Kluwer Arbitration Blog

Is Investor-State Arbitration Warming up to Security for Costs?

Chiara Cilento, Benjamin Guthrie (Herbert Smith Freehills LLP) · Tuesday, June 18th, 2019 · Herbert Smith Freehills

On April 29, 2019, an ICSID annulment committee broke new ground by upholding a tribunal's order that a party post security for costs. This decision, in the case *RSM Production Corp v. Saint Lucia*, is the first time that an *ad hoc* committee has addressed whether the ICSID Convention and Rules grant tribunals such a power. Although the decision is unpublished, it has been reported on by various outlets. The committee is reported to have held that although the ICSID Convention does not expressly mention security for costs as a provisional measure that may be ordered, a tribunal's power under the Convention in respect of provisional measures is broad enough to permit security for costs. The committee further reportedly held that even if that were not the case, the tribunal's action did not "manifestly" exceed its power given that other tribunals had also concluded they had authority to order security for costs.

In this post, we look at the significance of the *ad hoc* committee's decision, and explore whether it heralds a new trend of ordering security for costs. Following the *RSM* tribunal's 2014 order (the first time an investment tribunal had ordered security for costs), another tribunal ordered security for costs in *García Armas v. Bolivarian Republic of Venezuela*; the *ad hoc* committee's decision is a further step in the same direction. However, while security for costs is plainly an issue that parties need to be aware of, it may be too early to say that it is the "new normal" in investment arbitration.

What is security for costs?

Security for costs is a type of interim measure which enables a party to post security to cover the legal costs associated with the arbitration (these may include, but are not limited to, attorney's fees, tribunal fees, as well as administrative costs). Security for costs should not be confused with security for claims, which refers to the security posted for the substantive claims in the arbitration.

Security for costs is a form of interim measure typical in England and Wales and other

Commonwealth jurisdictions, and is a commonly sought relief in arbitrations seated in such jurisdictions. While security for costs has historically been less common in arbitrations in civil law settings, it appears to have become more common in the recent years. In investor-state arbitration, security for costs was not historically granted until *RSM*.

The context of the *ad hoc* committee's decision

The order of security for costs affirmed by the *RSM ad hoc* committee was hailed as groundbreaking when it was published in 2014. No investment tribunal had previously issued such an order. Moreover, neither the ICSID Convention nor the ICSID Arbitration Rules expressly grant a tribunal the authority to order security for costs—they empower the tribunal to impose provisional measures generally, but security for costs is not specifically listed as a provisional measure that may be imposed (s*ee* ICSID Convention Art. 47; ICSID Arbitration Rule 39). The same is true of the ICSID Additional Facility Rules and UNCITRAL Arbitration Rules (s*ee* ICSID Additional Facility Arbitration Rule 46; UNCITRAL Arbitration Rules (2013) Article 26).

However, as the *RSM* tribunal itself observed, a number of ICSID tribunals opined as early as 1999 that they had the authority to order security for costs. None actually exercised such a power, holding that it would only be warranted in exceptional circumstances that were not present in each case (¶¶ 52–53).

The *RSM* and *García Armas* cases

The *RSM* tribunal was the first to find that the exceptional circumstances warranting an order of security for costs were present. It did so based on fairly atypical facts. Prior to commencing arbitration against Saint Lucia, RSM had initiated two ICSID arbitrations against Grenada (*RSM Production Corporation v. Grenada*, ICSID Case No. ARB/05/14; *Rachel S. Grynberg and others v. Grenada*, ICSID Case No. ARB/10/6). In both proceedings, RSM failed to pay required advances on costs and reimburse Grenada for costs advanced on its behalf, leading to discontinuance of annulment proceedings in one of the cases.

These past failures were front and center in the tribunal's decision to order security for costs in *RSM v. Saint Lucia*. The tribunal took them as evidence that RSM was unwilling or unable to pay the advances and that, as further evidenced by statements by counsel regarding RSM's difficult financial position, RSM would likewise be unable or unwilling to pay an award of costs against it (¶¶ 77–81). The tribunal also found it relevant that RSM's claim was supported by a third-party funder, as the tribunal considered it doubtful that the funder would comply with an award of costs (¶ 83).

On June 20, 2018, four years after the order in *RSM*, the *García Armas* tribunal also ordered security for costs by ordering the claimants to provide security in the amount of US$ 1,500,000. As mentioned above, this was only the second known time in which

security for costs were ordered in an investor-state arbitration setting, and was also based on fairly atypical facts. The claimants were ordered to produce their funding agreement with the third-party funding their case (¶ 2), which disclosed the fact that the funder would not cover an award for costs (¶ 25). As a result, the tribunal ordered the claimants to produce evidence of their assets, to show that the respondent would have been able to successfully attach their assets in the event of an award for costs in favor of the respondent (¶ 7). The tribunal finally found that the solvency of the claimants had not been sufficiently proved (¶ 250), and further opined that, taking into account all of the circumstances, the damage inflicted on the respondent by not awarding the security for costs would be greater than the damage caused to the claimants by ordering them to post the security (¶ 231).

Is security for costs still exceptional?

In short, the decisions to order security for costs in both the *RSM* and *García Armas* cases were based on facts that won't be present in all investment arbitrations. So while one might wonder whether the *RSM* annulment committee's decision confirms a trend of increased willingness to order security for costs, the unique facts of these cases suggest that the decision may signify another step toward increased acceptance of security for costs, but perhaps not, by itself, an opening of the floodgates. It is certainly a notable decision, however, particularly with respect to its ruling that ICSID tribunals have authority to order security for costs.

There has been substantial discussion about the relationship between third-party funding and security for costs. Both the *RSM* and *García Armas* tribunals found third-party funding relevant to their decisions, as described above. In *RSM*, moreover, Gavan Griffith authored an assenting opinion proposing that when a claim is funded by a third party, the burden should shift to the claimant to show why security for costs should not be ordered (¶¶ 11–18). This position has not been universally adopted, but even it envisions that there are situations in which ordering a third-party-funded claimant to post security for costs is not appropriate, including when the claimant shows an ability to satisfy an adverse award of costs (¶ 16).

Eskosol S.p.A. v. Italian Republic is a further example. In a 2017 order, the tribunal declined to order a third-party-funded claimant to post security for costs. The tribunal held that it need not decide whether it had the power to make such an order because, even if it did, the exceptional circumstances that would warrant exercising that power were absent. The key factor in the tribunal's decision was that, although the claimant was bankrupt and there was no evidence its agreement with its third-party funder would require the funder to pay an award of costs, the claimant had taken out an insurance policy to cover the risk of an adverse award of costs (¶ 37). This contrasts with the *RSM* case, in which there was no evidence that the funder would comply with an award of costs against the claimant, and *García Armas*, in which there was evidence it would not. *Eskosol* shows that there are ways for third-party-funded parties to assuage concerns about whether an eventual award of costs will be honored – parties may wish give thought to these when commencing arbitration.

An additional development in this area are the proposed amendments to the ICSID Rules. In addition to the obligation provided by proposed Arbitration Rule 13 that the name of any third-party funder is disclosed to the Secretariat, proposed Arbitration Rule 51 provides that "[u]pon request of a party, the Tribunal may order any party asserting a claim or counterclaim to provide security for costs". If adopted, this latter rule would confirm tribunals' authority to order security for costs. But it would not mean that such orders are always appropriate. In that regard, the proposed rule sets out a number of factors that a tribunal must consider, including the party's willingness and ability to comply with an adverse decision on costs and the parties' conduct. While it does not expressly state that security for costs should only be ordered in exceptional circumstances, these factors are substantially the same those on which some tribunals are already relying, as illustrated by the cases discussed above.

Conclusion

In sum, recent years have seen steps toward a greater role for security for costs in the investment arbitration regime. The rise of third-party funding is playing a role in that. But it is perhaps too early to say that orders of security for costs are the norm – the decisions of tribunals both granting and denying security for costs suggest that particular circumstances are required.

This entry was posted on Tuesday, June 18th, 2019 at 6:17 am and is filed under ICSID Arbitration, Security for Costs, Third party funding
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.