CHAPTER THREE

SECURITY FOR COSTS AND ENFORCEABILITY OF ORDERS FOR COSTS

Introduction. Articles 14 to 17 (which form Chapter II of the Convention) deal with security for costs, often referred to by its Latin title cautio judicatum solvi. The requirement of security for costs is well-established in common law jurisdictions. It might be helpful to reproduce the relevant passage from Dicey and Morris, The Conflict of Laws (10th Edition, 1980), which sets out the position in England. In the passage which follows all footnotes have been omitted.

> "Order 23, rule 1(1) of the Rules of the Supreme Court provides that where, on the application of the defendant, it appears to the court that the plaintiff is ordinarily resident out of the jurisdiction, then if, having regard to all the circumstances of the case, the court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs as it thinks just.
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> This power of the High Court is in origin inherent and dates back to the middle of the eighteenth century. Its justification is that 'if a verdict is given against the plaintiff he is not within reach of our law so as to have process served upon him for the costs.' There is no question of any discrimination against plaintiffs on grounds of nationality, for the test is ordinary residence, not nationality or even domicile. Thus a plaintiff of foreign nationality who is resident within the jurisdiction is not bound to give security for costs, but an English plaintiff ordinarily resident outside the United Kingdom may be ordered to do so.
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> Under Order 23, rule 1(1), which in its present form dates from 1962, the court has an unfettered discretion whether or not to order security for costs. There is no longer an inflexible rule that a plaintiff ordinarily resident abroad must give security, as there was in all cases before 1920 and in all but a few specified cases between 1920 and 1962. Thus it seems likely that cases decided before 1962 in which security was refused would still be followed, but that cases decided before 1962 in which security was ordered may no longer be safe guides.
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> No order will usually be made if one of several co-plaintiffs resides in England, unless such a co-plaintiff is added for the purpose of evading such an order. An order can be made if the plaintiff goes to live abroad after the issue of the writ, and can include past as well as future costs. No order will be made if the plaintiff lives abroad in an official capacity, but it can be made against a foreign sovereign.

No order will be made if the plaintiff shows that he has substantial property within the jurisdiction which could be made available to satisfy any order as to costs.

The fact that the plaintiff is compelled to take proceedings in England, e.g. because of a submission to arbitration or of an English jurisdiction clause in a contract, is not a sufficient reason for not ordering him to give security. On the other hand, since the passing of the Judgments Extension Act 1868 [which deals with the enforcement in England of Scottish and Northern Irish judgments] it is no longer the practice to require plaintiffs ordinarily resident in Scotland or Northern Ireland to give security, because an order for costs could easily be enforced against them under that Act. But this does not apply to plaintiffs resident in countries to which Part II of the Administration of Justice Act 1920 or Part I of the Foreign Judgments (Reciprocal Enforcement) Act 1933 has been extended by Order in Council [including a large number of Commonwealth jurisdictions] because procedure for enforcing judgments under those Acts is quite different from what it is under the Act of 1868: it is not automatic, but involves putting a judicial officer in motion and may be the subject of dispute and even of trial between the parties. Where the plaintiff is resident in such a country, the court will exercise its discretion; the fact that the country concerned is a member of the European Community may be taken into account as a factor weighing against the making of an order. ...

International conventions are progressively reducing the number of cases in which security for costs can be ordered. The Hague Convention on Civil Procedure 1954 (to which the United Kingdom is not a party) prohibits such orders as against nationals of other contracting states. Although Article 7 of the Treaty of Rome which prohibits discrimination on grounds of nationality has been held not to strike at the English practice, Article 45 of the EEC Convention on the Enforcement of Judgments (which the United Kingdom has not yet ratified) forbids the requirement of security from a party in one contracting state seeking the enforcement of a judgment in another such state on the ground of his nationality, domicile or residence. Similar provisions are found in the bilateral conventions negotiated by the United Kingdom with countries to which the Foreign Judgments (Reciprocal Enforcement) Act 1933 is extended. Security for costs is also prohibited by some of the international conventions on transport and the United Kingdom legislation giving effect to them. The Carriage by Railway Act 1972 prohibits the making of such orders in cases governed by the Berne Conventions on the Carriage of Goods and of Passengers and Luggage by Rail or by the Additional Convention to the latter. The Carriage of Goods by Road Act 1965 makes similar provision in respect of cases falling within the Geneva Convention of 1956,

and the Carriage of Passengers by Road Act 1974 (when it is brought into force) will have the same effect in relation to cases within the Geneva Convention of 1973. The Paris, Brussels and Vienna Conventions on Third Party Liability in the Field of Nuclear Energy each contain a general provision that 'this Convention shall be applied without any discrimination based on nationality, domicile or residence,' which would seem to exclude the usual English practice as to security for costs."

The position, therefore, is that in England, and, it is thought, in the great majority of Commonwealth jurisdictions, the practice of requiring security for costs is well established, even in cases involving other Commonwealth countries. It does involve discrimination based on the factor of residence, and justified on practical grounds. Although numerous international conventions limit the practice, few have Commonwealth parties.

The Convention proposals. Article 14 of the Convention outlaws the requirement of security for costs based on the plaintiff's foreign nationality, domicile or residence, where the plaintiff is habitually resident in a Contracting State; other "parties intervening" are also covered. This principle is quite out of line with Commonwealth practice, and it is believed that most Commonwealth jurisdictions will wish to take advantage of the right conferred by Article 28, second paragraph, item c, to make a Reservation excluding the application of Chapter II of the Convention (Articles 14 to 17).

Before doing so, however, Governments would wish to consider the full content of Articles 15 to 17, which are designed to meet the point of the need for some security. Although the traditional form of security is outlawed, the Convention requires Contracting States to render enforceable in their jurisdiction without charge any order for the payment of costs made against any person exempted by the Convention from giving such security. Articles 16 and 17 establish machinery, using the transmitting authority/ Central Authority system for forwarding such orders for enforcement.

It has to be said, however, that actual security for costs is much more advantageous to the defendant than an order for costs, even one capable of legal enforcement in the country in which the unsuccessful plaintiff resides. Legal enforceability does not necessarily lead to enforcement in fact, and this factor is certainly a disincentive when abandonment of the traditional Commonwealth practice is being suggested.

Constitutional points. It was pointed out at The Hague that in some countries, especially those with a federal constitution, the vesting of the discretion as to security for costs in the courts (especially the courts of a State or other unit of the Federation) was an additional difficulty in the way of accepting the Convention proposals on this matter.