Security for Costs in ICSID Arbitration

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Inna Uchkunova (International Moot Court Competition Association (IMCCA))

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and Oleg Temnikov

Purpose of security for costs

Security for costs falls into the category of provisional measures and is regulated by Article 47 of the ICSID Convention and Arbitration Rule 39. Its purpose is, inter alia to preserve the effectiveness of the award and the integrity of the proceeding by protecting the requesting party's potential right to reimbursement of costs. (*RSM Production Corporation v. Saint Lucia*, Decision on security for costs of 13 August 2014, para. 65) The present post discusses the decision on security for costs of the arbitral tribunal in *RSM Production Corporation v. Saint Lucia*, as well as its implications in an area inhibited by inconsistency.

Why past tribunals refrained from ordering security?

A number of past tribunals have dealt with the question of security for costs. The following overview is not necessarily exhaustive.

The first request came in the *Maffezini* case. The tribunal rejected the respondent's request reasoning, among others, that the right whose protection is sought is hypothetical and lacks a link to the subject-matter in dispute. (*Maffezini v. Spain*, Procedural Order No. 2 of 28 October 1999, paras. 18, 24-25) The failure of this request may however be explained by the formulation used by the respondent. It asserted that the claimant's claims are worthless and would eventually be sanctioned by shifting of the costs. This formulation required the tribunal at an early stage to assess the meritoriousness of the claimant's case which is unacceptable.

The next request was submitted before the *Pey Casado* tribunal. The tribunal found, in contrast with the Maffezini tribunal, that even conditional rights may be protected by way of provisional measures. (*Pey Casado v. Chile*, Decision on provisional measures of 25 September 2001, paras. 80-81) This positive result was overshadowed by the following findings: (1) the lack of express language in Article 47 of the Convention implies a presumption against security for costs; (2) by acceding to the ICSID Convention States assume the risk that the claimant may turn out to be impecunious and (3) there is no requirement for the claimant to prove its creditworthiness. (para. 86) Nevertheless, the tribunal did not exclude the possibility of ordering a security, if there is evidence that the claimant is insolvent. (para. 88) The request failed because the respondent made no showing of such a risk.

In *Libananco*, the tribunal joined the opinion expressed in *Maffezini* and held that the right whose protection is sought is hypothetical in that ICSID tribunals at that time would typically split the costs (pay-your-own-way approach) rather than order the losing party to pay the costs of the winning party,

a trend which has started to change gradually. (*Libananco v. Turkey*, Decision on preliminary issues of 23 June 2008, para. 59) Additionally, in this case, the respondent had based its petition on the mere assertion that the claimant is a "shell company". In rejecting the request, the tribunal did not find this sufficient reason since many investments are made through an investment vehicle.

In *RSM Production Corporation et al. v. Granada*, the tribunal differed from the previous tribunals and held that the right to reimbursement of costs is protectable. The tribunal doubted however that "an absence of assets alone would provide a sufficient basis for such an order." (*RSM Production Corporation et al. v. Granada*, Decision on security for costs of 14 October 2010, para. 5.19) It was not necessary for the tribunal to determine the exact threshold since the risk of non-payment was minimized given that there were "four Claimants who would be jointly and severally liable", and the respondent had itself conceded that the claimants have sufficient means. (paras. 5.21-5.22)

In the *Burimi* case, the respondent's request failed since the respondent merely alleged without proving that "it '*believes*' that because the Claimants [have] no real activity,… '[t]hey *could*… organize their bankruptcy when faced with an adverse award'." (*Burimi S.R.L. v. Albania*, Procedural Order No. 2 of 3 May 2012, para. 39)

RSM Production Corporation v. Saint Lucia

This brings us to the *RSM Production Corporation v. Saint Lucia* decision which is the first to order the provision of security for costs, thereby overcoming much of the previous hesitation. The tribunal was firm that it is competent to order the posting of security despite the fact that the right whose protection is sought is based on a number of conjectures such as the success of the respondent; and that this measure is intended to protect the integrity of the proceedings.

The decision makes a timely clarification of those issues but it tells us little with regard to the threshold for ordering a security since the circumstances of the case were specific. First, the claimant had a history of non-compliance with prior decisions and failure to make advance payments and, second, there was evidence that the claimant is funded by a third party in the initiation of its claim. According to the tribunal:

> "The third party funding exacerbates the concern engendered by RSM's conduct in the Annulment Proceeding and the Treaty Proceeding. It places an unfunded RSM and the third party funder(s) in the inequitable position of benefiting from any award in their favor yet avoiding responsibility for a contrary award." (para. 76)

General requirements for the indication of provisional measures

The general requirements for the indication of provisional measures are: (1) existence of *prima facie* jurisdiction; (2) the right to be protected is at least plausible; (3) and relates to the dispute; (4) the measure is necessary and (5) urgent. Requirements 1 to 3 do not any longer pose difficulties in the context of security for costs since it has been clarified in practice that the question of *prima facie* jurisdiction need not be examined in detail in case the respondent itself requests the indication of provisional measures; the potential right to reimbursement of costs is susceptible of protection and it relates to the integrity of the proceedings.

The urgency requirement also does not present any problems since it has been accepted that if the matter relates to the integrity of the proceedings or the non-aggravation of the dispute it is always urgent. (*Quiborax S.A. v. Bolivia*, Decision on provisional measures of 26 February 2010, para. 153)

The most difficult question, therefore, is that of necessity, i.e. the threshold which must be met for the posting of security. Some tribunals have emphasized the exceptional nature of provisional measures but this shall not imply that the threshold is very high. It does not require more than a showing of necessity and urgency. (*Ceskoslovenska obchodni banka, A.S. v. Slovak Republic*, Procedural Order No. 3 of 5 November 1998, p. 2)

Threshold of necessity

The indication of provisional measures is necessary "when they are 'required to avoid harm or prejudice being inflicted upon the applicant.' In assessing necessity, tribunals usually weigh the interests of both parties and order the measure only if the harm spared the petitioner 'exceeds greatly the damage caused to the party affected' by it." (*Burimi S.R.L. v. Albania*, para. 35)

The threshold of necessity has remained ambiguous due to the lack of sufficient authority. Nevertheless, a number of conclusions can be drawn:

● Security for costs would be ordered, if the claimant has a track record of failure to comply with previous awards, making advance payment etc. and for this purpose information can be gathered from non-ICSID cases as well. (*RSM Production Corporation v. Saint Lucia*, para. 82)
● A guarantee will be necessary in case the claimant is stripping itself of assets in order to avoid an award of costs. (*RSM Production Corporation et al. v. Granada*, para. 5.24)
● A security may be required if there are reasons to believe that the enforcement of an adverse award would be obstructed – for e.g. if the State where most of the claimant's assets are located is not a party to the ICSID Convention or has failed to implemented legislation facilitating enforcement. (para. 5.21)
● It has also been noted that security is appropriate "where abuse or serious misconduct has been evidenced." (*Commerce Group v. El Salvador*, Ad Hoc Committee's decision on security for costs of 20 September 2012, para. 45) Although it is not clear how this is compatible with the requirement that at this stage the tribunal cannot prejudge the merits, there may be cases in which it is prima facie obvious that the claim is fabricated, for e.g. the claimant cannot present any original documents to prove the existence of investment (*Europe Cement v. Turkey*, Award of 13 August 2009, para. 184); or if there is indication of a post hoc corporate restructuring designed to obtain access to international arbitration.
● The existence of third-party funding is a circumstances which needs to be put into the equation and may well tilt the scales in the respondent's favour.

Claimant's lack of assets or inability to pay

As noted above, some tribunals have ruled that the claimant's lack of assets or inability to pay is insufficient for a security order. Notably, these decisions have been taken in instances in which no evidence was presented as to the claimant's precarious financial situation – the requests rested on the mere assertion that the claimant is an investment vehicle *possibly* lacking assets. The only case so far finding that failure to make an advance payment is insufficient was not taken under Article 47 but under Article 44 of the ICSID Convention which is a different issue. (*Commerce Group v. El Salvador*, para. 42)

Past tribunals may have been cautious not to stifle a *bona fide* claim, given moreover that the claimant's lack of assets may be due to the actions of the respondent itself in case of expropriation. Be that as it may, while in earlier cases the pay-your-own-way approach to costs was seemingly predominant, the more recent practice supports a costs-follow-the-event principle. This requires the rethinking of issues such as balancing the claimant's access to justice against the availability of assets from which the successful respondent may satisfy an award of costs.

Importantly, the tribunal in *Pey Casado* has accepted that it may order the provision of security in the event that the claimant is insolvent. (para. 88) Another tribunal has referred to a possible threshold of "insufficient or unavailable assets". (*RSM Production Corporation et al. v. Granada*, para. 5.25) Consequently, if there are no reasons to regard the claimant's lack of assets as due to the measures taken by the respondent, a security for costs may well be required.

Further, drawing an analogy from stay-of-enforcement proceedings where occasionally the argument has been made that a requirement for security penalizes the applicant for annulment, it is noteworthy that this argument has been rejected. (*Sempra v. Argentina*, Decision on stay of enforcement of 5 March 2009, para. 96) *Ad hoc* committees regularly take into account the financial standing of the parties. Thus, in *Mitchell v. Congo* the committee considered that Mr. Mitchell "is a natural person, whose activities and assets are difficult to localize." (Decision on stay of enforcement of 30 November 2004, para. 24)

As a policy reason, it may be added that the requirement for security is another means to prevent frivolous claims and practice shows that only States with strong cases go into the trouble of requesting security since, although binding, the orders are non-enforceable.

Conclusion

Decisions on security for costs require a careful balancing of the right to access to justice and the requirement that the tribunal renders an effective award. One tribunal has underlined that failure to comply with the award poses a systemic risk to the ICSID. (*Burimi S.R.L. v. Albania*, para. 49) Should this systematic risk continue to be shifted to the burden of States? What are the implications for security for costs in cases such as the *Abaclat* where the State faces claims from thousands of claimants and the costs are very high? These are questions which need to be clarified in the future.