

HONG KONG / JUDGMENT

R v. C

[2026] HKCFI 658

COURT

Court of First Instance

DECIDED

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HCCT 126/2025

[2026] HKCFI 658

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 126 OF 2025

IN THE MATTER of an arbitration administered by the Hong Kong International Arbitration
Centre (HKIAC/A25110)

and

IN THE MATTER of Sections 25 and 26 of the Arbitration Ordinance (Cap. 609) and Articles 12 and
13 of the UNCITRAL Model Law on International Commercial Arbitration

BETWEEN

R

Plaintiff

and

C

Defendant

DECISION

On 31 October 2024, C commenced two sets of arbitral proceedings against R. One is premised on R's alleged breaches of its obligations under the BIT ("BIT Arbitration") and the other ("ECT Arbitration") on R's alleged breaches under the Energy Charter Treaty ("ECT"). As described in R's evidence, in each of the two sets of arbitral proceedings, C challenges various measures that R adopted in response to sanctions against it by xxxxx xxx and other EU Member States which have allegedly harmed C. In the notice of arbitration commencing the BIT Arbitration ("BIT NOA"), C has quantified its monetary claim to be no less than xxxxx xxxxxx, the core allegations, in summary, are that R took control of xxxxxx, that R is intending to deprive C of its rights as a foreign investor, and that R is not intending to return xxxxxx to C.

SS is the arbitrator appointed by C in the BIT Arbitration and was the arbitrator appointed by C (until his removal set out at §2.7 below) in the ECT Arbitration. In addition to the BIT Arbitration and the ECT Arbitration, SS has also been appointed by another claimant, xxxxx xxxxx xxxxx, in another treaty claim against R brought in February 2024 ("xxxxxxxxxxxxxxxxxxxx").

The Challenge is concerned with SS's appointment as arbitrator in the BIT Arbitration. In the BIT Arbitration, R has appointed xxxx xxx xxxxx xxxxx ("NZ") as arbitrator.

Although Article 10 of the BIT contains an arbitration agreement, it only provides that either party to a dispute is entitled to refer the dispute to an international arbitral tribunal. Whilst Article 10 of the BIT provides that each party to the dispute, unless otherwise agreed, may request the Chairman of the Institute of Arbitration of the Stockholm Chamber of Commerce ("SCC") to appoint arbitrators, it does not specify where or by whom a challenge against an arbitrator is to be decided.

In the BIT NOA, C proposed London as the seat of the BIT Arbitration and the arbitral proceedings be governed by the 1976 UNCITRAL Arbitration Rules. R did not agree with such proposals.

On 26 November 2024, R challenged the appointments of SS in both the BIT Arbitration and the ECT Arbitration. In relation to the challenge in the ECT Arbitration, that challenge was dealt with by an appointing authority designated by the Permanent Court of Arbitration, and on 16 May 2025, the appointing authority upheld R's challenge against SS on the basis that his concurrent service as an arbitrator in both the BIT Arbitration and the ECT Arbitration would give rise to justifiable doubts as to SS's impartiality. As noted in the Reasons, it is common ground that SS has since been removed as an arbitrator in the ECT Arbitration.

In respect of the Challenge, the "lacuna" set out at §2.5 above gave rise to procedural disagreements on how the Challenge was to be determined:

Initially, on 28 January 2025, C notified R that it would request the SCC to determine the Challenge;

On 30 January 2025, R indicated that it did not agree with C's proposal and requested instead for an arrangement similar to that for the challenge in the ECT Arbitration, namely for the Challenge to be determined by an appointing authority designated by the Permanent Court of Arbitration;

On 6 February 2025, R agreed that it would permit an individual of the SCC Board to decide the Challenge, but the parties failed to agree on a member of the SCC Board to decide the Challenge;

Notwithstanding the disagreement, C requested the Chairman of the SCC Board to decide the Challenge, with which request R disagreed;

The impasse continued until a breakthrough in April 2025.

On 9 April 2025, to facilitate resolution of the disagreements arising from the "lacuna", R and C entered in a procedural agreement ("Procedural Agreement") specifying, inter alia, that (1) the BIT Arbitration would be administered by the HKIAC and seated in Hong Kong and (2) the Challenge would be decided by the HKIAC instead of the SCC.

As noted at Reasons §48, R relied on a number of grounds for the Challenge: (1) SS's appointments as arbitrator in multiple cases against R (ie the BIT Arbitration, the ECT Arbitration and the xxxxxxxxxxxxxxxxx), (2) SS's authorship of academic writings on certain issues featured in the arbitration which give rise to concerns of prejudgment and (3) SS's connection to xxxxxxxx.

As stated earlier, the Proceedings Committee of the HKIAC dismissed the Challenge on 14 August 2025. As I understand the position, the tribunal has still not been constituted as SS and NZ have not been able to agree on the identity of the third arbitrator.

Procedural history

After the filing of the OS on 2 September 2025, by BFC's letter to C sent by email on 4 September 2025, the OS was provided to C for reference and C was asked to agree on a method of service of the OS.

By HSFK's letter dated 4 September 2025, BFC was notified that HSFK was instructed by C to accept service of court documents in relation to the present proceedings.

On the following day, HSFK filed an acknowledgement of service ("AS") and by letter to BFC requested R to provide security for costs, on the bases that (1) R is not ordinarily resident in Hong Kong and (2) C is not aware of any assets owned by R in Hong Kong. In the letter, BFC was requested to provide information on whether R owned any assets in Hong Kong, and if so, to confirm such assets were not encumbered or otherwise protected by immunity privileges. In the alternative, if there were no assets in Hong Kong, HSFK sought confirmation by 12 September 2025 that R would be prepared to provide security for costs, failing which an application for security would be made.

The parties thereafter disputed whether the AS was served prematurely, as BFC took the position that the OS had by then not been served, and it followed that any request for security for costs was also premature.

Notwithstanding the position taken by BFC, on 10 September 2025, Mimmie Chan J (“Judge”) directed the parties to confer and work out proposed directions for the filing of evidence in respect of the OS and submit the same for the learned Judge’s consideration by 3 October 2025.

The parties submitted (partially disagreed) draft directions for the conduct of the OS to the learned Judge on 3 October 2025 and the differences were resolved by an order dated 6 October 2025, which order (§7 thereof) directed the fixing of a substantive hearing for the OS.

At the same time as the submission of the draft directions on 3 October 2025, C issued the Security Summons which was returnable on 3 November 2025.

By the learned Judge’s direction given on 6 October 2025, the parties were directed to propose directions for the conduct of the Security Summons by 27 October 2025.

Whilst the directions on the conduct of the Security Summons were pending, on 16 October 2025, the substantive hearing of the OS was fixed to be heard on 12 February 2026.

By an order dated 27 October 2025, the learned Judge gave directions for the conduct of the Security Summons. §4 thereof directed that the substantive arguments be fixed for an early hearing.

On 4 November 2025, the substantive hearing of the Security Summons was fixed for 10 February 2026, namely to take place only two days before the substantive hearing of the OS.

The Security Summons came before me on 17 November 2025 as a result of R’s application for an extension of time to file and serve its evidence in opposition. I granted a short time extension such that the evidential timetable would be completed by 21 December 2025. At that hearing, on C’s initiative, the issue of whether the substantive hearing of the Security Summons could be moved to an earlier date was broached.

Eventually, as an earlier date was not available, on 17 December 2025, I made an order vacating the hearing date on 10 February 2026 and directing the Security Summons to be disposed of on the paper.

As stated earlier, the Amendment Summons was filed on 19 December 2025. As explained in C’s evidence, the need to increase the quantum of the security sought was precipitated by (1) the need to engage an expert to deal with R’s expert evidence on sovereign immunity adduced on 21 November 2025 and (2) the costs of the preparation of reply submissions for the purpose of paper disposal of the Security Summons.

The rival contentions

C’s position is that security for costs should be ordered for the following reasons:

R is not ordinarily resident in Hong Kong;

R has refused to identify any assets available for enforcement in Hong Kong (or anywhere else);

Significant enforcement difficulties exist because (a) R may assert immunity against jurisdiction or execution making enforcement of a costs order difficult or impossible and (b) Hong Kong has not entered into any international conventions or agreements on the enforcement of judgments with R;

R has failed to comply with any of the HKIAC's requests for payment of costs in the underlying arbitration;

The Challenge brought before the Hong Kong court (a) is in breach of the Procedural Agreement, (b) has already been considered and dismissed by the HKIAC and (c) is manifestly without merit;

R's conduct, including its assertion of immunity, suggests it would not comply with any adverse costs order and R has made no representations that a security for costs order is unnecessary because R would comply with an adverse costs order of the court; and

R is not entitled to immunity, including because it has submitted to the jurisdiction of the court.

Conversely, R raises the following contentions:

R, as a sovereign state, is immune from jurisdiction and execution of the Security Summons by virtue of the 2023 Law of the People's Republic of China on Foreign State Immunity ("2023 Law") which is applicable in Hong Kong. R has claimed immunity and has not waived it and the Security Summons is liable to be dismissed for that reason alone;

Further and/or in the alternative (and without prejudice to R's immunity), none of the factors raised by C assist in its application for security. In this regard, R contends that the reasoning set out in P1 v D (Arbitration: Security for Costs) [2024] 5 HKLRD 699 on security for costs in the challenge phase should not be extended to the present Security Summons;

In the further alternative, R says that the amount of security sought is excessive.

There is no dispute between the parties that the 2023 Law has not been considered in any Hong Kong decisions. As I understand the expert evidence, given the "short life of the 2023 Law" since its inception, there has been no Chinese case reported in connection with the implementation of the law. For the reasons set out below, I am able to come to the conclusion that I should not accede to the Security Summons without engaging R's arguments on sovereign immunity, in that even on the assumption that R is not entitled to claim immunity, in the exercise of my discretion, no security should be ordered in the circumstances of the present case. As tempting as it is to engage the interesting arguments advanced by both sides on the issue of sovereign immunity in the present context (ie where R has engaged the jurisdiction of the Hong Kong court but asserts immunity against a "procedural" order which the court is empowered to make), it seems to me that, where their resolution is not necessary for the purpose of my determination, I should refrain from doing so given the importance and novelty of the issue (in the context of the 2023

Law) and its potential repercussions.

Security for costs: Determination Phase v Challenge Phase

In P1 v D, I attempted to deal with the proper approach to be applied in an application for security for costs in the context of arbitration-related court proceedings.

Section 56 of the AO provides as follows:

“(1) Unless otherwise agreed by the parties, when conducting arbitral proceedings, an arbitral tribunal may make an order –

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;
 - (b) a body corporate –
 - (i) incorporated under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong; or
 - (c) an association—
 - (i) formed under the law of a place outside Hong Kong; or
 - (ii) the central management and control of which is exercised outside Hong Kong.”

In that case, the plaintiffs relied on two authorities, AAD v BBF [2024] 2 HKLRD 297 and Zhong Da Chemical Development Co Ltd v Lando Industries Ltd [2009] 3 SLR(R) 1017 in support of the arguments that in the context of arbitration-related court proceedings, the principles governing the grant of an order for security for costs in court proceedings should not apply in their full rigour, as were it otherwise, the effect would 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 did not accord with the overarching objectives of the AO of promoting Hong Kong as a venue for arbitration. Indeed, such considerations, it was said, were reflected in and consistent with section 56 of the AO which expressly provided that an arbitral tribunal must not make an order for security for costs only on the ground of foreign residence.

The considerations set out in AAD and Zhong Da include:

The fact that a party is based outside of Hong Kong is an insufficient basis for ordering security for costs. In the arbitration context, it is not unusual to find that at least one of the parties will be based outside Hong Kong. Parties from outside Hong Kong choose to resolve their 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 has agreed to a Hong Kong-seated arbitration, that party is susceptible to an application for 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 (AAD §50 and Zhong Da §13);

Difficulties of enforcement 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 risks an order for security for costs would be inappropriate (AAD §51);

Security for costs is usually ordered against a person who is likely to be impecunious. Poor excuses for not honouring an award did not amount to a compelling basis for imposing an order for security for costs as a condition to hearing the substantive application to challenge the award (AAD §53).

In particular, it was accepted that the consideration set out at AAD §50 are reflected in and consistent with section 56 of the AO and the question was whether the rationale behind section 56 should “permeate” to court application made under RHC Order 23 concerning arbitral proceedings.

I drew a distinction between the determination phase and the challenge phase by reference to Xiamen Xinjingdi Group Co Ltd v Eton Properties Ltd (2020) 23 HKCFAR 348, the former being concerned with the determination of parties’ mutual rights and liabilities being a matter for the arbitral tribunal and the latter with the enforcement of an arbitral award being a matter for the court. For the reasons set out in my decision, I concluded that where an important part of Hong Kong policy is pro-award, I did 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.

However, I had expressly left open the question whether different considerations were applicable in the determination phase and further tentatively acknowledged that the counter arguments urged upon me in that case might be more applicable to a court application made during the determination phase.

As I understand Mr Chapman, he does not contend that the considerations in the determination phase should be the same as those in the challenge phase. Instead, he is content to proceed on the approach set out at Zhong Da §13, namely foreign residency is only a gateway to invoke RHC Order 23, rule 1:

“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)

In my view, the pro-award policy considerations identified in P1 v D should not apply with full rigour to applications for security for costs made in the determination phase. Whilst the court's discretion is unfettered and will still be guided by the jurisprudence relating to RHC Order 23, it seems to me that, in the determination phase, the court should be more open and receptive to the guidance set out in, for example, the Chartered Institute of Arbitrators' (CIArb) Guideline on Applications for Security for Costs ("Guideline") or similar literature, even if some of the observations set out therein go beyond the usual factors considered by the court in an application under RHC Order 23.

Mr Chapman however takes a more fundamental point. He contends that in asking the court to determine the Challenge which has already been dismissed by the HKIAC, any attempt to differentiate the OS from an application in the challenge phase (whether in the context of an application to set aside an award or to resist enforcement) is unprincipled, as both involve the court's supervisory role.

With the greatest respect, I am unable to agree with Mr Chapman. There are fundamental differences between an application to ask the court to determine the Challenge and an application made in the challenge phase, at least in the circumstances of the present case:

First, an application made in the challenge phase is circumscribed by the limited recourse the parties have under the AO. Conversely, subject to an argument raised by C dealt with below, section 26 of the AO (which gives effect Article 13 of the UNCITRAL Model Law) confers a statutory right to ask the court to decide on a challenge which has failed (in this case in the HKIAC) on a de novo basis.

Secondly, and perhaps more importantly, an application in the challenge phase is made after the arbitral tribunal has published its award (partial or final), namely upon the conclusion of the consensual process of final dispute resolution to which the parties have voluntarily agreed. In contrast, an application made under section 26 of the AO can be made, as here, even before the arbitral tribunal has been constituted. Whilst it is true that an application under section 26 of the AO can be made in the challenge phase conjunctively with an application to set aside an award or may give rise to an obstacle in the court granting leave to enforce an award, it is clear in my mind that the present case is one made very much in (or even anterior to) the determination phase and is one where R is exercising its rights to ensure that the disputes will be determined by a tribunal

which it considers to be independent and impartial, before any determination of the parties' mutual rights and liabilities.

Analysis of the factors

I now turn to my analysis of the factors placed before me by the parties.

R's foreign residency and lack of assets in Hong Kong

As noted above, the "lacuna" in the arbitration agreement in the BIT gave rise to procedural disagreements. In order to resolve the impasse, the parties entered into the Procedural Agreement specifying that (1) the BIT Arbitration would be administered by the HKIAC and seated in Hong Kong and (2) the Challenge would be decided by the HKIAC. Neither party has referred to the negotiations leading to the execution of the Procedural Agreement, but it seems to me that I can proceed on the basis that, in agreeing on the Procedural Agreement, Hong Kong was chosen as a neutral forum by the parties who do not have substantial connections to Hong Kong.

In my view, R's foreign residency and lack of assets in Hong Kong bear little weight in the exercise of my discretion.

Merits of the OS

I have considered the evidence and the submission. In my view, it cannot be clearly demonstrated one way or another that there is a high degree of probability of success or failure.

I specifically deal with a "knock out" point raised by C. C contends that the OS is brought in breach of the Procedural Agreement. The relevant clauses provide:

"[1.5] The Pending Challenge shall be decided by the HKIAC on the basis of the Parties' submissions made as of the date of signing this agreement. Neither party shall request leave to make additional submissions on the Pending Challenge to HKIAC. If HKIAC, on its own initiative, requests one of the Parties to make an additional submission on the Pending Challenge, the other party shall be entitled to make a reply submission."

[1.6] The HKIAC's decision on the Pending Challenge is final, binding, and may not be appealed." (emphasis added)

I agree with BSF that C's reliance on Clause 1.6 is subject to reasonable arguments to the contrary. Article 13 of the UNCITRAL Model Law provides:

"(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article."

- (2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.
- (3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.” (emphasis added)

As pointed out by BSF, it is reasonably arguable that the right to a party to ask the court to decide a challenge under Article 13(3) is a mandatory provision which cannot be contracted out of by the parties.

In any event, the exercise under Article 13(3) of the UNCITRAL Model Law undertaken by the court is not couched in terms as an appeal. This is to be contrasted with the language that the Court’s decision on the Challenge is not subject to appeal. It is therefore the case that, short of rectification or a rather strained construction, it is reasonably arguable that Clause 1.6 of the Procedural Agreement does not have the effect of prohibiting the prosecution of the OS.

I am therefore of the view that the merits of the OS do not constitute a weighty factor in the exercise of my discretion.

Difficulties in enforcement and R’s conduct

In my view, C stands on firmer grounds in respect of these factors. R does not dispute that a Hong Kong judgment cannot be enforced in R through international conventions.

However, as has been pointed out at Arbitration in Hong Kong: A Practical Guide, 5th Ed §15.124, in the context of the arbitral tribunal’s discretion in deciding an application for security for costs:

“The respondent must establish to the tribunal’s satisfaction that the claimant will be unable to pay the respondent’s costs if the claim is unsuccessful, or that there will be serious difficulties in enforcing an order for costs against the claimant other than difficulties arising from its residence abroad. Even then, an order for security will not follow as a matter of course.” (emphasis added)

It therefore suggests that difficulties in enforcement simpliciter (in the sense of having to enforce in a foreign country and perhaps in the absence of reciprocal enforcement arrangements) does not guarantee an order for security. In this regard, I note that there is an express finding at Zhong Da §18 that the court was satisfied that there was a high possibility that the plaintiff would fail to pay any costs order made against it by reference to previous conduct.

Similarly, in the cases relied on by C which are concerned with an application for security for costs against a sovereign state, the court only acceded to an application for security by reason of additional factors over and above difficulties in enforcement simpliciter, invariably consisting of conduct which the court disapproved of.

In *Ukraine v Pao Tatneft* [2019] EWCA Civ 763, Ukraine was held liable to Tatneft under an arbitral award. Ukraine applied to set aside the enforcement order. The English Court of Appeal granted an order for security for costs against Ukraine. The factors considered to be relevant included:

“[21] Mr Dudnikov also submitted that Tatneft’s evidence failed to demonstrate a real risk of non-enforcement. Like Mance LJ in Nasser v The United Bank of Kuwait [2002] 1 WLR 1868 at para.64, I consider this Court should take notice of the obvious realities of this case, even if there is no formal evidence. Ukraine has adopted an obdurate approach to all attempts by Tatneft to enforce the Award and it has failed to comply with a costs order of the English court. It seems likely that Ukraine would oppose an application for a writ of execution under Resolution 408 and it is striking that nowhere in its evidence does Ukraine condescend to identify the grounds on which the Ukrainian court would refuse to issue a writ of execution. In those circumstances, it seems to me that all that this Court can and should do is to conclude that there is such a real risk of nonenforcement.

[22] In my judgment, in these circumstances Tatneft has shown that real risk of substantial obstacles to enforcement which in turn demonstrate a real risk of nonenforcement such as to justify the making of an order for security for costs” (emphasis added)

In a similar vein, in *Infrastructure Services Luxembourg S.a.r.l v Kingdom of Spain* (security for costs) [2024] FCA 234, there was evidence of actual non-compliance by Spain in relation to judgment debts and costs orders:

“[2] In February 2020, in recognising and enforcing an arbitration award made under the auspices of the International Centre for the Settlement of Investment Disputes, I ordered that Spain pay the applicants, Infrastructure Services Luxembourg S.à.r.l. and Energia Termosolar BV, the sums of €101,000,000, US\$635,431.70 and £2,447,008.61 plus interest and costs: Eiser Infrastructure Ltd v Kingdom of Spain [2020] FCA 157; 142 ACSR 616. The central issue of contention was whether Spain enjoyed foreign state immunity in the proceeding. I held that it did not.

[5] The result is that since June 2021, Spain has been a judgment debtor in this proceeding in a very substantial sum (currently about €125 million which amounts to more than \$200 million), and since April 2023 it has had no further possibility of recourse against the judgment, all avenues having been exhausted. Spain, which doubtless has the resources to pay, has nevertheless failed to pay any part of the judgment or the successive costs orders at

three levels of the court hierarchy. Its refusal, or failure, to pay the judgment arises from peculiarities of the law of the European Union, but that does not detract in any way from its obligation to pay the judgment in Australia.

- [40] The strongest factor weighing in favour of requiring Spain to furnish security for costs is that it is a judgment debtor which has no possible further recourse against the judgment, it has firmly indicated its intention not to pay the judgment, it has not secured the judgment, it has not said that it will pay the costs previously awarded against it, and it has not said that it will pay any costs awarded against it in its reconsideration application. On any view, it is a recalcitrant judgment debtor in this proceeding. It deserves no sympathy.
- [46] When I weigh the various considerations, and in particular search for the fairest result, I inevitably reach the conclusion that Spain must furnish security for a possible costs award against it in due course. Where, as here, post-judgment enforcement procedures are pursued bona fide, the judgment debtor wishes to oppose them on at least an arguable basis, and requiring security from the judgment debtor will not stifle such opposition, the case for security for costs is overwhelming. One might ask rhetorically, why should the judgment creditor have to pursue enforcement procedures against the judgment debtor's opposition at risk of not being able to recover its costs in so doing even if it is successful in defeating that opposition? Has it not suffered enough by not being paid what successive courts have found is its due? Spain's status in this proceeding as a recalcitrant judgment debtor ultimately counts decisively against it." (emphasis added)

In the present case, C relies on R's alleged failure to comply with any of the HKIAC's requests for payment of costs in the underlying arbitration.

HSFK's letter dated 3 November 2025 to the HKIAC (copied to the solicitors acting for R in the BIT Arbitration ("Curtis")) (1) points out that R had failed to remit its share of the arbitration deposits, (2) refers to the fact that, in contrast, that payments were made to the Permanent Court of Arbitration in the ECT Arbitration and (3) suggests that R's ability to make international payments is underscored by the fact that it has engaged an US Law firm in the BIT Arbitration.

Curtis replied on 10 November 2025 in which it was pointed out that in order to facilitate payment in the parallel arbitration, the Permanent Court of Arbitration has opened a bank account in a jurisdiction that has not adopted sanctions against xxxxxx banks and into which R has been able to transfer funds. It was also emphasized that R has requested that the HKIAC similarly take steps to help facilitate payment in the BIT Arbitration, but no solution has yet been found.

Viewed thus, R has provided a legitimate explanation for its failure to pay its share of the arbitration deposits due to the sanctions in place. In my view, R's conduct (relied on by C) does not amount to compelling evidence that R will adopt an obdurate approach to any attempts to enforce the costs orders or will become a recalcitrant judgment debtor. For completeness, I do not regard R's assertion of immunity can provide a proper basis for an inference that it would not comply with any adverse costs order.

Timing of the Security Summons/ Amount of costs involved

As set out in section 3 above, whilst the issue of security for costs was raised at the outset of these proceedings, the substantive hearing of the OS was fixed before any meaningful directions were given in respect of the Security Summons. As a result, the original hearing of the Security Summons (two days before the substantive hearing of the OS) had to be vacated. Even on the basis that the Security Summons is now determined by paper disposal on a somewhat urgent basis, the knock-on effect is that R is left little time to make arrangements to comply with the order.

It seems to me that the timing of the Security Summons is a factor which I can take into account. As stated in *Yieldworth Engineers v Arnhold & Co Ltd*, HCMP 2710 of 1991, 12 September 1991 §24:

“On any basis, this is a very late application. Had I ordered security for costs on 12th September, the claimants would have been placed in great difficulties. Firstly, they would not have been able to appeal my order if minded so to do, before the hearing started, and thus they would have been faced with either accepting my order or seeking yet a further adjournment. Secondly, they would have had very little time indeed to make arrangements to comply with the order which itself might have necessitated a further adjournment. Any further adjournments in this matter are clearly undesirable.”

Whilst I do not regard C to have been late in taking out the Security Summons, the effect of first fixing the substantive hearing of the OS has given rise to the prejudicial effect on R contemplated in *Yieldworth* above. This is particularly so when C is seeking an order for the dismissal of the OS in default of provision of security.

I also take a step back and look at the big picture. Whether the costs involved are substantial is a factor which may be taken into account: *Arbitration in Hong Kong: A Practical Guide* §15.134 referring to *Bani K/SA/S and K/SA/S Havbulk I v Korea Shipbuilding and Engineering Corp* [1987] 2 Lloyd's Rep 445 where the English Court of Appeal said:

“This is expensive and complex litigation. If the buyers are successful, it seems to me just that they should not be at risk for their costs. In the exercise of my discretion I would make the order the buyers seek.”

It seems to me that I can legitimately take into account the fact that the Security Summons is in respect of a very small part of the BIT Arbitration and the amount of security sought (HK\$2.9 million) is but a very small portion of the monetary claim by C (in excess of xxxxxxxxxxxxxxxx) and the costs to be incurred in pursuing its claims in the BIT Arbitration. The foregoing has to be balanced against the difficulties in making arrangements to comply with the order if made (given the timing and the sanctions in place) and the potential deprivation of R's statutory right to request the Court to decide on the Challenge to ensure (on R's case) a fair and unbiased tribunal is constituted at the outset.

Balancing and taking into account the factors identified above, in the exercise of my discretion, I am not prepared to accede to the Security Summons.

Quantum

For completeness, had I been minded to grant an order for security, in adopting a broad-brush approach, I would have ordered a security in the sum of HK\$1.8 million. Using the costs claimed in respect Mr Joris Bertrand as an example and assuming an 8-hour day, Mr Bertrand's time spent on these proceedings is said to be 20 days. In addition to Mr Bertrand, Mr Crockett's time spent is another 9 days. In my view, there is a substantial room for discount, even on the basis that the costs are to be taxed on an indemnity basis.

Conclusion

For all the above reasons, I grant leave to C to amend the Security Summons but dismiss the Security Summons (as amended).

I also make a costs order nisi that the costs of the Amendment Summons and the Security Summons be paid by C to R. R is to lodge and serve its statement of costs within 3 days hereof (limited to 3 pages) and C its statement of objections within 3 days thereafter (limited to 3 pages). I will then carry out summary assessment on the papers.

(Jonathan Wong)

Deputy High Court Judge

Messrs BF & Co., for the Plaintiff

Mr Simon Chapman KC and Mr Antony Crockett, Solicitor Advocates of Messrs Herbert Smith Freehills Kramer, for the Defendant

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