Security for Costs

Peter Collie

Peter Collie is a Barrister, Mediator and Adjudicator.

The theme for today is to examine the role that costs do and should play in the management of Arbitration. One of the tools for managing Arbitration is security for costs. It is in my view an interesting power which requires the arbitrator to attempt to reconcile two fundamentally irreconcilable principles. Which manifest themselves in the proposition that in those cases where security is needed the most it is the least appropriate to grant security.

The principles are:

The Defendant's right to be protected from the risk that a Claimant may not be able to pay a costs order if his claim is unsuccessful; and

Article 6 of the European Convention on Human Rights as enacted by the Human Rights Act 1998 gives everyone the right to a fair hearing.

In **Olakunle Olatawura v Abiloye [2003] 1 WLR 275** (CA) Simon Brown LJ said:

> Before ordering security for costs in *any* case (i e whether or not within CPR Pt 25) the court should be alert and sensitive to the risk that by making such an order it may be denying the party concerned the right to access to the court. Whether or not the person concerned has (or can raise) the money will always be a prime consideration, not least since article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms became incorporated into domestic law. Paradoxically, of course, the more difficult it appears to be for the person concerned to raise the money, the more obvious becomes the need for an order for security to protect the other party against the risk of incurring irrecoverable costs. The court will have to resolve that conundrum as best it may.

It is a difficult one, and I must say that there are days when I am glad I am Counsel rather than the tribunal.

The starting point in Arbitration is Section 38 of the Act or if the parties have agreed a set of rules, what those rules say about Section 38. The power is that "*the tribunal may order a claimant to*

© Peter Collie 2004

provide security for the costs of the arbitration". It sounds straight forward but on careful analysis are we comfortable with this definition.

Key Words:

- May
- Claimant
- Security
- Costs of the arbitration

Costs of the Arbitration

Section 59 of the Act defines these as:

(a) the arbitrators' fees and expenses,
(b) the fees and expenses of any arbitral institution concerned, and
(c) the legal or other costs of the parties

such costs to include costs of or incidental to any proceedings to determine the recoverable costs.

It would seem that the costs of enforcement may be taken into account **Texuna International Ltd v Cairn Energy Ltd** (unreported) [check details]

Claimant

By Section 82 of the Act includes a counterclaimant. However be very careful as very often the counterclaim is merely the converse of the claim. In **B J Crabtree (Insulation) Ltd v GPT Communications Systems Ltd (1990) 59 BLR 43 CA** the court held that it would be inappropriate to order security when the Counterclaim raised the same issues as the Claim. However where the Counterclaim raises new issues and goes well beyond the Claim it may be appropriate to grant security for those increased costs **Hutchison Telephone (UK) Ltd v Ultimate Response Ltd [1993] BCLC 307 CA** or if the tribunal considers that the costs of the counterclaim are such that they should be assessed in full on the basis of a stand alone claim the tribunal can order that security for the costs of the counterclaim be given **Petromin SA v Secnav Marine Ltd [1995] 1 Lloyds Rep 603 QBD**.

© Peter Collie 2004

If the Claimant is a limited company in England or Wales then Section 726 of the Companies Act 1985 applies. Thus the tribunal has in addition the obligations of that Section to comply with as well as Section 38 of the Act.

Even Governments can be subject to orders for security for costs per **Government of Sierra Leone v Davenport** (2003) (unreported).

May

It is only a short word but it brings with it so much responsibility, because for every may there is a may not. At which point the tribunal wishes that the word may were replaced with a set of strict criteria such as CPR 25.13. Well unfortunately CPR 25.13 does not apply and whilst there are some very interesting cases that will give guidance, they must not be slavishly followed. A good idea is to ask Counsel to explain and distinguish the differences between the Act and the CPR or the Rules and the CPR.

The average case will not involve the claimant being required to give security for costs. There is no reason why it should be necessary. The tribunal will not be concerned about the claimant's means or any other reason for ordering security for costs.

Another significant issue is to what extent can the tribunal use security for costs to actively manage the matter? Be it because the claim lacks merit or because of the claimant's conduct or any other reason. In **Wicketts & Anor v Brine Builders & Anor [2001] CILL 1805** HHJ Seymour held that the grounds for exercising the discretion were analogous to those in court and that there had to be credible evidence that the claimant would not be able to pay the costs if ordered to do so. However if the test is simply "analogous to the grounds applicable in court", then a court can order security for costs in at least two other situations, first as a condition for allowing a questionable case to continue and second to manage unacceptable repeated misconduct see **Olakunle Olatawura v Abiloye [2003] 1 WLR 275** (CA)

So where should the tribunal start when considering how to exercise this very wide discretion? I suggest with some searching questions.

Why are we considering security?

The Act simply gives the tribunal the power to order security it does not say anything about whether that is upon the application of the respondent or upon the tribunal's own motion.

© Peter Collie 2004

It is not unusual for a tribunal to include in their terms and conditions of acting a requirement that a payment or payments on account of anticipated fees of the tribunal shall be made as a pre condition to the tribunal acting. Is this security for costs?

Why should a Respondent agree to this request as he is not under an obligation to give security for costs? If the Respondent refuses to give such security this places the tribunal in a very difficult position per **Norjarl AS v Hyundai Heavy Industries Co Ltd [1991] Lloyd's Rep 524**

This leads on to the broader issue of the tribunal, of their own motion, ordering security for all the costs. Technically it would appear from the wording of the Act that the answer to this is that they can. It is a common view that the tribunal should be very slow to embark on this course of action. This raises all sorts of issues about impartiality and fair hearings. In my view the biggest argument against such a course is that the tribunal will be stepping into the arena and becoming the advocate for security not the tribunal who weighs the case for and against and decides whether in all the circumstances security should be ordered per **Fox v P J Wellfair Ltd 19 BLR 52** (CA). In **Wicketts & Anor v Brine Builders & Anor [2001] CILL 1805** HHJ Seymour held that it was wrong to make such an order which was not prompted by the application of the Respondent.

This leads to a conclusion that usually the tribunal will only be considering security for costs upon the application of the Respondent which must be supported with specific grounds and evidence.

Why is security considered necessary?

Having established why the tribunal is considering the need for security for costs it is necessary to identify the grounds on which the application is made. There must be specific grounds and specific reasons all supported by evidence per **Wicketts & Anor v Brine Builders & Anor [2001] CILL 1805**.

It is wholly unacceptable that a general un-particularised application is made. These should be dismissed without bothering the claimant.

The Act does 'help' the tribunal on this matter. It tells the tribunal that it cannot order security for costs on the ground that the claimant is-

a) an individual ordinarily resident outside the United Kingdom, or

© Peter Collie 2004

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.

Well that's helpful the tribunal can not play the discrimination card! The proviso was inserted to try to give the international commercial community confidence in the English system of Arbitration. However the tribunal can take account the foreign residency when considering all the circumstances and if the foreign residency will make enforcement more difficult than in England the tribunal can order security for the increased costs of enforcement per **Nasser v United Bank of Kuwait [2002] 1 WLR 1868**.

It is really helpful to tell the tribunal what they can not take into consideration without giving the first clue as to what matters they should take into consideration. Let me see if I can give some pointers:

It is useful to remind the tribunal of the purpose of the power: that is to protect the Respondent against the risk of being unable to enforce any costs order he may later obtain.

So if the claimant is impecunious the tribunal can take that into account. However the tribunal has to balance the rights of the Respondent to protection with the rights of the claimant to access to a tribunal and so any order must reflect the fact that if the claimant lacks the means to pay the security ordered this may amount to a breach of Article 6 of the European Convention on Human Rights.

If the application is in relation to an English or Welsh company then Section 726(1) of the Companies Act applies. It is for the Respondent to prove by testimony that the company will be unable to pay an order for costs. The respondent must prove that the company will not be able to pay not merely that they may not be able to pay. The security ordered must not be oppressive such that it stifles a genuine claim **Dominion Brewery v Foster (1897) 77 LT 507**. Note the ECHR applies as much to companies as individuals. Further if there is evidence that such an order may stifle a claim that has reasonable prospects of success then the tribunal is entitled to refuse the order **Aquila Design (GRB) Products Ltd v Cornhill Insurance plc [1988] BCLC 134 CA**. Note the test is for the claimant to show only a probability that it cannot pursue the claim not that it certainly cannot pursue the matter. However the tribunal should take into account not just the companies resources but the possibility that the company can raise funds from outside sources, such as directors, shareholders, creditors or other backers. Accordingly the company

© Peter Collie 2004

would need to show that it cannot raise funds from these sources either **Kufaan Publishing Ltd v Al Warrack Bookshop Ltd March 1 2000, CA** (unreported).

In **Sir Lindsay Parkinson & Co Ltd v Triplan Ltd [1973] 2 All ER 273** Lord Denning gave some guidance in relation to some of the circumstances a tribunal may want to take into account. These are whether:

1. **the claimant's claim is bona fide and not a sham**
2. **the claimant has reasonably good prospects of success**
   The tribunal should be very slow to start looking at the merits of the claim as this could lead to a mini trial and will not usually help the tribunal in an application for security for costs. If the answers to points one and two are not immediately obvious, I submit that the tribunal should resist embarking on any thing other than a cursory look at the merits **Fernhill Mining Ltd v Kier Construction Ltd [2000] LTL January 27, 2000**.
3. **there is an admission in the defence or elsewhere that money is due**
   This will be a question of fact based upon the evidence provided
4. **there is a substantial payment into court or an open offer of a substantial amount**
   This needs modifying in relation to arbitration and calderbank offers. The courts deal with the problem by ensuring that the trial judge is different to the judge that heard about the offers. Under the Act this option is not available. The tribunal will need to put such offers out of their mind or the parties could by agreement have the security application heard by some other arbitrator.
5. **the application is being used oppressively to stifle a genuine claim**
   This is back to the clash of principles
6. the claimant's want of means is brought about by any conduct by the defendant such as delay in paying or doing their part of the work.
   This appears to be a question in relation to pre arbitration conduct. One example is **Europa Holdings Ltd v Circle Industries (UK) Ltd [1993] BCLC 320** where the claim was for work done.
7. the application for security is made at a late stage of the proceedings.
   If a request for security is not made timeously the tribunal can decide not to make an order because of the Defendants delay.

If the claimant has failed to give an address or has given an incorrect address, the tribunal may consider this as a circumstance in which it would be appropriate to order security on the ground that without an accurate address enforcement could be very difficult. I once had a client who

© Peter Collie 2004

gave an address in a Worcestershire village that turned out to be a plot of land with an old garden shed just about standing on the plot.

If the claimant changes address, moves abroad or moves assets abroad then this will be a good ground for ordering security. The converse is also true if a claimant brings assets or his address within the jurisdiction of the English courts he may be able to argue that security should be reconsidered and released.

Can the tribunal consider the claimants conduct in the arbitration. There is no doubt that in court the Judge can on two specific grounds. First as a condition for allowing a weak case to proceed. So that instead of striking out a claim it can proceed if the claimant provides security. Second as part of the general case management powers the judge can take action if he is faced with repeated unacceptable conduct see **Olakunle Olatawura v Abiloye [2003] 1 WLR 275** (CA). The Act does not limit the grounds for ordering security for costs to impecuniousity so why limit the tribunal. In **Wicketts** the judge said that the power reflected the courts power.

The position in court is that an order for security for costs should not be made solely because one or more of the conditions is made out but only if having regard to all the circumstances it is considered just. There is no doubt that as ECHR Article 6 becomes more prominent then the impecunious claimant ground will diminish at which point conduct will become the more important ground. The tribunal is under an obligation to set a procedure that is fair and without unnecessary delay or expense. The courts are using security for this purpose so why should the tribunal not use security for the same purpose. There is no doubt that costs generally are moving to an issue and conduct based test. Ordering security on the grounds of issues and conduct would seem to fit well with the objectives of Article 1 and could reign a claimant in long before the final Award and long before overall costs are determined.

What evidence supports the case?

The application must be supported by credible cogent evidence. So if the ground is impecuniosity the Respondent must show evidence to support the assertion see **Wicketts**. This may be in the form of expert evidence. If the claimant is bankrupt or in liquidation then the impecuniousity is self evident and would not need expert evidence.

If other grounds such as address or conduct are asserted then these assertions must be supported by evidence.

© Peter Collie 2004

If the conduct is during the arbitration proceedings then whilst the tribunal will be aware of the conduct, security should only be considered on the application of the Respondent and the claimant must be given an opportunity to explain the conduct. There may be events outside of the formal arena that are impacting upon conduct.

What means of raising security are available?

It is necessary for the tribunal to consider in the broadest terms the means available to the claimant for raising security. See below.

What are the consequences of ordering security?

The tribunal should consider very carefully the consequences of ordering security. The security must not stifle a genuine claim nor must security be ordered in an amount that the tribunal knows cannot be raised as this will raise ECHR Article 6. However it is permissible to order security that will involve a third party providing funds such as directors or shareholders or even pure funders.

What will the tribunal do if it orders security and the claimant fails to raise the security will it go on to issue a peremptory order and eventually dismiss the claim Section 41 of the Act, or will the tribunal back down and allow the claimant to continue. This raises issues about the tribunals ability to control proceedings as well as the duty to both parties to act impartially and fairly. The tribunal needs to consider all outcomes before ordering security and in particular maintaining authority without being unfair. If you do not think through Section 41 before you make your order you will end up with problems.

One interesting point, I could find no clear authority as to whether if a tribunal dismisses the claim the matter is Res Judicata or as in court the matter can recommence on payment of the costs of the previous proceedings. The Act gives no guidance and the case law seems unclear.

What are the consequences of not ordering security?

The consequences of not awarding security are a disgruntled Respondent, who may complain in this day and age. You can not be concerned by this threat. If you are satisfied that security is inappropriate you must give your reasons and stand by. It is always permissible for the Respondent to make further applications as events unfold.

Why are we considering this now?

© Peter Collie 2004

Timing is always important early applications may be genuine or may be just testing the water prior to making a calderbank offer.

Late applications need to be considered carefully is the application made as soon as possible after the grounds came to light or has the application been made late with the purpose of delay. If the majority of the costs have been incurred before the application, think very carefully about whether to allow security based on costs incurred or just future costs.

Would it be fair in all the circumstances to order security?

The BIG question. My advice is simple weigh up all the circumstances and try to balance the respective rights. If the application is based on one ground alone be very slow to order security. Always consider the clash of principles.

Security

There are two issues how much and on what basis.

The amount is a matter of discretion from simply taking account of additional risk for a foreign claimant through to full security. If the application is made early the issues to consider are whether security should be ordered in stages and whether there should be a significant discount against the Respondent's assessment as a tool to control expense. For some guidance see **Procon (Great Britain) Ltd v Provincial Building Co Ltd [1984] 1 WLR 557**. It will be rare for complete security to be considered appropriate in all the circumstances **Re Unisoft Group No 2 [1993] BCLC 532**. Sufficient security is not full security **InnovareDisplays plc v Corporate Broking Services Ltd [1991] BCC 174** where an application for security in the estimated sum of £147,655 only £10,000 was ordered.

There are several ways in which security may be raised:

1. Cleared funds held by Solicitors or by the Chartered Institute on trust for the purpose of the security for costs.

2. Bank or insurance bond.

3. Guarantee from some appropriate third party

© Peter Collie 2004

4. Solicitors undertaking. If the Solicitor is happy to become personally liable then this is an acceptable security. see **A Ltd v B Ltd [1996] 1 WLR 665**.

If the arbitration is being funded by a third party the court may be able to make a costs order against the third party. In Arbitration the tribunal can not. This leads to the question what security should be ordered. The answer may be none! But it will depend on all the circumstances. In **Abraham v Thompson [1997] 4 All ER 362** the CA held that it was preferable that the Defendant suffered the injustice of irrecoverable costs than the claimant be forced to abandon a well pleaded genuine claim.

One interesting point on security for costs is to remember that it is money given for a purpose. A trust will more than likely be created. So if circumstances change the security may have to be returned. Also if circumstances change and you know that a third party provided the security they must have it returned. Such security can not be used for other purposes such as satisfying an Award or Order see **Crescent Oil and Shipping Services Ltd v Sociedade Nacional de Combustivers de Angola UEE [1999] LTL February 19th 1999**.

Conclusion

Security for costs can be an effective tool for managing the process of arbitration and is a very important part of the tribunals armoury. But remember the clash of principles.

Peter Collie
No 5 Chambers
Fountain Court
Birmingham
B4 6DR
Tel 0870 203 5555

© Peter Collie 2004