

ONE SMALL STEP BACKWARD?:

A Comment on the Ken-Ren Cases¹

by Louise Barrington²

A global eyebrow was raised in response to last year's decisions of the British House of Lords in two separate but similar international arbitration cases initiated by the same party. As one English solicitor was quick to point out, these decisions will doubtless provide an opportunity for critics to "cast doubt on London's credentials as an international arbitration centre".³ At the very least they provide a focus for the continuing dialogue about the relationship between national authorities and international arbitration. At issue was the role of the English courts in an ICC arbitration procedure.

The Facts

Ken-Ren Chemicals and Fertilizers Limited, a Kenyan joint venture corporation owned 65% by the government of Kenya and 35% by N-Ren Corporation of Ohio, was ordered by the House of Lords, in a three to two decision, to provide security for costs in two arbitration proceedings being conducted under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Both Ken-Ren Chemicals and its Ohio parent were in liquidation by the date of the original High Court hearing, with Ken-Ren described by the trial court judge as "seriously insolvent".⁴

In 1975, Ken-Ren had signed two contracts, one with an Austrian company, Voest-Alpine Aktiengesellschaft ("Voest") for the construction of two ammonia plants, and a second with Belgian company Coppée Lavalin SA/NV (Coppée) for a fertilizer production plant. Both projects were to have been executed in Kenya, but turned out disastrously, with considerable losses incurred.⁵

In 1990, fifteen years later, Ken-Ren requested arbitration against Voest and (one day later) against Coppée. Arbitrators were appointed in both cases, in accordance with the ICC Rules.

The Arbitration Clauses

The Voest contract, after stipulating that the ICC arbitrators should apply the law of the Republic of Austria to any dispute, went on to say:

...the arbitrators shall also determine the liability of the parties as to the costs of representation. Nothing contained in this Section shall however prevent either party from having recourse to the ordinary Courts of law having jurisdiction in the event of a failure by a party to fulfil the contractual obligations hereunder, in particular where such action is

1 Coppée-Lavalin SA/NV v. Ken-Ren Chemicals and Fertilizers Ltd. and Voest-Alpine v. Ken-Ren Chemicals and Fertilizers Ltd., H.L. [1994] 2 All ER 449

2 Member of the Ontario and New York Bars; Director, ICC Institute of International Business Law and Practice. All comments and opinions expressed herein are solely those of the author personally and in no way reflect or represent a position of the ICC. The author wishes to thank Kevin Curtin, law student at the University of Florida for his valuable help in researching US law.

3 Beechey, John; [1994] ADRLJ Part 4, p.250

4 Lloyd LJ, in Ken-Ren Court of Appeal transcript, p.1

5 ibid., p.2

required without delay to protect the interests of the party...The arbitration shall be held at London or at such other place as the arbitrators shall determine.⁶

The Coppée contract arbitration clause reads:

"...any question, dispute or difference...shall be referred to the International Chamber of Commerce in Paris. The arbitrators shall...be appointed in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce in Paris and shall sit in London....Belgian law shall be the substantive governing law."⁷

The Terms of Reference

After signature of Terms of Reference, each party was asked to contribute one-half of the advance on costs, in accordance with ICC Rules. Coppée refused to pay, and Ken-Ren advanced Coppée's share of the costs under article 9.2 of the Rules. The Terms of Reference became operative in 1992, after which Coppée and Voest initiated their actions in the British High Court, each requesting an order for security for costs against the claimant Ken-Ren.

The Terms of Reference in both cases confirmed London as the seat of the arbitration. As to procedural rules, the Voest Terms of Reference specify:

"The arbitration shall be conducted in accordance with the Rules of Conciliation and Arbitration and Appendices of the International Chamber of Commerce, and in particular article 11 thereof. Procedural matters arising during the proceedings, such as requests for extensions of time limits, shall be determined by the Chairman of the Tribunal alone after such consultation with the other arbitrators as he considers appropriate, unless either party requests that the decision be taken by the full Tribunal."⁸

The Coppée Terms of Reference differ slightly, with a direct reference to English law:

"Subject to any mandatory rules of English law relating to arbitration procedure, and subject to the Rules for the International Court of Arbitration of the ICC (1 January 1988 edition), the procedure to be followed shall be as agreed between the parties, or failing such agreement, as determined by the Tribunal in its discretion..."⁹

The ICC Rules

The ICC Rules, quoted extensively in the judgments of the Court of Appeal and the House of Lords, do not prohibit recourse to national authorities:

"Article 8.5: Before the file is transmitted to the arbitrator, and in exceptional circumstances even thereafter, the parties shall be at liberty to apply to any competent judicial authority for interim or conservatory measures, and they shall not by so doing be held to infringe the agreement to arbitrate or to affect the relevant powers reserved to the arbitrator."

Article 11 of the ICC Rules deals with procedural rules:

"The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a

6 *op.cit.*, Ken-Ren, p.453

7 *ibid.*, p. 453

8 *op.cit.*, Lloyd LJ, p.3

9 *ibid.*, p.4

municipal procedural law to be applied to the arbitration." Additionally, according to article 15: "The arbitrator shall be in full charge of the hearings."

Nowhere in the ICC Rules is there a clear reference to the possibility of an order for security for costs. The ICC system of requiring each party to deposit an advance on costs is a partial solution to the problem posed in Ken-Ren; however, this initial deposit amounts to only one quarter of the expected costs of the proceeding, the remainder coming due only at the end of the proceedings, once the award has been written. Furthermore, "costs" in article 9 does not cover lawyers' fees, usually the main component of "costs". There is no constraint on a losing party against whom an order for costs will be made, to pay them. The prevailing party's only option will be to apply to a national court for exequatur of the award and the order for costs contained in it, hoping the loser still has assets which can be seized to satisfy it. This was clearly not going to be the case of the "judgment-proof" Ken-Ren.

English Law

The law invoked by counsel for Coppée and Voest was the English Arbitration Act 1950, section 12(6)(a) which provides as follows:

"Conduct of proceedings, witnesses, etc.

The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of -

(a) security for costs;...

Provided that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid."

The excerpts from the Terms of Reference in both cases might lead one to wonder why counsel in both cases came before the English Courts, as it is arguable that, under ICC Rule 8.5, the arbitrators had an implied power to make the order. However, a 1917 decision from three judges of England's King's Bench in the Stearinerie case had held that under section 19 of the Arbitration Act of 1889, the arbitrator did not have the power to order a party to give security for costs, so there may have been some doubt in this regard.¹⁰

English Jurisprudence: Bank Mellat¹¹ and KS/AS Bani cases¹²

The Bank Mellat decision concerned an appeal from the refusal of Bingham J., to grant an order for security for costs on the grounds that the defendant was likely to be unable to pay the plaintiff's costs if the latter were successful in the litigation, and that the defendants were resident outside the jurisdiction. As in the Ken-Ren cases, neither party carried on business in England or had any other connection with it. In Bank Mellat, the non resident defendant was, like Ken-Ren, insolvent.

Kerr LJ, in the main speech, observed: "...under (English) rules of private international law, in the absence of any contractual provision to the contrary, the procedural law governing arbitrations is that of the forum of the arbitration...since this is the system of law with which the agreement to arbitrate...will have its closest connections..."

10 In re an arbitration between Unione Stearinerie Lanza and Weiner, [1917] 2 K.B.559 at 563

11 Bank Mellat v. Helliniki Techniki SA, [1984] 1 QB 291

12 KS/AS Bani and KS/AS Havbulk v. Korea Shipbuilding and Engineering Corp., [1987] 2 Lloyd's Rep.445, C.A.

He stated that under English rules of private international law, in the absence of agreement by the parties to the contrary, the procedural (curial) law governing arbitrations is that of the forum of the arbitration. He added that English jurisprudence "does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law". He also noted that a particular feature of English law is the relationship between the courts and arbitrations, which is considerably closer than in most civil law jurisdictions and the United States, and involves a measure of control or supervision.¹³

However, in an ICC arbitration, although the ICC rules expressly refer to the possibility of the proceedings being governed by some municipal law, they provide a code that is intended to be self-sufficient...covering every step in an arbitration conducted under their terms.¹⁴

Kerr LJ stressed the particular regard which should be had for the degree of connection that the parties or the arbitration might have with England and its legal system. Thus, if the respondent is English and the claimant is foreign, and there is no agreement that any particular rules are to apply, then an order for security for costs is likely to be the norm. On the other hand, if both parties are foreign and the contract has no other connection with England, the case for the exercise of a purely English discretionary jurisdiction must inevitably be weakened.¹⁵ The application for security for costs in the present case is one that is inconsistent with the scheme and spirit of the ICC Rules, he said, not literally inconsistent, but sufficiently inconsistent to make it inappropriate for the court to exercise its discretion in favour of the order.¹⁶

Kerr LJ went on to state that an order for security for costs would be inconsistent with the even-handed scheme that the (ICC) rules envisage, and would have the effect of compelling (a party) to make a double deposit of the costs, first to the ICC (under article 9) and secondly by way of security.¹⁷ He also noted that the power of the English courts to order security for costs is somewhat exceptional, compared with most systems of law.¹⁸ He added that the fact that the ICC Rules make no provision for security for costs militates against any intention concerning the provision of security for costs.¹⁹ The English court should be slow in applying its discretionary jurisdiction to order security for costs in international arbitration unless there is some specific connection with this country. The mere fact that the parties have agreed on England as the site of arbitration is insufficient. It was thus inappropriate to base an order for security for costs on the ground that the impecunious claimant is ordinarily a non resident of England.²⁰

Goff LJ agreed with the result, but for different reasons. He reasoned that the silence of the ICC Rules did not permit an inference that the parties should be prevented from taking advantage of any provision of the curial law of the arbitration allowing for an order for security for costs. However, he distinguished between two different types of international arbitration, those which have close connections with England, and those, like the *Bank Mellat* case, where London was chosen as a convenient neutral (or even accidental) forum. In the latter case, the policy considerations in favour of an order for security for costs are inapplicable, so that the court should as a general rule decline to exercise its discretion to make an order for security for costs unless there are special circumstances that warrant it.²¹ Goff surmised that the silence in the ICC Rules was due to the fact that they were drafted by persons familiar only with systems of law in which

13 *op.cit.* *Bank Mellat*, p.301

14 *ibid.*, p. 304, 305, 307

15 *ibid.*, p. 303

16 *ibid.*, p. 309

17 *ibid.*, p. 309, 310

18 *ibid.*, p. 308

19 *ibid.*, p. 306

20 *ibid.*, p. 310

21 *ibid.*, p. 315

security was not ordered, and who simply had not envisaged such an application.²² He concluded: "Either the parties have, by incorporating the ICC Rules in their contract, expressly or implyingly agreed not to apply for security for costs, or they have not. In my judgment, plainly they have not."²³ However, Goff LJ based his decision on the exercise of discretion, concluding that the case at bar did not warrant it.²⁴

The Bank Mellat case remained undisturbed for over a decade, and was widely relied upon by the international community as an assurance of the reluctance of English courts to intervene in the question of security for costs. A notable exception was the KS/AS Bani case, where great care was taken to distinguish the instant facts from Bank Mellat in order to grant an order for security for costs. Bingham LJ considered the case, involving two foreign parties, to have a substantial connection to the English legal system, in that it was one of the ordinary commercial arbitrations of the type that have for many years been regularly held in England, "regular London business", and not one of the "quintessentially one-off arbitrations of the kind which Goff LJ had in mind in the case of Bank Mellat". In addition the KS/AS Bani parties had not referred to a detailed set of institutional arbitration rules, but had "embraced the English legal system", rather than choosing England simply as a convenient neutral forum.²⁵

Progress of the Ken-Ren Cases Through the English Courts

The initial applications for security for costs in both Coppée and Voest were refused by Potter J, and Hirst J, the latter applying the reasoning of Kerr LJ in the case of Bank Mellat which he paraphrased in the following passage:

"...(A)n application for security for costs is one that is inconsistent with the scheme and spirit of the ICC rules, which renders it inappropriate in principle for the court to exercise its statutory discretion in favour of an order for security for costs, unless some very special factor is shown of sufficient magnitude to outweigh that important general principle, and that the insolvency of the defendants, at all events in the Bank Mellat case, did not constitute such a factor."²⁶ The English courts did possess the discretion to make an order, but this was not a suitable case in which to exercise it.

Renewed applications were brought *ex parte* before Lloyd LJ, by counsel for both Voest and Coppée, who indicated their wish to take their cases to the House of Lords in order to challenge the correctness of the Bank Mellat Court of Appeal decision. Lloyd LJ, apparently uncomfortable with the effect of Bank Mellat in the instant case, adjourned the proceedings to a full court of three judges, "so that the application could be allowed and the appeals dismissed after the briefest of hearings". At the hearing (of both the Voest and Coppée appeals together) both counsel attempted to persuade the court both that the trial judge had misunderstood the ratio of Bank Mellat, and that their cases could be distinguished on the facts.²⁷

After a lengthy analysis of the speeches of Kerr LJ and Goff LJ in the Bank Mellat decision, Lloyd LJ concluded:

"Although we have not heard full argument on the point, my provisional view would be that, but for being bound by the majority decision in the Bank Mellat case, I would have allowed these appeals. Accordingly, I would propose to grant leave to both these applicants, dismiss their appeals and grant them leave to take their cases to the House of Lords." His brother judges concurring, both Voest and Coppée found their way to the House of Lords.

22 *ibid.*, p. 313

23 *ibid.*, p. 313

24 *ibid.*, p. 314

25 *op.cit.*, K/S A/S Bani, p.453

26 *op.cit.*, Lloyd LJ, p.5, quoting Hirst, J.

27 *op.cit.*, Lloyd LJ, p.6

The House of Lords Decision

In a rather paradoxical configuration, Lord Mustill wrote what might be regarded as the "main speech", and then found himself in the minority, as three of the five judges disagreed with him and decided to allow the appeal, referring the case back to the trial judge for an order for security for costs. The majority justices expressed their complete agreement with the analysis of Lord Mustill concerning the existence and the extent of the discretionary powers of the English courts, differing with him only on the manner in which that judicial discretion should be exercised in the instant case.

Regarding the existence and extent of judicial discretion

After crediting ICC arbitration with providing a venue for dispute resolution acceptable to parties widely separated in geography and culture, and with offering parties an established administrative structure, Lord Mustill turned to the theory of "transnationalism". Acknowledging the widely recognized principle of party autonomy, which encourages courts to recognise and give effect to any express or tacit agreement between the parties as to the way in which the arbitration should be conducted, Lord Mustill went on to describe the notion of transnationalism as "a theoretical ideal which posits that international arbitration...is a self-contained juridical system, by its very nature separate from national systems of law, and indeed antithetical to them...(N)ational courts will not feature in the law and practice of international arbitration at all, and differences between national laws will become irrelevant."²⁸ Doubting that the doctrine actually commanded widespread support, he echoed Kerr LJ's opinion that it could not be the law of England, and that arbitration could not be totally detached from local procedural laws.

Concerning the exercise of the discretion

Lord Mustill cited and dismissed four arguments against the exercise of judicial discretion to grant the security requested.

(a) **The "Complete Code"**. He endorsed the view of Goff LJ that the trial judge had misdirected himself in construing ICC Rules as a complete and exclusive code, which ousted the discretionary jurisdiction of national courts: "I see nothing either express or implied in the Rules to inhibit the court from deploying whatever national interim remedies may be necessary to suit the justice of the individual case....It is impossible to doubt that at least in some instances the intervention of the court may be not only permissible but highly beneficial."²⁹

(b) **"Opted Out"**. "I do not believe that the parties, if asked, would have agreed to abandon any of the ways in which an award might be rendered fruitful;...(nor) why the court should abstain from adding a further means to ensure that a party in default does not escape from its obligations..."³⁰

(c) **"One-off"**. Lord Mustill disagreed with the conclusion of Goff LJ that as a "quintessentially one-off arbitration", this case demanded a different treatment by national judges. On the contrary, he found nothing unique about this case, considering it to be a typical ICC arbitration.

(d) **"English idiosyncrasy"**. Even if most national laws do not offer the possibility of an order for security for costs, it does not follow that this unique remedy should be excluded from the cosmopolitan world of international arbitration. The uniqueness stems from the

28 op.cit. *Ken-Ren*, p.458

29 ibid., p. 466

30 ibid., p. 467

fact that many jurisdictions do not offer the possibility of ordering the losing party to pay its opponent's costs. But if a particular feature of national law conduces to justice it should not be rejected simply because other nations do not employ it.³¹

In conclusion then, Lord Mustill rejected all arguments tending to a general exclusion of English discretionary remedies in international arbitrations. This affirmation of the existence of the discretion led to the individual analysis of the facts in Ken-Ren.

Insisting that he was not applying the doctrine of transnationalism, nevertheless found that in Ken-Ren, "foreign parties to a contract governed by a foreign law and entirely performed abroad have by choosing an ICC arbitration given an unmistakable signal of their intention...that it is the invariable framework of the ICC rather than the diverse local laws and practices which is to form the context within which the dispute is resolved...(T)he parties are looking for a relationship with particular national courts which is less closely-coupled than would otherwise be the case."³²

He classified interim measures, according to their effects. Some orders are purely procedural, others seek to maintain the status quo and the third type, which is meant to ensure the practical effect of an award, may be seen as the greatest encroachment on the arbitration agreement and should be used sparingly by national courts. Since the order for security for costs would be accompanied by a stay of the arbitral process in case of non-compliance, it represents a serious encroachment; this is a "powerful countervailing factor" to exercising the discretion. As to fixing the line of demarcation, Lord Mustill admitted to great difficulty before holding against the exercise of the discretion, "notwithstanding that on a narrower view it appears to answer the justice of the case."³³

Although in complete agreement with Lord Mustill's general approach, three other Lords differed in the last step of the analysis. For Lord Woolf, "...with an arbitration of the class here being considered, incorporating the ICC Rules but only having very limited connection with this country, it is not right to say that there will never be circumstances in which it will be appropriate to order security for costs, only that it will be rarely right to do so."³⁴ He then found that the Ken-Ren cases fell into this rare category. As well as the claimant's insolvency, he cited as a critical factor that the arbitration was being funded by a third party. For Lord Woolf, the order for security for costs, "avoids the risk of a third party, while financing what could prove to be unfounded litigation, sheltering behind an impoverished party so as to escape what would be otherwise a normal consequence as to costs of being unsuccessful in the arbitration. This seems to me to be the sort of exceptional situation where ...it could not be said that the intervention of the English court is in any way inappropriate.

As to the difficulty of identifying a class of arbitration where such intervention is appropriate, he minimized the problem, saying that those practicing in the field, including the judges of the commercial courts, will rarely have difficulty in identifying the cases to which he referred.

One interesting omission by all three Lords who wrote judgments was a discussion of the policy considerations which form the basis of an order for costs. Goff LJ, in a passing reference, had merely noted that they were not present in the instant case.

31 *ibid.*, p. 467-8

32 *ibid.*, p. 468

33 *ibid.*, p. 471

34 *ibid.*, p. 476

Other Jurisdictions and Rules

Given the surprise effect of the Ken-REN decision on the international community, it might be interesting to see what produced it. It is trite to say that international commercial operators in choosing arbitration, are avoiding the disparities of the various national legal systems. However, when it comes to the question of security for costs, there appears a whole range of treatment among national procedural laws and even from one set of arbitration rules to another. It is this divergence which caused Ken-REN to raise eyebrows in Europe, while it may even be applauded in the United States and other common law jurisdictions.

UNCITRAL Model Law

The UNCITRAL Model Law, adopted in 1985, has provided the basis for legislation in several jurisdictions (but not England). After a sweeping exclusion of national court intervention³⁵, a few lines later it opens the door to a request, before or during arbitral proceedings, that a court grant an interim measure of protection.³⁶ Article 17 provides that the tribunal may require security for the costs of any interim measures it orders.³⁷ It is unclear whether such an order could be made to apply to the costs of the entire proceedings. Lord Mustill in the Ken-REN decisions pointed out the lack of consensus as to whether an order for security for costs is indeed an "interim or conservatory measure", contemplated by article 8(5) of the ICC Rules. (The same question is open with respect to the UNCITRAL Model Law). Lord Mustill preferred to think that it was³⁸, saying that in Ken-REN nothing turned on that point. In view of the English penchant for awarding costs to a successful litigant, which is shared by most other common law jurisdictions, it may be interpreted in that way by common lawyers. Civil lawyers may not agree.

The United States

In the absence of a federal rule providing for the posting of security for costs, the United States Supreme Court has decided that in diversity cases, the relevant state law should be applied to allow for such an order.³⁹

In New York, one of the most frequently chosen American sites for international arbitration proceedings, orders for security for costs are commonplace in commercial litigation, although there is no published precedent or statute authorizing either an arbitrator in New York or a New York court to order security for costs in an international arbitration case. There are two New York statutes allowing for an order for security for costs in litigation matters, one mandatory and applicable only to plaintiffs, the other discretionary and including any party.⁴⁰

According to one Federal Court judge, the policy behind section 8501(a) (which is normally mandatory) such an order will be made to discourage harassment of New York citizens by the institution of groundless suits, and to assure that an innocent defendant will be able to recover the costs of litigation.⁴¹ The operative words here seem to be "New York citizens". A substantial connection with New York state is implicit. If the plaintiff is not a domestic corporation, a foreign corporation licensed in New York or a resident of New York, the defendant in most cases will be. (Or there will at least be some connection

35 UNCITRAL Model Law, Article 5

36 *ibid.*, Article 9

37 *ibid.*, Article 26

38 *op.cit.*, Ken-REN, p. 460

39 Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 93 L.Ed. 1528 (1948) The Supreme Court had rejected the argument that an order imposing security for costs violated the plaintiff's constitutional rights.

40 NY CLS CPLR sec. 8501(a)

41 94 F.R.D. 76, 81-2 (S.D.N.Y. 1982)

between the subject matter and the state of New York, to warrant action by a New York judge.) However, in international arbitration, parties often choose a neutral third country as the situs of the arbitration, and absent such a choice, the ICC will never situate the proceedings in the home state of one of the parties. Thus in a New York based ICC arbitration, no party will be a "New York citizen". Should judicial discretion be exercised narrowly, to protect only local defendants, or liberally so as to protect all innocent defendants? We will return to this question.

In the case of McCreary Tire and Rubber, on appeal from an order denying the defendant's motion to *inter alia*, dissolve a foreign attachment and to stay the case pending arbitration, the Third Circuit of the U.S. Court of Appeals reversed the order. The case involved an ICC arbitration, where the parties had chosen Italian law with the site in Belgium. Gibbons J. reasoned that while an attachment could be available for the enforcement of an arbitration award, to grant it before the arbitration award would be inconsistent with the agreement between the parties and would be by-passing their agreed method of settling of disputes, and thus prohibited by the Convention of New York. The contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, was unavailable.⁴² Gibbons J relied on the case of Bernhardt v. Polygraphic Company of America, Inc. in which the Supreme Court of the U.S. had previously rejected this argument. Later, the New York Court of Appeals followed McCreary, vacating an order which the plaintiff had obtained *ex parte* to attach a debt owed to the defendant, because the parties had agreed that the dispute in question was to be arbitrated in Switzerland.⁴³ In effect, these two American courts accepted the "opted out" argument which Lord Mustill rejected in Ken-Ren.

The McCreary and Cooper judgments dictate a strictly "hands-off" approach for American courts in cases where the parties have chosen international arbitration, and they have been criticized for it.⁴⁴ Subsequent cases at the same level in New York have not followed them, and have granted provisional remedies.⁴⁵

Several U.S. states have recently passed laws concerning international arbitration. Like the UNCITRAL Model Law, the statutes of Texas, California, Connecticut, Georgia and Florida all explicitly authorize arbitrators to order interim relief measures as they deem appropriate, and in some cases to order a party to post security in connection with those measures, but not specifically security for costs.

It is interesting to note that the Texas statute provides for specific orders which can be granted by a state court to assure execution of an interim measure, including attachment.⁴⁶ In other states the statutes merely mention that it is not incompatible with an arbitration agreement for a party to request and a state court to grant such a measure.⁴⁷

In Florida, it is the arbitral tribunal itself which may apply or authorize a party to apply to the state court for interim relief.⁴⁸ Since the measures are not enunciated, in any of these statutes, it is unclear whether they would include an order for security for costs. (see comment of Lord Mustill, *supra*)

42 (1974) 501 F.2d 1032 at p. 1038

43 Cooper v. Ateliers de la Motobecane 57 N.Y.2d 408 (1982)

44 see Meier, Provisional Judicial Remedies in Arbitration: The United States Position, in Interim Court Remedies in Support of Arbitration, Shenton and Kuhn, IBA 1987

45 see: Bordon v. Meiji Milk Products, mentioned in a speech delivered by Robert Davidson at a seminar hosted by Baker & McKenzie: Provisional Remedies in Aid of International Arbitration, September 28, 1994. Also, Blumenthal v. Merrill Lynch (1990) C.A., 910 F.2d 1049, involving other provisional remedies, which rejected the "hands-off" approach.

46 Arbitration and Conciliation of International Commercial Disputes, Tex.Rev.Civ.Stat. art 249-9sec.3(1995)

47 Cal. Code Civ. Proc. sec. 1297.171 (1994); Conn. Gen. Stat. sec. 50a-109 (1992); O.C.G.A. sec.9-9-35 (1994)

48 Florida International Arbitration Act, Fla.Stat. sec.684.16(1)(1994)

The Maryland statute provides specific authority for an arbitrator to order a party to post security for the amount claimed, but also specifically excludes legal expenses, and so is of no help to the current discussion.⁴⁹

On the other hand, the Hawaii statute, (which provides for the creation of arbitration centers) specifically authorizes an arbitration center to require a party to post a bond or other security as it deems appropriate to assure likelihood of enforcement of any award or other relief ultimately ordered by the center.⁵⁰ This wording might be broad enough to encompass an order to post security for costs which might ultimately be ordered by the center. The statute is silent as to the possibility of state court intervention. The Hawaiian solution has merit in that it provides the best of both worlds: the arbitrator maintains control over the proceedings, but is free to invoke the aid of a state court where necessary.

However, in cases where the Federal Arbitration Act applies, McCreary and Cooper remain undisturbed, and these state laws contradict them. In view of the necessity for security for costs and other interim remedies, "a near consensus has emerged that the (Federal Arbitration Act) should be amended to insure the availability of suitable provisional relief in aid of international arbitration."⁵¹

AAA Rules

Article 34 of the American Arbitration Association Rules authorizes an arbitrator to make interim orders to safeguard the property which is the subject matter of the arbitration. No mention is made of security for the costs of the arbitration. Article 49, which deals with responsibility for expenses, is silent as to security for their payment. Article 51 allows for the AAA to require a deposit in advance to cover the expenses from the **parties**. (author's emphasis) Since the requirement mentions parties, rather than "from one or more parties", it is likely that it does not contemplate the type of security presently under consideration, and in fact in that respect is similar to the ICC Rules.

Canada

As with the American federal jurisdiction, no statute or judicial precedent explicitly authorizes an arbitrator or a judge to make an order for security for costs in the case of an international arbitration. The UN Foreign Arbitral Award Convention Act⁵² (bringing the New York Convention to Canada) received royal assent in 1986, and all of the provinces save Quebec (which integrated the content into its Code of Civil Procedure) have adopted the UNCITRAL model law. The Ontario enacting statute provides that an order of the arbitral tribunal under article 17 of the Model Law for an interim measure of protection and the security in connection with it is subject to the provisions of the Model Law as if it were an award.⁵³ The same limitation is thus found here as in the Model Law itself, and we are no further ahead in knowing if an order for security for costs is contemplated.

Rule 56.01(1) of the Ontario Rules of Civil Procedure provides that a court, on motion by the defendant, may make an order for security for costs if, *inter alia*, the plaintiff is resident outside Ontario, or the plaintiff is a nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in Ontario to pay the costs of the defendant, or it is likely that the action is frivolous and vexatious and the plaintiff has insufficient assets in Ontario to pay the costs of the defendant.

49 Md.Cts.and Jud.Proc.Code sec.3-2B-06(a) (1994)

50 Hawaii International Arbitration, Mediation, and Conciliation Act, HRS sec.658d-9(a) (1994)

51 Hoellering, Michael F., International Arbitration Under U.S. Law and AAA Rules, in Dispute Resolution Journal, v.50, no.5, (Jan 1995) p.25

52 SC 1986 c. 16

53 International Commercial Arbitration Act, RSO 1980 c. 30 sec.9

The Rule has not spawned any appeal level jurisprudence with respect to arbitral proceedings. Some small indication may be drawn from the one Ontario judge who did refuse such an order in a case where two foreign corporations with no place of business or assets in Ontario were involved in several actions before the Ontario Court.⁵⁴ This decision is not binding in the other provinces.

Other European Jurisdictions

An informal poll of several leading practitioners in the field of international commercial arbitration confirmed the perception of Lord Mustill that, in continental Europe, state courts do not make orders requiring one party to post security for the costs of the proceedings. Neither the French nor the Swiss arbitration laws include such an order under interim, provisional or protective measures. One experienced French arbitrator recalled having ordered both parties to an international commercial arbitration to post security for the costs of the other. He was amazed to realize that this was the first case to be reported in which an arbitrator in France had made such an order.

A review of European literature on interim and conservatory measures discloses no mention of an order for security for costs, either in arbitral or state court procedure.⁵⁵ Nor does it seem to be sorely missed. Articles 1696 and 1697 of the Belgian Judicial Code set out interim and provisional powers of arbitrators and judges, and costs are also mentioned. However, there is no mention of security for costs. In the Netherlands, arbitrators have limited power to grant provisional relief, provided the parties have given them the power; among the measures mentioned, an order for security for costs does not appear.⁵⁶

The German Bundesgerichtshof has decided that an arbitral tribunal does not have jurisdiction to make any provisional or interim orders.⁵⁷ This also seems to be the case in Italy.⁵⁸ This leaves a party wishing interim protection, including perhaps an order for security for costs, in the hands of the national judges. But given the silence of these national laws, it is questionable whether such an order would be granted even by a national judge.

A similar measure, known as the caution judicatum solvi, once existed in the French Code of Civil Procedure, but was abolished in 1972, after having been criticized as a discriminatory and dilatory tactic. A foreign plaintiff in a French court could be ordered to furnish a guarantee for the payment of damages and costs which might be awarded against it, unless it could prove it had sufficient "immeubles" (real property) in France to ensure payment. For decades before, bilateral and multilateral conventions had provided for dispensation from the caution in litigation before the state courts of signatories. (In the international arbitration context, one might have been led to wonder which of the parties would be considered "foreign"!)

54 ICC International Computer Consulting & Leasing Ltd. v. ICC International Computer Consulting GMBH (1989) 33 C.P.C. (2d) 40 (H.C.J.)

55 See for example, Marc Blessing's comprehensive review, The New International Arbitration Law in Switzerland, *Jrl.Int.Arb.* v.5.no.2, (1988) p.9, where he makes no mention of security for costs among interim orders available. Nor does Robert Briner in his paper presented at the XII ICCA International Arbitration Congress in November 1994.

56 Art. 1051, Dutch Code of Civil Procedure, cited in Bosch, Axel; Arbitration, cited in Bosch, Axel; Provisional Remedies in International Commercial Arbitration - A Practitioner Handbook; deGruyter, Berlin, NY, 1994, p. 473.

57 BGZ ZJP 71 (1958) 427, 436, cited in Bosch, (ibid) p. 278

58 Art. 818 CPC, cited in Bosch, (ibid) p. 377

LCIA Rules

Article 15 of the London Court of International Arbitration Rules, drafted in 1985, specifically authorizes an arbitrator to order any party to provide security for costs by way of deposit, bank guarantee or any other measure as the tribunal sees fit, clearly separating this type of security from other preaward conservatory measures. The same article also stipulates that by agreeing to LCIA arbitration the parties "shall be taken to have agreed to apply only to the tribunal, and not to any court of law or other judicial authority"⁵⁹ Here the intent to exclude the discretion of the English municipal judge is clear.

WIPO Rules

The World Intellectual Property Organization arbitration centre, in operation since October 1994, had the benefit of analysing the rules of many other international arbitration organizations in the formulation of its rules. Under Interim Measures, article 46(b) provides specifically that, at the request of a party, the Tribunal may order the other party to provide security in a form to be determined by the Tribunal, for costs.⁶⁰ Again, here there is no doubt of the arbitral tribunal's jurisdiction to order security, so the temptation to refer such an application to a state court is to a great extent removed.

Conclusion

For over a decade, Bank Mellat had been interpreted as an effective exclusion of the exercise of judicial discretion to order security for costs; in theory, the discretion existed, but it was impossible to imagine an ICC arbitration, or other type of institutional international arbitration, where it could be used. In the wake of Ken-Ren, with the question re-opened, will we witness a flood of dilatory applications to the English courts by defendants eager to make use of this long-abandoned manoeuvre? It is unlikely. The facts were compelling in Ken-Ren, and are not apt to be encountered often. The English courts, however, may well see more applications for other forms of judicial intervention into international arbitration cases by parties who see Ken-Ren as a wedge in the door. Who can expect to succeed?

What of the policy underlying the English statute? If English legislators mean generously to protect all innocent defendants from all frivolous proceedings which happen to take place in England, then the expenditure of English judicial resources and time, as well as the exercise of judicial discretion to grant orders for security for costs are all both comprehensible and justified, and we can expect to see a notable increase. However, all of the speeches in the Ken-Ren saga, from first instance to House of Lords, have stressed a very limited exercise of judicial discretion: only in rare cases.

This raises the question of legal predictability; despite Lord Woolf's assurance that experienced practitioners would have no difficulty in identifying that rare class of arbitration where judicial discretion should be exercised, some of England's most experienced commercial judges came to opposite conclusions in this very case.

The decision also emphasises once again the difference in approach to the arbitral procedure, between English judges and many other European national jurisdictions. It is true that the English Arbitration Act, the Canadian and some U.S. state laws give the national judges some very useful powers to support and back up the arbitrators, in the event of evasion, delaying tactics and non-cooperation, in an attempt to ensure that the successful party is not just left with a piece of paper at the conclusion of the arbitration,⁶¹ However, it may also be that the Ken-Ren decision has reawakened a sleeping dragon. After finally

59 LCIA Rules, Article 15.3

60 WIPO Arbitration Rules, WIPO Publication No. 446, 1994

61 Shenton, "Attachments and Other Interim Court Remedies in Support of Arbitration: The English Courts", in International Business Lawyer, March 1984

shedding their reputation for jealousy and hostility towards arbitration in the past decades, once again English judges will be regarded with some apprehension by international arbitration practitioners anxious to maintain the independence of arbitral proceedings. Despite the insistence at all levels of the English courts that judicial discretion is available in order to support arbitration, in many cases it is going to be interpreted as meddling. If parties are choosing arbitration in order to opt out of national litigation, they will once again shy away from choosing England (and similar jurisdictions) as a situs for their arbitration proceedings. England may well be known as a refuge for innocent defendants to arbitration proceedings. The trouble is of course that parties rarely predict in advance who will be the defendant, and indeed each one if asked would probably instinctively assume the position of claimant. And claimants, who normally want an expeditious end to the affair, will avoid an arbitration site where the national judges are prone to "meddling".

There is currently before the British Parliament a new Bill to reform arbitration in England. The draft would give the arbitral tribunal the power to order a party to provide security for costs, to exactly the same extent that the High Court would have if hearing the matter. The High Court would retain the same power.⁶² The definition of that "rare case" where judicial or arbitral discretion should be exercised, would remain in the hands of the judge or more probably, in the hands of the arbitrator. If the Bill becomes law it will clarify the arbitrator's power at least in England, so as to make recourse to the High Court unnecessary. Some commentators wish to go even further, suggesting that the Bill should remove the court's power to issue interim orders once the tribunal is constituted.

On the other hand, the ICC Court, might want to consider adding a provision to its Rules, explicitly allowing arbitrators to order security for costs, with an implicit or explicit direction to parties to renounce their rights to apply to a judge for the order.

If the Ken-Ren decisions do encourage parties to seek orders for security for costs from national courts, it is likely that they will meet with more success if the *lex arbitri* is one of the common law family rather than civil. For the time being, it will remain up to parties and their counsel to decide what kind of arbitration they want, and to choose England or elsewhere as a situs, only after thoughtful consideration of just how much judicial intervention will be welcome in their proceedings.

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