SA

and

BH (Arbitration: Security for Costs)

[2024] HKCFI 1357

(Court of First Instance)

(Construction and Arbitration Proceedings No 69 of 2023)

Mimmie Chan J in Chambers

29 February, 30 May 2024

Arbitration — arbitral award — setting aside — security for costs — jurisdiction — plaintiffs applied to set aside arbitral award in favour of defendant — court had jurisdiction under O.23 to order plaintiffs to provide security for defendant's costs — O.23 not excluded by O.73 r.10A — necessary and just to order security in circumstances — Rules of the High Court (Cap.4A, Sub.Leg.) O.23, O.73 r.10A

Civil procedure — security for costs — application to set aside arbitral award — jurisdiction under O.23 to order security against party seeking to set aside award — Rules of the High Court (Cap.4A, Sub.Leg.) O.23

[Rules of the High Court (Cap.4A, Sub.Leg.) O.23, O.73, O.73 r.10A]

仲裁 — 仲裁裁決 — 撤銷 — 訟費的保證金 — 司法管轄權 — 原告人申請撤銷有利於被告人的仲裁裁決— 法院根據第23號命令有司法管轄權，命令原告人為被告人的訟費提供保證金 — 第23號命令未被第73號命令第10A條規則所排除— 在該些情況下下令提供訟費的保證金是必要且公正的 — 《高等法院規則》(第4A章，附屬法例) 第23號命令及第73號命令第10A條規則

民事訴訟程序 — 訟費的保證金 — 申請撤銷仲裁裁決 — 根據第23號命令的司法管轄權，可命令對尋求撤銷裁決的訴訟方提供保證金 — 《高等法院規則》(第4A章，附屬法例) 第23號命令

[《高等法院規則》(第4A章，附屬法例) 第23號命令、第73號命令及第73號命令第10A條規則]

P1 was a company incorporated in the Netherlands and P2-3 were individuals resident in the USA. Ps and D1, a BVI company, were parties to a shareholders agreement (SHA) and partners in a joint

venture holding shares in D2, a Cayman Islands company. A dispute between the parties to the SHA was referred to arbitration in Hong Kong. An interim award (the Award) was made by the Tribunal allowing D1's claim that Ps were in breach of the SHA. Subsequently, Ps commenced these proceedings to set aside the Award on the basis that, among other things, the subject matter of the arbitration was not arbitrable. D1 applied for security for costs from Ps under O.23 of the Rules of the High Court (Cap.4A, Sub.Leg.) and the inherent jurisdiction of the court. Ps submitted that the Court had no jurisdiction to order security to be furnished in the setting-aside application. Ps argued that the more specific rules of O.73 of the RHC, which applied to arbitration-related court proceedings, excluded and took precedence over the more general O.23, which dealt with security for costs; and that as D1 had not sought leave to enforce the Award, the Court's power under O.73 r.10A to impose terms as to security was not invoked.

Held, **allowing the application and ordering Ps to provide security for D1's costs, that:**

(1) The Court had jurisdiction to order security to be furnished by Ps under O.23 of the RHC. Order 73 r.10A did not exclude or take precedence over O.23. The RHC applied to proceedings relating to arbitrations, unless O.73 made specific provision which was different to the general rules in which event the specific provisions in O.73 applied. (See paras.5, 18–19.)

(2) O.73 r.10A of the RHC was introduced to empower the court to order security because a debtor applying to set aside an enforcement order made on the application of the creditor who had initiated the proceedings would be a defendant, and security against a plaintiff under O.23 could not apply. There was no distinction between challenges to the enforceability of an award which were determined locally and challenges made to a foreign court for setting aside in the present context. When the Hong Kong Court was the supervisory court of the arbitration, there was more reason for the Court to exercise control and to avoid or minimise the effect of the delay in the resolution of a challenge to the award. Here, Ps were challenging the Award and seeking interference by the Court. Ps were in name and by deed the "plaintiffs" in these proceedings instituted by the originating summons, to which O.23 may apply (*Wisdom Glory Investment Ltd v ADWO Media Holding Ltd* [2022] HKCA 685, *中國機床銷售與技術服務有限公司 v 國晟機電設備有限公司 (Nationsync Electrical and Machinery Equip Corp Ltd)* [2024] HKCFI 958 applied). (See paras.10–11, 21–25.)

(3) It was necessary and just to order security to be furnished by Ps for D1's costs. Ps were ordinarily resident outside Hong Kong. Ps' shareholding in D2 did not constitute assets within Hong Kong which were readily realisable. Ps' challenge in their setting-aside application did not have a high degree of probability of success. Ps never alleged to the Tribunal that the subject matter of the arbitration fell within the scope of national security and was thus not arbitrable, and such failure may well constitute waiver, estoppel, or breach of their duty of good faith. The history of the proceedings also showed that D1 would have difficulties in recovering its costs even if orders were made in its favour. (See paras.29–42.)

Application

This was an application by the first defendant for security of costs from the plaintiffs in their application to set aside an arbitral award.

Ms Valerie Tang, instructed by John CH Suen & Co, for the 1st to 3rd plaintiffs (SA, Y and J) (The 1st to 3rd plaintiffs acted in person since 26 April 2024).

Mr Laurence Li SC and Mr Tony HH Chow, instructed by CL Chow & Macksion Chan, for the 1st defendant (BH).

Legislation mentioned in the judgment

Arbitration Ordinance (Cap.609) ss.3, 3(2)(b), 84, 84(1), 86, 86(1)(f), 86(4), Sch.2, Sch.2 s.7, 7(4), 7(5)

National Security Law of the People's Republic of China [PRC] art.32

Rules of the High Court (Cap.4A, Sub.Leg.) O.1 r.2, O.1 r.2(1), (2), O.5 r.1, O.6, O.11 r.2, O.23, O.23 r.1, O.29, O.73, O.73 rr.1, 7, 10(6), 10A

Cases cited in the judgment

Firm "H" v "W" [2021] HKCFI 68, [2021] HKEC 5281

JJ Agro Industries (P) Ltd (a firm) v Texuna International Ltd [1994] 1 HKLR 89

Soleh Boneh International v Uganda [1993] 2 Lloyd's Rep 208

TK BulkHandling GMBH v Meridian Success International Ltd (HCMP 4765/1998, [1998] HKEC 256)

Wisdom Glory Investment Ltd v ADWO Media Holding Ltd [2022] HKCA 685, [2022] HKEC 1788

X v Jemmy Chien [2019] HKCFI 2172, [2019] HKEC 2953

中國機床銷售與技術服務有限公司 v 國晟機電設備有限公司 (Nationsync Electrical and Machinery Equip Corp Ltd) [2024] HKCFI 958, [2024] HKEC 1281

Other material mentioned in the judgment
Hong Kong Civil Procedure 2024 (Vol.1), para.73/10A

DECISION

Mimmie Chan J

Background

1. This is an application made by the 1st defendant in this action, seeking security from the plaintiffs and a stay of these proceedings until the provision of security. The application is made under O.23 RHC, and the inherent jurisdiction of the Court. The plaintiffs oppose the application on the ground that the Court has no jurisdiction or power to order security, when s.7 of Sch.2 to the Arbitration Ordinance (Cap.609) (**Ordinance**) does not apply to the arbitration, and the Court has no other power under the Ordinance to order security.

2. The 1st plaintiff is a company incorporated in the Netherlands, and the 2nd and 3rd plaintiffs are individuals resident in California, USA. The plaintiffs and the 1st defendant are parties to a shareholders agreement (**SHA**) and partners in a joint venture, holding shares in the 2nd defendant which is a company incorporated in the Cayman Islands. The 1st defendant is also a company incorporated in the British Virgin Islands.

3. The dispute between the parties to the SHA was referred to arbitration in Hong Kong (**Arbitration**), pursuant to an arbitration clause contained in the SHA. The 1st defendant was Claimant, and the plaintiffs and the 2nd defendant were Respondents in the Arbitration. By an interim award dated 21 June 2023 (**Award**), the tribunal allowed the 1st defendant's claims that the plaintiffs were in breach of the SHA, and further allowed the claims for damages made by the Claimant (1st defendant herein) and the 4th Respondent (2nd defendant herein).

4. On 10 October 2023, the plaintiffs commenced these proceedings to set aside the Award, on various grounds including that the subject matter of the Arbitration was on national security within the scope of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong SAR (**NSL**) and the Interpretation by the National People's Congress Standing Committee (**Interpretation**) promulgated on 30 December 2022, and is not capable of being settled by arbitration in Hong Kong; that the arbitral procedure was not in accordance with the parties' agreement; that the plaintiffs were not given the reasonable opportunity to present their case on legal issues relating to national security; and that the Award was in conflict with the public policy of Hong Kong. This prompted the 1st defendant to apply for security

for costs, which application is opposed by the plaintiffs, on the ground that the Court has no power to order security in this case and further, that the plaintiffs have assets in the form of a 13.25% shareholding in the 2nd defendant, and that they undertake not to deal in these shares, such that security is not necessary.

Jurisdiction

5. I do not accept the plaintiffs' submission, that this Court has no jurisdiction to order security to be furnished by them under O.23 RHC.

6. On behalf of the plaintiffs, counsel highlighted the principle and object of the Ordinance as stated in s.3 of the Ordinance, and in particular placed reliance on s.3(2)(b), that the Court shall interfere in the arbitration of a dispute only as expressly provided for in the Ordinance. Counsel submitted that under the Ordinance, the Court *only* has the express power to order a party to give security for the costs of an application to challenge an award on the ground of serious irregularity, or for an appeal to the Court on a question of law — where such remedies are available to a party because Sch.2 of the Ordinance (**Schedule**) applies. In no other case does the Court have power or jurisdiction to order security against a party, and on the plaintiffs' case, to do so would amount to the Court's impermissible interference in the arbitration.

7. The plaintiffs pointed out that the defendants in this case have not yet applied to the Court for leave to enforce the Award pursuant to s.84 of the Ordinance. The plaintiffs therefore do not have to apply to set aside any order of the Court granting leave to enforce the Award, as provided for under O.73 rr.10(6) and 10A RHC. Hence, on the plaintiffs' case, the Court's power under O.73 r.10A to impose terms as to security is ***not*** invoked, as that rule is expressed to apply "where *a debtor* has applied to *set aside an order made under rule 10(4)*" (namely an order granting leave to enforce the award under s.84(1) of the Ordinance).

8. There can be no dispute that the Schedule does not apply to the Arbitration, such that appealing on a question of law is not an avenue open to the parties in this case. The power of the Court to order security which is provided for in s.7(4) and (5) of the Schedule does not apply.

9. The issue in dispute is whether the Court has jurisdiction to order security for the 1st defendant's costs in these proceedings initiated by the plaintiffs to set aside the Award.

10. At the forefront, it has to be recognised that it is the plaintiffs who are challenging the Award and seeking the "interference" by the Court. As counsel for the 1st defendant highlighted, the plaintiffs are the "real attackers".

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.

12. It is correct to say that this is the first occasion of a party challenging the jurisdiction of the Court to order security for costs from a party seeking to set aside an award made in an arbitration which was held in Hong Kong, as opposed to security being sought in a case against a party which opposes enforcement of a Hong Kong award when the other party has obtained leave to enforce the award here. Before the plaintiffs' challenge in this case, the Court has in many other cases, and without disputes raised by any party, ordered security to be furnished both in circumstances when a party opposes enforcement and applies to set aside an order made by the Court for leave to enforce an arbitral award, and in circumstances when a party seeks active remedy and applies to set aside an arbitral award. In considering whether to order such security, the Court has also without disputes being raised by any party, applied the principles set out in *Soleh Boneh v Government of Uganda* [1993] 2 Lloyd's Rep 208.

Does s.86(4) of Ordinance apply?

13. Section 86 of the Ordinance states that enforcement of an award may be refused if the person against whom it is invoked proves one or more of the grounds set out. In a case where a party seeks to oppose enforcement of an award in Hong Kong, one of the grounds which may be invoked under s.86 is that the award has not yet become binding or has been set aside or suspended by a competent authority (s.86(1)(f)). In such a case, if an application for the setting aside or suspension of the award has been made to a competent authority of another jurisdiction, the Court before which enforcement is sought (ie the Hong Kong court) may, if it thinks fit, adjourn the enforcement proceedings, and may order the person against whom enforcement is invoked to give security (under s.86(4) of the Ordinance). The plaintiffs in this case emphasise the fact that (although there is an application to set aside the award, made to the Hong Kong Court as the supervisory court) there is **no** application or necessity to ***adjourn*** the proceedings for enforcement, and contend that there is nothing to trigger the exercise of the Court's power to order security.

14. Counsel for the 1st defendant in this case does not rely on s.86 being applicable to the present case, and so the proper construction of s.86 shall be left to another day.

Does O.73 exclusively apply to the proceedings?

15. Order 1 r.2(1) Rules of the High Court (Cap.4A, Sub.Leg.) (**RHC**) states that the rules shall have effect "in relation to all proceedings in the High Court". Order 1 r.2(2) goes on to state that the RHC shall ***not*** have effect in relation to the proceedings specified: namely, bankruptcy proceedings, proceedings relating to the winding up of companies, proceedings relating to remedies for unfair prejudice to members' interests, non-contentious or common form probate proceedings, proceedings in the Court when acting as a Prize Court, matrimonial proceedings, adoption proceedings and proceedings under the Domestic and Cohabitation Relationships Violence Ordinance. The rest of O.1 r.2 goes on to state that the RHC shall not have effect in relation to any criminal proceedings and election proceedings.

16. Arbitration proceedings are not stated in O.1 r.2, as proceedings in relation to which the RHC do not have effect.

17. Order 73 RHC sets out various rules of procedure in relation to applications, requests or appeals to the Court under the Ordinance. These rules provide for the manner of initiation of applications made under the Ordinance, the hearing of such proceedings, the manner of making applications for interim measures or orders (with express reference to O.29 RHC being applicable, with necessary modifications), the time limits for various applications made under the Ordinance including the manner in which they should be made, and (by r.10A) the terms as to giving security or otherwise which may be imposed by the Court for an application made, specifically, under O.73 r.10(6).

18. As RHC have not been stated in O.1 r.2(2) to have no effect in proceedings relating to arbitration, they apply unless O.73 makes specific provision for a situation, which provision is inconsistent with the general provisions of the RHC. Examples are the use of an originating summons in Form 10 for an application made under the Ordinance (as specifically provided for in O.73 r.1), such that O.6 does not apply; and leave for service out of the jurisdiction of the originating summons which is governed by O.73 r.7, instead of O.11 r.2.

19. As counsel for the plaintiffs argued, the more specific rules prevail over general rules (*lex specialis derogat legi generali*) as a matter of interpretation. However, I cannot agree that O.73 r.10A has excluded and must take precedence over O.23, or that O.73 has excluded the application and operation of other rules of the High Court. In my judgment, RHC apply to proceedings relating to arbitrations, unless O.73 makes specific provision which is different to the general rules in which event the specific provisions in O.73 apply.

20. In support of her argument, counsel for the plaintiffs contended that there is no reason for O.73 to contain a provision under r.10A, for security to be ordered in proceedings relating to arbitration, if O.23 is applicable in any event.

21. Order 73 r.10A was introduced to cure the defect identified by the Court in *JJ Agro Industries (P) Ltd (a firm) v Texuna International Ltd* [1994] 1 HKLR 89, and to empower the Court to order payment into court and to impose other terms, in circumstances where a party (as a respondent) opposes enforcement of an award and seeks to set aside an order granting leave to an applicant to enforce the award, had not applied to the supervisory court to set aside the award, and an adjournment was considered necessary by the Court. The editors of the *HK Civil Procedure* commented at para.73/10A that the rule was to put the Court on the same footing as the powers vested in it by the other relevant sections of the Ordinance. Rule 10A also deals with the anomaly or distinction made by the Court in *TK BulkHandling GMBH v Meridian Success International Ltd* (HCMP 4765/1998, [1998] HKEC 256, 30 November 1998), that there is no jurisdiction of the court to order security under O.23 RHC against the plaintiff/creditor under an arbitral award, as the Court did not consider that the debtor is in truth a "defendant" in any action or proceedings before the Court. In the light of O.5 r.1, which states that civil proceedings in the Court of First Instance may be begun by writ or originating summons, I cannot agree with the observation made by the learned judge in *TK Bulk* that there was no "action or proceedings" simply because the application for leave to enforce an award was made by *ex parte* affidavit, and these observations cannot apply to these proceedings.

22. The reason for the need to have the power expressly provided for in O.73 r.10A is because a debtor applying to set aside an enforcement order made on the application of the creditor who had initiated the proceedings would be a "defendant", and security against a plaintiff under O.23 cannot apply. It is because the situation of the parties in an application under r.10(6) does not fall within O.23, that r.10A was enacted to confer the power on the Court to order security against the debtor defendant seeking to challenge the award. Rule 10A does not exclude the operation of O.23 altogether, in circumstances when it can apply to a proper "plaintiff" in the proceedings. In a case where the debtor takes the initiative of commencing proceedings to set aside the award, such debtor would be the plaintiff and its counterparty, the creditor, is the "defendant" which will be entitled under O.23 to seek security against the plaintiff. Far from restricting the powers of the Court, r.10A confers the additional jurisdiction and power, where none had been provided before under the RHC.

23. In a recent case of *中國機床銷售與技術服務有限公司 v 國晟機電設備有限公司 (Nationsync Electrical and Machinery Equip Corp Ltd)* [2024] HKCFI 958, handed down on 3 April 2024, Deputy High Court Judge Jonathan Wong dismissed the arguments made for the defendant debtor in the proceedings that the grant of security under the principles set out in *Soleh Boneh v Government of Uganda* [1993] 2 Lloyd's Rep 208 are not applicable, and had been wrongly adopted, in cases where a party does not adopt the "active remedy" option of seeking the setting aside of an arbitral award, but instead opposes enforcement when the creditor seeks leave to enforce a Mainland award in Hong Kong. Although the defendant in the case did not assert that the Court lacked jurisdiction to order security, the *Soleh* guidelines or tests in the consideration of ordering security (which have been applied in applications made under O.73 r.10A) were challenged as being wrong in principle.

24. In his judgment, the learned Deputy Judge pointed out that he was bound by the decision of the Court of Appeal in *Wisdom Glory Investment Ltd v ADWO Media Holding Ltd* [2022] HKCA 685, in which the Court of Appeal did apply the *Soleh* guidelines in considering an application for security which was made under O.73 r.10A. In *Wisdom Glory*, security had been ordered by the court at first instance against the debtor which had taken the initiative to apply to the Hong Kong Court to set aside a Hong Kong award, and ***no*** leave to enforce the award had been made ***before*** the setting aside application. These are the same as the facts of the present case. The Court of Appeal in *Wisdom Glory* did ***not*** consider that the court had no jurisdiction to order security at all, and instead affirmed that the *Soleh* guidelines and tests were applicable to the application for security made under r.10A.

25. I agree with the learned Deputy Judge, that there is no point or justification in making a distinction between challenges to the enforceability of an award which are determined locally, ie by the Hong Kong Court as the supervisory court of the Arbitration, and challenges made to a foreign court for setting aside, in the context of whether consideration should be given to ordering security to cater for the consequent delay in the enforcement of the award. When the Hong Kong Court is the supervisory court of the entire Arbitration and the process leading up to the Award, there is more reason for the Court to exercise control and to avoid or minimise the effect of the delay in the resolution of a challenge to the award. I would also add that in ordering security against the debtor which is making the challenge and resisting enforcement of the award, the Court is not imposing or creating a more onerous condition on a creditor seeking to enforce an award pursuant to the New York Convention, compared to the conditions facing a creditor seeking to enforce a domestic award. As emphasised in the earlier

part of this judgment, it is the debtor in this case which is seeking the Court's interference in the arbitration and the enforcement of the award, by actively launching its attack against the award. The plaintiffs in this case are properly and for all purposes in name and by deed the "plaintiff" in proceedings instituted by the Originating Summons, to which O.23 may apply.

Security appropriate under O.23?

26. I have found that O.23 has not been excluded by any express statutory provision of the Ordinance or O.73 itself.

27. There have been many cases in which the Court has, in exercise of its powers under O.23 RHC, ordered security for costs to be provided by a party which either applies to set aside an award, or opposes enforcement of an arbitral award by seeking to set aside enforcement orders made by the court (*X v Jemmy Chien* [2019] HKCFI 2172, *Firm "H" v "W"* [2021] HKCFI 68 being examples).

28. Order 23 r.1 provides that where it appears, on the application of "a defendant to an action or other proceedings in the Court of First Instance", that the plaintiff is ordinarily resident out of the jurisdiction, then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as the Court thinks fit.

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.

30. In the present case, there is no dispute that the plaintiffs are ordinarily resident outside Hong Kong. They argued however that they have assets, comprising their shareholding in the 2nd defendant, which is valued at approximately US$20 million, and they claim that these shares are "real and readily available" to the defendants. The 3rd plaintiff has offered an undertaking not to dispose of or diminish the value of the shares until the final conclusion of these proceedings or further order of the Court.

31. The 2nd defendant is a private company, incorporated in the Cayman Islands. The plaintiffs' shareholding in the 2nd defendant does not constitute assets within the jurisdiction of Hong Kong which are readily realisable or transferable. Transfers of the 2nd defendant's shares are in fact restricted under the Agreement. Moreover, the 1st defendant has pointed out that the 2nd defendant

has been put into liquidation and a winding up order was made against it on 8 February 2024.

32. The 1st defendant also pointed out that the plaintiffs' reference to the 2nd defendant's alleged net assets as at 31 December 2018 is misleading, because the tribunal found that the 2nd defendant had no identifiable assets. The tribunal further found in the Arbitration that by virtue of the plaintiffs' breach, the 2nd defendant has sustained substantial loss and damage.

33. As for the merits of the plaintiffs' claim in these proceedings, the main thrust of their case is that the subject matter of the Arbitration is not arbitrable. Even on a brief consideration of the strength of the plaintiffs' argument, I cannot agree that the plaintiffs have "a high degree of probability of success" as counsel contended.

34. The plaintiffs' case is that neither the Court nor any other institution in Hong Kong has the power to interfere with the duties and functions of the Committee for Safeguarding National Security of the HKSAR (**Committee**) to decide on questions as to whether the national security interests of Hong Kong or the Mainland are involved. The Arbitration dealt with a commercial dispute over a joint venture project to develop a communication satellite, and to launch the satellite into the orbit over Equatorial Africa, with the intention to provide broadcast Internet services to that part of the African continent. The plaintiffs claim that the dispute falls within the scope of "national security", as it touches upon the "safety of the activities, assets and other interests of the Country's outer space" as defined in art.32 of the PRC National Security Law. According to the skeleton submissions of counsel for the plaintiffs, the plaintiffs (as Respondents in the Arbitration) had alleged that the defendants were acting under the control of a PRC state-owned enterprise which in turn has ties with one of the largest military aviation manufacturers on the Mainland, and that the defendants had obtained restricted US satellite technology in violation of US export control laws. The plaintiffs have highlighted the fact that in the Award, the tribunal itself described the core issue of the Arbitration as whether the commercial satellite project which was the subject matter of the dispute infringed US export control laws and regulations.

35. The plaintiffs' complaint appears to be that the tribunal had failed to consider or to give the plaintiffs the opportunity to properly present their case on national security interests, and whether the subject matter of the Arbitration fell within the scope of national security, as a result of the enactment of the NSL and the Interpretation.

36. The 1st defendant's answer to this was simply that the plaintiffs had never made any allegation to the tribunal, that the subject matter of the Arbitration was not arbitrable as a result of the enactment of the NSL and the Interpretation. The NSL was

promulgated on 30 December 2022. The hearing of the Arbitration only commenced in January and February 2023. A claim that the subject matter of the dispute is not capable of settlement by arbitration should have been made at the earliest stage of the submission to arbitration, and certainly by the time of the hearing of the Arbitration in January and February 2023, after the promulgation of the NSL in December 2022. Failure to do so, and failure to draw such an important issue to the attention of the tribunal, not only renders the claim now made incredulous, but may well constitute waiver, estoppel, or breach of a party's duty of good faith, to prevent it from raising the point now.

37. Although the breach of US export control laws was raised by the Respondents in the Arbitration (ie the plaintiffs herein), I have not been referred to any evidence that they had raised national security, or the arbitrability issue, before the tribunal, whether in the pleadings, the evidence or in the course of the hearing before the tribunal in 2023.

38. 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".

39. The 1st defendant has referred to the conduct of the plaintiffs, which was described by the tribunal as "dishonest and egregious". The tribunal had referred to the claim, made by the Respondents in the Arbitration, of infringement of the PRC Prohibition to be "specious". In the Award, the tribunal found that there was no evidence of PRC control of the 2nd defendant, and no export, re-export or transfer of any satellite or related item to any entity acting for and on behalf of a PRC entity.

40. The 1st defendant also relied on the fact that the plaintiffs had failed to comply with costs orders made by the Courts in the US and in the Cayman Islands. On their part, the plaintiffs claimed that some of these costs orders were not made against the plaintiffs directly, but were directed at parties controlled by the plaintiffs. The plaintiffs argued that although there are no existing arrangements between Hong Kong and the United States for reciprocal enforcement, the United States operate a common law system, the 2nd and 3rd plaintiffs are residents of the United States, and their assets can be ascertained and enforced there.

41. On the entirety of the available evidence, it suffices to say that from the history of the proceedings between the parties, it seems to be reasonably clear that the plaintiffs would not be cooperating with the defendants if any costs orders should be made against them for enforcement, and that the 1st defendant would in

reality have difficulties in recovering its costs, even if orders should be made in its favour.

Conclusion and disposition

42. Having considered the plaintiffs' lack of presence and lack of assets in Hong Kong, the merits of their case for setting aside the Award, their conduct as found by the tribunal, and the status of the 2nd defendant, I consider that it would be necessary and just to order security to be furnished by the plaintiffs for the 1st defendant's costs.

43. On a broad-brush approach, the reasonable amount of costs up to the 2 days' substantive hearing of the setting aside application would be HK$2 million. These proceedings are stayed until payment into court of the said amount, or provision of a bank guarantee acceptable to the 1st defendant, is made within 21 days of the handing down of this Decision.

44. The costs of the summons for security are to be paid by the plaintiffs to the 1st defendant, with certificate for counsel, on indemnity basis.

Reported by Ken TC Lee