

## Security for costs and security for claim in international commercial arbitration



### 1. General remarks

International commercial arbitrations are complex proceedings which involve substantial costs for the parties for securing the legal representation and for the payment of arbitral fees.

In this respect, security for costs and security for claim are interim protective measures available during an arbitration, for the purpose of ensuring the amounts in respect of the advanced costs or the requested damages.

Such measures may be used when one side is concerned that the other side may not have enough money to pay an adverse costs order or satisfy an award made against it. Once granted, the measures require that the party against whom they are ordered sets aside a sum of money to satisfy any eventual award or costs order.

Although in theory these types of measures are available under most arbitral rules, in practice arbitral tribunals order such measures following a rigorous analysis with the application of a high threshold.

In the lines to follow, we will analyse the minimal conditions in view of obtaining these interim reliefs and will continue by analysing certain particular cases where such provisional measures have been granted or dismissed.

### 2. The security for costs interim measure

Security for costs is an interim measure that allows an applicant (usually the respondent) to secure an amount representing its arbitration costs, namely the legal costs, the tribunal's fees, administrative costs etc. This measure is grounded on the principle of law recognized in most jurisdictions, which provides that an unsuccessful party in the legal proceedings is obliged to reimburse such costs to the successful party.

This principle may be found under Romanian law as a general principle (Article 451 of the Romanian Civil Procedure Code – “CPC”), but also as a particular rule, in the section dedicated to arbitration (Art. 595 CPC).

It is important to underline that in order to issue an order for security on costs, arbitral tribunals must have good reasons for securing such sums in advance, based on claimant's alleged inability to pay an adverse costs order against it.

If security for costs is granted in favour of the applicant, the opposing party will be required to set aside a sum of money, usually an estimate of the applicant's arbitration costs, either in an escrow account or more commonly by way of a bank guarantee, until the tribunal issues its final award dealing with the arbitration costs.

### **3. The security for claim interim measure**

Security for claim is an interim measure that allows an applicant (either the claimant, or the respondent in respect of the counterclaim) to secure the amount that it is claiming against the opposing party before the issuance of the arbitral award.

As in the case of security for costs applications, there must be solid grounds for securing the amounts claimed in advance of an award to that effect, based on the opposing party's alleged inability to pay the awarded damages.

### **4. Availability of security for costs and security for claim in various international arbitration rules**

Most international arbitration rules give a tribunal the power to award security for costs and claim, either expressly or by implication.

The arbitration rules of the London Court of International Arbitration (LCIA) and of the rules the Singapore International Arbitration Centre (SIAC) both expressly provide powers to award security for costs (Article 25.2 and Rule 27(j) respectively) and security for claim (Article 25.1(i) and (iii) and Rule 27(k) respectively).

In a similar manner, the 2018 Rules of Arbitration of the Vienna International Arbitration Centre (VIAC), explicitly provide within Article 33 a particular provisional measure for security of costs.

In contrast, the Arbitration Rules of the International Court of Arbitration attached to the International Chamber of Commerce (ICC) Rules and the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules do not make specific reference to these forms of relief. However, it is acknowledged and accepted that Article 28 (ICC Rules) and Article 26 (UNCITRAL Arbitration Rules) represent the legal basis for the general power awarded to tribunals to order such interim measures.

Similarly, in respect of investment arbitration, Article 47 of the International Centre for Settlement of Investment Disputes (ICSID) Convention and Rule 39 of the ICSID Arbitration Rules, grant the tribunals the power to order provisional measures. As to be further detailed below, such provisions have been used by parties in applying for provisional measures for security for costs taking into account the high costs and high damages involved in investment arbitration claims.

The Rules of Arbitration of the International Court of Arbitration attached to the Romanian Chamber of Commerce and Industry provide within Article 40<sup>1</sup> the arbitral tribunal's possibility to order such provisional measures, the rule being a general one, without a specific provision referring to security for costs or security for claim. However, as in the case of the ICC Rules, such provisional measures may be requested based on this general legal ground.

In what concerns the general provisions of Romanian law in respect of arbitration, such a request may be grounded on the provisions of Art. 585 CPC (*Provisional measures*), corroborated with the provisions of Art. 597 CPC (*Payment in advance of arbitral costs*)

Despite their wide availability in the commonly used international arbitration rules, such interim measures are seldom made. The reason for this is that the threshold for granting such measures is very high.

A 2014 ICC publication<sup>2</sup> analysing the arbitral decisions concerning security for costs in ICC arbitrations concluded that out of approximately 10 applications submitted, only three were successful. Moreover, where such measures were granted, they were granted only partially and subject to certain conditions.

Despite these statistics, what is important is that if the requests for such provisional measures are justified, more precisely if these comply with the conditions for such a claim, as these are defined by the case law, such provisional measures will be granted by the arbitral tribunals, as to be further detailed below.

## **5. Admissibility conditions for a request for provisional measures for security for costs and security for claim**

In practice, there are no standard criteria which apply to a request for provisional measures in respect of security for costs or claim. The rules of arbitral institutions are generally silent as to the exact circumstances that need to exist, or conditions that need to be met.

The 2015 Guidelines issued by the Chartered Institute of Arbitrators<sup>3</sup> in relation to security for costs applications suggest that, upon the issuance of provisional measures arbitral tribunals should take into account the following:

### **(a) The prospects of success for the claim(s) and defence(s)**

Taking great care not to prejudge or predetermine the merits of the case itself, arbitrators should consider whether, on a preliminary view of the relative merits of the case, there may be a need for security for costs (**Article 2 of the Guidelines**).

### **(b) Claimant's ability to satisfy an adverse cost award**

According to the Guidelines:

1. Arbitrators should consider whether there are reasonable grounds for concluding that there is a serious risk that the applicant will not be able to enforce a costs award in its favour because: i) the claimant will not have the funds to pay the costs awarded; and/or ii) the claimant's assets will not be readily available for an effective enforcement against them.

2. If the arbitrators conclude that, for either or both of these reasons, there is a real risk that the applicant will have difficulty enforcing a costs award, then these factors favour an order for security, unless these factors were considered and accepted as part of the business risk at the inception of the parties' relationship. Conversely, if the arbitrators conclude that the claimant has assets that will likely enable the applicant to pursue enforcement of a costs award, and that these assets will be readily accessible to the applicant, then there is no justification for an order for security. (**Article 3 of the Guidelines**).

### **(c) Whether it is fair under the circumstances to make the order.**

In what concerns the third condition, the Guidelines provide that:

1. Before making an order requiring a party to provide security for costs, arbitrators should consider and be satisfied that, in light of all of the surrounding circumstances, it would be fair to make an order requiring one party to provide security for the costs of the other party.

2. In any event, arbitrators should consider whether awarding security would unjustly stifle a legitimate and

material claim (**Article 4 of the Guidelines**).

## **6. Review of relevant legal case law in respect of provisional measures for security of costs and security of claim**

In the upcoming section, we will present certain particular cases which will outline the aspects which arbitral tribunals have considered as relevant upon granting the provisional measures.

In *Garcia-Armas v. Venezuela*, the UNCITRAL tribunal ordered that claimants post a security in the form of a bank guarantee in the amount of USD 1.5 million because: the claimant was insolvent (or failed to prove its solvency), its claim was funded, and the third-party funder had no obligation to cover adverse costs.<sup>4</sup>

In the recent 2020 case *Kazmin v. Latvia*, the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of EUR 3 million based on the following facts: a) claimant's failure to pay former counsel; b) the existence of Ukrainian criminal investigations against claimant; c) the fact claimant had untraceable assets despite allegations of having assets; and d) the existence of unusual transactions by claimant which were being investigated.<sup>5</sup>

In *RSM v. St. Lucia*, the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of USD 750,000 because the claimant had financial difficulties, because the claim was funded by an unidentified third-party funder and because the claimant had a history of not paying costs awards.<sup>6</sup>

In *Herzig v. Turkmenistan*, the ICSID tribunal ordered claimant to post a security in the form of a bank guarantee in the amount of EUR 3 million because the claimant was the insolvency administrator of a German company, and because the claim was being funded by a third-party funder who did not have an obligation to pay an adverse costs award.<sup>7</sup>

UNCITRAL tribunals, such as the *Orlandini v. Bolivia* and the *Tennant v. Canada*<sup>8</sup> tribunals have rather focused on a party's "improper" behaviour.<sup>9</sup>

The *Orlandini* tribunal gave the following examples of such "improper" behaviour, as well as additional factors to be considered: (i) a claimant's track record of non-payment of cost awards in prior proceedings; (ii) a claimant's improper behaviour in the proceedings at issue, such as conduct that interferes with the efficient and orderly conduct of the proceedings; (iii) evidence of a claimant moving or hiding assets to avoid any potential exposure to a cost award; or (iv) other evidence of a claimant's bad faith or improper behaviour.

In *EuroGas v. Slovak Republic*<sup>10</sup>, the tribunal refused to make an order for security for costs as the respondent had failed to establish that the claimants had defaulted on their payment obligations in the proceedings or in other arbitration proceedings. The tribunal made clear in that case that "*financial difficulties and third-party funding – which has become a common practice – do not necessarily constitute per se exceptional circumstances justifying that the Respondent be granted an order of security for costs*".

As for the awarding of **security for claim provisional measures**, in the ICC case 8786, the respondent requested a security for claim by arguing that the claimant would not comply with the award that would be in its favour and the chances of such award's enforcement in State X "*are less than slim*". The tribunal refused the request on the grounds that the applicant "*has failed to sufficiently substantiate the existence of a not easily reparable prejudice*" and that there was no urgency.<sup>11</sup>

In the ICC case 10021, however, the tribunal indirectly complied with the request for security payment. In this case, the claimant requested the tribunal to attach the assets of the respondents. The tribunal, rather than accepting the request, ordered the respondents to refrain from disposing of the assets in dispute since the power to attach assets would not be within the domain of arbitration.<sup>12</sup> The dispute, in this case, arose from breach of certain agreements including a shareholders agreement concerning a company. The claimant made a request for security for claim by arguing that respondents were transferring their shares in the company. The respondents did not deny the claim and made no reasonable explanation about it.

Further, the claimant also claimed that apart from its shares in the company, the respondents no longer had sufficient liquid assets enabling them to satisfy a possible award for damages. In fact, the tribunal observed that the respondents refrained from depositing their share of costs and stating the real value of their shares or real estate. In addition, the claimant demonstrated to the tribunal that it had certain monetary claims.

Under the above circumstances, the tribunal held that the value of the respondents' shares in the company did not seem to exceed the amount of security requested. Accordingly, the tribunal ordered, the respondents, by an award, not to transfer or in any way dispose of those shares, rather than attaching the respondents' assets.

## **7. Conclusions**

Security for costs and security for claim in international commercial arbitration are certain types of provisional measures less usual in the arbitration practice.

However, it is important that the parties are aware of the rules governing them, so that they make use of them in certain situations. The major benefit is that the party requesting such measures might be protected from the potential insolvability of the opponent. Otherwise said, a party which files ungrounded claims and also has a fragile financial situation could be discouraged to pursue such bad faith claims.

However, arbitral tribunals must carefully weigh the awarding of such measures, so as not to financially block the party initiating the arbitration proceedings and who may have a weak financial situation due to the harmful actions of the party requesting such measures.

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[1] Article 40. – Interim and Conservatory Measures

(1) The arbitral tribunal may, at the request of a party and by means of a procedural order rendered under an expedited regime, grant any interim or conservatory measures that it deems appropriate.

(2) The arbitral tribunal may order the party requesting an interim or conservatory measure to provide the necessary security in connection with the measure requested.

(3) Requests for interim or conservatory measures filed before the initiation of the arbitration or before the case file was referred to the arbitral tribunal shall be decided by an emergency arbitrator, in accordance with the procedure set forth in Annex II.

(4) A request for interim or conservatory measures made by a party to a judicial authority is not incompatible with the arbitration agreement or with these Rules.

[2] ICC Bulletin Vol 25 Supplement 2014, "Procedural Decisions in ICC Arbitration: Security for Costs".

[3] <https://www.ciarb.org/media/4196/guideline-5-security-for-costs-2015.pdf>

[4] Manuel García Armas et al v. the Bolivarian Republic of Venezuela, UNCITRAL, PCA Case No. 2016-08, Procedural Order 9, Decision on Respondent's Request for Provisional Measures, 20 June 2018, para. 261.

[5] Eugene Kazmin v. Republic of Latvia, ICSID Case No. ARB/17/5, Procedural Order No. 6 - Decision on the Respondent's Application for Security for

Costs, 13 April 2020, paras. 31-60.

[6] RSM Production Corporation v. Saint Lucia, ICSID Case No ARB/12/10, Decision on Saint Lucia's Request for security for Costs, 13 August 2014, para. 90.

[7] Dirk Herzig as Insolvency Administrator over the Assets of Unionmatex Industrieanlagen GmbH v. Turkmenistan, ICSID Case No. ARB/18/35, Decision on Security for Costs, 27 January 2020, para. 20.

[8] Tennant Energy, LLC v. Government of Canada, PCA Case No. 2018-54, Procedural Order No. 4 for Interim Measures, 27 February 2020, para. 174,

[9] The Estate of Julio Miguel Orlandini-Agreda and Compañía Minera Orlandini Ltda v. The Plurinational State of Bolivia, UNCITRAL, Decision on the Respondent's Application for Termination, Trifurcation and Security for Costs, 9 July 2019, para. 143.

[10] EuroGas v. Slovak Republic, ICSID Case No. ARB/14/14, Procedural Order no. 3 on Provisional Measures, 23 June 2015, para. 123.

[11] ICC Interim Award 8786 of 1996, extracts published in 11(1) ICC Int'l Ct Arb Bull 82-83 (2000). The tribunal relied mainly on the requirements set forth under the law of the place of arbitration for the granting of the requested measure.

[12] ICC Interim Conservatory Award 10021 of 1999 (unpublished), cited in Ali Yesilirmak, Provisional Measures in International Commercial Arbitration, Kluwer Law International 2005, Chapter 5.