



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: RSM Production Corporation v. Santa Lucia (ICSID Case No. ARB/12/10) – Decision on Annulment – 29 April 2019

Case Report by: Bettina Gomes Omizzolo**, Editor: Ignacio Torterola***

Summary: Claimant brought an action for relief against Saint Lucia pursuant to the implementation of an agreement granting Claimant an exclusive oil exploration license. Regarding a Request for Provisional Measures, the Arbitral Tribunal ordered Claimant to pay all costs advances and to post security for costs, which were not complied with. The Tribunal then vacated the procedural directions granting Claimant a deadline to provide security for costs. The vacatur period expired and Claimant still did not comply with the Tribunal's order. In its final award, the Tribunal dismissed all Claimant's prayers for relief, ordering it to bear all Costs of the Proceedings and to reimburse Respondent's legal costs. Claimant filed an Application for Annulment stating that the Tribunal was improperly constituted due to a challenged arbitrator who was not removed from the Tribunal and that the Tribunal had allegedly exceeded its powers. The *ad hoc* Committee partially annulled the Tribunal's award to the extent that the latter concluded that Claimant's prayers for relief were to be dismissed "with prejudice". Further, the *ad hoc* Committee decided that the *ad hoc* Committee Members' fees and expenses, the ICSID administrative fees and other direct expenses must be borne on the basis of one-third by Saint Lucia and two-thirds by Claimant.

Main Issues: *Ad hoc* committee's competence to annul a disqualification decision; Arbitral Tribunal's powers on provisional measures and security for costs.

Ad hoc Committee: Professor Donald M. McRae (President), Professor Andreas Bucher (*Ad Hoc* Committee Member) and Mr. Alexis Mourre (*Ad Hoc* Committee Member)

Claimant's Counsel: Mr. Jack J. Grynberg, Mr. Roger Jatko; Mr. Karel Daele, Ms. Deepa Somasunderam, Ms. Heidrun Walsh; and Mr. A.M. Kip Hunter

Respondent's Counsel: Mr. Stephen C. J. Julien (Attorney General for the Government of Saint Lucia); Mr. D. Brian King and Mr. Elliot Friedman (Freshfields Bruckhaus Deringer US LLP)

* Directors can be reached by email at ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com

** Bettina Gomes Omizzolo is an attorney qualified in Brazil. She holds an LLB degree from the Federal University of Santa Catarina, Florianópolis, Brazil and is a Master of Private International Law Candidate also at

the Federal University of Santa Catarina. IACL's case reports do not offer personal views but strictly reflect the content of the decision. However, in case of doubts, the views set forth herein are the personal views of the author and do not reflect those of ACICA or the IBA. Ms Omizzolo can be contacted bgomizzolo@gmail.com

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL) and a partner in the International Arbitration and Litigation Practice at GST LLP.

Digest:

1. Relevant Facts

RSM Production Corporation ("RSM", "Claimant" or the "Applicant") is a company organized and licensed in Texas, United States of America. Respondent is Saint Lucia ("St. Lucia" or the "Respondent") (¶¶ 2-3). The underlying annulment proceeding relates to the Award issued by the Arbitral Tribunal in the arbitration proceedings that dismissed RSM's case with prejudice as well as the disqualification decision issued by the majority of the Tribunal with respect of Dr. Gavan Griffith, arbitrator.

On 30 March 2012 Claimant submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") a request for arbitration against St. Lucia concerning the implementation of an agreement between the Parties that granted RSM an exclusive oil exploration license in an area off the coast of St. Lucia. Due to a boundary dispute involving Martinique, Barbados and St. Vincent affecting the exploration area, Claimant was allegedly prevented from initiating exploration. Respondent argued that the Agreement had expired or at least was not enforceable due to *force majeure* (¶¶ 5-6). The Arbitral Tribunal was composed of Prof. Siegfried H. Elsing, Judge Edward Nottingham and Dr. Gavan Griffith Q.C. (¶8).

In the course of the arbitration proceedings, upon Respondent's Request for Provisional Measures, the Tribunal ordered RSM to pay all costs advances pursuant to ICSID Administrative and Financial Regulation 14(3)(d) and Arbitration Rule 28(1)(a) (¶10). Further on in the proceedings, following Respondent's request, the Tribunal issued its Security for Costs Decision ordering RSM to post security for costs in the form of an irrevocable bank guarantee for USD 750,000 within 30 days of the decision, followed by assenting reasons by Dr. Griffith and a dissenting opinion by Judge Nottingham (¶13). On 10 September 2014, RSM submitted a proposal for the disqualification of Dr. Gavan Griffith alleging his bias in favor of Respondent and against third-party funded claimants such as RSM (¶82) which was declined in the remaining arbitrators' decision (¶14).

Claimant then informed the Tribunal that it would be unable to post security for costs or placing that amount in escrow, leading Respondent to file a request for the discontinuation of proceedings (¶¶15-16). The Tribunal issued a decision on St. Lucia's request (the "Vacatur Decision") vacating the procedural directions unless Claimant provided security for costs as previously determined within six months as of the date of the decision [i.e., by October 8, 2015] (¶18). Because the vacatur period expired and RSM did not provide security for costs, after Parties' manifestations, the Tribunal rendered its final Award, along with an assenting opinion of Dr. Griffith dismissing all Claimant's prayers for relief, ordering Claimant to bear all Costs of the Proceedings and to reimburse Respondent's legal costs (¶25). On 12 November 2016 RSM filed an Application for Annulment (the "Application") at ICSID (¶26).

2. Procedural History

RMS's Application was registered by ICSID Secretary General on 21 November 2016. On 19 December 2016 the Parties were informed of the Centre's recommendation on the composition of the *ad hoc* Committee (the "Committee") of Prof. Andreas Bucher, Prof. Donald McRae and Mr. Alexis Mourre (¶28), which was then constituted on 4 January 2017 (¶31). Upon the Applicant's request and Respondent's acceptance, the Committee granted a delay of one month to the first session (¶¶32-40), which was then held on 16 May 2017 by teleconference (¶41). Applicant filed its Memorial on Annulment with accompanying documentation on 8 September 2017. On 13 December 2017 Respondent requested to submit new factual exhibits into the record (¶44), which were admitted by the Committee on 20 December 2017 (¶48). Respondent then filed its Counter-Memorial (¶49).

A pre-hearing conference was held by the Committee with the Parties on 24 October 2018, in which it was decided, *inter alia*, that the hearing would be limited to one day. On 15 November 2018 the hearing on Annulment was held in Washington, D.C. (the "Hearing") (¶¶52-53). As no detailed costs submissions were then required by the Committee, the Parties filed their submissions on costs on 22 March 2019 and St. Lucia submitted a reply on 5 April 2019. RSM did not file a reply submission (¶54).

3. Positions of the Parties

3.1 Claimant's Position

Claimant requested the annulment of the Award under Article 52(1) of ICSID Convention by the *ad hoc* Committee sustaining that it is entitled to do so due to the Committee's role, to the nature of annulment, and to the applicable threshold. Claimant also denied that the arguments brought in the annulment proceeding had not been submitted in the arbitration proceeding. As to the annulment grounds, Claimant contended that the Tribunal was improperly constituted because Dr. Griffith despite being challenged was not removed from the Tribunal, disregarding a fundamental rule of procedure due to the alleged lack of impartiality of Dr. Griffith. Claimant also contended that the Tribunal had exceeded its powers by ordering a provisional measure, requiring security for costs, suspending the arbitration and finally, by dismissing Claimant's claims with prejudice (¶¶55-56).

3.1.1 Claimant is entitled to seek for annulment due to the role of the ad hoc Committee, the nature of annulment and the applicable threshold

Despite recognizing that annulment proceedings are destined to reviewing the integrity of an arbitration, Claimant argued that the Committee could also annul the Award due to manifest excess of powers by the Tribunal and failure to apply the law (¶58). Claimant argued that there is no presumption either in favor or against annulment, granting *ad hoc* committees such competence depending on the relevant circumstances (¶¶59-60). RSM further rejects Respondent's view that the threshold for annulling an award would be "exceptionally high". Claimant relied on *EDF v. Argentina* to sustain that Dr. Griffith's participation in the Tribunal while lacking impartiality had a material effect on the Tribunal's decision enough to justify the annulment under Articles 52(1)(a) and 52(1)(d). Claimant also contended that by ordering RSM to secure costs, vacating the hearing, and finally dismissing the claims with prejudice the Tribunal exceeded its powers, disregarding the Parties' agreement and rights under the ICSID Convention (¶¶61-62).

3.1.2 Claimant had properly addressed all arguments for annulment in the arbitration proceedings

Concerning Respondent's allegations, Claimant sustained that its arguments for the annulment were properly raised during the arbitration proceedings. RSM argued that Dr. Griffith's bias under Article 52(1)(a) and (d) was raised in the context of the challenge proceedings and that it had contested the Tribunal's power or authority to order security for costs under Article 52(1)(b) in three opportunities (¶¶ 63-65), as well as the Tribunal's power or authority to impose sanctions for non-compliance with the Security for Costs Decision (¶ 67).

3.1.3 Possibility of annulment of the Award under Article 52(1)(a)(d) and the drafting history of the ICSID Convention due to arbitrator's lack of impartiality under the reasonable doubt test

Claimant submitted that Dr. Griffith does not comply with Article 14(1) of the ICSID Convention due to his alleged lack of impartiality justifying the annulment of the Award under Article 52(1)(a) and (d) (¶¶73-75). RSM contends that according to the drafting history and language of Article 52(1)(a) the drafters had no intention of limiting the role of *ad hoc* committees, as rules against reviewing the constitution of the Tribunal at the arbitration or the annulment stages do not exist (¶79). RSM also contends that Dr. Griffith lacks impartiality under the reasonable doubt test (¶72) as a reasonable third party would consider the existence of reasonable grounds for doubting of Dr. Griffith's impartiality under Article 14(1) of the ICSID Convention (¶81).

3.1.4 Grounds for lack of impartiality in Dr. Griffith's Assenting Opinions

RSM argues that Dr. Griffith's lack of impartiality and bias in favor of Respondent and against third-party funded claimants such as RSM were manifested in his First Assenting Opinion supporting the Tribunal's Security for Costs Decision as he referred to third- party funders as "mercantile adventurers". The absence of comments after RSM filed the challenge and his Second Assenting Opinion, in which he "backtracked" from the First Assenting Opinion, would have allegedly reinforced the lack of impartiality (¶¶82-84).

3.1.5 The Tribunal exceed its powers by ordering a binding provisional measure

Claimant contents that the arbitration agreement between the Parties did not grant the Tribunal the power to order binding provisional measures and that by doing so the Tribunal failed to apply the law, specifically Articles 26 and 47 of the ICSID Convention (¶¶89-91). RSM argues that from a contextual perspective the term "recommendation" in the ICSID Convention and Arbitration Rules cannot be understood as an 'order' (¶¶94-95).

3.1.6 The Tribunal exceed its powers by requiring security for costs

By ordering Claimant to post security for costs in order to preserve St. Lucia's right to seek reimbursement in case of a favorable award, RSM contends that the Tribunal exceed its powers intending to preserve a non-existent right, as the right to costs only arises at the end of the proceeding with the final award (¶¶99-100). Referring once more to the negotiating history of the ICSID Convention RSM argues that it was concluded that the power to post security for costs relies on prior consent of the parties, while the ICSID Administrative and Financial

Regulations provides mechanisms only for the direct costs of the proceedings, excluding the parties' potential fees and expenses (¶¶102-103).

3.1.7 The Tribunal exceed its powers by suspending the arbitration and dismissing RSM's claims

RSM argues that by imposing a sanction for the non-compliance to post security for costs and by the dismissal of Claimant's claims with prejudice the Tribunal exceeded its powers under Article 44, second sentence, of the ICSID Convention (¶105). Claimant alleges that such Article only empowers tribunals to decide questions of procedure and not on the suspension of the arbitration (¶111), as the drafters of the Convention and the Contracting States only agreed on empowering tribunals to 'recommend' provisional measures by wording of Article 44 (¶108).

3.2 Respondent's position

Respondent rejects the Applicant's claims for annulment in its entirety by addressing the nature of the procedure and the threshold for annulment; the application of the standards set out in Article 52(1)(a) and (d); the alleged grounds for Dr. Griffith's lack of impartiality; and that the Tribunal did not exceed its powers, requiring RSM to bear all costs and expenses of the Annulment proceeding, including Respondent's legal fees and expenses.

3.2.1 Claimant's claims are against the nature of annulment proceedings and do not satisfy the burden of proof

Santa Lucia argues that an annulment proceeding is not an appeal, it is an exceptional remedy whose threshold is extremely high (¶116) and limited to reviewing arguments and evidence already put before the tribunal in the arbitration (¶117).

3.2.2 Claimant does not meet the standards for annulment under Article 52(1)(a) and (d)

Respondent argues that Article 52(1)(a) and (d) as raised by Claimant in its arguments do not relate to challenge procedures, but only to the constitution of the tribunal and therefore, not to a challenge decision (¶119). Santa Lucia asserts that a committee does not assess different issues in a disqualification decision from those already examined by the tribunal, including whether Dr. Griffith's complied to the qualities required by Article 14(1) (¶123).

3.2.3 Dr. Griffith has not given reasons for lack of impartiality

Contrary to RSM's claims, Santa Lucia asserts that Dr. Griffith's dissenting opinion cannot provide grounds for his disqualification as he expressed no view as to whether RSM's claims were meritorious or not, nor had he adopted any "radical" position (¶126), leading the Tribunal to reasonably conclude that there were no reasons for disqualification (¶127).

3.2.4 Nonexistent grounds for annulment under Article 52(1)(b)

Contrary to RSM's allegations, Respondent contends that under the provision of Article 52(1)(b) an excess of powers must be manifest on the face of the award (¶130) and an erroneous interpretation or application of the law does not constitute basis for annulment (¶132). Santa Lucia asserts that the Tribunal did not go beyond the Parties' agreement in any event (¶138).

3.2.5 Tribunal's authority to order security for costs under Article 47

Santa Lucia argues that tribunals are empowered to order security for costs in ICSID arbitration proceedings (¶¶139-141) and that the negotiating history of the ICSID Convention does not evidence any intent in prohibiting such kind of order (¶142). Even if the Tribunal lacked such competence under Article 47, Respondent contains that Article 44 also empowers the Tribunal to order security for costs (¶144).

3.2.6 Dismissal of RSM's claim with prejudice did not constitute an excess of powers by the Tribunal

Respondent asserts that RSM did not present a cognizable annulment claim in the sense of Article 52(1)(b) (¶145) as the Tribunal merely identified a gap concerning a question of procedure by dismissing Claimant's claims with prejudice. Santa Lucia also states that the dismissal necessarily had to be with prejudice otherwise RSM could simply refile its case (¶146). Furthermore, Respondent sustains that the Tribunal was also entitled to dismiss RSM's claims on the grounds of Articles 41 and 44, regarding its duty to protect the integrity of the proceeding and to prevent abuse of right (¶148).

4. Ad hoc Committee's analysis

4.1 The nature of annulment proceedings

Regarding the threshold for annulment and the Committee's competence to annul the award, the Committee concluded that the criteria for annulment set out in Article 52 of the ICSID Convention are to be interpreted in good faith and in accordance with their ordinary meaning, in their context and in light of the object and purpose of the treaty as a whole, as provided by Article 31 of the Vienna Convention on the Law of Treaties. Despite providing limited grounds for annulment, Article 52 poses no limitation on the way the provisions are to be interpreted and applied by the Committee (¶151).

Regarding whether or not the Committee is to take into account arguments that were not raised in the arbitration proceedings, it was considered that arguments not presented to the Tribunal are not to be introduced in the annulment process and that an *ad hoc* annulment committee cannot base its decision on new facts or new arguments presented at the annulment stage (¶152). Therefore, the Committee concluded that there was nothing for it to decide on this matter.

4.2 Whether Dr. Griffith should be disqualified

Before addressing this matter, the Committee made two preliminary observations: (a) under the ICSID Convention only awards of a tribunal can be annulled, while the decision on a challenge to an arbitrator is a decision taken only by the unchallenged members of a tribunal. Thus, the Committee has no power of annulment with respect to a challenge decision but such decision shall be taken into account when the Committee decides on the proper constitution of the tribunal according to the terms of Article 52(1)(a) of the Convention (¶159); (b) the Committee understood that it was unnecessary to express its own opinion about the precedents *Azurix v. Argentina* and *EDF v. Argentina* because Claimant did not address these cases in its arguments (¶160).

Regarding the arguments raised by Claimant in relation to the challenge of the arbitrator and the constitution of the arbitral tribunal the Committee understood that Dr. Griffith's opinion does not lack impartiality and that his inclusion in the Tribunal did not lead to its improper constitution (¶162-164). The Committee acknowledged that Dr. Griffith used evocative language in the wording of his First Opinion and that such language simply emphasizes a point rather than evidencing bias (¶165). Regarding RSM's allegation of bias because Dr. Griffith did not submit any comments in the challenge stage but only in his Second Assenting Opinion, the Committee concluded that that does not amount to impartiality as it merely provides clarification of what was said in the First Assenting Opinion, and it neither adds to nor subtracts from the conclusion that he did not lack impartiality (¶166). The Committee concluded that Dr. Griffith does not lack the necessary impartiality required by Article 14(1) of the ICSID Convention (¶167) and that the Tribunal was not improperly constituted within the meaning of Article 52(1)(a) (¶169).

4.3 Whether the Arbitral Tribunal exceeds its powers by ordering a provisional measure and security for costs

The Committee understood that despite the Parties' divergence on the wording of Article 47 of the Convention the issue is whether there can be any consequences for non-compliance with a recommendation for provisional measures under Article 47, whether it is expressed in terms of a recommendation or an order (¶174). Using the word "order" rather than "recommend" cannot itself constitute an excess of powers (¶176). As for the Tribunal's decision to order RSM to post security for costs the Committee understood that Article 47 imposes no limitation on the nature of the rights to be preserved, whether they are conditional or not. Moreover security for costs is often ordered as a provisional measure by other tribunals and thus cannot be considered a "manifest" excess of powers (¶179). In the present case, the Tribunal recognized security for costs to be an exceptionally required measure due to the apprehension that Claimant would not pay any costs ordered based on the experience with RSM in other cases and the circumstance of an undisclosed third-party funder whose willingness to pay any costs award could not be ascertained (¶180). As the Committee did not detect any excess of powers by the Tribunal in these regards, RSM's claim for annulment under Article 52(1)(b) of the Convention was rejected (¶¶181-182).

4.4 Whether the Arbitral Tribunal exceed its powers by suspending and discontinuing the arbitration

The Committee observed that in its Vacatur Decision the Tribunal had noted that the question of sanctions for non-compliance with an order for provisional measures was not dealt with expressly in the ICSID Convention or its Rules and that it decided, based on Article 44, second sentence, of the ICSID Convention, it was unfair for Respondent to continue participating in proceedings where there was a real likelihood that it would be unable to recover any costs awarded to it (¶186). Consequently, the Committee concluded that such reliance on Article 44, second sentence, as the basis for the suspension of the proceedings did not constitute a manifest excess of powers (¶187).

Regarding the issue whether or not a party must face consequences for the non-compliance with a provisional measure even though the Convention is silent on this matter, the Committee stated that it is up to the Tribunal to determine its own competence, in accordance with Article 41, and decide any question of procedure not yet regulated by the Convention that may arise, in accordance with Article 44 (¶188). Considering RSM's absence of compliance with the order

for posting security for costs, the Committee considered the suspension of the proceedings to be a logical consequence imposed by the Tribunal within its powers (¶190). In this sense, the Committee stated that in the event of failure to provide security for costs the Tribunal was left with no alternative but to terminate the proceedings (¶190) and avoiding that Parties remain in a limbo without any prospect of the suspension ever being lifted (¶191). The Committee decided that the discontinuance of proceedings was a direct result of RSM's failure to provide security for costs rather than an excess of powers by the Tribunal (¶192).

4.5 The dismissal of RSM's claims with prejudice

The Committee noted that the Tribunal's final award contained different references to "dismissing the proceedings with prejudice" and simply "dismissing the proceedings", making it unclear whether or not the case was dismissed with prejudice (¶194). Because both Parties have treated the Final Award as a dismissal with prejudice, the Committee also treated it as such (¶195).

In the view of the Committee, a decision dismissing claims with prejudice prevents such claims from being reintroduced at a later stage, despite no decision on the substance of the issues claimed has been rendered (¶196). The dismissal with prejudice is not just a procedural matter, it affects the merits of the case and ceases the party's right to ever pursue its claims in the future, creating a risk of denial of justice. In this sense, the Committee understood there is no basis in the ICSID Convention, nor in the ICSID Arbitration Rules for a tribunal to dismiss the case with prejudice without having heard arguments on the merits (¶198).

The Committee concluded that while the Tribunal was not manifestly exceeding its powers by discontinuing the proceedings, it was manifestly exceeding its powers by dismissing RSM's claims "with prejudice". Consequently, the Committee ordered that the Award to be partially annulled to preserve the discontinuation of proceedings dealing with RSM's prayers for relief but to abrogate the stipulation that such decision entails the dismissal of RSM's claims "with prejudice" (¶200).

5. Costs

As Claimant was partially successful in its application for annulment, despite not succeeding in its major claim to annul the Award, the Tribunal considered that the costs of the annulment proceeding, including the fees and expenses of the *ad hoc* Committee, and ICSID's administrative fees and direct expenses, should be borne more substantially by Claimant, on the basis of two-thirds to be paid by RSM and one-third by St. Lucia. In this sense, the Tribunal also ordered RSM to bear its own legal costs and expenses plus one-third of the legal costs and expenses of St. Lucia (¶¶213-214).