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show me the money: security for costs in commercial arbitrations

The Ontario Court of Appeal recently confirmed that arbitrators may order plaintiffs to post security for costs under the Ontario *Arbitration Act, 1991*.[1] The decision in *Inforica Inc. v. CGI Information Systems*[2] is an important one for all defendants to arbitration proceedings. The decision may be used by defendants as a shield against arbitrations commenced by nominal or shell plaintiffs with minimal assets in the jurisdiction.

what is security for costs?

In Canada, an unsuccessful party to a lawsuit is generally ordered to pay some portion of the successful party's legal fees. Defendants to court proceedings may seek an order requiring plaintiffs to post "security" for these legal costs before the case is resolved in certain circumstances, such as where the plaintiff has insufficient assets in the jurisdiction. The purpose of a security for costs order is to protect defendants from shell or foreign plaintiffs who commence speculative litigation at no financial risk to themselves (by reason of their lack of assets). When security for costs is ordered, the plaintiff cannot take any further step in the action until the security is posted. Moreover, the court may dismiss the litigation if the plaintiff fails to post security when ordered.

The ability of defendants to obtain security for costs orders in arbitrations is different. Arbitral jurisdiction arises from applicable legislation and the agreement between the parties. The courts have traditionally held that arbitrators lack the inherent jurisdiction to award security for costs. For an arbitrator to have such a power, it must spring from the arbitration statute or the arbitration agreement itself.

Most domestic and international arbitration statutes across Canada do not specifically give arbitrators the power to order security for costs. In *Inforica*, the Ontario Court of Appeal considered whether an arbitrator can require the plaintiff to post security for costs under the general provisions of Ontario's *Arbitration Act, 1991*.

1 S.O. 1991, c. 17 [Act].
2 (2009), 97 O.R. (3d) 161 (C.A.) *[Inforica]*.

the facts in Inforica

The plaintiff in *Inforica* was a subcontractor of the defendant who provided services relating to the development of an information management system. The contract between the parties provided that all disputes be arbitrated under the Ontario *Arbitration Act, 1991*. A dispute ultimately arose, and Inforica commenced an arbitral claim under the contract for $14 m.

The defendant to the arbitration, CGI, moved for security for costs on the grounds that the plaintiff had insufficient assets to pay any costs that might ultimately be awarded. The arbitrator ordered security to be posted, concluding that he had jurisdiction to do so under s. 20(1) of the *Act* (which provides that an arbitrator may "determine the procedure to be followed in an arbitration") and the procedural rules that he found to be applicable to the arbitration.

Inforica applied to the court to set aside the arbitral order, arguing that the arbitrator lacked jurisdiction to make a security for costs order. At first instance, the court held that a security for costs order is not a procedural order under s. 20(1) of the *Act*, and was therefore beyond the arbitrator's jurisdiction. The court set aside the arbitrator's order. CGI then appealed to the Ontario Court of Appeal.

the Court of Appeal's decision

The Court of Appeal allowed CGI's appeal and restored the security for costs order. Rather than finding that the general power to determine procedural matters under s. 20(1) of the *Act* enables the making of security for costs orders, however, the Court of Appeal came at the case a different way. The Court of Appeal based its decision on a finding that the lower court lacked jurisdiction to set aside the arbitrator's order.

Inforica had initially moved to have the court set aside the order on two grounds: 1) the arbitrator erred when ruling on the scope of his own jurisdiction (s. 17(8) of the *Act*); and 2) the arbitral "award" flowed from a decision on a matter that was beyond the scope of the arbitration agreement (s. 46(1) of the *Act*). The Court of Appeal found that the lower court had no basis to consider Inforica's application on either basis.

Essentially, the Court of Appeal held that the arbitrator's ruling on interlocutory matters did not amount to either a decision on whether he had jurisdiction to conduct the arbitration or an "award" on the merits of the dispute. Accordingly, the Court of Appeal concluded that the arbitrator's decision was not reviewable by the court under the *Act*.

Given its disposition of the case, the Court of Appeal did not need to consider whether the arbitrator's general power to determine procedure under s. 20 of the *Act* conferred the jurisdiction to order security for costs. That said, the court observed that the parties, by their conduct, had agreed that certain arbitral rules be incorporated into their agreement. The

relevant rules contained a provision that expressly permitted the arbitrator to make security for costs orders. The court concluded that the arbitrator had a strong evidentiary basis for finding that the rules applied.

impact of the Inforica decision

The *Inforica* case is important for what it says, as well as for what it does not say.

The Court of Appeal expressly reaffirms the modern view that courts should seldom intervene in the arbitral process. Intervention should be limited to situations expressly contemplated by the *Act*. Noting that there is nothing in the *Act* that permits appeals from arbitral rulings on procedural points, the court confirms that arbitration is a self-contained, autonomous process that is presumptively immune from judicial review and oversight. The decision recognizes that the courts will be loathe to interfere with arbitral rulings.

As for what the decision does not say, that is important too. The case does *not* stand for the proposition that arbitrators have the inherent power to award security for costs. While this may be the better argument, the case does not go that far.

Accordingly, the decision reinforces the need for parties to expressly address those issues which are important to them in their arbitration agreement. Had the arbitration agreement in *Inforica* included a specific power to order security for costs, there would have been no room for debate about the point.

If you are a potential defendant to an arbitration, and you are concerned about the financial wherewithal of the other side, make sure your arbitration agreement clearly gives you the ability to seek an order for security for costs.

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