Security for costs: a useful procedural tool?

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ICSID Convention, Article 47

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.

ICSID Arbitration Rules, Rule 39

(1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
UNCITRAL Rules 2010

Article 26

1. The arbitral tribunal may, at the request of a party, grant interim measures.

2. An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

   …

   (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

   …

3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

   (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

   (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
Source of the power: inherent jurisdiction

*Commerce Group v El Salvador* (Annulment proceeding)

45. As the guardian of the integrity of the proceeding, the Committee may, in the appropriate situation, use its inherent powers to order security for costs. However, the power to order security for costs should be exercised only in extreme circumstances, for example, where abuse or serious misconduct has been evidenced.
Issues for security for costs applications

1. Is there a *right* in need of protection?

2. Is a *procedural* right permissible?

3. Is it capable of being *necessary* and *urgent*?

4. Can a *claimant* bring an application?

5. Must there be *exceptional* circumstances?
Lessons from the caselaw: *RSM v St Lucia*

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<th>Case No.</th>
<th>Claimant(s)</th>
<th>Respondent(s)</th>
<th>Status</th>
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<td>RSM Production Company</td>
<td>Republic of Cameroon</td>
<td>Concluded</td>
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<tr>
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<td>ARB/10/6</td>
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Lessons from the caselaw: RSM v St Lucia

RSM v St Lucia

86. The difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied, is that in this case the circumstances which were brought forward in other proceedings occur cumulatively. Those circumstances are, in summary, the proven history where Claimant did not comply with cost orders and awards due to its inability or unwillingness, the fact that it admittedly does not have sufficient financial resources itself and the (also admitted) fact that it is funded by an unknown third party which, as the Tribunal sees reasons to believe, might not warrant compliance with a possible costs award rendered in favor of Respondent.
Lessons from the caselaw: *RSM v St Lucia*

*EuroGas v Slovak Republic*

122. It is true that in *RSM v. Saint Lucia*, an ICSID tribunal ordered security for costs. However, the underlying facts in that arbitration were rather exceptional since the claimant was not only impecunious and funded by a third party, but also had a proven history of not complying with cost orders. As underlined by the arbitral tribunal, these circumstances were considered cumulatively.¹⁰⁰
Lessons learnt from unsuccessful applications

1. Lack of assets or financial difficulty alone is insufficient.

2. Mere assertion of impecuniosity will not satisfy a tribunal. Evidence is required to prove the necessity for the order.

3. The fact that the claimant is a shell company is not enough.

4. Tribunals are concerned to protect a claimant’s access to justice.
Are they a useful procedural tool?

1. There is uncertainty as to certain legal elements. There is also a high threshold. This means it is difficult to predict a Respondent’s prospects.

2. Yet, the potential benefits for a successful Respondent are immense.

3. The approach taken to costs allocation is critical to that success.

4. The softer strategic benefits should not be underestimated.
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