

JUDICIAL INTERPRETATION OF THE HIGH COURT
IN APPLICATION OF THE SECURITY FOR COSTS

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A dissertation submitted in partial fulfillment of the
requirements for the awards of the degree of
Master of Construction Contract Management

Faculty of Built Environment
Universiti Teknologi Malaysia

SEPTEMBER 2012

DEDICATION

*Deepest thanks to my parents, Siew How and Choy Har,
my family and friends
for their love, guidance, understanding and the countless hours of joy
we shared throughout the years.*

*Two small words to convey my inherit feeling in my heart:
Thank you.*

ACKNOWLEDGEMENT

Firstly, I would like to thank to my Supervisor, Dr. Nur Emma Mustaffa for willing to spare out her precious time to provide me valuable advices and ongoing support throughout my candidature to complete this research project. Without her guidance and help in providing additional ideas, the completion of this research project would not be a reality.

With the blessings and encouragement from lecturers, I continue my journey of pursuing the challenges to study Master of Science in Construction Contract Management. I am indebted to all the lecturers of this course for their kind advice during the process of completing this master project report.

Other than that, I would also like to thank my family for supporting me to take up this study. They have been very supportive to my ideas and kept inspiring me besides pouring me with their unconditional love and tolerance that has been the drive in pursuing my dreams. Without their constant support and love, I would not become the person I am today.

Besides that, I would like to extend my sincere appreciation to everybody who contributed to the accomplishment of this dissertation. My beloved course mates, friends and buddies thanks for you all too. Without you all, life will become dully. You make my university life interesting.

Lastly, a thousand thank to Universiti Teknologi Malaysia for providing such a wonderful sanctuary for me and my fellow course mates. Thanks to you.

ABSTRACT

Security for costs is a fund of money paid into Court by a plaintiff to protect defendants from unrecoverable costs associated with the plaintiff's action. The High Court is guided by some considerations to make order for security for costs but the considerations are not defined in detail and left the Court to interpret the meaning. This has caused the Courts to give different interpretations in making the decisions. Another issue which arise is whether the High Court has the power to grant interim measures and make security for costs under section 11(1) of Arbitration Act 2005 in support of an arbitration which is taking place or will take place outside Malaysia. Besides that, section 11(1) of Arbitration Act 2005 has stated that any party including the plaintiff may apply to the Court for interim measure which is nature is contradictory to the general rule that is the security for costs is applied by the defendant. Section 19 of Arbitration Act 2005 gives overlapping but not coextensive powers to the arbitral tribunal that is baffling whether an interim order should be sought from the High Court or the arbitral tribunal. In order to clear the doubt regarding the application of security for costs, this research project is carried out to determine the grounds for the High Court to order or dismiss the application for security for costs. Legal cases are collected from year 1986 to year 2009 from Malayan Law Journal via Lexis Malaysia website and documentary analysis was conducted on the related cases. Finally, this research has shed some light in exposing what are the possible reasons that the High Court may order or dismiss the application for security for costs. From the analysis done on the cases, it is observed that the party who apply the security for costs has to be the defendant. The High Court has to consider all the circumstances in a particular case before making any decisions. The High Court will order the plaintiff to furnish such security when the High Court believes that the security is necessary.

ABSTRAK

Jaminan kos adalah sejumlah wang yang dibayar ke dalam Mahkamah oleh plaintif untuk melindungi defendan daripada kos tidak boleh dipulihkan kesan daripada tindakan plaintif. Mahkamah Tinggi bersandarkan beberapa pertimbangan untuk membuat perintah jaminan kos tetapi pertimbangan tidak ditakrifkan secara terperinci dan meletakkan Mahkamah Tinggi untuk mentafsir makna. Oleh yang demikian, Mahkamah Tinggi telah memberikan tafsiran yang berbeza dalam membuat keputusan. Satu lagi isu yang timbul ialah sama ada Mahkamah Tinggi mempunyai kuasa untuk memberikan langkah interim dan membuat jaminan kos di bawah seksyen 11 (1) Akta Timbang Tara 2005 dalam menyokong timbang tara yang sedang berlaku atau yang akan mengambil tempat di luar Malaysia. Selain itu, seksyen 11 (1) Akta Timbang Tara 2005 menyatakan bahawa sesiapa termasuk plaintif boleh memohon kepada Mahkamah Tinggi bagi langkah interim yang bercanggah dengan peraturan umum iaitu jaminan kos dikenakan oleh defendan. Situasi menjadi keliru bahawa sama ada suatu perintah interim perlu dicari daripada Mahkamah Tinggi atau tribunal timbang tara apabila Seksyen 19 Akta Timbang Tara 2005 memberi kuasa yang bertindih tetapi tidak terperinci kepada tribunal timbang tara. Demi menghilangkan keraguan mengenai permohonan jaminan kos, projek penyelidikan ini dijalankan untuk menentukan alasan Mahkamah Tinggi memerintah atau menolak permohonan jaminan kos. Kes-kes undang-undang dikumpul dari tahun 1986 hingga tahun 2009 dari *Malayan Law Journal* melalui laman web Malaysia Lexis dan analisis dokumentari telah dijalankan ke atas kes-kes berkaitan. Akhirnya, kajian ini menemui apa sebab-sebab Mahkamah Tinggi memerintah atau menolak permohonan untuk jaminan kos. Dari analisis kes, ia diperhatikan bahawa pihak yang memohon jaminan kos perlu dilakukan oleh defendan. Mahkamah Tinggi perlu mempertimbangkan segala keadaan dalam setiap kes sebelum membuat sebarang keputusan. Mahkamah Tinggi akan memerintahkan plaintif untuk memberikan jaminan itu apabila Mahkamah Tinggi percaya bahawa jaminan adalah diperlukan.

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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPLANATION
AC	Law Reports: Appeal Cases
All ER	All England Law Reports
AMR	All Malaysia Reports
BCLC	Building and Construction Law Cases
BLR	Building Law Reports
CA	Court of Appeal
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CLJ	Current Law Journal (Malaysia)
CP	Law Reports, Common Pleas
CPD	Law Reports, Common Pleas Division
DC	District Court
FMSLR	Federated Malay States Law Report
JCA	Justice of Court of Appeal
KB	King Bench
KLRC	Kuala Lumpur Regional Centre for Arbitration
LJCP	Law Journal Reports, Common Pleas Decisions (England)
LJ	Lord Justice
LJQB	Law Journal Reports, Queens Bench
Lloyd's Rep	Lloyd's List Reports
LNS	Lawyers Reports Annotated, New Series
T	Law Times Reports (England)
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
NZLR	New Zealand Law Report

QB, QBD	Law Reports: Queen's Bench Division
TLR	Times Law Reports
CITRAL	United Nations Commission on International Trade Law
RCA	Rule of Court of Appeal
RFC	Rule of Federal Court
RHC	Rules of High Court
WLR	Weekly Law Report
WR	Weekly Reports

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CHAPTER 1

INTRODUCTION

1.1 Background Of The Study

The Arbitration Act 2005 which substantially founded on the UNCITRAL model law governs the arbitration proceedings in Malaysia.¹ After 15th of March 2006, this Arbitration Act only applies to arbitrations commencing.² Arbitrations that began before this date are governed by the Arbitration Act 1952.³

Jayaseelan has reported that arbitration gradually became more important in current years as more business is operated internationally.⁴ The essence of the sort of arbitration is that some dispute is referred by the parties for settlement to a tribunal of their own choosing, instead of to a court.⁵ Arbitration is better than the usual legal process because parties can determine the span of the arbitration process and numbers of arbitrators either one or three, who are usually experts in their own field.⁶ It is also a more cost effective and efficient dispute resolution.⁷ The arbitrators are familiar in a particular areas of business with the cases involve.⁸

¹ Kuala Lumpur Regional Centre for Arbitration. Available at <http://www.klrca.org.my/scripts/view-anchor.asp?cat=10>. (Last access on 28th March 2012)

² Ibid.

³ Ibid.

⁴ Risen Jayaseelan. *New Life for Arbitration*. The Star 1st January 2011.

⁵ Anthony Walton. *Russell on the Law of Arbitration*. 20th Edition. London Stevens and Sons. 1982.

⁶ Ibid, No. 4.

⁷ Ibid.

⁸ Ibid.

Arbitration has become the dispute settlement mechanism and the norm in the construction industry.⁹ This is because the popularity of arbitration clauses in standard forms of construction contract.¹⁰ In addition, the use of arbitrator's skills in technical disciplines due to the technical content of disputes.¹¹ Next, the arbitrator need to be empowered to open up, review and revise decisions or certificates, arising from the architect's or engineer's judgment in administering the building contract.¹²

Fees, charges, disbursements, expenses and remuneration incurred by a party or incidental to the conduct of the proceedings are examples of cost awarded by the Courts.¹³ The award of costs is discretionary and the Court must make and order as to costs to enable a party to recover such costs incidental to whom and the amount of costs to be paid to litigant.¹⁴ The costs awarded may either be remuneration paid by the client to his own solicitor or the costs which a litigant has to pay to another litigant to compensate the other for the expenses which he has incurred in the litigation.¹⁵

The general rule for security for costs is only applies against the plaintiff and not against the defendant.¹⁶ Security for costs is an amount of money paid into the Court by a plaintiff to protect a defendant against otherwise unrecoverable costs either in whole or in part linked with reacting to the plaintiff's action.¹⁷ Hence, the plaintiffs who start the legal proceedings are obligated to accept the resulting responsibility for costs if their claims eventually fail. There are two exceptions which are the defendant appealing and the defendant brings a counterclaim and is therefore in the position of a plaintiff with regards to the counterclaim.¹⁸

⁹ Sundra Rajoo. *Arbitration in The Construction Industry*. Master Builders 1st Quarter. 2008.

¹⁰ Ibid.

¹¹ Ibid.

¹² Ibid.

¹³ Ravi Nekoo. *Civil Procedure*. 2nd Edition. Lexis Nexis. 2006.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ravi Nekoo. *Practical Guide to Civil Procedure in Malaysia*. International Law Book Services. 2002.

¹⁷ John A. Keith, Cox Hanson O'Reilly Matheson Halifax and Nova Scotia. *Security for Costs against Fraudulent Claims: A Comparative Overview*. Risk Management Counsel of Canada. 1999.

¹⁸ Ibid, No. 16.

The defendant may apply to the Court so that the plaintiff provide security as to costs where the defendant feels that the strength of the defence is good and there is a good chance of defeating the plaintiff but is worried that the plaintiff will be unable to make payment as to the order as to costs that maybe made at the end of the trial.¹⁹ The Court or the arbitrator makes order securing the right party who is eventually successful to recover his costs of the arbitration and securing the right of a successful claimant to be paid the amount of the award.²⁰ There are two types of order for security which are security for costs and security for claims.²¹ If the application of the defendant for security to costs is allowed, the plaintiff will be required to reimburse specific amount of money into court within specified period.²²

1.2 Problem Statement

The High Court is guided by the following considerations in the practice of its discretion to order security for costs²³:

- i. Is the plaintiff's claim bona fide? Does the plaintiff have reasonably good prospects of success?
- ii. Is there an admission by the defendant?
- iii. Is the application oppressive in nature that is to stifle a genuine claim?
- iv. Has the plaintiff's want of means been brought on by the defendant?
- v. The application must be made as early as possible in the proceedings.

Each consideration should act as a guideline to the Court for ordering security for costs. However, they left behind some unclear statements. There are issues and uncertainties regarding to the considerations stated above. This is because the

¹⁹ Ibid, No. 13.

²⁰ Mustill and Boyd. *Commercial Arbitration*. 2nd Edition. Butterworths. 1989.

²¹ Ibid.

²² Ibid, No. 13.

²³ Ibid.

guideline is very general in nature and does not specifically define in detail what the considerations are and leave the Court to interpret the meaning. This situation would to a certain extent lead to different interpretations by the Courts in making decisions.

Furthermore, one question arises is whether the High Court has the power to approve interim measures under section 11(1) of Arbitration Act 2005 in support of an arbitration which is taking place or will take place outside Malaysia.²⁴ Hence, there is an issue showing that whether the High Court has the power to approve security for costs outside Malaysia. Besides, there is an issue which is whether the power of the Court determines the grounds of the Court to dismiss the application for security for costs. In other words, will the High Court dismisses the application for security for cost due to the arbitration is held or will be held outside Malaysia?

The Arbitration Act (Amendment) 2011 amends the Arbitration Act 2005 and empowers the Malaysian court that practices admiralty jurisdiction to order the retention of vessels or the provision of security, during the determination of arbitration proceedings related to admiralty or maritime disputes.²⁵ Above all, the Arbitration Act (Amendment) 2011 amends section 11 of the Arbitration Act 2005. The altered section 11 is as the following:

“11. Arbitration agreement and interim measures by the Court:

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:...”

Section 11(1) stated that any party may apply to the High Court for interim measures and it seems that the High Court may make orders for security for costs

²⁴ Sundra Rajoo and WSW Davidson. *The Arbitration Act 2005 UNCITRAL Model Law as applied in Malaysia*. Sweet and Maxwell Asia. 2007.

²⁵ Rahayu Partnership - Advocates & Solicitors. *Ship Arrest as Security for an Arbitration Claim: Post the Arbitration (Amendment) Act 2011*. E-newsletter 2011.

which is contradict to the general rule that the application for security for costs is by the defendant.²⁶ Thus, which party is in the position to apply for security for costs? It should be the Plaintiff or the Defendant?

Security for costs is obtained by taking action by applying interim order. Section 19 of Arbitration Act 2005 gives overlapping but not coextensive powers to the arbitral tribunal, the question often arises as to whether an interim order should be sought from the court or the arbitral tribunal.²⁷ The Arbitration Act 2005 does not provide any guidelines in this respect.²⁸ This will lead to another question or problem to the arbitrators whether to approve a security for costs. On the other hand, the High Court has no reason not to hear the application for security for costs since the Court is given such powers in Section19 of Arbitration Act 2005. Does the Court have reasons not to grant security for costs for the plaintiff?

There are a few of uncertainties relating to apply security for costs as mentioned at above. These uncertainties will definitely leads to many issues and problems. In order to find out the solution and clear the doubt regarding to the application of security for costs, this research project is has to carry out.

1.3 Objective of The Study

The objective of this study is to determine the grounds for the High Court to order or dismiss the application for security for costs.

²⁶ Ibid, No. 25.

²⁷ Ibid, No. 24.

²⁸ Ibid.

1.4 Scope of the Study

This study is focused on the following:

1. Arbitration Act 1952, Arbitration Act 2005, Rules of the High Court 1980 and Companies Act 1965.
2. Legal cases reported in Malayan Law Journal and Lexis Malaysia in relation to security for costs in Malaysia and Singapore.

1.5 Significance of the Study

Essentially, this study was expected to generate answers for the uncertain issues that arise in arbitration specifically the issues that in relation to security of costs. In accordance to that, the identified issues stated in sub-heading 1.2 were analyzed based on the interpretation and judgment by the High Court. This study is capable to assist and guide the professionals in the construction industry to have a clear and better understanding of judicial interpretation on security for costs in arbitration.

1.6 Research Procedure

In order to achieve the research objective, a systematic method in conducting this research had been organized. The study process consists of five phases:

- Phase 1: Preparation of Research Proposal
- Phase 2: Literature Review
- Phase 3: Data Collection
- Phase 4: Data Analysis
- Phase 5: Conclusion and Recommendation

1.6.1 Phase 1: Preparation of Research Proposal

The first stage of the research involves initial study and discussion with friends and lecturers regarding what are the issues in construction industry. Initial literature review was conducted to find the idea of the research topic. After the initial study, the brief proposal of the research topic was created. Then, the objective and scope of the research were fixed. Next, a research outline was prepared to discover what type of data was required in this research. Meanwhile, the data sources were identified as well.

1.6.2 Phase 2: Literature Review

Literature review was a fundamental phase in the research process. It was very important to assist in carrying out the research. It was conducted to provide a comprehensive background study of the research. Literature review and various documents related to the research field had been collected to achieve the research objective. The reviews mainly focused on the Arbitration Act, Civil Procedure and Security for Costs.

1.6.3 Phase 3: Data Collection

At this phase, all the data and information related to security for costs were gathered and collected. Data collected were from the Malayan Law Journal viz the Lexis Malaysia online database. All the legal cases related to the research topic were classified out from the database. Important cases were collected and utilised for the analysis at Phase 4. Data collected were mainly through documentary analysis. All gathered data and information were documented neatly and systematically so that the data and information can be easily be traced back.

1.6.4 Phase 4: Data Analysis

This phase of research included data analysis, data interpretation and data arrangement. This phase converted the data collected into information that is useful and valuable for the research. Arrangement of data tends to simplify the process writing of the paper.

1.6.5 Phase 5: Conclusion and Recommendation

The phase 5 was the final phase of the research process. Mainly, it involved the writing up and checking of the writing. Conclusion and recommendations were prepared with reference to the findings during the phase of data analysis.

1.7 Research Flow Chart

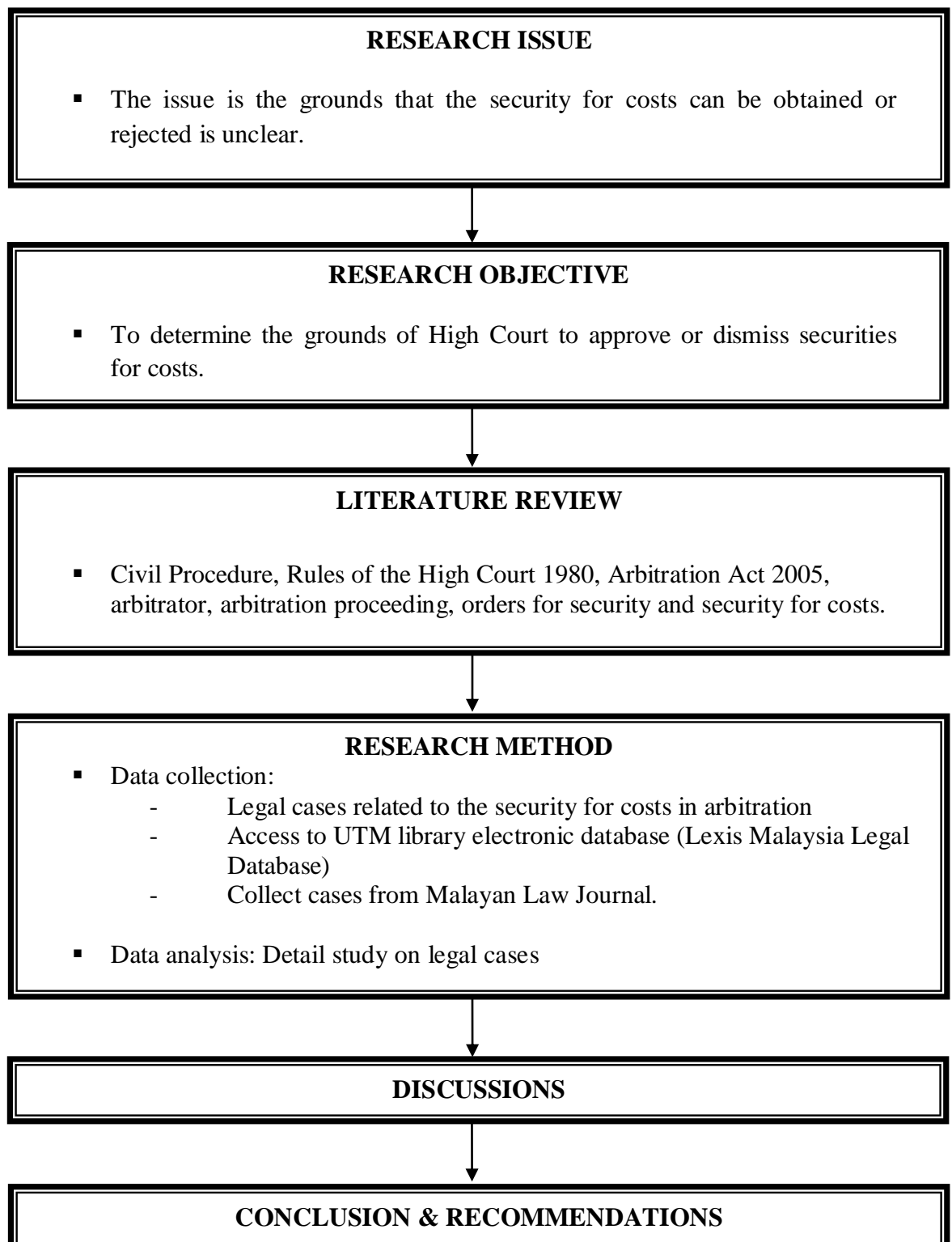


Figure 1.0: Flow Chart for Research Methodology

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