [Respondent]'s submission and invited Claimant to communicate its Answer to the Request for Security for Costs ...

3. Claimant ... communicated its Answer to the Request for Security for Costs and requested that the Tribunal "dismisses Respondent's Request for Security for Costs entirely".

II. The position of [Respondent]

4. [Respondent] maintains that [Claimant] is in a disastrous financial situation, that its liabilities ... were 13 times higher than its assets, that [Claimant]'s financial situation has considerably deteriorated since 2006 and that [Claimant] is apparently inactive. According to [Respondent], it only became aware of [Claimant]'s deteriorated financial situation and cash position on 2 May 2008 when [Claimant] produced its balance sheets as of 31 December 2006 and 31 December 2007.

5. [Respondent] submits that the Sole Arbitrator has the power to order security for costs both under the ICC Rules and under Chapter 12 of the PILS as the applicable *lex arbitri* in this arbitration.