Security for Claims

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Security for claims

The obtaining of security for claims in the disputes is very important. The benefit is not just to ensure that the award, if successful, will be eventually honored by the respondents/debtors. Another important side benefit will be to heighten the probability of an early amicable settlement.

The security is likely to be put up in the "best possible light" of the claim, with costs and interest being included. In other words, it is going to be excessive. This will ensure that the respondents/debtors will want to seek an early settlement so that the security can be released and they can get back part of the funds. If no amicable settlement can be reached, with security in place the respondents/debtors are unlikely to employ delaying tactics in the course of the reference. This will ensure an economical and speedy arbitration.

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Security for claim is opposite ton security for costs. Security for costs is a request by the respondent against the claimant, but security for claim involves the claimant seeking to secure his claim against the respondent.
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Traditionally, the power to order the respondent to give security of claim 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-
(b) requiring money in dispute to be secured;"

In s. 2GC(1), it provides "The Court or a judge of the Court may, in relation to a particular arbitration proceeding, do any of the following -
(a) make an order directing an amount in dispute to be secured;"

The arbitrator now has the power to order the respondent to give security for money in dispute. Importantly, the parties cannot contract out of this provision. Applications should now be made either to the arbitrator or to the court

The power of the arbitrator set out in s 2GB(1)(b) is a power that is exercisable concurrently by the High Court under s 2GC(1)(a). The High Court cannot act in respect of this power vested exclusively in the arbitral tribunal.

Although it is appropriate in most cases for a party to apply initially to the tribunal for the an order of

security for money in dispute, there will clearly be a small number of cases where it is more appropriate for a party to seek the order from the court. These include:

1. where arbitration proceeding have been commenced, but no tribunal has yet been appointed;
2. where an order must be directed so as to bind a third party as well as a party to the arbitration,

There are different ways open to claimants seeking the security:

1. Arrest of ship (for maritime claims)

Traditionally, the plaintiff has the right to an right arrest in respect of any maritime claim which is within the Admiralty in rem jurisdiction.

In Hong Kong, a right of arrest vessel for claims is within the Court's jurisdiction, but there are arguments and uncertainties in the common law relating to the situation where Admiralty proceedings are stayed in order for the dispute to be submitted to arbitration, and the vessel has been arrested, or security has been given to prevent, or obtain its release from, arrest.

In London, s. 11 of the English arbitration Act 1996 give a provision on "Retention of Security where Admiralty Proceedings Stayed" by specifying on granting the stay, the court may order the retention of the arrested vessel or the provision of equivalent security as a means of ensuring the satisfaction of any award in respect of that dispute.

For certainty and avoiding the difficult arguments surrounding cases like "The Rena K", "The Vasso", and The Tuyuti", we should introduce a new section in the light of s. 11 of the English arbitration Act 1996 "Retention of Security where Admiralty Proceedings Stayed".

2. Mareva injunction

The original Mareva injunction was against foreign defendants. It now extends to respondent domiciled with the jurisdiction. In appropriate cases, even a worldwide mareva injunction may be ordered.

In applying for a Mareva injunction, the applicant must show that, inter alia, he has a good arguable case and that the defendants have assets within the jurisdiction with a real risk of dissipation or removal that will result in an unsatisfied judgment or award.

The applicant must be sure to make full and frank disclosure by way of an affidavit which should include matters such as: any known defence raised by the defendants; the existence of proceedings in other jurisdictions; whether there are negotiation and settlement discussions; what might be the financial standing of the defendants; and the possible effect on known third parties of the Mareva injunction.

A Mareva injunction is usually against the bank accounts of the defendants. But it can be against a ship (The Rena K (1978) 1 LLR 545) or against insurance proceeds (The Siskina (1978) 1 LLR 1).

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The advantages of a Mareva injunction over the arrest of a ship:

- it is not just limited to maritime claims. Not a lot of debtors will have a ship to be arrested, but most will have a bank accounts. Thus it has much wider application

The disadvantages to a Mareva injunction over the arrest of a ship:

- An arrest of ship is never subject to the discretionary power of the judge, nor are there requirements like a good arguable case, full and frank disclosure, and an undertaking for damages by the applicant.
- Unlike an arrest of a ship which in itself has to invoke the Admiralty Court's jurisdiction by an in rem action. A Mareva injunction has to have an existing legal or equitable right within the jurisdiction of the Court seeking such an injunction..

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The seeking of security by Mareva injunction is certainly an order which bind a third party as well as the respondent to the arbitration. It will be more appropriate for the claimant to seek the order from the court. In addition to this, whether an arbitrator should deal an ex parte application is another question which I do not suggest an arbitrator to entertain (breach of the general duty of natural justice under s.2GA).

3. Interim protection order:

If the arbitration is concerned with the rights to proterty' the order can be applied from the arbitral tribunal or court.

4. Procedural "Order Nisi"

Tribunal of limited jurisdiction have for many years contrived to make orders which lie beyond their powers by using a device which may be called 'order nisi'. The essence of this stratagem is for the tribunal to say 'we have no power to order you to do X, but we co have power to do A (or refuse to do it), so that if you wish us to make (or refuse) an order to do A, you might agree to X'. This versatile procedure can be used in many contract contexts, and we mention it here because it provides a means of obtaining security for the claim where the arbitrator would not otherwise be entitled order it.

5. Orders for Specific Performance.

Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire shall have the same power as the court to order specific performance of any contract other then a contract relating to land or any interest in land.