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Security for costs in commercial arbitration: playing hard to get

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Respondents often face jurisdictional obstacles in obtaining security for costs in commercial arbitration. A recent Ontario Superior Court of Justice decision increases those obstacles.

Arbitral jurisdiction derives from the agreement between the parties and the statute applicable to their arbitration. Correspondingly, arbitrators have long been recognized as lacking inherent power to order security for costs or stay an arbitration pending the posting of such security (see *Ramot Gill Development Corporation v. Precision Homes Corporation Inc.*, [1979] O.J. No. 4485 (Div Ct.)).

Arbitrators are unlike provincial superior courts in this regard. For example, in the absence of broad rules of court addressing security for costs such as those found in Ontario, the B.C. Supreme Court relies on its inherent jurisdiction to order the posting of security for costs (see *Shiell v. Coach House Hotel Ltd.*, [1982] B.C.J. No. 666 (C.A.)) as well as on security – related provisions in legislation such as the B.C. *Business Corporations Act*.

“Arbitrators have long been recognized as lacking inherent power to order security for costs...” - Ludmilla Herbst

Express statutory jurisdiction to order security costs in the arbitration context is found in B.C.’s *Commercial Arbitration Act*, through its incorporation of the *Domestic Commercial Arbitration Rules of the British Columbia International Commercial Arbitration Centre* (s. 22). Those rules provide that unless the parties otherwise agree, the arbitration tribunal may order the other party by way of a deposit or bank guarantee or in any other manner that tribunal things fit (R. 29(1)(h)).

Otherwise, respondents seeking security for costs in the absence of agreement on the post (including an agreement specifically including or referring to security –related arbitral rules) have been left to argue that arbitral jurisdiction should be implied from the general terms of otherwise applicable arbitration statutes.

In the Ontario Superior Court of Justice’s recent decision, *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, [2008] O.J. No. 4695, the governing statute was *Ontario’s Arbitration Act*, 1991, and the arbitrator’s pointed to s. 20(1) of that statute as a basis for jurisdiction: “[t]he arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with the Act.

However, the court found that making of an order for security for costs “is not merely a matter of procedure.” Rather than facilitating resolution of the parties’ substantive dispute, an order for security for costs “may well have the potential to delay or inhibit a resolution and hence frustrate the underlying purpose of the arbitral process;” and an order for security for costs may mean that until the ordered sum is posted, “the arbitration is effectively at an end.” Statutory jurisdiction to award costs likewise does not empower the arbitrator to order the posting of security for costs (see *Ramot Gil*).

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In *Inforica*, the court distinguished *Jaffasweet Juices Ltd. V. Michael J. Firestone & Associates*, [1997] O.J. No. 4585 (Gen. Div.). In addressing a complaint that the arbitrator, of his own motion, had adjourned one party's motion pending the posting of security cost, the court in *Jaffasweet* had noted the fact of arbitral jurisdiction over procedure. The court in *Inforica* commented that arbitral jurisdiction to order security for costs per se was no "the principal issue" in *Jaffasweet*; indeed, perhaps the arbitration agreement – the terms of which were not apparent from the reasons – had explicitly provided for security to be granted.

Statutes in Canada that address international commercial arbitration, as well as the federal *Commercial Arbitration Act*, which deals with both domestic and international arbitration, also provide that the arbitral tribunal "may order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute" and "may require any party to provide appropriate security in connection with such measure."

However, those interim measures are specific to "the subject matter of the dispute" (a qualification remaining in Canada but no longer found in the UNCITRAL Model Law on International Commercial Arbitration - on which the Canadian international statutes had been based - since the Model Law's amendment in 2006). Security for costs does not fall within the "subject' matter of the dispute" category.

Can a court step in to order security for costs in a commercial arbitration under the Canadian international statutes, that also provide that it is not incompatible with an arbitration agreement for a party to request an interim measure of protection from a court? The answer is likely no. This provision was not considered sufficient to empower the Federal Court (although, given the court's statutory basis, this may be distinguishable from the case of a provincial superior court) to award security for costs in an arbitration (*Frontier International Shipping Corp v. Tavros (The)*, [1999] F.C.J., No. 1744 (T.D. Proth.), varied on other grounds [1999] F.C.J. No. 1921 (T.D.)).

An inability to obtain security for costs in commercial arbitration may render it less attractive than litigation to respondents. Not only may an unsuccessful claimant ultimately lack the funds required to satisfy an award of costs, but particularly in international arbitrations, a claimant's residence outside Canada may complicate enforcement of a costs award.

The court's approach in *Inforica* reinforces the need for parties considering arbitration to expressly address the matters important to them in their arbitration agreement if the governing statute does not.