Security for Costs Orders in London Arbitration: Consequences of Non Compliance

Two recent London arbitration decisions (London Arbitration 6/26 and 7/26) have highlighted the tribunal's firm approach on the serious consequences of failing to comply with a security for costs order.

Security for costs is a procedural safeguard frequently used in arbitration to protect a party from incurring irrecoverable legal costs where there is a genuine concern about the other party's ability or willingness to pay. A security for costs order requires one party to an arbitration to provide financial security to cover all or part of the other party's anticipated legal costs.

In deciding whether to order security, a tribunal may consider factors such as the financial position of the party against whom security is sought, the strength of the claims advanced, and whether ordering security would unfairly stifle a genuine claim or defence. Tribunals seated in London have wide discretion to order such security and to enforce compliance. The recent London arbitration decisions considered below provide a clear reminder that security for costs orders, and the peremptory orders that may follow, are not optional and will be enforced strictly.

Background to the Dispute

Disputes had arisen under a NYPE time charterparty which were referred to London arbitration in line with the Charterparty.

The Owners claimed US$1,952,549.63 for unpaid hire and other sums. The Charterers defended the claim and then advanced a substantial counterclaim of US$3,749,500 relating to the Owners' arrest of another vessel and other matters. This counterclaim was also sought in two (2) related references before the same arbitrators.

Partial Final Award on Undisputed Hire

The Owner applied for a partial final award in respect of the undisputed portion of the unpaid hire, but the

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Charterers opposed the application and requested additional time to file an amended defence and counterclaim.

This application was opposed by the Owners' solicitors. The tribunal clarified the nature of the Owners' application and directed the Charterers to provide a detailed response to it. In their reply, the Charterers conceded that a part of the unpaid hire was undisputed but argued that it should be set off against their counterclaim relating to the arrest.

The tribunal rejected this position, finding that the Charterers had no valid claim for wrongful arrest, and therefore no right of set-off. The Owners were accordingly granted a partial final award for the undisputed hire.

Security for Costs Orders

Following this award, the Charterers amended and continued to pursue their counterclaim, reducing it to US$1,791,560.52.

Alongside the application for the first partial award, the Owners applied for security for their costs in defending the counterclaim and the two other related references. The Charterers opposed that application, but the tribunal ordered them to provide the modest sum of £20,000 as security for costs for the counterclaim and similar securities for the two related references in which the tribunal had been appointed.

The parties were instructed to agree the form and source of the security, with any undertakings to follow the wording published on the LMAA website. The deadline for providing security was set for 7 February.

Non-Compliance with Peremptory Orders

When the Charterers failed to comply, the Owners applied for a peremptory order on 8 February. In response, the Charterers notified the Tribunal of their intention to pay the security to a London solicitor who would issue the required undertaking.

A further application for a peremptory order was made on 5 March. On 6 March, the tribunal issued a peremptory order requiring compliance by 12 March, unless the Charterers provided a credible explanation the following day. The Charterers' solicitors replied that their clients were experiencing banking difficulties and requested an extension to 15 March. Despite the Owners' objections to this request, the tribunal granted the extension and warned that serious consequences would follow any further non-compliance.

The Charterers again failed to provide the ordered security by the extended deadline. Having given them various opportunities to comply, the tribunal exercised its powers under section 41(6) of the Arbitration Act 1996 and dismissed the Charterers' counterclaim.

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Key Takeaways

- Set-off arguments must be supported by a valid underlying claim – the tribunal will not permit set-off against a counterclaim lacking merit.
- Security for costs orders are taken seriously – failure to comply with security for costs orders can have severe consequences.
- Peremptory orders are not mere warnings – continued non-compliance with them can lead to dismissal of claims or counterclaims.

If you are involved in arbitrations and are facing issues or need legal support/advice, our arbitration team can provide strategic and practical advice. Please contact us to discuss how we can assist in protecting your position and managing procedural risk(s).

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