Article Information

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Sword or shield? Resisting the enforcement of arbitration awards in Australia and security for costs – Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd [2020] FCA 1033

In the matter of Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd [2020] FCA 1033, the Federal Court of Australia provided clarity on whether security for costs will be awarded where parties resist the enforcement of arbitration awards in Australia.

The facts

In *Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd NSD 94/2020*, the Applicant, Energy City, sought to enforce an arbitration award in the Federal Court of Australia under section 8(3) of the *International Arbitration Act 1974* (Cth) (**IAA**). Section 8(3) of the IAA provides that a foreign award may be enforced in the Federal Court of Australia as if the award were a judgment or order of that court.

The Dispute

The arbitration award arose from a dispute relating to a contract for the supply of lighting and street furniture entered into in 2010 (**Contract**) by Energy City Qatar (**ECQ**) and Hub Street (**Hub**). Under the Contract ECQ made an advanced payment of approximately $820,000 to Hub. In 2012, ECQ decided not to proceed under the Contract and sought repayment of the advance. Hub refused to return the funds to ECQ.

Under the Contract, ECQ was required to issue its arbitration notice to Hub at its listed address in Sydney. If the dispute the subject of the notice was not settled within 28 days, it was to be referred to arbitration in accordance with the rules of arbitration in Qatar. ECQ did not send a notice of arbitration to Hub, but rather, in June 2016 filed a statement of claim in the Qatari Plenary Court of First Instance. In November 2016, ECQ sent a notice of the court proceedings to a related company of Hub in Doha.

In January 2017, the Qatari Plenary Court of First Instance made orders appointing a Qatari arbitral tribunal to resolve this dispute. Between 18 April 2017 and 12 July 2017, there were six notices of arbitration sent to Hub at its Sydney address. Hub did not make an appearance at the arbitration in Qatar.

On 1 August 2017, the Qatari-appointed arbitral tribunal issued an award in ECQ's favour, ordering repayment of ECQ's funds. On 28 January 2020, ECQ sought to register the foreign award made against ECQ in Australia by filing an application pursuant to section 8(3) of the IAA with the Federal Court. Hub sought to resist ECQ's enforcement application under sections 8(5) and 8(7) of the IAA for irregularities in the issuing and procedure of the arbitration, which it alleged were contrary to the provisions of the Contract. Further, Hub argued that the arbitral award involved a breach of the rules of natural justice and enforcement would be contrary to public policy.

Security for Costs

ECQ dealt in the first instance with Hub's application by seeking security for costs in relation to the application. ECQ argued that Hub's reliance on ss 8(5) and 8(7) of the IAA constituted a cross-claim as these provisions were separate to the enforcement proceedings brought under s 8(3) of the IAA. Accordingly, ECQ submitted, Hub was an "Applicant" within the meaning of s 56 of the *Federal Court of Australia Act 1976* (Cth) (**FCA**).

Her Honour Justice Jagot presided over ECQ's security for costs application. In assessing whether security for costs will be ordered against a respondent under s 56(1) of the FCA, her Honour considered whether Hub's position was defensive in nature or not. She noted 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.

In considering this point, her Honour at [9] referred to *Classic Ceramic Importers Pty Ltd v Ceramica Antiga SA* (1994) 13 ASCR 263 (which adopted the test in *Visco v Minter* [1969] 2 All ER 714):

> *The principle seems to be that where a defendant counter-attacks on the same front on which he is being attacked by the plaintiff, it will be regarded as a defensive manoeuvre. But if he opens a counter-attack on a different front, even to relieve pressure on the front attacked by the plaintiff, he is in danger of an order for security for costs depending upon the court's assessment of the position in each case.*

Justice Jagot found at [14] and [15] that the structure of s 8 of the IAA does not support a conclusion that Hub's defence to the proceeding is other than purely defensive. Section 8(3) operates "subject to this Part" of the IAA and sections 8(5) and 8(7) are both provisions of that relevant Part. Her Honour therefore held that there was no cross-claim and no counter-attack on a different front. Hub was instead directly resisting the proceeding brought against it by invoking provisions of the IAA which provide the Court with a discretion to refuse to enforce an arbitral award.

In the absence of any cross-claim, her Honour reiterated at [17], there is no authority which requires a Respondent to provide security for costs. Accordingly, the security for costs application brought by ECQ was dismissed.

Conclusion

Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd [2020] FCA 1033 affirms that parties cannot obtain security for costs if a responding party resists the enforcement of an arbitral award pursuant to Part II of the IAA.

Key Takeaway

Energy City Qatar Holding Company v Hub Street Equipment Pty Ltd [2020] FCA 1033 affirms that security for costs will not be granted for merely resisting the enforcement of arbitration awards under section 8(5) and 8(7) of the *International Arbitration Act 1974* (Cth)

If you have any queries about or require assistance with enforcing or defending an arbitration award, please do not hesitate to contact Piper Alderman.