SECURITY FOR COSTS IN INTERNATIONAL ARBITRATION AND OTHER INTERIM MEASURES

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1. INTRODUCTION

1.1 This lecture. In this lecture I discuss arbitrators’ powers to grant interim relief in support of international arbitration and the approach taken to applications for such relief. Particular attention is given to applications for security for costs.

1.2 Thanks. I am grateful to Melody Ihuoma, a junior tenant in my chambers (4 New Square, Lincoln’s Inn), for the substantial assistance which she has given to me both in research and in the preparation of this lecture.

1.3 Abbreviations. I use the following abbreviations:

‘ATE’ means after-the-event.
‘QM’ means Queen Mary University of London.

1.4 The ICCA-QM Task Force Report. In April 2018 a task force set up by ICCA and QM published a report on third party funding in international arbitration. Chapter 6 of the report deals with costs and security for costs. I shall refer to this as the ICCA-QM Task Force Report.

2. INTERIM MEASURES

2.1 Litigation v arbitration. Whereas international arbitration has the edge over litigation when it comes to enforcement, this is less obviously the case in relation to interim measures. Courts have immediate coercive powers over parties within their jurisdiction. Arbitral tribunals have no power to enforce their own orders but depend upon courts to do so. Also, an emergency arbitrator (under those institutional rules which provide for such) may be less readily available than an out-of-hours judge. When (many years ago) I was from time to time the QB duty judge, I kept a dedicated judicial mobile at my side and on occasions got up in the middle of the night to deal with urgent matters. I will not be doing that as arbitrator, and I doubt that many of my colleagues will.
2.2 **Arbitrators’ powers to grant interim remedies.** Very few arbitration agreements make express provision for interim measures. But the major arbitral institutions generally do. In my experience most arbitrations proceed under institutional rules rather than *ad hoc.*

**ICC Arbitration Rules 2017.** Article 28 empowers the tribunal to “order any interim or conservatory measure it deems appropriate”.

**SIAC Rules 2016.** Rule 30 empowers the tribunal to “issue an order or an Award granting an injunction or any other interim relief it deems appropriate”.

**Astana IAC Rules 2018.** Article 24.1 empowers the tribunal to “issue an order or an Award granting an injunction or any other interim relief it deems appropriate”.

**LCIA Rules 2014.** Article 25 is more specific about the forms of interim measures the tribunal can order: security for the amount in dispute or for costs or preservation of evidence etc.

**HKIAC Rules 2018.** Article 23.2 empowers the tribunal to order “any interim measures it deems necessary or appropriate”. Article 23.3 defines interim measures as follows: “any temporary measure ordered by the arbitral tribunal at any time before it issues the award by which the dispute is finally decided, that a party, for example and without limitation:

(a) maintain or restore the status quo pending determination of the dispute; or
(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; or
(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.”

**UNCITRAL Model Law on International Commercial Arbitration 1985 (amended 2006)** gives the tribunal power to grant interim measures. Article 17 defines interim measures as:

“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.”

2.3 **Lack of guidance.** Beyond giving the bare powers to order interim measures, most institutional rules provide very little guidance about how those powers should be exercised. The exception is the **HKIAC Rules,** article 23.4 of which states:

“The arbitral tribunal shall take into account the circumstances of the case. Relevant factors may include, but are not limited to:

(a) harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
(b) there is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”

Although UNCITRAL is not an arbitral institution, article 17A of the **UNCITRAL Rules** gives
similar guidance about how the tribunal should exercise its powers to grant interim measures.

2.4 How then do arbitral tribunals approach applications for interim measures? Perhaps inevitably, there are variations in approach between different tribunals. This arises from (a) the lack of guidance in most of the institutional rules and (b) the different legal cultures from which arbitrators are drawn. In a typical international arbitration, all three tribunal members are of different nationalities. Despite those matters, it is possible to formulate some general principles which apply:

(i) Interim measures are exceptional rather than the norm. Tribunals are cautious about interfering with property rights before they have decided the substantive issues.
(ii) The risk of substantial harm to one or other party is a threshold requirement.
(iii) Urgency is another threshold requirement. If there is no urgency, everyone should wait until the determination of the reference.
(iv) In general, the purpose of interim measures is to preserve the status quo. This may mean (a) the preservation of relevant evidence, (b) restraining either party from flouting the arbitration agreement by resorting to a different form of dispute resolution or (c) ensuring that a party’s current ability to honour a future award of damages or costs is not dissipated – that means requiring the party to set aside the money now, so that it remains ready and available.
(v) Arbitral tribunals, being paid by both parties and comprising lawyers of long experience, are scrupulous about the need to act fairly. As a result, they are particularly reluctant to pre-judge any issue.
(vi) Despite that reluctance, the tribunal must be satisfied that the party seeking relief has a sufficiently strong case on the substantive issues to warrant the grant of interim relief.
(vii) The strength of the prima facie case required depends upon the interim relief being sought. For example, if the tribunal is being asked to grant an anti-suit injunction, it may not spend long exploring the merits of the substantive claim – that will be for consideration in the future arbitration. On the other hand if the tribunal is ordering an interim payment (eg because the parties are in a commercial relationship and C will become insolvent if regular payments cease) the tribunal will be bound to assess the prospects of the underlying claim succeeding.

2.5 Emergence of a general lex mercatoria. More generally, the fact that we can infer the above principles from such arbitral decisions as are in the public domain is part of a wider process. This is the emergence of a general lex mercatoria, which both common lawyers and civilian lawyers can acknowledge. The recent phenomenon of international commercial courts, which are springing up around the globe and producing reportable decisions after hearings in public, can only accelerate that process.

2.6 Interplay between judges and arbitrators. As noted above, in relation to interim measures the division between judges and arbitrators is less stark. They need each other, so to speak, and they must co-operate to deliver justice to parties in international disputes.

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2 Several ICC decisions emphasise this, eg ICC case 8786.
2.7 Nori Holdings. Nori Holdings Ltd v PJSC Bank Otkritie [2018] EWHC 1343 (Comm) affords a good example of the interplay between judges and arbitrators in relation to interim measures. O, a Russian bank, alleged that it was the victim of fraudulent transactions in which C1, C2 (both registered in Cyprus) and C3 (registered in BVI) were involved. Cs maintained that the transactions were part of a bona fide restructuring and denied that there was any fraud.

(i) In October 2017, O commenced proceedings in the Moscow Arbitrazh Court against Cs and seven other parties to recover its losses flowing from the fraudulent transactions.

(ii) In January 2018 O commenced proceedings in the Cyprus courts against C1 and C2 to recover its losses flowing from the fraudulent transactions.

(iii) In January and February 2018, Cs relying upon their arbitration agreements with O, commenced arbitration proceedings in London against O seeking declarations that the impugned transactions were bona fide and valid.

(iv) Cs applied to the Commercial Court for an anti-suit injunction to stop the proceedings in Moscow and Cyprus.

2.8 Males J granted an anti-suit injunction requiring O to discontinue the Moscow proceedings. He said that he could not grant an anti-suit injunction in relation to the Cyprus proceedings, because Cyprus was an EU member state. He added at [100] that, if the Cyprus courts allowed the Cypriot proceedings to continue:

“It may be that in due course the arbitrators will issue an order restraining the further pursuit of the Cypriot proceedings against the claimants. If so, Gazprom shows that such an award will be entitled to recognition and enforcement under the New York Convention even in EU member states.”

2.9 The Nori decision neatly illustrates how jurisdiction to grant interim measures may be shared between courts and arbitral tribunals.

2.10 What is sauce for the goose is sauce for the gander. If, as Males J said, arbitrators have a wide power to restrain court proceedings, so also the courts can by injunction restrain arbitration proceedings. In a thoughtful article last year SR Subramian has argued that courts should adopt a very restrictive approach to the exercise of that power.

2.11 Competition from international commercial courts. In recent times a new breed of international commercial courts has appeared on the landscape. They have sprung up in Singapore, Dubai, Abu Dhabi, Qatar, Kazakhstan (where I am one of the judges) and

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3 Another recent example is A v B [2019] WLUK 420: arbitration agreement with seat in London; Jacobs J granted injunction to restrain parallel proceedings in Israel.


5 In Gazprom OAO (Case C-536/13) [2015] 1 WLR 4937, the CJEU held that courts of EU Member States are not precluded (under the Brussels Regulation) from recognising and enforcing an arbitral award which contains an injunction restraining a party from bringing claims before the courts of that Member State (see paragraphs [41] - [44]). In contrast, by virtue of the decision of the CJEU in Allianz SpA v West Tankers Inc (Case C-185/07) [2009] AC 1138, the courts of Member States are precluded from granting anti-suit injunctions to restrain court proceedings brought in another Member State. Both decisions pre-date the Recast Brussels Regulation but remain applicable to cases decided under it (see Nori at paragraphs [69] - [100]).

elsewhere. This increases the competition for business and can only be good for international users. These new courts generally have the power to make emergency orders, as well as coercive powers to enforce them. This represents a challenge to the arbitral institutions to keep their own rules and procedures on interim measures as slick and efficacious as possible.

3. SECURITY FOR COSTS

3.1 One form of interim relief. An order that one party (or sometimes both parties) do give security for any future amount of costs which they may be ordered to pay is just one form of interim relief. But it is an aspect of interim relief to which the organisers of this lecture have asked me to pay particular attention.

3.2 Courts’ power to order security for costs. The power of the court to order security for costs is long established. The Supreme Court reviewed the exercise of that power in Goldtrail Travel Ltd v Onur Air [2017] UKSC 57. An order that a party do give security for costs is less onerous than an order that it give security for the sum in dispute. Even so, such an order should not generally be made if it will stifle the proceedings. See [12]-[14]. As the Court of Appeal noted in Harbour Castle Ltd v David Wilson Homes Ltd [2019] EWCA Civ 505; [2019] BLR 304, Goldtrail marked a change in approach. The question is not whether the shareholders of the relevant company can raise the money, but whether the company can do so. See the judgment of David Richards LJ at [11]-[24].

3.3 Arbitrators’ power to order security for costs. An arbitral tribunal may order security for costs in the exercise of its general jurisdiction to make interim orders. Alternatively, it may be exercising an express power conferred by institutional rules or by legislation. Under English law, section 38 of the Arbitration Act 1996 confers such a power. Under Cayman law, section 38 of the Arbitration Law 2012 confers such a power.

3.4 Reluctance to make such an order. Despite the plethora of powers to make such orders, arbitral tribunals are less willing than courts to order security for costs. This is for a number of reasons:

(i) The parties have agreed to arbitrate their disputes. An order for security may inhibit or prevent that arbitration taking place. Relatedly, it is assumed that a respondent who has entered into a transaction with a financially unstable entity has accepted the risks associated with transacting with such an entity.
(ii) The obligation on claimants to pay an advance on costs to arbitral institutions and to cover future fees of the arbitrators is regarded as sufficient to deter ‘try-on’ claims.
(iii) Impecunious claimants often assert that their lack of funds is due to the conduct of the respondent. If true, it would be an injustice to shut out the claim because the claimant cannot put up security for adverse costs. But at the outset the tribunal cannot pre-judge the case and so cannot tell whether or not the respondent is responsible for the claimant’s...
impecuniosity.
(iv) There is a general reluctance amongst international arbitrators to order such security.

3.5 ICSID arbitrations. In ICSID arbitrations, tribunals are even more reluctant to order security for costs.9 The notion that the tribunal should intervene to protect a state’s right to recover costs, when the tribunal cannot afford similar protection to claimants is unattractive.10 The ICCA-QM Task Force was only aware of one ICSID arbitration in which the tribunal had ordered the claimant to put up security for costs. That was *RSM Production Corporation v St Lucia* (ICSID Case No ARB/12/10). The facts of *RSM* were unusual. The claimant had failed to pay ICSID’s advance on costs, had not complied with costs orders in previous ICSID arbitrations and was supported by a third party funder. It was therefore most unlikely that the claimant would pay any adverse costs that were ordered at the end of the instant arbitration. On the other hand, at the time of the application the claimant had access to funds which could provide security.

3.6 Guidance from the Chartered Institute of Arbitrators. The Chartered Institute has published a helpful Guideline on applications for security for costs. The guidance is set out in six articles with accompanying commentary. Article 1 states:

> “1. The General principles stated in Article 1 of the *Guideline on Applications for Interim Measures* are equally applicable to applications for security for costs.

> 2. When deciding whether to make an order for security for costs, arbitrators should take into account the following matters: i) the prospects of success of the claim(s) and defence(s) (Article 2); ii) the claimant’s ability to satisfy an adverse costs award and the availability of the claimant’s assets for enforcement of an adverse costs award (Article 3); and iii) whether it is fair in all of the circumstances to require one party to provide security for the other party’s costs (Article 4).

> 3. This list is not exhaustive and arbitrators should also take into account any other additional considerations they may consider relevant to the particular situation of the parties and the circumstances of the arbitration.”

3.7 Where both parties seek security for costs. Where both parties seek security for costs, tribunals may be less reluctant to make such orders. This may happen in arbitrations where there is a counterclaim. I have had experience of making orders for security against both parties in an appropriate case.

4. SECURITY FOR THE SUM IN ISSUE

4.1 Power to award security for the substantive sum claimed. Article 25.1 (i) of the LCIA Rules and article 27 (k) of the SIAC Rules empower the tribunal to award security for the amount in dispute. Whereas security for costs is traditionally a remedy available for respondents, security for the amount in dispute is a remedy for the benefit of claimants. For obvious reasons, this Draconian remedy is seldom awarded. According to the LCIA website, this remedy was granted on three occasions in 2017 and two occasions in 2018. I am aware of one application for such a remedy in 2019, but that was not successful.

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9 ICCA-QM Task Force report, pages 172-9
10 See e.g. *Eskososol SPA in Liquidation v Italy* (ICSID Case No ARB/15/50 at [35]-[36]. The tribunal refused to order security for costs, because the claimant had ATE insurance.
4.2 **Why should arbitrators have this Draconian power?** The justification for arbitral tribunals having this power is that, unlike courts, they cannot grant world-wide freezing orders which will bind third parties.¹¹

4.3 **Lack of guidance.** So far as I am aware, there are no judicial decisions giving guidance about how arbitrators should exercise this power. Nor (unsurprisingly) are there any published arbitral decisions giving such guidance. I would suggest that, in order to obtain an order that a respondent do give security for the sum in issue, the claimant should show (i) a strong case on the substantive merits; and (ii) a real risk that the respondent will dissipate its assets.

4.4 **An alternative approach.** An alternative approach open to claimants who fear dissipation of assets by the respondent is to apply to the court for a freezing order. English courts may make such an order in support of arbitration under s. 44 of the 1996 Act. They are willing to do so where England is the seat of the arbitration or where there is a sufficient connection to this jurisdiction.¹² Any claimant who can establish factors (i) and (ii) set out in the previous paragraph would be well advised also to apply to the court for a world-wide freezing order.

5. **THIRD PARTY FUNDING**

5.1 **Access to justice.** Although the subject is controversial, I have for many years argued that third party funding, if properly regulated either formally or informally, promotes access to justice and is therefore ‘a good thing’.¹³ Third party funding has an increasing role to play in arbitration. I am told that some 40% of ICSD arbitrations proceed with third party funding. Third party funding not only benefits claimants. It may also assist a respondent to know that an outside entity with much litigation experience has audited the case and decided to invest in it.

5.2 **Liability for adverse costs.** Justice demands that if a third party funder stands to make a profit from successful litigation, it should pay the adverse costs of any case which the funded party loses.

5.3 **Court orders against funders.** Courts both in England and the US have been willing to order third party funders to meet adverse costs orders: *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1134; *Mohammed Abu-Ghazaleh v Gerard Martin Demeritis Chaul*, Florida Third district Court of Appeal, 2 December 2009, 36 So 3d 691.¹⁴ In England and Wales until recently the unfortunate CA decision in *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 was thought to limit the funder’s liability to the extent of the funding which it provided. The recent decision of Snowden J in *Davey v Money* [2019] EWHC 997 (Cg) has put

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¹¹ The international scope of English freezing injunctions is criticised by Filip Saranovic in ‘Jurisdiction and freezing injunctions: a reassessment’ *ICLQ* 68 (2019) 639-664.

¹² Harris Bor, ‘Freezing orders in support of arbitration proceedings’, *Journal of International Banking and Financial Law* 43 (2014) 1-9

¹³ *Review of Civil Litigation Costs Final Report* (January 2010), chapter 11

¹⁴ Unusually for the US, this was an appeal in which costs shifting applied.
that right. The court also has power to order a party to disclose the name of any funder supporting the litigation: Anatolie Stati v Kazakhstan [2019] 5 WLUK 275.

5.4 Effect on security for costs. In litigation, the effect of third party funding is ambivalent. The presence of a third party funder may indicate that the claimant is impecunious and thus be a pointer towards ordering security. On the other hand, some well-resourced claimants use litigation funding as a means of laying off part of the risk. Furthermore, if the funder is able and willing to meet adverse costs, that may be a reason to refuse an application for security for costs.

5.5 The position in arbitration. In arbitration, unlike litigation, the funder cannot be joined as a party unless it consents (which in practice will not happen). So, arbitrators have no power to make costs orders against funders. Therefore, the only way in which the tribunal can protect a respondent’s ability to recover costs (if it wins) against an impecunious funded claimant is by ordering the claimant to provide security for costs. Then either the funder puts up the security as ordered or, alternatively, the arbitration comes to an end.

5.6 But other factors still militate against ordering security for costs. The considerations mentioned in section 3 above still apply. If the funder is unwilling to put up security for costs, then such an order may stifle the claim. That is generally unacceptable in both litigation (see Goldtrail) and arbitration. To avoid that outcome, an impecunious party supported by a third party funder may be allowed to press on without giving any form of security. This happens on occasions.

5.7 A powerful bargaining counter. One unfortunate consequence is that this puts a weapon in the hands of impecunious, but funded, claimants. They can say: “We can afford to go on and if we win you will pay our costs. But if you win, you won’t get your costs back. So settle now.” The situation becomes even harsher if, in the event of winning, the impecunious claimant is entitled to recover not only its ordinary legal costs, but also its funding costs (as some judges and arbitrators have ordered). The prospect of such double recovery puts an even stronger bargaining counter into the claimant’s hands.

5.8 The way forward. The role of third party funders is a controversial topic. Over the last two years regulatory changes in both Singapore and Hong Kong have allowed such funding to be used in arbitration. Over time it is to be hoped that an international consensus will emerge about whether and how third party funders should be regulated. Ideally, it should be part of the international lex mercatoria that litigation funding can only proceed in any case on the basis that:
(i) The identity of the funder is disclosed.
(ii) The funder accepts full liability for adverse costs.
(iii) There must be measures to prevent arbitrary withdrawal by the funder mid-case.
In this way litigation funding will become generally recognised as a means of promoting access to justice, not as an instrument of oppression.

A QUESTION AND ANSWER/DISCUSSION FOLLOWED THE DELIVERY OF THIS LECTURE – SEE BELOW
The above paper is an expression of views for discussion at the meeting on 19 November. It is not a statement of advice which can be relied upon in any present or future case.

**QUESTION AND ANSWER/DISCUSSION SESSION FOLLOWED**

During this session Ian Hunter QC stated that in New York (where he has sat) it is quite common for an arbitral tribunal to order security for the sum at stake. He also gave an example of a case where he had refused to order security for costs; this turned out to be the right decision, because the respondent’s fraud had caused the applicant’s impecuniosity.

There was also discussion about whether/when interim orders should be embodied in an award. RJ commented that making a partial award may aid enforcement overseas.