CAN YOU SEEK SECURITY FOR COSTS IN INTERNATIONAL ARBITRATION IN AUSTRALIA?

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International arbitrations can be conducted under either federal or state legislation in Australia. In both cases complexities arise in the resolution of procedural questions, such as whether security for costs can be granted. There is scant Australian case law on such issues. This article considers whether an arbitral tribunal or a court has the power to order security for costs in an international arbitration in Australia. After analysing Australia's international arbitration laws and discussing New Zealand and House of Lords' authority, it is argued that unless the parties have specifically empowered the arbitral tribunal to order security for costs, only the relevant court has that power, and even that is uncertain.

1. INTRODUCTION

Procedural questions in international arbitration are determined by the agreement of the parties, any applicable procedural or institutional rules and the law governing the arbitration. These three factors determine the nature of the international arbitration that will take place, including the kinds of powers the arbitral tribunal has and the level of interference or supervisory powers the local courts have. The demands of the international business community for speed and efficiency have fuelled a trend away from court interference in international arbitration. This means there is more interest in the powers available to arbitral tribunals. This article considers the powers of courts and arbitral tribunals to order security for costs in international arbitrations conducted in Australia. However, the approach set out below is not limited to security for costs and could be applied to other procedural questions.

In the United Kingdom some procedural matters including ordering security for costs are now within the exclusive competence of the arbitral tribunal.[1] But the position in Australia is doubtful. Partly the result of a two–tiered system of arbitration laws (at the federal and state level), and partly the result of a House of Lords decision 10 years ago, it is unclear whether security for costs is available in international arbitration and, if so, whether it is the arbitral tribunal or the local Supreme Court which has the power to make the order.

2. INTERNATIONAL ARBITRATION REGIME IN AUSTRALIA

The sources of an international arbitral tribunal's powers and the level of court interference allowed is complicated in Australia by the fact there are international arbitration laws at both the federal and state level.

The International Arbitration Act 1974 (Cth) (IAA) incorporates the UNCITRAL Model Law on International Commercial Arbitration (Model Law) in s16. According to Art 1, the Model Law applies to an international commercial arbitration with its seat in Australia. Article 1(3) defines as international an arbitration in which the parties to the agreement have at the time of the conclusion of that agreement their places of business in different States or the place of arbitration is in a State different from that in which the parties have their principal places of business.

Section 21 of the IAA provides that if the parties to an arbitration agreement have agreed in writing that their dispute is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to

the settlement of that dispute. Thus parties can exclude the Model Law. Parties can exclude the Model Law expressly, for example, by agreeing that the Model Law does not apply in relation to the settlement of that dispute or implicitly by agreeing that a different arbitral procedural law applies.[2] However, while the parties to an international arbitration may exclude the Model Law, they cannot exclude the IAA itself.[3]

The state Commercial Arbitration Acts (CAAs) are now largely uniform.[4] The CAAs are mainly designed for use in domestic arbitrations. However, parties may choose the CAA to govern their international arbitration, or exclude the Model Law in favour of it.[5] The relevant CAA will also apply by default if parties exclude the Model Law.

An international arbitration conducted under the CAAs is procedurally the same as a domestic arbitration but with three exceptions, none of which are immediately relevant to this discussion.[6] So, when considering questions of procedure in Australia it is necessary to consider: (i) the IAA; (ii) the Model Law; and (iii) if the parties have excluded the Model Law, the CAA of the State in which the arbitration takes place. In the latter case it is necessary to question which parts of the CAA apply. To complicate matters further, there may be examples of situations where, even if the Model Law has not been excluded, parts of the CAA apply in addition to the Model Law because there is no inconsistency between the federal and State legislation. However, that is a matter which has not yet come before the Australian courts.

Finally, in determining procedural questions in international arbitration it is necessary to examine the arbitration agreement itself and any arbitration rules the parties have chosen. There is no doubt that Australian law permits parties to international arbitrations expressly to empower an arbitral tribunal to order security for costs. In this discussion it will be assumed that there is no such express authorisation and nothing else relevant in the parties' arbitration agreement or chosen rules. Indeed it would be very rare to see an express stipulation regarding security for costs in an arbitration agreement. It should be noted though for the sake of completeness that an Australian court might interpret a broadly drafted arbitration agreement (for example, one submitting to arbitration 'all disputes or differences arising out of or in connection with or relating to this contract') as implicitly empowering the arbitral tribunal to order security for costs.[7] However, we are not aware of any such decision to date.

The jurisdiction of both the competent Supreme Court and an arbitral tribunal to order security for costs will now be examined under both the Model Law and the CAAs.

3. SECURITY FOR COSTS UNDER THE MODEL LAW

3.1 Jurisdiction of the Supreme Court under the Model Law

Article 5 of the Model Law states:

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 9 provides that:

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

... it is argued that unless the parties have specifically empowered the arbitral tribunal to order security for costs, only the relevant court has that power, and even that is uncertain

On a plain reading of 'interim measure of protection' there is no reason to suspect that it is too narrow to include security for costs. Further, from the Legislative History and Commentary on Art 9 it is apparent that the drafters did not intend to limit it to a particular kind of interim measure, but nor did they specifically foresee its use for security for costs:

Thus it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre–award attachments to secure an eventual award and similar seizures of assets; measures required from third parties; and enforcement of any interim measures ordered.[8]

There is, however, New Zealand authority which suggests otherwise. This issue came before the High Court of New Zealand in Lindow v Barton McGill Marine Ltd[9] (Lindow). In Lindow, Salmon J made a clear determination that the High Court did not have jurisdiction to order security for costs in an international arbitration. Salmon J also noted in obiter dictum that he did not consider Art 9 of the Model Law, which is applicable in New Zealand with some modifications, to empower international arbitrators to order security for costs.

Lindow involved a US plaintiff (claimant in the arbitration) who contracted with the defendant company to have a boat built. The US plaintiff attempted to gain an order for security for costs from the arbitrator, Mr Derek Firth. Mr Firth found he did not have jurisdiction to order security for costs under the Model Law. The US plaintiff apparently did not attempt to argue before the High Court that Mr Firth incorrectly found he did not have jurisdiction. The plaintiff rather sought an order for security from the High Court.

It was common ground that the arbitration was an international one, and that Sch 2 of the Arbitration Act 1996 (NZ) did not apply.[10] By way of background Sch 2 of the Arbitration Act 1996 (NZ) expressly empowers an arbitral tribunal to order security for costs.[11] However, for international arbitrations Sch 2 is an 'opt in' part of the Act such that it only applies to international arbitrations where the parties specifically agree to adopt it.[12] Lindow is useful in any discussion of the Australian position as '[t]he provisions of this Schedule [1] correspond, for the most part, to the provisions of the Model Law on International Commercial Arbitration',[13] notwithstanding that Art 9 has been amended slightly.

Article 9 of Sch 1 differs from the Model Law in that it expressly empowers the courts of New Zealand to make orders regarding certain interim measures in the same way the court could in a matter before it. Article 9(2) states that the court:

... shall have the same power as it has for the purposes of proceedings before that court to make …

…

(d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party.

In Lindow, Salmon J construed Art 9(2)(d), as well as Art 9 generally, as limited to matters concerning the subject matter of the dispute.[14] Despite noting '[o]n that basis Art 9 would have much the same purpose as Art 17',[15] Salmon J's opinion ignores the fact that Arts 9 and 17 are drafted in a very different manner. Article 17 deals with the powers of an Arbitral Tribunal to order interim measures and expressly limits those powers to matters 'in respect of the subject–matter of the dispute', and is discussed further below. In our view the Lindow decision has been rightly criticised for implying this limit to matters concerning the subject of the dispute for the court under Art 9.[16] However, there are some valuable principles of law which may still be extracted and we return to this case below.

Our view is that nothing in the wording of Art 9 of the Model Law limits the court's power in relation to interim measures. The phrase 'interim measure of protection' means measures designed to prevent a party to a dispute from doing something to frustrate the effect of an eventual award against it. In other words these are measures designed to protect one party from the evasive tactics of the other. It is submitted that 'interim measures of protection' includes both measures protecting against tactics in relation to the subject matter of the dispute, as well as with respect to matters incidental to the dispute but relating to the dispute resolution process. An order for security for legal costs specifically protects one party from being dragged into a dispute it has to fund itself but is not guaranteed recovery of those funds if the plaintiff's claims are unsuccessful. We therefore see no reason to limit 'interim measures of protection' to matters in respect of the subject mater of the dispute for the purpose of Art 9 of the Model Law. This view is supported by the fact the drafters of the Model Law expressly limited the powers of an arbitral tribunal to order interim measures in Art 17 to matters 'in respect of the subject–matter of

the dispute'. No such limit was included in Art 9.

However, even if the court is empowered to order security for costs under Art 9 the court might refuse to do so. This is not unlikely where the arbitral tribunal has already been constituted and the court considers either: (i) that the matter is within the jurisdiction of the arbitral tribunal; or (ii) that the parties, by agreeing to some form of delocalised international arbitration, intended to minimise the jurisdiction of local courts as far as possible. This approach, which implies that courts should be reluctant to interfere in international arbitrations, is consistent with the reasoning in Coppee–Lavalin SA/NA & Voest–Alpine AG v Ken–Ren Chemicals & Fertilisers Ltd (in liq)[17] (Ken Ren).

In Ken Ren, the House of Lords held that the UK High Court's jurisdiction to order security for costs in international arbitration should be exercised sparingly and only in exceptional circumstances. In that instance the arbitration was under the Rules of Arbitration of the ICC International Court of Arbitration (ICC Rules) and its only connection to the United Kingdom was that London was the seat of the arbitration. The House of Lords reasoned that the parties, by choosing a highly institutionalised form of international arbitration, had intended to oust the High Court's jurisdiction as far as possible. Therefore the High Court should interfere only in exceptional circumstances.

It followed from what his Lordship had said [Lord Justice Goff in Bank Mellat v Helliniki Techniki [1984] QB 291] that no order for costs should be made against the defendants unless there were special circumstances justifying such an order … no particular weight being attached to the fact the parties had agreed to arbitration in accordance with the ICC rules, save that it emphasised the international character of the arbitration.

The solution to the present problem must, I consider, lie in a realistic appreciation of the character of the relevant arbitrations and the circumstances in which England comes to be chosen as the forum, rather than in squeezing indications, often with great difficulty, out of rules the draftsman of which in all probability never even addressed his mind to the question of security for costs. Indeed, it is theoretically possible that there could be arbitrations under the ICC Rules that are not of the character that I have described, in which it might be proper to make an award for security. But in practical terms, having regard to the character of arbitrations conducted under the ICC Rules, I cannot myself conceive of any such case.

…

In the end, and with much hesitation, I have come to the conclusion that an order for security for costs does not conform with the type of procedure which the parties have impliedly chosen, and that an order for security should be refused notwithstanding that on a narrower view it appears to answer the justice of the case. My Lords.[18]

However, on the facts, the majority of the House of Lords found that the circumstances were exceptional and ordered that security for costs be made.

The UK legislation has now changed but Ken Ren forms part of the common law and should be considered if the issue of a court's jurisdiction to order security for costs in an international arbitration arises in Australia. It is surprising that Ken Ren was not considered by the New Zealand High Court in Lindow.

If a court refused jurisdiction to order security on the basis that the matter should be referred to the arbitral tribunal (assuming one has already been constituted), could the party requesting security use that court's decision in support of its subsequent application to the arbitral tribunal for security for costs? This would depend on the precise ruling of the court. In Ken Ren, the House of Lords did not say that in all instances an arbitral tribunal would have jurisdiction. Rather, the House of Lords found that the parties, by choosing ICC arbitration, had opted for a comprehensive dispute settlement regime and structure such that a court at the seat of arbitration should be very reluctant to interfere. The House of Lords thus did not determine the issue for all arbitral tribunals. Rather the House of Lords simply held that the parties opted out of the local court system. The House of Lords did not say that there was an implied empowerment of the arbitral tribunal to order security. The question of whether an arbitral tribunal has authority to order security is a matter for each arbitral tribunal to decide pursuant to the competence–competence principle contained in Art 16 of the Model Law,[19] and with careful consideration of the actual words of the arbitration agreement and the content of any adopted arbitration rules. Thus what the parties have agreed is of primary importance. As Lord Mustill noted:

[P]arty autonomy, … emphasises that arbitration is a consensual process, and … national courts should within very broad limits recognise and give effect to any

agreement between the parties, express or tacit, as to the way in which the arbitration should be conducted. This is now widely recognised as a first principle of arbitration law, and the English Courts in common with those of other nations with developed systems of arbitration law strive to give effect to it.[20]

Assuming an Australian court's decision is similar to that of the House of Lords in Ken Ren there would be little or no effect on the jurisdiction of the arbitral tribunal. As just noted, whether there is jurisdiction to order security would be a matter for the arbitral tribunal itself to decide pursuant to the competence–competence principle. However, if the court's decision were different, and the judge effectively determined that 'the court does not have jurisdiction but the arbitral tribunal does', then that decision could be used by the party requesting security in support of an argument before the arbitral tribunal that the latter has jurisdiction to order security. It is interesting to consider whether the arbitral tribunal would be bound by such a court decision, or whether it would simply find it persuasive. Such a direction from the court could be construed as either: (i) an interpretation that Art 17 of the Model Law empowers the arbitral tribunal to order security; or (ii) an interpretation of words of the arbitration clause. If it were the former it would form part of the law governing the arbitration and therefore be binding on the arbitral tribunal. If it were the latter the arbitral tribunal might be free to make its own interpretation because the tribunal is empowered to interpret the arbitration agreement in the first instance by virtue of the competence–competence rule.

3.2 Jurisdiction of the Arbitral Tribunal under the Model Law

(a) Does an arbitral tribunal have the power to order security for costs?
In the preceding paragraph reference was made to Art 17 of the Model Law. That article states:

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, 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. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

At the time of writing there is no Australian case law on whether Art 17 empowers an arbitral tribunal to order security for costs. However, it is submitted that from a plain reading, and following the New Zealand High Court decision of Lindow, referred to above, Art 17 does not empower an arbitral tribunal to do so because security for costs would not be part of the 'subject matter of the dispute'.[21] That phrase must be referring to a dispute that is external to the dispute resolution process itself; that is going to the heart of the actual dispute. Article 17 therefore empowers the arbitral tribunal to order interim measures as long as those interim measures relate to the merits of the substantive dispute. There is a distinction between substantive and procedural matters. Disputes about costs are procedural rather than substantive because they are subsidiary to, and not part of, the 'subject matter of the dispute'.

This analysis is supported by the Lindow decision. Although we consider that Salmon J was wrong to read 'subject matter of the dispute' into Art 9 of Sch 1 of the Arbitration Act 1996 (NZ), the fact that he did conveniently lead him to then interpret that phrase. In doing so Salmon J concluded that '[a]n award may incorporate an order for costs, but costs are obviously not the substance of the dispute'.[22] Referring specifically to Art 17 and whether it empowered an arbitrator to order security for costs, Salmon J noted by way of obiter:

In my view that [sic] Art [17] does not give the arbitrator the requisite jurisdiction. The reference to 'protection of the subject matter of the dispute' [sic] makes it clear in what is [sic] envisaged by that Article are preservation orders or orders analogous thereto.[23]

Further, the phrase 'appropriate security in connection with such measure' in Art 17 is referring to security for the taking of the interim measure itself, and not security in relation to the cost of defending the substantive dispute. This assertion is supported by the lack of any suggestion to the contrary in the major commentaries such as the travaux pre'paratoires on the Model Law by H M Holtzmann and J E Neuhaus, and the Commentary on the UNCITRAL Model Law in the ICCA Handbook by A Broches. Broches makes no suggestion that the phrase 'appropriate security in connection with such measure' could be applied to security for costs generally,[24] Holtzman and Neuhaus state:

The Commission made this change to make clear that the security required could cover not only the direct costs of imposing the measure itself but also consequential damages to a winning party resulting from the imposition of the measure against that party.[25]

There is no mention or suggestion that the security discretion provided by this article can be used in any other way. It is therefore submitted that Art 17 does not assist a party attempting to argue that an arbitral tribunal has the authority to order security for costs. In recognition of this problem, other Model Law jurisdictions such as Singapore[26] have specifically bolstered the Model Law and now provide express authority in their international arbitration laws for the arbitral tribunal to order security for costs. The fact these other Model Law countries have adopted such specific legislation supports our submission that the Model Law alone is insufficient in this regard.

Leaving the above conclusion aside, there is nothing in the Model Law that prohibits an arbitrator from ordering security for costs. As noted above the parties could expressly empower the arbitral tribunal in this way. Moreover, it is possible that a broadly drafted arbitration agreement implicitly so empowers the tribunal. If a dispute arose between the parties about whether the arbitration agreement implicitly authorised the arbitral tribunal to order security for costs, the arbitral tribunal could decide this jurisdictional point by virtue of Art 16 of the Model Law, which enacts the principle of competence–competence. Although a decision as to an arbitral tribunal's competence can be reviewed by a court, it is submitted that a court is unlikely to overrule an arbitrator's decision interpreting the scope of the arbitration agreement because that would involve substituting the court's own interpretation of the arbitration agreement for that of the arbitral tribunal.

(b) Assuming it did have the power, would an arbitral tribunal order security for costs?
Assuming the arbitral tribunal found that it was competent to make the order, another question is whether or not the arbitral tribunal would order security for costs. There is no doubt that such a power if it exists is discretionary.

Whether the tribunal will make the order depends on the arbitrators' attitude to security for costs in international arbitration, how the application is made, and the circumstances and grounds for the application. International arbitrators are reluctant to order security for costs unless there is strong evidence that the winning party could not successfully enforce a costs order against the loser. The mere fact the parties are in different States is certainly not enough. This is evidenced by the fact that ordering security for costs in international arbitration is uncommon.[27] Factors that may be taken into consideration by a tribunal are considered below, but it is worth noting at this point the impost of security on the claimant is likely to weigh heavily on an arbitrator's mind. Almost certainly it would be a contested application, and under the Model Law the claimant would have the ability to seek judicial review of the decision on the arbitral tribunal's authority to render such an order.

We have shown that the law in this area is vague and untested, leaving an arbitrator on uncertain ground. In addition, as Rubins highlights, security for costs has until relatively recently been a predominantly English convention, stemming from the presumption in Commonwealth jurisdictions that costs follow the event.[28] Lord Mustill in Ken Ren also alludes to this when he says:

Finally there is the argument that security for costs is an English idiosyncrasy which should be excluded from the cosmopolitan world of institutional arbitration. This is correct to the extent that most national arbitration laws do not offer such a procedure, which is not surprising since only the common law systems (and not all of these) enable a tribunal to order the losing party to pay its opponent's costs.[29]

The influence of civil law procedures on international arbitration may have contributed to the overall preference against security for costs. Also, arbitrators may be reluctant to force what they believe to be an unfamiliar procedure on a civil law party.[30]

Just as the Singapore arbitration laws were referred to earlier, the Singapore International Arbitration Centre (SIAC) rules specifically and explicitly empower arbitral tribunals to make an order for security for costs.[31] It is submitted that arbitrators will be more inclined to make potentially controversial orders of this nature when explicitly supported by the applicable arbitration rules chosen by the parties or by the agreement of the parties. In other words, if there is doubt about an arbitral tribunal's authority to order security for costs, even once it establishes jurisdiction, the tribunal may be reluctant to make the order. But if the parties have specifically adopted a set of arbitration rules that allow for security for costs arbitrators may be less reluctant.

4. SECURITY FOR COSTS UNDER THE CAAS

4.1 Jurisdiction of the Supreme Court under the CAAs

Section 47 is the relevant provision of the CAAs. It provides that:

The court shall have the same power of making interlocutory

orders for the purposes of and in relation to arbitration proceedings as it has for the purposes of and in relation to proceedings in the court.

Case law confirms that s 47 empowers the court to order security for costs, at least in domestic arbitration proceedings.[32]

But following on from the discussion of the Ken Ren case above, the position may not be the same for international arbitrations. The House of Lords made clear in Ken Ren that international arbitrations are less connected than domestic ones to the laws and courts of the seat of the arbitration.

However, applying the reasoning of Ken Ren, it is also possible to construct a contrary argument in favour of the court's jurisdiction to order security for costs. The House of Lords in Ken Ren, especially Lord Mustill, carefully analysed the nature of the arbitration regime the parties had chosen to adopt. In that case they had opted for a denationalised set of arbitration rules which the House of Lords found was evidence of a preference for minimal court intervention. The contrary conclusion could be drawn where parties to an international arbitration have chosen the CAA, or excluded the Model Law. The parties have expressly chosen a more heavily supervised form of arbitration. They have opted out of an international law providing for minimal court interference and into a law that provides for considerable court interference. Thus the reasoning in Ken Ren could actually be used to support the contention that the parties wanted more, not less, court intervention. If this reasoning were accepted a court may find that it does have jurisdiction to order security for costs in an international arbitration conducted under the CAAs.

If similar circumstances to those in Ken Ren came before an Australian court, Ken Ren should be considered. However, it is submitted that, on balance, in an international arbitration governed by a CAA the relevant Supreme Court would find it does have jurisdiction to order security for costs under the CAA notwithstanding it is an international arbitration.

4.2 Jurisdiction of the Arbitral Tribunal under the CAAs

Recall that the jurisdiction of an arbitral tribunal to order security for costs results from either the agreement of the parties or the arbitral procedural law (the relevant CAA). Nothing in the CAAs authorises an arbitral tribunal to order security for costs, although the position has not been tested in international arbitration. The parties could specifically empower the arbitral tribunal to order security.[33] However, in the absence of a contrary agreement, in general under the CAAs an application for security for costs must be made to the relevant Supreme Court pursuant to s 47 of the CAA.

It is interesting to speculate about what an international arbitral tribunal acting under a CAA would do if asked to order security for costs. The CAAs do not contain a provision equivalent to Art 16 of the Model Law, which authorises the arbitral tribunal to rule on its own jurisdiction. However, more recent court decisions accept that the competence–competence rule exists at common law in Australia.[34] In practice in domestic arbitrations arbitrators generally seek guidance from the court if there is a dispute as to their jurisdiction. However, international arbitrators might be reluctant to do this because of the trend away from court interference. It is submitted that in the presence of a broad arbitration clause international arbitrators might find that they do have jurisdiction to order security for costs.[35] It would then be up to one of the parties to test the matter in a court pursuant to the competence–competence principle.

5. FACTORS TO BE TAKEN INTO ACCOUNT BY AN ARBITRAL TRIBUNAL IN DECIDING WHETHER TO ORDER SECURITY FOR COSTS

While courts are bound to follow precedent and are subject to the lex fori, arbitrators are not. Nevertheless both would likely give consideration to similar generic factors when assessing a security for costs application. This is true whether the arbitration is governed by the Model Law or a CAA.

Although not intended to be exhaustive, the following factors are examples of those likely to be considered by an international arbitral tribunal:

- prospect of the claimant's (or counter–claiming respondent's) success without assessing the merits of the case;[36]
- whether the claimant (or counter–claiming respondent) is actually footing the cost of the claim or whether those funds are being provided by a third party who could not be the subject of a costs order;[37]
- whether the respondent's actions contributed to the claimant's difficult financial position;[38]
- the real purpose behind the application for security for costs—that is whether it is born from a genuine concern or simply as an oppressive measure designed to frustrate;

• the behaviour of the claimant; for example, any evidence which may tend to suggest it has acted in a way aimed to evade an unfavourable award;[39]

• all of the circumstances will be considered;[40] and

• the mere lack of means of a party is not in ordinary circumstances sufficient by itself to justify the grant of security.[41]

6. ENFORCEMENT OF AN ORDER FOR SECURITY FOR COSTS

In litigation the most powerful method of enforcing an order for security for costs at a court's disposal is the ability to dismiss the plaintiff's action if the security is not provided.[42] It is unlikely that a court could or would dismiss a claim in arbitration proceedings if an arbitral tribunal had already been constituted. However, an order with the same practical effect is to restrain the arbitration proceedings from continuing until the security is made.[43]

The arbitral tribunal could also be requested to stay its own proceedings until a security for costs order issued by the court or by the arbitral tribunal is complied with. While there is no specific power in the CAA enabling an arbitral tribunal to do this, the arbitral tribunal could take these measures under its general power to conduct the proceedings as it sees fit.[44] Similarly there is no specific empowerment in the Model Law. To avoid any doubt parties should consider specifically empowering the arbitral tribunal to stay its proceedings in the event of non–compliance with an order of the arbitral tribunal.

Finally, there is a continuing debate about the applicability of the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards to interim awards of an arbitral tribunal. The prevailing view is that the Convention does not oblige member states to enforce orders as opposed to awards.[45]

7. CONCLUSION

Arbitration laws at the federal and state levels in Australia complicate the resolution of procedural questions arising in international arbitrations. This is compounded by the fact the Model Law can be excluded and it is not clear the extent to which the IAA and the CAAs will apply. This article demonstrates the lack of clarity on one particular procedural question and proposes theoretical responses. However, until the matter comes before a court or is resolved through legislative review it is not clear whether international arbitral tribunals and courts are authorised to order security for costs.

One of the enormous benefits of international arbitration is party autonomy. Given the uncertainty over the resolution of procedural questions, parties should resolve such questions in their arbitration agreements well before any dispute arises. Arbitration agreements should specifically empower (or specifically not empower, as the preference may be) the arbitral tribunal to order security for costs or make any other desired order arising in relation to the dispute resolution process.

REFERENCES

1. Section 38(3) of the Arbitration Act 1996 (UK)

2. However, simply choosing a set of arbitration procedural rules should not exclude the application of the Model Law in its entirety. See further M Pryles, 'Excluding the Model Law' [2001] International Arbitration L Rev175

3. See American Diagnostica Inc v Gradipore (1998) 44 NSWLR 312 and Abigroup Contractors v Transfield [1998] VSC 103 (unreported, Vic SC, 16 October 1998, BC9805944)

4. Some minor differences remain between the states. All references in this article are from the Victorian CAA.

5. See, for example, Abigroup Contractors, above n 3

6. Sections 11, 40 and 55 of the CAA operate differently if the arbitration is an international one.

7. E Gaillard and J Savage (eds), Fouchard Gaillard Goldman on International Commercial Arbitration, Kluwer Law International, The Netherlands, 1999, p 687 (para 1256)

8. See Fourth Working Group Report, A/CN.9/245, para 188, p 340; Fifth Working Group Report A/CN 9/246, para 26, pp 341–2; Seventh Secretariat Note, A/CN 9/264 Art 9, para 4, p 343; Commission Report, A/40/17, para 96, pp 345–6; H Holtzmann and J Neuhaus, A Guide to the UNICTRAL Model Law on International Commercial Arbitration—Legislative History and Commentary, Kluwer Law and Taxation Publishers 1994

9. Lindow v Barton McGill Marine Ltd (2002) 16 PRNZ 796

10. Ibid, at [7]

11. Clause 3(1)(d)

12. Section 6(2) of the Arbitration Act 1996 (NZ)

13. <http://www.legislation.govt.nz/browse_vw.asp?content–set=pal_statutes> Heading to Sch 1 (accessed 25 January 2005)

14. Lindow, above, n 9, at [13]–[14].

15. Ibid, at [11]

16. D Williams, 'Review: Arbitration & Dispute Resolution' (2004) NZ L Rev 87 at 103.

17. [1994] 2 All ER 449

18. Ibid, at 464–5 per Lord Mustill, then 471

19. According to the competence–competence principle an arbitral tribunal is empowered to decide on its own jurisdiction. This jurisdictional decision can, however, be reviewed by a competent court. See Art 16 of the Model Law.

20. Ken Ren, above, n 17, at 458 per Lord Mustill

21. Lindow, above, n 9, at [9]

22. Ibid, at [13]

23. Ibid, at [9]

24. A Broches, 'UNCITRAL—Commentary On The Model Law' in J Paulsson (ed), International Handbook on Commercial Arbitration, Suppl 11 (January/1990) Kluwer, The Netherlands

25. Holtzmann and Neuhaus, above n 8

26. See, e.g. s 12 of the Singapore International Arbitration Act 1994; to a less explicit extent see s 2GC of the Hong Kong Arbitration Ordinance (Ch 341); Art 6 of Turkish International Arbitration Law of 2001.

27. See for instance the discussion of ICC arbitration practices in N Rubins, 'In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration' (2000) 11 Am Rev Int'l Arb 307 at 339; and WL Craig, WW Park and J Paulsson, International Chamber of Commerce Arbitration (3rd ed), Oceana Publications, 2000, pp 467–9 as cited in Rubins. See also A Redfern and M Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, London, 1999, pp 357–8 paras 7–30 to 7–32 generally.

28. Rubins, above n 27, at 320

29. Ken Ren, above n 17, at 468

30. Rubins, above n 27 citing G Bernini, 'Report on Neutrality, Impartiality, and Independence' in The Arbitral Process and the Independence Of Arbitrators, International Chamber of Commerce, publication 472, 1991, pp 31, 35

31. SIAC Rule 27.3

32. Imperial Leatherware Co Pty Ltd v Macri & Marcellino Pty Ltd (1991) 22 NSWLR 653; Holland–Stolte Pty Ltd, Re [1993] 2 Qd R 247; Baulderstone Hornibrook Engineering Pty Ltd v State Constructions Pty Ltd (1993) 61 SASR 94; McKensey v Hewitt [1999] NSWSC 685 (unreported, 17 June 1999, BC9903910); Leary v Tasmanian Kit Homes Pty Ltd (1995) 12 BCL 228

33. Re Unione Stearinerie Lanza and Wiener [1917] 2 KB 558; McKensey v Hewitt [1999] NSWSC 685 (unreported, 17 June 1999, BC9903910)

34. Ferris v Plaister (1994) 34 NSWLR 474

35. Gaillard and Savage, above n 7, p 687 para 1256

36. Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534; Re J&M O'Brien Enterprises Pty Ltd: The Shell Company of Australia Ltd [1983] 70 FLR 261; 7 ACLR 790; Sir Lindsay Parkinson v Triplan [1973] QB 609; [1973] 2 All ER 273; Wong Kwok Mei Sanrita v Eversonic Inc [1992] 2 HKC 62

37. Ken Ren, above n 17

38. Aspendale Pastoral Co Pty Ltd v WJ Drever Pty Ltd [1983] 7 ACLR 937; Rubins, above n 27

39. XY International, Inc v Societe Z [1933] Lloyd's Rep 421

40. Ken Ren, above n 17

41. Ibid, at 658 per Lord Wolf; Bank Mellat v Helliniki Techniki SA [1984] QB 291; [1983] 3 All ER 428; Gaillard and Savage, above n 7, p 688

42. See, e.g. Supreme Court (General Civil Procedure) Rules (Vic) 1996 r 62.04

43. Petromin SA v Secnav Marine Ltd [1995] 1 Lloyd's Rep 603

44. See, e.g. s 14 of the CAA

45. UNCITRAL Working Group 32nd Session 20; Resort Condominiums International Inc v Bolwell [1995] 1 Qd R 406; (1995) 118 ALR 655

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