



Security for Costs in Set Aside Proceedings

By Friven Yeoh, Partner, Skadden, Arps, Meagher & Flom
Sui-Hang Hui, Associate, Skadden, Arps, Meagher & Flom

In *P1 and P2 v D* [2024] HKCFI 3052, the Court of First Instance ordered security for costs against the plaintiffs who had applied to set aside an arbitral award. The Court further ordered that the set aside application be dismissed with indemnity costs in the event the plaintiffs fail to provide such security.

This decision is another reminder to parties of the pro-arbitration approach adopted by the Hong Kong courts. Whereas the policy in Hong Kong is to support arbitration agreements and awards, the Court explained it would

be against that policy to create an environment whereby the challenge phase is made easier or more accessible. This is consistent with the courts' practice of awarding costs on indemnity basis for unsuccessful challenges to arbitral awards, so as to deter parties from making unwarranted challenges.

Background

On 26 January 2021, the defendant (a foreign person, "D") commenced arbitration proceedings against the first plaintiff (a foreign person, "P1") and the second plaintiff (a Hong Kong

company, "P2") alleging a breach of an agreement executed by the parties in 2017. The arbitration was administered by the HKIAC and the proceedings were bifurcated, with issues of liability heard in Phase I and issues of remedies heard in Phase II.

On 6 April 2023, the arbitral tribunal issued its Partial Final Award ("Partial Award") and found that P1/P2 had breached the agreement. Phase II of the proceedings was scheduled to commence on 8 September 2025, and D sought damages as part of the relief sought.

By originating summons dated 11 September 2023 (subsequently amended on 27 June 2024), P1/P2 sought to set aside the Partial Award (“**Set Aside Application**”) pursuant to Section 81 of the Arbitration Ordinance (Cap. 609, the “**AO**”). The substantive hearing of the Set Aside Application was fixed to be heard on 4 December 2024, and in the meantime D applied for security for costs (the “**Application**”) by way of summons dated 2 August 2024.

D originally only relied on Order 23, rule 1 of the Rules of High Court (Cap. 4, “**RHC**”), which provides that an order for security for costs may be made in court if the plaintiff is ordinarily out of the jurisdiction. It soon became clear to D that the rule did not apply to P2 as a Hong Kong company, so at the initial hearing of the summons on 24 September 2024, D sought leave to amend its summons to include reliance on section 905 of the Companies Ordinance (Cap. 622, “**CO**”).¹ Leave was granted to D to amend its summons, and directions were given for the parties to lodge further submissions and for P1/P2 to file further evidence in

response to D’s reliance on Section 905. Nonetheless, no further evidence was filed by P1/P2.

Common Ground and Issues in Dispute

It was common ground between the parties that: (a) Order 23, rule 1 of RHC applies to proceedings relating to arbitrations; (b) P1 is ordinarily resident out of the jurisdiction and P2 has no substantial assets; and (c) the Set Aside Application does not enjoy such a high probability of success that an order for security for costs should be refused on basis of the underlying merits.

The parties however disagreed on the proper approach to an application for security for costs in the context of arbitration-related court proceedings. On behalf of P1/P2, it was contended that:

- a. whereas residence overseas is relevant as a gateway to engage Order 23, rule 1 of RHC, that rule should be displaced in the arbitration context where the circumstances are evenly balanced such that it would ordinarily be just to dismiss the application for security for costs (the “**First Proposition**”).
- b. in the context of an application concerning arbitral proceedings, orders for security for costs will typically only be made where the

defendant is “likely to be impecunious” (the “**Second Proposition**”).

The Court’s Decision

The Court agreed with D that the First and Second Propositions are incorrect in the context of a court application to challenge an arbitration award. A key consideration here is the distinction drawn between the determination phase and the challenge phase of the arbitral process.

Whereas an application for security for costs in the course of an arbitral proceeding falls within the determination phase and is therefore a matter for the arbitrators, an application for security for costs in the course of a set aside proceeding falls within the challenge phase and is therefore a matter for the court. Different considerations apply.

The First Proposition

As a starting point, the Court observed that Hong Kong has long been striving to establish and uphold a policy of being supportive of arbitration agreements and awards. It would be against that policy to create a situation where a challenge of an award is made easier and more accessible.

At the determination phase, the Court noted that the tribunal’s power to award security for costs is based on Section 56

¹ Section 905 provides that an order for security for costs may be made in court if a company is a plaintiff in a legal proceeding and there is reason to believe that the company will be unable to pay the defendant’s costs if the defendant succeeds in the defence.



of the AO. In this regard, Section 56(2) of the AO expressly provides that an arbitral tribunal must not make an order for security for costs solely on the basis that the claimant is a natural person ordinarily resident outside Hong Kong. The Court observed that the statutory framework here is to create an equal playing field between foreign and domestic parties in the determination phase.

Nonetheless, the AO stops short of circumscribing the court's power to order security for costs in a manner that mirrors the powers conferred upon an arbitral tribunal by section 56(2) of the AO. Plainly, different considerations apply in the challenge phase before the Court, which are subject to the Court's procedural rules. In this regard, Order 23, rule 1(1)(a) is asymmetrical in two aspects: (a) it only applies to plaintiffs but not defendants; and (b) it only applies to foreign but not local plaintiffs.

The Hong Kong court has held that Order 23, rule 1(1)(a) is not discriminatory or potentially discriminatory, and the reasons for both asymmetries apply in the present case: (a) in seeking to set aside the Award, P1/P2 are the real attackers and D should not be required to give security simply because he is exercising his right to defend himself against attack; and (b) residence abroad normally entails difficulties in enforcing a potential award against the plaintiff, and the evidence shows that D is likely to have to incur costs and time in enforcing a costs order against P1.

The Second Proposition

As to the Second Proposition, the Court did not see why impecuniosity should be elevated into a typical requirement. Even in the context of an application for security for costs within an arbitration, there is no such requirement. Instead, the Court's emphasis was on the ease of enforcement and here the Court noted D's concerns (amongst others) that P1/P2 were cautious not to reveal details of P1's assets and wealth in the arbitral proceedings.



Conclusion

In conclusion, the Court considered it appropriate to order security for costs against P1 given: (a) P1's lack of presence in Hong Kong; (b) P2's lack of assets within the jurisdiction; and (c) the difficulties in enforcing an adverse costs order against P1.

Since it was not disputed that P2 only has negligible assets, Section 905 of CO is plainly engaged as there is reason to believe that P2 will be unable to pay D's costs if D succeeds in the defence. Accordingly, the Court considered it appropriate to also make an order against P2 for the same reasons why it exercised its discretion to make an order against P1.

Commentary

Security for costs are not routinely granted in international arbitration, at least not on the sole basis of the claimant being based out of jurisdiction. Amongst others, the policy considerations here include the potential impact on access to justice and ensuring that foreign parties who choose to arbitrate their disputes in Hong Kong are not being discriminated.

Nonetheless, these same considerations apply to a different degree at the challenge phase. Hong Kong adopts a pro-arbitration approach, and there are only limited avenues of challenge to an arbitral award. As this case demonstrates, it would be antithetical to that policy if the

challenge phase is made easier or more accessible considering the real attackers in a set aside application are the plaintiffs.

The courts have on other occasions issued reminders to parties not to embark on expensive and time-consuming proceedings by way of unwarranted challenges to an award. Indeed, costs have routinely been awarded on an indemnity basis for unsuccessful challenges to serve as a deterrence. Nonetheless, the authors observe that these have not discouraged parties from taking up unmeritorious applications to buy time and delay efforts to enforcement. From the defendant's (or claimant's) perspective, this can be a frustrating process especially when the parties had (presumably) opted for arbitration to achieve a fair and speedy resolution of their dispute.

This decision is therefore a welcome development for arbitration users, as the Court's emphasis on the ease of enforcement strikes at the heart of the process. Plaintiffs who fail to provide any security for costs ordered by the courts face the risk of their underlying set aside application being dismissed with costs on an indemnity basis. ■

**All views are expressed in the authors' personal capacity and do not represent the views of the firm which they are associated with.*



「撤銷裁決程序」 中的訟費保證

作者：世達國際律師事務所合夥人 楊冠華
世達國際律師事務所律師 許瑞恒



在 *P1* 及 *P2* 訴 *D* [2024] HKCFI 3052 一案中，原訟法庭命令已申請撤銷仲裁裁決的原告提供訟費保證。法院還命令，如果原告未能提供此保證，則駁回「撤銷裁決的申請」，原告並當支付彌償訟費。

這一判決再次提醒各方注意香港法院所採取的支持仲裁的做法。鑑於香港的政策是支持仲裁協議和裁決，法院解釋說，創造一個使提出申請撤裁變得更容易或更易達致的環境將違反該政策。這與法院的慣例一致，即對申請撤裁不成功的案件，法院會按彌償基準判給訟費，以阻嚇當事人提出無理的撤裁申請。

背景

於 2021 年 1 月 26 日，被告（一名外國人士，“D”）對第一原告（一名外國人士，“P1”）及第二原告（一間香港公司，“P2”）展開仲裁程序，聲稱原告違反雙方於 2017 年簽

立的協議。仲裁由香港國際仲裁中心執行，程序分為兩部分。第一階段審理法律責任問題，第二階段審理補救辦法問題。

2023年4月6日，仲裁庭發出了其部分最終裁決（“**部分裁決**”），認定 P1/P2 違反了協議。訴訟的第二階段定於 2025 年 9 月 8 日開始，D 尋求損害賠償作為所尋求的濟助的一部分。

根據日期為 2023 年 9 月 11 日的原訴傳票（其後於 2024 年 6 月 27 日修訂），P1/P2 根據《仲裁條例》（第 609 章）第 81 條尋求撤銷部分裁決（“**撤裁申請**”）。撤裁申請的正式聆訊定於 2024 年 12 月 4 日進行，同時 D 通過日期為 2024 年 8 月 2 日的傳票申請訟費保證（“**申請**”）。

D 原本只依據《高等法院規則》（第 4 章）第 23 號命令第 1 條規則，其中規定，如果原告通常不在司法管轄區內，則可由法院發出訟費保證命令。不久，D 發現該規則並不適用於作為香港公司的 P2，因此，在 2024 年 9 月 24 日傳票的首次聆訊中，D 請求許可修訂其傳票，以包括依據《公司條例》（第 622 章）第 905 條。D 獲許可修改其傳票，法院並指示雙方提交進一步的陳詞，以及 P1/P2 提交進一步的證據，以回應 D 對第 905 條¹ 的依賴。然而，P1/P2 沒有提交進一步的證據。

共同立場及爭議問題

雙方當事人的共同立場是：(a) 《高等法院規則》第 23 號命令第 1 條規則適用於與仲裁有關的程序；(b) P1 通常在外地居住，而 P2 並無重大資產；(c) “撤裁申請”的成功概率不高，因此不應根據潛在的理據拒絕訟費保證令。

然而，當事雙方不同意在與仲裁有關



的法院程序中申請訟費保證的適當做法。代表 P1/P2 的主張如下：

- a. 居住海外是適用《高等法院規則》第 23 號命令第 1 條規則的一個相關途徑。然而，若背景屬仲裁及情況均衡，該規則則應被取代，所以駁回訟費保證申請通常是公正的（“**第一項主張**”）。
- b. 在涉及仲裁程序的申請中，通常只有在被告“可能身無分文”的情況下才會下達訟費保證令（“**第二項主張**”）。

法院的判決

法院同意 D 的觀點，即在法院申請撤銷仲裁裁決的情況下，第一和第二項主張是不正確的。這裏的一個關鍵

考慮因素是仲裁程序的裁決階段和撤裁階段之間的區別。

在仲裁程序過程中申請訟費保證屬於裁決階段，因此是仲裁員的事項，而在撤銷程序過程中申請訟費保證屬於撤裁階段，因此是法院的事項。不同的考慮因素適用於不同的階段。

第一個主張

首先，法院注意到香港長期以來一直致力於建立和維護支持仲裁協議和裁決的政策。創造一種使申請撤裁變得更容易和更易達致的情況，將會違反這一政策。

在裁決階段，法院指出，法庭判給訟費保證的權力是基於《仲裁條例》第 56 條。在這方面，《仲裁條例》第 56 (2) 條明確規定，仲裁庭不得純粹基於申索人是通常居於香港以外地方的自然人而作出訟費保證的命令。法院指出，此處的法定框架是在裁決階段為外國和本地當事人創造平等的較量環境。

儘管如此，《仲裁條例》沒有限制法院發出訟費保證命令的權力，以反映



¹ 第905條規定，如果一家公司是法律訴訟中的原告，並且有理由相信如果被告勝訴，該公司將無法支付被告的訟費，則可由法院發出訟費保證金的命令。

《仲裁條例》第 56 (2) 條賦予仲裁庭的權力。顯然，不同的考慮因素適用於法院的撤裁階段，這取決於法院的程序規則。在這方面，第 23 號命令第 1 (1) (a) 條規則在兩個方面是不對稱的：(a) 它只適用於原告而不適用於被告；(b) 它只適用於外國而不是本地的原告。

香港法院裁定，第 23 號命令第 1 (1) (a) 條規則並無歧視性或潛在歧視性，而兩項不對稱的理由均適用於本案：(a) 在尋求撤銷該裁決時，P1/P2 是真正的攻擊者，而 D 不應僅因其行使自衛權利而被要求提供保證；(b) 居住在國外通常會給執行針對原告的潛在裁決帶來困難，而證據表明 D 在執行針對 P1 的訟費命令時可能需產生費用及消耗時間。

第二個主張

至於第二項主張，法院不明白為什麼要將“身無分文”提升為一項典型的要求。即使在仲裁中申請仲裁費用保證的情況下，也沒有這樣的要求。相反，法院強調的是執行的便利性。在此，法院注意到 D 的（其中一項）關切，即 P1/P2 在仲裁程序中謹慎地不透露 P1 資產和財富的細節。

結論

鑑於：(a) P1 不在香港；(b) P2 在司法管轄範圍內沒有資產；(c) 對 P1 強制執行不利訟費命令的困難，法院最終認為下令針對 P1 的訟費保

證是適當的。

由於對 P2 只有微不足道的資產這一點沒有受到爭議，《公司條例》第 905 條顯然適用，故有理由相信若 D 辯護成功 P2 將無法支付 D 的訟費。因此，法院認為也應對 P2 作出命令，理由與其行使酌情權對 P1 作出命令的理由相同。

評論

訟費保證在一般國際仲裁是不會獲批的，至少不會僅僅因為申索人不在司法管轄範圍內而獲批。這方面的政策考慮因素中包括對尋求司法公正的潛在影響，以及確保選擇在香港仲裁糾紛的外國當事人不會受到歧視。

儘管如此，在撤裁階段，這些相同的考慮因素在不同程度上適用。香港採取支持仲裁的做法，對申請撤裁的途徑有限。正如本案所示，考慮到撤裁申請中的真正攻擊者是原告，如果撤裁階段變得更容易或更易達致，這將與該政策背道而馳。

在其他情況下，法院還提醒當事人



不要提出無正當理由的撤裁申請，進行昂貴和耗時的訴訟。事實上，對於不成功的撤裁申請，通常會在彌償的基礎上判給訟費，以起到阻嚇作用。然而，作者認為，這些並沒有阻止當事方作出沒有理據的申請，以爭取時間和拖延執行工作。從被告（或申索人）的角度來看，這可能是一個令人沮喪的過程，尤其是當事人選擇仲裁（據信）是想以公平和迅速的方式解決其爭議。

因此，對於仲裁使用者來說，這一判決是一個值得歡迎的發展，因為法院對執行便利性的強調，觸及了程序的核心。未能為法院命令訟費提供的任何保證的原告，會面臨其潛在撤裁申請被駁回的風險，並須在彌償的基礎上支付訟費。■

* 所有觀點均以作者個人身份發表，並不代表與其相關的律師行的觀點。

