

## Security for Costs in International Arbitration

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Arbitration tribunals have long had authority, at the close of proceedings, to determine whether the losing party should cover some or all of the prevailing party's arbitration expenses, including its legal fees. From the perspective of respondents, the possibility of recovering costs at the end of the day may be the only hope for emerging unscathed from a dispute they did not initiate. Yet this hope is only as meaningful as the claimant's ability or willingness to honor a cost award. It is scant comfort where the claimant is insolvent or likely to become so, or may take steps during the course of proceedings to frustrate any eventual award against it. The respondent in these circumstances could find itself without effective recourse after incurring millions of dollars in legal fees and expenses, even if it is fully vindicated on the merits.

The only meaningful protection against such an outcome is a requirement by the tribunal, early in the case, that the claimant post security for the respondent's costs. Although not uncontroversial, the modern trend in international arbitration has been to recognize tribunals' authority to mandate such security. The LCIA Rules now explicitly grant this power, and the ICC Rules and AAA International Rules (though less explicit) have both been interpreted as permitting security measures as well. The English Arbitration Act was revised in 1996 to confirm the arbitrators' power to order security for costs. Arbitrators proceeding under the rules of several Swiss institutions

have likewise confirmed their authority to render such relief. Even at ICSID, where the question has arisen only rarely, two tribunals have confirmed that the general power to recommend provisional measures to preserve a party's rights extends in principle to security for costs.

The question of when security should be required is much less settled. The only thing upon which all commentators agree is that security for costs is not an ordinary or general measure that should be granted as a matter of course. Nor should it be granted on the basis of "foreign nationality," the standard originally underlying the related *cautio judicatum solvi* in civil law systems. In international arbitration by definition at least one party will be alien to the forum state, and the problems of international enforcement of judgments that once spurred development of the *cautio judicatum solvi* are largely laid to rest by the New York Convention.

One factor that some tribunals have found justifies ordering security to be posted is insolvency or, as sometimes stated, "financial incapability." Where a claimant is already in liquidation or bankruptcy proceedings, or its debts so far exceed its assets that insolvency seems likely, tribunals may be persuaded of the unfairness of requiring respondents to incur substantial arbitration costs with no possibility of recovering should they prevail. On the other hand, others have

argued that a claimant's poverty should not suffice without other compelling factors, because an order to post security in these circumstances may impede a party with a meritorious claim from pursuing precisely the arbitration remedy necessary to help it back on its feet. In the context of investment disputes between private investors and sovereign states, an additional factor is the prevalence of bilateral investment treaties that may be interpreted as guaranteeing investor access to ICSID or UNCITRAL arbitration, regardless of the investor's means at the time the claim is filed.

However, a consensus is emerging that even where financial weakness alone may not suffice to justify a requirement of security for costs, such remedies are warranted where there are additional compelling circumstances. Thus, security is more likely to be awarded where the claimant's financial incapability appears the result of deliberate actions to shield itself from potential liability, while maintaining the upside potential of a favorable merits award. A twist on this scenario is where the claimant's arbitration fees and expenses are being covered by a related entity or individual who stands to gain if the claimant wins, but would not be liable to meet any award of costs that might be made against the claimant if it lost. This scenario has been called "arbitral hit and run," and described by arbitrators and commentators alike as particularly compelling grounds for security for costs.

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