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.'

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.

6. As to the substance, [Respondent] argues that the basic prerequisite 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 cost award would not be enforceable" (... [Respondent]'s Request) On the basis of the information available from [Claimant]'s balance sheets as of 31 December 2006 and 2007, [Respondent] concludes that this prerequisite is met in the present case, given that those balance sheets would reveal that [Claimant] is manifestly over-indebted and – under Swiss law – [Claimant] would have to notify the judge and deposit its balance sheet.

III. The position of [Claimant]

7. ... According to [Claimant], [Respondent] has rather been on notice about [Claimant]'s financial troubles and its inactivity for a long time, by all means since receipt of [Claimant]'s letter to [Respondent two years earlier]. According to [Claimant], its financial difficulties result "precisely because of the absence of total payment of its work as subcontractor in the Project, in particular because of [Respondent]'s ability [sic!] to act promptly vis-à-vis [the Employer] to have the subcontractor's pending claims dealt with" (... [Claimant]'s Answer).

8. Furthermore, [Claimant] maintains that [Respondent], by contributing to the advance of the costs of the arbitration fixed by the ICC Court, accepted to arbitrate against [Claimant] although [Respondent] knew of [Claimant]'s financial situation. Moreover, by mentioning in ...the Answer to the Request for Arbitration that [Claimant] "is ultimately controlled by the ... family ... [which is] well connected within [Claimant's country] and has excellent connections to [the Employer]", [Respondent] expressed its satisfaction with the fact that [Claimant]'s shareholders would make sure that any judgment adverse to [Claimant] would be enforced.

9. With respect to the Arbitral Tribunal's authority, [Claimant] does not deny that the Sole Arbitrator has, in principle, the power to order security for costs.

10. As to the merits, [Claimant] argues that an order for security for costs is justified "only under very particular circumstances and with the greatest reluctance", in particular, it "should not have the effect of depriving a party to have access to justice and to have its case heard" (... [Claimant]'s Answer). [Claimant] therefore submits that the mere initiation of bankruptcy proceedings or even insolvency as such would not justify awarding security for costs. After all, [Claimant] concurs with [Respondent] in the opinion that "a fundamental change in the circumstances 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 may lead to the granting of security for costs" (... [Claimant]'s Answer).

IV. Authority of the Tribunal

11. The Sole Arbitrator notes that both parties accept an ICC arbitral tribunal's jurisdiction and power to rule on a party's request for security for costs.

12. For the sake of completeness, the Sole Arbitrator notes that, although not specifically mentioned in the ICC Rules, commentators consider the wording of Article 23(1) of the ICC Rules to be broad enough to embrace applications for security for costs.[22] Moreover, legal doctrine and practice support the view that Article 183 of the PILS, which allows an arbitral tribunal to order precautionary or conservatory measures, also extends to orders requesting a party to provide security for the opposing party's legal costs.[23]

V. Requirements of an order for security for costs

13. A precautionary or conservatory measure requires that (i) the claim of the applicant is justified ("*Verfügungsanspruch*") and (ii) the legal position of the applicant to be secured or preserved is in acute danger ("*Verfügungsgrund*"). The right to an order for security for costs thus requires that (i) the applicant, in case of success in the proceedings, would have a right to be reimbursed for its costs incurred, and (ii) the applicant puts forward with a reasonable degree of certainty ("*glaubhaft machen*") that its possible future claim for recovery would be deprived failing an immediate securing of those costs.[24]

14. Turning to the first requirement identified in para. 13 hereinabove, the Sole Arbitrator notes that Article 31(3) of the ICC Rules grants complete discretion to the arbitral tribunal when deciding which of the parties shall bear the costs of the arbitration and in what proportion they shall be borne by them. However, the Sole Arbitrator also notes that both parties, by having put forward similar reciprocal prayers for relief with respect to their costs, seem to concur in the opinion that this Arbitral Tribunal should basically apply the rule

22 Derains/Schwartz, *A Guide to the ICC Rules of Arbitration*, 2nd ed., The Hague, p. 297.

23 Poudret/Besson, *Droit comparé de l'arbitrage international*, Zurich 2002, N 610; Zurich Chamber of Commerce (ZCC), Arbitration Proceedings No. 415, Fourth Order of 20 November 2001, in Bull. ASA 2002, p. 467; Procedural Order No. 14, 27 November 2002, Ad Hoc Arbitration of the Arbitral Tribunal in Zurich, Bull. ASA 2005, p. 108.

24 Berger/Kellerhals, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, Bern 2006, N 1466, 1467.

customary in arbitration proceedings conducted in Switzerland, i.e. to allocate the costs in proportion to the outcome of the case, taking into account the relative success of their claims and defences.[25] Therefore, the Sole Arbitrator concludes that the first requirement for an order for security for costs is met in the instant case.

15. Turning to the second requirement identified in para. 13 hereinabove, a review of the scholarly writing and published arbitral decisions on point reveals that arbitral tribunals sitting in Switzerland are indeed generally reluctant in willing to assume factual situations in which an applicant's future claim for recovery of its costs would be in acute danger. In particular, it is common ground that the obligation to provide security may not depend on the opponent's domicile as is sometimes the case in court proceedings, nor can a request for security for costs be granted merely on the fact that a party's state of domicile is not a signatory to the New York Convention.[26]

16. As mentioned above, both parties agree, however, that one of the possible grounds ("*Verfügungsgrund*") upon which an order for security for costs may be granted is if a fundamental change in the circumstances has occurred since the agreement to arbitrate was made, which results in a clear and present danger that a future cost award would not be enforceable (see the quotations from the parties' briefs in para. 6 and para. 10 above). One of the possible fundamental changes in the circumstances may indeed result from the opponent's manifest insolvency at the time of the initiation of the arbitral proceedings if the same party was still in good standing when the arbitration agreement was made.[27]

17. At this point, it must be recalled that security for costs in international arbitration is first and foremost an issue about the conflict between the (insolvent) plaintiff's right to have access to arbitral justice on the one hand and the defendant's interest to have a reasonable chance of being able to enforce a future cost award issued in its favour on the other. Deciding on an application for security for costs is therefore about the task of arbitral tribunals to balance these two conflicting interests against each other and about determining, on the basis of all relevant circumstances of the case, which of them shall prevail over the other.

18. When dealing with these issues in the context of insolvency, the behaviour of the party having become insolvent may well have an impact on whether security for costs should be granted or not. However, these subjective aspects are not the only relevant points to be considered. In particular, making an order for security for costs dependent on the condition that the insolvent party has deliberately and in view of the arbitration taken steps to deprive the other party from recovering its costs would be inappropriate. Such an approach would be one-sided; putting all the weight of the decision on the (insolvent) plaintiff's interest to have access to arbitral justice. In case of insolvency, it is therefore justified that subjective considerations (such as the plaintiffs behaviour) step back and make way for a prevailing objective analysis: If there is no reasonable chance for the defendant to enforce a future cost award in its favour, an order for security for costs must be granted, unless the plaintiff would prove that its financial troubles are directly connected to a behaviour of the defendant contrary to the principle of good faith.

19. The foregoing applies, however, only if the objective analysis reveals that the plaintiff is manifestly insolvent at the time of the initiation of the arbitration proceedings. Manifest insolvency may not be readily assumed. The opening of bankruptcy would not be sufficient grounds as long as the estate of the bankrupt party has sufficient realizable assets in order to finance the arbitration and to honour a future cost award issued against it.

20. The approach outlined in para. 18 hereinabove is not in violation of the plaintiff's right to have access to arbitral justice. As all legal maxims, this principle must be subject to exceptions. Such an exception may be justified if – as explained above – a fundamental change in the circumstances has occurred since the agreement to arbitrate was made, with the effect that access to arbitral justice is no longer allowed unconditionally, but rather subject to the requirement of providing security for the other party's costs.

21. Put differently: If a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred. If those third parties are not willing to provide such security, it would be finally up to the insolvent party's creditors to decide how to proceed with the claim in dispute.

25 Derains/Schwartz, op. cit., p. 371.

26 Poudret/Besson, op. cit., N 610.

27 Berger/Kellerhals, op. cit., N 1468 with further reference and N 1472.

VI. Application of the principle to the instant case

22. In the instant case, the four contracts between the parties which provide for arbitration under the ICC Rules were made in 1999. There is no evidence on record rebutting the assumption that [Claimant] was in good standing at the time. Therefore, if [Claimant] was insolvent at the time when it initiated the present proceedings in 2007, a fundamental change in the circumstances has indeed occurred since the agreements to arbitrate were made.

23. The Sole Arbitrator notes that [Claimant]'s financial status, as it has been described by [Respondent] in its Request for Security for Costs, has not been challenged by [Claimant]. Indeed, [Claimant]'s balance sheet as of 31 December 2007 reveals that its assets were worth ... equal to approximately USD 270,000.00 and that the total of its liabilities amounted to ... equal to approximately USD 3,650,000.00. Thus, it is fair to state that, as of 31 December 2007, [Claimant]'s liabilities exceed its assets by 13 (thirteen) times and that, on the basis of a purely arithmetic calculation, its creditors would have received a dividend of less than 7.5%.

24. In addition, the balance sheet as of 31 December 2007 reveals that [Claimant] has only ... equal to approximately USD 4,000.00 worth of cash. Moreover, it is unknown to the Tribunal whether and to what extent the other assets of [Claimant] would meet the values entered in the balance sheet. Experience shows that, at least in a forced sale, this is normally not the case. The largest part of [Claimant]'s assets relates to "Investment Debtors" ... Assuming that at least part of these claims against debtors relates to [Claimant]'s claims brought against [Respondent] in these proceedings, the Sole Arbitrator must conclude, on the totality of evidence before him, that [Claimant] found itself in a status of manifest insolvency when it initiated the present arbitration proceedings, meaning that [Claimant] is not in the position to finance its own costs of the arbitration, nor to honour a possible cost award adverse to it.

25. The Sole Arbitrator also notes that [Claimant] has not challenged [Respondent]'s remark that - under Swiss law - [Claimant] would have been for a long time in a situation that would require its board of directors to notify the judge of its over-indebtedness and deposit its balance sheet, meaning that - according to Swiss standards - [Claimant] would have been under an obligation to declare itself bankrupt long time ago.

26. These determinations contrast with the documents filed by [Claimant] together with its submission ... These documents certify, inter alia, that [Claimant], [eleven days earlier], was existing and duly registered with the relevant register of commerce in [the country where it was incorporated], that it was not under liquidation and not subject to any bankruptcy situation. Therefore, the Tribunal must assume that the shareholders and directors continue to keep full control over the insolvent and over-indebted company, i.e. there would be no official receiver or bankruptcy administrator making sure that [Respondent] (as a new creditor) would be paid for its costs before any (further) distributions to the existing creditors of [Claimant] would be made. Therefore, even if [Claimant]'s funds were sufficient to finance its own costs of the arbitration, [Respondent] would only be able to recover, on account of a possible future cost claim, a small fraction (dividend), similar to all other existing creditors of [Claimant]. [Claimant] has not argued, nor brought forward evidence showing that [Respondent]'s possible cost claim would have priority over the claims of its existing creditors.

27. Moreover, [Respondent]'s reference to the ... family in para. 13 of the Answer to the Request for Arbitration cannot be considered as an (implied) waiver of the right to claim for security for costs, respectively, as a (tacit) acceptance of [Claimant]'s financial situation, or as an acceptance that the ... family as the shareholders of [Claimant] would substitute for [Claimant] if the latter would not be in the position to honour a cost award adverse to [Claimant]. There is no firm and binding declaration to this effect on record (e.g. in the form of a guarantee in favour of [Respondent]). [Respondent] cannot be considered bound to [Claimant]'s mere reference to the good financial standing of its shareholders.

28. Finally, [Claimant] has argued that its uncomfortable financial situation has occurred due to [Respondent]'s behaviour, i.e. because of lack of payment of its work as subcontractor in the Project. While this would indeed be a valid reason to refuse ordering security for costs (see above, para. 18 in fine), the Sole Arbitrator must conclude that [Claimant]'s allegations to this effect are not "liquid" to be decided at this time. In addition, while it is true that awarding to [Claimant] its claims brought forward in this arbitration would considerably improve its balance sheet, there is no evidence on record showing that [Respondent]'s refusal to comply

with [Claimant]'s (disputed) claims is the one and only reason for [Claimant]'s continuing business inactivity and over-indebtedness.

29. Likewise, [Respondent] cannot be considered to have been put on notice of [Claimant]'s actual financial situation by [Claimant]'s letter to [Respondent] ... This letter merely informed [Respondent] that [Claimant] "has ceased to conduct any business activity", that it has "liquidated operating assets, downsized its management and labour structure over the last 18 months", and that it would put forward in the next 28 days "a claim related to the liquidation of the company and the cessation of its business activity". Nothing in this letter indicates that [Claimant] was manifestly insolvent and/or over-indebted at the time. These facts have come to [Respondent]'s secure attention only when [Claimant] filed its balance sheets as of 31 December 2006 and 2007 together with its submission ...

VII. Conclusion

30. On the basis of the foregoing, the Sole Arbitrator concludes that [Respondent]'s request for security for costs must, in principle, be granted.

31. No security seems justified for the [amount] already advanced by [Respondent] to the ICC as its share of the advance fixed by the ICC Court. [Respondent] paid this amount voluntarily, although – given [Respondent]'s doubts about [Claimant]'s financial situation – [Respondent] could have refused to make this advance payment. As Article 30(3) of the ICC Rules provides for such case, [Claimant] would then have been free to substitute for [Respondent]'s share of the advance.

.....

VIII. Decision

34. On the basis of the foregoing, the Arbitral Tribunal hereby:

(a) Decides to order [Claimant] to provide a security for [Respondent]'s reasonable legal and other costs incurred by it for the arbitration ...

(b) Decides to order [Claimant] to deposit the amount of [the security by the date set by the Arbitral Tribunal] on a trust account to be designated by the Arbitral Tribunal in the next few days.

(c) Decides that the amount of [the security] shall be kept in trust until such time as the Tribunal shall decide, in an award, on the costs of the arbitration and which of the parties shall bear them.

(d) Decides to confirm the time limits and dates fixed in the Provisional Timetable ...

(e) If the required security is not paid in full [by the date set by the Arbitral Tribunal], the Arbitral Tribunal reserves to order the suspension or termination of the arbitral proceedings.'