ARBITRATION PRACTICE

Security for Costs: Trends and Developments in Swiss Arbitral Case Law

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I. Introduction

The concept of security for costs (cautio judicatum solvi) is well established in state court litigation for centuries.[1] Indeed, it even has its roots in Roman law:

"*Ab eius vero parte, cum quo agitur, si quidem alieno nomine aliquis interveniat, omnimodo satisdari debet, quia nemo alienae rei sine satisdatione defensor idoneus intellegitur. (...)*."[2]

"*Iudicatum solvi stipulatio tres clausulas in unum collatas habet: de re iudicata, de re defendenda, de dolo malo*."[3]

In spite of this longstanding tradition, the cautio judicatum solvi faced difficulties to find its way into the field of arbitration. Before 1990, only very few decisions became public at all.[4] As of 1990, however, the issue seems to have arisen more frequently, as the following table with decisions rendered by arbitral tribunals with their seat in Switzerland reveals:

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1 Cf. e.g. Gesetzbuch über das gerichtliche Verfahren in Civil-Rechtssachen für den Canton Bern vom 26. März 1821, 49. Satzung („Rechtsversicherung"). For its part, this provision relied upon a predecessor in the Gerichtssatzung für die Stadt Bern vom 9. Christmonat 1761 (III. Teil, VI. Titel). Under these rules, Claimant had to provide security for costs, inter alia, when he was insolvent or had its domicile or habitual residence outside the Canton of Bern.

2 G. Inst., 4, 101. Translation: "However, the party against whom an action is brought must always give security if another person is acting on his behalf, for no one is considered to be a sufficient defendant of another person's case without security. (…)." This text shows that it was normally the *respondent* who had to provide security for costs, while today, it is normally the claimant. This was so because the *cognitor* or *procurator*, although having been mandated by the defendant as his legal representative, was considered to defend the action in his own name, for Roman law had not yet developed the concept of "direct representation" as it is nowadays commonly accepted (cf. e.g. Articles 32 et seq. of the Swiss Code of Obligations).

3 Dig. 46, 7, 6. Translation: "The stipulation judicatum solvi is composed of three clauses: for satisfaction of the judgment, for defending the action, and for fraud."

4 Cf. e.g. NAI Arbitration, Interim Award of 12 July 1985, XI Yearbook Commercial Arbitration (1986), p. 189. Decision of an Arbitral Tribunal under the Rules of the Zurich Chamber of Commerce of 25 June 1956, SJZ 54 (1958) p. 92.

No	Date	Instance	Source	Comments
1	12.11.1991	ZCC Arbitration (seat: Zurich)	ASA 1995, p. 84	Request rejected. The Tribunal considered it had no power to order security for costs in the absence of an express party agreement.
2	28.02.1994	ICC Case No. 7047 (seat: Geneva)	ASA 1995, p. 301	Request rejected. Respondent knew that it was contracting with an offshore shell company (i.e. Claimant).
3	undated [1993-94]	Ad hoc Arbitration (seat: Geneva)	ASA 1995, p. 529	Request rejected. The Tribunal considered it had no power to order security for costs under Article 183 PILS.
4	undated [1996]	ICC Arbitration (seat: Lausanne)	ASA 1997, p. 363	Request rejected. Respondent failed to prove existence of "exceptional circumstances".
5	25.09.1997	CCIG Arbitration (seat: Geneva)	ASA 2001, p. 745	Request rejected. Voluntary liquidation considered as a normal commercial risk.
6	21.12.1998	Ad hoc Arbitration (seat: Neuchâtel)	ASA 1999, p. 59	Security for costs ordered. Claimant in liquidation.
7	20.11.2001	ZCC Case No. 415 (seat: Zurich)	ASA 2002, p. 467	Security for costs ordered. Claimant in bankruptcy; third-party funding.
8	27.11.2002	Ad hoc Arbitration (seat: Zurich)	ASA 2005, p. 108	Request rejected. Claimant in bankruptcy, but holding sufficient assets.
9	19.12.2003	ICC Arbitration (seat: Geneva)	ASA 2005, p. 685	Request rejected. No proof of insolvency. Respondent knew that it was contracting with an offshore shell company (i.e. Claimant).

In spite of the increased interest that the cautio judicatum solvi has attracted in international arbitration over the last two decades, a traditional reluctance – sometimes even outright refusal – to deal with it and especially awarding it has remained. The present compilation of further decisions rendered by arbitral tribunals with their seat in Switzerland between 2003 and 2009 (cf. at p. 15 et seq. below) confirms this trend: the availability of security for costs in international arbitration is specific and limited, not least due to the inherent increased risks in cross-border trade and commerce as compared with mere domestic transactions. However, the more recent case law also confirms, and thereby settles, certain issues that had been discussed controversially in legal writing and earlier case law.

II. Legal Qualification of an Order for Security for Costs

For an arbitral tribunal with its seat in Switzerland most decisions published below confirm that the legal basis to order security for costs is to be found in Article 183 PILS (and/or in a corresponding provision of the applicable arbitration rules). In other words, one may state that it is by now well-established practice that a request for security for costs is considered as a form of an application for a provisional or conservatory measure. There is one decision in which the tribunal, in addition to Article 183 PILS, also considered Article 182 PILS as a valid basis empowering it to review an application for cautio judicatum solvi (Order of 19 December 2008, p. 47 below, at para. 5.2.9). In another decision the tribunal saw the appropriate basis in Article 182 PILS only (Order of April 2009, p. 59 below, at para. 30).

Indeed, many of the newer decisions confirm that the legal requirements for ordering security for costs are the "classic" requirements that must be met for any order of provisional or conservatory measures:

- Existence of a potential, future claim for reimbursement of costs worthy of protection (so-called *Verfügungsanspruch*, *titularité du droit invoqué*). In other words, the applicant must demonstrate, with a reasonable degree of certainty (*glaubhaft machen*), that it will have good title to a claim for reimbursement of its costs in case the dispute should be decided in its favour (so-called *fumus boni iuris*). For the avoidance of doubt, this test does not include a prima facie assessment of the outcome of the dispute (cf. on this point the Decision of 19 December 2008, p. 47 below, at para. 6.2.4).
- Immediate danger of being deprived of such claim (so-called *Verfügungsgrund*, *motif qui justifie la mesure*). The applicant must

also show, with a reasonable degree of certainty, that it would suffer irreparable harm if the order for security for costs were not granted immediately (so-called *periculum in mora*).

In view of the above, the recent case law should also put an end to the debate on the question of whether the decision of an arbitral tribunal to award security for costs should take the form of an *order* or an *award*. The reasons for this debate are obvious: if it is an award, the decision is within the ambit of the New York Convention and, thus, can be recognized and enforced abroad, otherwise not. In order to overcome this difficulty, the drafters of certain arbitration rules thought it would be useful to state that interim measures and orders contemplated under their rules (including security for costs) may "take the form of an interim award" (see e.g. Article 46 (c) WIPO Rules). We do not believe that arbitration rules can make such a determination with binding effect. Rather, the courts of the country where recognition and enforcement is sought will always examine with unfettered powers of review whether the decision before them is indeed an "arbitral award" within the meaning of the New York Convention. In any event, under Swiss arbitration law, it can be considered as settled that a decision awarding a cautio judicatum solvi is a mere *procedural order* without any final and binding effect (no res judicata). This also means that the arbitral tribunal is free to reconsider, amend, or revoke its decision upon request of one or the other party at any time.[5]

III. Factual Circumstances for Ordering Security for Costs

With regards to the factual circumstances which may justify an order for security for costs, two different categories emerge from the decisions published below.

The *first category* of circumstances may be summarized as: *serious deterioration of the opponent's financial status compared to the time when the arbitration agreement was concluded*. Within the ambit of this first category, arbitral tribunals have decided, inter alia, the following:

– Security for costs was *granted* in the context of a claimant-company with continuing business inactivity and a balance sheet

[5] See e.g. Art. 17D UNCITRAL Model Law: "The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative." Cf. also Decision of 19 December 2008, p. 47 below, at para. 7.7.

showing a manifest over-indebtedness and practically no liquid assets. The arbitral tribunal justified its decision, in part as follows: "If a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred" (Decision of 4 July 2008, p. 37 at para. 21).

- Security for costs was *denied* in a case where the respondent had contracted with an offshore shell company having its domicile in the Caribbean, but then argued that this would justify to order a cautio judicatum solvi. The arbitral tribunal considered: *« Enfin – et ce point est décisif – une partie qui entre dans une relation contractuelle avec un partenaire dont la solidité financière n'est pas garantie prend un risque, y compris celui de ne pas recouvrer des dépens en cas de litige. Il se justifie d'ordonner des mesures destinées à pallier ce risque uniquement s'il a augmenté entre la conclusion du contrat et le procès arbitral de façon considérable et imprévisible* » (Decision of 29 May 2009, p. 71 below, at para. 2.3.[6]
- Security for costs was *denied* in the context of a complex multi-party arbitration involving two claimants and sixteen respondents. In a parallel proceeding before a state court in a foreign jurisdiction, which involved some but not all of the same parties, a freezing order had been issued against the claimants enjoining them from disposing of certain assets. However, it was not proven that certain other assets of the claimants were also within the scope of the freezing order and that the banks in which those assets were held "… would be unwilling – either *de facto* or *de jure* – to transfer assets relating to the present arbitration" (Decision of 19 December 2008, p. 47 below, at para. 7.2.8). The tribunal therefore concluded that the respondents "… have failed to establish with reasonable probability an impending injury to their entitlements or rights or a threat of irreparable harm to them" (at para. 7.3.1 of the Decision).

[6] English translation: "After all – and this point is decisive – a party which enters into a contractual relationship with a partner with no guaranteed financial solidity takes a risk, including the one of not recovering the legal costs in case of dispute. It is justified to order measures intended to mitigate such risk only if it has increased between the conclusion of the contract and the arbitral proceedings in a considerable and unforeseeable way."

The *second category* can be generalized in the following terms: *bad faith manoeuvres of a party being specifically intended to frustrate the other party's potential future cost claim*. Within the ambit of this second category, arbitral tribunals decided the following:

- Security for costs was *granted* in a case where the claimant was an offshore company registered in the Republic of Panama which had acquired the claim in dispute by way of assignment against no apparent compensation and without showing cause for such assignment. The assignment was dated and signed only 15 days before the filing of the request for arbitration. The arbitral tribunal considered that, in view of all of the circumstances, it "cannot but assume that at least one of the reasons for such assignment was to prevent Respondents from recovering their cost claim in case the dispute should be decided against Claimant".[7]
- Security for costs was *denied* in the context of a transfer of a party's domicile from Switzerland to the Principality of Monaco. The arbitral tribunal held: "… Respondent has failed to produce prima facie evidence that Claimant's transfer of his domicile to Monaco (allegedly more than ten years ago) stands in any direct or indirect connection with this arbitration, i.e. that Claimant deliberately moved to Monaco so as to escape enforcement of a possible future award in favor of Respondent" (Decision of 17 May 2003, p. 15 below, at para. 27).
- Security for costs was *denied* in the context of a company in bankruptcy. The arbitral tribunal considered: "… Respondent has failed to produce prima facie evidence that Claimant's status as a company 'in Bankruptcy' stands in any direct or indirect connection with this arbitration, i.e. that Claimant deliberately manoeuvred itself into insolvency so as to deprive Respondent from recovering a possible future award in its favor. Furthermore, […], there is no evidence before the Arbitral Tribunal that the bankruptcy proceedings against Claimant have ever been suspended due to lack of assets until today. Moreover, not even contended by Respondent are other circumstances amounting at bad faith as, e.g., deliberate divestiture from assets" (Decision of

[7] In the German original: "… Grund zu der Vermutung, dass wenigstens einer dieser Beweggründe darin bestanden haben dürfte, die Beklagten für den Fall des Unterliegens der Klägerin an der Vollstreckung eines Parteikostenentscheids zu hindern" (Decision of 25 July 2003, p. 28 below, at para. 21).

17 June 2003, p. 23 below, at para. 29). It must be added that the bankrupt party's estate still had liquid assets of more than CHF 100 million (para. 2 of the Decision).

In one decision, the arbitral tribunal denied security for costs on the grounds that the respondent asserted counterclaims involving the same facts and issues as the claimant's claims and was intent on pursuing those counterclaims (Order of April 2009, p. 59 below, at para. 30).

IV. Further Practical Issues

An order for security for costs is often requested at the very beginning of the arbitral proceedings. Therefore, the question may arise as to whether the arbitral tribunal is authorized to decide upon such an application even though its *jurisdiction is contested* (normally by the respondent who also claims for the cautio judicatum solvi). It is widely recognized that an arbitral tribunal may award costs even if it ultimately determines that it has no jurisdiction over the dispute. Therefore, the arbitral tribunal in its Decision of 19 December 2008 correctly stated "… that it accordingly is authorized to grant security for costs even if its jurisdiction to hear the merits of the instant dispute has been questioned by all respondents" (p. 47 below, at para. 5.2.11).

Where an arbitral tribunal has concluded that the application for security for costs is justified, it has to decide *in what form* the party so ordered shall have to put up the cautio judicatum solvi. Possible solutions include a cash deposit with the arbitral tribunal or the provision of a security with similar "liquidity" as cash such as a bank guarantee or a stand-by letter of credit (Decision of 25 July 2003, p. 28 below, at para. 25 and Decision of 4 July 2008, p. 37 below, at para. 34).

Where security for costs has been ordered, the arbitral tribunal shall, in its final award, decide on the *release* of such security. If the party that had to put up the security (normally the claimant) is the successful party, the tribunal must usually simply order that the security be returned to that party. If the secured party (normally the respondent) is successful with its defence, the security must typically be released in favor of that party. In this context, the arbitral tribunal should make sure that the other party does not run the risk of having to pay twice the same amount; therefore, it should order that the security be set off against that party's cost claim (to this effect see the dispositive part of the Final Award of 20 April 2009, p. 46 below).

V. Security for Costs in Domestic Arbitration

In Swiss domestic arbitration, Article 26 of the Concordat on Arbitration (CA) prevents an arbitral tribunal from ordering provisional and conservatory measures, basis for ordering security for costs. Hence an ad hoc arbitral tribunal with its seat in Berne correctly decided on 9 February 2009 that it was not authorized to hear a request for security for costs. Having been seized with an action for annulment on the grounds of Article 36 (b) CA, the Court of Appeals of the Canton of Bern, by judgment of 22 May 2009, confirmed the decision of the arbitral tribunal (see p. 77). The Court considered that the purpose of a cautio judicatum solvi can be compared with a seizure pursuant to Article 273 of the Swiss Debt Enforcement and Bankruptcy Code (SchKG/LP); therefore, the Court concluded, an order for security for costs is a provisional measure within the meaning of Article 26 CA and, thus, is not within the jurisdiction of an arbitral tribunal acting under the Concordat (see Section III, para. 2-4).

When the new Swiss Code of Civil Procedure (CCP) applicable to all Swiss cantons will take effect on 1 January 2011, domestic arbitral tribunals will also be empowered to order provisional and conservatory measures (Article 374 CCP). In addition, Article 379 CCP will provide a special statutory basis for ordering security for costs:

> **Art. 379** Security for the Costs for Legal Representation and Assistance
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> If the claimant appears to be insolvent, the arbitral tribunal may, upon request by the respondent, order the claimant to provide security for the respondent's foreseeable costs for legal representation and assistance within a certain time. Article 378(2) applies mutatis mutandis to the respondent.

The wording of this provision raises a number of questions. *First*, it seems inappropriate to limit the concept of security for costs to the costs for legal representation and assistance (*dépens*, *Parteikosten*). If the requirements for a cautio only materialize after the respondent has already paid its share of the deposit for the arbitrators' fees and expenses, the respondent may have a legitimate interest to be protected also from the potential loss on those costs. *Second*, it would not seem correct to make the instrument of security for costs only available for the respondent ("… upon request by the respondent …"). Rather, one may conceive situations in which the claimant may also have an interest worthy of protection in obtaining security for costs from the

respondent.[8] *Third*, Article 379 CCP seems to provide for an undue limitation of the concept of cautio judicatum solvi to instances where the claimant is insolvent ("… the claimant appears to be insolvent …"). As mentioned above, there is, besides the cases of manifest insolvency, a second category of situations in which security for costs may be appropriate: if a party deliberately takes measures that are specifically intended to frustrate the other party's future cost claim (manoeuvres of bad faith).

Decision of 17 May 2003 in an International Ad hoc Arbitration with its seat in Berne between Mr X. (Claimant) and Mrs Y. (Respondent).

I. Background

1. On April 3, 2003, Respondent filed a request for security for costs in the amount of CHF 600,000.-, together with a request for cancellation of the time limit of June 13, 2003, to file her Answer to the Statement of Claim (and her Counterclaim, if any), whereas a new 90 days time limit to that effect should be set as from the date on which such sureties have been put up.

2. As to the power of the Arbitral Tribunal to decide on her request, Respondent contends that the decision on an application for security for costs qualifies as a provisional or conservatory measure within the meaning of Article 183 SPIL. Respondent further refers to item 7.1 and 8.1 of the Terms of Reference of February 3, 2003, and also to Article 70(1) of the Berne Code of Civil Procedure (...).

3. On the merits, Respondent substantially argues that Claimant resides "in a State known as a tax haven" (i.e., Monaco); that Claimant, with Article 70(1) of the Berne Code of Civil Procedure in mind, has no domicile in Switzerland; that Claimant "is an astute businessman and might make arrangements to complicate recovery of the costs and expenses allocated by the arbitration tribunal"; that Monaco has signed the New York Convention, however, by making the declaration stipulated in Article 1(3) of said Convention; and that Monaco does not have the "reputation of facilitating the recovery of claims on the territory of this State and Mr X. did not choose that

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[8] For instance where the claimant is confronted with a counterclaim or if the respondent, in an obvious attempt of bad faith, is divesting its assets to make itself an empty shell; cf. Berger/Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, p. 516, footnote 42.

domicile without being aware of all the advantages which he might gain as a result …" (...).

4. On April 17, 2003, the Arbitral Tribunal determined by Procedural Order No. 2 the suspension of the time limit for Respondent to file her Answer to the Statement of Claim (and Counterclaim, if any), and invited Claimant to file comments on Respondent's application for security for costs within three (3) weeks from the date of receipt of said order.

5. On May 8, 2003, Claimant filed his comments on Respondent's application for security for costs requesting the Arbitral Tribunal to dismiss Respondent's application and to award Claimant costs related to this matter.

6. Claimant, referring to more recent scholars, does not challenge the authority of the Arbitral Tribunal to decide on an application for security for costs.

7. On the merits, Claimant, adding numerous references to doctrine and case law, concludes that, in international arbitration, security for costs can only be ordered in exceptional circumstances, and that, in the present case, such circumstances are not met. In particular, Claimant explains that he has his domicile in Monaco for about 10 years and, as a consequence thereof, there is no evidence provided by Respondent that Claimant chose this domicile to complicate recovery of a possible future cost award in favor of Respondent in this very arbitration.

II. The Arbitral Tribunal takes into Consideration

A. Authority of the Arbitral Tribunal

8. The Parties have agreed that this arbitration is an international arbitration governed by the procedural framework contained in Chapter 12 of the SPIL (cf. item 8.1.a of the Terms of Reference).

9. Article 183(1) SPIL provides: "In the absence of an agreement by the parties to the contrary, the arbitral tribunal can, on application by a party, order precautionary or conservatory measures". The Parties have expressly confirmed the applicability of Article 183 SPIL in item 7.2.c of the Terms of Reference. The Arbitral Tribunal therefore acknowledges that it has the power to order, on application by a Party, precautionary or conservatory measures in accordance with Article 183 SPIL.

10. Thus, the next question to be determined is whether an order for security for costs qualifies as a precautionary or conservatory measure in the sense of Article 183 SPIL.

11. It is true that the authority of an arbitral tribunal to order security for costs has been generally doubted for some time, notably by Swiss authors[1]. It is worth noting, however, that the statements of these authors mainly dealt with domestic arbitration under the Swiss Concordat on Arbitration of March 27, 1969 (SR 271).

12. In international arbitration, it is largely acknowledged today that the power to order security for costs is not reserved to state courts and proceedings before state authorities, but is rather also conferred to an arbitral tribunal:

13. (a) Leading scholars consider that an order for security for costs forms one of the various categories of precautionary or conservatory measures[2]. Accordingly, these authors acknowledge that an arbitral tribunal sitting in Switzerland has, in accordance with Article 183 SPIL, unless otherwise agreed by the parties, the power to order a party to provide security for costs.

14. (b) Furthermore, a considerable number of international arbitration awards made in Switzerland have determined that an arbitral tribunal has the power to require a party to provide security for costs. The most detailed recently reported decision was issued in a CCIG arbitration chaired by Professor Claude Reymond[3]. From a detailed review of authorities, the learned arbitrator formed the opinion that the power "to issue such an order in international arbitration located in Switzerland may be derived from Article 182(2) and 183 of the Act". Another published case concerns an ICC arbitration[4]. A further decision was issued by a sole arbitrator in an ICC

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1 See, in particular, Thomas Rüede/Reimer Hadenfeldt, Schweizerisches Schiedsgerichtsrecht nach IPRG und Konkordat, 2nd ed. Zurich 1993, p. 33 und p. 241; Pierre Lalive/Jean-François Poudret/Claude Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne 1989, p. 162; Pierre Jolidon, Commentaire du Concordat Suisse sur l'arbitrage, Berne 1984, p. 422; Max Guldener, Schweizerisches Zivilprozessrecht, 3rd ed., Zurich 1979, p. 611.

2 Marc Blessing, in: Berti/Honsell/Vogt/Schnyder (eds.), International Arbitration in Switzerland, Basle 2000, Intro, n. 843; Jean-François Poudret/Sébastien Besson, Droit comparé de l'arbitrage international, Zurich/Basle/Geneva 2002, n. 610 and n. 628. Pierre A. Karrer/Marcus Desax, Security for Costs in International Arbitration, why, when, and what if ..., in: Robert Briner et al. (eds.), Liber Amicorum Karl-Heinz Böckstiegel, Cologne 2001, p. 330 et seq.; Laurence Craig/William Park/Jan Paulsson, International Chamber of Commerce arbitration, 3rd ed., p. 467 §26.05; Yves Derains/Eric Schwartz, A guide to the New ICC Rules of Arbitration, The Hague 1998, p. 274; François Knoepfler, Les mesures provisoires et l'arbitrage international, in: Andreas Kellerhals (ed.), Schiedsgerichtsbarkeit, Zurich 1997, p. 307 et seq.

3 Geneva Chamber of Commerce and Industry (CCIG), Decision of the Arbitral Tribunal of September 25, 1997, A. S.p.A. (Italy) v. B. A.G. (Germany), security for costs denied; published in ASA Bulletin 2001, p. 745 et seq.

4 ICC Arbitration No. 8786, Interim Award (1996), Claimant and Counter-defendant (Turkey) v. Defendant and Counter-claimant (Germany), security for costs denied; published in ASA Bulletin 2001, p. 751 et seq. (754).

arbitration who determined that "*le Tribunal arbitral est d'avis que l'ordre de fournir des sûretés pour le paiement des dépens se rattache bel et bien à une mesure provisoire destiné à faciliter l'exécution future de la sentence à rendre*"[5]. Earlier decisions stated that the authority of an arbitral tribunal to issue an order for security for costs should be recognized at least if the Parties have agreed on such competence in the arbitration clause, the arbitration agreement or in the terms of reference[6].

15. (c) Finally, reference is made to foreign arbitral decisions, which have likewise granted security for costs[7]. And it should be remembered that in England, one of the major centers for international arbitration, security for costs has been practiced for a long time. Only for the purpose of illustration, the Arbitral Tribunal refers the Parties to Article 38(3) of the English Arbitration Act of 1996, i.e., the English counterpart to Chapter 12 of the SPIL, which expressly states that the "tribunal may order a claimant to provide security for the costs of the arbitration"[8].

16. The Arbitral Tribunal considers the above authorities persuasive. It seems justified to rank an order for security for costs among the different categories of conservatory or precautionary measures. Duly considered, the purpose of such order is to ensure the future enforcement of a part of an arbitral tribunal's final award, more precisely, the part dealing with the costs (incl. attorneys' fees) of the arbitration[9].

17. As a result, by referring to Article 183 SPIL and to item 7.2.c of the Terms of Reference, the Arbitral Tribunal considers having the power to decide on Respondent's request for security for costs.

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5 Ordonnance de procédure n°1 du 21 décembre 1998, dans l'arbitrage entre X, Demanderesse et Y, Défenderesse et demanderesse reconventionelle, security for costs granted; published in ASA Bulletin 1999, p. 59 et seq. (63). In the same way, the Final Award in the ICC Arbitration No. 7047 of February 28, 1994, did not deny security for costs on the ground that the arbitrators were of the opinion that they had no such power; published in ASA Bulletin 1995, p. 301 et seq. (305-306).

6 Arbitrage entre X Panama, demanderesse, et une personne physique domiciliée à Genève, défendeur; published in ASA Bulletin 1995, p. 529 et seq. See also the Sixth Order in a Zurich Chamber of Commerce arbitration of November 12, 1991; reported in ASA Bulletin 1995, p. 84 et seq.

7 See, e.g., decision in the ICC arbitration No 6697/1990, published in Revue de l'arbitrage 1992, p. 143 et seq. Decision in the ICC arbitration No 6682/1993, quoted in the decision reported in ASA Bulletin 2001, p. 745 (748).

8 See also Article 25.2 of the Arbitration Rules of the London Court of International Arbitration of 1998 (LCIA).

9 „La question des dépens, supposé que l'arbitre en octroie à l'une ou l'autre partie, entre bien dans l'objet du litige et concerne effectivement la procédure ‚proprement dite'." See the decision reported in ASA Bulletin 1999, p. 59 (63).

B. Valid Reasons for Security for Costs in International Arbitration

18. Once the Arbitral Tribunal has determined its general authority to decide on Respondent's request, the question of what are the valid reasons for security for costs becomes relevant.

19. Respondent substantially argues that Claimant is domiciled in Monaco and refers to Article 70(1) of the Berne Code of Civil Procedure. This provision states that a claimant, upon application of the respondent, may be ordered to provide security for the costs of the proceedings if the claimant is not domiciled in Switzerland, subject to international treaties or conventions.

20. The Parties indeed agreed that the Arbitral Tribunal shall be guided "subsidiarily by the general principles laid down in the Berne Code of Civil Procedure" (cf. item 8.1.b of the Terms of Reference). This reference can be understood as a valid referral to a system of procedural law in the sense of Article 182(1) SPIL.

21. The question of whether and to what extent the Berne Code of Civil Procedure shall apply to the present security proceedings is a matter of construction of the Parties' agreement. Certainly, the mentioned reference cannot and does not mean that the Berne Code of Civil Procedure shall apply without taking due account of the fact that this is an international arbitration. In the present context, Respondent's reference to the Berne Code of Civil Procedure is, however, not helpful. Article 70(1) is a provision designed for proceedings before state courts. It is common understanding in practice and doctrine of international arbitration that a decision on a request for security for costs may not depend on the criterion of the claimant's domicile[10]. It seems obvious that both Claimant and Respondent would not have agreed to apply Article 70(1) of the Berne Code of Civil Procedure if they had been aware of such a consequence of their referral contained in item 8.1.b of the Terms of Reference. Put differently, it appears that Article 70(1) of the Berne Code of Civil Procedure does not belong to the "general principles" of said Code, to

[10] See Poudret/Besson (op. cit.) n. 610 with further reference. See also the decision reported in ASA Bulletin 2001, p. 745 (749): „It is obvious that registration or domicile of the party outside the place of arbitration can not justify such an order, since such situation is in the essence of international arbitration." Similar consideration in the decision reported in ASA Bulletin 1999, p. 59 (64). Merely to emphasize this generally accepted principle, the Arbitral Tribunal refers again to the English Arbitration Act of 1996. Article 38(3)(a) of said Act states that the power to provide security for the costs of the arbitration "shall not be exercised on the ground that the claimant is … an individual ordinarily resident outside the United Kingdom".

which the Parties referred in item 8.1.b of the Terms of Reference. As a consequence thereof, the application of this provision must be denied.

22. The remaining reasons for security for costs provided in Article 70 of the Berne Code of Civil Procedure are irrelevant in the case at hand. There is no evidence that Claimant might be insolvent or bankrupt, nor has Respondent in any way raised allegations to that effect; Article 70(2) to be denied. Moreover, Claimant's main claim does not form an action under Article 83(2), 86(2) or 187 of the Swiss Bankruptcy Act (SR 281.1); Article 70(3) to be denied.

23. As a result, the Arbitral Tribunal has to decide whether the requested security for costs should or might be granted on grounds other than those mentioned in Article 70 of the Berne Code of Civil Procedure, in particular, on the basis of general principles developed in international arbitration.

24. A review of the authorities quoted above shows that international arbitral tribunals as well as the leading scholars are generally reluctant to require a party to provide security for costs. Besides the already mentioned irrelevance of a party having its domicile outside the place of arbitration, they also tend to deny security for costs in case that a party is in financial difficulties, up to and including bankruptcy[11]. It seems justified that such risks are to be borne by the parties, given the nature of international arbitration, which normally arises out of operations of international trade, which generally imply greater risks than domestic trade. Similarly, the leading opinion considers the fact that a party's state of domicile is not a signatory to the New York Convention[12] is not a valid reason for security for costs[13]. Respondent, in this respect merely claiming that Monaco made the declarations provided for in Article I (3) of the NY-Convention, failed to produce prima facie evidence that an award on the subject of the present dispute might not be enforceable in Monaco due to the reservations contained therein (i.e., in Article I [3] of the NY-Convention).

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[11] See the decision reported in ASA Bulletin 2001, p. 745 (749). See also Poudret/Besson, op. cit., n. 610. In another decision, sole arbitrator Markus Wirth held, however, that if a party went through bankruptcy proceedings that were suspended due to lack of assets, then the other party's interest in security for costs should prevail over the first party's interest in unimpeded access to arbitral justice; Zurich Chamber of Commerce (ZCC) Arbitration Proceedings No. 415, Claimant (Switzerland) v. Respondent (Netherlands), Fourth Order of November 20, 2001, published in ASA Bulletin 2002, 467 (471); securties for costs granted.

[12] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of June 10, 1958 (SR 0.277.12).

[13] See, e.g., the decision reported in ASA Bulletin 1995, p. 301 (306).

25. Rather the general approach followed by the quoted authorities aims to limit security for costs in international arbitration to cases where a party has *deliberately* and *in view of the arbitration* taken steps so as to ensure that the other party, in case of a final award in its favor, would be deprived of recovering the costs of the arbitration. Professor Claude Reymond, in his reasoning, expressly refers to "manoeuvres contrary to good faith" and to "decisions made in circumstances amounting at bad faith"[14].

26. This rather restrictive approach seems justified, all the more so as it must be remembered that an order for security for costs qualifies as a category of precautionary or conservatory measures within the meaning of Article 183 SPIL. A precautionary or conservatory measure normally requires that a certain legal position of the applicant (a) is in acute danger, and that this very claim (b) *is due*[15]. The claim for recovery of costs, however, is *never* due at the time when a party requests that it be secured. For *monetary* claims, which are *not yet due*, precautionary or conservatory measures normally require that the debtor deliberately takes steps so as to escape from the performance of its obligations, or willfully divests itself from its assets[16]. This description precisely corresponds to the above-quoted "manoeuvres contrary to good faith". It confirms that orders for security for costs should only be granted in exceptional circumstances.

27. Returning to the present case, the Arbitral Tribunal determines that Respondent has failed to produce prima facie evidence that Claimant's transfer of his domicile to Monaco (allegedly more than ten years ago) stands in any direct or indirect connection with this arbitration, i.e., that Claimant deliberately moved to Monaco so as to escape enforcement of a possible future award in favor of Respondent. Not even contended by Respondent are other circumstances amounting at bad faith as, e.g., deliberate divestiture from assets. Nor has Respondent produced prima facie evidence for her allegation that an award rendered in her favor would in fact not be enforceable in Monaco.

28. In the light of the foregoing, the Arbitral Tribunal concludes that there is no ground for the issuance of an order for security for costs in this matter.

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[14] Cf. ASA Bulletin 2001, p. 745 (749 and 750). The learned arbitrator mentions, e.g., the divestiture of assets in order to launch the arbitration with or from an empty shell.

[15] Cf., e.g., Article 326(3) of the Berne Code of Civil Procedure as to non-monetary claims, and Article 271(1) of the Swiss Bankruptcy Act for monetary claims.

[16] Cf., e.g., Article 271(2) in connection with Article 271(1) item 2 of the Swiss Bankruptcy Act.

C. Time Limit for Respondent's Answer to the Statement of Claim

29. As it follows from the above considerations, the Arbitral Tribunal rejects Respondent's application for security for costs. Therefore, a new time limit for Respondent to file her Answer to the Statement of Claim (and her Counterclaim, if any) must be set from the date of receipt of this order by the Parties.

[...]

D. Costs of the Present Proceedings

33. According to item 8.6.b of the Terms of Reference, the Arbitral Tribunal may decide upon the costs of the arbitration as and when it decides matters of substance or procedure. It is, however, not required to do so and may decide upon the costs in its final award only.

34. The present decision of the Arbitral Tribunal as to the question of whether Claimant should be required to provide security for costs is a matter of procedure, which does not conclude these proceedings. Thus, it is appropriate to postpone the decision on the costs of these security proceedings (incl. attorneys' fees) and to liquidate said costs together with the costs of the main proceedings.

III. The Arbitral Tribunal hereby Determines and Orders

1. The Arbitral Tribunal dismisses Respondent's request dated April 3, 2003, for the provision of security for costs of the arbitration.

2. In accordance with its considerations in para. 29 et seq. hereof, the Arbitral Tribunal hereby invites Respondent to file her Answer to the Statement of Claim (and her Counterclaim, if any) within 30 days upon receipt of this [Decision].

3. In accordance with item 8.6.b of the Terms of Reference, the Arbitral Tribunal shall decide on the costs of this [Decision] in its Final Award.

Procedural Order No. 4 of 17 June 2003 in an International Ad hoc Arbitration with its seat in Geneva between X. Holding in Bankruptcy, Switzerland (Claimant), and Y. Co. Ltd., Republic of Yemen (Respondent).

I. Background

1. By letters dated October 20, 2002, and November 19, 2002, Respondent *inter alia* sought an order from the Arbitral Tribunal that Claimant pay a security for legal costs of Respondent in the amount of at least CHF 2,206,000.- (computed on the basis of the ordinance on lawyer's fees of the Appeal Court of Zurich of June 10, 1987). Respondent essentially based its request for security for costs on the fact that Claimant is a company "in Bankruptcy".

2. By letters dated October 23, 2002, and December 23, 2002, Claimant asked for rejection of Respondent's request, on the one hand by contesting the Arbitral Tribunal's jurisdiction to make provisional orders in this arbitration, on the other hand by referring to the fact that the estate of Claimant still has liquid assets in excess of CHF 110 million, which will result in a dividend to its creditors of between 5% and 10%. Claimant, however, indicated its readiness to provide a bank guarantee in a reasonable amount as security for the legal costs of Respondent, provided that Respondent would be required to do so, too.

3. In Section 6.7(a) of Procedural Order No. 1 of April 2, 2003, the Arbitral Tribunal invited both Parties to inform it within 20 days whether or not they accept a proposal as to which each Party provides a bank guarantee in the amount of CHF 500,000.- as security for costs of the adverse Party. In the event that one or both Parties should refuse to accept the mutual security, Section 6.7(b) of Procedural Order No. 1 provided that the Arbitral Tribunal shall notify such disagreement and decide on Respondent's request for security for costs by separate order, if need be after another exchange of written submissions on this subject.

4. By letter of May 9, 2003, Claimant indicated its readiness to provide the proposed bank guarantee as security for costs in favor of Respondent. By letter of May 13, 2003, Respondent informed the Arbitral Tribunal that it is neither able to pay its share of the advance on costs of the arbitration, nor in a position to provide the proposed bank guarantee as security for costs in favor of Claimant.

5. In the meantime, Claimant has timely paid its own share of the advance on costs of the arbitration in the amount of CHF 150,000.- (...). In addition, as a result of Respondent's failure to pay its share of the advance on costs, Claimant has advanced, as provided for in Section 6.3(a)(3) of Procedural Order No 1, another CHF 150,000.- on account of advance on costs of the arbitration (...).

6. It results from para. 4 hereof that the Parties did not agree on the mutual security for costs proposed by the Arbitral Tribunal. Hence, the Arbitral Tribunal is now called to proceed as provided in Section 6.7(b) of Procedural Order No. 1, i.e., to decide on Respondent's request for security for costs of October 20, 2002, and November 19, 2002, respectively.

7. In view of the pertinent doctrine and case law regarding the issue of security for costs in international commercial arbitration, which will be discussed in detail in Sections II.A. and II.B. infra, the Arbitral Tribunal considers the present case ready to be decided. Therefore, the Arbitral Tribunal has concluded – as was reserved in Section 6.7(b) of Procedural Order No 1 – to decide on Respondent's request for security for costs without previously ordering another exchange of written submissions on this subject.

II. The Arbitral Tribunal takes into Consideration

A. Authority of the Arbitral Tribunal

1. Authority to Order Conservatory or Precautionary Measures

8. The Arbitral Tribunal has determined that this arbitration is an international arbitration governed by the procedural framework contained in Chapter 12 of the SPIL; cf. Section 6.1(a) of Procedural Order No. 1.

9. Moreover, the Arbitral Tribunal, taking account of item 6 of the Memorandum of Agreement of September 13, 1991, concluded that it shall further apply the Concordat Suisse sur l'Arbitrage (CSA); cf. Section 6.1(b) of Procedural Order No. 1.

10. Article 183(1) SPIL provides that an arbitral tribunal can, in the absence of an agreement by the parties to the contrary, on application by a party, order precautionary or conservatory measures. Article 26 CSA, on the other hand, provides that the authority to order precautionary or conservatory measures remains solely with the ordinary state courts.

11. In the opinion of the Arbitral Tribunal, the above is not a conflict of norms in the common sense. In the present case, the purpose of the Parties' reference to the CSA (cf. item 6 of the Memorandum of Agreement

of September 13, 1991) is not to exclude the provisions of the SPIL but rather to apply the CSA in addition, i.e., in complement to the provisions of the SPIL.

12. As a result, failing an agreement between the Parties to the contrary, the Arbitral Tribunal acknowledges that it has the power to order, on application by a Party, precautionary or conservatory measures in accordance with Article 183 SPIL.

2. Qualification of an Order for Security for Costs

13. […].

[Essentially same reasoning as in para. 11-17 of the Decision of 17 May 2003.]

3. Conclusion

20. By referring to Article 183 SPIL and to Section 6.1(a) of Procedural Order No. 1, the Arbitral Tribunal considers having the power to decide on Respondent's request for security for costs.

B. Valid Reasons for Security for Costs in International Arbitration

21. Once the Arbitral Tribunal has determined its general authority to decide on Respondent's request, the question of what are the valid reasons for security for costs becomes relevant.

22. As already mentioned, Respondent substantially applies for security for costs on the ground that Claimant is a company "in Bankruptcy".

23. A review of the authorities quoted above shows that international arbitral tribunals as well as the leading scholars are generally reluctant to require a party to provide security for costs:

24. (a) It is common understanding in international arbitration that a decision on a request for security for costs may, e.g., not depend on the criterion of the claimant's domicile[1].

[1] See Poudret/Besson (op. cit.) n. 610 with further reference. See also the decision reported in ASA Bulletin 2001, p. 745 (749): „It is obvious that registration or domicile of the party outside the place of arbitration can not justify such an order, since such situation is in the essence of international arbitration." Similar consideration in the decision reported in ASA Bulletin 1999, p. 59 (64). Merely to emphasize this generally accepted principle, the Arbitral Tribunal refers again to the English Arbitration Act of 1996. Article 38(3)(a) of said Act states that the power to provide security for the costs of the arbitration "shall not be exercised on the ground that the claimant is … an individual ordinarily resident outside the United Kingdom".

25. (b) Doctrine and case law also tend to deny security for costs in case that a party is in financial difficulties, up to and including bankruptcy[2]. It seems justified that such risks are to be borne by the parties, given the nature of international arbitration, which normally arises out of operations of international trade, which generally imply greater risks than domestic trade. After all, sole arbitrator Markus Wirth recently held that if a party went through bankruptcy proceedings, which were suspended due to lack of assets, then the other party's interest in security for costs should prevail over the first party's interest in unimpeded access to arbitral justice[3]. The case at hand, however, differs from the aforementioned one in so far as there is no evidence that the bankruptcy proceedings against Claimant have ever been suspended due to lack of assets until today.

26. (c) Likewise, the leading opinion considers the fact that a party's state of domicile is not a signatory to the New York Convention[4] is not a valid reason for security for costs[5].

27. In general, the approach followed by the quoted authorities rather aims to limit security for costs in international arbitration to cases where a party has *deliberately* and *in view of the arbitration* taken steps so as to ensure that the other party, in case of a final award in its favor, would be deprived of recovering the costs of the arbitration. Professor Claude Reymond, in his reasoning, expressly refers to "manoeuvres contrary to good faith" and to "decisions made in circumstances amounting at bad faith"[6].

28. This rather restrictive approach seems justifiable, all the more so as it must be remembered that an order for security for costs qualifies as a category of precautionary or conservatory measures within the meaning of Article 183 SPIL. A precautionary or conservatory measure normally requires that a certain legal position of the applicant (a) is in acute danger, and that this very claim (b) is *due*[7]. The claim for recovery of costs, however, is *never* due at the time when a party requests that it be secured. For

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2 See the decision reported in ASA Bulletin 2001, p. 745 (749). See also Poudret/Besson, op. cit., n. 610.

3 Zurich Chamber of Commerce (ZCC) Arbitration Proceedings No. 415, Claimant (Switzerland) v. Respondent (Netherlands), Fourth Order of November 20, 2001, published in ASA Bulletin 2002, 467 (471); securities for costs granted.

4 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) of June 10, 1958 (SR 0.277.12).

5 See, e.g., the decision reported in ASA Bulletin 1995, p. 301 (306).

6 Cf. ASA Bulletin 2001, p. 745 (749 and 750). The learned arbitrator mentions, e.g., the divestiture of assets in order to launch the arbitration with or from an empty shell.

7 Cf., e.g., Article 326(3) of the Berne Code of Civil Procedure as to non-monetary claims, and Article 271(1) of the Swiss Bankruptcy Act for monetary claims.

monetary claims, which are *not yet due*, precautionary or conservatory measures normally require that the debtor *deliberately* takes steps so as to escape from the performance of its obligations, or *willfully* divests itself from its assets[8]. This description precisely corresponds to the above-quoted "manoeuvres contrary to good faith". It confirms that orders for security for costs should only be granted in exceptional circumstances.

29. Returning to the present case, the Arbitral Tribunal determines that Respondent has failed to produce prima facie evidence that Claimant's status as a company "in Bankruptcy" stands in any direct or indirect connection with this arbitration, i.e., that Claimant deliberately manoeuvred itself into insolvency so as to deprive Respondent from recovering a possible future award in its favor. Furthermore, as already mentioned, there is no evidence before the Arbitral Tribunal that the bankruptcy proceedings against Claimant have ever been suspended due to lack of assets until today. Moreover, not even contended by Respondent are other circumstances amounting at bad faith as, e.g., deliberate divestiture from assets.

30. Needless to add that Claimant seems far from being an illiquid company: as opposed to Respondent, Claimant was not only ready to provide a bank-guarantee in the amount of CHF 500,000.- as a security for Respondent's costs, but rather also fully advanced both its own and Respondent's share of the ordered advance on costs of the arbitration (cf. para. 5 hereof).

31. In the light of the foregoing, the Arbitral Tribunal concludes that there is no ground for the issuance of an order for security for costs in this matter.

III. The Arbitral Tribunal hereby Determines and Orders

1. In accordance with Section 6.7(b) of Procedural Order No. 1 of April 2, 2003, the Arbitral Tribunal determines that the Parties did not agree on the mutual security for costs proposed by the Arbitral Tribunal under Section 6.7(a) of Procedural Order No. 1 (mutual bank guarantee in the amount of CHF 500,000.-).

2. The Arbitral Tribunal dismisses Respondent's request for the provision of security for costs of the arbitration dated October 20, 2003, and November 19, 2002, respectively.

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[8] Cf., e.g., Article 271(2) in connection with Article 271(1) item 2 of the Swiss Bankruptcy Act.

3. In accordance with Section 6.8(c) of Procedural Order No 1 of April 2, 2003, the Arbitral Tribunal shall decide on the costs of this Procedural Order No. 4 in its Final Award.

Verfügung Nr. 6 vom 25. Juli 2003 des Schiedsgerichts der Handels-, Industrie- und Gewerbekammer des Kantons Tessin (Ccia-Ti Nr. 103/00) in der Streitsache zwischen X. SA, Panama (Klägerin) und A., B., C. a.s. sowie D. a.s., alle Tschechische Republik (Beklagte). Schiedsrichter: Werner Wenger, Franz Kellerhals und Wolfgang Peter.

I. Grundlagen

1. In ihrer Stellungnahme vom 14. Januar 2002 verlangte die Beklagte Nr. 4 von der Klägerin eine Kostensicherstellung (*cautio judicatum solvi*) als Garantie ihrer eigenen Kosten im Zusammenhang mit dem vorliegenden Streitfall, da die Klägerin eine unbekannte panamaische Gesellschaft sei.

2. In ihrer Stellungnahme vom 28. Juni 2002 verlangte die Beklagte Nr. 3 von der Klägerin eine Kostensicherstellung (*cautio judicatum solvi*) als Garantie ihrer eigenen Kosten im Zusammenhang mit der vorliegenden Streitigkeit. Sie beantragt, das Schiedsverfahren bis zur erfolgten Leistung der Sicherheit einzustellen.

3. Das Schiedsgericht hat am 17. Oktober 2002 den Beklagten eine Frist bis zum 18. Februar 2003 zur Einreichung der auf die Fragen der Zuständigkeit und der Kostensicherstellung beschränkten Klageantworten im Sinne von Artikel 10.3 des Schiedsreglements von Lugano (nachfolgend „das Schiedsreglement“) gesetzt.

4. Auf Antrag der Beklagten Nr. 1, 2 und 4 hat das Schiedsgericht am 26. Dezember 2002 diese Frist für alle vier Beklagten bis zum 31. März 2003 erstreckt (Verfügung Nr. 3).

5. Am 31. März 2003 haben alle vier Beklagten ihre auf die Fragen der Zuständigkeit und der Kostensicherstellung beschränkte Klageantwort beim Schiedsgericht eingereicht. Am 31. Mai 2003 haben die Beklagten eine weitere Schrift über den Betrag einer eventuellen Kostensicherstellung eingereicht.

6. In ihren Klageantworten vom 31. März 2003 und weiteren Eingaben vom 31. Mai 2003 beantragen die Beklagten Nr. 1 und 2 eine Kostensicherstellung (*cautio iudicatum solvi*) in Höhe von CHF 100'000.- von der Klägerin als Garantie ihrer eigenen Kosten im Zusammenhang mit dem vorliegenden Streitfall, da die Klägerin eine Gesellschaft mit Sitz in Panama ist, über deren finanziellen Verhältnisse nichts bekannt sei. Die Beklagten Nr. 1 und 2. führen an, dass die Verfügung einer Kostensicherstellung notwendig sei, um ihre berechtigten Ansprüche auf Prozessentschädigung sicherzustellen. Insbesondere behaupten die Beklagten Nr. 1 und 2, dass Y. der wahre Ansprecher der eingeklagten Forderung sei und dieser die Klägerin als Prozesspartei nur vorschiebe, um in der Öffentlichkeit nicht als Partei wahrgenommen zu werden sowie um sich im Fall des Unterliegens der Vollstreckung zu entziehen; die Vollstreckung in Panama sei, obwohl auch dieser Staat das NY-Übereinkommen unterzeichnet hat, unsicher und mit erheblichem zusätzlichem Aufwand verbunden. Die Tatsache, dass die Klägerin alle vorherigen Kosten bezahlt habe, ändere daran nichts. Im übrigen verweisen die Beklagten Nr. 1 und 2 auf die Eingaben der Beklagten Nr. 4 vom 14. Januar 2002 und der Beklagten Nr. 3 vom 28. Juni 2002.

6. In ihrer Klageantwort vom 31. März 2003 und weiteren Eingaben vom 31. Mai 2003 fordert die Beklagte Nr. 3 eine Kostensicherstellung von CHF 200'000.- von der Klägerin. Die Beklagte Nr. 3 führt an, dass die Klägerin eine panamaische Gesellschaft ist, über deren Aktivitäten und Vermögenslage nichts bekannt sei. Es sei anzunehmen, dass die Klägerin die ihr in einem Schiedsspruch anfallenden Kosten und Entschädigung nicht bezahlen könne. Eine Kostensicherstellung sollte deshalb den Eintritt eines für die Beklagte Nr. 3 nicht leicht wiedergutzumachenden Nachteils abwenden und damit die Zahlung ihrer Verfahrenskosten und die Vollstreckung eines Schiedsspruchs in Panama gewähren. Die Beklagte Nr. 3 macht weiter geltend, dass sie nie an der im Aktionärbindungsvertrag enthaltenen Schiedsvereinbarung beteiligt war und dass die Klägerin nur eine Zessionarin von Rechten sei, die aus dem Aktionärbindungsvertrag erwachsen sein sollen.

7. In ihrer Klageantwort vom 31. März 2003 und weiteren Eingaben vom 31. Mai 2003 fordert die Beklagte Nr. 4 eine Kostensicherstellung von CHF 250'000.- von der Klägerin. Die Beklagte Nr. 4 beantragt, dass die Klägerin noch vor jeglichen anderen Verfahrensschritten zur Leistung einer Kostensicherstellung verpflichtet werde. Eine solche Kostensicherstellung solle die Risiken einer Nichtzahlung ihrer Kosten im Zusammenhang mit dem Schiedsverfahren von der Klägerin sowie die Risiken der Vollstreckung

eines Schiedsspruchs in Panama vermeiden. Die Beklagte Nr. 4 führt weiter an, dass die Klägerin eine panamaische Gesellschaft ist, von deren Aktivitäten und Vermögenslage nichts bekannt sei, insbesondere sei sie vielleicht nur eine „empty-shell"-Gesellschaft. Die Beklagte Nr. 4 führt weiter an, dass die Klägerin nur eine Zessionarin von Rechten sei, die aus dem Aktionärsbindevertrag erwachsen sein sollen, und dass das Schiedsverfahren eigentlich von Y. finanziert wird. Die Beklagte Nr. 4 behauptet weiter, dass sie nie Partei des Aktionärbindungsvertrags war.

8. In ihrer Klageschrift vom 18. Dezember 2003 und Erwiderungsschrift vom 2. Mai 2003 beantragt die Klägerin, den Antrag der Beklagten auf Kostensicherstellung abzuweisen, da die Gründe für eine Kostensicherstellung nicht gegeben seien. Insbesondere führt die Klägerin an, dass eine Kostensicherstellung nicht ausdrücklich in der Schiedsvereinbarung vorgesehen sei, dass ihre finanzielle Lage gut sei, dass ihr ausländischer Sitz in einem internationalen Schiedsverfahren nicht beachtet werden sollte und dass kein besonderes Problem für eine Vollstreckung vorläge. Die Klägerin behauptet weiter, dass die Abtretung der Ansprüche von Y. an sie irrelevant sei, da dieser kein Aktionär der Klägerin wäre. Die Klägerin macht weiter geltend, dass eine Kostensicherstellung die Regel der Gleichbehandlung der Parteien verletzte.

II. Die Kostensicherstellung in einem Schiedsverfahren

2.1 Vorsorgliche Massnahmen

9. Art. 34 des Schiedsreglements regelt die vorsorglichen Massnahmen und lautet:

„Im Bereich der internationalen Schiedsgerichtsbarkeit ist Artikel 183 IPRG anwendbar."

10. Das Schiedsgericht hat entschieden, dass das vorliegende Schiedsverfahren ein internationales Schiedsverfahren im Sinne des Art. 176 IPRG ist und dass daher die Art. 176 ff. IPRG Anwendung finden (...).

11. Art. 183 Abs. 1 IPRG sieht vor, dass, wenn die Parteien nichts anderes vereinbart haben, das Schiedsgericht auf Antrag einer Partei vorsorgliche oder sichernde Massnahmen anordnen kann.

12. Gemäss diesen Bestimmungen ist das Schiedsgericht im Allgemeinen ermächtigt, vorsorgliche Massnahmen anzuordnen.

2.2 Qualifikation der Kostensicherstellung

13. Da das Schiedsgericht ermächtigt ist, vorsorgliche Massnahmen anzuordnen, stellt sich die Frage, ob eine Kostensicherstellung als

vorsorgliche Massnahme im Sinne des Art. 183 Abs. 1 IPRG in Betracht gezogen werden kann.

14. Nach herrschender Lehre gilt in der internationalen Schiedsgerichtsbarkeit der Grundsatz, dass ein Schiedsgericht ermächtigt ist, Kostensicherstellungen anzuordnen, da solche Anordnungen als vorsorgliche Massnahmen qualifizieren[1]. Ein Schiedsgericht mit Sitz in der Schweiz ist mithin gestützt auf Art. 183 Abs. 1 IPRG ermächtigt, Kostensicherstellungen zu verfügen, wenn die Parteien nichts anders vereinbart haben.

15. Im weiteren kann auf eine inzwischen erhebliche Anzahl von Präjudizien verwiesen werden, worin sich internationale Schiedsgerichte mit Sitz in der Schweiz für den Erlass von Kostensicherstellungsverfügungen (gestützt auf Art. 183 IPRG) für zuständig erklärt haben[2].

16. Die Zuständigkeit des Schiedsgerichts für die Anordnung von Kostensicherstellungen entspricht auch der Praxis auf ausländischen Schiedsplätzen. Namentlich in England, einem der wichtigsten Zentren der internationalen Schiedsgerichtsbarkeit, ist die Befugnis des Schiedsgerichts zum Erlass von Kostensicherstellungsverfügungen heute sogar gesetzlich festgeschrieben[3].

17. Gemäss allen diesen Erwägungen entscheidet das Schiedsgericht, dass eine Kostensicherstellung eine der verschiedenen vorsorglichen Massnahmen ist, deren Zweck die Gewährung der zukünftigen Vollstreckung eines Teils des Schiedsspruchs und insbesondere des Teils über die Kosten (inkl. Anwaltskosten) des Schiedsverfahrens ist.

2.3 Befugnis des Schiedsgerichts

18. Das Schiedsgericht bestimmt, dass es gemäss Art. 34 des Schiedsreglements und Art. 183 Abs. 1 IPRG ermächtigt ist, die Leistung einer Kostensicherstellung durch die Klägerin anzuordnen.

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1 Marc BLESSING in BERTI/HONSELL/VOGT/SCHNYDER, International Arbitration in Switzerland, Basel 2000, Intro, N. 843; Jean-François POUDRET/Sébastien BESSON, Droit comparé de l'arbitrage international, Zürich/Basel/Genf 2002, N. 610 and N. 628; Pierre A. KARRER/Marcus DESAX, Security for costs in International Arbitration, why, when, and what if…, in: Robert BRINER et al. (eds.), Liber Amicorum Karl-Heinz Böckstiegel, Cologne 2001, p. 330 ff.; Laurence CRAIG/William PARK/Jan PAULSSON, International Chamber of Commerce Arbitration, Den Haag 1998, S. 274; François KNOEPFLER, Les measures provisoires et l'arbitrage international, in Andreas KELLERHALS, Schiedsgerichtsbarkeit, Zurich 1997, S. 307 ff.

2 ASA Bulletin 2002, 467 (471); ASA Bulletin 2001, S. 745; ASA Bulletin 2001, S. 751 (754); ASA Bulletin 1999, 59 (63); ASA Bulletin 1995, 301 (305-306).

3 Art. 38 (3) des English Arbitration Act of 1996; siehe auch Art. 25.2 der Arbitration Rules of the London Court of International Arbitration of 1998 (LCIA).

III. Gründe der Anordnung auf Kostensicherstellung

19. Wie schon oben erwähnt, begründen die Beklagten ihren Antrag auf Kostensicherstellung hauptsächlich mit der Tatsache, dass die Klägerin eine panamaische Gesellschaft ist, von deren Aktivitäten und Vermögenslage nichts bekannt sei, insbesondere, dass sie vermutlich nur eine „empty-shell"-Gesellschaft sei. Die Beklagten machen auch geltend, dass die Klägerin nur eine Zessionarin von Rechten sei, die aus dem Aktionärbindungsvertrag erwachsen sein sollen, und dass das Schiedsverfahren eigentlich von Y. finanziert werde. Schliesslich behaupten die Beklagten, dass sie an keiner relevanten und schriftlichen Schiedsvereinbarung beteiligt seien.

20. Theorie und Praxis sind sich einig, dass in der internationalen Schiedsgerichtsbarkeit hinsichtlich der Anordnung von Kostensicherstellungen Zurückhaltung geboten ist. Die Anordnung einer Kostensicherstellung stellt eine einschneidende Massnahme zulasten einer Prozesspartei dar. Sie kann u.U. dazu führen, dass der damit belasteten Partei (mangels Liquidität) der Anspruch auf Beurteilung des eingeklagten Rechts durch das (vertraglich vereinbarte) Schiedsgericht entzogen wird. Kostensicherstellungsverfügungen sind deshalb auf begründete Ausnahmefälle zu beschränken.

Für die Anordnung einer *cautio iudicatum solvi* reicht es z.B. nicht aus, dass eine Partei im Ausland domiziliert ist[4]. Ebenso wenig genügt es, dass der Staat, in welchem die Partei domiziliert ist, das NY-Übereinkommen[5] nicht unterzeichnet hat[6]. Auch genügt z.B. der Umstand, dass eine Partei in finanziellen Schwierigkeiten steckt oder gar zahlungsunfähig ist, für sich allein noch nicht zur Anordnung einer Kostensicherstellung[7]; erst wenn bspw. der Konkurs mangels Aktiven eingestellt wurde, dürfte sich die Anordnung einer *cautio iudicatum solvi* aufdrängen[8].

Nach herrschender Lehre und Rechtsprechung hat die gesuchstellende Partei (hier die Beklagten) dem Schiedsgericht Tatsachen und Indizien

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4 Siehe Jean-François POUDRET/Sébastien BESSON, op. cit. , N. 610. IHK Entscheid im ASA Bull. 1999, S. 59 ff., insb. S. 64: "l'une des spécificités de l'arbitrage international, qui est sa délocalisation, conduit à ne pas prendre en considération le domicile ou l'établissement de l'une des parties"; ähnliches im GIHK Entscheid des Schiedsgerichts vom 25. September 1997, in ASA Bull. 2001, S. 745 ff., insb. 749.

5 Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche vom 10. Juni 1958 (New Yorker Übereinkommen).

6 Siehe z.B. Entscheid in ASA Bull. 1995, p. 301, insb. 306

7 Vgl. etwa ASA Bulletin 2001, 745 (749) sowie POUDRET/BESSON, op. cit., Rn. 610.

8 So der Entscheid in Bulletin 2002, 467 (471).

vorzutragen, welche *prima facie*[9] darauf schliessen lassen, dass die Gesuchsgegnerin (hier die Klägerin) im Hinblick auf ihr Unterliegen im Schiedsprozess Massnahmen getroffen hat, die darauf abzielen, die gesuchstellende Partei an der künftigen Einforderung einer zugesprochenen Parteikostenentschädigung zu hindern bzw. die Vollstreckung dieses Anspruchs zu vereiteln. Es müssen m.a.W. Anzeichen namhaft gemacht werden, die glaubhaft erscheinen lassen, dass ein Partei bewusst mit Blick auf das Schiedsverfahren Massnahmen getroffen hat, welche sicherstellen sollen, dass die Gegenseite für den Fall ihres Obsiegens an der Rückgewinnung ihrer Verfahrenskosten gehindert sein würde. Eine solche Annahme kann z.B. gerechtfertigt sein, wenn die anspruchsberechtigte Partei den Klageanspruch im Hinblick auf den Schiedsprozess an eine „empty-shell"-Gesellschaft zediert, welche alsdann als Klägerin auftritt[10]; oder wenn eine Partei im Hinblick auf oder während des laufenden Schiedsverfahrens ihren Sitz in einen Staat verlegt, in welchem die Vollstreckung von Schiedssprüchen anerkanntermassen erheblich erschwert ist.

Zusammengefasst hält das Schiedsgericht fest, dass die Anordnung einer Kostensicherstellung auf Machenschaften einer Partei zu beschränken ist, die ein Verhalten wider Treu und Glauben erkennen lassen[11].

21. Im vorliegenden Fall sprechen die folgenden Umstände für die Anordnung einer Kostensicherstellung:

– Die Klägerin beruft sich hinsichtlich ihrer Aktivlegitimation auf einen Abtretungsvertrag vom 5. Dezember 2000 (KB 1). Aus diesem Dokument ist ersichtlich, dass Y. seine angeblichen Schadenersatzansprüche aus einem Aktienkaufvertrag, den er mit den Beklagten abgeschlossen haben will, an die Klägerin abgetreten hat. Die Klägerin hat bis heute weder einen tatsächlichen noch einen rechtlichen Grund für die fragliche Forderungszession vorgebracht. Dies obwohl sie, nach entsprechender Aufforderung durch die Beklagten und das Schiedsgericht, dazu mehrmals Gelegenheit gehabt hat. Das Schiedsgericht stellt fest, dass aus dem bisherigen Schriftenwechsel nicht hervorgeht, welche Motive die Klägerin zum besagten Forderungserwerb bewogen haben.

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9 Vgl. François KNOEPFLER, Les décisions redues par l'arbitre à la suite d'un examen 'prima facie', ASA Bulletin 2002, 587 (599).

10 Siehe z.B. GIHK Entscheid des Schiedsgerichts vom 25. September 1997, in ASA Bull. 2001, S. 745 ff., insb. 749-750; den KEN REN Fall; Philippe FOUCHARD/Emmanuel GAILLARD/Berthold GOLDMANN, Traité de l'arbitrage commercial international, Paris 1999, p. 703.

11 Vgl. den Entscheid in ASA Bulletin 2001, 745 (749 und 750) worin ausdrücklich "manoeuvres contrary to good faith" und "decision made in circumstances amounting at bad faith" verlangt werden.

Ebenso stellt das Schiedsgericht fest, dass die Klägerin bisher jede Angabe über einen Rechtsgrund für die fragliche Zession schuldig geblieben ist, sich insbes. darüber ausgeschwiegen hat, ob und inwieweit sie für den Forderungserwerb eine Gegenleistung erbracht hat oder noch erbringen wird.

– Der genannte Abtretungsvertrag (KB 1) zwischen Y. und der Klägerin wurde am 5. Dezember 2000 unterzeichnet. Lediglich 15 Tage später, d.h. am 20. Dezember 2000, hat die Klägerin bei der im Aktionärsbindungsvertrag vom 21. August 1998 (KB 2) vorgesehenen Schiedsstelle gegen die Beklagten 1–4 das vorliegende Schiedsverfahren eingeleitet. Das Schiedsgericht stellt fest, dass sich die Klägerin zu dieser (zeitlichen) Koinzidenz in ihren verschiedenen Eingaben nicht geäussert hat. Der Umstand, dass die Abtretung des Klageanspruchs und die Einleitung des vorliegenden Verfahrens praktisch zusammenfallen, erhärtet für das Schiedsgericht den Verdacht, dass die Zession vom 5. Dezember 2000 (KB 1) *bewusst im Hinblick auf das unmittelbar bevorstehende Schiedsverfahren* erfolgt ist.

– Über die wahren Gründe, die Y. bzw. die Klägerin bewogen haben mögen, im Hinblick auf das vorliegende Schiedsverfahren die behaupteten Ansprüche aus dem angeblichen Aktienkaufvertrag mit den Beklagten abzutreten bzw. zu erwerben, ist dem Schiedsgericht (ausser den von den Beklagten angestellten Mutmassungen) nichts bekannt. Aufgrund der bisherigen Erwägungen hat das Schiedsgericht hingegen Grund zu der Vermutung, dass wenigstens einer dieser Beweggründe darin bestanden haben dürfte, die Beklagten für den Fall des Unterliegens der Klägerin an der Vollstreckung eines Parteikostenentscheids zu hindern. Dafür spricht einmal die Tatsache, dass Y. in der Person der Klägerin mit einer Gesellschaft kontrahiert hat, über deren Aktivitäten und Vermögenslage dem Schiedsgericht keine Angaben vorliegen, die den Verdacht ausschliessen würden, dass es sich dabei lediglich um ein Vehikel handelt, dessen einziges Aktivum der vorliegende Klageanspruch ist und dessen einziger Zweck (momentan) darin besteht, in der Klägerrolle den vorliegenden Schiedsprozess zu führen. Anderseits spricht für die erwähnte Vermutung der Umstand, dass Y. als Zessionarin eine Gesellschaft in Panama ausgesucht hat. Wiewohl (auch) Panama ein Signatarstaat des NY-Übereinkommens ist, erachtet es das Schiedsgericht als notorisch, dass es für die Beklagte ungleich schwieriger und mit erheblich

grösserem Aufwand verbunden sein dürfte, einen allfälligen Anspruch auf Parteikostenentschädigung statt z.B. in Tschechien (Wohnsitzstaat des Zedenten Y.) in Panama durchsetzen zu müssen.

– Die Klägerin hat ferner trotz mehrfacher Gelegenheit keine näheren Angaben über die an ihr bestehenden Beteiligungsverhältnisse gemacht. Zusammen mit dem bereits erwähnten Umstand, das über die Entgeltlichkeit der am 5. Dezember 2000 erfolgten Abtretung des Klageanspruchs (KB 1) nichts bekannt ist, erhärtet dies den Verdacht, dass Y. am Klageanspruch nach wie vor wirtschaftlich berechtigt ist. Dies wiederum legt die Vermutung nahe, dass die Klägerin unter anderem dem Zweck dient, für Y. das mit dem vorliegenden Schiedsprozess verbundene Kostenrisiko zu minimieren.

22. Gestützt auf die vorstehenden Erwägungen erachtet es das Schiedsgericht *prima facie* als glaubhaft gemacht, dass die Klägerin bzw. der (vermutlich) hinter ihr stehende Y. mit der am 5. Dezember 2000 erfolgten Abtretung des Klageanspruchs (KB 1) gegenüber den Beklagten ein Verhalten an den Tag legen, das ernsthafte Zweifel erweckt, ob sie dem allgemeinen Gebot, nach Treu und Glauben zu handeln, tatsächlich genügen. Das Schiedsgericht hält es deshalb grundsätzlich für angezeigt, die Klägerin anzuhalten, den Beklagten 1–4 eine Sicherheit für allfällige künftige Parteientschädigungsansprüche zu leisten.

IV. Betrag der Kostensicherstellung

23. Da die Anordnung auf Kostensicherstellung begründet ist, hat das Schiedsgericht den Betrag einer solchen Kostensicherstellung zu bestimmen.

24. Das Schiedsgericht ist der Meinung, dass sich der Betrag der beantragten Kostensicherstellung vorläufig nur an den mutmasslichen Parteikosten bis zum Entscheid über die Zuständigkeitsfrage und den allfälligen, von den Beklagten bisher an die Kosten des Schiedsverfahrens geleisteten Vorschüssen auszurichten hat. Es lässt sich dabei von der Überlegung leiten, dass ein allfälliger Nichteintretensentscheid zugleich Endentscheid (Final Award) wäre. Im Falle eines Eintretensentscheids wäre über die Kostensicherung im allgemeinen sowie über die Verwendung der hierin angeordneten Sicherheiten neu zu befinden.

25. Für die Berechnung der Höhe der Sicherheit sind – wie vorstehend erwähnt – zunächst die von der Beklagten bereits geleisteten Vorschüsse an die Kosten des Schiedsgerichts zu berücksichtigen. In diesem Zusammenhang stellt das Schiedsgericht fest, dass bisher nur die Beklagten

Nr. 3 und 4 einen Vorschuss von CHF 8'750.- geleistet haben und mithin in diesem Zusammenhang ein Kostenrisiko eingegangen sind. Nur die Beklagten Nr. 3 und 4 haben folglich unter dem Titel Kosten für das Schiedsverfahren einen Anspruch auf Sicherstellung je im Umfang von CHF 8'750.-.

Hinsichtlich des mutmasslichen Aufwandes der Beklagten für ihre Vertretung bis zum Entscheid über die Zuständigkeitsfrage hat das Schiedsgericht die ins Recht gelegten Beweismittel (insbes. Honorarnoten) gewürdigt und den bis zum Zuständigkeitsentscheid noch anfallenden weiteren Aufwand abgeschätzt. Das Schiedsgericht erachtet es aber auch als angezeigt, sich bei der Festsetzung einer Sicherheit für künftige Ansprüche auf Parteikostenentschädigung eine gewisse Zurückhaltung aufzuerlegen, andernfalls die Gefahr besteht, dass durch übermässig hohe Gutsprache der Klägerin die Fortführung des Verfahrens in unzumutbarer Weise erschwert werden könnte.

In Würdigung dieser verschiedenen Aspekte hat das Schiedsgericht festgelegt, dass für die Beklagten Nr. 1 und 2 eine Kostensicherstellung von CHF 100'000.- angezeigt ist. Für die Beklagten Nr. 3 und 4 sind jeweils CHF 100'000.- zu leisten sowie die Sicherstellung des von diesen Beklagten an die Handelskammer Ticino einbezahlten Kostenvorschusses, sodass für die Beklagten Nr. 3 und 4 der Betrag zur Kostensicherstellung jeweils CHF 108'750.- beträgt.

Der Obmann des Schiedsgerichts hat beim Credit Suisse ein Konto unter der Nummer 0251-283831-11-10 (Rubrik „Ticino“) eröffnet, auf welches die genannten Beträge bis zum 15. September 2003 einzuzahlen sind. Es steht der Klägerin jedoch frei, die Kostensicherstellung auch in Form einer Bankgarantie zu leisten, welche im Wesentlichen dem Modelltext zu entsprechen hat, der dieser Verfügung beigelegt ist. Eine allfällige Bankgarantie ist durch eine Schweizer Bank auszustellen.

Ferner ist die Klägerin aufgefordert, bei Leistung von Kostensicherheit klarzustellen, in Bezug auf welche der Beklagten diese erfolgen.

Die Kosten des Verfahrens betreffend Sicherheitsleistungen werden im Rahmen des am Ende des Schiedsverfahrens ergehenden Kostenentscheids mitberücksichtigt (Art. 53 des Schiedsreglements).

V. Weiteres Schiedsverfahren

Das Schiedsgericht geht davon aus, dass die Frage der Zuständigkeit ein Beweisverfahren von mindestens einem Tag beanspruchen wird. Die

Modalitäten des Beweisverfahrens werden demnächst zwischen dem Schiedsgericht und Parteien festgelegt.

VI. Anordnung

Das Schiedsgericht ordnet an:

1. Die Klägerin hat bis zum 15. September 2003 den Betrag von CHF 100'000.- als Beitrag an die Verfahrenskosten der Beklagten Nr. 1 und 2 zu leisten und diesen Betrag entweder auf das Konto Credit Suisse N° 0251-283831-11-10 (Rubrik „Ticino“) als Kostensicherheit zu deponieren oder durch Bankgarantie sicherzustellen.
2. Die Klägerin hat den Betrag von CHF 108'750.- bis zum 15. September 2003 als Beitrag an die Verfahrenskosten der Beklagten Nr. 3 zu leisten und diesen Betrag entweder auf das Konto Credit Suisse N° 0251-283831-11-10 (Rubrik „Ticino“) als Kostensicherheit zu deponieren oder durch Bankgarantie sicherzustellen.
3. Die Klägerin hat bis zum 15. September 2003 den Betrag von CHF 108'750.- als Beitrag an die Verfahrenskosten der Beklagten Nr. 4 zu leisten und diesen Betrag entweder auf das Konto Credit Suisse N° 0251-283831-11-10 (Rubrik „Ticino“) als Kostensicherheit zu deponieren oder durch Bankgarantie sicherzustellen.

Procedural Order No. 3 of 4 July 2008 in an ICC Arbitration with its seat in Berne between X. S.A.R.L., Lebanon (Claimant), and Y. AG, Germany (Respondent). Sole Arbitrator: Franz Kellerhals.

I. Background

1. Respondent, by submission dated 21 May 2008, filed a Request for Security for Costs and sought an order from the Arbitral Tribunal that “Claimant be ordered to provide a security for Respondent’s costs in appropriate form and for an adequate amount, but for not less than USD 300,000.00.”

2. The Tribunal, by letter dated 26 May 2008, acknowledged receipt of Respondent’s submission and invited Claimant to communicate its Answer to the Request for Security for Costs until 3 June 2008.

3. Claimant, by letter dated 2 June 2008, communicated its Answer to the Request for Security for Costs and requested that the Tribunal "dismisses Respondent's Request for security for costs entirely".

II. The Position of Respondent

4. Respondent maintains that Claimant is in a disastrous financial situation, that its liabilities per 31 December 2007 were 13 times higher than its assets, that Claimant's financial situation has considerably deteriorated since 2006 and that Claimant is apparently inactive. According to Respondent, it only became aware of Claimant's deteriorated financial situation and cash position on 2 May 2008 when Claimant produced its balance sheets as of 31 December 2006 and 31 December 2007.

5. Respondent submits that the Sole Arbitrator has the power to order security for costs both under the ICC Rules and under Chapter 12 of the PILS as the applicable lex arbitri in this arbitration.

6. As to the substance, Respondent argues that the basic prerequisite for ordering security for costs is "the requirement of a fundamental change of situation since the agreement to arbitrate was entered into, which results in a clear and present danger that a future cost award would not be enforceable" (...). On the basis of the information available from Claimant's balance sheets as of 31 December 2006 and 2007, Respondent concludes that this prerequisite is met in the present case, given that those balance sheets would reveal that Claimant is manifestly over-indebted and – under Swiss law – Claimant would have to notify the judge and deposit its balance sheet.

III. The Position of Claimant

7. Claimant contends that Respondent became aware of Claimant's financial situation not only in May 2008. According to Claimant, Respondent has rather been on notice about Claimant's financial troubles and its inactivity for a long time, by all means since receipt of Claimant's letter to Respondent of 3 June 2006 (...). According to Claimant, its financial difficulties result "precisely because of the absence of total payment of its work as subcontractor in the Project, in particular because of Respondent's ability [sic!] to act promptly vis-à-vis the Z. to have the subcontractor's pending claims dealt with" (...).

8. Furthermore, Claimant maintains that Respondent, by contributing to the advance of the costs of the arbitration fixed by the ICC Court, accepted to arbitrate against Claimant although Respondent knew of Claimant's

financial situation. Moreover, by mentioning in para. 13 of the Answer to the Request for Arbitration that Claimant "is ultimately controlled by the […] family C. [which is] well connected within [country X.] and has excellent connections to Z.", Respondent expressed its satisfaction with the fact that Claimant's shareholders would make sure that any judgment adverse to Claimant would be enforced.

9. With respect to the Arbitral Tribunal's authority, Claimant does not deny that the Sole Arbitrator has, in principle, the power to order security for costs.

10. As to the merits, Claimant argues that an order for security for costs is justified "only under very particular circumstances and with the greatest reluctance", in particular, it "should not have the effect of depriving a party to have access to justice and to have its case heard" (...). Claimant therefore submits that the mere initiation of bankruptcy proceedings or even insolvency as such would not justify awarding security for costs. After all, Claimant concurs with Respondent in the opinion that "a fundamental change in the circumstances since the agreement to arbitrate was entered into […] which results in a clear and present danger that a future cost award would not be enforceable may lead to the granting of security for costs" (...).

IV. Authority of the Tribunal

11. The Sole Arbitrator notes that both parties accept an ICC arbitral tribunal's jurisdiction and power to rule on a party's request for security for costs.

12. For the sake of completeness, the Sole Arbitrator notes that, although not specifically mentioned in the ICC Rules, commentators consider the wording of Article 23(1) of the ICC Rules to be broad enough to embrace applications for security for costs.[1] Moreover, legal doctrine and practice support the view that Article 183 of the PILS, which allows an arbitral tribunal to order precautionary or conservatory measures, also extends to orders requesting a party to provide security for the opposing party's legal costs.[2]

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1 DERAINS/SCHWARTZ, A Guide to the ICC Rules of Arbitration, 2nd ed., The Hague, p. 297.

2 POUDRET/BESSON, Droit comparé de l'arbitrage international, Zürich 2002, N 610; Zurich Chamber of Commerce (ZCC), Arbitration Proceedings No. 415, Fourth Order of 20 November 2001, in Bull. ASA 2002, p. 467; Procedural Order No. 14, 27 November 2002, Ad Hoc Arbitration of the Arbitral Tribunal in Zurich, Bull. ASA 2005, p. 108.

V. Requirements of an Order for Security for Costs

13. A precautionary or conservatory measure requires that (i) the claim of the applicant is justified *("Verfügungsanspruch")* and (ii) the legal position of the applicant to be secured or preserved is in acute danger *("Verfügungsgrund")*. The right to an order for security for costs thus requires that (i) the applicant, in case of success in the proceedings, would have a right to being reimbursed for its costs incurred, and (ii) the applicant puts forward with a reasonable degree of certainty *("glaubhaft machen")* that its possible future claim for recovery would be deprived failing an immediate securing of those costs.[3]

14. Turning to the first requirement identified in para. 13 hereinabove, the Sole Arbitrator notes that Article 31(3) of the ICC Rules grants complete discretion to the arbitral tribunal when deciding which of the parties shall bear the costs of the arbitration and in what proportion they shall be borne by them. However, the Sole Arbitrator also notes that both parties, by having put forward similar reciprocal prayers for relief with respect to their costs, seem to concur in the opinion that this Arbitral Tribunal should basically apply the rule customary in arbitration proceedings conducted in Switzerland, i.e. to allocate the costs in proportion to the outcome of the case, taking into account the relative success of their claims and defenses.[4] Therefore, the Sole Arbitrator concludes that the first requirement for an order for security for costs is met in the instant case.

15. Turning to the second requirement identified in para. 13 hereinabove, a review of the scholarly writing and published arbitral decisions on point reveals that arbitral tribunals sitting in Switzerland are indeed generally reluctant in willing to assume factual situations in which an applicant's future claim for recovery of its costs would be in acute danger. In particular, it is common ground that the obligation to provide security may not depend on the opponent's domicile as is sometimes the case in court proceedings, nor can a request for security for costs be granted merely on the fact that a party's state of domicile is not a signatory to the New York Convention.[5]

16. As mentioned above, both parties agree, however, that one of the possible grounds *("Verfügungsgrund")* upon which an order for security for costs may be granted is if a fundamental change in the circumstances has

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3 BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 1466, 1467.

4 DERAINS/SCHWARTZ, op.cit., p. 371.

5 POUDRET/BESSON, op.cit., N 610.

occurred since the agreement to arbitrate was made, which results in a clear and present danger that a future cost award would not be enforceable (see the quotations from the parties' briefs in para. 6 and para. 10 above). One of the possible fundamental changes in the circumstances may indeed result from the opponent's manifest insolvency at the time of the initiation of the arbitral proceedings if the same party was still in good standing when the arbitration agreement was made.[6]

17. At this point, it must be recalled that security for costs in international arbitration is first and foremost an issue about the conflict between the (insolvent) plaintiff's right to have access to arbitral justice on the one hand and the defendant's interest to have a reasonable chance of being able to enforce a future cost award issued in its favor on the other. Deciding on an application for security for costs is therefore about the task of arbitral tribunals to balance these two conflicting interests against each other and about determining, on the basis of all relevant circumstances of the case, which of them shall prevail over the other.

18. When dealing with these issues in the context of *insolvency*, the behavior of the party having become insolvent may well have an impact on whether security for costs should be granted or not. However, these subjective aspects are not the only relevant points to be considered. In particular, making an order for security for costs dependant on the condition that the insolvent party has deliberately and in view of the arbitration taken steps to deprive the other party from recovering its costs would be inappropriate. Such an approach would be one-sided, putting all the weight of the decision on the (insolvent) plaintiff's interest to have access to arbitral justice. In case of insolvency, it is therefore justified that subjective considerations (such as the plaintiff's behavior) step back and make way for a prevailing *objective analysis*: If there is no reasonable chance for the defendant to enforce a future cost award in its favor, an order for security for costs must be granted, unless the plaintiff would prove that its financial troubles are directly connected to a behavior of the defendant contrary to the principle of good faith.

19. The foregoing applies, however, only if the objective analysis reveals that the plaintiff is *manifestly insolvent* at the time of the initiation of the arbitration proceedings. Manifest insolvency may not be readily assumed. The opening of bankruptcy would not be sufficient grounds as long as the

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6 BERGER/KELLERHALS, op.cit., N 1468 with further reference and N 1472.

estate of the bankrupt party has sufficient realizable assets in order to finance the arbitration and to honor a future cost award issued against it.

20. The approach outlined in para. 18 hereinabove is not in violation of the plaintiff's right to have access to arbitral justice. As all legal maxims, this principle must be subject to exceptions. Such an exception may be justified if – as explained above – a fundamental change in the circumstances has occurred since the agreement to arbitrate was made, with the effect that access to arbitral justice is no longer allowed unconditionally, but rather subject to the requirement of providing security for the other party's costs.

21. Put differently: If a party has become manifestly insolvent and therefore is likely relying on funds from third parties in order to finance its own costs of the arbitration, the right to have access to arbitral justice can only be granted under the condition that those third parties are also ready and willing to secure the other party's reasonable costs to be incurred. If those third parties are not willing to provide such security, it would be finally up to the insolvent party's creditors to decide how to proceed with the claim in dispute.

VI. Application of the Principle to the Instant Case

22. In the instant case, the four contracts between the parties which provide for arbitration under the ICC Rules were made in 1999. There is no evidence on record rebutting the assumption that Claimant was in good standing at the time. Therefore, if Claimant was insolvent at the time when it initiated the present proceedings in 2007, a fundamental change in the circumstances has indeed occurred since the agreements to arbitrate were made.

23. The Sole Arbitrator notes that Claimant's financial status, as it has been described by Respondent in its Request for Security for Costs, has not been challenged by Claimant. Indeed, Claimant's balance sheet as of 31 December 2007 reveals that its assets were worth LBP 408,712,168 (equal to approximately USD 270,000.00) and that the total of its liabilities amounted to LBP 5,449,545,161.00 (equal to approximately USD 3,650,000.00). Thus, it is fair to state that, as of 31 December 2007, Claimant's liabilities exceed its assets by 13 (thirteen) times and that, on the basis of a purely arithmetic calculation, its creditors would have received a dividend of less than 7.5%.

24. In addition, the balance sheet as of 31 December 2007 reveals that Claimant has only LPB 5,951,169 (equal to approximately USD 4,000.00) worth of cash. Moreover, it is unknown to the Tribunal whether and to what extent the other assets of Claimant would meet the values entered in the balance sheet. Experience shows that, at least in a forced sale, this is

normally not the case. The largest part of Claimant's assets relates to "Investment Debtors" (LBP 353,600,730). Assuming that at least part of these claims against debtors relates to Claimant's claims brought against Respondent in these proceedings, the Sole Arbitrator must conclude, on the totality of evidence before him, that Claimant found itself in a status of manifest insolvency when it initiated the present arbitration proceedings, meaning that Claimant is not in the position to finance its own costs of the arbitration, nor to honor a possible cost award adverse to it.

25. The Sole Arbitrator also notes that Claimant has not challenged Respondent's remark that – under Swiss law – Claimant would have been for a long time in a situation that would require its board of directors to notify the judge of its over-indebtedness and deposit its balance sheet, meaning that – according to Swiss standards – Claimant would have been under an obligation to declare itself bankrupt long time ago.

26. These determinations contrast with the documents filed by Claimant together with its submission dated 2 May 2008. These documents certify, inter alia, that Claimant, as of 21 April 2008, was existing and duly registered with the relevant register of commerce in Lebanon, that it was not under liquidation and not subject to any bankruptcy situation. Therefore, the Tribunal must assume that the shareholders and directors continue to keep full control over the insolvent and over-indebted company, i.e. there would be no official receiver or bankruptcy administrator making sure that Respondent (as a new creditor) would be paid for its costs before any (further) distributions to the existing creditors of Claimant would be made. Therefore, even if Claimant's funds were sufficient to finance its own costs of the arbitration, Respondent would only be able to recover, on account of a possible future cost claim, a small fraction (dividend), similar to all other existing creditors of Claimant. Claimant has not argued, nor brought forward evidence showing that Respondent's possible cost claim would have priority over the claims of its existing creditors.

27. Moreover, Respondent's reference to the C. family in para. 13 of the Answer to the Request for Arbitration cannot be considered as an (implied) waiver of the right to claim for security for costs, respectively, as a (tacit) acceptance of Claimant's financial situation, or as an acceptance that the C. family as the shareholders of Claimant would substitute for Claimant if the latter would not be in the position to honour a cost award adverse to Claimant. There is no firm and binding declaration to this effect on record (e.g. in the form of a guarantee in favor of Respondent). Respondent cannot be considered bound to Claimant's mere reference to the good financial standing of its shareholders.

28. Finally, Claimant has argued that its uncomfortable financial situation has occurred due to Respondent's behavior, i.e. because of lack of payment of its work as subcontractor in the Project. While this would indeed be a valid reason to refuse ordering security for costs (see above, para. 18 in fine), the Sole Arbitrator must conclude that Claimant's allegations to this effect are not "liquid" to be decided at this time. In addition, while it is true that awarding to Claimant its claims brought forward in this arbitration would considerably improve its balance sheet, there is no evidence on record showing that Respondent's refusal to comply with Claimant's (disputed) claims is the one and only reason for Claimant's continuing business inactivity and over-indebtedness.

29. Likewise, Respondent cannot be considered having been put on notice of Claimant's actual financial situation by Claimant's letter to Respondent of 3 June 2006 (...). This letter merely informed Respondent that Claimant "has ceased to conduct any business activity", that it has "liquidated operating assets, downsized its management and labour structure over the last 18 months", and that it would put forward in the next 28 days "a claim related to the liquidation of the company and the cessation of its business activity". Nothing in this letter indicates that Claimant was manifestly insolvent and/or over-indebted at the time. These facts have come to Respondent's secure attention only when Claimant filed its balance sheets as of 31 December 2006 and 2007 together with its submission of 2 May 2008.

VII. Conclusion

30. On the basis of the foregoing, the Sole Arbitrator concludes that Respondent's request for security for costs must, in principle, be granted.

31. No security seems justified for the USD 48,000.00 already advanced by Respondent to the ICC as its share of the advance fixed by the ICC Court. Respondent paid this amount voluntarily, although – given Respondent's doubts about Claimant's financial situation – Respondent could have refused to make this advance payment. As Article 30(3) of the ICC Rules provides for such case, Claimant would then have been free to substitute for Respondent's share of the advance.

32. In respect of Respondent's legal and other costs incurred by it for the arbitration, Respondent maintains that it "has already incurred costs for legal representation of some CHF 100,000 and expects further legal expenses of at least CHF 150,000." Respondent has not offered specific proof for any of these figures.

33. According to Article 31(1) of the ICC Rules, the costs of the arbitration shall include, inter alia, the "reasonable legal and other costs incurred by the parties for the arbitration". On the basis of all relevant information on the case before it at present, the Tribunal deems it just and appropriate to fix those costs to USD 150,000.00.

VIII. Decision

34. On the basis of the foregoing, the Arbitral Tribunal hereby:

(a) Decides to order Claimant to provide a security for Respondent's reasonable legal and other costs incurred by it for the arbitration in the amount of USD 150,000.00.

(b) Decides to order Claimant to deposit the amount of USD 150,000.00 until 10 August 2008 on a trust account to be designated by the Arbitral Tribunal in the next few days.

(c) Decides that the amount of USD 150,000.00 shall be kept in trust until such time as the Tribunal shall decide, in an award, on the costs of the arbitration and which of the parties shall bear them.

(d) Decides to confirm the time limits and dates fixed in the Provisional Timetable (i.e. in Procedural Order No. 1 of 26 March 2008).

(e) If the required security is not paid in full until 10 August 2008, the Arbitral Tribunal reserves to order the suspension or termination of the arbitral proceedings.

(f) Decides to communicate this Procedural Order to the parties' Counsel by facsimile and mail with a copy to the ICC.

Final Award of 20 April 2009 in an ICC Arbitration with its seat in Berne between X. S.A.R.L., Lebanon (Claimant), and Y. AG, Germany (Respondent). Sole Arbitrator: Franz Kellerhals.

I. Introduction

[...]

VII. Costs

175. [...]. Consequently, Claimant shall be obliged to reimburse Respondent for the amount of CHF 000,000.85, corresponding to CHF 000,000.75 minus CHF 00,000.90.

176. As Claimant has provided USD 150,000.00 security for costs in favour of Respondent (...), and given the outcome of the case by which Claimant has to reimburse Respondent for its costs for legal representation and assistance (...), the full amount of USD 150,000.00 representing security for costs shall be released and transferred to a bank account to be designated by Respondent. Respondent shall have to credit these USD 150,000.00 against its claim for reimbursement of its costs for legal representation and assistance (to be converted into Swiss francs at the conversion rate applicable on the date of receipt on Respondent's account).

VIII. Award

177. For these reasons, and by applying the ICC 1998 Rules of Arbitration, the agreed rules of procedure and Chapter 12 of the Swiss Private International Law Statute,

the Arbitral Tribunal:

(1) Decides to reject Claimant's claim for the principal amounts.

(2) […].

(3) Declares that Claimant shall bear USD 000,000.00 and Respondent USD 0,000.00 of the costs of the arbitration fixed by the ICC International Court of Arbitration at USD 000,000.00. As Respondent has advanced USD 00,000.00 of those costs, Claimant shall reimburse and pay to Respondent USD 00,000.00.

(4) Decides to order Claimant to reimburse and pay to Respondent CHF 000,000.85 on account of Respondent's legal and other costs incurred

in the arbitration. Consequently, decides to release the security for costs of USD 150,000.00 and to transfer this amount to a bank account to be designated by Respondent to the Sole Arbitrator within 20 days from the receipt of this final Award. Furthermore, declares that on the date of receipt of those USD 150,000.00, they shall be credited to the amount of CHF 000,000.85 so that those CHF 000,000.85 shall reduce by USD 150,000.00 (to be converted into Swiss francs at the conversion rate applicable on the date of receipt on Respondent's account).

(5) Decides to dismiss Claimant's request for reimbursement of its costs incurred for the arbitration.

(6) […].

Order No. 1 of 19 December 2008 of an Arbitral Tribunal acting under the Swiss Rules of International Arbitration in a matter between Claimants 1-2 and Respondents 1-16.

Reference is made to the requests of Respondents 1-2, 12-14, and 15-16 that the Arbitral Tribunal order Claimants to secure Respondents' costs of arbitration. Pursuant to the deadline set forth in its email to the Parties dated December 12, 2008, the Arbitral Tribunal offers its decision on this matter below.

As the present Order is in fact the first Procedural Order and precedes the "Initial Directions and Procedural Order No. 1" provided to the Parties in draft for comment on December 12, 2008, the present Order is Order No. 1 and sets forth certain background to the arbitration prior to addressing the petitions for security for costs.

1. […]

[…]

3. Procedural History of the Case

3.1 Claimants: On January 21, 2008, Claimants commenced the arbitration by filing their Notice of Arbitration with the ZCC. On January 23, 2008, they paid a Registration Fee in the amount of CHF 6,000.00. On February 20, 2008, they filed a Complement to the Notice of Arbitration with the ZCC. On May 8, 2008, they communicated with the ZCC concerning

Service on Respondents 12-14 and the conduct of multiparty proceedings. On July 2, 2008, they communicated with the ZCC concerning the designation of arbitrators.

3.2 Respondents 1-2: On June 16, 2008, Respondents 1-2 filed their Answer to the Notice of Arbitration with the ZCC. On April 9, 2008 and April 30, 2008, they requested that the Claimants be directed to file separate notices of arbitration with respect to separate Respondents or groups of Respondents and that notice be properly served on Respondents 12-14. On June 30, 2008, they communicated with the ZCC concerning the number of arbitrators and on August 8,2008 concerning the designation of a party arbitrator.

3.3 Respondents 3-11: On June 16, 2008, Respondents 3-11 filed their Answer to the Notice of Arbitration with the ZCC. On April 9, 2008 and April 30, 2008, they requested that the Notice and Complement to Notice be rejected and that notice be properly served on Respondents 12- 14. On June 30,2008, they communicated with the ZCC concerning the number of arbitrators and on August 8,2008 concerning the designation of a party arbitrator.

3.4 Respondents 12-14: On June 30,2008, Respondents 12-14 filed their Answer to the Notice of Arbitration with the ZCC. On August 8, 2008, they communicated with the ZCC concerning the designation of a party arbitrator.

3.5 Respondents 15-16: On June 16, 2008 Respondents 15-16 submitted to the ZCC a request for the award of security for their legal costs. On June 26, 2008, they filed their Answer to the Notice of Arbitration with the ZCC. On April 9, 2008 and April 22, 2008, they communicated with the ZCC concerning service. On May 1, 2008 and May 9, 2008, they requested that the Claimants be directed to file separate notices of arbitration with respect to separate Respondents or groups of Respondents. On June 30, 2008 and August 8, 2008, they communicated with the ZCC concerning the designation of arbitrators.

3.6 Following the constitution of the Arbitral Tribunal, the Parties were invited to comment on the quantification of the amount in dispute, the provisional timetable, procedural issues, and the appointment of an arbitral secretary (letters dated November 20, 2008 and December 5, 2008). Claimants submitted comments on December 3, 2008, December 5, 2008, and December 10, 2008. Respondents 1-2 submitted comments on December 3, 2008 and December 5, 2008. Respondents 3-11 submitted comments on November 24, 2008 and December 5, 2008. Respondents 12-14 submitted comments on November 26, December 5, 2008 and December 10, 2008. Respondents 15-16 submitted comments on December 3, 2008 and December 18, 2008.

4. Request for Security for Costs

4.1 Three groups of Respondents have requested that the Arbitral Tribunal order Claimants to secure Respondents' costs:

4.1.1 Respondents 15-16 submitted comments on December 3, 2008.

4.1.2 Respondents 1-2 submitted comments on December 5, 2008.

4.1.3 Respondents 12-14 submitted comments on December 10, 2008 and December 18, 2008.

4.2 Claimants submitted comments on December 10, 2008.

4.3 The Arbitral Tribunal notes that Respondents 3-11 have not submitted a request for security for costs as of the date of this Order No. 1.

4.4 Respondents 1-2 requested that the Arbitral Tribunal order Claimants to secure their costs for three reasons.

4.4.1 First, Claimants "expressly acknowledge that they do not have the financial means available to them to pay the substantial deposit the Arbitral Tribunal will be required to request in order to cover the costs of this procedure." According to Respondents 1-2, "this arbitral procedure is not likely to continue." Therefore, it will "save all concerned substantial time and effort if the present proceedings are suspended until Claimants have secured the costs of the Arbitral Tribunal."

4.4.2 Second, Respondents 1-2 contend that they "cannot in good faith be required to spend substantial amounts to defend themselves against the claims being asserted by Claimants when, pursuant to Claimants' own pleadings, it is evident that Claimants will not be able to compensate Respondents 1 and 2 to the extent that costs are awarded to Respondents 1 and 2."

4.4.3 Third, Respondents 1-2 allege that the Arbitral Tribunal will find that it has no jurisdiction over them, since "in a parallel procedure (case no. [...] in which claimants asserted jurisdiction based on some of the same documents which are also being relied on by Claimants in the present dispute) a 60 page decision rejecting the Arbitral Tribunal's decision was rendered today after more than one and a half years of chaotic arbitration [...]. It is hardly to be expected, that things will be easier in this case […]."[1]

4.4.4 Respondents 1-2 thus imply that they should be shielded from the cost of defending themselves against Claimants' allegedly unsuccessful claims.

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[1] Based on Respondent 1-2's description, it is unclear whether that arbitration involved the same parties as in the present arbitration.

4.5 Respondents 12-14 allege that "Claimants clearly admit that they do not have the necessary funds to finance this multi-party arbitration proceeding (...)."

4.5.1 They therefore requested that the Arbitral Tribunal order Claimants to secure their costs because "[o]therwise, Respondents 12 to 14 would have to pay for their defense without any reasonable chance of ever being able to recover these costs."

4.5.2 Respondents 12-14 additionally commented that "[]the reason for [Claimants'] 1ack of funds is of no interest in the present proceeding, and Claimants reference to the Temporary Restriction Order of 11.1.2008 is completely irrelevant."

4.6 Respondents 15-16 allege that a Temporary Restraining Order (TRO) issued in [...] on December 26, 2007 "in effect freezes all assets held by Claimants 1-2," "worldwide."

4.6.1 Specifically, "at the date of entering into the limited arbitration clauses of January 20, 2000 (as the only conceivable contractual basis with Respondents 15-16 [...]), Claimant 1 was solvent and good standing and there was no reason for Respondents 15-16 to doubt his ability to pay the costs of arbitration in the event he was unsuccessful. However, the financial situation of Claimant 1 has significantly changed since January 20, 2000: He and Claimant 2 now face substantial allegations of fraud and of misappropriations and the [the courts of country X.] has frozen their worldwide assets. Unlike in January 2000 there is now no reasonable prospect that Claimants will be able to meet the arbitration costs."

4.6.2 As a result, "Respondents 15-16 bear the considerable risk not to be able to enforce cost awards in their favour against Claimants 1-2."

4.6.3 Moreover, "[w]ithout there being an adequate security, Respondents 15-16 cannot be required to participate in the present proceedings, to defend the various actions of Claimants and/or to address in detail the jurisdictional failings of Claimants' Complaint."

4.6.4 Respondents 15-16 assert that "Claimants can only seek to rely on their purported contractual right to arbitrate if they provide Respondents 15-16 with sufficient cost security and thereby reinstate the underlying commercial basis of the arbitration clauses at the date when the agreement was executed."

4.6.5 In this case, "ordering Claimants to secure a future cost award, does not unduly deprive Claimants' of their purported contractual right to

arbitrate." In fact, so Respondents 15-16, "Claimants are solely responsible for their current financial position."

4.7 Claimants contend that they "have sufficient funds to ensure the payment of Respondents costs, if any [...]." Yet "all the Claimants' assets in [country X.]) have been frozen by Court order on Respondents 1 to 11's (and not only Respondents 3 and Y.'s) sole and exclusive initiative.

4.7.1 However, as concerns assets in Claimant 1's bank accounts in [country X.] or deposits with the firm Z. [country A.] these "were never mentioned in the list of assets subject matter of the TRO," nor could they "be frozen or attached through a Foreign Court."

4.7.2 Rather, "Respondents 1 to 11 put pressure on the entities concerned (...) to prevent them from releasing the funds in their custody to their legal owner, [...]."

4.7.3 Similarly, Respondents 1 to 11 allegedly blocked all Claimants' assets [in country C.].

4.7.4 As concerns Respondents 15-16, they allegedly "have admitted that they still own funds for Claimant 1 that they withhold precisely to guarantee their legal costs in the frame of the present arbitration proceedings (...).

4.7.5 Additionally, Respondents 15-16 allegedly "acted throughout the entire chain of events in the core of the present dispute in capacity as owners of the various trust entities involved as Respondents 1 to 11 in these proceedings [...] they benefit or will benefit of the same advantages as Respondents 1 to 11 as regards the freezing/blocking of Claimants' assets."

4.7.6 Claimants additionally state that as a matter of law, "the criteria that justify an order for security of costs must be severe." In other words, "[s]uch an order should only be ordered in exceptional circumstances when the party against whom the application for security is made adopt a behavior contrary to good faith." In particular, "no security can possibly be obtained – and therefore ordered – from the Claimant because it was insolvent: such an order would *ipso facto* deprive the Claimant of its right to submit its claim to the Tribunal."

4.7.7 Also, "Security for costs may not be required from claimant which has little money [...] where the claimant claims that its lacks of money is due to the conduct of the respondent." Claimant alleges that "the situation mentioned here mirrors exactly the events in the case under scrutiny [...]."

5. Authority to Rule on Security for Costs

5.1 The Arbitral Tribunal notes that none of the Parties have questioned its authority to rule on security for costs.

5.2 For the sake of good order, the Arbitral Tribunal nevertheless identifies the legal bases of its authority as follows:

5.2.1 Without prejudice to any later decision in the jurisdictional phase of the arbitral proceedings on the validity of the Parties' arbitration agreement(s), the Arbitral Tribunal finds that, for purposes of of the jurisdictional phase of the dispute, the arbitration is seated in Zurich, Switzerland and it is being conducted under the Swiss Rules.

5.2.2 As the seat of the arbitration is deemed to be Zurich and only some of the Parties are domiciled in Switzerland, the arbitral proceedings are governed by Chapter 12 of the Swiss Federal Statute on Private International Law ("PILS") (Art. 176(1) PILS).

5.2.3 Pursuant to Article 183(1) PILS, "[u]nless the parties have otherwise agreed, the Arbitral Tribunal may, on motion of one party, order provisional or conservatory measures."

5.2.4 Under a "modern" view (Fourth Order, ZCC Arbitration No. 415, November 20,2001, available at 20 ASA Bull. 467, 470 (2002)), security for costs is among the provisional measures foreseen by Article 183(1) PILS (id.; Procedural Order No. 14, 23 ASA Bull. 108, 112 (2005); Procedural Order No. 1, Ad Hoc Case, December 21, 1998, available at 17 ASA Bull. 59 , 63-64 (1999)); Bernhard Berger & Franz Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz 404 (2006); Markus Wirth, Interim or Preventive Measures in Support of International Arbitration in Switzerland, 18 ASA Bull. 31 (2000); Michael Bühler, Grundsätze und Praxis des Kostenrechts im ICC-Verfahren, 87 ZVglRwiss 431, 455 (1988); Heinrich Honsell et al., Kommentar zum Schweizerischen Privatrecht: Internationales Privatrecht 1538 (1996) (stating that Art. 183 PILS contains no limitations regarding the possible substance of interim or conservatory measures and suggesting that security for costs fall within the scope of Article 183 PILS)).

5.2.5 It follows that the Arbitral Tribunal is authorized to grant security for costs pursuant to Article 183(1) PILS.

5.2.5 The arbitration agreement that the ZCC as a *prima facie* basis for the instant arbitration – i.e. the arbitration agreements contained in the [Agreement 1], the [Agreement 2], and the [Agreement 3] – all refer to the Swiss Rules as the Parties' agreed institutional rules. Thus, prima facie, this

designation is deemed to be an indication of specific party intent as to the governing procedural rules.

5.2.7 Pursuant to Article 26(1) Swiss Rules, "[a]t the request of either party, the arbitral tribunal may take any interim measures it deems necessary or appropriate." Security for costs is among the interim measures permitted by Article 26(1) (Zuberbühler et al., Swiss Rules of International Arbitration: Commentary 347 (2005)).

5.2.8 It follows that since Respondents 1-2, Respondents 12-14, and Respondents 15-16 have requested an award of security for costs, the Arbitral Tribunal is authorized to grant this request pursuant to Article 26(1) Swiss Rules.

5.2.9 In addition to Article 183 PILS and Article 26(1) Swiss Rules, Article 182(2) PILS affords a second basis for an award of security for costs. Article 182(2) states: "If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration." Since the decision to award security for costs can be interpreted as a procedural question (Andreas Reiner, ICC Schiedsgerichtsbarkeit163 (1989)), pursuant to Article 182(2) an arbitral tribunal can determine this issue of procedure "directly" (id.; Procedural Decision in ICC Arbitration No. [...], 15 ASA Bull. 363, 370 (1997)).

5.2.10 The Arbitral Tribunal finally notes that it is widely recognized that an arbitral tribunal may award costs even if it ultimately determines that it has no jurisdiction over the underlying dispute (Julian D.M. Lew et al., Comparative International Commercial Arbitration 653 (2003)).

5.2.11 The Arbitral Tribunal finds that it accordingly is authorized to grant security for costs even if its jurisdiction to hear the merits of the instant dispute has been questioned by all respondents.

6. Standard applied to Decision on Security for Costs

6.1 Both under the Swiss Rules and PILS, an award of security for costs is appropriate only under exceptional circumstances (Procedural Order No. 14, supra; Fourth Order, ZCC Arbitration No. 415, supra; Otto Sandrock, The Judicatum Solvi in Arbitration Proceedings (unpublished paper presented at ASA on January 31, 1997, p. 17 et sec.); Jean-François Poudret & Sébastien Besson, Comparative Law of International Arbitration (Stephen V. Berti & Annette Ponti trans. 2007); Wirth at 36).

6.2 Accordingly, arbitral tribunals and commentators alike find that the authority to award security for costs should be exercised only with considerable constraint (Wirth at 36).

6.2.1 Thus, a mere showing that the arbitral claimant is insolvent or close to insolvency is insufficient to warrant an award of security for costs (Decision of the Arbitral tribunal, Geneva Chamber of Commerce and Industry, September 25, 1997, 19 ASA Bull. 745 (2001); Zuberbühler et al. at 358).

6.2.2 Likewise, the fact that an arbitral claimant has less assets now than at the time of concluding the arbitration agreement is insufficient grounds to grant security for costs (see Bernhard Berger, Prozesskostensicherheit (cautio iudicatum solvi) in Schiedsverfahren, 22 ASA Bull. 4, 16-17 (2004)). This is true in particular where there is no evidence that the claimant consciously secreted or reduced its assets in anticipation of the arbitration (see id.; Zuberbühler et al. at 348).

6.2.3 Nor are an embargo or other events brought about without the claimant's doing grounds in and of themselves to award security for costs (Pierre A. Karrer & Marcus Desax, Security for Costs in International Arbitration: Why, When, and What if ... , in Liber Amicorum Karl-Heinz Böckstiegel 339, 346 (Robert Briner et al. eds. 2001)). Rather, it must be shown that that there is a "clear and present danger that a future cost award would not be enforceable" (Fourth Order, ZCC Arbitration No. 415, supra), for instance that there was a fundamental change in circumstances (Karrer & Desax at 347, citing to ICC Case No. 10032 (seated in Zurich)). If the freeze is only a temporary measure and the possibility exists that a request to unfreeze the assets could be filed, then an award of security for costs would be unwarranted (see id.).

6.2.4 In no event should an arbitral tribunal prejudge the outcome of the dispute – whether in the jurisdictional phase or the merits phase – in its decision to award security for costs (Lew et al., supra at 604 ("To avoid any appearance of prejudgment arbitrators are invariably reluctant to express their views on the merits before they have considered at least a significant amount of the evidence presented by the parties. For this reason the merits of the case rarely play any indirect role in determining whether or not interim relief is granted.")).

6.3 Based on a review of relevant case law and commentary as well as of international best practice, the Arbitral Tribunal finds that the following factors usefully apply in assessing whether an award of security for costs is warranted (see generally Berger & Kellerhals at 402-03):

6.3.1 *First*, is the request for security for costs related to the matter in dispute?

6.3.2 *Second*, have the petitioners established with reasonable probability an impending injury to their entitlement or rights?

6.3.3 *Third*, is there a threat of irreparable harm to the applicant if the request for security for costs were denied?

6.3.4 *Fourth*, are security for costs appropriate in light of the overall circumstances of the case?

6.3.5 As for the last element, considerations such as the existence of a fundamental change of circumstances (e.g. where a party's financial situation has significantly and unforeseeably deteriorated since the basic agreement between the parties was entered into, see Poudret & Besson at 524; Karrer & Desax at 345; in the ICC context, see Michael Bühler & Thomas Webster, Handbook of ICC Arbitration 346 (2d ed. 2008)), a violation of good faith on the petitioner's part (e.g. where a party has deliberately become insolvent with a view to avoiding the financial risks of arbitral proceedings, see Poudret & Besson at 524), the likelihood that an award of security for costs would unduly restrict Claimants' access to arbitral justice (Procedural Order No. 1, Ad Hoc Case, December 21, 1998, supra at 65); etc. factor into the overall assessment of the appropriateness of awarding security for costs.

6.4 The party requesting security for costs bears the burden of proof in relation to all the facts on which its request is based (Procedural Decision in ICC Arbitration No. [...], supra at 377).

6.5 Accordingly, Respondents 1-2, Respondents 12- 14, and Respondents 15- 16 bear the burden of proving all facts on which their request is based.

7. Arbitral Tribunal's Decision

7.1 The Arbitral Tribunal denies the requests for security for costs of Respondents 1-2, Respondents 12-14, and Respondents 15-16 at this time. The petitioners have not shown that exceptional circumstances are present justifying a grant of security for costs at this time.

7.2 Preliminary Findings:

7.2.1 The Arbitral Tribunal acknowledges the pendency of litigation in the [courts of country Y.] (Case No. ...), hereinafter the "Litigation") involving, as Plaintiffs, Respondents 3-11, P., Q., and R. (who is acting as Receiver and Manager of the Assets of F. and G.) and, as Defendants, Claimants 1-2, Respondents 13-14, and [...]. Neither P., Q., nor R. is a party to the instant arbitration.

7.2.2 The Arbitral Tribunal understands that Respondents 1-2 are represented by M. only by virtue of their status as being in receivership.

7.2.3 As far as the Arbitral Tribunal is concerned, Respondents 1-2 are parties to the Litigation.

7.2.4 The Arbitral Tribunal takes cognizance of the Oder to Show Cause with Temporary Restraining Order issued by the [courts of country Y.] dated December 21, 2007, the Order to Post a Bond of USD 1 million issued by the [courts of country Z.] dated January 11, 2008, and the Stipulation and Order issued by the [courts of country Y.] dated August 1, 2008 (...).

7.2.5 The TRO enjoins and restrains Claimants 1-2 as well as Respondents 13 and 14 (who also are defendants in the Litigation) from "taking any action, directly or indirectly, to remove, transfer, sell, pledge, assign, destroy or otherwise dispose of certain assets specifically identified in Schedule A." Schedule A enumerates [certain moveable properties and immovable property in country A.], furniture, and 6 bank accounts held in various Parties' names. Contrary to Respondents 15-16's assertions, there is no indication that these assets represent Claimants 1-2's "worldwide assets", nor that any of the assets – aside from the apartment in [country A.] – are located outside of [country Y.].

7.2.6 Claimants have moved for a dismissal or stay of the [country Y.] proceedings on grounds of alleged agreement to arbitrate between the parties to the [country Y.] litigation (...).

7.2.7 At this time, the Arbitral Tribunal is not informed of the [country Y. court's] decision on this motion. Yet the Arbitral Tribunal understands that should the [country Y. court] decide to dismiss the case, the TRO will be lifted.

7.2.8 To date the Parties have failed to demonstrate that, as a legal matter, Claimants' assets outside of [country Y.] have been frozen. Claimants allege that Respondents 1-11 have exerted "pressure" on banks to freeze Claimants' accounts. However, it has not yet been shown that these banks would be unwilling – either *de facto* or *de jure* – to transfer assets relating to the present arbitration. Moreover, it remains unclear whether Claimants have assets outside of [country Y., country A., and country B.].

7.3 Reasoning relating to decision on request for security for costs by Respondents 1-2:

7.3.1 Respondents 1-2 have failed to establish with reasonable probability an impending injury to their entitlements or rights or a threat of irreparable harm to them. Nor would it appear appropriate to award security

for costs to the petitioners in light of the overall circumstances of the case. For these reasons, the Arbitral Tribunal declines to award security for costs to Respondents 1-2.

7.3.2 Respondents 1-2 currently enjoy the benefit of the protection established by the TRO. With respect to the value of Claimants' assets in [country Y.], the Respondents 1-2's litigation costs are secured by the TRO. If the [court of country Y.] should decide that there is no agreement to arbitrate among the parties to the Litigation and that it therefore has jurisdiction over the dispute brought before it, Respondents 1-2 conceivably could apply to the [courts of country Y.] for an award of the costs that Claimants gave rise to by bringing and prosecuting the instant arbitration.

7.3.3 Moreover, as the parties that requested the TRO, Respondents 1-2 should not be able to invoke its effects to request security for costs, inasmuch as they brought about the circumstances that allegedly prevent Claimants from paying costs in the future.

7.3.4 As concerns Claimants' assets outside of [country Y.], since none of the Respondents have proven that these assets are frozen *de facto* or *de jure*, Respondents 1-2 have made no showing that they would suffer either an impending injury or a threat of irreparable harm.

7.3.5 As indicated above, the Arbitral Tribunal shall not prejudge the outcome of the dispute in its order or award concerning security for costs. For that reason, Respondents 1-2's implicit assertion that the Arbitral Tribunal must find that it has no jurisdiction and its further assertion that there is a need to protect them from spending "considerable amounts to defend themselves" cannot motivate the Arbitral Tribunal to award security for costs.

7.3.6 An award of security for costs does not appear to be appropriate in light of the overall circumstances of the case. Imposing security for costs is likely unduly to restrict Claimants' access to arbitral justice. By requiring Claimants to pay a deposit of CHF 117,032.95, the Arbitral Tribunal already is effectively testing Claimants' ability to fund the costs of this arbitration. If Claimants fail to pay the deposit, the Arbitral Tribunal may suspend or terminate the arbitral proceedings pursuant to Article 41(4) Swiss Rules. To additionally require a payment of security for costs at this time, when there is *prima facie* evidence of a significant restriction on Claimants' ability to pay large sums of money, could ultimately mean that Claimants opt no longer to prosecute their case. This restriction on Claimants' ability to arbitrate the case appears to be unjustified.

7.4 Reasoning relating to decision on request for security for costs by Respondents 12-14:

7.4.1 Respondents 12-14 have failed to establish with reasonable probability an impending injury to their entitlements or rights or a threat of irreparable harm to them. Nor would it appear appropriate to award security for costs to the petitioners in light of the overall circumstances of the case. For these reasons, the Arbitral Tribunal declines to award security for costs to Respondents 12-14.

7.4.2 None of the Respondents have proven that Claimant's assets outside of [country Y.] are frozen are frozen either *de facto* or *de jure*. Accordingly, Respondents 12-14 have failed to demonstrate their assertion that there is no "reasonable chance of ever being able to recover these costs."

7.4.3 Moreover, since Claimants have shown that they dispose of assets in [country A.] (...), the Arbitral Tribunal deems Claimants to be in a position to pay costs, should costs be awarded at a later time in these arbitral proceedings. Accordingly, the Arbitral Tribunal finds there to be no reasonable probability of an impending injury or threat of irreparable harm.

7.4.4 As concerns Respondents 13 and 14, who are Defendants in the Litigation, should the [courts of country Y.] decide that there is no agreement to arbitrate among the parties to the Litigation and that it therefore has jurisdiction over the dispute brought before it, Respondents 13 and 14 conceivably could be able to cross-claim for an award of the costs that Claimants gave rise to by bringing and prosecuting the instant arbitration.

7.4.5 Even if Claimants' assets should be frozen world-wide as a result of the TRO and even if Respondents 13 and 14 had no opportunity to cross-claim for damages, the TRO by itself is not sufficient to warrant an award of security for costs. The Arbitral Tribunal analogizes the TRO to an embargo, which prevents a claimant from paying costs, but which is not sufficient to justify a request for security for costs. Accordingly, the existence of the TRO by itself does not warrant awarding security for costs. It is not inconceivable that the TRO might be lifted in the future or that the [courts of country Y.] will allow a lifting of the TRO for purposes of paying costs awarded by the Arbitral Tribunal.

7.4.6 Moreover, an award of security for costs does not appear to be appropriate in light of the overall circumstances of the case. Imposing security for costs is likely unduly to restrict Claimants' access to arbitral justice. By requiring Claimants to pay a deposit of CHF 117.032,95, the Arbitral Tribunal already is effectively testing Claimants' ability to find the

costs of this arbitration. If Claimants fail to pay the deposit, the Arbitral Tribunal may suspend or terminate the arbitral proceedings pursuant to Article 41(4) Swiss Rules. To additionally require a payment of security for costs at this time, when there is *prima facie* evidence of a significant restriction on Claimants' ability to pay large sums of money, could ultimately mean that Claimants opt no longer to prosecute their case. This restriction on Claimants' ability to arbitrate the case appears to be unjustified.

7.5 Reasoning relating to decision on request for security for costs by Respondents 15-16: [identical reasoning as under 7.4 less 7.4.4].

7.6 In sum, the Arbitral Tribunal declines to award security for costs at this stage.

7.7 This decision, however, is without prejudice to a possible reconsideration of such a request at a subsequent stage of the arbitral proceedings.

Extract from Procedural Order in ICC Case in Geneva (April 2009) Concerning Security for Costs, in particular:

- **when requested by a Counterclaiming Respondent and**
- **whether coming under Article 182 PILA /Article 23 ICC Rules (interim measures) or Article 183 PILA / Article 15 ICC Rules (procedure generally)**

Summary of Procedural Background

1. Disputes relating to a € 12.0 million contract for the sale and installation in India of a complex machine for industrial production of packaging material were submitted to arbitration in Switzerland.
2. Prior to completion of the Terms of Reference, and the day after receiving a court order in India directing the Claimant in arbitration to furnish, within 30 days, a bank guarantee for about € 10.5 million, the counterclaiming Respondent in arbitration submitted to the Arbitral Tribunal an Application for Interim Measures seeking an order that the Claimant provide the Respondent party with (i) a bank

guarantee as security for the amount of the counterclaim (About € 10.5 million) and (ii) a bank guarantee as security for costs (for at least € 0.55 million).

3. Claimant requested (i) that the Application for Interim Measures be dismissed and (ii) that costs be granted in its favor.

4. Following modification, the Respondent party's requests to the Arbitral Tribunal were worded as follows:

   (i) To direct Claimant to provide a bank guarantee, issued by a leading .... banking institution, in the amount of EUR 10,454,176, provided that Claimant has not already provided such a bank guarantee pursuant to the court order ...; and

   (ii) To direct Claimant to provide a second bank guarantee, issued by a leading ... banking institution, in an amount sufficient to cover the costs and expenses of arbitration that may be awarded to Respondent-Counterclaimant in these proceedings ..., and which are currently estimated provisionally to amount to no less than EUR 550,000; and

   (iii) To render any other interim or conservatory relief that it, in its discretion, deems appropriate under the circumstances to protect Respondent-Counterclaimant's interests; and

   (iv) To deny Claimant's request that Respondent-Counterclaimant be required to bear Claimant's share of the costs ... relating to this present petition for interim measures.

Extract from Procedural Order no. 4 (April 2009)

[…]

2.3 Nature of the Request for Security for Costs; Applicable Laws

64. The Terms of Reference confirm that the arbitration proceedings are governed by the provisions of chapter 12 PILA, are regulated by the provisions of the ICC Rules, and that, pursuant to Article 16 of the Contract between the Parties, "*all legal relationship in connection with this contract shall be governed and resolved by the laws of India/ laws of United Kingdom ...*".

65. With respect to procedure in general, Article 182 PILA provides (in unofficial English translation) as follows:

> *1. The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.*
>
> *2. If the parties have not determined the procedure, the Arbitral Tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration.*
>
> *3. Regardless of the procedure chosen, the Arbitral Tribunal shall ensure equal treatment of the parties and the right of both parties to be heard in adversarial proceedings.*

66. With respect to interim measures, Article 183 PILA provides (in unofficial English translation) as follows:

> *1. Unless the parties have otherwise agreed, the Arbitral Tribunal may, on motion of one party, order provisional or conservatory measures.*
>
> *2. If the party concerned does not voluntarily comply with these measures, the Arbitral Tribunal my request the assistance of the state judge, the judge shall apply his own law.*
>
> *3. The Arbitral Tribunal or the state judge may make the granting of provisional or conservatory measures subject to appropriate sureties.*

67. For rules providing particular conditions for granting particular interim measures, the Arbitral Tribunal may start from the terms of the Parties' contract and also refer to rules of arbitration determined in accordance with the designated *lex arbitri* (i.e. chapter 12 PILA and in particular its Article 182), as well as to legal rules contained in the designated *lex causae* (i.e. "*the laws of India/laws of United Kingdom*")[3] In addition, the Arbitral Tribunal may also look to rules of law in places where an

[3] See, e.g., Blessing, INTRODUCTION TO ARBITRATION–SWISS AND INTERNATIONAL PERSPECTIVES (1999), p. 279. See also Besson, ARBITRAGE INTERNATIONAL ET MESURES PROVISOIRES (1998), §§ 441-43; Poudret/Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION (2nd ed. 2007), N. 624; Dutoit, COMMENTAIRE DE LA LOI FEDERALE DU 18 DECEMBRE 1987 (4eme ed. 2005), N. 4 ad 183; Vischer, ZÜRCHER KOMMENTAR ZUM IPRG, N. 5 ad art. 183; Walter/Bosch/Brönnimann, INTERNATIONALE SCHIEDSGERICHTSBARKEIT IN DER SCHWEIZ (1991), p. 132.

interim measure might be presented to a national court for enforcement ("*lex executionis*").[4]

68. However, another aspect has also to be taken into account due to the two types of relief requested by Respondent in the present instance. Under Swiss law for international arbitration, the request for **security for the counterclaims** is clearly a provisional or conservatory measure coming under Article 183 PILA.[5] However, under Swiss law for international arbitration the request for **security for costs** is subject to continuing controversy over its proper qualification as a provisional or conservatory measure governed by Article 183 PILA, or as a specific procedural measure within the scope of Article 182 PILA.[6]

69. Notwithstanding this doctrinal controversy, which will be considered further in section 3.2.2.3 below, it can nonetheless be observed that provisions of chapter 12 PILA apply in either circumstance. Consequently, the basic jurisdiction and power of the Arbitral Tribunal to consider a request for security for costs is not in doubt, regardless of whether that power is grounded in Article 182 or 183 PILA.

70. In conclusion on this point, the basic jurisdiction and power of the Arbitral Tribunal to consider Respondent's request for security for costs in addition to the request for security for the counterclaims does not depend on a determination as to the nature or legal basis for such measures.

[…]

3.2.2 *With Respect to Security for Costs*

3.2.2.1 *Introduction*

142. The second prayer included in the original Application for Interim Measures requests that the Arbitral Tribunal direct Claimant to provide a bank guarantee "*for the amount of ICC fees and other expenses*

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4 Wirth, "*Interim or Preventive Measures in Support of International Arbitration in Switzerland*", 18 ASA Bulletin (2000), p. 31 at 33; Vischer, ZÜRCHER KOMMENTAR ZUM IPRG, N. 5 ad art. 183.

5 Wirth, "*Interim or Preventive Measures in Support of International Arbitration in Switzerland*", 18 ASA Bulletin (2000), p. 31 at 35; Besson, ARBITRAGE INTERNATIONAL ET MESURES PROVISOIRES (1998), § 444; Sangiorgio, DER VORSORGLICHE RECHTSSCHUTZ IN DER INTERNATIONALEN SCHIEDSGERICHTSBARKEIT NACH ART. 183 IPRG (1996), p. 140.

6 See, e.g., Stacher, Swiss Rules of International Arbitration: Commentary (2005), ad Art. 41 N 24; Reymond, "Security for Costs in International Arbitration", 110 LAW QUARTERLY REVIEW (Oct. 1994), p. 501 at 504; and Berger, "*Prozesskostensicherheit (cautio iudicatum solvi) im Schiedsverfahren*", 22 ASA Bulletin (2004), p. 4 at pp. 10-11.

which have been and may be incurred by the Respondent in the Arbitration".

143. The Supplement to the Application modified this request as follows:

"*[that Claimant be directed] to provide a second bank guarantee ... in an amount sufficient to cover the costs and expenses of arbitration that may be awarded to Respondent-Counterclaimant in these proceedings ..., and which are currently estimated provisionally to amount to no less than EUR 550,000;*"

144. In opposition to this request, Claimant relies principally on a reference from Bühler/Webster[39] containing extracts from a published arbitral decision from 2001 that describes an unpublished arbitral decision rendered in Zurich in 1995 under the Zurich Chamber of Commerce Rules of International Arbitration. Although itself unpublished, the 1995 decision thus invoked by Claimant is also described by Wirth.[40] Furthermore, two published arbitral decisions rendered by other Swiss arbitral tribunals, one in Zurich (in 2001)[41] and another in Lausanne (undated, but between 1996 and 1997)[42], also describe the same, otherwise unpublished, decision from 1995.

145. According to the description given in the published arbitral decision from 2001 (i.e. the same decision quoted by Bühler/Webster as referenced by Claimant), the arbitrator in the unpublished decision from 1995 had held that security for costs should only be ordered in "*exceptional circumstances*", i.e. circumstances where there is "*a clear and present danger that a future cost award would not be enforceable, e.g. because of a party's insolvency as proven by the applicant*".[43] It may be noted that the unpublished 1995 decision apparently refused the request for security for costs, whereas the published 2001 decision granted the request on the basis that the claimant party was in liquidation proceedings.

146. An earlier decision from 1996-97 provides another description of the reasoning contained in what is evidently the same unpublished

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39 Bühler/Webster, HANDBOOK OF ICC ARBITRATION (2005, 1st ed.), § 23-21 at p. 291.

40 Wirth, "*Interim or Preventive Measures in Support of International Arbitration in Switzerland*", 18 ASA BULLETIN (2000), p. 31 at 36.

41 Order of 20 November 2001 in ZCC Case no. 415 (Zurich, ZCC Rules), published in ASA BULLETIN (2002), p. 467.

42 Order (undated) in ICC Case (Lausanne, ICC Rules), published in ASA BULLETIN (1997), p. 363.

decision rendered in Zurich in 1995. The Arbitral Tribunal notes that this earliest published source emphasizes that the ZCC arbitral tribunal in Zurich referred expressly in its decision to the (at the time) newly-adopted Arbitration Rules of the World Intellectual Property Organization (WIPO). Under Article 46 lit. b of the WIPO Rules, an arbitral tribunal may order the other party to provide security for costs (or for a claim or counterclaim) "*if it considers it to be required by exceptional circumstances*".[44]

147. Based on the principle adopted in the WIPO Rules and endorsed by the unpublished decision from 1995, Claimant argues in the present case that the circumstances are not "exceptional", and that Respondent has not met its burden of proof concerning Claimant's allegedly imminent insolvency.

148. The Arbitral Tribunal notes that the stated condition of "exceptional circumstances" is quite different in nature than the conditions that are commonly considered to be applicable to requests for interim measures (e.g. "risk of irreparable harm", "chance of success", "urgency", etc. ...). Moreover, a reference to "exceptional circumstances" makes plain that the general rule would be against security for costs, and that a grant of security for costs is a recognized exception to the general rule.

3.2.2.2 *Swiss Arbitral Decisions on Security for Costs*

149. Both Parties referred the Arbitral Tribunal to unpublished arbitral decisions concerning security for costs.[45]

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[43] Order of 20 November 2001 in ZCC Case no. 415 (Zurich, ZCC Rules) (Wirth, sole arbitrator), published in ASA BULLETIN (2002), p. 467.

[44] The Arbitral Tribunal notes that under the WIPO Rules, security for claims and counterclaims, and security for costs, are the subject of a special section within Article 46 of the WIPO Rules that is devoted to Security for Claims and Costs. The first part of Article 46 WIPO Rules is devoted to Interim Measures of Protection.

[45] Respondent's example is an ICC decision rendered by an arbitral tribunal in Paris and not Switzerland. Claimant's Swiss example from 1995 has already been described above.

Both Parties also referred the Arbitral Tribunal to a partial award rendered in Zurich in ICC Case no. 8113 (Partial Award of October 1995 (Zurich, ICC Rules), published in ICC BULLETIN (2000), p. 67). ICC Case no. 8113 is essentially a case concerning security for claims. However, it also provides an example of an effort to combine an accessory claim for costs together with a principal claim amount, and requesting security for the entire amount of a prospective award, costs included. The Arbitral Tribunal considers that the combination of such requests is not consistent with the ICC Rules. Considering the fact that the prospective value of claims for costs are not included by the ICC Court in its assessment of the amount in dispute for purposes of the fixing of the advance on costs.

150. These references to unpublished decisions are surprising in that the Arbitral Tribunal has identified ten published decisions by Swiss arbitration tribunals that address requests for security for costs.[46] Of these ten published decisions, eight rejected the request for security for costs.

151. Three of the oldest decisions simply denied the jurisdiction and power of the Swiss arbitral tribunal (in the absence of an express agreement concerning security for costs). As discussed in section 2.4.2 above, the change of attitude in Switzerland concerning the question of jurisdiction and power occurred in the mid-1990s. This shift occurred shortly after a widely-felt shock wave caused by the decision from the English House of Lords in the Ken-Ren case.[47] Since that time, the jurisdiction and power of a Swiss arbitral tribunal to order security for costs in international cases came to be accepted in principle.

152. However, of the seven published decisions from Swiss arbitral tribunals that accepted the principle of security for costs, only two (one rendered in 1998[48] and the other in 2001[49]) actually granted security for costs. And of these two exceptional decisions, one of them expressly rejected insolvency – as well as the risk of insolvency – as providing adequate grounds for requiring security for costs.[50] The prevailing circumstance in both successful instances was that the claimant party was in bankruptcy proceedings when it initiated the arbitration proceedings.

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[46] Order of 25 June 1956 (Zurich, ZCC Rules), published in REVUE SUISSE DE JURISPRUDENCE (1958), p. 92; Order of 12 November 1991 (Zurich, ZCC Rules), published in ASA BULLETIN (1995), p. 84; Final Award of 28 February 1994 in ICC Case no. 7047 (Geneva, ICC Rules), published in ASA BULLETIN (1995), p. 301; Order (undated) (Geneva, ad hoc), published in ASA BULLETIN (1995), p. 529; Order (undated) in ICC Case (Lausanne, ICC Rules), published in ASA BULLETIN (1997), p. 363; Order of 25 September 1997 (Geneva, CCIG Rules), published in ASA BULLETIN (2001), p. 745; Order of 27 November 1998 (Zurich, ad hoc), published in ASA BULLETIN (2005), p. 108; Order of 21 December 1998 (Neuchâtel, ad hoc), published in ASA BULLETIN (1999), p. 59; Order of 20 November 2001 in ZCC Case no. 415 (Zurich, ZCC Rules), published in ASA BULLETIN (2002), p. 467; Order of 19 December 2003 in ICC Case no. 12542 (Geneva, ICC Rules), published in 23 ASA BULLETIN (2005), p. 685.

[47] Coppée Lavalin SA NV v. Ken-Ren Chemicals and Fertilizers Ltd (In Liquidation in Kenya), [1994] All E.R. 449.

[48] Order of 21 December 1998 (Neuchâtel, ad hoc), published in ASA BULLETIN (1999), p. 59.

[49] Order of 20 November 2001 in ZCC Case no. 415 (Zurich, ZCC Rules), published in ASA BULLETIN (2002), p. 467.

[50] Order of 21 December 1998 (Neuchâtel, ad hoc), published in ASA BULLETIN (1999), p. 59.

153. Moreover, the Arbitral Tribunal also notes that five of the ten published decisions do not even mention insolvency as a potentially relevant factor or circumstance, while only three suggested (and by means of obiter dicta) that insolvency could provide a sufficient basis for ordering security for costs. In contrast, two firmly expressed the opposite opinion.

3.2.2.3 *The Nature of Security for Costs*

154. As noted above in paragraph [66], the nature of a request for security for costs is not a settled issue in Switzerland, where the doctrinal debate centers on whether the topic is governed by Article 182 PILA (procedure) or by Article 183 PILA (interim measures).[51]

155. The Arbitral Tribunal also observes that the ICC Rules reflect a very similar division between the general procedural provision (Article 15) and the specific provision for interim measures (Article 23). Leading commentators on the ICC Rules all clearly favour placing security for costs under the broadly-worded provision for interim measures (which they note is not limited to "the subject-matter of the dispute"), while also noting that inclusion of a specific provision concerning security for costs was expressly rejected during the revision process that led to the 1998 version of the ICC Rules.[52] In this connection, it is stated that the reason for not having added a specific provision concerning security for costs during the 1998 revision was in order not to encourage a practice "*generally disfavored in ICC arbitration*".[53]

156. The answer given to the classification controversy, while clearly not determinative of the jurisdiction and power to order security for costs, will nonetheless determine the relevant process by which the Arbitral Tribunal should seek to identify relevant legal conditions for the request.

157. For purposes of the present proceedings, the classification issue addressed in this section has to be considered in the context of the Swiss *lex arbitri*. A first clear answer to the problem under Swiss law is revealed by consideration of the situation concerning security for

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[51] See, e.g., Poudret/Besson, DROIT COMPARE DE L'ARBITRAGE INTERNATIONAL (2002), at 549-50 footnote 348.

[52] See Blessing, INTRODUCTION TO ARBITRATION–SWISS AND INTERNATIONAL PERSPECTIVES (1999), p. 114; Craig/Park/Paulsson, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (3d ed. 2000), p. 467-69; Derains/Schwarz, A GUIDE TO THE ICC RULES OF ARBITRATION (2nd ed. 2005), p. 297.

[53] Derains/Schwarz, A GUIDE TO THE ICC RULES OF ARBITRATION (2nd ed. 2005), p. 297.

costs that prevailed prior to the adoption of chapter 12 PILA. A second answer may be drawn from consideration of the consequences of a failure to abide by an order to provide security for costs.

158. Before the entry into force of the Swiss PILA on 1 January 1989, Swiss arbitration law reserved interim measures of protection to the exclusive jurisdiction of national courts (cf. Article 26 of the Swiss Intercantonal Concordat on Arbitration, currently still applicable to domestic arbitrations).[54] However, during the period when interim measures could not be ordered by an arbitral tribunal in Switzerland, parties would nonetheless occasionally make requests for security for costs.[55] Such requests were attempted with reference to provisions concerning security for costs contained in cantonal civil procedure laws. Consequently, security for costs was not considered in such cases as an interim measure, but rather was considered as a specific procedural question in its own right.[56] In the context of arbitration under the Swiss Concordat (which formerly applied to both international and domestic arbitrations), the issue might be covered either by a specific procedural agreement by the parties or by reference to a cantonal code of civil procedure.[57]

159. A second observation, which in fact is not limited to Swiss law, is that an arbitral tribunal can normally enforce its own procedural order for security for costs without requiring the assistance of any national court.[58] The normal sanction for an eventual failure to comply with an order for security for costs is a refusal to proceed with the case.[59] The Arbitral Tribunal considers that this characteristic clearly distinguishes security for costs from any interim measure of protection.

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[54] However, the Swiss Concordat nonetheless allows for consensual arrangements between arbitrating parties made upon the proposal of the arbitrators.

[55] See, e.g., Order of 25 June 1956 published in 54 REVUE SUISSE DE JURISPRUDENCE (1958), N. 50 at p. 92.

[56] Thus, in a decision dated 22 June 1981, the Zurich Court of Appeals confirmed that in Zurich an arbitral tribunal has the power to order security for costs.

[57] Poudret ad Article 30 Concordat N. 1, in Lalive/Poudret/Reymond, LE DROIT DE L'ARBITRAGE INTERNE ET INTERNATIONAL EN SUISSE (1988); contra Jolidon, COMMENTAIRE DU CONCORDAT SUISSE SUR L'ARBITRAGE (1984), p. 422.

[58] See, e.g., Rubin, "*In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration*", in 11 AMERICAN REVUE OF INTERNATIONAL ARBITRATION (2000), p. 307 at p. 315.

[59] For examples from Switzerland, see Art. 95 CPC (Vaud); Arts. 102, 103 LPC (Geneva); Arts. 73, 77, 78 ZPO (Zurich).

160. On the basis of the foregoing, the Arbitral Tribunal considers that security for costs is not an interim measure of protection but that it is rather a procedural institution which may be determined by agreement of the Parties or, in the absence of an express agreement concerning security for costs, by the Arbitral Tribunal pursuant to Article 182 PILA and Article 15 ICC Rules.

3.2.2.4 ***National Laws of Relevance***

161. While national codes of civil procedure are not directly applicable to the determination of procedural questions in international commercial arbitration, for purposes of making a procedural ruling in the present context, the Arbitral Tribunal considers that some relevant information may be gained from a review of the situation of security for costs under national laws of India, the United Kingdom, and Switzerland.

162. Under Indian law, the Civil Procedure Code provides that the power to order security for costs is not regulated under Order XXXVIII (discussed above in respect of interim measures), but under the separate Order XXV as follows:

> "*At any stage of a suit, the Court may, either of its own motion or on the application of any defendant, for reasons to be recorded, to give within the time fixed by it, security for the payment of all costs incurred and likely to be incurred by any defendant:*
>
> *Provided that such an order shall be made in cases in which it appears to the Court that a plaintiff is residing out of [the country] and that such plaintiff does not possess ... any sufficient immovable property within [the country] other than the property in suit*."

163. Under English law,[60] the power of a court to order security for costs in judicial proceedings was merged relatively recently into Part 25 of the Civil Procedure Rules, which now bears the amended heading "Interim

[60] Note that the Arbitration Act, 1996 (England and Wales) is not relevant in this context since the place of arbitration in the present proceedings is in Switzerland and not England or Wales. As may be expected, however, the power of an English arbitration tribunal to order security for costs comes under section 38 of the Arbitration Act, 1996 concerning general powers exercisable by the tribunal ("the tribunal may order a claimant to provide security for the costs of the arbitration"). Consistent with the distinction between interim measures and security for costs, the Arbitration Act, 1996, provides that the power of an English arbitral tribunal to order provisional relief comes under the separate section 39 of the Act.

Remedies and Security for Costs".[61] The traditionally separate and independent nature of security for costs[62] is nonetheless preserved by means of the separate Section I for Interim Remedies and the additional Section II for the topic of security for costs.

164. [Reference to Part 25.12 and 25.13 CPR]

165. [In accordance with Part 25.12 (1)(b)(ii) above, reference was also be made to § 726 of the Companies Act, 1985]

166. In Switzerland, the newly adopted Code of Civil Procedure dated 19 December 2008 ("CPC") also distinguishes very clearly between interim measures and security for costs. All issues pertaining to costs, including the advance on court costs and security for the costs of a defendant party, will become regulated under Articles 95 to 103 CPC. Interim measures will become regulated under Articles 261 to 269 CPC.

167. In respect of court proceedings, Article 99, para. 1 CPC will provide (when it enters into force) that, upon request by a defendant, a plaintiff shall provide security for costs in circumstances where: (a) the plaintiff does not have a domicile or administrative seat in Switzerland, (b) appears to be insolvent (notably by reason of involuntary bankruptcy, voluntary liquidation proceedings, or a certificate of insolvency), (c) is a debtor for unpaid costs in a previous court case, or (d) for other reasons presents a significant risk that it would not pay the defendant's costs following an adverse judgment. Article 100 CPC allows that security for costs may be provided, inter alia, by means of a bank guarantee. Article 101 CPC stipulates that in case of a failure to provide security for costs the claim shall be deemed inadmissible. Unlike an order for interim measures, a court order to provide security for costs is subject to appeal under Article 103 CPC.

168. Similarly, but in respect to future domestic arbitration proceedings in Switzerland, interim measures and security for costs are also regulated under separate provisions. Interim measures will be covered by Article 374 CPC while security for costs will be covered by Article 379 CPC. In contrast to the provision contained in Article 99 CPC for court proceedings, the sole conditions under which a Swiss domestic arbitral tribunal may order security for costs will be that the respondent party

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[61] U.K. Statutory Instruments 2000 No. 221, The Civil Procedure (Amendment) Rules 2000 § 13.

[62] For example, under the former Rules of the Supreme Court, security for costs was regulated by Order 23 and interim remedies by Order 29.

requests security for costs and that the claimant party appear to be insolvent.

3.2.2.5 *When a counterclaim is raised*

169. The Arbitral Tribunal also observes that the request for security for costs does not distinguish amongst "*the costs and expenses of arbitration that may be awarded to Respondent-Counterclaimant in these proceedings"*. Respondent's estimated amount of at least € 550,000 does not distinguish any portion solely attributable to defending against the claims and thus not attributable to assertion of the counterclaims.

170. The procedural institution of security for costs is for the protection of a respondent party (whether as respondent to a claim or as counter-respondent to a counterclaim). Intricate situations arise when, as in the present instance, a request for security for costs is submitted by a counter-claiming respondent.

171. O'Reilly observes (with respect to English law) that "*If ... the counterclaim is of significant magnitude and the facts which found the claim are substantially the same as those which found the counterclaim, an order for security against the claimant is inappropriate if the respondent is intent on pursuing the counterclaim*".[63]

3.2.2.6 *Conclusions with respect to security for costs*

172. In light of the provisions of Article 182 PILA and Article 15 of the ICC Rules and upon consideration of the foregoing, the Arbitral Tribunal concludes that there is no prevailing reason in this case to order Claimant to furnish security for costs, and that, even if circumstances that could justify such an order were present in this case, Respondent's assertion of counterclaims involving the same facts and issues as the claims would cause the Arbitral Tribunal to deny the request for security for costs.

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[63] O'Reilly, "*Orders for Security for Costs: From the arbitrator's perspective*", in ARBITRATION (1995), p. 250 (citing a decision of the English Court of Appeal in B.J. Crabtree (Insulation) Ltd. v. G.P.T. Communication Systems Ltd., reported in 59 Building L. Rep. 43).

Ordonnance de procédure No. 2 du 29 mai 2009 dans l'Arbitrage CCI 15951/FM opposant XXX INC., incorporée dans une île des Caraïbes (Demanderesse), à YYY S.A., incorporée dans un pays d'Amérique latine (Défenderesse). Arbitre Unique: Elliott Geisinger.

Vu:

- Les articles 7, 10 et 11 de l'Acte de Mission du 17 mars 2009;
- L'article 23 du Règlement d'arbitrage de la Chambre de commerce internationale (ci-après « RCCI »)
- Les articles 182 al. 1 et 183 de la Loi fédérale suisse sur le droit international privé (ci-après « LDIP »);
- La « *Demande de* cautio judicatum solvi » de la défenderesse, datée du 8 mai 2009 et reçue par l'Arbitre Unique le 15 mai 2009;
- La « *Réponse à la demande de* cautio judicatum solvi *et demande incidente* » déposée par la demanderesse en date du 25 mai 2009;

L'Arbitre Unique rend la présente **Ordonnance de procédure No.2**:

1. Rappel de la procédure relative à la demande de *cautio judicatum solvi* et à la demande incidente de la demanderesse: les positions des parties

1.1. Par écriture intitulée « *Demande de* cautio judicatum solvi », datée du 8 mai 2009 et reçue par l'Arbitre Unique le 15 mai 2009, la défenderesse a pris les conclusions suivantes:

> II. CONCLUSIONS
>
> PAR CES MOTIFS
>
> YYY S.A. conclut respectueusement à ce qu'il
>
> PLAISE AU TRIBUNAL ARBITRAL
>
> Principalement:
>
> - Condamner XXX Inc. à déposer des sûretés d'un montant de CHF 100'000.- auprès d'un établissement bancaire genevois ou en mains du Tribunal arbitral.
>
> Subsidiairement:

– Condamner XXX Inc. à déposer des sûretés d'un montant fixé par le Tribunal arbitral auprès d'un établissement bancaire genevois ou en mains de ce dernier.

1.2 A l'appui de ses conclusions, la défenderesse a fait valoir, en substance, les arguments suivants:

– L'article 23 RCCI donnerait compétence à l'Arbitre Unique de prononcer la mesure sollicitée, ce qui serait confirmé par de nombreux exemples tirés de la pratique arbitrale.

– S'agissant des conditions de fond, la partie désirant obtenir une sûreté devrait rendre vraisemblable que le recouvrement de dépens qui lui seraient par hypothèse alloués dans une sentence serait difficile.

– En l'espèce, cette difficulté serait établie car il existerait des indices de l'insolvabilité de la société demanderesse, à savoir: des déclarations faites en audience par l'ayant droit économique de la demanderesse, qui aurait « *tout simplement acheté* » la société et le fait que la demanderesse a demandé des prolongations de délai pour s'acquitter des avances de frais à la CCI. En outre, la défenderesse allègue que la seule raison d'être de la demanderesse serait de percevoir des commissions. Or, en cas d'insuccès dans l'arbitrage, la demanderesse perdrait sa raison d'exister.

– En outre, la mesure se justifierait au motif que la demanderesse serait un simple véhicule juridique offshore, une coquille vide. Selon toute vraisemblance, il serait nécessaire d'opérer un « *Durchgriff* » contre l'ayant droit économique de la société.

– Enfin, les perspectives d'exécution d'une éventuelle sentence allouant des dépens à la défenderesse seraient aléatoires, car celle-ci a son siège dans un Etat dont l'effectivité de la justice serait sujette à caution et qui aurait ratifié la Convention de New York de 1958 sur la reconnaissance et l'exécution de sentences arbitrales étrangère seulement « *sous de larges réserves* ».

– Quant au montant des sûretés, la défenderesse estime qu'il serait juste de le fixer à CHF 100'000, compte tenu des frais directs que prévoit la demanderesse, des honoraires prévus de son conseil, des frais liés aux témoins et de la provision d'arbitrage.

– Si l'Arbitre Unique devait ordonner la fourniture de sûretés et si la demanderesse devait ne pas y donner suite, il conviendrait de considérer la demande retirée par application analogique de l'article 20(4) RCCI.

1.3 Pour le surplus, référence est faite à l'écriture de la défenderesse datée du 8 mai 2009.

1.4 Par lettre du 18 mai 2009, l'Arbitre Unique a fixé à la demanderesse un délai au 25 mai 2009 pour se déterminer sur la Demande de *cautio judicatum solvi* de la défenderesse.

1.5 Le 25 mai 2009, la demanderesse a déposée une écriture du même jour, intitulée « *Réponse à la demande de* cautio judicatum solvi *et demande incidente* ». Dans cette écriture, la demanderesse a pris les conclusions suivantes:

> II. CONCLUSIONS
>
> PAR CES MOTIFS
>
> XXX Inc. conclut à ce qu'il
>
> PLAISE A l'ARBITRE UNIQUE
>
> 1. Rejeter la demande de dépôt de sûretés de YYY S.A. avec suite de frais et dépens.
>
> Subsidiairement:
>
> 2. Condamner YYY S.A. à déposer des sûretés d'un montant fixé par le Tribunal arbitral, mais au moins équivalente à celles demandées à XXX Inc., auprès d'un établissement bancaire genevois ou en mains du Tribunal arbitral.

1.6 A l'appui de ses conclusions, la demanderesse a fait valoir, en substance, les arguments suivants:

– L'article 23 RCCI ne donnerait pas compétence à l'Arbitre Unique de prononcer la mesure sollicitée; pareille compétence suppose l'accord des parties (qui fait défaut en l'espèce).

– Même à supposer que l'article 183 LDIP donnerait cette compétence à l'Arbitre Unique, la demande de *cautio judicatum solvi* devrait être formée en début de procédure, de manière à permettre à la partie demanderesse de connaître rapidement les frais auxquels elle risque de s'exposer en poursuivant sa demande. La

demanderesse se réfère aux commentateurs de la Loi de procédure civile genevoise sur ce point et considère que le même principe serait applicable en arbitrage international. Or, en l'espèce la demande de *cautio judicatum solvi* a été formée alors que la demanderesse avait déjà exposé des frais. Par conséquent, la demande serait tardive et, partant, irrecevable.

– La défenderesse s'appuierait sur des allégations non établies s'agissant de la situation financière de la demanderesse. Par ailleurs, la forme juridique et le siège social de la demanderesse étaient connus de la défenderesse au moment de conclure la convention d'arbitrage, de sorte que la défenderesse ne saurait en tirer argument aujourd'hui.

– Subsidiairement, pour le cas où l'Arbitre Unique devait ordonner la mesure sollicitée, la demanderesse a fait valoir que ses propres chances de succès pour faire exécuter en [*pays d'Amérique latine où la défenderesse a son siège*] une sentence condamnant la défenderesse aux frais de l'arbitrage seraient aléatoires, de sorte qu'il se justifierait d'ordonner la fourniture d'une garantie au moins équivalente par la défenderesse.

1.7 Pour le surplus, référence est faite à l'écriture de la demanderesse datée du 25 mai 2009.

1.8 L'Arbitre Unique n'a pas invité la défenderesse à se déterminer sur la demande incidente. Pour la raison exposée au chap. 3 ci-dessous, pareille détermination s'avère superflue.

2. Considérants a propos de la demande de *Cautio judicatum solvi* sollicitée par la défenderesse

2.1 Quand bien même il n'existe aucune disposition du RCCI ou de la LDIP relative aux demandes de *cautio judicatum solvi*, il ne fait aucun doute que pareille mesure fait partie des décisions que des arbitres siégeant en Suisse sous le RCCI sont habilités à prononcer.[1] De même,

[1] Ainsi: Ordonnance de procédure rendue le 19 décembre 2003 dans l'arbitrage CCI 12542/EC, Bulletin ASA 23 (2005), pp. 690-693 ch. 34-38 et références; Ordonnance de procédure rendue le 27 novembre 2002 dans un arbitrage ad hoc, Bulletin ASA 23 (2005), p. 112 ch. 4.1; Sentence CCI rendue le 21 décembre 1998, Bulletin ASA (1999), p. 63, ch. 7; WIRTH, Interim or preventive measures in support of international arbitration in Switzerland, Bulletin ASA 18 (2000), p. 36.

il n'est plus contesté que l'article 23 RCCI donne la compétence et le pouvoir aux arbitres d'ordonner ce type de mesure.[2]

2.2 Toutefois, la pratique montre une certaine retenue dans l'octroi de ces mesures.[3] En effet, il ne faut pas perdre de vue que le RCCI impose au demandeur comme seule charge financière le paiement des frais d'enregistrement et de la provision d'arbitrage (cette dernière étant généralement supportée à parts égales par les parties).[4] Par ailleurs, l'article 31(3) RCCI accorde aux arbitres un très large pouvoir d'appréciation pour la répartition des frais dans la sentence finale. Si la règle selon laquelle la partie qui succombe supporte les frais est largement suivie, c'est avec de très nombreuses nuances et exceptions. Il n'est donc pas certain que le demandeur dont la demande est rejetée sera condamné aux frais.[5]

2.3 Enfin – et ce point est décisif – une partie qui entre dans une relation contractuelle avec un partenaire dont la solidité financière n'est pas garantie prend un risque, y compris celui de ne pas recouvrer des dépens en cas de litige. Il se justifie d'ordonner des mesures destinées à pallier ce risque uniquement s'il a augmenté entre la conclusion du contrat et le procès arbitral de façon considérable et imprévisible.[6]

2.4 En l'espèce, aucune des circonstances alléguées par la défenderesse ne pouvait lui être inconnue au moment de la conclusion des contrats litigieux. La défenderesse n'affirme du reste pas le contraire, tout comme elle n'allègue pas qu'il y aurait eu un changement fondamental et imprévisible dans la situation financière de la demanderesse entre 2000 et 2009.

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2 Ainsi: Sentence CCI rendue le 21 décembre 1998, précitée, p. 62, ch. 5-6; CRAIG / PARK / PAULSSON, International Chamber of Commerce Arbitration, 3ème éd. 2000, § 26.05 pp. 467-468; DERAINS / SCHWARTZ, A Guide to the ICC Rules of Arbitration, 3ème éd. 2005, p. 297.

3 Voir l'Ordonnance de procédure rendue le 27 novembre 2002 dans un arbitrage ad hoc, précitée; CRAIG / PARK / PAULSSON, *op. cit.*, § 26.05 p. 467; DERAINS / SCHWARTZ, *op. cit.*, p. 297.

4 CRAIG / PARK / PAULSSON, *op. cit.*, § 26.05 pp. 468-469.

5 CRAIG / PARK / PAULSSON, *op. cit.*, § 26.05 p. 469.

6 Voir Ordonnance de procédure rendue le 19 décembre 2003 dans l'arbitrage CCI 12542/EC, précitée, p. 694 ch. 44; POUDRET / BESSON, Comparative Law of International Arbitration, 2ème éd. 2007, ch. 610, qui considèrent qu'une détérioration importante et imprévisible de la situation financière constitue le « critère décisif »; VEIT, Note – Procedural Order No. 14 of 27 November 2002, Bulletin ASA 23 (2005), p. 116, pour qui ce principe est le « dénominateur commun de la pratique arbitrale internationale » en la matière. Voir également BÜHLER / WEBSTER, Handbook of ICC Arbitration, 2005, ch. 23-22. L'Arbitre Unique relève que exemples cités par BERGER, Prozesskostensicherheit (cautio iudicatum solvi) im Schiedsverfahren, Bulletin ASA 22 (2004), pp. 15-16, ont en commun que les circonstances ayant justifié la *cautio iudicatum solvi* sont survenues après la conclusion du contrat.

2.5 Cette première considération justifie à elle seule le rejet de la requête de la défenderesse.

2.6 En outre, les éléments factuels que la défenderesse avance comme indices d'une insolvabilité n'emportent pas conviction:

- Le seul fait que la demanderesse est une société « *simplement achetée* » par son actuel ayant droit et incorporée dans une juridiction offshore ne signifie pas qu'elle est financièrement incapable de faire face à ses obligations. Il existe en effet de nombreuses sociétés incorporées dans ces Etats avec des ressources financières importantes. Autre est la question de savoir si l'ayant droit économique de la société est prêt à laisser le substrat financier de celle-ci garantir les dettes sociales: ce sujet concerne la problématique traitée au paragraphe précédent.
- La demande de prolongation de délai pour le paiement de la provision d'arbitrage n'a aucune signification: les motifs de la demande peuvent être multiples et sans relation avec la situation financière de la demanderesse.

2.7 Ce second motif justifie également, et indépendamment du premier, le rejet de la demande de *cautio judicatum solvi*.

2.8 Enfin, on peut imaginer d'autres circonstances, exceptionnelles, dans lesquelles une *cautio* pourrait se justifier (p.ex., le fait que le demandeur a déjà été condamné à des dépens dans d'autres procédures mais ne s'en acquitte pas). Toutefois, la défenderesse n'a ni allégué ni établie l'existence de pareille situation.

3. Considérants a propos de la demande incidente sollicitée par la démanderesse

3.1 La demande incidente de la demanderesse est clairement subordonnée à la condition que l'Arbitre Unique ordonne la mesure sollicitée par la défenderesse. Comme tel n'est pas le cas, la demande incidente devient sans objet.

* * *

4. Dispositif

4.1 Pour ces motifs, l'Arbitre Unique:

1. Rejette la demande de *cautio judicatum solvi* formée le 8 mai 2009 par YYY S.A.;

2. Déclare sans objet la « demande incidente » formée par XXX Inc. le 25 mai 2009;

3. Réserve la décision sur les dépens pour une sentence ultérieure.

Entscheid des Appellationshofes des Kantons Bern, 1. Zivilkammer, vom 22. Mai 2009 in der Streitsache zwischen X. (Beklagter/Beschwerdeführer) und Y. (Kläger/Beschwerdegegner).

befunden und erwogen:

I.

1. Mit Entscheid des Schiedsgerichts Y. c. X. vom 9. Februar 2009 wurde auf das Gesuch des Beklagten/Beschwerdeführers (nachfolgend Beschwerdeführer) vom 18. Dezember 2008 um Anordnung einer Prozesskostensicherheit nicht eingetreten. Die Kosten dieses Entscheids wurden zur Hauptsache geschlagen (...).

2. Gegen diesen Schiedsspruch erhob der Beschwerdeführer mit Eingabe vom 11. März 2009 (...) Nichtigkeitsbeschwerde und beantragte Folgendes:

> „Es sei festzustellen, dass das Schiedsgericht für die Anordnung einer Prozesskostensicherheit zuständig ist und die Sache sei zur Behandlung des entsprechenden Gesuchs vom 18.12.08 an das Schiedsgericht zurückzuweisen.
>
> Eventualiter: Der Entscheid des Schiedsgerichts vom 9. Februar 2009 betreffend Gesuch um Prozesskostensicherheit sei aufzuheben und der Beschwerdegegner sei zu verurteilen, die dem Beschwerdeführer entstehenden Prozesskosten – Anwalts- und Gerichtskosten –, in gerichtlich zu bestimmender Höhe beim Schiedsgericht zu hinterlegen.
>
> – unter Kosten- und Entschädigungsfolge –“

Weiter stellte der Beschwerdeführer in seinem Begleitschreiben zur Nichtigkeitsbeschwerde den Antrag, der Beschwerde die aufschiebende Wirkung i.S. von Art. 38 KSG zu erteilen.

3. Mit Verfügung der Referentin der 1. Zivilkammer des Appellationshofs des Kantons Bern vom 24. März 2009 (...) wurde der Beschwerde antragsgemäss die aufschiebende Wirkung erteilt.

4. Der Kläger/Beschwerdegegner (nachfolgend Beschwerdegegner) schliesst in seiner Stellungnahme vom 6. April 2009 (...) auf vollumfängliche Abweisung des Haupt- wie auch des Eventualantrags des Beschwerdeführers.

5. Der Appellationshof ist gemäss Art. 36 lit. b i.V.m. Art. 3 lit. f KSG und Art. 380 Abs. 2 ZPO sachlich, örtlich und funktionell zuständig, so dass auf die Nichtigkeitsbeschwerde materiell einzutreten ist.

II.

1. vorliegend ist Prozessthema, ob das Schiedsgericht zur zwangsweisen Anordnung einer anbegehrten Prozesskostensicherheit sachlich zuständig ist.

Das Schiedsgericht führte dazu aus, der Beschwerdeführer verlange die Sicherstellung eines allfälligen künftigen Anspruches gegen den Beschwerdegegner auf Ersatz der ihm durch das Schiedsverfahren entstehenden ersatzfähigen Kosten. Die anbegehrte Kautionsverfügung diene der Sicherung allfälliger künftiger Ansprüche und sei damit als Sicherungsmassnahme und als vorsorgliche Massnahme i.S.v. Art. 26 KSG zu qualifizieren. Gemäss Art. 26 Abs. 1 KSG seien zur Anordnung vorsorglicher Massnahmen alleine die staatlichen Gerichte zuständig. Den Parteien sei es indessen unbenommen, sich im Rahmen des schiedsgerichtlichen Verfahrens den vorgeschlagenen vorsorglichen Massnahmen freiwillig zu unterziehen. Da sich der Beschwerdegegner der anbegehrten Massnahme widersetze, sei nach dem Gesagten deren Anordnung im Schiedsverfahren nicht möglich. Mangels Zuständigkeit des Schiedsgerichts sei damit auf das Gesuch um Anordnung einer Prozesskostensicherheit vom 18. Dezember 2008 nicht einzutreten.

2. Demgegenüber macht der Rechtsvertreter des Beschwerdeführers im Wesentlichen geltend, es werde nicht bestritten, dass Art. 26 Abs. 2 KSG (recte: Art. 26 Abs. 1 KSG) unmissverständlich festlege, dass für vorsorgliche Massnahmen alleine die staatlichen Gerichte zuständig seien. Allerdings stelle sich die Frage, was unter dem Begriff der vorsorglichen Massnahme zu verstehen sei. Die vorsorgliche Massnahme diene der Sicherung des Streitgegenstandes, definiert durch die gestellten Rechtsbegehren, währenddem das Institut der Prozesskostensicherheit dazu diene, einen allfälligen Anspruch der gesuchstellenden Partei auf Ersatz der ihr durch das Verfahren entstandenen Kosten zu sichern. Genau diese Kosten würden nicht als Streitgegenstand gelten; sie würden denn bei der Berechnung des Streitwertes auch nicht berücksichtigt. Das Schiedsgericht habe damit das Gesuch um Prozesskostensicherheit fälschlicherweise als vorsorgliche Massnahme qualifiziert und sich zu Unrecht als nicht zuständig

erklärt. Schliesslich sei das Gesuch um Anordnung einer Prozesskostensicherheit auch inhaltlich begründet.

3. Die Rechtsvertreterin des Beschwerdegegners bringt im Wesentlichen vor, selbst wenn sich die Vorinstanz zu Unrecht als nicht zuständig bezeichnet haben sollte, ändere dies nichts daran, dass der Beschwerdeführer vom Beschwerdegegner gestützt auf Art. 70 Abs. 1 Ziff. 2 ZPO i.V.m. Art. 26 KSG keine Prozesskostensicherheit mehr verlangen könne, da sein diesbezügliches Gesuch vom 18. Dezember 2008 verspätet sei bzw. er hierauf mit Einreichung seiner Klageantwort endgültig verzichtet habe. Auch gestützt auf Art. 70 Abs. 1 Ziff. 1 ZPO könne der Beschwerdeführer vom Beschwerdegegner keine Leistung einer Prozesskostensicherheit verlangen, da der Beschwerdeführer seinen Wohnsitz nachweisbar in der Schweiz habe. Im Übrigen sei das Gesuch um Leistung einer Prozesskostensicherheit auch materiell nicht begründet.

III.

1. Der einstweilige Rechtsschutz ist umfassender oder beschränkter, jedoch immer *provisorischer* richterlicher Schutz der Rechtspositionen von Kläger und/oder Beklagten zur Abwehr der Nachteile, die den Parteien aus der Dauer des Verfahrens bis zum definitiven Rechtsschutz entstehen können. Als vorsorgliche Massnahmen gelten insbesondere auch Sicherungsmassnahmen, die der Vollstreckung eines künftigen Urteils dienen (vgl. ISAAK MEIER, Grundlagen des einstweiligen Rechtsschutzes, Zürich 1983, S. 7).

Währenddem das kantonale Recht einstweilige Verfügungen unter den Voraussetzungen von Art. 326 ZPO zulässt, ist die Sicherung von Geldforderungen bundesrechtlich abschliessend durch das Institut des Arrests gemäss Art. 271 ff. SchKG geregelt.

Sowohl ZPO wie SchKG räumen dem Gericht die Möglichkeit ein, vorsorgliche Massnahmen von einer Sicherheitsleistung durch den Gesuchsteller abhängig zu machen (Art. 329 ZPO; Art. 273 Abs. 1 SchKG).

2. Die Arrestkaution ist ihrem Wesen nach eine Sicherungsmassnahme, denn über die Haftpflicht des Arrestgläubigers wird frühestens nach rechtskräftiger Erledigung des Arrestaufhebungs- oder Arrestprosequierungsprozesses endgültig entschieden. Der Auflage einer Arrestkaution kommt daher selbst notwendigerweise der Charakter einer einstweiligen Verfügung zu (vgl. ERNST MEIER, Die Sicherheitsleistung des Arrestgläubigers [Arrestkaution] gemäss SchKG 273 I, Dissertation der Rechts- und staatswissenschaftlichen Fakultät der Universität Zürich, Zürich

1978, S. 48). Nichts anderes kann aufgrund der identischen Rechtsnatur für eine Kautionsauflage gemäss Art. 329 ZPO gelten.

3. Wenn nun aber eine Sicherheitsleistung für Ansprüche des materiellen Rechts als einstweilige Verfügung und damit als vorsorgliche Massnahme qualifiziert wird, so muss dies auch für die Prozesskostensicherheitsleistung gemäss Art. 70 ZPO gelten. Über deren Aushändigung an den Beklagten wird nämlich erst nach rechtkräftiger Erledigung der Sache selbst und Feststellung der Prozesskostenersatzpflicht endgültig entschieden. Mithin ist der Bezugsgegenstand zwar ein anderer als bei den vorsorglichen Massnahmen, welche den Streitgegenstand an sich betreffen, wird doch die Sicherung des allfällig entstehenden Anspruchs auf Ersatz der Prozesskosten des Beklagten verlangt. Indessen ist der Sinn und Zweck der Massnahme genau der gleiche, nämlich die provisorische Sicherung eines künftigen Anspruchs.

4. Art. 26 Abs. 1 KSG ist mit dem Titel „vorsorgliche Massnahmen" überschrieben, ohne diese nach dem Bezugsgegenstand einzuschränken. Wie der Beschwerdeführer unter Zitierung von BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Bern 2006, N 1127 selbst ausführt, werden vorsorgliche Massnahmen i.S. von Art. 26 Abc. 1 KSG als Anordnungen definiert, welche dazu dienen, während des Verfahrens die umstrittenen Ansprüche der Parteien von Bedrohung zu schützen, die Durchsetzung der beantragten Rechtsbegehren zu sichern oder die Beziehungen unter den Streitparteien vorläufig zu regeln. Der Kostenschluss ist nun ohne weiteres als ein eigenständiges Rechtsbegehren zu qualifizieren. So hat denn der Beklagte anlässlich seiner Klageantwort auch den Antrag auf Ersatz der Verfahrenskosten gestellt (...). Damit ist dargelegt, dass auch eine Prozesskostensicherheitsleistung eine vorsorgliche Massnahme im Sinne von Art. 26 KSG darstellt.

Demnach ist die Vorinstanz mangels sachlicher Zuständigkeit gestützt auf den eindeutigen Wortlaut von Art. 26 Abc. I KSG zu Recht nicht auf das Gesuch des Beschwerdeführers zur Leistung einer Prozesskostensicherheit eingetreten. Die Nichtigkeitsbeschwerde ist daher abzuweisen.

IV.

Bei diesem Verfahrensausgang hat der Beschwerdeführer die gesamten Gerichtskosten des Nichtigkeitsbeschwerdeverfahrens zu tragen und dem Beschwerdegegner eine Parteientschädigung zu leisten (Art. 57 ff. ZPO). Die oberinstanzlichen Gerichtskosten, bestimmt auf CHF 500.00, werden daher dem Beschwerdeführer zur Bezahlung auferlegt und dem von ihm geleisteten Kostenvorschuss entnommen. Der Beschwerdeführer wird zudem verurteilt,

dem Beschwerdegegner für das oberinstanzliche Verfahren einen Parteikostenersatz auszurichten. Dessen Höhe wird nach Eingang der Kostennote von Rechtsanwältin A. mit separater Verfügung bestimmt.

Aus diesen Gründen wird erkannt:

1. Die Nichtigkeitsbeschwerde wird abgewiesen.
2. Die oberinstanzlichen Parteikosten, bestimmt auf CHF 500.00, werden dem Beschwerdeführer zur Bezahlung auferlegt und dem von ihm geleisteten Kostenvorschuss entnommen.
3. Der Beschwerdeführer wird verurteilt, dem Beschwerdegegner für das oberinstanzliche Verfahren einen Parteikostenersatz auszurichten. Dessen Höhe wird nach Eingang der Kostennote von A. mit separater Verfügung bestimmt.
4. Den Parteien zu eröffnen, dem Schiedsgericht Y. c. X. schriftlich mitzuteilen.
