

Frontier International Shipping Corporation (Plaintiff)

v.

The Owners and All Others Interested in the Ship "Tavros" and Passport Maritime S.A.(Defendants)

Indexed as: Frontier International Shipping Corp.v. Tavros (The) (T.D.)*

Trial Division, Hargrave P."Vancouver, October 18 and November 5, 1999.

Maritime law " Practice " Arbitration " Plaintiff may have ship arrested in Canada to obtain security for arbitration award at New York " Where plaintiff has no assets within jurisdiction of Court, defendant may not ask Court to order security for counterclaim at arbitration.

Practice " Costs " Security for costs " Where plaintiff has no assets within jurisdiction of Court, defendant may not ask Court to order security for counterclaim at foreign arbitration of dispute in maritime law matter " Nor can defendant obtain security for arbitration costs as matter part of arbitrators' jurisdiction, as Court's capacity to award security for costs limited to proceedings in Federal Court, and as need for security for costs not demonstrated herein " Lack of proper procedure not bar to defendant obtaining interim relief or protection (security for costs) by way of incidental request brought on occasion of plaintiff's motion for stay " Defendant awarded costs of providing security " While defendant may not take any security from this jurisdiction to New York arbitration, equitable solution that defendant be awarded costs of this Federal Court action.

* Editor's Note: An appeal from the part of this decision awarding costs to the defendant was allowed. It is reported at [1999 CanLII 9396 \(FC\)](#), [2000] 2 F.C. 445 (T.D.).

Practice " Stay of proceedings " Court cannot make stay conditional upon posting of security for costs of arbitration as matter part of arbitrators' jurisdiction, as Court's capacity to award security for costs limited to proceedings in Federal Court, and as need for security for costs not demonstrated herein.

After initiating an action for breach of charter party in the Federal Court, the plaintiff had the *Tavros* arrested in Vancouver and thereby obtained security in the form of a letter of undertaking applicable to both the action and to arbitration at New York. At the hearing of the plaintiff's motion for a stay of the Federal Court action, the defendant shipowner, Passport Maritime S.A., did not oppose the stay but asked for security for its counterclaim in the arbitration, security for the costs of the arbitration and security for costs of the present Federal Court action, including for the cost of the bank guarantee by which the *Tavros* has been released from arrest.

Held, the defendant should be awarded the costs of this Federal Court action as interim protection within Article 9 of the *Commercial Arbitration Code*.

Recourse to a court's *in rem* jurisdiction to arrest a ship in order to force the putting up of security for a future arbitration award has bothered judges from time to time. In Canada, plaintiffs often invoke the Federal Court's *in rem* jurisdiction to that end. Based on the Federal Court Trial Division cases of *Atlantic Lines & Navigation Company Inc. v. The Ship "Didymi"* and *Pictou Industries Ltd. v. Secunda Marine Services Ltd. et al.*, there is no inherent unfairness in an arrest merely to obtain security for an arbitration.

However, there is no basis for the defendant's argument that, since the plaintiff now has security for its claim, fairness mandates protection in the form of counter-security for the shipowner's counterclaim at arbitration. Article 9 of the *Commercial Arbitration Code*, which deals with interim protective measures, does not provide support for this argument. The common thread running through interim measures of this nature (garnishment, Mareva injunctions, arrests of ships) is that such measures are based upon the presence of an asset within the jurisdiction of the Court which might be moved against in order to force the putting up of security. In the present instance, there is no local asset belonging to the plaintiff against which defendant might move. Rather, the defendant looks to the Court to create security without either concrete foundation or legal justification, but merely grounded on some form of fair play.

Neither should security for arbitration costs be awarded to the defendant in this instance. In the present case, arbitrators clearly have jurisdiction in that respect. The Court ought not, except as necessary and available interim protection, to become involved in security which the arbitrators can more easily decree. Secondly, it is doubtful that this Court's capacity to award security for costs, set out in rules 415 and 416 of the *Federal Court Rules, 1998*, goes beyond security for costs for proceedings in the Federal Court. Thirdly, there was no demonstrated need for security for costs in the present instance. Finally, the Court may not attach any conditions, such as the posting of security for costs of the arbitration, to the stay that must, by reason of Article 8 of the *Commercial Arbitration Code*, be granted in the present case.

However, the defendant should be awarded security for costs of this action. Once this Federal Court action has been stayed at the plaintiff's request to go to arbitration, the chance of it ever proceeding is infinitesimal. If the defendant is entitled to costs and is ever to recoup them, it must be now, as an interim measure of protection. The lack of proper procedure is not a bar to the defendant obtaining interim relief or protection by way of an incidental request brought on the occasion of the plaintiff's motion for a stay. The plaintiff was not caught by surprise. Furthermore, that a procedural impropriety of this kind could be fatal would be contrary to the philosophy of the *Federal Court Rules, 1998*, as set out in rule 3.

While the plaintiff has obtained the stay it sought in this motion, costs of this motion should not be awarded to it. The plaintiff has, in a sense, used the Court as a collection agency and having achieved its ends, moved on to another jurisdiction. This is not an improper approach, but neither is it one that ought to be rewarded. The costs of this motion are, therefore awarded to the defendant. The defendant is awarded the sum of \$13,262.64, being the cost of security and the costs of this motion. This is not a condition of the stay. Nor is payment of the award a condition of the stay.

statutes and regulations judicially considered

Arbitration Act, 1950 (U.K.), 1950, c. 27, s. 12(6).

Arbitration Act 1975 (U.K.), 1975, c. 3.

Civil Jurisdiction and Judgments Act 1982 (U.K.), 1982, c. 27, s. 26.

Commercial Arbitration Code, being Schedule to the *Commercial Arbitration Act*, R.S.C., 1985, (2nd Supp.), c. 17, Arts. 8, 9.

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, signed at Brussels on 27 September 1968.

Federal Court Rules, 1998, [SOR/98-106](#), rr. 3, 415, 416, Tariff B.

cases judicially considered

applied:

Atlantic Lines & Navigation Company Inc. c. The Ship "Didymi", [1985] 1 F.C. 240 (T.D.); *Pictou Industries Ltd. v. Secunda Marine Services Ltd. et al.* (1994), 78 F.T.R. 78 (F.C.T.D.); *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.* (1994), [1994 CanLII 845 \(BC SC\)](#), 113 D.L.R. (4th) 116; 89 B.C.L.R. (2d) 132; 24 C.P.C. (3d) 362 (S.C.); *Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd.*, [1994] 2 All ER 449 (H.L.); *K/S A/S Bani and K/S A/S Havbulk I v. Korea Shipbuilding and Engineering Corporation*, [1987] 2 Lloyd's Rep. 445 (C.A.); *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, [1994 CanLII 3466 \(CAF\)](#), [1994] 2 F.C. 662; (1994), 113 D.L.R. (4th) 536; 167 N.R. 294 (C.A.); *World Star, The*, [1986] 2 Lloyd's Rep. 274 (Q.B. (Adm. Ct.)); *Antares Shipping Corp. v. The Capricorn*, [1977] 2 F.C. 274; (1977), 17 N.R. 1 (C.A.).

distinguished:

Silver Standard Resources Inc. v. Joint Stock Co. Geolog (1998), [1998 CanLII 6468 \(BC CA\)](#), 168 D.L.R. (4th) 309; 115 B.C.A.C. 262; 59 B.C.L.R. (3d) 196 (C.A.).

considered:

Cap Bon, The, [1967] 1 Lloyd's Rep. 543 (Adm.); *Rena K, The*, [1978] 1 Lloyd's Rep. 545 (Q.B. (Adm. Ct.)); *Vasso (formerly Andria), The*, [1984] 1 Lloyd's Rep. 235 (C.A.).

referred to:

Nordglimt, The, [1987] 2 Lloyd's Rep. 470 (Q.B. (Adm. Ct.)); *Mavani v. Ralli Bros. Ltd.*, [1973] 1 W.L.R. 468 (Q.B.).

authors cited

Holtzmann, Howard M. and Joseph E. Neuhaus. *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*. Boston: Kluwer Law and Taxation Publishers, 1989.

Paterson, Robert K. and Bonita J. Thompson (editors). *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation*. Toronto: Carswell, 1987.

Sutton, David St. John *et al.* *Russell on Arbitration*, 21st ed. London: Sweet & Maxwell, 1997.

MOTION by plaintiff to stay an action for breach of charter party in favour of arbitration; request by the defendant for security for its counterclaim, security for the costs of arbitration and security for costs of the present Federal Court action, including for the cost of the bank guarantee. The motion, not being challenged, was allowed; the defendant was awarded the costs and disbursements of this action.

appearances:

H. Peter Swanson for plaintiff.

Doug G. Morrison for defendants.

solicitors of record:

Campney & Murphy, Vancouver, for plaintiff.

Bull, Housser & Tupper, Vancouver, for defendants.

The following are the reasons for order rendered in English by

[1]Hargrave P.: Ostensibly the plaintiff, who is a charterer, seeks to litigate a breach of charter party. In fact the action was commenced and the *Tavros* arrested at Vancouver in order to force security for any arbitration award which might arise out of existing arbitration in New York. Having obtained security in the form of a letter of undertaking applicable to both the action and to the arbitration (replaced by a bank guarantee), thus allowing the *Tavros* to sail, the plaintiff now moves to stay this Federal Court action in favour of the New York arbitration.

[2]Article 8 of the 1985 *Commercial Arbitration Code*, adopted by the United Nations Commission on International Trade Law (the *Commercial Arbitration Code*) which is enacted in Canada by the *Commercial Arbitration Act*, R.S.C., 1985 (2nd Supp.), c. 17, requires that this matter be stayed, subject to various exceptions. As I understand it, none of these exceptions apply in the present instance. However, the defendant shipowner, whom I shall also call the defendant, submits that coupled with the stay or granted concurrently with the stay, although not by a separate motion in this instance, ought to be security for its counterclaim, security for the costs of the arbitration and security for the costs of the present Federal Court action, including for the cost of the bank guarantee by which the *Tavros* has been released from arrest.

[3]The stay, *per se*, not being challenged, these reasons deal with the defendant's request for counter-security, but because the defendant raised the question of fairness of an arrest to obtain security for an arbitration, I will touch first on that procedure.

CONSIDERATION

Arrest to Obtain Security for Arbitrators' Award

[4]Not infrequently a plaintiff will make use of the *in rem* jurisdiction of the Court to obtain security for an award which arbitrators might make. Counsel for the defendant shipowner questions the fairness of the procedure and submits that the plaintiff ought, as I say, to provide counter-security, to cover first, the defendant's counterclaim for hire, second, costs in the arbitration, and third, costs in the present action, in order to place matters on an equitable and fair footing.

[5]The concept of using a court's *in rem* jurisdiction to arrest a ship in order to force security for a future arbitration award has bothered judges from time to time. In *Cap Bon, The*, [1967] 1 Lloyd's Rep. 543 (Adm.), Mr. Justice Brandon was unequivocally negative, pointing out at pages 546 and 547 that:

In my view, when an action *in rem* is brought the security thereby obtained is security in respect of any judgment which may be given by the Court after hearing and determining the claim. The security so obtained

also covers the payment of any sum which may become due under an agreement whereby the action is settled. But the security so obtained is not in my view available for the purpose of insuring payment of the judgment of some other Court or for the purpose of insuring payment of the award of an arbitration tribunal.

Subsequently in *Rena K, The*, [1978] 1 Lloyd's Rep. 545 (Q.B. (Adm. Ct.)), Mr. Justice Brandon (at pages 554-555) paraphrased his reasoning in *The Cap Bon* by saying it was based on two propositions, one positive and one negative:

The first and positive proposition is that the purpose of arresting a ship in an action in rem is to provide the plaintiff with security for the payment of any judgment which he may obtain in such action, or of any sum which may become payable to him under a settlement of such action. The second and negative proposition is that it is not the purpose of arresting a ship in an action in rem to provide the plaintiff with security for payment of an award which he may obtain in an arbitration of the same claim as that raised in the action and the Court therefore has no jurisdiction to arrest a ship, or keep her under arrest, for some other purpose.

In effect, the claimant was put to an election between two courses of action, either pursuing the claim in the Court with the advantage of security, or pursuing the claim through arbitration without the advantage of security.

[6]In *The Rena K*, Mr. Justice Brandon considered security in the context of a stay for arbitration and the evolving case law. While he felt that the principles set out in *The Cap Bon* were correct, he also recognized that the Court had the discretion, on granting a stay in favour of arbitration, to allow existing security to remain in place, depending upon the circumstances in any particular instance.

[7]The general principle that arrest of a ship merely to provide security for an arbitration ought not to be countenanced was endorsed by the Court of Appeal in *Vasso (formerly Andria), The*, [1984] 1 Lloyd's Rep. 235. However, the Court of Appeal also acknowledged that the Court had the jurisdiction to arrest and to maintain an arrest simply to obtain security for an arbitration (page 241). The British courts, having, in a sense, ignored the whole basis for *in rem* proceedings, that is to obtain security at a place where the eventual award might be satisfied, because the ship is there, seemed to have painted themselves into a corner. The British courts were spared rationalizing themselves out of this corner by legislation: specifically, section 26 of the *Civil Jurisdiction and Judgments Act 1982* [(U.K.), 1982, c. 27] (as amended) allowed existing security to remain in place following a stay pending arbitration. As pointed out by Mr. Justice Hobhouse in *Nordglint, The*, [1987] 2 Lloyd's Rep. 470 (Q.B. (Adm. Ct.)), at page 481 this provision is consistent with the 1968 *Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters* (including the Protocol annexed to that Convention), signed at Brussels on 27 September 1968.

[8]Canada has not yet ratified the 1968 Brussel's Convention. It has enacted some of its provision in Canadian legislation, but not portions bearing on the issue of the arrest of a vessel in one jurisdiction in support of the determination of the merits of the dispute in another jurisdiction. Thus, the Federal Court has had to deal with and distinguish the English authorities in order to grant security for arbitration awards and to rationalize the continuation of existing security in the face of a stay for arbitration.

[9]In *Atlantic Lines & Navigation Company Inc. v. The Ship "Didymi"*, [1985] 1 F.C. 240 (T.D.), Madam Justice Reed, faced with the invocation of an arrest for the primary purpose of obtaining security for arbitration, refused either to strike out the statement of claim or to release the arrested ship without security. Instead, she held that the ship might be released against an undertaking as to security.

[10]The decision in *Didymi* is pragmatic and reasonable, being based on an analysis of at least the majority of the leading cases, the clear distinguishment of contrary cases and the concept that *in rem* proceedings flowed from the necessity of allowing a plaintiff to proceed in the jurisdiction in which the ship lay, because that was the place where an award might be satisfied and that the instances where security would be cancelled were limited, but included instances where the loss of security would prejudice no one (see page 251). Indeed, "[i]t is only in very rare cases that in the absence of consent, the court will order the release of an arrested vessel without the posting of security even where the parties are pursuing arbitration of the dispute" (*Pictou Industries Ltd. v. Secunda Marine Services Ltd. et al.* (1994), 78 F.T.R. 78 (F.C.T.D.), at page 80).

[11]In the light of both the reasoning in *Didymi* and the clear statement in *Pictou Industries*, I do not believe it open to the defendant owner of the *Tavros* to urge any inherent unfairness in an arrest merely to obtain security for an arbitration.

Security for the Defendants' Counterclaim at Arbitration

[12]The defendant submits that there must be some degree of fairness and a level playing field in the present instance: the defendant says that since the plaintiff now has security for its claim, fairness mandates protection in the form of counter-security for the shipowner's counterclaim at arbitration. The counterclaim is in the amount of US\$42,475.75.

[13]The defendant refers to Article 9 of the *Commercial Arbitration Code* which article deals with interim protective measures which a court may grant:

Article 9

...

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

[14]My understanding of Article 9 is that it allows a court the scope to grant recognized relief, to a party who is arbitrating or who must arbitrate, for example in the nature of a garnishment before judgment or, as here, an arrest of a ship to force security, neither of which would be incompatible with an arbitration. Indeed, as to garnishment, this is the view of Mr. Justice Bouck of the B.C. Supreme Court in *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.* (1994), [1994 CanLII 845 \(BC SC\)](#), 113 D.L.R. (4th) 116. Mr. Justice Bouck referred to Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, published by Kluwer Law and Taxation of Boston in 1989 and to Robert K. Paterson and Bonita J. Thompson (eds.), *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation*, published by Carswell of Toronto in 1987:

Article 9 is not limited to any particular kind of interim measures. Thus it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizure of assets. . . . [Holtzmann and Neuhaus, at p. 332.]

Section 9 establishes that requests for interim judicial measures of protection (such as Mareva injunctions) are not incompatible with an agreement to arbitration. UNCITRAL has referred to pre-award attachments and measures to protect trade secrets and proprietary information as the type of measure that might be covered by that section. [Paterson and Thompson, at p. 118.]

[15]Mr. Justice Bouck concluded (at page 121):

From this analysis it seems reasonable to conclude that the concept of "protection" in s. 9 includes the right of an arbitrating party to obtain a garnishee order before judgment in order to secure funds for payment of the eventual arbitration award. That is what happened here. Thus, the garnishee order must stand unless it is affected by a procedural defect.

[16]From all of this one may conclude that the scope of the interim protection afforded under Article 9 is quite broad and may include garnishment, a Mareva injunction and, as I have suggested, the arrest of a ship, in order to obtain security for an arbitration. However the common thread running through interim measures of this nature is that such measures are based upon the presence of an asset within the jurisdiction of the Court which might be moved against in order to force security.

[17]In the present instance, the defendant does not have a local asset belonging to the plaintiff against which they might move. Rather the defendant looks to the Court to create security without either concrete foundation or legal justification, but merely grounded on some form of fair play. The Court should not be

asked to invent such an extraordinary solution. I now turn to the second aspect of the relief which the defendant seeks, that of security for costs in the arbitration.

Security for Costs in the Arbitration

[18]The defendant estimates its costs of arbitration at US\$25,000 and submits that since the plaintiff now has, by virtue of this Federal Court action, security for its costs of arbitration, the defendant should have similar security. Counsel for the plaintiff submits that for the defendant to obtain such relief it ought to have applied by a separate motion rather than look for security for arbitration costs and ancillary to the plaintiff's motion for a stay. It may indeed be preferable for a party in the position of the defendant shipowner to bring a separate motion for security for costs, or any other similar protection so as to try to come clearly within Article 9 of the *Commercial Arbitration Code*. However I need not decide the issue at this point in my reasons for there are a number of answers why security for arbitration costs ought not to be awarded to the defendant in this instance.

[19]To begin, "It is settled law that unless a submission to arbitration expressly empowers an arbitral tribunal to order security for costs the tribunal has no such power": *Mavani v. Ralli Bros. Ltd.*, [1973] 1 W.L.R. 468 (Q.B.), at page 472. Articles 32 and 34 of the American Arbitration Association, International Arbitration Rules, which I am told apply to the present arbitration, make it clear that the arbitrators can require security for the costs of a respondent. This is clearly a part of the arbitrators' jurisdiction. The Court ought not, except as necessary and available interim protection, to become involved in security which the arbitrators can more easily decree. Here I would refer to a portion of the decision of Lord Mustill in *Coppée-Lavalin SA/NV v. Ken-REN Chemicals and Fertilizers Ltd*, [1994] 2 All ER 449 (H.L.), at page 470:

It is in my judgment clear that the approach of the national court to the grant of interim relief should be conditioned to an important extent by the degree to which the particular remedy encroaches on the agreement that the arbitrators shall be the sole judges of the merits.

At first sight it may appear that this general approach does no harm to Coppée's application since an order for security of costs neither awards in advance something which it is the arbitrators' function to award nor calls for any preliminary assessment of the merits. Yet there is one respect in which such an order impinges much more fundamentally on the arbitration agreement than any of those already mentioned; for the order is almost invariably accompanied by a condition, such as was imposed in the present case, that until security is provided the arbitration will be stayed. Thus, notwithstanding that the parties have agreed that the claimant can and must submit his claim to arbitration, that art II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), UN Treaty Series (1959) 330 (see Mustill and Boyd *Commercial Arbitration* (2nd edn., 1989) App 2, p 725) requires the United Kingdom to recognise and enforce the agreement, and that *Bermer Vulkan Schiffbau Und Maschinenfabrik v South India Shipping Corp* [1981] 1 All ER 289, [1981] AC 909 put beyond doubt the general principle that the English court has no power to interfere directly with the conduct of the reference, an order for security will prohibit the claimant from proceeding with a validly constituted arbitration until he has put up the security, and will (if he is unable or unwilling to do so) prevent him from pursuing his claim at all. This is a powerful countervailing factor. I do not say that it is conclusive, for there are many international arbitrations in which it is, and may properly continue to be, the practice to make such orders. But I believe that in any case which is out of the ordinary the court should pause and look carefully for considerations which point the other way; and, in particular, should have regard to the particular type of arbitration in the course of which the application is brought.

Lords Keith, Slynn and Woolf went so far as to say that even though the Court had the jurisdiction, statutory and inherent, to award security for costs, that order should be made only in exceptional cases (pages 452, 471 and 476). This is not an exceptional case.

[20]The second reason for denying security for costs of the arbitration is that I doubt that this Court's capacity to award security for costs, set out in rules 415 and 416 [of the *Federal Court Rules, 1998*, [SOR/98-106](#)], goes beyond security for costs for proceedings in the Federal Court. [Subsection 416\(1\)](#) refers to a motion by a defendant to obtain security for costs and that [rule 415](#) extends the availability of security for costs "to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal". There is nothing in the *Federal Court*

Rules, 1998 which extend the benefit of security for costs to a party going off to arbitrate unless, as in the case of the plaintiff, there is some asset in the jurisdiction to move against and thereby obtain security for costs. Here I would also note that while the English courts seem routinely to give security for costs of an arbitration, that is pursuant to specific legislation, namely subsection 12(6) of the *Arbitration Act, 1950* [(U.K.), 1950, c. 27]. I was not referred to any equivalent Canadian legislation. There is no provision in the Canadian *Commercial Arbitration Act*. The *Commercial Arbitration Code*, which is given force by the *Commercial Arbitration Act*, only refers to interim protection: I do not take this, in itself, to give jurisdiction to the Federal Court to award security for costs in an arbitration.

[21]Third, I do not see a demonstrated need for security for costs in the present instance. Certainly there is nothing in the affidavit material. The Court of Appeal considered security for costs of arbitration in *K/S A/S Bani and K/S A/S Havbulk I v. Korea Shipbuilding and Engineering Corporation*, [1987] 2 Lloyd's Rep. 445. Among the factors which induced the Court to allow the appeal for security for costs were the expected high cost of the arbitration by reason of complex technical issues which might only be investigated and arbitrated at great expense and the fact that if the party seeking security was successful, it might, because of the other's clear precarious financial position, be at risk in being able to collect costs at the end of the day. There is not that sort of evidence in the present instance.

[22]Finally, there is the question of whether I may attach any conditions to the stay that I must, by reason of Article 8 of the *Commercial Arbitration Code*, grant in the present instance.

[23]The Federal Court of Appeal in *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, 1994 CanLII 3466 (CAF), [1994] 2 F.C. 662, pointed out that "once a reference to arbitration has been made, there is no residual discretion in the court to refuse to stay all proceedings between the parties to the arbitration even though there may be particular issues between them not subject of the arbitration" (pages 674-675). Counsel for the plaintiff submits that this passage means that once there is a reference to arbitration I may not attach conditions to any stay, such as a condition for the provision of security for the costs of the arbitration. This interpretation is consistent with *World Star, The*, [1986] 2 Lloyd's Rep. 274 (Q.B. (Adm. Ct.)), a decision of Mr. Justice Sheen who points out that when the Court is required to stay a proceeding by reason of the *Arbitration Act 1975* [(U.K.), 1975, c. 3], which provides for a mandatory stay subject to the same sort of conditions as are set out in Article 8 of the *Commercial Arbitration Code*, "it is not open to the Court to impose conditions upon which that stay is ordered." (page 275). There is a similar passage in the 21st edition of *Russell on Arbitration*, Sweet & Maxwell, 1997, at pages 331-332:

The imposition of conditions. In *John Mowlem & Co. plc. v. Carleton Gate Development Co. Ltd.*, (51 Build. L.R. 104) the judge indicated that he would exercise his discretion to grant a stay only subject to the condition that the arbitration should be legally qualified and have knowledge of the building industry. As the court does not have discretion under [section 9](#) of the [Arbitration Act 1996](#), this decision would not be followed.

[24]From all of this it is clear that I may not make the stay conditional upon the posting of security for costs of the arbitration. Further, while there is no material before me to show the necessity of security for costs of the arbitration, the arbitrators themselves would appear to have the discretion to order security for the costs of the arbitration if it were appropriate in their view.

[25]In the result, there will be no security for costs of the arbitration. Security for costs of this proceeding may stand upon a different footing.

Security for the Costs of this Action

[26]The defendant seeks security for costs in this Federal Court action, being the annual cost of security at \$4,256, which I take to be an American dollar figure and legal costs to date in Vancouver, at \$7,000, which would seem to be a solicitor and client cost figure in American dollars.

[27]The chance of this Federal Court action, once stayed at the plaintiff's request, ever proceeding, given the New York arbitration, is infinitesimal. If the defendant is entitled to costs and is ever to recoup costs it must be now, as an interim measure of protection.

[28]I do not accept the plaintiff's position that the lack of proper procedure is a bar to the defendant obtaining interim relief or protection by way of an incidental request brought on the occasion of the plaintiff's motion for a stay. The plaintiff refers to *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 1998 CanLII 6468 (BC CA), 168 D.L.R. (4th) 309 (B.C.C.A.), for the proposition that all interim measures of protection require appropriate steps in the Court and the correct and exact use of the Court's procedure. From this the plaintiff submits that the failure to seek costs in the Federal Court action, by a motion, is fatal. I do not read that much into *Silver Standard*. *Silver Standard* is an example of how interim protection may be obtained using the Court's procedure, there the garnishing process, but the case does not establish that interim protection may only be obtained by strict compliance with procedural requirements when justice requires that there should be some procedural flexibility.

[29]The defendant's request for the costs of this Federal Court action to date, as interim relief, does not catch the plaintiff by surprise, for it is well set out in the defendant's material. That the defendant has not brought a separate motion for relief is perhaps improper, but not fatal, for rule 3 of the *Federal Court Rules, 1998* sets out the basic philosophy of the Rules, that they should be interpreted and applied to secure a just, expeditious and inexpensive result.

[30]Nor is the matter of the Federal Court costs necessarily a bar to or a clog on either the stay in favour of arbitration or the arbitration itself.

[31]The amount of costs claimed are small and smaller still if one looks at what might realistically be taxed and sets a lump sum. That is what I propose to do, for there is no point in having counsel spend many hours preparing for and attending on a taxation.

[32]This action was commenced in mid-September. No defence has been filed. While time has likely been spent negotiating and putting in place security and obtaining the release of the *Tavros*, those are not taxable items under Tariff B of the *Federal Court Rules, 1998*.

[33]While the success on this motion has been to some degree mixed and here I would note that the defendant does not oppose the stay, for the defendant merely seeks interim protection, I am not prepared to award costs of the motion to the plaintiff. The plaintiff has, in a sense, used the Court as a collection agency and having achieved its ends, moved on to another jurisdiction. This is not an improper approach, but neither is it one that ought to be rewarded. Thus the costs of the present motion are to the defendant, in the amount of \$750.

[34]The expense of providing security is a proper taxable item (see *Antares Shipping Corp. v. The Capricorn*, [1977] 2 F.C. 274 (C.A.), at page 276), at US \$4,256 for a year. It would be overly optimistic to think that the arbitration might be completed in a year: that would likely be the exception, not the norm. Thus, as interim protection, I allow the defendants US\$8,512 as the cost of security. That sum can always be adjusted after the fact if only one year's security is required.

[35]The defendant shall have its costs of providing the security and the lump sum which I have awarded for this motion. Converting the cost of security in the form of a bank guarantee to Canadian dollars at today's rate and adding in the \$750 award in the costs of this motion the total is \$13,262.64. That the defendant shipowner has been awarded this sum of costs is not a condition of the stay. Nor is payment of the award a condition of this stay. It will be up to the defendant to collect its costs as best it may.

CONCLUSION

[36]That the plaintiff is able to obtain security for its claim and legal expenses and to transfer that security to the benefit of the outcome of the New York arbitration, and the defendant is not, is perhaps unfortunate but not unfair. It merely happens that the defendant had an asset in this jurisdiction and was thus vulnerable to the arrest and to the forcing of security. The plaintiff was not similarly vulnerable.

[37]While the defendant may not take any security from this jurisdiction to the New York arbitration, it may have the costs of this Federal Court action. That is an equitable resolution, one that does no violence to the principle in *Nanisivik Mines (supra)* for such costs are an interim measure of protection within Article 9 of the *Commercial Arbitration Code* and do not in any way impose on either the stay of the Federal Court action or on the ability of the arbitrators to proceed.