**Security for costs**

Defending an arbitration, particularly in complex disputes can be expensive. The general principle in Hong Kong arbitration is to have costs follow the event, an award allowing a successful respondent to recover his costs from the claimant will be of little value if it cannot be enforced because the claimant is insolvent or his assets are located in a jurisdiction which makes recovery difficult. An order of security for costs will ensure that there are funds against which the respondent can enforce an award in his favour, but there is also a risk that a respondent may apply for such an order simply to stifle a valid claim.

+++
Security for costs is the opposite of security for the claim. Security for claim involves the claimant seeking to secure his claim against the respondent. But security for costs is a request by the respondent against the claimant. The logic is: If the respondent turns out to be successful in the defence, he should get his costs.
+++

Traditionally, the power to order the claimant to give security for costs was outside the arbitrator's statutory jurisdiction and application to be made to the Court. The s. 2GB of the HKAO bring fundamental changes to the law and practice of arbitration in Hong Kong. In s. 2GB(1), it provides "When conducting arbitration proceedings, an arbitral tribunal may make orders or give directions dealing with any of the following matters-
(a) requiring a claimant to give security for costs of the arbitration;"

The arbitrator now has the power to order the claimant to give security for cost. Importantly, the parties cannot contract out of this provision. Applications should now be made to the arbitrator and not to the court

**The Terms of the Order**
Security under the HKAO can only be demanded from a claimant or, in accordance with s2(1) (Claimant – includes a person who make a counterclaim) from a counterclaiming respondent. There is no powder for an arbitrator to make such an order in relation to a defence alone.

If the respondent has a distinctive and separate counterclaim, a cross order for security for costs can be ordered. But the order against the respondent for security for costs should only relate to the defence by the claimant to this counter-claim.

.
**Making an Order**
Prior to the introduction of the s.2GB, one of the grounds most commonly relied on the order by the Court was that the claimant was a person ordinarily resident abroad, or a company incorporated and managed outside Hong Kong. It is now changed the basis on which an order may be made.
Section 2GB(3) of the Arbitration Ordinance now clearly states that an arbitrator must not make an order requiring a claimant to provide security for costs only on the ground that it is foreign.

Importantly, the use of the word "only" means that a claimant's residence or place of incorporation can still be taken into account if some other ground for ordering security exists. English law (s. 38(3) of the English Arbitration Act 1996) has been amended differently to provide that foreign residence or incorporation can never be a ground for ordering security for costs.

The Arbitration Ordinance does not otherwise set out the basis on which an arbitrator should exercise his discretion and award security for costs. It does impose an overriding duty to act fairly and arbitrators have a general duty to exercise their discretion judicially (s.2GA).

+++

It is likely, however, that the extent of an arbitrator's discretion will be the source of considerable debate. While some will contend that the jurisdiction must be exercised in a manner consistent with that which the courts adopted to deal with applications arising out of arbitrations (see, for example, *Coppee-Lavalin SA/NV V Ken-Ren Chemicals and Fertilizers Ltd* [19941 2 All ER 449], others may argue that the only limitations on an arbitrator's discretion are those expressly set out in the Arbitration Ordinance (in particular, the point on foreign claimants discussed above) and that the discretion is otherwise unfettered.

+++

It is safe to say that the arbitrator’s discretion in ordering security for costs is very flexible. Factors to account for should be:

- finance soundless of the claimant, location of assets, etc. It may be, like a Mareva injunction, a security for costs will be ordered against a Panamanian or St. Vincent company, not because it is “foreign” but because of the nature of such a company. A distinction will be drawn between different jurisdictions, making “foreignness" less important if the claimant's assets are located in a country that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- Having ascertaining the sort of claimant (or the counter-claiming respondent) who ought to put up security for costs, the case *Sir Lindsay Parkinson v Triplan (1973) 1 QB 609* set out other principal factors to be taken into consideration and weighted:

a. The bona fides of the claim and the prospects of success – It is however not a factor that can always be taken into account in practice.
b. Any oppressive features of the application for security – the genuine desire to seek security is something that ought to be supported in proper case. The other one is to stifle the claim procedurally in making an excessive demand for security.
c. The timing of application – An application for security for costs can only be made after the statement of claim and statement of defence (and counter-claim if any) have been served. If it is made at a late stage of the proceeding may cause prejudice to the claimant
d. An arbitration on documents will not normally attract an order for security unless the documents and contentions

are unusually elaborate

e. If in a particular dispute, it is simple by chance that the claimant commences the action, which could have been the respondent wearing the hat of the claimant, then a cross order for security for costs could be warranted: *The Silver Fir (1980) 1 LLR 371.*

**The Form of security**

The Arbitration Ordinance does not prescribe the form that the security is to take. Although the arbitrator, as is the case with the court, can order the manner of the security to be given, he will usually leave it to the parties agreement in the first place. Thus, the security as agreed can be in the form of a solicitor's letter of undertaking or P&I club's letter of undertaking (for maritime claims); or a bank guarantee from a first class bank; or a deposit in an escrow account in a bank.

+++

The practice in litigation has been for security to be given by way of a payment into court or a bond. It seems likely that arbitrators will continue to accept payment by way of a bond, but would not be able to order a payment into court, as the court would have no jurisdiction in the matter (0 73 r 11 only gives the court jurisdiction to receive payments "in satisfaction" of claims in the reference).

+++

In any event, arbitrators have a discretion to accept any form of security they consider to be appropriate. This should allow creative orders to be made, which will offer sufficient protection for the respondent while causing the minimum of difficulty to the claimant.

**Possible sanction for non-compliance to the order**

What if an order has been made against the claimant but it has not been complied with?

The Ordinance does, however, specify two particular aspects of the order. First, in accordance with s 2GB (4), the arbitrator must specify a period within which the order is to be complied with. Second, according to S 2GB(5), while the arbitrator has the power to extend any period which he has set, he also has an express power, if security is not provided, to dismiss or stay the claim.

This is different to the typical court order. Generally, court orders provide that proceedings will be stayed until security is given. The HKAO, however, requires the arbitrator to give the claimant a period within which to provide security for costs. The arbitration will continue throughout this time and will only be stayed if the arbitrator's order is not complied with. Under this section, the arbitrator has a discretion, which must be exercised judicially, as to whether to dismiss the claim or to stay it. Dismissal of claim would mean the claim is *res judicata* and thus not subject to further proceeding.

+++

What if an order has been made against the claimant but it has not been complied with?
Normally, and in the first instance, there will be a stay of the claim. But it can be far more serious. Under s.41 (6) of the English Arbitration Act, the power to sanction is: "If a claimant fails to comply with a peremptory order of the tribunal to provide security for costs, the tribunal may make an award dismissing his claim".

In practice, a 'permanent' stay and the issuing of an award dismissing the claim are very little different. A probable benefit of the latter is to have an award with costs allowed to the respondent, which is then capable of enforcement under the New York Convention against the claimant.
+++

**Conclusion**

The law concerning security for costs in Hong Kong arbitrations has changed significantly. Arbitrators now have the power to order a claimant to give security for costs and they are not restricted to doing so in the circumstances in which the courts would have made such an order. Whether this has the effect of making Hong Kong a more attractive venue for arbitration will depend upon the way in which arbitrators exercise their discretion.