

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

Applications for Security for Costs

Chartered Institute of Arbitrators

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Introduction

1. This Guideline sets out the current best practice in international commercial arbitration in relation to applications for security for costs. It provides guidance on:
 - i. matters which are relevant to the consideration of an application for security for costs (Articles 1 to 4); and
 - ii. the process for granting and releasing security for costs (Articles 5 and 6).
2. This Guideline should be read in conjunction with the *Guideline on Applications for Interim Measures* much of which is applicable to applications for security for costs.¹ However, as applications for security for costs raise their own discrete considerations, these are dealt with in this Guideline.
3. In this Guideline references to ‘claimant’ should be taken to include ‘counterclaimant’ and references to ‘applicant’ should be understood as ‘respondent’ (whether as respondent to a claim or as counter-respondent to a counterclaim). Also, a reference to ‘providing security’ means providing security for costs.
4. For the purposes of security for costs, costs in arbitration should be understood as the legal costs of the parties as well as the arbitrators’ fees and expenses, fees and expenses of the arbitral institution (if any) and any other costs (non-legal) of the parties.

Preamble

1. Depending on the terms of their appointment, the governing laws, the parties’ agreement and any applicable rules, arbitrators may order that a party that loses the arbitration should reimburse some or all of the reasonable legal costs and expenses incurred by the winning party. This ‘costs shifting’ rule from the winning party to the losing party can

be an effective tool for discouraging parties from advancing weak claims or defences.² However, the risk of an adverse costs order is of no consequence if the party against whom it is likely to be made has no funds to pay those costs or no assets against which the order can be enforced. Accordingly, arbitrators may, as an interim measure in appropriate circumstances, require a party bringing a claim or a counterclaim to provide security for the costs of the other party in case the claim or counterclaim fails and the claiming party does not pay the costs awarded against it.³

2. The rules of most arbitral institutions based in common law jurisdictions,⁴ and most of the national laws of those jurisdictions,⁵ expressly provide that arbitrators may order security for costs. Conversely, the rules of many arbitral institutions based in civil law jurisdictions, and most of the national laws of those jurisdictions, do not include express powers for arbitrators to order security for costs.⁶ However, the national laws of those civil law jurisdictions do give arbitrators broad powers to order any interim measure that they deem necessary and/or appropriate. This general power is considered to be sufficiently wide to include the power to require a party to provide security for costs in appropriate situations and with appropriate safeguards.⁷ Consequently, security for costs is considered to be widely available in international arbitration but in practice it is only ordered in very particular circumstances.⁸
3. Since orders requiring security frequently provide that the claim cannot proceed until the security is provided, failure to comply can have adverse consequences. Accordingly, great care should be taken before making such an order to avoid any injustice, including, in particular, unjustly stopping genuine claims by impecunious parties.
4. The way in which arbitrators approach applications for security for costs in international arbitrations reflects, in many respects, the practices and

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procedures of legal systems which have built up a body of jurisprudence as to when security for costs should and should not be granted.⁹ However, arbitrators should bear in mind that court decisions, and procedures relating to civil litigation are not normally binding on them, and they usually have a broad discretion to decide what procedures to adopt and issues to take account of when considering an application for security for costs.¹⁰ In any case, it is advisable that arbitrators make sure that, pursuant to the law of the place of arbitration (*lex arbitri*) and any rules, they are authorised and empowered to issue orders for interim measures and/or whether any specific criteria apply before considering any application for security for costs.

Article 1 — General principles

- 1. The General principles stated in Article 1 of the *Guideline on Applications for Interim Measures* are equally applicable to applications for security for costs.**
- 2. When deciding whether to make an order for security for costs, arbitrators should take into account the following matters:**
 - i) the prospects of success of the claim(s) and defence(s) (Article 2);**
 - ii) the claimant's ability to satisfy an adverse costs award and the availability of the claimant's assets for enforcement of an adverse costs award (Article 3); and**
 - iii) whether it is fair in all of the circumstances to require one party to provide security for the other party's costs (Article 4).**
- 3. This list is not exhaustive and arbitrators should also take into account any other additional considerations they may consider relevant to the particular situation of the parties and the circumstances of the arbitration.**

Commentary on Article 1

Matters to consider when dealing with applications for security for costs

- a) Arbitrators should deal with applications for security for costs in an expeditious manner. Often a four-step process is appropriate: (1) if the application is at the very start of an arbitration, the arbitrators should begin by considering whether they have jurisdiction to hear the dispute;¹¹ (2) if they decide, or have already decided, that they have jurisdiction they should then consider whether they have power to order security for costs taking into account any requirements and/or limitations expressly stipulated in the arbitration agreement, including any arbitration rules and the applicable national law; (3) if they decide that they have power to order security for costs, they should exercise their discretion to decide the process for hearing the application and in doing so they should, as always, ensure that both parties are given a fair opportunity to present their case;¹² and (4) the arbitrators should consider the merits of the application having due regard to all of the relevant circumstances of the case and without any predisposition in favour of, or against, the application.

Balancing the parties' conflicting interests

- b) In assessing the merits of the application, arbitrators should balance the right of a party to pursue its claim against the right of an opposing party to recover the costs of a defence that defeats the claim. Therefore, arbitrators should assess the relative merits of all of the arguments for and against the grant of security with a view to reaching a decision that is just and fair in light of all of the circumstances of the case.

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*Dealing with applications for security for costs
where there is a counterclaim*

- c) When faced with an application for security for costs in respect of a counterclaim, arbitrators should determine the nature of the counterclaim and assess the merits of such counterclaim along with the assessment of the (primary) claim.¹³
- d) If a counterclaim raises a matter which is distinct from the claim, or goes significantly beyond that claim, or if the value of the counterclaim hugely exceeds the value of the claim, then security may be ordered specifically in respect of the costs of defending the counterclaim. However, specific security should not be ordered in respect of a counterclaim that is inseparable from or closely connected with the original claim.¹⁴
- e) Where a counterclaim is by way of set-off, to diminish or extinguish the claim (for example, where the claim is for the value of goods and services provided, and the counterclaim is that the goods and services were defective), the counterclaim is in effect a defence to the claim, and an order for security might stifle that defence.

Article 2 — The prospects of success for the claim(s) and defence(s)
Taking great care not to prejudge or predetermine the merits of the case itself, arbitrators should consider whether, on a preliminary view of the relative merits of the case, there may be a need for security for costs.

Commentary on Article 2

- a) When considering this issue arbitrators should be extremely careful not to prejudge or predetermine the merits of the case itself and should make it clear to the parties that they have not done so. The danger is that, if arbitrators consider the merits of the case before the substantive hearing,

they may compromise their impartiality and may disqualify themselves from proceeding further.¹⁵ Arbitrators should not consider the merits in detail, as it is unlikely that there will be adequate materials to do so and it would be a time-consuming and expensive exercise. Instead, they should limit their preliminary examination to determine whether there is a *prima facie* claim made in good faith and a *prima facie* defence made in good faith.¹⁶

- b) If their preliminary view, based on the information before them, is that the claim has a reasonably good prospect of success, arbitrators may conclude that this factor is against an order for security. Conversely, if their preliminary view is that the defence has a reasonably good prospect of success, then they may conclude that this factor is in favour of an order for security. If, however, they conclude that both parties have reasonably good arguable cases, they may consider that this factor is not helpful in determining whether an order for security is appropriate. In most cases, consideration of this factor will not be determinative and it will also be necessary to consider the additional factors set out in the following Articles.

Article 3 — Claimant's ability to satisfy an adverse costs award

- 1. Arbitrators should consider whether there are reasonable grounds for concluding that there is a serious risk that the applicant will not be able to enforce a costs award in its favour because:**
 - i) the claimant will not have the funds to pay the costs awarded; and/or**
 - ii) the claimant's assets will not be readily available for an effective enforcement against them.**
- 2. If the arbitrators conclude that, for either or both of these reasons, there is a real risk that the applicant will have difficulty enforcing a costs award, then these factors favour an order for security, unless**

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these factors were considered and accepted as part of the business risk at the inception of the parties' relationship. Conversely, if the arbitrators conclude that the claimant has assets that will likely enable the applicant to pursue enforcement of a costs award, and that these assets will be readily accessible to the applicant, then there is no justification for an order for security.

Commentary on Article 3

Serious risk of inability to pay

- a) Before ordering the posting of security, arbitrators should be satisfied that there is a serious risk that the claimant will be unable to pay the respondent's costs if the latter succeeds. Conversely, if it appears that a claimant will have the necessary means and that such means will be readily available for the satisfaction of any costs award, arbitrators should refrain from ordering security as a protection against a possible change in the claimant's finances.

Insolvency and accepted business risk

- b) Arbitrators should bear in mind that the lack or inaccessibility of assets is a necessary but not a sufficient reason for requiring security for costs. Combined with other factors it may lead to an order for security for costs.¹⁷ Further, if the solvency of a party was questionable at the inception of the relationship between the parties, arbitrators may consider that the inability to pay is no reason to order security as such a risk was a consequential effect of doing business with that party.¹⁸ Similarly, if a party contracts with a shell company without obtaining some kind of financial guarantee, arbitrators may consider that its inability to pay was known, or ought to have been reasonably known, at the inception of the relationship and was an accepted consequence of doing business with it.¹⁹ Even if a party's ability to pay has deteriorated

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since the inception of the relationship, the arbitrators may consider that this was a normal commercial risk known at the inception of the relationship.²⁰

- c) If, however, the circumstances show that the deterioration of the party's financial situation or the lack of available assets was caused by something other than an accepted business risk, arbitrators may consider that an order for security for costs is justified.²¹ For example, if they conclude that a party's lack of funds is because it has deliberately organised its affairs in such a way as to hide its assets or has given wrong information about them or has taken any steps to frustrate a future costs award, then these are factors in favour of requiring security.²²
- d) Also, as the party against whom an order for security for costs is sought is in the best position to provide evidence as to its financial situation, if it fails to produce accounts and documents to demonstrate whether it will be able to pay, or unreasonably delays their disclosure, arbitrators may draw the inference that the failure or delay favours requiring security.²³

Beneficiary of claims

- e) When security for costs is sought from a beneficiary of a claim, the arbitrators should consider whether the claiming party is a nominal claimant pursuing a claim for the benefit of another party, who does have funds, and who has a commercial interest in the outcome of the arbitration.²⁴ Before determining whether to grant security for costs in such circumstances, arbitrators should also consider any additional factors including, *inter alia*, accepted business risk, who actually controls the proceedings, whether the person or entity who stands to benefit if the claimant wins will seek to escape liability and avoid paying any adverse costs, and any other relevant factors applicable to the dispute at hand.²⁵

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Place of residence of the party

- f) Arbitrators should not order security for costs solely on the ground that the claiming party has a foreign residence, i.e. different from the country of the place of the arbitration.²⁶ The restriction against requiring security from a party purely because they are resident in a foreign jurisdiction is expressly stated in many national laws²⁷ and international treaties which forbid discrimination against foreign parties.²⁸ Moreover, discrimination on the grounds of foreign residence would be contrary to the fundamental principles of international arbitration which enables parties from different jurisdictions to choose where their disputes should be resolved.²⁹

Availability of the party's assets

- g) Notwithstanding the above, the location of the assets of a party may be a legitimate consideration if the arbitrators are satisfied that an order for security is justified because enforcing a costs award would be more difficult or uncertain than would normally be expected. This is a permissible consideration because it is based on the risk of unenforceability of a costs award in the foreign location of the assets, rather than the foreign residence of the party.³⁰ However, if the risk associated with the jurisdiction in which a party organises its affairs (and holds its assets) was known at the inception of the relationship and there is no reason to conclude that this was to defeat creditors, then the arbitrators may conclude that it was part of the accepted risk of doing business with that party.³¹

Article 4 — Is it fair to require security

- 1. Before making an order requiring a party to provide security for costs, arbitrators should consider and be satisfied that, in light of all of the surrounding circumstances, it would be fair to make an order**

requiring one party to provide security for the costs of the other party.

- 2. In any event, arbitrators should consider whether awarding security would unjustly stifle a legitimate and material claim.**

Commentary on Article 4

Paragraph 1

- a) Assuming that arbitrators have decided that one or more of the factors identified in Articles 2 and 3 above are in favour of granting an order for security for costs, before proceeding to make such an order, they should consider the conduct of the party applying for security both before and during the course of the arbitration to date and all of the surrounding circumstances in order to determine whether it would be fair to require security.
- b) So, for example, if the claimant's lack of funds to pay a costs award has been caused or contributed to by the conduct of the opposing party, such as delay in payment of sums due or failing to perform its contractual obligations, the arbitrators may conclude that it would not be fair to require security in those circumstances. Conversely, if the arbitrators conclude that a party has deliberately organised its financial affairs so as to be unable to pay or has deliberately used foreign jurisdictions to avoid enforcement of claims, then it may be fair to require security.³²

Timing of applications

- c) Applications for security for costs should be made promptly, that is, as soon as the risk or facts giving rise to the application are known or ought to have been known. Arbitrators should consider whether an application has been made at an appropriate time. If the application is made after significant expense has been incurred, they may consider that this unfairly disadvantages the other party and refuse the application unless

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there is a good reason for the delay. So, for example, if the need for security arose because a party's solvency has deteriorated during the course of the arbitration, this may be a reasonable explanation for the delay.

- d) Alternatively, if the arbitrators consider security is required but that there has been a delay, they may order security for future costs only, rather than completely refuse the application.

Advance on costs

- e) Many arbitration rules provide that the parties should contribute equally to an advance on the arbitrators' fees and expenses as well as any administrative fees of the institution.³³ Where there is such a provision, arbitrators should consider whether the advances, assuming they have been and, in future, will be paid, provide the applicant with sufficient protection.³⁴ Further, if the applicant has not paid its share of an advance on costs, arbitrators may consider this to be a ground for refusing the request.³⁵ Conversely, if the claimant has not paid its share of an advance on costs, this is a matter the arbitrators may take into account in granting security.

Paragraph 2

Stifling a genuine claim

- a) Arbitrators should consider whether an application is being used unfairly or oppressively to intimidate a weaker party, to delay the time when the applicant has to address the substance of the dispute or to unjustly prevent a party from pursuing a genuine and legitimate claim. The fact that requiring security will frustrate a party's ability to pursue its claim because of its financial situation may not of itself lead to a refusal to grant security. The arbitrators should consider all of the surrounding

circumstances to determine that their decision, whether or not to require security, is in all of the circumstances fair.

Admissions of liability and settlement offers

- b) Parties may seek to rely on admissions in case documents or settlement offers as evidence in support of, or in opposition to, an application for security for costs. Before reviewing any such evidence, particularly of settlement offers, arbitrators should consider whether the evidence is admissible in the arbitration according to the parties' agreement, including any applicable rules and the *lex arbitri*. If the evidence is inadmissible, they should not rely on it when considering the application. If it is admissible, they should take it into account.
- c) So, for example, evidence of an offer to settle for a fraction of the amount claimed, or an admission that the claim is inflated, may lead the arbitrators to conclude that the claim is being used oppressively and it would be fair to require the party to provide security for the applicant's costs. Conversely, evidence of substantial offers or significant admissions of liability by the applicant may lead the arbitrators to conclude that the application is being used oppressively, and that it would be unfair to require the claimant to provide security for the applicant's costs.

Article 5 — Form and content of an order for security for costs

- 1. A decision whether or not to require security for costs should be recorded in a reasoned procedural order or an interim award.**
- 2. Arbitrators should determine the amount of the security to be provided and should invite the parties to agree on the form of security which best suits their needs.**
- 3. If the parties fail to agree, arbitrators should decide on the form of**

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security to be provided. They should include a time period within which security is to be provided and the consequences if the party against whom an adverse security for costs decision has been rendered fails to provide security within the stipulated time.

Commentary on Article 5

Paragraph 1

It is good practice to explain briefly the reasons for the decision in order to avoid the decision being seen as arbitrary. For ‘Matters to consider when deciding the form of the decision for interim measures’ please refer to the *Guideline on Applications for Interim Measures*.³⁶

Paragraph 2

The amount of security

- a) The precise amount of the security required should be specified in the order. In determining what that amount should be, arbitrators should consider whether the amount of security requested is realistic and proportionate taking account of the nature and complexity of the dispute. They should also consider whether the legal fees claimed are reasonable in terms of both rates and number of hours.³⁷
- b) Arbitrators have a wide discretion to determine the amount of security. They may order any amount up to the sum requested by the applicant. They should be careful not to order an excessive amount that would unfairly pressure a party or to order a nominal amount that would inadequately protect the applicant.
- c) Arbitrators should consider how much security is appropriate, after receiving submissions from the parties. In doing so, they may request details of the costs incurred to date and reasonably expected to be incurred by the party seeking security, as well as comments on those details from the party against whom the application has been made.

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Costs of the application

- d) If a party asks for an order for its costs in respect of the application for security to be paid by the losing party, arbitrators should consider whether it is appropriate to include an order for payment of those costs in the order requiring security or alternatively whether they should reserve consideration of this issue until making a decision on liability.

Paragraph 3

The form of security and time for providing it

- a) Arbitrators possess a broad discretion as to the type of security which they can order. Some common forms are bank guarantee,³⁸ parent company guarantee, bond, payments into escrow account, liens on property, insurance coverage, an assignment of a financial instrument, deposit with an independent stakeholder (such as an arbitration institution),³⁹ or a joint account controlled by the parties' lawyers. It would not be appropriate for arbitrators themselves to take any role in the handling of the security, such as holding it in a bank account they control. Where there are costs associated with the provision of security, arbitrators should consider including them in their decision.
- b) If there has been limited discussion as to the form of security and the time required to put it in place, the arbitrators may invite the parties to attempt to agree these issues in a specified time frame. In the event the parties fail to agree, the arbitrators may have to direct the parties to make further submissions so that they have sufficient information on which to make a fair decision. In any event, the arbitrators should make an order as soon as possible and in the form that they consider to be the most appropriate to the circumstances of the party and specify a reasonable time frame within which it is to be provided.⁴⁰ It is good practice to include in the order an exact date as to when security must be provided to avoid any confusion or further dispute.

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Security for costs in stages

- c) At an early stage in the arbitration it is only possible to estimate the probable costs that will be incurred and, similarly, it is only possible to estimate the amount of security that would give the applicant adequate protection. The arbitrators may decide that it is more appropriate to order security to be provided in stages, rather than order the full amount at the outset. When security is ordered in stages, further applications should only consider what further amount of security is to be provided and in what form, unless there has been a change in circumstances that warrants reconsidering the decision to require security.⁴¹

Consequences of non-compliance

- d) Arbitrators should consider what powers they have in relation to non-compliance under the applicable national law and/or arbitration rules. In many jurisdictions arbitrators are given express or implied powers including the ability to order stay of the proceedings or such other procedural orders as they consider appropriate.⁴²

Dismissal of the claim

- e) Some jurisdictions give arbitrators power to dismiss a claim for non-compliance by rendering a final award recording their decision to dismiss the claim.⁴³ These jurisdictions require that the defaulting party, who has failed to comply with an initial order, should be given an opportunity to explain the reasons for the failure. Furthermore, the defaulting party has the possibility to comply with the initial order within a specified period of time and failing to do so will result in the claim being dismissed. This power should only be exercised in extreme situations where the party has disobeyed the order without good reasons.

Article 6 — Release of the security

Where security for costs has been ordered, arbitrators should decide on the release of such security in their final award, as well as the costs associated therewith or pertaining to the application insofar as they were reserved until the final award.

Commentary on Article 6

Arbitrators should deal with the release of any security for costs which they have ordered in their final award. If the party against whom an adverse order for security for costs has been rendered is successful on the merits of its claim, arbitrators should order that the security be returned to it and consider whether the applicant should be ordered to reimburse all costs and/or expenses of posting the security. Where the applicant is successful in its case, the security should be released in its favour.⁴⁴ In such event, arbitrators should make sure that the security is set off against the amount payable to that party under the final award in respect to costs.

Conclusion

The ability to require security for costs can be a very powerful tool in the hands of arbitrators. It is therefore not surprising that the number of applications for security for costs in international arbitration is steadily rising.⁴⁵ However, it has been described as one of ‘the most neglected and misunderstood forms of interim relief’.⁴⁶ This is probably due to the lack of express provisions in many national arbitration laws and arbitration rules.⁴⁷ This Guideline is intended to fill that gap by collecting together best practice in international commercial arbitration in relation to these types of applications.

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NOTE

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to psc@ciarb.org

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Endnotes

1. See CIArb Guideline on Applications for Interim Measures.
2. It is important to note that if each party is required by law, contract or rules to bear its own costs in any event, then security for costs may cease to be an issue.
3. Security for costs may be ordered against a defending party to the extent that they bring a counterclaim. As to security for costs where there is a counterclaim, see Michael O'Reilly, 'Orders for Security for Costs: From the Arbitrator's Perspective' (1995) 61(4) *Arbitration*, pp. 251-252.
4. See e.g., Article 25(2) LCIA Rules (2014), Article 24 HKIAC Rules (2013) and Rule 27(j) SIAC Rules (2016).
5. See e.g., Section 38(3) English Arbitration Act 1996, Section 56(1) (a) Hong Kong Arbitration Ordinance 2011 and Section 12(1)(a) and 12(4) Singapore International Arbitration Act 2012.
6. In civil law countries security for costs is known as *cautio judicatum solvi*, Bernhard Berger, 'Security for Costs: Trends and Developments in Swiss Arbitral Case Law' (2010) 28(1) *ASA Bulletin*, p. 7 ("The concept of security for costs (*cautio judicatum solvi*) is well established in state court litigation for centuries. Indeed, it even has its roots in Roman law [...]"). See also Claude Reymond, 'Security for Costs in International Arbitration' (1994) 110 *Law Quarterly Review*, p. 503 ("It is also a fact that most if not all continental countries have provisions empowering their courts to order a foreign claimant to give security for costs. But these provisions have become obsolete in most circumstances, because of the general acceptance in Europe of the Hague Conventions on civil procedure, 1905 and subsequently 1954, which prohibit security for costs to be required from nationals of the signatory countries."); Otto Sandrock, 'The *Cautio Judicatum Solvi* in Arbitration Proceedings or

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the Duty of an Alien Claimant to Provide Security for the Costs of the Defendant' (1997) 14 Journal of International Arbitration, pp. 18-20.

7. This is notably the case under Article 28 ICC Rules (2012). Numerous tribunals have acknowledged that the power to order security for costs is included in the powers to order interim measures under the ICC Rules, see e.g., 'Security for Costs' (2014) ICC Bulletin, p. 7 and the procedural orders published in the same volume. See also the UNCITRAL Arbitration Rules which encompass security for costs within the expression "provide means of preserving assets out of which a subsequent award may be satisfied" in Article 26(2) even though they do not expressly provide for such a measure. The same provision can be found in Article 17 of the UNCITRAL Model Law. See discussions in relation to the drafting of the Model Law, UNCITRAL, Report of the Working Group on Arbitration on the work of its thirty-seventh session, UN Doc. A/CN.9/523 and UN Doc. A/CN.9/WG.II/WP.108. For an overview of the countries which have adopted the UNCITRAL Model Law, see Jan Paulsson and Lise Bosman (eds), *ICCA International Handbook on Commercial Arbitration* (Kluwer Law International, Supplement 84, May 2015).
8. In relation to tribunals operating under the ICC Rules which appear to apply a rather restrictive approach, see ICC Case No. 12035 (6 June 2003), (2010) ICC Bulletin, p. 28 *et seq.*, and ICC Case No. 12835 (3 December 2003), (2010) ICC Bulletin, p. 80 *et seq.* See also 'Security for Costs' (2014) ICC Bulletin, p. 7.
9. Daniel Brawn and Peter Fenn, 'Security for Costs in Arbitration in England and Wales' (2003) 6(6) *International Arbitration Law Review*, pp. 193-194 and Robert Merkin and Louis Flannery, *Arbitration Act 1996* (5th ed, Informa 2014), p. 148 ("As there is

absolutely no guidance whatsoever for arbitrators considering applications for security for costs, applicants routinely wheel out the relevant provisions of the English [Civil Procedure Rules]). See also Michael O'Reilly, *Costs in Arbitration Proceedings* (2nd ed, LLP Limited 1997), p. 83 (stating that “while the power under which an arbitrator operates is different [from courts], the relevant factors are broadly similar.”)

10. Weixia Gu, ‘Security for Costs in International Commercial Arbitration’ (2005) 22(3) *Journal of International Arbitration*, p. 184 and Alastair Henderson, ‘Security for Costs in Arbitration in Singapore’ (2011) 7(1) *Asian International Arbitration Journal*, pp. 67-68. See also ICC Case No. 13359 (Procedural Order February 2006) in (2014) *ICC Bulletin*, pp. 63-65 (where the tribunal has concluded that “no weight should be given to [practice, regulations and decisions in the country of the applicable law]” to reject an application for security for costs.)
11. See generally CIArb Guideline on Jurisdictional Challenges.
12. See Article 1 and the accompanying commentary in the CIArb Guideline on Applications for Interim Measures.
13. Such applications are exceptional and the power of granting security for costs in respect of counterclaims is rarely exercised.
14. See e.g., *Parties Not Indicated*, Procedural Order No. 4, 2009, (2010) 28(1) *ASA Bulletin*, p. 70.
15. See Article 2, paragraph 3 and the accompanying commentary in the CIArb Guideline on Applications for Interim Measures. See also e.g., ICC Case 6632 (unpublished) (where both parties to an arbitration agreement applied for an order for security for costs. However, the tribunal declined the application, stating: “The arbitral tribunal considers that, in the present stage of its information, it cannot, without pre-judging the issues relating to the merits of the

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- case, determine whether the contract was validly terminated or not and whether the property was legally or illegally seized by the respondent.”)
16. See Interim Award in NAI Case No. 1694 (1996), Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXIII (Kluwer Law International 1998), p. 105 (where the tribunal stated that: “At this preliminary stage of the proceedings, the Tribunal is neither required nor prepared to make detailed findings on the numerous factual issues that separate the parties. The Tribunal’s task is instead more limited...to identify the broad areas in which [the moving party] has, or has not, made out a *prima facie* claim for relief.”)
 17. Emmanuel Gaillard and John Savage (eds), *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International 1999), p. 158. See also ICC Case No. 12035, n 8, and ICC Case No. 14355 (Procedural Order January 2007), (2014) ICC Bulletin, vol. 24, p. 72 (where the claim was rejected because the “Respondent relied exclusively on the fact that insolvency proceedings have been opened” and the tribunal observed that the mere opening of insolvency proceedings is not sufficient.) See also ICC Case 14993 (Procedural Order December 2007), (2014) ICC Bulletin, vol. 24, pp. 24-25 (where the tribunal pointed out that “the opening of bankruptcy in itself is insufficient for as long as the bankruptcy assets are sufficient for the financing of potential legal costs.”)
 18. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer International Arbitration 2012), p. 650; and Pierre Karrer and Marcus Desax, ‘Security for Costs in International Arbitration: Why, When, and What if...’ in Robert Briner and others (eds), *Law of International Business and Dispute Settlement in the*

- 21st Century—Liber Amicorum Karl-Heinz Böckstiegel* (Heymanns 2001), p. 346. See also ICC Case No. 7047, Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XIX (Kluwer Law International 1994), p. 79.
19. ICC Case No. 7047, n 18, (where the respondent made an application for security for costs on the basis that the claimant was incorporated in Panama as a shell company with no assets. In addition, the respondents who were from Yugoslavia argued that there was “no bilateral convention of securing costs of arbitral procedures’ between Panama and Yugoslavia” and as a result, the respondents were at risk of being unable to recover their costs. The tribunal rejected the application for security for costs stating that the reasons cited by the respondents in support of their application were already known to them before signing the contract.)
 20. See *A. S.p.A v B AG* (25 September 1997), (2001) ASA Bulletin, p. 745 (where the respondent applied for security for costs on the grounds that the claimant had filed for liquidation after the start of the proceedings but the tribunal rejected the claim stating that the claimant’s insolvency was a normal commercial risk that the respondent should bear.)
 21. Waincymer, n 18, p. 650 and Karrer and Desax, n 18, p. 345. See also Procedural Order No. 14 of 27 November 2002, (2005) 23(1) ASA Bulletin p. 116; ICC Case No. 15951/FM, 2009 (2010) ASA Bulletin, p. 75 and ICC Case No. 13070 (2006) (unreported) in Thomas Webster and Michael W. Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials* (3rd ed, Sweet & Maxwell 2014), p. 433.
 22. David Altaras, ‘Security for Costs’ (2003) 69(2) *Arbitration*, pp. 87-88.
 23. Gu, n 10, p. 196.

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24. See generally Stephen Colbran, 'Security for Costs from Nominal Plaintiffs' (1992) 11 Civil Justice Quarterly, p. 384. See also Gu, n 10, p. 197 and Altaras, n 22, p. 88.
25. Gu, n 10, p. 197; Jean Kalicki, 'Security for Costs in International Arbitration' (2006) TDM 5; Angelynn Meya, 'Third-Party Funding in International Investment Arbitration The Elephant in the Room' in Antonias Dimolitsa and Bernardo M. Cremades Román (eds), *Third-Party Funding in International Arbitration* (Dossiers of the ICC Institute of World Business Law, ICC 2013), p. 132; and Noah Rubins, 'In God We Trust, All Others Pay Cash: Security for Costs in International Commercial Arbitration' (2000) 11 American Review of International Arbitration, p. 362.
26. See e.g., ICC Case No. 11399 (2001), (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration, vol. 22, pp. 9 and 38.
27. See e.g., Section 38(3) English Arbitration Act 1996 stipulating that the power to order a claimant to provide security for the costs of the arbitration "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 a country outside the United Kingdom, or whose central management and control is exercised outside the United Kingdom." See also Section 7(5), Schedule 2 Hong Kong Arbitration Ordinance 2011 and Section 12(4) Singapore International Arbitration Act 2012.
28. See Article 17 of the Hague Convention on Civil Procedure (1 March 1954). See also Article 9(1) European Convention on Establishment of 13 December 1955, Article 11 Convention concerning International Carriage by Rail/ (COTIF), Article 36(1) Convention révisée pour la navigation du Rhin and Article 18 of

Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union stating that “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.”

29. Karrer and Desax, n 18, p. 345.
30. The New York Convention has been ratified by over 150 countries and therefore such a situation rarely arises.
31. See ICC Case No. 12228, (2010) ICC Bulletin (“In conclusion Respondent could have known the risk of the alleged hindrances to the enforceability of an award of this Tribunal and, therefore, cannot invoke them as a reason for security for costs.”) See also *Mr X. v Mrs Y.*, Decision, 2003, (2010) 28(1) ASA Bulletin, p. 21 (where the arbitral tribunal dismissed an application for security for costs because “[the] Respondent has failed to produce prima facie evidence that Claimant’s transfer of his domicile to Monaco (allegedly more than ten years ago) stands in any direct or indirect connection with this arbitration, i.e., that Claimant deliberately moved to Monaco so as to escape enforcement of a possible future award in favor of Respondent. Not even contended by Respondent are other circumstances amounting at bad faith as, e.g., deliberate divestiture from assets. Nor has Respondent produced prima facie evidence for her allegation that an award rendered in her favor would in fact not be enforceable in Monaco.”)
32. See e.g., *X Holding in Bankruptcy, Switzerland v Y. Co. Ltd., Republic of Yemen*, Procedural Order No. 4, 2003, (2010) 28(1) ASA Bulletin, p. 26.
33. See e.g., Article 36(2) ICC Rules (2012), Rule 34(2) SIAC Rules (2016) and Article 41(1) UNCITRAL Rules (2010/2013).
34. See ICC Case 12035, n 8, p. 28 *et seq.* (where the arbitrators denied

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ordering security for costs because the applicant did not pay its share of the advance on costs and was in default). There are numerous examples, where the ICC has taken this into account, see ICC Case 11399, n 26, p. 38 (“In the present case, each of the parties has made payment of a deposit in the amount of...for the purpose of the proceedings to be funded, ... Awarding an application for security of costs to one party against the other party may, especially given the fact that each of the parties will already have paid a substantial share in the costs of the proceedings, lead to an inequality between the parties, which would be contrary to the spirit and nature of international arbitration.”) ICC Case 13359, n 10, p. 64 (where after acknowledging expressly that such advances only secure the charges of the ICC and the fees of the tribunal, not the costs of the parties, the tribunal looked at whether the parties have paid their shares and compared this to a previous procedural order, ie ICC Case No. 7074 when assessing the requirements that need to be fulfilled to grant an application for security for costs.) See also ICC Case No. 13620 (Procedural Order February 2006), (2014) ICC Bulletin, vol. 24, p. 66 (“It is the Tribunal’s view that the failure of the First Respondent to abide by the ICC Rules, although not automatically disqualifying the First Respondent from seeking interim relief from the Tribunal, does create a substantial obstacle to the success of the application.”)

35. See e.g., ICC Case No. 7047, n 18.
36. See Article 6(2) CIArb Guideline on Applications for Interim Measures.
37. Greg Reid, ‘Security for Costs in International Arbitration: Forget It?’ (2002) 152 *New Law Journal* 1426.
38. See e.g., ICC Case No. 8307 (2001) (2011) ICC Bulletin, Special Supplement: Interim, Conservatory and Emergency Measures in ICC Arbitration”, vol. 22, p. 8 (stating that “[Respondent 1] shall within

- thirty days from the date of this Interim Award put up a security in favour of [Respondent 2] in the amount of...in the form of a guarantee issued by a first class bank having offices in Geneva (the place of arbitration).”)
39. Institutions such as the ICC and the LCIA have special accounts to hold money even where they are not administering given arbitration.
 40. O’Reilly, n 9, p. 92.
 41. D. Mark Cato, *Arbitration Practice and Procedure: Interlocutory and Hearing Problems* (3rd ed, Informa 2002), p. 546.
 42. Gu, n 10, p. 167; Melissa Magliana, ‘Commentary on the Swiss Rules, Article 26: Interim measures of protection’ in Manuel Arroyo (ed), *Arbitration in Switzerland: The Practitioner’s Guide* (Kluwer Law International 2013), p. 222; Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: A Commentary* (5th ed, Wiley 2014), p. 199 and Simon Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press 2011), p. 370. See e.g., *X. S.A.R.L., Lebanon v Y. AG*, Germany, Procedural Order No. 3, 2008, (2010) 28(1) ASA Bulletin, p. 45. But see Merkin and Flannery, n 9, p. 151 and O’Reilly, n 9, p. 92. (“The judicial remedy of staying proceedings is not appropriate in the context of arbitration.”).
 43. In England and Wales, where an order for security for costs is not complied with, arbitrators can issue a peremptory order. This is an order which is made following failure by one or more parties to adhere to the arbitrators’ previous procedural orders, and may take the form of an ‘unless’ order. See Section 41(5) and (6) English Arbitration Act 1996.
 44. Unless the claimant otherwise reimburses the applicant’s costs through other means, for example, direct payment as ordered in the final arbitral award.

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45. Neil Kaplan, 'Interim Measures – A Practical Experience' in Albert Jan van den Berg (ed), *International Arbitration 2006: Back to Basics?* ICCA Congress Series No. 13 (Kluwer Law International 2007), p. 772 and Alan Redfern, 'Interim Measures' in Lawrence W. Newman and Richard D. Hill, *The Leading Arbitrators' Guide to International Arbitration* (3rd ed, Juris 2014), p. 368.
46. Gu, n 10, p. 167.
47. Wendy Miles and Duncan Speller, 'Security for Costs in International Arbitration – Emerging Consensus or Continuing Difference' (2007) *European Arbitration Review*, p. 34. See also Gary Soo, 'Securing Costs in Hong Kong Arbitration' (2000) *International Arbitration Law Review*, p. 25.