Arbitration


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Security for costs – a levelling playing field

It is well known that despite arbitral tribunals having the power to award security for costs, this power is rarely used. If it is, then generally it is only in exceptional circumstances. But some recent cases suggest obtaining security for costs in arbitration is becoming easier.

Authority

An express or implied power for an arbitral tribunal to grant security for costs is usually found in most institutional arbitral rules. For example, articles 25.1(i) and (ii) of the London Court of International Arbitration (LCIA) Rules, rule 27(j) of the Singapore International Arbitration Centre Rules, and article 38(1) of the Stockholm Chamber of Commerce Arbitration Rules expressly provide for this power. Article 26 of the United Nations Commission on International Trade Law (UNCITRAL, pictured) Arbitration Rules and article 28 of the International Chamber of Commerce (ICC) Rules provide for the general power of tribunals to order conservatory or interim measures, which encompass the power to grant security. The International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules, which previously contained an implicit power, have recently been amended. Article 53 of the ICSID Arbitration Rules 2022 now expressly grants a party the right to request security for costs from the tribunal.

The power to grant security for costs is discretionary and, usually, arbitral tribunals consider factors such as the financial position of the claimant, its likely willingness to pay and the likelihood it will have to meet a costs order. Historically, security for costs has been considered a notoriously difficult measure to obtain. The first time an investment arbitration tribunal granted security was in *RSM Production Corp v Saint Lucia* in 2014, which was upheld by the ICSID annulment committee in 2019.

Recent case law

In 2019, an ICSID tribunal in *Ipek Investment Limited v Republic of Turkey* examined the two main heads of high economic

risk and bad faith/abuse of process when considering Turkey's application seeking that Ipek provide $6.8m by way of security for costs. With respect to the former head, a lack of funds to meet adverse costs was deemed insufficient to justify an order. The tribunal also rejected the arguments of bad faith on the basis that they considered that the claimant had made reasonable efforts to secure financial provisions to allow them to meet their obligations in the event of an adverse costs order. Thus, Turkey's application for security of costs was denied.

In January 2020, in *Dr Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v Turkmenistan,* an ICSID tribunal ordered the administrator of an insolvent German construction company, who was bringing a claim against Turkmenistan with the benefit of third-party funding, to pay security for costs in the sum of $3m, due to the 'exceptional circumstances' of the case. This case turned, *inter alia*, on the issue of the explicit non-liability of the third-party funder for a costs award adverse to its funded party, which the tribunal considered to give rise to a 'more extreme situation' and therefore was an exceptional circumstance. Relying on *RSM Production Corporation v Saint Lucia*, Turkmenistan showed evidence it had been unable to enforce costs awards that it had successfully obtained in several other cases against funded claimants.

However, in contrast, in February 2020 an UNCITRAL tribunal, having satisfied itself that it has the power under article 26 of the UNCITRAL rules to order security for costs, then applied the exceptionality test in *Herzig* and denied the application in *Tennant Energy LLC v Government of Canada*, on the basis that despite the existence of third-party funding, the respondent did not adduce evidence proving the claimant's impecuniosity and did not submit any case law where the exceptional circumstances requirement was deemed unnecessary.

Similarly, in September 2020 in *Bay View Group LLC and the Spalena Company LLC v Republic of Rwanda,* the ICSID tribunal found that the existence of a contingency arrangement with a third-party funder who would not be required to cover an adverse costs award was insufficient to discharge the exceptionality burden in *Herzig*. The tribunal also held that impecuniosity or insolvency of the claimant could not be implied solely based on Rwanda's allegations that the claimant's investments were non-operational and, in any event, the possibility that the claimants would not be able to satisfy an adverse costs order did not amount to exceptional circumstances. Based on these reasons *inter alia*, the tribunal refused to grant an award for security.

Following the trend in *Bay View* and *Tennant Energy*, earlier this year the ICSID tribunal in *Hope Services LLC v Republic of Cameroon*, refused to grant security for costs despite the claimant being third-party-funded and the funding agreement containing a clause excluding payment of any adverse costs award. The tribunal decided that, although it had the power to make an order for security for costs, the application did not satisfy the criteria required for making such an order.

On a positive note for defendants, the LCIA tribunal has been exercising its discretion without such extreme caution. We have recently been successful in obtaining security for costs in an LCIA arbitration. Given recent cases, certainly in the ICSID tribunal, it is possibly too soon to say that there is a level playing field in terms of awards granting security for costs being the standard in arbitration.

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