EUROPEAN ACADEMIC RESEARCH
Vol. VII, Issue 1/ April 2019

Impact Factor: 3.4546 (UIF)
DRJI Value: 5.9 (B+)

ISSN 2286-4822
www.euacademic.org

The Authority of Arbitrators to Order Security for Legal Costs in International Commercial Arbitration

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Abstract

Arbitration is one of the means of resolving disputes, which has taken a huge strain in recent years due to the advantages that this alternative dispute resolution brings, such as flexibility, confidentiality, speed, informality, etc. However, the legal costs in arbitration are very large. During arbitration proceedings, parties must pay for their counsels legal services, but also for the administrative costs of arbitration and arbitrators fees. Consequently, if an impecunious claimant raises a groundless claim in arbitration, the respondent will not be able execute an arbitral award in its favour which orders claimant to reimburse legal costs.

In order to protect respondents from such situation, international practice of arbitration has begun to apply a new interim measure which is widely known as security for costs. Under such measure, the arbitral tribunal orders claimant to provide security for respondent's legal costs in arbitration, in case an adverse arbitral award is rendered for claimant. Different arbitrators, such as, for example, Gary Born, have considered security for costs in arbitration as sui generis interim measure.

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This paper is an attempt to analyze the authority of Arbitral Tribunal to order a party to provide security for costs under UNCITRAL Model Law on International Commercial Arbitration and arbitration rules of some of most important arbitral institutions worldwide.

Keywords: arbitration, security, costs, power, law, model law, interim, measure.

INTRODUCTION

Security for costs is one of the interim measures that Arbitral Tribunal may order during an arbitration proceeding, in case it deems such a measure as necessary. By ordering a party (claimant) to order security for the other party's (respondent) legal costs in arbitration, the arbitral tribunal preserves the right of the second party to execute an arbitral award rendered in its favour regarding the legal costs of arbitration.

However, before the arbitral tribunal decides whether a security for costs request is grounded or not, it must firstly ensure that it has the authority to order such a measure under applicable law and applicable arbitration rules. To asses this, it is necessary to analyze whether the arbitration agreement between the parties or the arbitration rules chosen by the parties confer to arbitrators such powers. The combination of these legal sources, together with the public order of the state where the arbitral award will be recognized and enforced, brings a complex interaction of legal systems with regard to security for legal costs.[2]

It should be said that many jurisdictions have been sceptical about the authority of the arbitral tribunal to order security for costs in arbitration for various reasons. Some of them rule that ordering of security for costs should not be a

[2] It is known from the New York Convention "On the Recognition and Enforcement of Foreign Arbitral Awards" that an arbitral award is not recognized and enforced by the courts of the state of recognition if this award is contrary to the public order of the state of recognition (Article 5).

prerogative of the arbitral tribunal, but only of the state courts. However, due to the importance of securing the costs of an arbitration procedure and the general tendency in favour of arbitration, most of these jurisdictions have recognized the full authority of the arbitrators to order security for costs without the intervention of state local courts. Consequently, arbitration rules of ICC, LCIA, AAA etc. have followed this approach and have explicitly or implicitly recognized the arbitral tribunal's power to issue such interim measures.

1. The authority of arbitrators to order interim measures in general.

Before focusing on the authority of arbitrators to order security for costs, it is worth analyzing how the international practice of arbitration treats the arbitral tribunal's jurisdiction (power, authority) to impose interim measures in general. Many jurisdictions, including lex arbitri of Italy, Austria, Greece, Switzerland, rule that the imposition of interim measures related to an arbitration procedure is an exclusive prerogative of state courts. This approach is justified as a requirement of public order, because of the restrictive character that has an interim measure.

However, the current legal trend favours the arbitral tribunal's authority to grant interim measures in an arbitration procedure. This tendency is justified by various arguments:

First, the prohibition of arbitrators' power to impose interim measures interferes with the will of the parties to resolve the dispute by arbitration. The Parties agreeing to resolve the dispute by arbitration are presumed to have agreed that even the request for imposing interim measures shall be assessed by the same entity. In this sense, the deprivation of arbitrators from power to render interim measures undermines the party autonomy in an arbitration procedure.

Second, in an arbitration agreement the parties aim to resolve their disputes in the most practical and effective way

possible, and in this respect, the arbitral tribunal is much quicker and more efficient than the state courts.

Third, giving the state courts the right to render interim measures related to an arbitration procedure, creates grounds for the arbitral tribunal to prejudge the case, due to the influence of an interim measure given by the state court.

Fourth, arbitrators are in a better position to establish interim measures related to an arbitration procedure as they are familiar with the facts of the case, as they assess the merits of the case at the same time.

Fifth, often arbitrators in an arbitration procedure are experts of the matter under arbitration, an expertise which is lacking in state court judges. Arbitrators can be scientists, engineers, etc. and based on the nature of the dispute, they are more appropriate to assess the imposition of an interim measure than a lawyer who is not an expert in the field.

For all these reasons, many states and jurisdictions have ruled that the arbitral tribunal should have the authority to order interim measures related to the arbitral proceedings. Eventually, the UNCITRAL Model Law on International Commercial Arbitration has expressly provided that an arbitral tribunal may impose any interim measure that they deem necessary for an arbitration proceeding. Since this model law has been adopted by a large number of legal systems in the world, it is understood that the tendency of these systems is to recognize to the arbitral tribunal the jurisdiction of imposing these security measures.

2. A retrospective of lex arbitri in different states on the power of arbitrators to order security for costs in arbitration.

It is important to note that many jurisdictions have been reluctant on the authority of arbitral tribunal to order interim measures in general, as it was known as an exclusive prerogative of state courts. This was one of the ways how state

judicial jurisdiction interferes with the jurisdiction of arbitration. However, such a situation contradicted the very purpose of the parties which enter in an arbitration agreement: The parties address arbitration as a way to resolve their dispute with the aim of detaching any contact with state courts. The general tendency in support of the international arbitration, especially the international commercial arbitration, has led to the fact that different *lex arbitri* (the law which covers arbitration matters in a specific state*)*, or the parties themselves through the arbitration agreement, give to the arbitral tribunal the authority to order security for costs measures, at the request of respondent in an arbitration proceeding.[3]

There are few legal systems that have explicitly recognized arbitrators the prerogative to order security for legal expenses in arbitration. Security for costs is traditionally considered as a concept of British arbitration law (lex arbitri). For this reason, the English Arbitration Act of 1996 is one of the few legal acts that explicitly recognized to the arbitral tribunal the power to order interim measures for securing legal costs in arbitration.[4] Prior to this legal act, the request for security for arbitration costs could not be addressed directly to the arbitral tribunal, but only to the state courts which acted to assist in the conduct of arbitration proceedings.[5] This provision was precisely amended by the 1996 English Arbitration Act, which in Article 38 (3) 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:*

[3]Noah Rubins, In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration, Rev. Int'l Arb. 307, 2000, page. 315.

[4] Jean Pessey, When to Grant Security for Costs in International Commercial Arbitration: the Complex Quest for a Uniform test, 2011, page. 7-8.

[5] Ibid.

> *(a) an individual ordinarily resident outside the United Kingdom, or*
> *(b) 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.*

In short, based on British law, the arbitral tribunal has full power to order security for costs of arbitration proceedings, even if that authority has not been explicitly recognized by the parties in their the arbitration agreement. Even New Zealand's lex arbitri is part of those few legislations that have explicitly recognized the arbitrators the authority to order interim measures for securing legal costs in arbitration. Also the German Code of Civil Procedure, which is lex arbitri in Germany, pursues the same approach, being an exception for civil law jurisdictions.

Meanwhile, other civil law jurisdictions are more reserved on the institute of security for costs. For instance, Switzerland has been one of the most controversial states with regard to the authority of arbitrators to order such interim measure. However, under 1989 Private International Law, the arbitrators had the power to order interim measures in general. Although there is no explicit mention of security for costs, many authors have acknowledged that this tool constitutes one of the types of interim measures so we can conclude that Article 183 (1) of the Switzerland Private International Law also includes the power of arbitrators to order security for costs. While for the Swiss domestic arbitration, the 2011 Swiss Civil Procedure Code explicitly allows the arbitral tribunal to impose security for costs. The same approach is also found in French law.

In USA, it is generally accepted that arbitrators have the authority to order security for costs, although some US jurisdictions maintain that the arbitral tribunal has such an attribute only when the parties explicitly refer such power in

the arbitration agreement or if arbitration rules chosen by the parties give arbitrators this power.[6]

3. The authority of the arbitral tribunal to order security for costs in arbitration, under the UNCITRAL model law.

The UNCITRAL Model Law "On International Commercial Arbitration" is a standard legislation that serves as a model for those countries that want to reform and modernize their international arbitration legislation. Since the Model Law has been adopted by 75 states and 106 jurisdictions, it is worth to see analyze how this law addresses the authority of the arbitral tribunal to order interim measures for legal costs in arbitration. Article 17 of the Model Law provides the right of the arbitral tribunal to issue interim measures in general. Prior to the amendments made to the Model Law in 2006, this article recognized the arbitral tribunal's authority to provide only those security measures which were considered "necessary for the merits of the dispute between the parties".[7] Given that disputes concerning legal costs in arbitration were not considered of a material but procedural nature, the 1985 Model Law was interpreted as precluding the arbitrators from ordering security for costs.

In Yieldworth Engineers v. Arnold Co Ltd[8], Hong Kong High Court (jurisdiction that has adopted the Model Law) stated that: "in an ordinary arbitration case where the parties

[6] Noah Rubins, In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration, Rev. Int'l Arb. 307, 2000, page. 329.

[7] The 1985 version of the Model Law, Article 17 ruled that unless otherwise provided by the parties, the arbitral tribunal may, upon the request of one of the parties, order a party to comply with an interim measure that the arbitral tribunal shall render necessary for the object of the dispute between the parties.

[8] Yieldworth Engineers vs. Arnhold & Co. Ltd, Hong Kong, 1992, for more follow this link: http://neil-kaplan.com/wp-content/uploads/2013/08/Yieldworth-Engineers-v-Arnhold-Co-Ltd-HCMP2710-of-1991.pdf

did not expressly confer the arbitrators the power to order measures for the provision of costs, the arbitrators do not have such authority." By this decision we understand that the Hong Kong High Court's view was that the Model Law did not include the jurisdiction of the arbitral tribunal to order security for costs, and therefore if the parties want to attribute this competence to the arbitral tribunal must explicitly provide for it in their arbitration agreement.

In the same line in Lindow vs. Barton McGill Ltd,[9] sole arbitrator Dereck Firth ruled that he had no authority to order security for costs measures under Article 17 of the Model Law. After this decision, New Zealand moderated its international arbitration law by becoming part of those few legislations that explicitly recognized the arbitral tribunal's power to order interim measures for costs in arbitration.

In fact, these two decisions can be seen as too authentic because based on the research carried out for this issue, they are the only decisions that hold the view that the arbitral tribunal does not have the power to order security for costs under UNCITRAL Model Law. These courts have decided so because at the time these decisions were made, both Hong Kong and New Zealand had not amended their lex arbitri with the recent amendments to the Model Law of 2006, but had in force the Model Law unchanged of 1958.

The amendments made to article 17 of Model Law in 2006, show the lack of consensus among States regarding the interim measures issued by the arbitral tribunal, and in particular the measures to secure the legal costs of arbitration.[10] These changes were only made on the UNCITRAL 39th session, which also indicates the difficulties of finding a

[9] Lindow vs. Barton McGill Ltd facts of the case can be found on: Christopher Kee, International Commercial Arbitration: an Asia-Pacific perspective, page. 370.

[10] Wendy Miles, Duncan Speller, Security for costs in International Arbitration – emerging consensus or continuing difference?, 2007, page. 33.

common language among states.[11] The main amendment made to this article is that the phrase "measures related to the merits of the dispute" has been removed, thus enabling the arbitral tribunal to order interim measures not only on material matters but also on procedural issues. Since security for costs is considered to be a safeguard for a procedural issue, the removal of that phrase pave the way for the arbitral tribunal's power to order this type of interim measure. The version of Article 17 of the Model Law as amended in 2006, is as follows:

> "Article 17.
> Power of arbitral tribunal to order interim measures
> (1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
> (2) An interim measure is any temporary measure, whether in the form of an award or in another form, 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 to:
> (a) Maintain or restore the status quo pending determination of the dispute;
> (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
> (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
> (d) Preserve evidence that may be relevant and material to the resolution of the dispute."

Even though the amended version of Article 17 remains in general terms regarding the power of arbitrators to order security for costs, there is a widely accepted approach of international arbitration practice that stands that the ordering of security for costs is a prerogative that UNCITRAL Model

Law with the 2006 amendments has recognized to the arbitral tribunal implicitly.

4. The authority of the arbitral tribunal to order measures for obtaining legal expenses in arbitration under the arbitration rules of some of leading arbitral institutions.

Arbitration Rules of leading arbitration institutions worldwide provide for different approaches regarding the jurisdiction (authority) of the arbitral tribunal to order security for legal costs in arbitration.

The arbitration rules of LCIA expressly confer the arbitrators the power to order the security for costs. Since LCIA is based in London, it is clear that this arrangement reflects the same approach as the 1996 English Arbitration Act. Specifically, article 25.2. of the LCIA Rules provides that:

> "The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances."

Article 11.1 of the Arbitration Rules of HKIAC also contains an explicit provision for the arbitrators' authority to order the security for costs. Also the arbitration rules of SIAC and CEPANI follow the same approach. However, the aforementioned rules are the only rules of the leading arbitration institutions that have such a prediction.

In contrast to the above, some other arbitration rules do not contain an explicit provision which confer to the arbitral tribunal the authority to order security for costs. For instance, Article 28/1 of ICC Arbitration Rules provides that:

> "Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate."

Given the general approach of this Article, it has been interpreted that this provision has recognized to arbitral tribunal the power to order security for legal costs in arbitrations, whenever it deems it reasonable. However, the ICC's arbitration practice reflects that such an interim measure is ordered in very special and distinct cases.

In the same line, ICDR arbitration rules in Article 24/1 provide that:

> "At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property."

Rules of DIS (Arbitration Institution in Germany), Stockholm Chamber of Commerce, UNCITRAL etc. follow the same approach with ICC and ICDR rules.

Lastly, the ICSID (Investment Arbitration Convention) convention is also silent about the arbitral tribunal's authority to order security for costs. However, in RSM Production Corporation v. Saint Lucia, the arbitral tribunal ruled that the power to issue security measures for legal expenses in investment arbitration was covered by Article 47 of the ICSID Convention.

It should be said that there have been authors who have argued that the use of a general language in giving the jurisdiction of the arbitral tribunal to provide interim measures does not extend to the power for ordering security for costs.

These authors have argued that the arbitral tribunal may order security for costs only when the parties or arbitration rules explicitly have given this authority

However, the stance of the abovementioned authors remains in minority and does not reflect the general practice of international arbitration. Contrary to this approach, some of the most prominent professors in the field of arbitration such as Gary Born, Christopher Kee, Loucas Mistelis, Stavros Brekuolakis and many others have acknowledged that, despite its special nature, security for costs is undoubtedly one of the types of interim measures and thus the provisions allowing the arbitral to order the interim measures, also confers the authority to order security for legal expenses in arbitration.

CONCLUSION

In conclusion, based on the legal analysis conducted in this paper, it is clear that there is a general approach from numerous legal systems and many arbitration rules of the world's leading institutions that confirm that arbitral tribunal has the authority to order security for legal costs conducted in arbitration by respondent. Moreover, many authors have acknowledged that even when lex arbitri or the arbitration agreement does not explicitly provide for the authority of arbitrators to order security for costs, the arbitral tribunal may order such an interim measure, by exercising its discretion to take the necessary measures that protect the integrity of the arbitration proceedings. This approach has been followed by many legal systems that aim to make arbitration more attractive as an alternative dispute resolution, by tending to minimize the main negative aspect of arbitration, which is the large amount of costs it takes and the cost's risk for the respondent party.

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