

## Security for Costs in Arbitration: Part Two

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This is the second part of a two-part article examining the rules and case law on security for costs in commercial arbitration in Canada. The following will review Canadian case law on security for costs in arbitration along with various leading institutional rules with respect to security for costs in international arbitration. Parties looking to have greater certainty that a tribunal has jurisdiction to direct security for costs may want to select a set of rules that expressly reference security for costs, or to specifically provide for this jurisdiction in their arbitration agreement.

In the first part of this article we discussed some of the variation seen in institutional rules in Canada with respect to a tribunal's jurisdiction to award security for costs ("SFC"). This part will briefly review existing Canadian case law on SFC in arbitration and the prevailing institutional rules on SFC in international arbitration.

There are relatively few reported decisions addressing SFC in commercial arbitration in Canada. The traditional view, expressed by an Ontario court in 1979, was that a tribunal lacked any inherent statutory right or jurisdiction to require the posting or payment of SFC.<sup>1</sup> This was grounded in a lack of express language in either the then *Arbitrations Act*<sup>2</sup> or the applicable arbitration agreement. The court was guided by a literal interpretation of the arbitration agreement and statute, and appeared to favour the earlier English law premise that a tribunal did not have the powers of a judge and arbitration statutes should be read restrictively, limiting the arbitrator's jurisdiction to ordering "the parties to do such things as may be required in order to assist the arbitrator in arriving at a determination of the issue in dispute."<sup>3</sup> In a more recent decision, the Ontario Court of Appeal reversed the lower court's decision overturning a tribunal's award of SFC under section 20(1) of the *Arbitration Act*.<sup>4</sup> However, this decision was focused primarily on the principle that the lower court did not have the authority to set aside the tribunal's award; whether section 20(1) of the *Arbitration Act* provides jurisdiction to award SFC was not specifically addressed.<sup>5</sup> In light of the endorsement by Canadian courts generally of the arbitral process and the powers of arbitral tribunals, as well as the decision of an ICSID Tribunal in *RSM*, there are good arguments available that a tribunal is able to award SFC as part of its inherent jurisdiction, but the matter remains uncertain in the absence of express language conveying such a jurisdiction.

### International Commercial Arbitration

International commercial arbitration is more nuanced with respect to SFC. This is because SFC is very much an English construct. In many civil law jurisdictions, SFC is an entirely foreign concept, if not explicitly forbidden. To the extent it is available in arbitration in certain civil law jurisdictions (for example, Switzerland) it is, by comparison to common law jurisdictions, very restricted.<sup>6</sup> Therefore, where the

<sup>1</sup> *Re Ramot Gil Development Corporation Ltd. and Precision Homes Corporation Inc.* (1979), (1980) 106 DLR (3d) 558 (ON HCJ) at 561 [*Ramot Gil*].

<sup>2</sup> RSO 1970, c 25.

<sup>3</sup> *Ramot Gil*, *supra* note 18 at 560-561.

<sup>4</sup> *Inforica Inc. v CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 at para 42.

<sup>5</sup> *Ibid* at para 35.

<sup>6</sup> Weixia Gu, "Security for Costs in International Commercial Arbitration," (2005) 22:3 *Journal of International Arbitration* 167 at p 177.

parties are from different national legal systems with different histories regarding the availability of or grounds for directing SFC, the framework within which this jurisdiction is exercised is more complex.

Recent versions of certain institutional rules do expressly provide for SFC. Article 25.2 of the LCIA's Arbitration Rules expressly provides that a tribunal can "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" and stay proceedings if such security is not forthcoming.<sup>7</sup> Likewise the HKIAC Administered Arbitration Rules have a specific article confirming that a tribunal may require a party to provide SFC.<sup>8</sup>

By contrast the UNCITRAL Arbitration Rules<sup>9</sup> provide, at Article 26 on Interim Measures, a somewhat more restrictive form of relief where a tribunal may order a party to "[p]rovide a means of preserving assets out of which a subsequent award may be satisfied"<sup>10</sup> and "provide appropriate security in connection with the measure."<sup>11</sup> Similarly, the ICC's Rules of Arbitration at article 28(1) outline a general jurisdiction for the Tribunal to "order any interim or conservatory measure it deems appropriate."<sup>12</sup> This language could be viewed as not broad enough to enable SFC to be granted. That said, such an interpretation appears to run contrary to the acknowledgments of tribunals constituted under the ICC Rules and discussions at UNCITRAL that a tribunal's general power to order interim measures "is considered to be sufficiently wide to include the power to require a party to provide security for costs in appropriate situations and with appropriate safeguards."<sup>13</sup>

For arbitrations sited within Canada, the various statutes on international commercial arbitration are similarly silent with respect to any express jurisdiction to grant SFC. The language used here, either incorporating or adapted from Article 17 of the 1985 UNCITRAL Model Law, refers to a tribunal's ability to "order any party to take such interim measure of protection" as considered "necessary in respect of the subject-matter of the dispute."<sup>14</sup> Being limited to the protection of "the subject-matter of the dispute," this language is traditionally viewed as itself being insufficient to ground the jurisdiction to direct SFC.

Publicly available decisions on jurisdiction to award SFC in international commercial arbitration are limited. In *RSM*, under the ICSID Arbitration Rules, the majority determined that "[c]osts decisions, while contingent upon the tribunal's ultimate and final decision on the merits and the exercise of its discretion to grant cost reimbursement, are nonetheless part of the arbitral process the integrity of which deserves protection."<sup>15</sup> This same general principle underlies international commercial arbitration, but it will necessarily be influenced by the specifics of any given dispute, the terms of the arbitration agreement, the applicable rules, and the governing law.

An assessment of the test for when SFC may be awarded is outside the scope of this article, but the topic similarly raises interesting issues worthy of consideration, particularly in an international arbitration context. Given the lack of clarity on arbitral jurisdiction to award SFC in the absence of an express grant, this is a matter that parties should be considering when drafting their dispute resolution provisions and when selecting their institutional rules and arbitral seat. This may be particularly important in the international commercial arbitration context where respective national legal systems introduce additional complexity.

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<sup>7</sup> Effective 1 October 2014.

<sup>8</sup> 2013 Administered Arbitration Rules at article 24.

<sup>9</sup> With new article 1, para 4, as adopted in 2013.

<sup>10</sup> Article 26, para 2(c).

<sup>11</sup> Article 26, para 6.

<sup>12</sup> In force as of 1 January 2012.

<sup>13</sup> Chartered Institute of Arbitrators, International Arbitration Guidelines 2015/2016, Applications for Security for Costs, at pp 2-3 and fn 7, online: Chartered Institute of Arbitrators <<http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/2015securityforcosts.pdf?sfvrsn=16>>.

<sup>14</sup> See the *International Commercial Arbitration Act*, RSA 2000, c I-5 at Schedule 2, article 17 and the *International Commercial Arbitration Act*, RSO 1990, c I.9 at the Schedule, article 17 along with the *International Commercial Arbitration Act*, RSBC 1996, c 233 at section 17.

<sup>15</sup> *RSM Production Corporation v Saint Lucia* (ICSID Case No. ARB/12/10), Decision on Saint Lucia's Request for Security for Costs (August 13, 2014) at para 66.

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