

# Security for Costs 2017–2022

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## 1. Introduction

Since its establishment in 1917, the SCC Arbitration Institute (“SCC”) has developed into one of the world’s leading forums for international dispute resolution. In its centennial year of 2017 and alongside the celebrations of the importance of international arbitration for trade, economic development and peaceful resolution of disputes, new SCC Arbitration Rules, and SCC Rules for Expedited Arbitrations (together, the “SCC Rules”) entered into force. Among the noteworthy revisions and innovations designed to make arbitration more user-friendly as the SCC entered its second century, was the introduction of a specific provision on security for costs.

The security for costs provision under the SCC Rules expressly provides the possibility for the respondent(s) in an SCC case, in certain circumstances, to make a request to the Arbitral Tribunal to ensure its legal costs will be covered in the event of a successful result in the case.

Security for costs has previously been described as “a deviation from the principle that each party bears its own costs until the arbitral tribunal renders its costs decision.”<sup>2</sup> In Sweden, a Scandinavian civil law jurisdiction, the use of interim relief to secure a party’s legal costs has not typically been used in litigation or arbitration and, even in 2019, commentators have stated security for costs could be considered “a novelty in a Swedish context”.<sup>3</sup> Thus, the addition of a specific security for costs provision in the SCC Rules has clarified and expressly empowered the Arbitral Tribunal to grant such a request.

From the introduction of the provision on security for costs till 2022, the SCC saw a total of 31 applications for security for costs, a remarkable increase compared to the handful of cases seen by the SCC in the years before. Most of the cases were administered under the SCC Arbitration Rules. Six cases were administered under the SCC Rules for Expedited Arbitrations. Of the reviewed applications, the request for security for costs was dismissed or denied in all but two of the cases.

This practice note will summarise the reasoned decisions on security for costs rendered by Arbitral Tribunals from 2017 to 2022 under the SCC Rules in commercial cases where the proceedings have been closed, 22 cases in total, and provide some key takeaways.

The practice note is structured as follows.

**Section 2** analyses the security for costs provision under the SCC Rules.

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<sup>2</sup> Nedden, J. H., and Witte, I., Chapter 4: The Exception in Theory, a Unicorn in Practice? Revisiting Security for Costs from a Practitioner’s Perspective, in Calissendorff A. and Schöldstrom P. (eds), *Stockholm Arbitration Yearbook 2022* (Kluwer Law International 2022), pp. 39–58, p. 56.

<sup>3</sup> Gustafsson, B., Chapter 10: Article 38 of the SCC Rules: An Analysis of Security for Costs in TPF Arbitration, in Calissendorff A. and Schöldstrom P. (eds), *Stockholm Arbitration Yearbook 2019* (Kluwer Law International 2019), pp. 137–154, p. 140.

**Section 3** summarises the reasoned decisions on summary procedure rendered by Arbitral Tribunals from 2017 to 2022 under the SCC Rules in commercial cases. The section first summarises the decision wherein the request for security for costs was granted by the Arbitral Tribunal. Next, the section summarises the reasoned decisions wherein the requests for security for costs were dismissed by the Arbitral Tribunal.

**Section 4** provides a summary of the main conclusions on security for costs under the SCC Rules that can be drawn from the decisions set out in Section 3.

## 2. The SCC Rules on Security for Costs

Security for costs is regulated in Article 38 of the SCC Arbitration Rules and in Article 39 of the SCC Rules for Expedited Arbitrations, both of which are substantively similar. Minor linguistic amendments to the summary procedure rules were introduced in the 2023 revision of the SCC Rules. For the purposes of this practice note, reference to Article 38 of the SCC Rules also includes the corresponding reference to Article 39 of the SCC Rules for Expedited Arbitrations.

Article 38(1) of the SCC Rules expressly provides the Arbitral Tribunal with the broad discretion to order a claimant or counterclaimant to pay security for costs upon the request of a party in exceptional circumstances. This wording reflects the exceptional nature of the relief.

An order for security for costs entails “[balancing] the interest of a party to pursue its claim against the right of a potentially successful respondent to recover its reasonable costs of defending against the claim.”<sup>4</sup> Article 38(2) thus sets forth certain factors, which largely reflect the Chartered Institute of Arbitrators, International Arbitration Practice Guidelines for Applications for Security for Costs (2016) (CIA Guidelines), that the Arbitral Tribunal “shall have regard to” in making its determination.

First, the Arbitral Tribunal must undertake a preliminary, *prima facie* assessment of the prospects of success of the case. Commentators have

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<sup>4</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 122.

<sup>5</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 122.

<sup>6</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 122.

stated for example that “*reasonably good*” prospects would weight against an order for security for costs.<sup>5</sup>

*Secondly*, the Arbitral Tribunal shall consider whether the claimant or counterclaimant will be unable to pay an adverse cost award. However, it has been stated that a lack of assets alone will not necessarily be sufficient to order security for costs and will be considered alongside other factors.<sup>6</sup>

*Thirdly*, the Arbitral Tribunal shall consider whether an award for security for costs is in all the circumstances appropriate. It has been stated that an assessment of appropriateness might consider whether a party’s financial position was known to the applicant party at the beginning of their contractual relationship.<sup>7</sup>

*Fourthly*, the Arbitral Tribunal shall consider “*any other relevant circumstances*”, which may include the timing of the application, the conduct of the parties, any restructuring, among others, and accounting for the exceptional nature of the relief.<sup>8</sup>

According to Article 38(3), the Arbitral Tribunal has the discretion to stay the proceedings or dismiss the non-complying party’s claims in whole or in part, should the party fail to provide the security as ordered.

Pursuant to Article 38(4), any decision to dismiss the claims or stay the proceedings shall be in the form of either an award or a decision, depending on the circumstances including mandatory rules of the seat.<sup>9</sup>

In summary, the Arbitral Tribunal has the discretion to order a claimant or counterclaimant to provide security for costs upon the request of a party if it is satisfied there is evidence of:

- 1) exceptional circumstances;
- 2) a *prima facie* claim;
- 3) an inability to satisfy an adverse final costs award;
- 4) the measure’s appropriateness; and
- 5) any other relevant circumstances including timing, conduct, etc.

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<sup>7</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 122.

<sup>8</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 122–123.

<sup>9</sup> Ragnwaldh, J., et al., A Guide to the SCC Arbitration Rules (Wolters Kluwer, 2020), p. 123.

# 3. Security for Costs Decisions rendered in 2017–2022

## 3.1. Requests for Security for Costs granted

### 3.1.1 Case 1

#### Background

The dispute concerned the termination of the parties' supply contract and services contract due to the insolvency of the claimant, with competing claims for reimbursement and compensation for performance occurring prior to the termination of the contracts.

#### Respondent's position:

The respondent sought an order for security for costs arguing that, as the claimant was insolvent and unable to pay in accordance with the parties' agreement, the respondent would have virtually no chance to recover its costs if it were successful in the instant proceedings.

The respondent further argued that it had a high probability of success because it had performed its contractual obligations, which the claimant's representative had previously confirmed.

#### Claimant's position:

The claimant argued *inter alia* that the respondent had not satisfied the *prima facie* requirements for its claim and asserted the principle of "*lex fori concursus*", i.e., that the legal consequences of insolvency are determined solely by the law of the country in which the insolvency proceedings are instituted. As a consequence, the arbitration of the respondent's counterclaim would constitute a violation of domestic public policy. Finally, the claimant asserted that it had sufficient assets to cover any adverse costs decision.

#### Analysis and decision by the Arbitral Tribunal:

Considering first Article 38(1), the Arbitral Tribunal first with reference to legal doctrine and jurisprudence held that bankruptcy and insolvency situations can qualify as an exceptional circumstance. Given that it was undisputed that the claimant had been declared insolvent, the Arbitral Tribunal considered the circumstances to be exceptional in the meaning of Article 38(1).

Turning to Article 38(2)(i), the Arbitral Tribunal then considered the respondent's prospects of success against the claimant's claim. The Arbitral Tribunal's preliminary assessment was that it was sufficiently likely that the respondent's defences against the claimant's claim were not unfounded. Moreover, the respondent's counterclaim was sufficiently closely linked to the claimant's main claim so as not to be unfounded either. Therefore, the Arbitral Tribunal considered the requirement set forth in Article 38(2)(i) to be met.

Turning to Article 38(2)(ii) and the claimant's ability to comply with an adverse costs award, the Arbitral Tribunal noted that it was undisputed that the claimant was insolvent and that the total amount of the claimant's debts exceeded the total amount of the claimant's assets. Moreover, the deadline to register claims in the bankruptcy proceedings had already closed, rendering it impossible for the respondent to register a future cost claim. Therefore, the Arbitral Tribunal considered there to be a real risk that the claimant would not be able to reimburse the respondent for its costs should the respondent prevail with its defences and counterclaims.

Turning to Article 38(2)(iii), the Arbitral Tribunal assessed whether it was appropriate to order the claimant to provide the requested security. The Arbitral Tribunal weighed the claimant's interest in accessing arbitral justice against the respondent's interest in enforcing an award on costs and in avoiding costly arbitration proceedings with insufficient certainty that it would be reimbursed for its expenses in case the respondent were to prevail. The Arbitral Tribunal noted that the claimant had paid its share of the advance of costs in order for the arbitration to proceed and, considering the claimant's assertion that it had sufficient assets to satisfy any potential adverse costs award, the Arbitral Tribunal did not consider it unreasonable to order the claimant to submit a bank guarantee for security for costs.

*Finally*, the Arbitral Tribunal noted the claimant's bankruptcy was a material change in circumstances and independent of any actions of the respondent. Thus, the Arbitral Tribunal found that the respondent's application merited an order for security for costs.

### 3.1.2 Case 2

#### **Background:**

The case concerned a third-party funding agreement between the claimant, an individual, and the respondent, a funder, for the funding of an investment arbitration. The claimant commenced the arbitration in respect to the respondent's alleged termination of the agreement, alleged unpaid fees and alleged damages in respect of the loss of revenue. The respondent filed a request for security for costs on the basis that it assumed the claimant lacked the resources to comply with an adverse costs award.

#### **Respondent's position:**

In summary, the respondent argued first that the claimant's claim was borderline vexatious and substantially inflated. Secondly, that the claimant was an individual litigant who had failed to provide sufficient details of its financial means and assets available to satisfy an adverse costs order. Thirdly, that the claimant had no reasonable prospect of success on the claim, or at least that an adverse costs order against the claimant was highly likely. Fourthly, the claimant had not demonstrated it would be able to comply with an adverse costs award, and the respondent had serious concerns it would be unable to do so. Finally, that in all the circumstances, it was appropriate to order the claimant to provide security.

However, the respondent stated it would withdraw its request for security for costs if the claimant were to provide a bank statement holding a certain amount with an undertaking to maintain those funds in place until the conclusion of the arbitration.

#### **Claimant's position:**

In opposing the respondent's application for security for costs, the claimant argued inter alia that such a measure was only appropriate in exceptional circumstances to prevent the abuse of process by insolvent parties with marginal claims. Moreover, the claimant argued that as it was not insolvent and its claims were meritorious, the request was an abusive tactic, and the respondent was seeking to make the dispute more complex and costly. The claimant further argued that it had sufficient assets to satisfy an adverse award of costs, which would be enforceable in their jurisdiction. Finally, the claimant also argued that the respondent's costs claim was excessive. The claimant did not address the respondent's proposal that it provide a bank statement and undertaking.

#### **Analysis and decision by the Arbitral Tribunal:**

In addition to applicable arbitration rules and governing law, Arbitral Tribunal also applied the CIA Guidelines, which the respondent had followed in its arguments. The Arbitral Tribunal noted the need to balance the parties' conflicting interests in assessing the merits of an application for security for costs.

Turning to the application, the Arbitral Tribunal first considered the claimant's prospects of success, mindful that arbitrators should be very careful not to pre-judge the merits of the case. The Arbitral Tribunal considered that the claimant could potentially have a prima facie claim depending on the evidence.

*Secondly*, the Arbitral Tribunal considered the claimant's ability to comply with an adverse costs award. The claimant had stated that it had sufficient assets to satisfy an adverse costs award, however the Arbitral Tribunal concluded that there was insufficient evidence to verify that statement.

*Thirdly*, the Arbitral Tribunal considered whether it was appropriate in all the circumstances of the case to order the claimant to provide security for costs, and in particular whether the circumstances were "exceptional". The Arbitral Tribunal concluded the respondent's position, in particular its proposal the claimant provide a bank statement and undertaking, to be reasonable and appropriate. However, the claimant's refusal to comply or even address the proposal was unreasonable. In the Arbitral Tribunal's view, this constituted an exceptional circumstance.

*Finally*, in respect to any other relevant circumstances, the Arbitral Tribunal considered the timing of the application, noting that a request for security for costs made after significant expense has been incurred may be refused unless there is good reason for the delay. However, the Arbitral Tribunal noted nothing in the respondent's conduct that would prevent an order for security for costs being made.

Considering the respondent's proposal that the claimant provide a bank statement demonstrating a certain amount of funds and undertaking to maintain those funds to be reasonable and appropriate, the Arbitral Tribunal ordered the claimant to provide the same as soon as possible.

## 3.2 Requests for Security for Costs dismissed, denied, or rejected

### 3.2.1 Case 3

#### Background

The dispute concerned the construction of a paper mill and the installation of various vessels and piping. The claimant initiated the arbitration alleging the respondent had failed to pay for the works completed. The respondent filed a request for security for costs on the basis that the claimant had been declared bankrupt.

#### Respondent's position

The respondent argued that the claimant's prospects of success were very low and that, as the claimant was undergoing severe financial difficulties even before its bankruptcy, it was unlikely to be able to comply with an adverse cost award.

#### Claimant's position

The claimant argued that its lack of assets was not *per se* a reason to grant security for costs and the respondent's refusal to compensate the claimant had contributed to the claimant's financial situation. Further, the claimant argued it would likely be successful with the majority of its claims and, if security for costs were granted, it would make it impossible for the claimant to pursue the proceedings.

#### Analysis and decision by the Arbitral Tribunal

To determine whether there were "*exceptional circumstances*" as claimed by the respondent, the Arbitral Tribunal *first* considered the question of the parties' prospects of success. However, given the early stage of the proceedings the Arbitral Tribunal did not consider it possible to make a *prima facie* assessment of the case, let alone the probability of success of the claims, counterclaims and defences raised, nor whether they were manifestly unfounded, or in bad faith.

*Secondly*, the Arbitral Tribunal considered the claimant's ability to comply with an adverse cost award and the availability of assets for enforcement of an adverse cost award. It noted that the claimant was subject to a company restructuring when the request for arbitration was filed but was declared insolvent only two days after filing its statement of claim. Moreover, it could not be ascertained whether the bankruptcy estate would pursue the arbitration. Further, if the respondent were to succeed in full, it was assumed that the claimant would lack the resources to comply with an adverse costs award and need to rely on a third party. However, since the Arbitral Tribunal would eventually distribute the costs having regard to the relative success of the parties, this would be considered at a later stage.

*Thirdly*, as the claimant had raised its claim well before it entered into the company restructuring, the Arbitral Tribunal considered that care should be taken to avoid making an order for security for costs resulting in the inability of a financially weak party to pursue a claim not manifestly unfounded, or brought in bad faith, or where the financial weakness was not deliberately planned or created, for instance by setting up an under-financed company for the sole purpose of the arbitration.

*Finally*, having also considered whether it was otherwise appropriate to order the claimant to provide security for costs, the Arbitral Tribunal rejected the respondent's request for security for costs.

### 3.2.2 Case 4

#### Background

Following a reasoned request from the Arbitral Tribunal, the SCC had decided to order the parties to pay additional advances on costs. The claimant had requested an extension of time to make the payment due to a shortage of funds.

#### The respondent's position

The respondent requested the Arbitral Tribunal to make an order for security for costs, and failing which, that the Arbitral Tribunal dismiss the claimant's claims.

#### The claimant's position

The claimant argued that none of the circumstances alleged by the respondent justified an order for security for costs. There were several reasons for this position. *First*, the respondent's success was not certain, and the respondent therefore had no valid potential future claim for the reimbursement of its arbitration costs. *Secondly*, the respondent had not demonstrated the claimant's inability to comply with an adverse cost award. *Finally*, the claimant argued it would be inappropriate for the Arbitral Tribunal to order the claimant to post the significant sum requested, as it was not in line with the costs that should have been incurred to date in the case.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal primarily considered whether the claimant's request for an extension of time to pay the additional advance on costs constituted a "*serious risk*" to the respondent's ability to recover its costs in the case. The Arbitral Tribunal found that the respondent had not shown any "*exceptional circumstances*" justifying an order that the claimant provide security for costs. The Arbitral Tribunal further found that the respondent had failed to evidence any inability of the claimant to comply with an adverse costs award due to any lack of funds.

Further, the Arbitral Tribunal considered that a request for an extension of time to pay an advance on costs could not be a ground to ordering the claimant to pay a security for costs. The respondent had also failed to show that the claimant's financial situation had changed since the outset of the arbitration to the extent necessary to justify an order for security for costs. In addition, the Arbitral Tribunal did not consider it appropriate to grant security for costs. Hence, the respondent's request for security for costs was denied.

### 3.2.3 Case 5

#### Background

The dispute arose out of an alleged breach of a share purchase agreement which obligated one of the respondents to purchase and resell the shares in a third company to the claimant, a Special Purpose Vehicle (SPV). The respondent had failed to do so, and the claimant requested arbitration seeking specific performance.

#### Respondents' position

*Firstly*, the respondents argued that the prospects of success of the claimant's claim were limited as the jurisdiction against the second respondent was not established, and the claims against the first respondent lacked any merit.

*Secondly*, in respect to the claimant's ability to comply with an adverse cost award, the respondents submitted that it was very likely that the respondents would not be able to recover their costs as the claimant had no assets, carried out no economic activity, was *de facto* insolvent as its cash flow consisted only of borrowed funds, and had failed to comply with the decision of an emergency arbitrator, which *inter alia* ordered the claimant to compensate the respondents for their arbitration costs.

*Thirdly*, the respondents submitted that on balance, the respondents' right to security for costs should prevail over any inconvenience to the claimant, whose financial situation had most likely worsened since the parties' agreement. *Moreover*, the respondents alleged the claimant was receiving third-party funding and therefore had "*nothing to lose*" by bringing the proceedings. An order for security for costs would thus ensure equality between the parties.

*Finally*, the respondents argued that an order for security for costs was necessary for the first respondent to secure financing to cover its legal costs, as well as to safeguard the ability of the second respondent, which was not a party to the arbitration agreement, to recover its legal costs.

#### Claimant's position

The claimant objected to the respondents' request, *first* emphasising that security for costs was only available in exceptional circumstances. The claimant submitted that in international commercial arbitration, the parties are deemed to have reasonably assessed the counterpart's financial standing and the risk of adverse cost awards and only compelling subsequent fundamental changes in circumstances may justify an order for security for costs.

*Secondly*, the claimant stated that the respondents' claims as to the claimant's financial circumstances ignored the fact that it was an SPV, and by its inherent nature, was substantially structured, managed, and financed through arrangements procured by the lead investor from a pool of investors. It further denied the existence of any third-party funding.

*Moreover*, the respondents' claims were based on mere assumptions and did not meet the basic standards of due diligence in international business relationships for determining the fair value of a business or corporate entity.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal *first* noted that orders for security for costs were a novelty in a Nordic context and that the Swedish Arbitration Act (the "SAA") contains no comparable provision to Article 38, which empowers the Arbitral Tribunal to order security in "*exceptional circumstances*" upon the request of a party.

*Secondly*, the Arbitral Tribunal considered the claimant's prospects of success. Although the Arbitral Tribunal considered the second respondents' jurisdictional objection to be *prima facie* compelling, it did not follow that the merits of the claimant's claim could be prejudged at that stage of the arbitration.

*Thirdly*, in respect to the claimant's ability to meet an adverse costs award, the Arbitral Tribunal did not consider the claimant's failure to follow the decision by the emergency arbitrator to justify an order for security for costs.

*Fourthly*, the Arbitral Tribunal noted the claimant was an SPV, but was not convinced that there had been a substantial change in the claimant's financial standing since the parties entered into their agreement that would justify an order for security for costs. *Moreover*, the Arbitral Tribunal noted that the claimant had paid the full advance on costs in the arbitration, including the respondents' share. *Fifthly*, the Arbitral Tribunal considered the respondents' submission that an order for security for costs was necessary to secure financing for its participation in the proceedings and noted that it had not been argued that the first respondent's insolvency was a result of the claimant's actions or the arbitration. Hence, the

Arbitral Tribunal was not convinced that the first respondent's insolvency was conclusive or irremediable.

*Finally*, the Arbitral Tribunal considered that the existence of third-party funding could not be assumed since the claimant had denied the contention. Therefore, the Arbitral Tribunal held that the circumstances as presented did not warrant an order for security for costs and dismissed the respondents' request.

### 3.2.4 Case 6

#### Background

The dispute arose in connection to a transaction in which the claimant had acquired an asset from the respondent under an agreement. In particular, from the claimant's pledge of shares in one of its subsidiaries to the respondent as security for a loan from the respondent to the claimant's subsidiary under a later agreement. The claimant's subsidiary subsequently defaulted on the loan payments and the respondent seized the pledged shares at a value the claimant alleged was significantly lower than their fair market value.

#### Respondent's position

The respondent filed a request for security for costs on the basis that the claimant had allegedly failed to repay a receivable of the claimant's subsidiary and the negative equity reflected on the claimant's balance sheet. The respondent further alleged that the claimant's prospects of success in respect to the share valuation claim were small.

#### Claimant's position

The claimant objected to the request and submitted *first* that an order for security for costs represents an extraordinary measure.

*Secondly*, the claimant submitted that from a policy perspective the prospects of success of a claim was a relevant factor because an order for security for costs is an available form of provisional relief. However, it is not sufficient to merely present evidence suggesting that the outcome of the case was uncertain. Rather, this issue should not be decisive to the Arbitral Tribunal's overall assessment unless it is "*highly unlikely*" that the claim will be unsuccessful on merits.

*Thirdly*, the claimant submitted that the claimant's right of access to justice outweighs the respondent's interest in securing its costs in all but exceptional cases. To compel a claimant with limited resources to post security during an arbitral proceeding would put significant strains on its

ability to adequately present its case and even carries the risk of stifling the claimant's substantive claims.

*Fourthly*, the claimant argued that the timing of the respondent's request was considerably late in the arbitral proceedings, which spoke against any genuine interest of the respondent in securing its legal expenses.

*Fifthly*, with reference to *inter alia* jurisprudence under other institutional arbitration rules, the claimant submitted that a lack of funds alone was not sufficient to justify an order for security for costs. Rather, the degree of impecuniosity should be beyond mere insolvency, should amount to a change of circumstances, or there should be evidence that a deliberate alienation of funds had taken place to avoid liability. The claimant argued that the present case did not qualify under any of those circumstances.

*Finally*, the claimant underlined that the claims had been submitted in good faith and that the respondent did not have any credible defences thereto.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal *first* confirmed that the term "*exceptional circumstances*" under Article 38 reflects the dominant view in international arbitration on the use of orders for security for costs, i.e., that there must be "*very strong and compelling reasons for an order [for security for costs] to be issued.*"

*Secondly*, the Arbitral Tribunal confirmed that it would focus primarily on the claimant's prospects of success regarding its claim. Given that the Arbitral Tribunal's determination of the claimant's claim was largely dependent on a thorough legal analysis of the interaction between the parties' agreements, i.e., not merely a *prima facie* assessment, and that an order for security for costs is justified only in exceptional circumstances, the respondent's request for security for costs was denied.

### 3.2.5 Case 7

#### Background

The dispute arose out of an alleged breach of long-term agreements governing the licensing and management of a group of hotels, which led to the termination of the agreements. The respondent had raised a counterclaim which was dismissed without prejudice by the SCC due to the respondent's failure to provide information as to its beneficial ownership. The claimants had paid the entire advance on costs and requested the Arbitral Tribunal to order the respondent to provide security for costs equivalent to the respondent's share of the advance on costs.



### **Claimants' position**

The claimant referred *first* to the fact that the respondent had failed to pay its share of the advance on costs, and that the claimant was obliged to pay the full advance for the arbitration to proceed. With reference to Article 38, the claimant argued that there was a serious risk that the respondent, which the claimant submitted was on the brink of insolvency, would be unable to pay any adverse costs award. The claimant referred to the fact that the respondent had admitted that its financial position was precarious and deteriorating. *Moreover*, the claimant submitted that it would be appropriate to issue an order for security for costs as the claimant had paid the advances on cost upfront and the respondent had indicated that it was unwilling to pay its share. *Further*, the claimant argued that based on a *prima facie* assessment of its claims, its prospects of success were reasonably good.

*Finally*, the claimant argued that even if a request from the claimant under Article 38 was only possible in the event of an ongoing counterclaim, such restriction did not apply in respect to the Arbitral Tribunal's broad discretion to order any appropriate interim relief under Article 37 of the SCC Rules.

### **Respondent's position**

The respondent claimed that it did not pay its share of the advance on costs because of a lack of information about the current beneficial ownership of its parent company. Further, the respondent submitted that it was facing a pre-default situation with regards to its bank loan and undergoing an economic recovery procedure, which restricted its ability to enter into agreements. Accordingly, the circumstances did not amount to an inability of the respondents to meet any future adverse costs award, rather were to avoid the possibility of any further default situation.

Moreover, the respondent argued that the claimants had failed to evidence the likelihood of significant damage being caused to the claimants if interim measures were not granted, nor had the claimants suggested a solution for balancing the interests of the parties.

### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal held that, given that the respondent's counterclaim had been dismissed by the SCC, it did not form a part of the arbitration. Consequently, there was no entitlement for the claimants to be awarded under Article 38, which specifically refers to the request for an order for any claimant or counterclaimant to provide security for costs.

In respect to interim measures pursuant to Article 37, the Arbitral Tribunal held that despite the provision's broad wording and the clear jurisdiction to award security for costs, the Arbitral Tribunal cannot do so in the absence of a counterclaim. The Arbitral Tribunal reasoned that if the SCC

Rules had intended for a claimant to be entitled to request security for costs in the absence of a counterclaim, the SCC Rules would have expressly provided so. This was not the case.

### **3.2.6 Case 8**

#### **Background**

The dispute arose out of an alleged breach of contract for selling and marketing services which were to be provided by the claimant for the products developed by the respondent. Following a change to the claimant's legal representative, both parties had requested security for costs.

#### **Parties' positions**

The parties made similar submissions, with each arguing that there was a risk that the other party did not have sufficient funds to comply with an adverse cost award.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal confirmed that under Section 25 (4) of the SAA, an arbitral tribunal may, unless otherwise agreed between the parties, order interim measures at the request of a party. The Arbitral Tribunal considered both its discretion to grant any interim measures under Article 38 of the SCC Rules for Expedited Arbitrations, as well as its discretion under the SCC Rules to order a claimant or counterclaimant to provide security for costs in any manner the Arbitral Tribunal deems appropriate.

Against this backdrop, the Arbitral Tribunal held that since a final award could be expected shortly, the amount in dispute was relatively small, that most of the respondent's costs had already been incurred and that the claimant was established as a partnership, there were no compelling reasons sufficient to order the claimant security for costs to the respondent. Similarly, given the limited time remaining before a final award was expected to be rendered, an order for the respondent to provide the claimant with security for costs would have little practical meaning. Therefore, the Arbitral Tribunal rejected the parties' respective requests for security for costs.

### **3.2.7 Case 9**

#### **Background**

The dispute, administered under the SCC Rules for Expedited Arbitrations, concerned the non-payment of fees under the parties' agreement on the provision of financial consulting and agency services.

### **The respondent's position**

The respondent in its request for security for costs argued that the claimant had explicitly acknowledged its inability to comply with an adverse cost award and that there was a substantial risk the claimant's case would fail. Further, the respondent submitted that the claimant was a *de facto* litigation vehicle, and therefore lacked the resources to comply with an adverse cost award. Additionally, the respondent referred to separate proceedings in which it had been ordered to provide a bank guarantee for the protection of the claimant, and it would not be reasonable not to accord the respondent with such protection.

### **The claimant's position**

In response, the claimant *first* stated that the respondent's request for security for costs due to the claimant's lack of funds and the prospects of success for the claimant's claim did not meet the threshold under Article 38 of "*exceptional circumstances*". *Secondly*, the claimant argued that the circumstance in which the claimant lacked funds had arisen because the respondent had not paid the claimant, in breach of its contractual obligations. *Thirdly*, the claimant pointed out that it had paid all adverse cost awards in previous legal proceedings. *Finally*, the claimant argued that an order for security for costs would effectively terminate the arbitration proceedings prematurely, depriving the claimant of its right to access to justice.

### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal *first* confirmed that it had the discretion to grant a request for security for costs under Article 38 in certain circumstances but was not under an obligation to do so. *Secondly*, the Arbitral Tribunal noted that a request for security for costs may only be granted in "*exceptional circumstances*".

*Thirdly*, the Arbitral Tribunal noted that the claimant's inability to pay an adverse costs award, which was undisputed, spoke in favour of the respondent's request, but that this was only one of several determinative factors to be considered. However, given the early stage of the proceedings, the Arbitral Tribunal considered it difficult to weigh the prospects of success of the claims and defences.

*Fourthly*, the Arbitral Tribunal considered whether it was appropriate to order the claimant to provide security, considering any other relevant circumstances, including the undisputed fact that the claimant lacked sufficient funds to meet an adverse costs award and that the respondent had in other legal proceedings been ordered to provide a bank guarantee in favour of the claimant. Moreover, the Arbitral Tribunal noted that the claimant had been created as an SPV for the purpose of the transaction. Therefore, the respondent had entered into an agreement with a company whose financial situation was not materially different to the claimant's present position.

Consequently, the Arbitral Tribunal did not consider it appropriate to order the claimant to provide security for costs and denied the respondent's request.

### **3.2.8 Case 10**

#### **Background**

The dispute arose out of an alleged breach of a distribution agreement concerning the provision of goods and services within the high-pressure technology sector.

#### **Parties' positions**

The respondent requested an order for security for costs based on the financial status of the claimant, which was in liquidation, which made it highly uncertain whether the claimant would be able to satisfy an adverse costs award. The claimant opposed the respondent's request for security.

#### **Analysis and decision by the Arbitral Tribunal**

The majority of the Arbitral Tribunal rejected the respondent's request for security, finding that the high threshold of "*exceptional circumstances*" required under Article 38 had not been met.

However, the dissenting arbitrator considered that as claimant was domiciled in another jurisdiction, appeared to have no assets, and conducted no business, the criteria under Article 38 had been met and the claimant should be ordered to provide security for costs.

### **3.2.9 Case 11**

#### **Background**

The parties had entered into several agreements, including an agreement for the supply of energy modules. The dispute in this case concerned the alleged breach of obligations under a related agreement for the servicing of the products obtained under the supply contract.

#### **Respondent's position**

The respondent submitted *first* that there were exceptional circumstances in the case and the Arbitral Tribunal should therefore issue an order for security for costs. *Secondly*, the respondent submitted that the claimant's prospects of success were low as the amount claimed by the claimant was inflated and unsubstantiated.

*Thirdly*, the respondent submitted that the claimant was on the verge of an insolvency, bringing into question the claimant's ability to comply with an adverse costs award as well as the availability of assets to enforce such an award. This was therefore an extraordinary circumstance justify-

ing an order on security for costs. Moreover, the respondent referred to pending litigation and active enforcement proceedings against the claimant. According to the respondent, such circumstances did not exist at the time the parties entered into the arbitration agreement and therefore amount to a substantial change.

*Finally*, the respondent submitted that an order to provide security for costs would not hinder the claimant's access to the arbitration proceedings.

#### **Claimant's position**

The claimant submitted *first* that an order for security for costs was an exceptional measure to be ordered only in extreme circumstances, arguing that the respondent had failed to demonstrate the existence of such circumstances.

*Secondly*, the claimant argued that the respondent had failed to prove that the claimant would be unable to comply with an adverse costs award or that its assets would be unavailable for enforcement of an adverse costs award. In particular, the respondent had significantly overinflated the claimant's outstanding debts and the pending litigations against it.

*Thirdly*, the claimant argued that the respondent's allegations regarding the prospects of the claimant's claims were premature and lacked any substantiation. Moreover, the claimant noted there was no requirement to substantiate the precise amount of a claim in a party's request for arbitration under the SCC Rules.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal noted that its decision on security for costs was governed by the law of a civil law jurisdiction as the *lex arbitri*, as well as the SCC Rules, and that such an order should only be made in exceptional circumstances and with the greatest of reluctance.

The Arbitral Tribunal held that both the parties had made *prima facie* arguable cases, stressing that such preliminary views did not entail any prejudging or determination of the parties' claims and defences. However, the Arbitral Tribunal found that the respondent had not conclusively demonstrated a serious risk it would be unable to enforce a costs award against the claimant. A party's insolvency or near insolvency may be a compelling reason, however it is not always sufficient to justify an order for security for costs.

Moreover, the Arbitral Tribunal was satisfied that the pending litigations against the claimant did not *per se* affect the claimant's ability to comply with an adverse costs award. Thus, having considered all the relevant circumstances of the case, the Arbitral Tribunal denied the respondent's request for security for costs.

### **3.2.10 Case 12**

#### **Background**

The dispute concerned an agreement for the purchase, installation, and commissioning of two machines manufactured by the respondents, as well as for the training of the claimant's personnel on the methods and modes of work on the machines.

#### **Respondents' position**

The respondents in their request argued *inter alia* they would ultimately be successful in the arbitration and that the claimant would therefore be ordered to reimburse the respondents' costs. The respondents *further* argued that the claimant would be unable to comply with an adverse cost award due to the claimant's financial state and the fact that it was facing numerous claims in another jurisdiction due to its alleged close affiliation with, and payments received from, an insolvent third party.

*Moreover*, the respondents argued they never accepted the business risk of dealing with an insolvent company such as the claimant. *Finally*, the respondents argued that the request for an order for security for costs was appropriate considering all circumstances of the case, including the existence of exceptional circumstances, the amount requested, and the timing of the request.

#### **Claimant's position**

In opposing the request for security for costs, the claimant *first* argued that its case was strong and based on solid legal standing. The claimant referred to the amount the respondents had spent on their own legal defence as straightforward evidence of the *prima facie* strength of the claimant's case.

*Secondly*, the claimant denied that there was a serious risk that the claimant would be unable to pay an adverse costs award, asserting that its financial status was good and that it had not hidden any assets or taken any steps to frustrate a future costs award. *Moreover*, the claimant denied any knowledge of any litigation in another country dealing with claims from a bankruptcy estate in respect to the alleged affiliated entity.

*Finally*, in considering the appropriateness of security for costs in all the circumstances of the case, the claimant referred to the "excessively" high amount in the respondents' request, which the claimant argued covered not only the respondents' defences, but also the costs for their counterclaim.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal held that under Article 38 of the SCC Rules, an order to provide security for costs should only be granted in exceptional circumstances. Having regard to all circumstances of the case and the parties'

arguments, the Arbitral Tribunal did not find it appropriate to order the claimant to post security for the respondents' costs and rejected the respondents' request.

### 3.2.11 Case 13

#### Background

The dispute arose from an alleged breach of the parties' agreement concerning the provision of healthcare advisory services.

#### Respondent's position

The respondent requested an order on security for costs on the basis that the claimant was a company registered in an East Asian jurisdiction, which meant the respondent would have to seek enforcement of the award in an unfamiliar jurisdiction.

#### Claimant's position

The claimant submitted that the respondent's request for and order for security for costs was solely based on the claimant's place of registration. However, since the jurisdiction in question had acceded to the New York Convention, a compliant arbitral award could be enforced there. Therefore, the respondent's request was groundless.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal, considering the commentary to the SCC Rules, held that a party's lack of assets cannot be the sole reason for an order on security for costs. Rather, it must be considered alongside other circumstances, such as the party being solely used as a litigation vehicle. However, the Arbitral Tribunal held that there should typically be a lack of assets for a finding of "exceptional circumstances" to justify an order for security for costs. Further, a change in the circumstances prevailing at the time the parties agreed to arbitrate should be considered.

In the present case, the respondent had not alleged that the claimant lacked assets but merely that the claimant was registered in a foreign jurisdiction. However, the respondent was aware of the claimant's place of registration from the entry into the arbitration agreement. Moreover, the Arbitral Tribunal considered that the grant of an order for security for costs on the basis argued by respondent would lead to requests for security for costs in almost any international arbitration, which was not the purpose of the provision. Hence, the respondent had not demonstrated the existence of exceptional circumstances and its request for security for costs was rejected.

### 3.2.12 Case 14

#### Background

The dispute arose out of a production agreement. The claimant encountered problems in delivery due to actions it alleged were attributable to the respondent and initiated the arbitration.

#### Respondent's position

The respondent requested that the Arbitral Tribunal order for security for costs, alleging that the claimant would not be able to comply with an adverse costs award due to its financial situation. The respondent relied on the claimant's annual report, arguing *inter alia* that the claimant was a small company and that the costs of the dispute would exceed the claimant's total profits over the last year. The respondent further proposed that the parties enter into a mutual agreement to provide security.

#### Claimant's position

The claimant *first* argued that the respondent's request for security for costs was unfounded. The claimant had not been paid for work done under the agreement and granting the request would result in further harm to the claimant. The claimant *further* argued that the respondent's financial situation was more at risk compared to the claimant, since the respondent's annual report showed a large loss. The claimant further submitted that any obligation imposed on the claimant should also be imposed on the respondent. *Finally*, the claimant argued that it had been profitable for the last five years, with funds in reserve from the previous year's profit, and that it had been granted a stand-by loan agreement by a bank to finance the company.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal confirmed that an order for security for costs is an exceptional remedy. As to the ability to comply with an adverse costs award, the Arbitral Tribunal held that a party lacking assets is not in itself sufficient reason to order it to provide security. Considering the claimant's financial reports, the Arbitral Tribunal held it could not be concluded on this basis alone that the claimant would not be able to comply with an adverse cost award. Moreover, the Arbitral Tribunal held that the claimant's financial situation should have been considered by the respondent when entering into the parties' agreement.

Therefore, the Arbitral Tribunal held that there were insufficient reasons to order security for costs and denied the respondent's request.

### 3.2.13 Case 15

#### Background

The dispute arose out of an alleged breach of the parties' agreement concerning the expansion of broadband network services in certain areas.

#### Parties' positions

The respondent requested an order for security for costs on the basis that the claimant was a not-for-profit association that lacked legal capacity. The claimant disputed this claim and objected to the respondent's application for security for costs.

#### Analysis and decision by the Arbitral Tribunal.

The Arbitral Tribunal held that the grant of an order for security for costs followed an assessment of whether any exceptional circumstances exist within the meaning of the SCC Rules, with regard to the list of factors contained therein. In its assessment, the Arbitral Tribunal had also considered that the respondent had not paid its share of the advance on costs and that the oral hearing was scheduled to take place shortly. Thus, taking all circumstances into account, the Arbitral Tribunal rejected the respondent's request for security for costs.

### 3.2.14 Case 16

#### Background

The underlying dispute arose out of an alleged breach of a construction agreement concerning a multi-storey office complex.

#### Respondent's position

The respondent argued that there were exceptional circumstances in the meaning of the SCC Rules because it was impossible for the respondent to assess whether the claimant had sufficient assets to cover an adverse award as the claimant was domiciled in another jurisdiction.

#### Claimant's position

The claimant argued that the fact the parties were domiciled in different countries did not constitute an exceptional circumstance. Moreover, the claimant was obligated to report on its operations annually in line with international accounting standards. Further, as the jurisdiction where the claimant was domiciled was a signatory to the New York Convention, there was no issue in terms of the enforceability of an adverse costs award. Finally, the claimant referred to the parties' agreement for the claimant to deposit a specific amount in the client funds account of its legal representative, noting that sufficient funds remained in the account, which could be considered security.

#### Analysis and decision by the Arbitral Tribunal

With reference *inter alia* to the commentary on the SCC Rules, the Arbitral Tribunal held that there must be evidence of exceptional circumstances to order security for costs under Article 38. A party's lack of assets could not be the sole reason for granting security for costs, but the Arbitral Tribunal must assess whether the party would be able to comply with a final costs award. In the present case, the respondent provided no evidence that the claimant would not be able to comply with an adverse costs award. Moreover, the Arbitral Tribunal held that even if an investigation into the assets of a party is made difficult due to their location in a different jurisdiction, this did not justify an order for security for costs because the parties were aware of each other's domicile when they signed the agreement. Hence, the Arbitral Tribunal rejected the respondent's request for security for costs.

### 3.2.15 Case 17

#### Background

The dispute arose from the alleged breach of a shareholder's agreement. In this case, both parties requested security for costs, however the claimants' request was a request for interim measures made under Article 37.

#### Respondents' positions

The respondents submitted that the Arbitral Tribunal may, in the event of exceptional circumstances, order a party to provide security for costs. In assessing whether to grant such an order, the respondents submitted with reference to Article 38 that a party's prospects of success should be considered. The respondents argued that the claimants' case was deficient, and it could at most obtain approx. 30% of the claimed amount, although the respondents argued the claimants had low prospects of success.

#### Claimants' positions

The claimants opposed the request on the grounds that under Swedish law, security for costs was a protection available to creditors only. Moreover, the claimants argued they had provided evidence of clear breaches of contract, and had paid the entire advance on costs, which should be considered sufficient security. Further, the respondents had changed legal representatives three times, and the claimants argued they should not have to pay for the costs of new counsel to become familiar with the case.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal rejected the respondents' request for security for costs on the grounds that no exceptional circumstances under Article 38 had been evidenced. As regards the claimants' request for an interim measure, this was also rejected by the Arbitral Tribunal, as it had not been demonstrated that there was any risk that the respondent would sabotage the claimants' possibility of payment in the event they were successful with their claim.

### 3.2.16 Case 18

#### Background

The dispute arose out of a partnership agreement concerning services relating to the sale, distribution, and validation of tickets for trains. The respondent cancelled the partnership agreement, and the claimant initiated the arbitration, seeking damages for the respondent's wrongful termination and material breaches of contract as well as payment of unpaid invoices.

#### Respondent's position

The respondent argued there was an imminent risk that the claimant would not be able to satisfy an adverse costs award, based *inter alia* on the financial information in its most recent annual report, the fact the claimant's guarantor was bankrupt, financial authority investigations were pending in respect to other group companies, and the respondent's credit facility from an affiliated company did not constitute an acceptable security, as it could be cancelled at any time and violated the prohibition on loans according to the applicable law. Finally, the respondent argued that a *prima facie* assessment of the claimant's claim indicated low prospects of success.

#### Claimant's position

The claimant argued *inter alia* that the respondent's request did not consider the factors set forth in Article 38, the proper consideration of which led to the conclusion that an order for security for costs should not be granted, without the Arbitral Tribunal even having to assess whether there were exceptional circumstances in the case.

*Additionally*, the lack of evidence rendered a *prima facie* assessment of the parties' prospects of success irrelevant.

In respect to its liquidity, the claimant argued that its funds were part of the group of company's pool system and there was no question as to the affiliated company's ability to honour the loan, or the existence of a breach of the applicable law.

*Moreover*, the claimant argued that the respondent had entered into the partnership agreement with a newly registered company and had thus already from the beginning calculated the financial risk related to its contractual counterparty, which was a strong argument against an order for security for costs.

With reference to the CIArb Guidelines, the claimant submitted that the failure of the requesting party to pay its share of the advances on costs may be considered by the Arbitral Tribunal as a ground for refusing the request

for security for costs. The respondent in this case had not paid its share of the advance on costs.

#### Analysis and decision by the Arbitral Tribunal

The Arbitral Tribunal noted that the requirement of exceptional circumstances under Article 38 sets a very high bar for an order for security for costs. With respect to the circumstances to be taken into account in the review, the Arbitral Tribunal noted that, based on the evidence submitted in the case, it was not possible to draw any conclusions about the outcome of the dispute.

Turning to the claimant's ability to satisfy an adverse costs award, the Arbitral Tribunal referred to the CIArb Guidelines, noted that the lack of solvency and/or lack of enforceable assets favours the granting of a protective order "*unless these factors were considered and accepted as part of the business risk at the inception of the parties' relationship*". The Arbitral Tribunal considered this to be the case here.

In the Arbitral Tribunal's overall assessment of the circumstances of the case, including the respondent's refusal to pay its share of the advance on costs, the Arbitral Tribunal held that there were no exceptional circumstances to grant an order for security for costs and rejected the respondent's request.

### 3.2.17 Case 19

#### Background

The dispute arose from a purchase agreement concerning the sale of chemicals, in which the first claimant alleged it had delivered the products in accordance with the agreement, but that it had not received payment of the invoiced amount or contractual penalties from the respondent. The second claimant was another entity from the same concern.

#### Respondent's position

The respondent's request for an order for security for costs from the first claimant referred to the first claimant's alleged failures to produce documents, as well as the first and second claimants' "*self-created*" evidence. The respondent further submitted that the claimant had limited funds available and would therefore be unable to comply with an adverse cost award to the extent of the respondent's counterclaims. The respondent argued that the circumstances were therefore exceptional, and that the first claimant be ordered to provide security for costs.

#### Claimants' position

The first claimant disputed the respondent's allegation that the claimant had failed to produce documents, or that any evidence was forged. The

first claimant further submitted that there was no ground to order security for costs as “*the risk of disappearance*” was the same as the second claimant and the respondent, particularly as the second claimant had not paid its share of the advance on costs. By contrast, the first claimant had made all requested payments without delay and consequently denied the existence of any risk as alleged by the respondent.

The second claimant did not make any submissions in this respect.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal *first* considered the alleged failure to produce documents and of forged evidence, concluding that this did not constitute evidence of the first claimant’s financial situation, and certainly not that it was in financial difficulty.

*Secondly*, the respondent’s evidence that the first claimant had limited funds did not *per se* permit the conclusion of any financial difficulty and noted the claimant had made all required payments without delay.

*Finally*, the Arbitral Tribunal concluded that it had not seen any evidence that the first claimant’s financial status was cause for concern and it would not be able to satisfy an adverse costs award, nor of changes since the parties entered into their agreement, nor of the appropriateness of timing of the request. Accordingly, the Arbitral Tribunal rejected the respondent’s request for security for costs.

#### **3.2.18 Case 20**

##### **Background**

The dispute arose out of a consultancy agreement between the parties and an alleged failure to make payment thereunder, with the respondent raising a jurisdictional objection.

##### **Respondent’s position**

The respondent argued that an order for security for costs was justified as the dispute was not properly subject to arbitration, given the amount in dispute and alleged the claimant would be unable to pay an adverse costs award.

##### **Claimant’s position**

The claimant objected to the respondent’s request, arguing an order for security for costs was unnecessary as the claimant was not insolvent, and that it was not enforceable.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal considered whether there were exceptional circumstances in the case in the meaning of the SCC Rules to justify an order for security for costs. Finding no circumstances which would require the claimant to furnish a security for costs, the Arbitral Tribunal rejected the respondent’s request.

#### **3.2.19 Case 21**

##### **Background**

The claimants in this case had developed and patented a product. This patent along with the corresponding know-how was subsequently transferred to an SPV. The parties then entered into a share purchase agreement under which the SPV was sold to the respondents, who were obliged to make all commercially reasonable efforts to commercialise the product owned by the SPV. The dispute arose as the claimants alleged the respondents failed to comply with this obligation.

##### **Respondents’ position**

The respondents submitted that they had already and would continue to incur significant legal costs because the substantial claim, which was inflated and meritless, required substantial resources to defend. Furthermore, the statement of claim included a large number of exhibits, which was comprised mostly of excerpts, with important evidence omitted, requiring the respondent to undertake extensive work to properly investigate and rebut.

The respondents argued it was unlikely they would be able to recover the significant legal costs because all the claimants were either private individuals or small privately-owned companies located across several jurisdictions. Therefore, the respondents could not monitor or verify the claimants’ assets and financial situations and argued there was a real risk that they would face difficulties enforcing any successful costs award. Hence, the claimants should be ordered to provide security.

##### **Claimants’ position**

The claimants argued that an order for security for costs required “*culpable behaviour*” on the part of the non-applicant party, which was absent in the present case. Further, the claimants submitted that their conduct had been appropriate for the case and the value of the dispute. Consequently, there were no “*exceptional circumstances*” to justify security for costs.

As for the claimants’ financial situations, the claimants submitted that such information was publicly and easily available where most of the claimants were registered. The claimants further submitted that the reason for the absence of evidence of the claimants’ financial situations from the

respondents' request for security for costs was likely because such information would reveal that the request was unfounded.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal *first* confirmed that the main rule under the SCC Rules is that neither of the parties shall be required to provide security for costs, except under "exceptional circumstances", reflecting the "dominant view" in international arbitration.

*Secondly*, the Arbitral Tribunal considered that a merely preliminary examination was sufficient to determine whether there was a *prima facie* claim made in good faith. The Arbitral Tribunal considered that on a preliminary examination both parties had presented reasonably good arguable cases, rendering this factor under Article 38(2) not determinative.

*Thirdly*, the Arbitral Tribunal considered the onus to be on the applicant party to demonstrate a serious risk that the non-applicant party would be unable to comply with an adverse costs award justifying a deviation from the general rule. The Arbitral Tribunal did not consider the respondents, which *inter alia* had not alleged that any of the claimants were in financial difficulty, to have discharged their evidentiary burden in this respect. By contrast, the claimants had, through the annual report evidenced their ability to comply with an adverse costs award.

*Finally*, the Arbitral Tribunal noted that the New York Convention was applicable in all the relevant jurisdictions and therefore concluded that it would not be difficult for the respondents to enforce any costs award against the claimants. Thus, having considered all the parties' arguments, the Arbitral Tribunal rejected the respondents' application for security for costs.

### **3.2.20 Case 22**

#### **Background**

A dispute arose between the parties to a shareholders' agreement, with the claimant alleging that the forced acquisition of shares by one of the respondents was in bad faith and at an unjustified and undervalued price, in breach of the agreement.

#### **Respondents' position**

The respondents in their request for security for costs *first* argued the claimant's claim was *prima facie* without merit due to the high threshold required for the claimant to show a manifest error of the respondents and that they had not acted in good faith. Moreover, the claimant's argument that the respondents had unlawfully conspired amongst themselves could not be said to have "reasonably good prospects of success".

*Secondly*, the respondents argued that it was unlikely that the claimant would be able to meet any adverse costs order made against it because: i) the claimant was an SPV created for the sole purpose of holding securities, without any discernible assets, or business activities; ii) the claimant had refused to provide any evidence of its ability to satisfy an adverse costs award of any amount, and iii) there was no evidence that the funds paid by the respondents to the claimant remained in its possession or that it had not incurred any other significant liabilities.

*Thirdly*, the respondents submitted that the claimant had advanced its claim in an aggressive and improper manner which had resulted in disproportionate and wasted costs.

*Fourthly*, the respondents denied that they took a risk on the claimant's impecuniosity since under the shareholder's agreement there were no unsecured payment obligations on the claimant. Consequently, the respondents did not knowingly take "business risk" on the claimant.

*Fifthly*, the respondent claimed that there was no basis for the Arbitral Tribunal to conclude that any order would hinder the claimant's ability to prosecute its claim as no evidence had been invoked by the claimant in support of this assertion.

#### **Claimant's position**

The claimant *first* argued that its claims had a *prima facie* probability of success. It relied on *inter alia* expert opinions in respect to English law on various questions as well as the fact that the respondents did not apply for dismissal of the claim by way of summary proceedings.

*Secondly*, the claimant submitted that it could comply with a "reasonable" adverse costs award, and that the lack of public information about the claimant's finances was irrelevant. Further, the claimant submitted that it was under no obligation to provide its financial information.

*Thirdly*, the claimant argued that the respondents could not claim that they were facing exceptional circumstances as the respondents had always been aware that the claimant was an SPV and accepted the business risk. Any lack of assets to cover an adverse costs award was not sufficient reason to order security for costs.

*Fourthly*, the claimant cited the commentary on Article 38, specifically that the inability to comply with an adverse costs order did not *per se* justify an order for security for costs. The claimant also argued that an order for security for costs would not be enforceable in the claimant's place of registration, where its assets were held, on grounds of public policy of the applicable law. The claimant argued that an order to provide security for



costs would leave it in an impecunious position and thus prevent its ability to prosecute its claim, amounting to a denial of justice.

#### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal noted that the assessment of whether “*exceptional circumstances*” exists involves a balancing exercise between the right of a party to pursue its claim against the right of an opposing party to recover the costs of a defence that defeats the claim. This reflects that a claimant’s access to justice is an important right.

The Arbitral Tribunal, without assessing the claim’s merits, was satisfied that the claimant had a *prima facie* claim, made in good faith. Both parties had reasonably arguable cases, and this was therefore not a determinative as to whether to grant security for costs application.

According to the Arbitral Tribunal, the lack of assets is a necessary but not sufficient reason for granting security for costs and the Arbitral Tribunal may consider the business risk taken by the applicant party. The Arbitral Tribunal noted that, at the time that they entered into the shareholders’ agreement, the respondents were aware that the claimant was an SPV, which would receive the payments from the respondents under the shareholders’ agreement, and that the claimant was not specifically created to avoid cost responsibility in the ongoing arbitration.

Further, the Arbitral Tribunal noted the respondents’ application for security for costs was not made until after the parties had submitted their initial pleadings and a reasonably extensive document disclosure exercise. The respondents had been broadly aware of the financial circumstances of the claimant since the referral of the case.

The Arbitral Tribunal dismissed the respondents’ request for an order for security for costs, considering it inappropriate at that stage of the arbitration proceedings as a significant proportion of the arguments made related to the merits of the claims and the defence.

#### **3.2.21 Case 23**

##### **Background**

The dispute arose out the non-payment of fees arising out of a licensing agreement in the hotel industry.

##### **Respondent’s position**

The respondent argued that there were exceptional circumstances in the meaning of Article 38 *first* because the claimant had filed for bankruptcy

only three months after the initiation of the arbitration proceedings and continued to act in the arbitration, with the fees of its legal representative likely covered by an affiliated entity.

*Secondly*, the respondent submitted that as the bankruptcy receiver had decided not to enter the arbitration as a party, any potential funds received by the claimant in the case would under the applicable law be excluded from the bankruptcy estate and therefore available to the claimant’s shareholders.

*Thirdly*, the respondent argued that it was evident that the claimant had no assets and would be unable to satisfy any adverse costs award. Moreover, the respondent referred to the fact that the claimant had previously refused to comply with the adverse costs decision of an emergency arbitrator. Hence, the respondent requested that the decision on security for costs be made by the Arbitral Tribunal before any separate or final award is rendered.

##### **Claimant’s position**

The claimant objected to the respondent’s request for security for costs and denied there were exceptional circumstances at hand. The claimant argued that it was in bankruptcy only because the new owner of the property where the claimant operated its business had refused to sign a new lease agreement with the claimant. The changed circumstances had only occurred after the claimant’s initiation of the arbitration and there was no bad faith on the claimant’s part.

##### **Analysis and decision by the Arbitral Tribunal**

The Arbitral Tribunal addressed the issue of security for costs in the final award, which also dealt with the question of a time bar on the claimant’s claim. The Arbitral Tribunal did not consider the circumstances to be exceptional. Moreover, having found that the claimant’s claim was time barred, the final award represented the end of the arbitration. The respondent’s legal costs had thus already been incurred and the Arbitral Tribunal rejected the respondent’s request for security for costs.

## 4. Summary

Under the SCC Rules, the Arbitral Tribunal has the express power to consider the application of a party and order a *claimant or counterclaimant* to provide security for costs. Thus, in the absence of a counterclaim, it appears to be clear that a claimant may not make such a request.

However, based on the SCC's jurisprudence in commercial cases from 2017 to 2022, it is also clear that arbitral tribunals have applied a very high threshold to applications for such relief and in particular to the existence of "*exceptional circumstances*". An example of such exceptional circumstances may be the insolvency of one of the parties during the course of the proceedings. However, the conduct of the parties may also be decisive.

This practice is in line with the exceptional nature of the security for costs relief and its historical (lack of) status in Sweden. Despite the high threshold applied by arbitral tribunals under the SCC Rules, there is a demonstrable increase in the number of parties, typically the respondents in the arbitration, requesting an order for security for costs since the introduction of Article 38. It can be concluded that arbitration users consider the clear provision on security for costs to be an important and effective tool that preserves the careful balance between the legitimate interests of the parties, on the one hand the important right to recover costs, and the fundamental right to access to justice on the other.

Thus, parties to arbitrations administered under the SCC Rules seeking to bring claims or raise defences and counterclaims can be assured that an order to provide security for costs will only be granted where the circumstances are exceptional. Correspondingly, where the circumstances are exceptional, responding parties can be assured of the real possibility to request an order for security for costs to safeguard their rights. Security for costs under the SCC Rules is thus no mere "*unicorn*", but rather a reliable workhorse.