

ICC Case 14661

Date of procedural order: December 2008

Origins of parties: Europe

Place of arbitration: Paris, France

ICC Rules of Arbitration: 1998

Summary of issues:

- 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 the Arbitral Tribunal to "readjust its Order No. 5¹² by ordering Respondent to provide for sufficient security for costs in respect of Claimant's advances on costs and lawyers' fees taking into account the cost accrued so far in the amount of at least ... by way of a prime international bank guarantee or similar form of security".

2. In support of its request Claimant argues as follows.

(i) By Order No. 5, the Arbitral Tribunal granted Claimant a security for costs in the amount of ..., basing its decision on the fact that a) Respondent's critical financial situation would create the risk for Claimant not to be able to recover costs it might be awarded and b) the arbitration costs have been increased by Respondent's counterclaims.

(ii) The same criteria set out in Order No. 5 apply in light of the Partial Award. Since this arbitration proceeding will continue, it will cause further costs that are not covered by the security granted by the Arbitral Tribunal.

(iii) Respondent's financial situation has deteriorated since it was ordered to provide the security for costs. The sum ... granted by the Arbitral Tribunal to Respondent is not sufficient to balance Respondent's liabilities ... Therefore, there is the concrete risk that Claimant will not be able to recover its arbitration costs.

(iv) The Arbitral Tribunal in its Partial Award dismissed more than 93% of Respondent's counterclaims. Since Respondent's counterclaims by far exceeded Claimant's claims and caused the increasing of the arbitration costs, Claimant has the legitimate expectation that Respondent will have to reimburse Claimant for the arbitration costs.

(v) Contrary to what the Arbitral Tribunal stated in its Order No. 5, the security for costs should cover not only future costs but all costs Claimant has incurred in the present arbitration proceedings, including costs made prior to Claimant's request for security for costs.

3. ... Respondent challenged Claimant's request for security for costs as being inappropriate and wrong.

(i) It is inappropriate for Claimant to request the Arbitral Tribunal to revisit its findings, at a moment when the only pending issue is the implementation of the Partial Award. It is also inappropriate for Claimant to challenge the Arbitral Tribunal's reasoning on which Order No. 5 is based, or to suggest to the Arbitral Tribunal the allocations on costs between the parties.

(ii) Claimant's assumption that more than 93% of Respondent's counterclaims have been rejected is wrong and constitutes a misstatement of the ruling contained in the Partial Award. In fact:

a) the Arbitral Tribunal has rejected Claimant's allegations of fraud, which have triggered further costs;

b) the Arbitral Tribunal ruled that Claimant's refusal to provide the assistance for the software failure was not valid and therefore ordered Claimant in its Order No. 1 to provide the required assistance. Claimant's position has therefore caused additional costs;

c) the Arbitral Tribunal held that Claimant has breached the Agreement in various ways and that it was not entitled to withhold performance. Consequently, Claimant's main claim for the payment of the outstanding amount and the return of the performance bond have not been upheld by the Arbitral Tribunal, which rather made subject such payment and the return of the performance bond to the fulfilment of certain conditions, such as the implementation of the specific performance, as requested by Respondent in its counterclaim;

d) the Arbitral Tribunal has granted Claimant's monetary claims for damages only partially.

¹² Editor's note: Order No. 5 is reproduced immediately above.

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.