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Who Pays? Security for costs in international Commercial arbitration

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Abstract

An order for security for costs serves as a procedural safeguard, ensuring that a claimant can cover the respondent's legal costs should the claim be unsuccessful. While well-established in litigation, its adoption in international arbitration has been more gradual. Nonetheless, in recent years, there has been an increase in security for costs orders, ac-companied by growing attention to the issue, largely driven by the rise of third-party fund-ing. Arbitral tribunals continue to grapple with the challenge of balancing respondents' right to recover costs with claimants 'right to access justice–an issue further complicated by the absence of uniform standards to guide its application.

Security for Costs as an Interim Measure in Arbitration

The rationale behind security for costs seems straightforward: the claimant initiates the pro-ceedings, while the respondent has no choice but to mount a defense. Security for costs, therefore, serves to minimize the risk of the claimant defaulting on any award made against it, ensuring that the respondent can recover its costs.[1]

Security for costs is limited to legal fees and expenses incurred in defending the relevant claims in the proceedings and does not cover potential damages award. Essentially, it acts as a financial precondition that the claimant must fulfill in order to proceed with the claim. While primarily a tool for respondents, claimants may also seek it against counterclaims in specific circumstances.

Arbitrators have broad discretion in determining both the amount and the form of security to be ordered, which can include various forms such as bank guarantees, escrow pay-ments, or other similar assurances.[2]

Challenges in the Adoption of Security for Costs in Arbitration

Three reasons have been linked to the slower adoption of security for costs in arbitration. First, the inherently contractual nature of arbitration means that parties that engage with entities such as shell companies or SPVs effectively accept the risk that they may be unable to cover costs or comply with an adverse award. Second, the strong influence of civil law traditions has contributed to hesitancy, as many civil law practitioners are less familiar with security for costs compared to those in common law jurisdictions. Third, enforcement chal-lenges have made tribunals reluctant to grant such orders, as they lack effective mecha-nisms to ensure compliance–thereby reducing the practical value of this measure.[3]

The Exceptional and Provisional Nature of Security for Costs

Security for costs is an exceptional measure and, as such, differs from the regular payment mechanisms established by international arbitration practice. The first of these is the regis-tration fee, which is final, non-reimbursable, and intended to cover the initial costs of the arbitration proceedings. The second is the advance on costs, a

provisional payment in-tended to cover future costs, such as the fees and expenses of the arbitrators and adminis-trative charges, to be paid at the conclusion of the proceedings.

While security and advance on costs share certain similarities–both being provisional pay-ments subject to cost allocation in the ultimate award–their underlying purpose differs. Ad-vance on costs covers the arbitrators' fees and administrative costs and is paid in advance by both parties. In contrast, security for costs safeguards the respondent's ability to recover its own legal costs should it prevail. This includes the respondent's share of the advance, as well as its legal costs.

The fate of security for costs ultimately depends on the tribunal's final allocation of costs in the award. If the tribunal orders the claimant to bear the respondent's costs, the security is released in the respondent's favor; otherwise, it is returned to the claimant.[4]

Arbitral Tribunal's Authority to Issue Security for Costs Orders

The authority of an arbitral tribunal to grant interim measures, including security for costs, derives from two sources: the national law of the arbitration's seat and the parties' agree-ment as specified in either the arbitration agreement or the set of arbitral rules they have chosen to follow.

National Legislation

An arbitral tribunal may only issue security for costs if the applicable law at the arbitration's seat grants it the authority to do so. This

authority also extends to the enforcement of such orders. While most common law jurisdictions and arbitral institutions expressly permit tribu-nals to order security for costs, civil law jurisdictions tend to be more restrictive. Although they generally allow broad interim measures, they do not explicitly refer to security for costs as a distinct category.

As an example of the common law approach, both the United Kingdom and Singapore explicitly empower arbitral tribunals to order security for costs. Additionally, these laws em-phasize that a claimant's foreign nationality alone is not a valid basis for ordering security for costs. In international arbitration, where parties typically come from different jurisdictions, it is assumed that the respondent is aware of the claimant's nationality and residence before engaging in business, and thus reasonably accepts the risk of dealing with the claimant. On the other hand, jurisdictions like Switzerland, France, and Qatar allow tribunals to order inter-im measures, but do not specifically grant tribunals the power to order security for costs.[5]

Arbitration rules

Most leading arbitral institutions' rules address the tribunal's power to grant interim measures, although their approaches vary.

1. The UNCITRAL Arbitration Rules ("UNCITRAL Rules"): Under Article 26 of the 2010 UNCITRAL Rules, a party applying for security for costs must demonstrate a reason-able likelihood of success on the merits of the claim and show that without security, it will suffer irreparable harm which "substantially outweighs the harm that is likely to result to the party against whom the measure is directed".

2. The Rules of the International Chamber of Commerce ("ICC Rules"): Article 28 of the 2021 ICC Rules empowers a tribunal to order any interim or conservatory measure it deems appropriate, unless the parties have agreed otherwise.

3. The Rules of London Court of International Arbitration ("LCIA Rules"): Article 25 of the 2020 LCIA Arbitration Rules grants the tribunal the authority to order a party to pro-vide security for legal costs and arbitration costs.

4. The Dubai International Arbitration Centre Rules ("DIAC Rules"): Article 1 of the Ap-pendix II to the 2022 DIAC Arbitration Rules grants the tribunal the discretion to order interim measures that it considers appropriate.

5. The Hong Kong International Arbitration Centre Administered Arbitration Rules ("HKIAC Rules"): Article 24 of the 2024 HKIAC Rules provides that the arbitral tribunal may make an order requiring a party to provide security for the costs of the arbitra-tion.

6. Arbitration Rules of the Singapore Arbitration Centre ("SIAC Rules"): Under Rule 48.1 of the 2025 SIAC Rules, a party may apply for a security for costs order to secure le-gal costs, expenses, and arbitration costs.

7. Despite these provisions, neither national laws nor institutional rules provide comprehensive guidance for determining when security for costs should be granted, leaving tribunals with broad discretion in their assessment.[6]

Guidelines on Security for Costs Application

In the absence of definitive statutory or institutional guidance, arbitral tribunals can rely on established arbitral practice, as also outlined in the Practice guidelines on security for costs applications issued by the Chartered Institute of Arbitrators. The key factors typically con-sidered include:

1. **The prospects of success of the claim and defence (Fumus boni iuris):** Although *fu-mus boni iuris* translates to the likelihood of success on the merits of the case, in the context of security for costs, arbitrators must take care not to prejudge the case's merits when assessing the application. Instead, they should conduct a preliminary assessment to determine whether there is a prima facie claim and defense made in good faith. If, based on the available information, their initial view is that the claim has a reasonably strong prospects of success, they may consider this as a factor weighing against ordering security for costs.

2. **Risk of non-recovery (Periculum in mora):** The tribunal should examine the claimant's financial condition and asset availability to determine whether there is a genuine risk that the applicant will not recover its legal costs. This includes assessing whether the claimant may be unable to satisfy a costs award due to lack of sufficient funds or whether its assets may not be readily accessible for effective enforcement. While no universal test exists, a strong likelihood of non-payment may arise in situations such as:
   - The counterparty has a history of not honoring unfavorable decisions, particu-larly costs awards.

- The counterparty's financial situation suggests they may be unable to pay a negative cost award.
- A funding agreement is in place that does not obligate the funder to cover a negative cost award.
- The counterparty has refused to make any advance payment toward arbi-tration costs.
- The counterparty is attempting to hide or protect its assets.
- The counterparty initiated the arbitration in bad faith, intending to frustrate a potential cost award.

3. **Good faith (Bona Fides):** The tribunal must assess whether it is fair to require one par-ty to provide security for the other's costs. The application for security for costs must be made in good faith, which involves the following considerations. First, the appli-cant must not have been aware of the other party's financial difficulties or other rel-evant issues when the contract or arbitration agreement was signed. Second, the applicant cannot be responsible for the other party's inability to pay, nor can it have engaged in bad faith behavior.

These considerations are neither exhaustive nor binding, as the tribunal retains the com-plete discretion in deciding whether an order for security for costs is appropriate.[7]

Third-Party Funding and Security for Costs

The rise of third-party funding in arbitration has undoubtedly sparked many debates, includ-ing those related to security for costs. While some argue that the mere involvement of a third-party

indicates a potential risk for non-payment of adverse costs, thus necessitating security measures, critics counter that third-party funding is not exclusively used by financial-ly distressed claimants but also by stable ones who seek to share the risks of arbitration costs or maintain cash flow. From this standpoint, the mere presence of a third-party funder should not automatically justify security for costs. Further, opponents of this approach em-phasize that the burden of proof should not be reversed; rather it remains the applicant's responsibility to request disclosure of the funding agreement, particularly the parts related to costs.[8]

Enforcement and Consequences of Non-Compliance

Arbitral tribunals, lacking coercive powers, cannot directly enforce compliance with a se-curity for costs order. If the claimant refuses to comply, the requesting party may seek en-forcement through national courts, depending on the applicable legal framework. Howev-er, resorting to judicial intervention may undermine the very reason for choosing arbitration over litigation. Respondents must weigh the strategic benefits of enforcement against the possible disruption to the arbitral process.[9]

Failure to comply with the tribunal's order typically results in the claimant being barred from proceeding with their claim, leading to potential dismissal. It is important to note that such dismissal is procedural rather than substantive, meaning the claimant could eventually refile the claim at a later stage, a risk the respondent must consider. The respondent might prefer to incur the costs and have the claim dismissed on the merits to prevent it from

resurfacing. However, the claimant's ability to refile is not unrestricted, as the statute of limitations may prevent the claim from being brought again.

Moreover, respondents must be mindful that any application for security for costs inherently requires the tribunal to assess the merits of the case, which could lead to preliminary obser-vations on the merits. Such remarks might strengthen the claimant's position, attract third-party funding, or embolden the claimant to proceed with greater confidence. Lastly, if un-successful, the respondent may also be required to bear the claimant's costs incurred in resisting the application.[10]

Conclusion

The decision to grant security for costs necessitates balancing two principles: the respond-ent's right to recover costs in the event of an unsuccessful claim and the claimant's right to access arbitral justice. When a financially constrained claimant is required to post security, this may effectively bar it from pursuing a legitimate claim. Although the American proverb 'In God we trust, all others pay cash' may reflect the financial reality, tribunals must exer-cise caution to ensure that security for costs orders do not become a tool for procedural obstruction, unfairly preventing parties with meritorious claims from obtaining a fair hearing.

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