



ICSID committee affirms power to order security for costs

Cosmo Sanderson

07 May 2019



Harbour in Castries, the capital of Saint Lucia (Credit: istock/Flavio Vallenari)

An ICSID annulment committee has ruled that a tribunal did not exceed its authority in ordering a third-party funded claimant to post security for costs or discontinuing the arbitration when the claimant failed to comply – but went too far in dismissing the claim with prejudice.

In a decision on 29 April, the ad hoc committee chaired by Canadian-New Zealander Donald McRae partially annulled an award in favour of St Lucia, holding that an ICSID tribunal manifestly exceeded its powers by dismissing US oil company RSM’s US\$200 million claim with prejudice when less “draconian” measures were available. The decision opens the door for RSM to resubmit its original claim to arbitration.

The other committee members were Andreas Bucher of Switzerland and French arbitrator Alexis Mourre, the president of the ICC International Court of Arbitration.

RSM was represented by Mishcon de Reya and Oklahoma firm Hall Estill. St Lucia used Freshfields Bruckhaus Deringer. Mishcon and Freshfields both acted in the underlying arbitration.

Owned by controversial Colorado billionaire Jack Grynberg, RSM filed its claim against St Lucia in 2012 over the termination of a 16-year oil concession. The company alleged that the state ignored a force majeure event caused by a boundary dispute between its Caribbean neighbours Martinique, Barbados and St Vincent. St Lucia disputed the force majeure claim, arguing RSM had failed to do any exploration work for years.

A tribunal chaired by Germany's Siegfried Elsing issued a majority decision in 2014 ordering RSM to provide a US\$750,000 bank guarantee or cash to cover St Lucia's legal costs in the event the claim was dismissed.

The decision was unprecedented, as the ICSID Convention grants no explicit power to order security for costs or sanction parties for non-compliance (such a power is being considered by ICSID in current proposals to update its rules). Elsing and St Lucia's appointee Gavan Griffith QC of Australia made the order after St Lucia presented evidence to show that RSM had failed to comply with awards and adverse costs orders in prior ICSID cases it had brought against other states.

The majority's decision was also influenced by the revelation that RSM was relying on third-party funding to bring its claim, which signalled it might be unable to pay a costs award should St Lucia prevail. RSM never revealed the identity of the funder.

RSM's appointee to the tribunal, US arbitrator Edward Nottingham, disputed the majority's power to make the order.

Griffith issued an assenting opinion to the 2014 decision that attracted notoriety for its description of third-party funders as "mercantile adventurers" who enjoyed a "gambler's nirvana". The opinion led RSM to bring a challenge against Griffith for an alleged lack of impartiality, which was rejected by his co-arbitrators.

After RSM failed to pay the security, the tribunal dismissed the case with prejudice in 2016. It did so in the form of an award rather than a notice of discontinuance so RSM could apply for an annulment, given the unprecedented nature of the security issue. Griffith clarified in the final award that he did not believe all funded claimants should have to pay security for costs.

Among its grounds for annulment, RSM alleged that Griffith's lack of independence and impartiality meant the tribunal was improperly constituted and departed from fundamental rules of procedure. It also argued that the tribunal lacked the power to issue a binding provisional measure at all and an order for security for costs in particular. These arguments were all dismissed.

However, the committee upheld a final ground relating to the dismissal of the claim with prejudice,

Mishcon de Reya partner Karel Daele tells GAR,

"In essence, the ad hoc committee ruled that the tribunal manifestly exceeded its powers by dismissing the merits of RSM's claims with prejudice for a failure to post security for costs, thus preventing RSM from recommencing proceedings on its claims in the future.

“In the committee’s opinion, dismissing a claim with prejudice was the same as concluding that the claim has no merit. This was not a matter of procedure that the tribunal could have decided under article 44 of the ICSID Convention, the committee decided. This was a matter of substance but for which there was no basis in the convention.”

Daele says the committee described the dismissal of the merits of the case without those merits being heard as “draconian”.

He says RSM is “obviously pleased with the outcome” and will now “consider all of its options” including resubmitting its claims, entering into settlement discussions with St Lucia or “taking other initiatives.”

Freshfields declined to comment on the decision.

RSM was ordered to pay one-third of St Lucia’s legal fees in the annulment proceeding.

On 6 May, ICSID registered a rectification proceeding initiated by RSM in the dispute which GAR understands relates to a minor clerical issue in the award.

The oil company has previously brought ICSID claims against Grenada (twice), the Central African Republic and Cameroon.

RSM’s first claim against Grenada was denied in 2009 and annulment proceedings were discontinued two years later when it failed to pay the required advances. The company also lodged a US lawsuit worth more than US\$500 million in 2011 against Freshfields and its former partners Jan Paulsson and Brian King in connection with their representation of Grenada in the case; the suit was dismissed. RSM’s second ICSID claim against Grenada, also handled by Freshfields, was summarily dismissed.

The company won US\$27,000 in damages in an ICSID claim against the Central African Republic and failed to have the award annulled, leading it to sue ICSID and its secretary general Meg Kinnear in a US court in 2013. The suit was dropped later that year.

Its claim against Cameroon was discontinued in 2016.

RSM Production Corporation v Saint Lucia

In the annulment proceedings

Annulment committee

Donald McRae (New Zealand-Canada) (chair)

Andreas Bucher (Switzerland)

Alexis Mourre (France)

Counsel to RSM Petroleum

Mishcon de Reya

Partner Karel Daele and associates Deepa Somasunderam and Heidrun Walsh in London

Hall Estill

Shareholder AM ‘Kip’ Hunter III in Oklahoma

Counsel to St Lucia

Freshfields Bruckhaus Deringer

Partners Brian King\* and Elliot Friedman in New York

\*retired from the firm in January to practice independently as an arbitrator

Tribunal

Siegfried Elsing (Germany) (chair)

Edward Nottingham (US) (appointed by RSM Petroleum)

Gavan Griffith QC (Australia) (appointed by St Lucia)

Counsel to RSM Petroleum

The Law Office of Daniel L Abrams

Principal Daniel Abrams in New York

Mishcon de Reya

Partner Karel Daele and associate Heidrun Walsh in London

Counsel to St Lucia

Freshfields Bruckhaus Deringer

Partners Brian King\* and Elliot Friedman, senior associate Ben Love and associate Leslie Esbrook in New York

\*retired from the firm in January to practice independently as an arbitrator