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International Arbitration

Claimant's Security of Costs for Enforcement Proceedings

Asia Pacific – 22 July 2020

On 16 July 2020, the Federal Court of Australia refused a novel application for security of costs by an award creditor seeking to enforce an award under s 8 of the *International Arbitration Act 1974* (Cth): *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd* [2020] FCA 1033. After commencing enforcement proceedings against the debtor, the creditor applied for security for its costs of prosecuting the debtor on the basis proceedings were defensive in nature, i.e. that it was in fact the defender rather than the claimant.

Security for costs is usually only granted to parties defending claims, not to claimants, unless there is a counterclaim. It may be granted to claimants in the form of litigation funding orders in family law and public interest proceedings, where special considerations prevail, but not usually in commercial cases. Here, the creditor tried to circumvent that principle by arguing the proceedings were defensive because they were made necessary by the debtor's objections to enforcement of the award.

A ground for claimants to *resist* providing security for costs is that the proceedings are defensive due to the nature of the claim, and that the claimant is, in fact, the defender. Instances of such cases are where:

- The claimant sues to recover property seized by the defender
- The defender should have been the one to commence proceedings
- The proceedings have occurred because the defender resorted to self-help, where the claimant had no practical alternative to proceedings
- Where a cross-claim arises out of the same facts as the claim.

Part of the novelty of this application is that the claimant *sought* security for costs, rather than *resisted* security, on the basis the proceedings were defensive. Typically this argument would be raised by a claimant resisting an order for security for costs.

Here, the creditor argued the proceedings to enforce the award were defensive because of the wording of the *International Arbitration Act* and the objections to enforcement raised by the debtor. Section 8(5) said that, in any proceeding in which the enforcement of a foreign award is sought, the court may, *at the request of the party against whom it is invoked*, refuse to enforce the award. Those emphasised words indicated, said the creditor, that the debtor was in reality the party seeking relief under the Act, and the creditor was merely the party forced to take proceedings.

Justice Jagot disagreed, saying that "proceedings may be characterised as defensive in nature when they are either directly resisting proceedings already brought or seeking to halt self-help procedures" and that no authority was found requiring a defender to provide security in the absence of a cross-claim.

Security will be ordered where the defender's cross-claim raises a distinct claim or seeks relief other than dismissal of the head claim and, on the other hand, security will not be ordered where the cross-claim is actually only defensive: *Nine Films and Television Pty Ltd v Ninox Television Ltd* [2005] FCA 735; (2005) 146 FCR 144

Where a defender counter-attacks on the same front on which he is being attacked by the claimant, it will be regarded as a defensive manoeuvre. But if he open a counter-attack on a different front, even to relieve pressure on the front attacked by the claimant, he is in danger of an order for security for costs: *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ACSR 263; *Visco v Minter* [1969] 2 All ER 714.

The fact that the onus of proof lies on the defender cannot be determinative of the question whether they are in substance the applicant in the proceeding: *Toolgen Incorporated v Fisher* [2019] FCA 2158.

Here, the court was exercising a power under the *International Arbitration Act* to refuse to enforce the award. There was no cross-claim nor any order sought by the debtor against the creditor. The debtor was merely directly resisting the proceeding brought by the creditor to enforce the award. No analogy could be made with the two-step enforcement procedure under the rules of the Supreme Court of Victoria, there being no equivalent procedure in the Federal Court.

As a matter of principle, no order for security for costs should be made against a respondent to a proceeding who is doing nothing more than defending the proceeding.

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38980/07/20