Security for Costs Litigation v Arbitration

The receipt of a claim is never a welcome thing, not least because the defence of a claim may lead to substantial costs being incurred.

Security for Costs may offer some comfort to the Defendant, particularly in circumstances where they are ultimately found not liable. It can also be an important tactical weapon. Query though - is there is any advantage for the potential Defendant between Arbitration or Litigation proceedings, and does one may offer an easier route to protecting any necessary outlay?

In the absence of any express agreement between the parties and subject to the terms of the contract, any Application for Security for Costs is likely to be governed by either the Arbitration Act 1996 or the Civil Procedure Rules. The main issues are similar for both arbitration and court proceedings:

Application

A defendant to a claim commenced in the Commercial Court may make a written application for security for costs to the court. Under CPR Rule 25, the court has the power to order the claimant to provide security, and will also determine the amount of security and give a deadline within which the security must be given.

Clause 39(3) of the Arbitration Act provides the Tribunal with a general power to order the claimant to provide security for the costs of the arbitration. Note however, that this ‘general power’ of the Tribunal can be amended by mutual agreement between the parties, allowing greater flexibility with regard to the power of the Tribunal but care should be taken that a Defendants’ options are not limited by any such agreement.

Discretion

The decision to allow an application for security for costs is ultimately at the discretion of either the Tribunal or the Court. In exercising this discretion, various factors have to be taken into account.

The Court will consider (i) whether it is just to do so and (ii) jurisdiction.

Consideration will be given to all the circumstances and the court must be satisfied that an order for the Claimants to provide security for costs would be fair and reasonable. For example, that there is reason to believe that the Claimant would be unable to pay the Defendant’s costs if ordered to do so, or where there is evidence to suggest that the Claimant will try to evade the consequences of the litigation.

The second condition stipulates that the Claimant must be resident outside of the jurisdiction of the English court but NOT resident in the EU.

Contrast this with the conditions considered by the Tribunal which state that the power may NOT be exercised on the ground that the Claimant is ordinarily resident outside, or is a company associated or centrally managed outside, the UK. Thus a contract between parties based in different countries which includes an English law and jurisdiction clause, rather than an arbitration clause, may offer more scope to a Defendant to successfully obtain security for costs. Where there is an arbitration clause however, it may be possible to apply for security on the ground that the claimants main assets are lodged outside the jurisdiction of the English courts (which is arguably a different ground from that ground on which the Tribunal may not exercise their discretion, i.e. claimants have central management outside the UK). In addition, the Tribunal will also give consideration to whether the claimant is able to pay, as with the Court.

Both the Court and the Tribunal will give some consideration to the timing of an application for security for costs. The Commercial Court Guide stipulates that the application must not be made later than the Case Management Conference. Under the terms of the LMAA, an application will not be considered until after service of defence submissions.

Penalties

Once given, non-compliance with an order to provide security for costs may lead to dismissal of the claim in litigation proceedings; and equally, such an order will become a condition for allowing an arbitration to proceed and ultimately dismiss the claim. It should be noted that delay may cause the application to fail.

The inclusion of an arbitration clause in a contract may offer the parties a degree of flexibility in resolving any disputes, in that they can extend or limit the scope of the Tribunal’s powers by agreement. Whichever regime applies though, the ability to make such application is an important tool for the Defendant and one which may prove invaluable in deterring vexatious claimants and avoiding unnecessary expenditure.

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