Kluwer Arbitration Blog

Here Comes the Revolution? Here Comes the Revolution! Provisional Measures Under the New Proposed ICSID Arbitration Rules: Where Are We Heading Now?

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A. Introduction

The ICSID Convention and the corresponding Arbitration Rules contain certain provisions that, apparently, are not uniformly applied by arbitral tribunals. Article 47 of the ICSID Convention can be considered as one of them. In light of the proposal for new ICSID Arbitration Rules, a discussion about the use of provisional measures in the context of ICSID-based arbitration, under Article 47, seems to be timely. This post will look into the wording of Article 47 of the ICSID Convention, the current Rules 39 of the ICSID Arbitration Rules, as well as into the proposed Rule 50 of the new ICSID Arbitration Rules and the relevant commentary in ICSID Working Paper vol. 3.

B. Article 47 ICSID Convention – *Recommend* Means Binding? ICSID Case Law: Yes. Working Paper: No.

The first point which we are to examine is the approach currently adopted by tribunals with regard to the effect of an order for provisional measures versus the approach presented by the ICSID Working Paper. It seems that we can safely state that the approach taken by the Working Paper is no less than a revolutionary one.

Article 47 refers to the use of provisional measures and provides that

> Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Article 47 uses the word “recommend”, which seems to indicate that and arbitral tribunal has no power to compel the parties to abide to its ruling. Despite this presumption, the common view is that provisional measures which are rendered pursuant to ICSID Convention are, indeed, binding. One ICSID tribunal noted that:

> Despite the wording of the cited provision that indicated that the Tribunal may (only) "*recommend*" provisional measures, it is well settled among ICSID tribunals that such decisions are binding. Accordingly, the term "*recommend*" is to be understood as meaning "order" [RSM Production Corporation V Saint Lucia, ICSID Case no. ARB/12/10, August 13 2014]

Contrary to this statement, it appears that the reality is different. In fact, even the RSM Tribunal was split. The minority was of the opinion that the tribunals can only recommend provisional measures. It stated that "entry of an 'order' simply flies in the face of the explicit direction in both Article 47 and Rule 39 that a tribunal may 'recommend' provisional measures" [RSM V Saint Lucia, ICSID Case no. ARB/12/10 Dissenting Opinion of E. Nottingham, August 13 2014].

The proposed ICSID Arbitration Rules try to deal with this issue. The new Rule 50, maintains the same terminology and uses the verb to "recommend". By doing so the new Rule signals that, unlike the common view adopted by tribunals, provisional measures rendered pursuant to ICSID Convention are *not* binding. Indeed, the Working Paper clearly states that because the term *recommend* appears in the Convention it can only be modified through an amendment to the Convention. It also mentions the disagreements between states during the drafting of the ICSID Convention with regard to the consequences of the failure to comply with such a recommendation. It states that "taking into consideration the contentious debates during the drafting of the Convention and the objection of some States to binding provisional measures, the WP does not propose a new provision in this regard". This shows that the drafters of the new Rules are of the view that an order rendered pursuant to Article 47 is *not* binding. This seems to be a good start towards more clarity in this area, as it may elucidate this controversial issue.

However, some points should be noted. First, the proposed Rule 50 and the Working Paper overturn the existing case-law and make it clear that provisional measures are not binding. As stated above – this is no less than a revolutionary approach which stands contrary to the approach commonly adopted by many ICSID tribunals. Secondly, although the new Rule and the Working Paper make it clear that provisional measures are not binding, the Working Paper also states that tribunals "remain free to draw inferences from the failure of a party to follow a recommendation for provisional measures". This comment might still be misinterpreted by tribunals and lead, again, to lack of clarity and inconsistent rulings.

C. Article 47 – Security for Cost: So Is It or Is It Not a Type of Provisional Measure? ICSID Case law: Yes. Working Paper: No.

Another interesting point to examine is the approach taken by the proposed Rules towards security for costs, namely the arbitral tribunal`s ability to order a party, usually the claimant, to guarantee payment of potential future costs he might be ordered to pay to the other side to the dispute. The current set of Rules is silent with regard to the ability to order security for costs. However, tribunals have ruled that they can do so based on Article 47. One tribunal noted that it "agrees with the general proposition that security for costs can be ordered based on Article 47 ICSID Convention and ICSID Arbitration Rule 39" [See RSM v Saint Lucia, para 54]. However, the minority held a different approach. It stated: "I do not think that an order requiring Claimant to secure costs which may be awarded to Respondent is encompassed within the class of `provisional

measures` which may `be taken to preserve the rights ` of the Respondent".

The above demonstrates that although it is not clear whether Article 47 of the ICSID Convention includes the power to order security for costs, in practice tribunals did assume such power (although only rarely used it). The proposed Rules solve the debate by adding a new rule, Rule 51, which is dedicated to the issue, and which makes it clear that under the new regime tribunals are allowed to render orders for security for cost.

However, under the structure of the proposed Rules, it appears that security for costs is not a type of provisional measure, as it is provided for in Rule 51, separated from Rule 50 dealing with provisional measures. It can also be noticed that, unlike proposed Rule 50, Rule 51 on security for costs uses the verb to "order". This indicates that an order for security for cost is indeed binding. Indeed, the proposed Rule 51 provides arbitral tribunals with the power to sanction a party that refuses to comply with such an order, by suspending or discontinuing the proceedings. Similar sanctions (or any other sort of sanctions) do not exist under proposed Rule 50 in relation to provisional measures. It can also be noted that while the initiative to order provisional measures may be either the parties' or the tribunal's, an order for security for cost can only be rendered following a request submitted by one of the parties. Furthermore, the criteria tribunals are asked to apply when considering a request for provisional measures is different from the criteria applied when a request for security for cost is considered. In particular, a tribunal is allowed to recommend provisional measures only if it considers it to be urgent and necessary to do so. This is not required when a tribunal considers a request for security for costs.

D. Conclusions

The first conclusion derived from the above analysis is that we may still be facing inconsistent rulings or disagreements, particularly with regards to the effects of provisional measures. In light of the importance of this instrument such outcome is, of course, not desired. Nevertheless, the limitations imposed by the ICSID Convention are inevitable in this context.

The second conclusion is a welcome note for the express provision of the power of an ICSID arbitral tribunal to order security for costs. In the face of the increasing demand for such measures, it is an opportune development in the context of the new ICSID Arbitration Rules.

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