

Security for Costs in Arbitration

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Whatever their designation, such measures involve awards or orders issued for the purpose of preserving the status quo and safeguarding a party from damage during the course of the arbitral process, pending the outcome of the arbitration. Provisional measures are generally available from either the national court or an arbitral tribunal. However, the type of interim relief that a tribunal may grant in arbitration has generated considerable debate for some time now, particularly when it comes to the arbitral tribunal's power, or lack thereof, to order security for costs.

Generally, an order for security for costs is an order by a tribunal that orders a party bringing a claim or a counterclaim to provide security for the costs of the other party in case the claim or counterclaim fails and the claiming party does not pay the costs awarded against it. It does not extend to security for any award for damages. In practice, this is provided by way of bank guarantee or payment into an escrow account. Hence, when granted, security for costs allows for predictability regarding the recoverability of the respondent's costs in arbitration. After all, a respondent has not chosen to go to arbitration, and yet may find itself having to incur substantial legal fees defending a bad claim, only to find that the claimant then refuses to pay its costs or is unable to do so.

The arbitral tribunal's power to grant interim measures stems from two sources: the national law of the state in which the arbitration is seated, and (to the extent that law allows) the agreement of the parties (as contained either in the arbitration agreement or the set of arbitral rules that the parties agree to follow).

National Legislation

An arbitration tribunal should not grant provisional relief unless satisfied that the applicable arbitration law at the seat of arbitration confers the power on the tribunal to do so. Equally, interim relief ordered by a tribunal will likely not be enforceable in a national court unless the laws governing the arbitration allow such relief. In recent years, we have witnessed a general trend whereby most of the common law based national laws and the rules of most arbitral institutions based in common law jurisdictions expressly provide that arbitrators may order security for costs. In contrast, most of the civil law based national laws and the rules of most arbitral institutions of those jurisdictions do not confer express powers on the arbitrators to order security for costs. The national laws of most civil law jurisdictions do however include broad powers to order 'any interim measure that they deem necessary'. This general power is considered to be wide enough to include the power to order a party to provide security for costs. Therefore, while in practice it is only ordered in very particular circumstances and the threshold is somewhat high, provided that it is consistent with the parties' arbitration agreement security for costs is generally available in international arbitration.

For example, in line with this trend the revised 2006 UNCITRAL Model Law on International Commercial Arbitration provides at Article 17 that "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures". It follows that an arbitral tribunal has the power to grant interim relief in an arbitration seated in a jurisdiction that has adopted the Model Law. That said, whilst many national laws grant certain powers to the tribunal to order interim relief, there is still a general lack of express provisions empowering the tribunal to specifically order security for costs.

Common Law Approach

England's 1996 Arbitration Act and Singapore's 2012 International Arbitration Act are two examples of national laws which expressly authorize an arbitral tribunal to make an order for security for costs. Article 38(3) of England's Arbitration Act provides that:

"The tribunal may order a claimant to provide security for the costs of the arbitration.

This power shall not be exercised on the ground that the claimant is:

- an individual ordinarily resident outside the United Kingdom, or
- a corporation or association incorporated or formed under the law of a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom."

To the same end, the Singapore International Arbitration Act grants the tribunal the power to order security for costs (Article 12(1) (a)). The reason these laws specifically state that the fact the claimant is based abroad is not a grounds for ordering security for costs is because it is the very nature of international arbitration that parties typically will be from different jurisdictions, and parties will not want to arbitrate in a jurisdiction where security for costs order can be made on the mere fact that the claimant is from a different jurisdiction than that of the respondent. It is assumed that the respondent would know the nationality and place of residence of the claimant before entering into business and therefore can fairly be deemed to have assumed the risk of dealing with the claimant.

Moreover, many of the enforcement risks that might apply in respect of a costs award against a foreign claimant are reduced in the context of international arbitration by the application of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. Signatories to the New York Convention, which include (for example) Kuwait, Qatar, Bahrain, UAE, Singapore and England, provide an established legal mechanism for enforcement of the award that is available to the respondent if need be.

Civil Law Approach

Civil law jurisdictions such as Switzerland, France, Bahrain, and Qatar, permit tribunals to order interim measures but with no specific mention of the tribunal's power to make an order for security for costs. In the French Code of Civil Procedure, for example, both the tribunal and national courts have the requisite jurisdiction to order interim measures. Similarly, in the Middle East, Article 9 of Qatar's new Arbitration Law (Law No. 2 of 2017) states that the national courts have jurisdiction to order interim measures and Article 17 of the same law provides that:

"Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures or issue preliminary orders as entailed by the nature of the dispute or for prevention of reparable harm, including to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral tribunal itself;
- Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- Preserve evidence that may be relevant and material to the resolution of the dispute."

Whilst the aforementioned justifications do not expressly provide for security for costs, they do confer power on the tribunal to order interim measure it deems necessary, which in theory should include security for costs.

Arbitration Rules

Likewise, most major institutional rules nowadays address the tribunal's power to grant interim measures. For example, Article 26 of the 2010 UNCITRAL Rules does not explicitly refer to security for costs but provides that the tribunal may grant

“any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to:

- Maintain or restore the status quo pending determination of the dispute;
- Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral tribunal itself;
- Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- Preserve evidence that may be relevant and material to the resolution of the dispute.”

Article 28 of the 2017 ICC Rules authorizes a tribunal to order “any interim or conservatory measure it deems appropriate,” subject to contrary agreement by the parties. Along the same line, Article 30 of the DIAC Rules authorizes the tribunal to order various provisional measures as it deems necessary including “injunctions and measures for the conservation of goods”. Some institutional rules do directly refer to security for costs. Article 25 of both the LCIA Rules and the DIFC-LCIA Rules confers on the tribunal the power to order various interim measures, including security for all or part of the amount in dispute including a party’s claim to recover its legal and arbitration costs.

Test for Granting Security for Costs

As can be seen from the above, often the tribunal will have the power to order security for costs. However there is no detailed guidance in either the law or the arbitral rules as to when such orders should be made. Ordering the claimant to provide security for costs is a serious measure as it may prevent a claimant from being able to pursue a legitimate claim.

The Chartered Institute of Arbitrators (based in London) has issued practice guidelines on security for costs applications (updated in 2016), and recommends that when an arbitral tribunal decides whether to make an order for security for costs, they should consider the following points:

- the prospects of success of the claim and defence. If the defence is clearly hopeless, then there is little prospect of a costs order being given in the respondent’s favour. However tribunals are usually careful not to pre-judge the merits on the limited information they usually have at time a security for costs application is made, and will usually assume that the defence has some merit.
- the claimant’s ability to satisfy an adverse costs award and the availability of the claimant’s assets for an enforcement of an adverse award. This is often the real test, as if the claimant has money and enforcement will be relatively straightforward in the event the claimant does not pay an adverse costs order, then there is little need for security for costs to be granted.
- whether it is fair in all the circumstances to require one party to provide security for the other party’s costs. So, for example, there could be a situation where although the respondent will likely struggle to enforce a costs order made in its favour, it would be unfair to order security for costs because the claimant’s inability to pay is a result of the respondent’s conduct and it would prevent a seemingly legitimate claim progressing.

This list is not intended to be exhaustive and the guidance is only advisory, but in our experience tribunals follow similar tests. Arbitrators should exercise their discretion and consider any other additional circumstances surrounding the arbitration. A balance must be struck between the rights of a party to pursue its claim against the right of an opposing party to recover the costs of a defence in the event it defeats the claim.

Conclusion

A security for costs order can provide important protection for a respondent against the costs of an action where there is sufficient evidence that the claimant may not be able to pay costs. It is also a useful tool to put pressure on a claimant, or counterclaimant, to settle the proceedings. Care must be taken before making such an order though as to avoid unfairly blocking genuine claims made by impecunious parties from moving forward. As demonstrated above, while the majority of national laws and institutional rules

empower a tribunal to order interim measures, security for costs is rarely mentioned explicitly. Respondents should however keep the option in mind.