HCCT 59/2023
[2024] HKCFI 3052

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 59 OF 2023

IN THE MATTER of a Partial Final Award dated 6 April 2023 (as amended on 12 June 2023) in a Hong Kong-seated arbitration under the HKIAC Rules (Case No HKIAC/A21015)

and

IN THE MATTER of Section 81 of the Arbitration Ordinance (Cap 609) and Order 73 of the Rules of the High Court (Cap 4A)

BETWEEN

P1	1st Plaintiff (1st Claimant)
P2	2nd Plaintiff (2nd Claimant)

and

D	Defendant

Before: Deputy High Court Judge Jonathan Wong in Chambers (Not open to Public)

Dates of Hearing: 24 September and 18 October 2024

Date of Decision: 1 November 2024

D E C I S I O N

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1. Introduction

1.1 The 1st and 2nd Plaintiffs (respectively **"P1**" and "**P2**" and collectively "**Ps**") are the Respondents in an arbitration ("**Arbitral Proceedings**") administered by the Hong Kong International Arbitration Centre ("**HKIAC**").

1.2 [redacted] In or around 2017, Ps and the Defendant ("**D**") entered into an Investor Framework Agreement ("**IFA**").

1.3 P1 is a [redacted] Country A national with an address in [redacted] City X. P2 is a company incorporated under the laws of Hong Kong. D is a [redacted] Country B national with an address in [redacted] City Y.

1.4 D commenced the Arbitral Proceedings on 26 January 2021, claiming that Ps had acted in breach of the IFA. The Arbitral Proceedings are bifurcated, such that issues of liability would be heard in Phase I and issues of remedies would be heard in Phase II.

1.5 On 6 April 2023, the arbitral tribunal issued its Partial Final Award (which was later interpreted and clarified by an addendum dated 12 June 2023) ("**Award**"), by which the arbitral tribunal found that Ps had breached the

IFA. Phase II of the Arbitral Proceedings has been fixed to commence on 8 September 2025. As part of the relief sought, D seeks damages in the prodigious sum of [redacted].

1.6 By their Originating Summons dated 11 September 2023 (amended on 27 June 2024) ("**AOS**"), Ps seek to set aside the Award ("**Set Aside Application**") pursuant to section 81 of the Arbitration Ordinance Cap 609 ("**AO**"). The substantive hearing of the Set Aside Application has been fixed to be heard on 4 December 2024 (with 2 days reserved).

1.7 This is my decision on D's application for security for costs ("**Present Application**") made pursuant to (1) Rules of the High Court ("**RHC**") Order 23, rule 1(1)(a) on the basis that P1 is ordinarily resident out of the jurisdiction and (2) section 905 of the Companies Ordinance Cap 622 ("**CO**") on the basis that there is reason to believe that P2 will be unable to pay D's costs if D succeeds in the defence.

1.8 D is represented by Mr Bernard Man SC (leading Mr Thomas Wong) and Ps by Mr Charles Manzoni SC leading Mr Simon Chapman (solicitor advocate).

1.9 The Present Application first came before me on 24 September 2024. I adjourned that hearing for 2 reasons. First, the original time estimate and the submissions then provided were insufficient to deal with the issues identified. Secondly, it became clear that D had to amend its application as he originally only relied on RHC Order 23, rule 1 which did not apply to P2, it being a Hong Kong company. At that hearing: (1) leave was granted to D to amend its summons dated 2 August 2024 to include reliance on section 905 of CO and (2) directions were given for the parties to lodge further submissions and, at Ps' request, for Ps to file

evidence in response to D's additional reliance on section 905 of CO. In the event, no further evidence was filed by Ps.

1.10 There is no dispute between counsel that:

(1) For the cogent and comprehensive reasons set out by Mimmie Chan J at *SA v BH (Arbitration: Security for Costs)* [2024] 3 HKLRD 204 §§5 to 25, RHC Order 23 applies to proceedings relating to arbitrations, unless RHC Order 73 makes specific provisions which are different to the general rules, in which event the specific provisions in RHC Order 73 apply;

(2) P1 is ordinarily resident out of the jurisdiction and P2 has no substantial assets;

(3) The Set Aside Application does not enjoy such high probability of success that an order for security for costs should be refused on the basis of the underlying merits.

1.11 Whilst there is no dispute between counsel that RHC Order 23, rule 1(1)(a) is applicable to P1, they fundamentally disagree on what is the proper approach for an application made pursuant to it in the context of arbitration-related court proceedings, especially, as here, the court proceedings are related to a Hong Kong-seated international (or cross border) arbitration.

2. The position advocated by Ps

2.1 On behalf of Ps, Mr Manzoni principally relies on 2 cases in support of the following 2 propositions:

(1) First, he initially contends that in an application made pursuant to RHC Order 23, rule 1 in an arbitration-related court proceedings, the fact that P1 is ordinarily resident outside of Hong Kong is irrelevant[1]. I think he has to a certain extent retracted from that position and the submission he eventually advances is that residence overseas is relevant as a gateway to engage RHC Order 23, rule 1, but he submits that, in the arbitration context, where the circumstances are evenly balanced, it will ordinarily be just to dismiss the application for security for costs ("**First Proposition**")[2];

(2) It seems to me tolerably clear that the First Proposition represents a shift away from the jurisprudence on RHC Order 23, rule 1. As summarized at Hong Kong Civil Procedure 2024 Note 23/3/4, as a matter of discretion, it is the *usual ordinary or general rule of practice* of the court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do, and this is so, even though by the contract between the parties, the foreign plaintiff is required to bring the action in Hong Kong. As set out below, one of the cases heavily relied on by Mr Manzoni expressly recognizes the identified shift;

(3) Secondly, Mr Manzoni contends that 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*" ("**Second Proposition**");

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[1] Ps' 1st Written Submissions §3.
[2] Ps' 2nd Written Submissions §§4 and 12.5.

(4) Again, it has to be said at the outset that the Second Proposition also departs from the jurisprudence on RHC Order 23, rule 1. As summarized at Hong Kong Civil Procedure 2024 Note 23/3/4, the court is entitled to take into account, not impecuniosity *simpliciter*, but the ease of enforcement in the jurisdiction where the plaintiff is ordinarily resident.

2.2 The First and Second Propositions are directed principally at the application made pursuant to RHC Order 23, rule 1 against P1. Insofar as the application against P2 made pursuant to section 905 of the CO is concerned, Mr Manzoni contends that ultimately the positions of P1 and P2 stand or fall together, in the particular circumstances where, factually, D is more concerned with P1, as demonstrated by the fact that the section 905 has been included by amendment for which leave was only granted at the hearing on 24 September 2024[3].

2.3 The two cases relied on by Mr Manzoni are (1) *AAD v BBF* [2024] 2 HKLRD 297 and (2) a Singapore case, namely *Zhong Da Chemical Development Co Ltd v Lando Industries Ltd* [2009] 3 SLR(R) 1017.

2.4 In *AAD*, DHCJ Reyes SC observed as follows:

> *"[48] Relying on Order 73 Rule 10A, Mr Han submits that, as a company incorporated in mainland China, the respondent is based outside of Hong Kong and therefore liable to provide security for the claimants' costs of the Anti-Recognition Application. Citing Hong Kong Civil Procedure 2024, volume I, note 23/3/4, Mr Han argues that it is the "usual ordinary or general rule of practice for the court to require the foreign plaintiff to give security for costs, because it is ordinarily just to do so"...*
>
> *[49] I am unable to agree.*

[3] Ps' 3rd Written Submissions §§5 and 8.

[50] First, that the respondent is based outside of Hong Kong, is an insufficient basis for ordering security for costs in this case. This is not the usual situation referred to in note 23/3/4. In Hong Kong-seated cross-border commercial arbitrations, the likelihood is that (as here) at least one of the parties will be based outside Hong Kong. Parties from outside Hong Kong choose to resolve their commercial disputes in Hong Kong-seated arbitrations because they regard Hong Kong as a neutral, expeditious, and cost-effective jurisdiction in which to resolve their differences. It cannot be that, just because a non-Hong Kong party to a cross-border commercial contract has agreed to Hong Kong-seated arbitration, that party is susceptible to an application security for the other side's costs in court proceedings in aid of the arbitration. Something more must be shown to justify an order for security for costs.

[51] For example, the Chartered Institute of Arbitrators' (CIArb) Guideline on Applications for Security for Cost (2016) is a soft law instrument on the factors to consider when deciding whether to grant security for costs in cross-border arbitrations. It is routinely referred to for that purpose by arbitrators in common law and civil law jurisdictions. It warns (at p. 9):

> *'Arbitrators should not order security for costs solely on the ground that the claiming party has a foreign residence, i.e. different from the country of the place of the arbitration. The restriction against requiring security from a party purely because they are resident in a foreign jurisdiction is expressly stated in many national laws and international treaties which forbid discrimination against foreign parties. Moreover, discrimination on the grounds of foreign residence would be contrary to the fundamental principles of international arbitration which enables parties from different jurisdictions to choose where their disputes should be resolved.'*

The Guideline points out (at p. 7) that difficulties of enforcing an award against a debtor may have been part of the commercial risk which an enforcing party undertook when it entered into a business relationship with that debtor. In such situation of normal commercial risk, an order for security for costs would be inappropriate.

[52] Here, according to the claimants, the respondent turned out to be a difficult party with whom to do business. But it is not apparent to me why the claimants' problems of enforcement against a bad debtor should be regarded as something other than part of the normal business risk which the claimants accepted when they chose to deal with the respondent in the first place. The claimants, for instance, could have asked for some sort of financial guarantee when entering into the OEM Supply Agreement. If they did not do so at the outset of their business relationship with the respondent, there must be cogent reasons put forward as to why their commercial position should now be improved by the court ordering security for costs in arbitration-related litigation. The mere fact that the award debtor is resident outside Hong Kong will not be enough reason.

> *[53] Second, security for costs is usually ordered against a person who is likely to be impecunious. The party seeking security adduces evidence to show that, in all likelihood, the person against whom security for costs is sought, lacks the means to satisfy any future adverse order for costs. In the present case, the complaint is that the respondent has put up feeble excuses for not paying the sums ordered to be paid by the Prior Proceedings Judgment and the Prior Costs Order and is likely dissipating its assets, no evidence has been adduced that the respondent is impecunious apart from that. The respondent's excuses may or may not be feeble. That will be sorted out when the Anti-Recognition Application is substantively heard. By itself, poor excuses do not strike me as a compelling basis for imposing an order for security for costs as a condition to hearing the Anti-Recognition Application..."* (emphasis added)

2.5 The legal framework and practice in Singapore are similar to those of Hong Kong. In *Zhong Da*, Judith Prakash J (as she then was) said as follows:

> *"[8] The application by the defendant for security for costs of the action was made pursuant to O 23 r 1(1)(a) of the Rules of Court…*
>
> *[9] As is well known, there are two stages to an application for security for costs under O 23 r 1(1)(a). First, before the court can even consider making such an order, it must be shown that the plaintiff is ordinarily resident out of the jurisdiction. Where the plaintiff is a corporation, the plaintiff is resident in the jurisdiction where its central management and command takes place: see Wishing Star Ltd v Jurong Town Corp [2004] 1 SLR(R) 1. In the present proceedings, it is not disputed that, as a company incorporated in China, the plaintiff is ordinarily resident in China and hence is ordinarily resident out of the jurisdiction.*
>
> *[10] Ordinary residence out of the jurisdiction is, however, a necessary but insufficient ground for ordering security. There is a second stage to the test stated in O 23 r 1(1)(a) of the Rules. As the Court of Appeal said in Jurong Town Corp v Wishing Star Ltd [2004] 2 SLR(R) 427 ("Wishing Star"):*
>
> > *'[14] It is settled law that it is not an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. The court has a complete discretion in the matter: see Keary Developments Ltd v Tarmac Construction Ltd [1995] 3 All ER 534. It seems to us that under r 1(1)(a), once the pre-condition, namely, being 'ordinarily resident out of the jurisdiction', is satisfied, the court will consider all the circumstances to determine whether it is just that security should be ordered. There is no presumption in favour of, or against, a grant. The ultimate decision is in the discretion of the court, after balancing the competing factors. No objective criteria can ever be laid down as to the weight any particular factor should be accorded. It would depend on the*

fact situation. Where the court is of the view that the circumstances are evenly balanced it would ordinarily be just to order security against a foreign plaintiff.'

Thus, under the second stage, the court has complete discretion to consider all relevant factors, including the fact that the plaintiff is ordinarily out of jurisdiction, in determining whether it is just to order security for costs.

[11] Counsel for the plaintiff, Mr Lek Siang Pheng, suggested that the fact that the plaintiff here is ordinarily resident out of jurisdiction should not be a consideration under the second stage of the test since this is an application to set aside an arbitral award. In international arbitration proceedings…, it is common to find that both parties to the proceedings are foreign to the forum. Indeed, the seat of the arbitration which in turn determines the forum has usually been chosen precisely because it is a neutral one for both parties. As such, it was contended that the fact that the plaintiff was not resident in the jurisdiction should not be held against it…

[Paragraph 12 then sets out the provisions of the relevant Singapore legislations on the powers conferred upon the arbitral tribunal to order security for costs in the arbitral proceedings]" (emphasis added)

2.6 *Zhong Da* §13 is important as it neatly encapsulates the principal disagreements between counsel. It reads:

"*[13] The provisions cited above deal with the powers of an arbitral tribunal. Once the matter is brought into court via an application under the appropriate legislation, in this case the IAA, the court in considering an application for security will be guided by O 23 r 1 and the jurisprudence relating to it.* ***Having said that, it is also my view that in a case where parties seek relief under the IAA the approach to be taken in deciding whether to grant security should be somewhat different from the norm.*** *This is because in agreeing to the foreign arbitral forum the defendant should have been mindful, and must be taken to have agreed, that any future action to set aside the arbitral award will take place in the courts of the forum which would, ipso facto, not be the courts of the jurisdiction in which the plaintiff is resident. Further, it is a matter of chance (and thus unforeseeable) as to which party in the arbitration proceedings subsequently becomes the foreign plaintiff who may be the subject of an application for security by the foreign defendant. That being the situation, the plaintiff should not be penalised for being ordinarily resident out of the jurisdiction. Thus whilst in the usual case where the circumstances are evenly balanced, it is ordinarily just to order security against a foreign plaintiff… in an application under the IAA, it is my view that where the circumstances are evenly balanced, it would ordinarily be just to dismiss the application for security. The fact of the plaintiff's foreign residence will be the pre-condition*

for invoking the court's powers under O 23 r 1, ***but that fact on its own will bear little weight, if any, in the second stage process***." (emphasis added)

2.7 Mr Manzoni says that the First Proposition is supported by *AAD* §§50-52 and *Zhong Da* §13 and that the Second Proposition by AAD §53. He submits that the approach set out in *AAD* and *Zhong Da* reflects the well-established public policy of promoting Hong Kong as a venue for arbitration, as were it otherwise, the effect will be that a foreign party to arbitral proceedings seated in Hong Kong would likely have to deposit security before invoking the supervisory jurisdiction of the court, a result which does not accord with the overarching objectives of the AO. As explained at Reports of the Bills Committee on Arbitration Bill §4, the AO is meant to "*to make the law of arbitration more user-friendly to arbitration users both in and outside Hong Kong*", "*to attract more business parties to choose Hong Kong as the place to conduct arbitral proceedings*", and "*to promote Hong Kong as a regional centre for dispute resolution*".

3. The proper approach

3.1 Despite the persuasion with which Mr Manzoni has argued the case on behalf of Ps, for the reasons set out in this section, I agree with Mr Man that the First and Second Propositions are incorrect in the context of a court application to challenge an arbitral award.

3.2 I must state in unequivocal terms that, in so deciding, my conclusion (I hope), rather than eroding the objectives to promote Hong Kong as a regional centre for arbitration, has the effect of promoting them. Where, as here, counsel agree that in exercising my discretion, I must take into account all relevant and competing factors, it seems to me that a particularly weighty consideration is the

distinction drawn between the determination phase and the challenge phase of the arbitral process. As observed by Ribeiro PJ at *Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd* (2020) 23 HKCFAR 348 at §§118-119[4]:

> *"The line drawn is therefore between the determination of the parties' mutual rights and liabilities, being a matter for the arbitrators, and enforcement of that award, being a matter for the court."*

3.3 What follows is only meant to apply to, as here, an application made under section 81 of the AO. I leave open the question whether the First Proposition should apply to a court application made during the determination phase (for example a court application for interim measures made pursuant to section 21 of the AO). I acknowledge that the policy considerations urged upon me by Mr Manzoni may be more apposite to a court application made during the determination phase, but the correctness of that shall be left to another day.

(i) The First Proposition

3.4 As pointed out by Mimmie Chan J at *CNG v G* [2024] 2 HKLRD 152 §3, the aims, objectives, and principles of the AO are set out at section 3 and Hong Kong has long been striving to establish and uphold a policy of being supportive of arbitration agreements *and* awards. At *CNG* §§1 and 2, the learned Judge stated in clear terms the exceptional nature of challenges made under section 81 of the AO.

3.5 Where it is plain that the policy in Hong Kong is to support arbitration agreements (ie the determination phase) *and* awards (ie the challenge

[4] Although Ribeiro PJ's observations are directed at enforcement of an award, they seem to me to be equally applicable to the present case, namely an application to set aside an award, given the similarities of the permitted grounds to resist enforcement of an award and to challenge an award: Compare sections 81 and 86 of the AO.

phase), the question posed by Mr Man, in respect of the First Proposition, is whether the policy should be such to create a situation where a challenge of an award is made easier and more accessible. I agree with Mr Man that the question should be answered in the negative.

3.6 The starting point, it seems to me, is the relevant statutory provisions.

3.7 Section 56 of the AO provides:

> *"(1) Unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may make an order –*
>
> *(a) requiring a claimant to give security for the costs of the arbitration; …*
>
> *(2) An arbitral tribunal must not make an order under subsection (1)(a) only on the ground that the claimant is –*
>
> *(a) a natural person who is ordinarily resident outside Hong Kong; …"*

3.8 Counsel agree that the considerations set out at *AAD* §50 (at §2.4 above) are reflected in and consistent with section 56 of the AO. However, as ventilated at the hearings, section 56 is only a provision conferring powers upon the arbitral tribunal to order security for costs of the arbitral proceedings.

3.9 Conversely, RHC Order 23, rule 1 provides:

> *"(1) Where, on the application of a defendant to an action or other proceeding in the Court of First Instance, it appears to the Court –*
>
> *(a) that the plaintiff is ordinarily resident out of the jurisdiction, or …*
>
> *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 of the action or other proceeding as it thinks just."*

3.10 The question is whether the rationale behind enacting section 56 of the AO should also "permeate" to a court application made under RHC Order 23 concerning arbitral proceedings. Mr Manzoni relies heavily on *Zhong Da* §13 (at §2.6 above):

(1) Like section 56 of the AO, the corresponding provisions in the Singapore Arbitration Act Cap 10 and International Arbitration Act Cap 143A ("**IAA**") also confer similar powers to the arbitral tribunal to order security for costs of the arbitral proceedings, but not simply because a claimant is ordinarily resident out of the jurisdiction;

(2) Judith Prakash J observed that, whilst those provisions concern the powers of an arbitral tribunal, once the matter was brought to court, provisions similar to our RHC Order 23 applied. This did not mean, however, that the policy considerations applicable in an arbitration context are irrelevant. To the contrary, she found that it was essential in applications concerning arbitral proceedings that the court adopts a different approach to the question of security for costs;

(3) The Singapore Court did not see any reason why the approach in the IAA could not be applied analogously in an application made under the Singapore Order 23, rule 1(1)(a). The fact that the application arises from arbitral proceedings is a factor relevant to the exercise of the court's discretion, and indeed of such weight that it would ordinarily make it unjust to order security for costs.

3.11 In my view, Mr Man is right in his submission that a wholesale importation of the rationale behind enacting section 56 of the AO as a weighty

factor to an application made pursuant to RHC Order 23, rule 1 is unwarranted, at least insofar as it concerns a court application made to challenge an award, for the following reasons.

3.12 First, as pointed out by Mr Man, RHC Order 23, rule 1(1)(a) is asymmetrical, in that it only (1) applies to plaintiffs but not defendants and (2) foreign but not local plaintiffs. The reason for the first asymmetry is that the defendant is merely exercising his right to defend himself against attack and hence should not be required to give security. The second asymmetry is that residence abroad normally entails difficulties in enforcing a potential award against the plaintiff. At *Tsang Yee Mui v The Personal Representatives of Mak Chik Wing & Anor*, HCA 2606 of 2006, Chu J (as she then was) said as follows:

> *"[31] Further, the fact that the plaintiff is known to have fixed assets in the jurisdiction is highly relevant. This is because the rationale or objective underlying Order 23 rule 1(1)(a) is to alleviate the difficulty that may be faced by a successful defendant in seeking to recover costs against a foreign plaintiff. If it is known that there are assets within the jurisdiction available for costs, then the concern that the rule sets out to address will be met."* (emphasis added)

3.13 I agree with Mr Man that the reasons for both asymmetries apply in the present case. In relation to the former, as has been pointed out at *SA* §§10 and 25, Ps in seeking to set aside the Award, are plainly the real attackers. As regards the latter, the evidence shows that D is likely to have to incur costs and time in enforcing a costs order against P1. I shall return to the factual aspects in a later part of this decision.

3.14 Secondly, it is plain that as a matter of legislative choice, the AO has stopped short of circumscribing the court's power to order security for costs in a manner that mirrors the power conferred upon an arbitral tribunal by section 56(2) of the AO.

3.15 In any event, it is not apparent that the rationale behind section 56(2) should have wholesale application in the challenge phase. As pointed out by Mr Man, section 56 of the AO is based on section 38 of the English Arbitration Act 1996. Paragraph 366(ii) of the Report on the Arbitration Bill (February 1996) issued by the Departmental Advisory Committee on Arbitration Law ("**DAC Report**"), which comments on section 38 of the Arbitration Act 1996, states as follows:

> *"One of the grounds on which an order for security for costs may be made in court is that the plaintiff is ordinarily resident out of the jurisdiction: see Order 23, Rule 1(1)(a) of the Rules of the Supreme Court. On further consideration of the matter, we have concluded that it would be very damaging to this country's position as the leading centre for international arbitrations to make this ground available to arbitral tribunals. It would reasonably appear to those abroad who are minded to arbitrate their claims here that foreigners were being singled out for special and undeserved treatment..."* (emphasis added)

3.16 Similar observations are made at *AAD* §51 (at §2.4 above) by reference to the Chartered Institute of Arbitrators' Guideline on Applications for Security for Costs ("**Guideline**"), namely discrimination on the grounds of foreign residence would be contrary to the fundamental principles of international arbitration which enables parties from different jurisdictions to choose where their disputes should be resolved.

3.17 Both the DAC Report and the Guideline express observations only in relation to the power of the arbitral tribunal.

3.18 Therefore, by enacting section 56(2) of the AO, the statutory framework has achieved precisely those objectives set out in the DAC Report and the Guideline, that is, foreign parties who choose Hong Kong as the place to arbitrate their disputes are not discriminated against during the determination phase. To that extent, and as set out at §3.3 above, I can appreciate (without

deciding) how it may be said that those objectives should "permeate" to a court application made in the course of the determination phase.

3.19 However, different considerations apply in the challenge phase. As pointed out by Mimmie Chan J at *SA* §11:

> *"When the plaintiffs initiate the Court's permitted "interference" by way of an order to set aside the Award (the exclusive recourse against an award as provided for in the Ordinance), their proceedings before the Court are then subject to the procedural rules governing the action before the Court."*

3.20 The Hong Kong court has held that RHC Order 23, rule 1(1)(a) is not discriminatory or potentially discriminatory. See *Tagliani v Lee Wai Ying Elvis* [2006] 2 HKC 194 §§13-14 and Hong Kong Civil Procedure 2024 Note 23/3/4 and the cases cited therein (in particular *Lim Yi Shenn v Wong Yuen Yee* [2012] 3 HKLRD 505 §§22-56). Mr Manzoni has not sought to argue against the correctness of those cases, or in his words, "*reopen*" the arguments.

3.21 What Mr Manzoni does argue is that those cases are not related to arbitration and so the additional policy considerations were not before the court. However, as I have pointed out above, the Hong Kong policy is to support both the arbitral process *and* awards. On the question of security for costs, the statutory framework has plainly created an equal playing field between foreign and domestic parties in the determination phase by reason of section 56 of the AO. Where the Hong Kong policy is also to support awards, in my view, it would be against that policy to create an environment whereby the challenge phase is made easier or more accessible.

3.22 Thirdly, and relatedly, I accept Mr Man's submission that the choice of Hong Kong as the seat brings in its train the fully panoply of the relevant

statutory framework and procedural rules of the Hong Kong court if and when the court's jurisdiction is invoked.

3.23 In the course of the arguments, Mr Manzoni referred to Schedule 2 of the AO. Section 7 thereof contains supplementary provisions on challenge to or appeal against arbitral award. Section 7(4) confers powers upon the court to order security for costs of an application or appeal under section 4, 5 or 6 of Schedule 2. Section 7(5)(a) provides that the power to order security for costs must not be exercised only on the ground that the applicant or appellant is a natural person who is ordinarily resident outside Hong Kong. As I understand Mr Manzoni, he submits that section 7(5)(a) of Schedule 2 should inform on how the court should exercise its discretion in an application for security for costs.

3.24 As discussed at the hearing on 18 October 2024, it seems to me that, rather than assisting them, the reference to Schedule 2 of AO is a point against Ps. Schedule 2 contains opt-in provisions that, had the parties chosen to, could have been included in their arbitration agreement pursuant to section 99 of the AO.

3.25 Conversely, where, as here, the parties have chosen not to opt-in the different regime of challenge under Schedule 2 (and the associated consequences of facing an order for security for costs under that regime), it does not appear to me that section 7(5)(a) thereof is relevant to the present deliberation. See *SA* §§8, 29 and 42, where, like here, Schedule 2 did not apply in that case and Mimmie Chan J applied the usual RHC Order 23, rule 1 considerations, including the plaintiff's lack of presence in Hong Kong.

3.26 Fourthly, as regards Mr Manzoni's reliance on *AAD* §51, I agree with Mr Man that the observations therein do not represent the weight of the authorities on RHC Order 23 applications.

3.27 *AAD* §51 observes that the Guideline (at page 7) points out that difficulties of enforcing an award against a debtor may have been part of the commercial risk which an enforcing party undertook when it entered into a business relationship with that debtor, and in such situation of normal commercial risk an order for security for costs would be inappropriate. *AAD* §51 further states that there must be cogent reasons put forward as to why their commercial position should be improved by the court ordering security for costs in arbitration-related litigation and the mere fact that the award debtor is resident outside Hong Kong will not be enough reason.

3.28 As submitted by Mr Man, it is one thing to say that the applicant understood or even assumed the risks of dealing with a foreigner, but it is an entirely different proposition to say that the applicant has agreed not to seek security for costs where the foreigner invokes the jurisdiction of the Hong Kong court.

3.29 It bears emphasis to reiterate that the Guideline is only directed at how an arbitral tribunal should exercise its power to order security for costs. In any event, the relevant parts of the Guideline provides as follows:

> *"Article 3 - Claimant's ability to satisfy an adverse costs award*
>
> *1. Arbitrators should consider whether there are reasonable grounds for concluding that there is a serious risk that the applicant will not be able to enforce a costs award in its favour because:*
>
> > *i) the claimant will not have the funds to pay the costs awarded; and/or*
> > *ii) the claimant's assets will not be readily available for an effective enforcement against them.*
>
> *2. If the arbitrators conclude that, for either or both of these reasons, there is a real risk that the applicant will have difficulty enforcing a costs award, then these factors favour an order for security, unless these factors were considered*

and accepted as part of the business risk at the inception of the parties' relationship. Conversely, if the arbitrators conclude that the claimant has assets that will likely enable the applicant to pursue enforcement of a costs award, and that these assets will be readily accessible to the applicant, then there is no justification for an order for security."

3.30 In the commentary on Article 3, the specific examples cited are as follows:

"Arbitrators should bear in mind that the lack or inaccessibility of assets is a necessary but not a sufficient reason for requiring security for costs. Combined with other factors it may lead to an order for security for costs. Further, if the solvency of a party was questionable at the inception of the relationship between the parties, arbitrators may consider that the inability to pay is no reason to order security as such a risk was a consequential effect of doing business with that party. Similarly, if a party contracts with a shell company without obtaining some kind of financial guarantee, arbitrators may consider that its inability to pay was known, or ought to have been reasonably known, at the inception of the relationship and was an accepted consequence of doing business with it. Even if a party's ability to pay has deteriorated since the inception of the relationship, the arbitrators may consider that this was a normal commercial risk known at the inception of the relationship.

If, however, the circumstances show that the deterioration of the party's financial situation or the lack of available assets was caused by something other than an accepted business risk, arbitrators may consider that an order for security for costs is justified. For example, if they conclude that a party's lack of funds is because it has deliberately organised its affairs in such a way as to hide its assets or has given wrong information about them or has taken any steps to frustrate a future costs award, then these are factors in favour of requiring security." (emphasis added)

3.31 It appears that the considerations set out in the Guideline go beyond the usual factors considered by the court in an application for security for costs. Take insolvency as an example. The applicable principles are those summarized by Ng J in *Sunni International Ltd v Kao Wai Ho Francis* [2021] 1 HKLRD 841 at §§20-24. At §24, it is said that where a company is in liquidation, there is a presumption that it is insolvent and unable to pay the defendant's costs, which presumption the liquidator must rebut in order to resist the application for security.

3.32 As stated above, where an important part of Hong Kong policy is pro-award, I do not see any justification in creating a situation to make it easier for a party to challenge an award and, as a corollary, more onerous for a party resisting such challenge.

(ii) The Second Proposition

3.33 The Second Proposition may be dealt with shortly. I agree with Mr Man that it is difficult to see why impecuniosity should be elevated into a typical requirement, for the following reasons:

(1) Even in the context of applications for security for costs within an arbitration, there is no such requirement. See section 56 of the AO, as well as Article 3 of the Guideline, which makes clear that in considering whether there is a real risk that the applicant will have difficulty enforcing a costs award, the arbitral tribunal would consider not only the amount of the respondent's assets, but also the location or accessibility of those assets. In other words, there is no need to show that the respondent is "globally" impecunious;

(2) Even in *Zhong Da*, a case heavily relied on by Mr Manzoni, Judith Prakash J, like the position in Hong Kong, placed emphasis on ease of enforcement rather than impecuniosity (§19 thereof).

4. Whether security for costs should be ordered in the present case

4.1 For the reasons I have endeavoured to set out in the preceding section, I do not accept Mr Manzoni's arguments on the First and Second Propositions, at least in a court application made in the challenge phase. Neither

P1 nor P2 has raised the issue that, were an order security for costs made, it would stifle the Set Aside Application.

(i) The application against P1 under RHC Order 23, rule 1(1)(a)

4.2 The proper approach is that set out at *SA* §29:

> *"In deciding whether to order security for costs against a party, the Court takes into consideration all the circumstances of the case. These include (but are not restricted to) the fact that the plaintiff against which security is sought is ordinarily resident out of the jurisdiction, whether it has assets within the jurisdiction against which any order for costs may be enforced, the merits of the plaintiff's case, any delay in the application for security, and any other factor which may make it unjust to order security."*

4.3 On the applicable approach in assessing merits, there is a dispute between counsel whether the *Soleh Boneh* Guidelines are applicable. As set out *Soleh Boneh v Government of Uganda* [1993] 2 Lloyd's Rep 208, the relevant merits test is one of manifest validity of an award. That exercise entails as follows:

> *"The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point."*

4.4 Mr Manzoni submits that the *Soleh Boneh* Guidelines are not applicable as they are meant to apply to security for claim rather than security for costs[5].

[5] It seems to me that an additional reason for Mr Manzoni contending that the *Soleh Boneh* Guidelines are inapplicable is because the second consideration stated therein is for the court to consider the ease or difficulty of enforcement, as opposed to, as he contends, impecuniosity *simpliciter*. For the reasons set out in section 3 above, I do not regard impecuniosity *simpliciter* should be the proper focus.

4.5 Conversely, in an application under RHC Order 23, parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. It is not the function of the court, when faced with an application for security for costs, to make a preliminary run at deciding the ultimate success or failure of the claim.

4.6 In the context of the present case where counsel agree that the Set Aside Application does not enjoy such high probability of success that an order for security for costs should be refused on the basis of the underlying merits, it does not appear necessary for me to resolve the difference between counsel. Indeed, it seems to me that the two approaches (both involving only a brief consideration of the merits) are unlikely, in practical terms, to yield different results. For example at SA §38, Mimmie Chan J said:

> *"At this preliminary stage, it suffices to say that even on a brief consideration of the strength of the plaintiffs' argument, the Award is not manifestly invalid (using the term in Soleh), and the probability of success of the setting aside application cannot be regarded as of a "high degree"."*

4.7 In my view, it is appropriate to order security for costs against P1 given (1) P1's lack of presence in Hong Kong, (2) P2's lack of assets within the jurisdiction and (3) difficulties in enforcing an adverse costs order against P1.

4.8 In relation to the last factor, Mr Manzoni emphasizes that, on D's own evidence, P1 is one of the wealthiest persons in the world and he has complied promptly in depositing with the HKIAC the arbitrators' fees and the HKIAC's administrative costs. He, in reliance of *AAD*, submits that the burden lies on D to adduce evidence to show that P1 lacks the means to satisfy any future

adverse order for costs (ie the Second Proposition). As stated above, I do not agree with the Second Proposition.

4.9 Instead, I place emphasis on the ease of enforcement. The evidence shows that D had expressly raised the concerns that (1) Ps were cautious not to reveal any details of P1's assets and wealth in the Arbitral Proceedings, (2) P1's alleged wealth does not derive from publicly listed shares, the existence and value of which could be independently verified (and located), (3) P1 has adopted an intricate structure to organize his assets and (4) P1 has no known assets in Hong Kong. The above concerns are not addressed in Ps' evidence. For example, I have alluded to the fact that P1 is a [redacted] Country A national with an address in [redacted] City X. On the evidence, it is not even known whether P1 has assets in [redacted] Country A (if so where) or in [redacted] City X.

4.10 In my view, I do not need to resort to D's allegation that P1 has demonstrated a pattern of low commercial morality as evidenced by the fact that he is now serving a 4-month custodial sentence in the [redacted] Country C.

4.11 On the other hand, I agree with Mr Manzoni that I should and am entitled to take into account the delay in the Present Application. Mr Man says that there was no delay for the following broad reasons: although the Set Aside Application was commenced in September 2023, D was only served on 26 April 2024 and the Originating Summons was only amended pursuant to leave granted at a hearing on 20 June 2024. The Amended Originating Summons was only served on 27 June 2024.

4.12 However, I accept Mr Manzoni's submission that D was only served in April 2024 because D has throughout not cooperated in accepting service. Despite multiple attempts to liaise with D's legal representatives (to which no

reply was forthcoming), Ps had to resort to applications for substituted service and an application for service out of the jurisdiction. Even at the hearing before Mimmie Chan J on 20 June 2024, there was no indication of any application for security for costs, and it was only on 4 July 2024 that D's solicitor first raised the request for security,

4.13 In my view, it is appropriate to only order security for future costs, namely those set out at Part B of the D's Skeleton Bill of Costs in the sum of HK$1,504,600.

4.14 Mr Manzoni also relies on *AAD* §54 that any failure to pay the ordered security for costs should only result in the staying of the Set Aside Application, not as here a dismissal. I do not agree. As pointed out at *Wang Hsuan Han v Cathay Pacific Airways Ltd* [2024] HKCFI 386 §20, it is in principle not objectionable to provide for a dismissal in the event that the plaintiff fails to provide the ordered security for costs.

4.15 I should point out that even had I adopted the approach set out in *Zhong Da*, I would still have ordered security for costs against P1, having regard to, as did Judith Prakash J (who did make an order for security for costs), the issue of difficulties in enforcement.

(ii) The application against P2 pursuant to section 905 of CO

4.16 Where it is not disputed that P2 only has negligible assets, it seems to me that section 905 is plainly engaged, on the basis that there is reason to believe that P2 will be unable to pay D's costs if D succeeds in the defence.

4.17 On the evidence, there is no suggestion that there is an undertaking from P1 (or any other funder) to meet P2's liability for costs. In my view, and by reasons of those (applicable) factors which I took into account in exercising my discretion to make an order against P1, it is appropriate to also make an order against P2.

5. Conclusion

5.1 For the above reasons, I order Ps do give security for the Defendant's costs in the sum of HK$1,504,600 by paying the said sum into court within 14 days, and in the event that Ps fail to provide the said security, the Set Aside Application be dismissed with costs to D on an indemnity basis to be taxed if not agreed.

5.2 I also make a costs order *nisi* that Ps are to pay D's costs of the Present Application (including any costs reserved) with a certificate for 2 counsel to be summarily assessed on the papers. D is to lodge and serve his Statement of Costs within 7 days hereof and Ps are to lodge and serve their Statement of Objections within 7 days thereafter.

(Jonathan Wong)
Deputy High Court Judge

Mr Charles MANZONI, SC leading Mr Simon CHAPMAN (Solicitor Advocate) instructed by Messrs Herbert Smith Freehills for the 1st – 2nd Plaintiffs

Mr Bernard MAN, SC leading Mr Thomas WONG instructed by Messrs Gall for the Defendant