Examining security for costs and disclosure of funding details (Eskosol SpA v Italian Republic)

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Arbitration analysis: George Spalton and Anthony Jones of 4 New Square examine the interlocutory decision on security for costs in the International Centre for Settlement of Investment Disputes (ICSID) case Eskosol SpA v Italian Republic and offer their assessment of the key issues that will prove relevant to arbitration lawyers.

Original news

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Who was on the arbitral panel? What is the date of the decision?

On 12 April 2017, Procedural Order No 3 was issued in the Energy Charter Treaty (ECT) dispute between the renewable energy company Eskosol SpA (now in liquidation and represented by its receiver) and Italy.

Italy had applied to the Tribunal (President Ms Jean Kalicki, together with Prof Guido Santiago Tawil and Prof Brigitte Stern) requesting orders on two provisional measures:

- security for costs against Eskosol, and
- disclosure of Eskosol's third party funding arrangements

What is the background to the arbitration?

The case arises following investment from 2009 onwards by Eskosol, and associated entities, in the development of solar photovoltaic energy plants in Italy and associated infrastructure. At that time, photovoltaic power generation in Italy was subject to a regulatory framework guaranteeing fixed payments by way of feed-in tariffs (FITs) for a period for 20 years for eligible plants. In early 2011, however, legislative and policy developments in Italy altered the scope of the FIT payment system, such that only projects entering into operation in the first half of 2011 would remain eligible for the existing payments, whereas projects coming online after that date would be subject to new and less generous conditions. Eskosol alleges that, following the developments in early 2011, investors withdrew support and the entire plan was rendered no longer feasible, giving rise to a breach of Italy's obligations under Articles 10 (equitable treatment) and 13 (expropriation) of the ECT.

What was the background to Italy's applications for security for costs and for disclosure of details of the claimant's funding arrangements?

In November 2016, Italy sought summary dismissal of the claim pursuant to Article 41(5) of the ICSID Arbitration Rules as 'manifestly without legal merit,' arguing that Eskosol (being now an entity in liquidation controlled by the Italian courts) did not qualify as a foreign investor entitled to bring proceedings under the ECT, and that the similar proceedings brought by Eskosol's major shareholder (a Belgian company called Blusun SA) in its own right prevented the current claim on lis pendens and/or res judicata grounds.

Given the fact of Eskosol's liquidation, Italy also, in January 2017, made an application under Article 39 of the ICSID Arbitration Rules for provisional measures aimed at ensuring that, should Italy's defence succeed, there would be sufficient protection to satisfy its costs. At the time of the application, Eskosol had not disclosed its funding position, and so Italy's application, as well as seeking security for costs of $250,000 (estimated to cover Italy's costs up to the conclusion of the summary dismissal proceedings), also sought disclosure of whether or not Eskosol had third party funding and, if so, whether the terms of such funding ensured that the funder was required to cover Italy's costs.

Before the hearing of the application Eskosol revealed that its claim was backed by a third-party funder, who had assisted Eskosol in obtaining an after the event (ATE) insurance policy to protect Eskosol from adverse costs liability to Italy up to €1m.

What did the tribunal decide about the security application?

Security for costs

With respect to the security for costs aspect, the tribunal considered that there were two questions:

- whether such an application could properly be said to preserve a 'right' held by Italy, such that there was jurisdiction to make an order for provisional measures under Article 39(1) of the ICSID Arbitration Rules and
- whether, even if the jurisdiction did exist, an order for security for costs was 'required' in the circumstances of the present case

Jurisdiction

On the jurisdictional point, the tribunal questioned Italy's assertion that its right to effective enforcement of any future costs order in its favour was potentially prejudiced unless security was provided. The tribunal drew a distinction between the right to claim payment of a favourable costs order (which is not itself prejudiced by the absence of assets), and the outcome desired upon exercise of that right (which might well be affected by the absence of assets on the part of the debtor) (para [33]). The tribunal classified potential frustration of the desired outcome of payment a circumstance of 'collection risk,' and noted that the ICSID Convention:

'…generally does not concern itself with collection risk, and, indeed, Article 54(3) makes explicit that "the [e]xecution of the award" is to be governed by national law, including…national law related to the immunity of State assets.' (para [34]).

In that context, the tribunal questioned whether it was appropriate for provisional measures to be ordered which appeared to be directed at collection and enforcement matters even though the tribunal would not have the competence after the proceedings to rule on the substance of those same matters.

This approach suggests that it will be very difficult to obtain an order for security for costs in this type of dispute, especially taking into account the tribunal's approach to the ATE policy, addressed in the following paragraph. That said, there is clearly scope to test the tribunal's approach in future claims, not least given that the focus on 'collection risk' is a somewhat novel application of a principle directed towards recovery of damages to the question of whether a defendant should be entitled to security for an adverse costs order.

'Requirement' for interim measure

Notwithstanding the tribunal's discussion of this interesting point, the tribunal did not ultimately feel the need to decide the issue. Instead, the tribunal considered that, even assuming that it had discretion to grant security for costs, it would not be appropriate to do so in the present case. The tribunal recalled that Article 39(1) of the ICSID Arbitration Rules deals with provisional measures which a party 'requires.' For a measure to be required, the tribunal observed, it needed to fulfil the three criteria of necessity, urgency, and proportionality. The tribunal noted that an ATE insurance policy had apparently been obtained which would cover costs up to €1m—well above the security level sought by Italy—and noting the potentially disproportionate cost burden on Eskosol if it were required to arrange additional insurance above that amount, the tribunal decided that security was not required.

What did the tribunal decide about the disclosure application?

As to the disclosure application, this was clearly a moot point by the time of the hearing as the fact of third party funding involvement had been revealed. But Italy had also sought information as to whether the third party funder would be 'financially sound as well as committed to execute a cost award…against Eskosol.' On this point the tribunal was also against Italy and found that, given the ATE policy, there was no need to compel Eskosol to provide further disclosure.

Interviewed by Julian Sayarer.