When will Australian courts order security for costs in international arbitrations?

Although courts have traditionally been reluctant to interfere with arbitral proceedings, they can intervene by ordering claimants to pay security for costs where arbitral rules normally do not permit such an order. Senior Associate Lucas Shipway outlines the English experience and examines whether Australian courts will follow a similar path.

International arbitration allows parties to resolve their disputes outside the courts of any particular jurisdiction according to a set of rules more or less of their own choosing. Increasingly, this rationale has been reflected in the courts’ reluctance to interfere with arbitral proceedings. However, one way in which courts will sometimes ‘intervene’ in arbitrations is by ordering claimants to pay security for costs where the arbitral rules do not permit the arbitrator to make such an order.

There have been relatively few cases in Australia dealing with the circumstances in which the courts will require claimants in arbitrations (particularly international arbitrations) to provide security. It appears that the principles applicable to applications for security in non-arbitral proceedings will also tend to apply, with some modifications, to applications for arbitrations.

Principles governing security for costs in non-arbitral proceedings

The power to order security for costs originally emerged as a part of the civil courts’ inherent jurisdiction to regulate their processes. In most Australian jurisdictions, the

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1 In earlier times, the civil courts were distrustful of arbitration. For a discussion of the possible reasons, see *Raguz v Sullivan* [2000] NSW CA 240 per Spigelman CJ and Mason P at paras 46 ff.
power is now regulated by applicable court rules. In New South Wales, for example, Part 53 of the Supreme Court Rules 1970 provides that:

- the Court may order [the] plaintiff to give such security as the Court thinks fit for the costs of the defendant of and incidental to the proceedings and that the proceedings be stayed until security is given.

In relation to corporations, section 1335 of the Corporations Act similarly enables a court to require a plaintiff corporation to provide security in certain circumstances.

In all cases, the court’s power to order security is discretionary but the presence of one or more of the following factors will generally be a pre-requisite:

- the plaintiff is ordinarily resident outside the jurisdiction;
- the plaintiff is a corporation or sues, not for its own benefit, but for the benefit of some other person and there is reason to believe that the plaintiff has insufficient assets in the jurisdiction to pay the defendant’s costs if ordered to do so; and
- the address of the plaintiff is not stated or is misstated on the originating process, or the plaintiff has changed its address with a view to avoiding the consequences of the proceedings.

Principles governing security for costs in arbitral proceedings

There is nothing to prevent the parties to an arbitration agreement from agreeing that before one of them may refer a dispute to arbitration that party must provide security for the other’s costs. Alternatively, the parties may agree to confer on the arbitrator the discretion to order security. In practice, the London Court of International Arbitration (LCIA) Rules are among the few standard-form rules that confer upon the arbitrator the power to order security for costs. In the absence of such an agreement, arbitrators in Australia have been held not to have any inherent power to order security for costs.

It follows that parties look to the courts to grant security. Before 1984, the courts in NSW took the view that neither the Supreme Court Rules nor the Corporations Act provisions referred to above permitted them to make an order for security for costs in connection with domestic arbitration proceedings. The position changed with the enactment of the Commercial Arbitration Acts, s47 of which gave courts ‘the same power of making interlocutory orders… in relation to arbitration proceedings’ as they had in relation to other proceedings. This section has been held to permit the making of orders for security for costs in domestic arbitrations and there appears to be nothing to prevent the section also applying to international arbitrations.

Australia has adopted the UNCITRAL Model Law as the procedural law applicable to international arbitrations. Article 5 of the Model Law, which prevents a domestic court from ‘intervening’ in matters ‘governed by’ the Law, does not appear to prevent a court from ordering security, given that Article 9 provides that ‘it is not incompatible with an arbitration agreement for a party to request… from a court an interim measure of protection and for the court to grant such measure’.

Hong Kong, which has also adopted the Model Law, has express legislation to the effect that domestic courts have the power to order security in respect of international arbitrations but there is no equivalent in Australia.

The position in England

The English courts traditionally demonstrated a reluctance to intervene in international arbitrations by ordering security for costs. In Bank Mellat v Helliniki Techniki SA, an Iranian bank applied to the High Court in England for an order for security in relation to an arbitration commenced by a Greek company in London under the International Chamber of Commerce (ICC) Rules.

The grounds for the application were that the company was resident outside the jurisdiction and there was reason to believe that it would be unable to pay the respondents’ costs if its claim failed. The Greek company maintained that an order for security would be inappropriate given that the parties had no connection...
with England. The application was made under s12(6)(a) of the then UK Arbitration Act which, like s47 of the Australian Commercial Arbitration Acts, gave the court ‘the same power of making orders in respect of… security for costs [in an arbitration] as it has… in relation to an action or matter in the High Court’.

The UK courts refused to make the order. Lord Justice Kerr recognised that, while parties who agree to arbitrate in England should be deemed to have subjected themselves to the English rules of procedure, there needed to be some specific connection with England – beyond the mere fact that an arbitration was to take place there – before an English court would order security for costs. Lord Justice Goff pointed out that an application for security in an international arbitration had to be treated differently from a domestic proceeding because of the fact that the defendant was a foreign company without assets in the jurisdiction was clearly less unusual.

Bank Mellat set the tone for the English courts’ attitude toward security for costs in international arbitrations for some time. Arbitrations held in London relating to maritime or commodity disputes under English standard forms tended to be treated as if they were domestic proceedings,10 but where it was difficult to show any specific connection with the local jurisdiction, the courts tended not to order security. This approach (rightly) deferred to the parties’ intentions: parties who chose to arbitrate their disputes under English standard-form contracts might be presumed to have agreed to submit themselves to the jurisdiction of the English courts for the purpose of related interlocutory proceedings, such as applications for security.

The English High Court famously departed from this trend in SA Coppee Lavalin NV v Ken-Ren Chemicals and Fertilisers Ltd.11 In that case, the Belgian plaintiffs had contracted with the Kenyan defendant to build a chemical plant in Kenya. When a dispute was referred to arbitration by the ICC in London, the plaintiffs sought security from the defendant, which had become insolvent, on the ground that the defendant’s backers (which included the Kenyan Government) were unlikely and could not be forced to pay costs should its claim fail. The House of Lords agreed to order security, partly on the basis that the insolvent defendant was being funded by its government.

The disquiet that followed the Ken-Ren decision resulted in amendments to the Arbitration Act, s38 of which now gives arbitral tribunals almost exclusive authority to order security for costs, even in the absence of prior agreement between the parties. That section provides:

1. The parties are free to agree on the powers exercisable by the arbitral tribunal for the purposes of and in relation to the proceedings.
2. Unless otherwise agreed by the parties the tribunal has the following powers.
3. The tribunal may order a claimant to provide security for the costs of the arbitration. This power shall not be exercised on the ground that the claimant is –
   a. an individual ordinarily resident outside the United Kingdom, or
   b. a corporation or association incorporated or formed under the law of the country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom.

The position in Australia

Unless the parties opt out of its provisions, an international arbitration in Australia will be governed by the UNCITRAL Model Law. Article 17 of the Model Law empowers an arbitrator to order a party to take an ‘interim measure of protection’, which may include providing security for costs, subject to a contrary agreement between the parties. As noted above, in the absence of a relevant agreement, a party must resort to the courts to seek to compel the other party to provide security.

No reported Australian cases appear to have considered a security for costs application in relation to an international arbitration. Given that the wording of s47 is similar to s12(6)(a) of the old UK Arbitration Act, it is reasonable to expect that Australian courts would take a similar approach to that taken by the courts in England under the old Act; that is, they may require a sufficient connection with Australia (or, more precisely, the particular state jurisdiction in which the application is brought) before they will make a security order. The mere fact that the arbitration is to be heard in Sydney (for example) may not be sufficient.

Once that ‘jurisdictional’ issue has been overcome, it appears likely that Australian courts will apply the same principles when dealing with an application for security in an international arbitration as they apply in other cases.

There have been cases, however, that suggest that Australian courts might take a more pragmatic approach. In Gentry Bros Pty Ltd v Wilson Brown &
Assocs Pty Ltd. Justice Cooper held that the court’s discretion in granting security is to be exercised having regard to ‘the interests of justice’ and that it was not possible or appropriate to attempt to list all the matters relevant to the exercise of the discretion as the relevant factors will vary from case to case.

This might suggest that an Australian court faced with an application for security in relation to an international arbitration will apply whatever test appears to be appropriate in the circumstances. However, other judges have disapproved of Justice Cooper’s view, holding that the discretion is not unfettered and must be exercised in accordance with established principles. Those principles include reference to whether or not the plaintiffs were likely to pay the defendant’s costs if their defence succeeded, as noted above.

In one respect, at least, the Australian courts’ approach to security in arbitrations may differ from their approach in other cases. It has been held in the UK that, although the strength of the claimant’s case is ordinarily a relevant consideration in granting security, where there is an arbitration, the courts will not examine the merits of the case. That is solely the jurisdiction of the arbitrator. No Australian cases appear to have considered this point but the reasoning is sound: arguably, it would be an unreasonable interference in arbitral proceedings for a court to embark on an examination of the merits of a case at any stage, let alone at the beginning of the arbitration (which is when the majority of security applications are brought).

Australian courts may also agree with Lord Justice Goff’s point in Bank Mellat that an application for security in an international arbitration has to be treated differently from a domestic proceeding because the fact that a claimant is a foreign company without assets in the jurisdiction is clearly less unusual. Accordingly, that factor may be given less weight.

**Conclusion**

In the absence of any decided cases, it is difficult to predict with confidence how an Australian court, faced with an application for security for costs in respect of an international arbitration, would respond.

The courts appear to have the power to order such security, notwithstanding the lack of an express legislative foundation. It is likely that they would look to the overseas authorities (and particularly English authorities) for assistance as to the applicable principles. Those authorities arguably support the proposition that, provided there is a connection with the jurisdiction in which the application is brought and provided that is sufficiently close to warrant a presumption that the parties have agreed to be bound by the decisions of a domestic court on interlocutory matters, the Australian court is permitted to intervene and order security for costs. In doing so, the court will have regard to the same criteria as in conventional civil applications, subject to some modifications appropriate to the arbitration context.

Ultimately, it may be for the Australian legislatures to enact reform similar to that adopted in England, so as to give arbitrators the power to order security for costs. Arguably, by removing a potential means of court interference in the process, such an arrangement best suits the spirit of arbitration, particularly international arbitration.

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12 (1992) 8 ACSR 405.
13 *Erolen v Baulkham Hills Shire Council* (1983) 10 ACSR 441 per Powell J.

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