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Security for Costs in Arbitration: Part One

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The jurisdiction of an arbitral tribunal to award security for costs in either domestic or international arbitration can lack clarity depending on the specific arbitral agreement between the parties, the applicable rules, and the governing law. This article will examine, in two parts, the rules and case law on security for costs in commercial arbitration in Canada. This first part discusses some of the variation seen in institutional rules in Canada with respect to a tribunal's jurisdiction to award security for costs.

Security for costs ("SFC") is a well-known form of relief in litigation in Canada to preserve a party's ability to recover a costs award in the event a claim or counterclaim is unsuccessful.[1] SFC in arbitration is traditionally less well-known, however, with the increasing costs of arbitration and presence of third-party funding there is increasing interest in the topic. In 2014, for the first time, a tribunal constituted under the International Centre for Settlement of Investment Disputes ("ICSID") directed a claimant to post SFC. The tribunal did so in *RSM Production Corporation v Saint Lucia*,[2] in the form of a guarantee of USD $750,000, to cover the potential costs of the respondent state.[3] As is the case in any SFC application, the decision in *RSM* was fact-specific and a result of the tribunal's findings with respect to the claimant's history of non-compliance with previous awards, previous failure to advance the required payments to the tribunal, and the fact that the claimant's case was funded by a third party.[4] Most notable was the majority's decision that the tribunal had jurisdiction to direct the posting of SFC to protect the integrity of the arbitral proceedings.[5] This basis for jurisdiction to direct SFC in arbitration – the tribunal's inherent jurisdiction to control its process – had been postulated by some authors.[6] While perhaps a helpful addition to the jurisdictional base for SFC, it can lack clarity. This two-part article will address the institutional rules and current case law on SFC in commercial arbitration in Canada.

A tribunal's jurisdiction to award SFC can arise in many ways: it may be found in the parties' agreement to arbitrate, the rules applicable to the dispute, the applicable procedural law, the terms of the tribunal's appointment, or the tribunal's inherent authority to control its process. It is possible that parties to a dispute will have specifically stated in their arbitration agreement that the tribunal may direct interim measures, including the payment or posting of SFC, or similar language to this effect. "No problems should arise where the parties have expressly conferred to the tribunal the power to order security for costs,"[7] but from experience this level of detail is usually not found in the dispute resolution provisions of a commercial agreement. It is also possible that the rules or law applicable to a dispute will expressly

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[1] See *Amex Electrical Ltd. v 726934 Alberta Ltd.*, 2014 ABQB 66 at para 49 and *Jedynak v Wheatland (County)*, 2007 ABQB 384 at para 14.
[2] *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) [*RSM*].
[3] *Ibid* at para 90.
[4] *Ibid* at paras 77-83 and the associated comments in the Assenting Reasons of Arbitrator Gavan Griffith.
[5] *RSM*, *supra* note 2 at paras 66 and 69.
[6] Weixia Gu, "Security for Costs in International Commercial Arbitration," (2005) 22:3 Journal of International Arbitration 167 at p 182.
[7] International Council for Commercial Arbitration, ICCA – Queen Mary Task Force on Third-Party Funding, Draft Report from the Subcommittee on Security for Costs and Costs (1 November 2015) at p 12, online: ICCA <http://www.arbitration-icca.org/media/6/09700416080661/tpf_taskforce_security_for_costs_and_costs_draft_report_november_2015.pdf>.

provide for SFC as an interim measure, in which case arbitral jurisdiction ought to be clear. The availability of SFC is, however, "less clear where the applicable arbitration law or arbitration rules only contain a general clause for interim measures" as opposed to an express power for the tribunal to order SFC.[8] As the following discussion demonstrates, not all institutional rules for arbitration in Canada **expressly** provide that a tribunal may award either the payment or posting of SFC.

Domestic Commercial Arbitration

The current ADRIC Arbitration Rules[9] specifically state that a tribunal may "make provision for interim measures of protection, including payment of security for costs, posting of security for the amount claimed, or preservation of property that is the subject matter of the dispute."[10] Similarly the BCICAC's Domestic Commercial Arbitration Rules of Procedure[11] specify that unless agreed otherwise a tribunal may "order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the arbitration tribunal thinks fit."[12]

By comparison, the ICDR's Canadian Arbitration Rules[13] contain only a generic reference to interim measures at article 24, providing that "...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"[14] and that "the tribunal may require security for the costs of such measures."[15] Depending on the construction given to these provisions along with any other relevant aspects of a particular arbitration, this general language gives rise to a question whether a tribunal operating under the ICDR Canadian Arbitration Rules has the jurisdiction to make a general direction for SFC.[16]

Provincial arbitration legislation generally does not provide any clarity on the issue. For example, the Ontario *Arbitration Act*[17] at section 20(1) contains a general reference to the tribunal's ability to determine the procedure to be followed as does the Alberta *Arbitration Act* at its section 20(1).[18] This is perhaps the most difficult basis for establishing jurisdiction to award SFC: the inherent power of a tribunal to control its own process and, by extension, to ensure that its awards (including awards as to costs) have effect. For parties looking to have greater certainty as to whether a tribunal will have jurisdiction to direct SFC, they may want to select a set of rules that expressly references this power, or to specifically provide for the jurisdiction to direct SFC in their arbitration agreement.

The next part of this article will briefly discuss Canadian case law on SFC and then review the prevailing institutional rules on SFC in international arbitration.

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[8] *Ibid.*
[9] Effective 1 December 2014.
[10] At section 5.1.2(a).
[11] As amended June 1, 1998.
[12] At section 29(1)(h).
[13] Effective 1 January 2015.
[14] Article 24(1).
[15] Article 24(2).
[16] This discussion only looks at the most recent versions of the Rules canvassed, not previous versions which may still be the applicable institutional rules to a given dispute.
[17] SO 1991, c 17.
[18] RSA 2000, c A-43.