# Zhong Da Chemical Development Co Ltd v Lanco Industries Ltd
# [2009] SGHC 112

**Case Number** : OS 1546/2008, SUM 266/2009

**Decision Date** : 07 May 2009

**Tribunal/Court** : High Court

**Coram** : Judith Prakash J

**Counsel Name(s)** : Lek Siang Pheng, Tan Teck Wang and Jeannette Lim (Rodyk & Davidson LLP) for the plaintiff; Ang Yong Tong and Linus Ng (Robert Wang & Woo LLC) for the defendant

**Parties** : Zhong Da Chemical Development Co Ltd — Lanco Industries Ltd

*Civil Procedure – Costs – Security – Seller repudiating or breaching agreements to sell to buyer – Buyer successfully commencing arbitration against seller – Seller applying to set aside arbitration award – Buyer applying for security for costs – Whether buyer entitled to security for costs*

7 May 2009

**Judith Prakash J:**

1 The plaintiff herein applied under section 24 of the International Arbitration Act, (Cap. 143A, 2002 Rev Ed) ("IAA"), to set aside an arbitral award on the ground that the making of the award was induced or affected by fraud. The defendant subsequently took out a summons (summons 266 of 2009) asking for, *inter alia*, orders that the plaintiff pay it amounts due under costs orders made in the arbitration proceedings and also for security for costs in the present court proceedings. I dismissed the first part of the application but ordered the plaintiff to provide security for the defendant's costs herein. The plaintiff has appealed. I therefore give my reasons for the grant of security for costs.

**Background**

2 The plaintiff and the defendant are companies incorporated in China and India respectively. By way of two agreements dated 15 January 2004 and 4 February 2004 ("the Agreements"), the plaintiff agreed to sell 30,000 metric tons of low ash metallurgical coke ("coke") to the defendant at US$210 per metric ton. A dispute soon arose between them in relation to the sale and, by 5 March 2004, the defendant took the position that the plaintiff had repudiated or breached the Agreements. Subsequently, the defendant took steps to mitigate its loss by entering into fresh contracts with third parties. In particular, the defendant contracted to purchase 20,990 metric tons of coke from one Arkley Commercial AG ("Arkley") at US$479 per metric ton.

3 On or about 13 December 2004, the defendant commenced arbitration proceedings against the plaintiff at the Singapore International Arbitration Centre ("SIAC") to recover from the plaintiff the damages the defendant had to bear as a result of the plaintiff's repudiation of the Agreements. The plaintiff challenged SIAC's jurisdiction to arbitrate the dispute but the arbitral tribunal dismissed the challenge and awarded costs for the failed jurisdictional challenge to the plaintiff ("the Interim Award"). Hearings of the substantive claim before the arbitral tribunal took place on 5 and 6 December 2005 in Singapore and on 14 November 2006 in Shanghai. On 30 January 2007, the arbitral tribunal decided in favour of the defendant and awarded the defendant damages in the sum of US$5,037,000, party costs and costs of the arbitration ("the Final Award"). The plaintiff did not, thereafter, pay the defendant any part of the amounts awarded.

4 On 11 May 2007, the defendant filed an application at the First Intermediate People's Court of Shanghai Municipality ("the Shanghai Court") for recognition of the Final Award. In response, the plaintiff filed an application against the recognition and enforcement of the Final Award in China. The plaintiff's application was dismissed and the Shanghai Court held that the Final Award could be recognised and enforced in China. Accordingly, the defendant applied to have the Final Award enforced. Pursuant thereto, the defendant successfully seized real properties belonging to the plaintiff and is currently in the process of having their value appraised. By the plaintiff's reckoning, these properties are worth about S$814,000.

5 On 5 December 2008, the plaintiff filed these proceedings in the Singapore High Court to set aside the Final Award, under section 24 of the IAA, on the basis that the defendant had fraudulently induced the making of the Final Award in its favour. According to the affidavit of one Qi Wei Qing, filed on 5 December 2008 and made on behalf of the plaintiff, the defendant had used two invoices to prove that it had bought 20,990 metric tons of coke from Arkley. The invoices stated that the coke was to be delivered from Xingang Port, China to Chennai Port, India by the vessel *Maritime Skill*. However, after the Final Award was made, the plaintiff had obtained documentary and oral evidence that the invoices were fake and that the parties to the sale of the coke to be shipped by the *Maritime Skill* were not Arkley or the defendant but one Shanxi Datuhe, as seller, and one Glencore International AG, as buyer. Furthermore, according to the plaintiff, the new evidence also showed that the coke was not destined for Chennai as asserted by the defendant but for Brazil.

6 The defendant denied the plaintiff's allegations of fraud and asserted that the plaintiff, in initiating the present proceedings, was simply trying to avoid having the Final Award enforced. According to the affidavit, filed on 20 February 2009, of one G D Saini made on behalf of the defendant, the defendant had documentary evidence to prove that the invoices produced before the arbitral tribunal were genuine and that the Final Award was not induced or affected by fraud. The defendant then filed Summons No 266 of 2009.

7 On 30 March 2009, I made, *inter alia*, the following orders with respect to security for costs:

(a) The plaintiff does within 8 weeks give security for the defendant's costs (inclusive of estimated disbursements) for S$75,000 to cover the cost of the hearing but if the hearing stretches beyond one (1) tranche, the defendant may apply for additional security for costs. The security is to be furnished by way of a banker's guarantee on terms acceptable to the defendant issued by a fully licensed bank operating in Singapore or such other method as the defendant in their sole discretion may agree to; and

(b) All further proceedings herein be stayed until security has been duly furnished to the defendant.

**The law**

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 (Cap 322, R 5, 2006 Rev Ed) ("the Rules") which reads:

**Security for costs of action, etc. (O. 23, r. 1)**

1. – (1) Where, on the application of a defendant to an action or other proceeding in the Court,

it appears to the Court –

(a) 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 proceeding as it thinks just.

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 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 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 under the IAA, 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. In support thereof, Mr Lek relied on Lord Mustill's interpretation of s 38 of the English Arbitration Act 1996 as stated in *Commercial Arbitration*, (Butterworths, 2001), at p. 313:

> …the fact that the claimant is resident outside the jurisdiction is not in any circumstances to be regarded as the ground, or even one ground among others, for ordering security for costs…

12 Section 38 of the English Arbitration Act 1996 is reflected in Singapore through section 28(3) of

the Arbitration Act (Cap. 10, 2002 Rev Ed) and section 12(4) of the IAA. The two local provisions read as follows:

**Arbitration Act**

**General powers exercisable by the arbitral tribunal**

**28.** –(3) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (2)(a) shall not be exercised by reason only that the claimant is –

(a) an individual ordinarily resident outside Singapore; or

(b) a corporation or an association incorporated or formed under the law of a country outside Singapore or whose central management and control is exercised outside Singapore.

**International Arbitration Act**

**Powers of arbitral tribunal**

**12.** –(4) The power of the arbitral tribunal to order a claimant to provide security for costs as referred to in subsection (1) (*a*) shall not be exercised by reason only that the claimant is —

(a) an individual ordinarily resident outside Singapore; or

(b) a corporation or an association incorporated or formed under the law of a country outside Singapore, or whose central management and control is exercised outside Singapore.

From a plain reading of these provisions, it would appear that Lord Mustill's proposition that an arbitral tribunal, in deciding whether to order security for costs, should not consider whether a claimant is ordinarily resident outside the jurisdiction has been slightly modified in relation to arbitration proceedings in Singapore. In such cases, residence outside Singapore is not a sufficient factor for the grant of the security. The legislation does not, however, rule out consideration of residence as one of the factors that may affect the decision.

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 (*pace Wishing Star*) 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.

14 In the present case, in my estimation, the additional burden that the defendant had to bear in a case of this kind was fully met by considerations that made it just to order security for the defendant's costs.

**My assessment**

15 In my view, two critical factors weighed in favour of ordering security for the defendant's costs in the present case.

16 First, the plaintiff's conduct with regard to the arbitration proceedings indicated that it had a propensity to resist paying costs orders made against it. In the arbitration proceedings, the arbitral tribunal made two costs awards against the plaintiff, once in the Interim Award and again in the Final Award. Not only did the plaintiff not pay the Interim Award, but it also did not comply with SIAC's requests for it to contribute towards the costs of the arbitral proceedings during the proceedings. The plaintiff went further to oppose an application by the defendant to enforce the Final Award before the Shanghai Court. After the plaintiff's application was dismissed, the plaintiff still failed to comply with the Final Award or to pay the amount due under the Interim Award. The defendant had to spend much time and incur additional expense in order to finally have certain properties belonging to the plaintiff seized and appraised.

17 It seemed to me that the plaintiff's continued refusal to pay the costs awards made by the arbitral tribunal was unreasonable and contumelious. Costs, once awarded against a party, should be paid expeditiously and the party in whose favour the award was made should not be required to resort to enforcement proceedings in order to obtain payment. A party against whom costs were awarded should not be allowed to delay or, worse, prevent payment of costs simply because it disagrees with the making of the award.

18 In the present case, even if the plaintiff subsequently had grounds to believe that the Final Award was procured by fraud, there was no valid reason for it not to pay the Interim Award. The plaintiff did not dispute that the Interim Award was validly made. The costs ordered thereby amounted to only US$5,000 and these remained outstanding from the date of the Interim Award (21 September 2005) to the date of this hearing (30 March 2009), a period of some 42 months. It was also conspicuous that all affidavits filed in on behalf of the plaintiff did not respond to the defendant's allegation that the plaintiff was purposely making it difficult for the defendant to recover the costs of the arbitral proceedings. In the circumstances, I had to conclude that there was a high possibility that the plaintiff would fail to pay any costs orders made against it in the present proceedings.

19 Second, to compound the problem, it appeared that it will not be easy for the defendant to enforce, in China, any costs order that it might receive, in Singapore, in its favour. In this regard, I agreed with the position taken by Prof Jeffrey Pinsler in his book, *Singapore Court Practice 2006* (LexisNexis: 2006) (at p. 596), as follows:

> Ideally, the defendant should not be required to experience the inconvenience and expense of enforcing his judgment in a different jurisdiction. Nor should his entitlement to costs be delayed by the process of enforcement and lengthy procedures which might operate in the foreign jurisdiction. In these circumstances, the defendant would certainly be in a more unfavourable position than if the plaintiff had provided the necessary funds to cover the defendant's costs. There is also the risk that enforcement in the foreign forum might be successfully challenged so that the defendant is not only deprived of his costs, but incurs additional expense (on the process for reciprocal enforcement) without gain.

> Accordingly, the availability of the process for the enforcement of judgments in the plaintiff's jurisdiction – even when there exists a reciprocal arrangement for the enforcement of judgments between that jurisdiction and the jurisdiction of the suit – should never be a conclusive factor against the provision of security.

In *Ooi Ching Ling Shirley v Just Gems Inc*, [2002] 3 SLR 538, the Court of Appeal allowed an application for security for costs, in part because orders of the Singapore court were not enforceable in the USA as there was no arrangement for reciprocal enforcement of judgment between Singapore and USA.

20 Similarly, there was no bilateral or international treaty or convention between China and Singapore allowing for reciprocal recognition and enforcement of judgments between China and Singapore. An opinion rendered by a Chinese law firm, Bao Rui Legal, acting on instructions by the counsel for the plaintiff, stated the manner in which a judgment in Singapore may be enforced by the defendant in China, as follows:

> (1) A Singapore High Court judgment or order is not directly enforceable in the PRC because there is no bilateral or international treaty/convention singed [*sic*] by the PRC and Singapore or to which both countries are members for the mutual recognition and enforcement of judgments or orders made by courts of each other and there has been no reciprocity practice in the recognition and enforcement of judgments or orders between each other.
>
> However, a Singapore High Court judgment or order can be indirectly enforced by starting a legal action before the PRC courts.
>
> (2) As stated above the Applicant can start a legal action before the PRC courts. The PRC courts will give a judgment or order in accordance with the PRC laws based on the facts stated in the Singapore High Court judgment or order. If the judgment or order of the PRC courts is in favour of the Applicant, the Applicant can hold such a judgment or order to apply for enforcement in the PRC courts.

This view accorded, in the main, with the opinion rendered by Chinese solicitors, Duan & Duan, instructed by counsel for the defendant. Duan & Duan opined as follows:

> Therefore, there is no legal ground for any judgment or order made by any courts in Singapore to be enforced in China through any courts in China. Even if [the plaintiff's] application is dismissed by Singapore High Court and [the plaintiff] is ordered by the Court to pay legal costs to [the defendant], [the defendant] will not have legitimate right to apply for enforcement of that judgment or order by PRC Courts…
>
> [The defendant] could raise another lawsuit in a competent court of PRC for the legal costs issue with [the plaintiff], and this lawsuit may be accepted by that court. However, this method cannot be deemed as indirect enforcement under Chinese law.

21 As I understood the two opinions, any judgment made by the Singapore court could not be enforced in China. In order to obtain payment of any costs order, the defendant would have to start a case regarding the costs issue in China. If, by applying the facts of the case to Chinese law, the Chinese court comes to the conclusion that the plaintiff should pay the defendant's costs, the defendant will then be able to apply for enforcement of the Chinese judgement in China. While Bao Rui Legal tried to couch this method of obtaining payment for costs as 'indirect enforcement', this was, in my view, no enforcement of any Singapore judgment at all. In essence, the defendant would have to

have the costs issue retried in China. Any judgment as to costs awarded in favour of the defendant in Singapore would be, for all intents and purposes, a paper judgment.

22 Mr Lek pointed out that, by the plaintiff's estimation, the defendant had already seized assets worth S$814,000 to enforce the Final Award. It was suggested that this demonstrated that the defendant would be able to recover any costs awarded to the defendant by the Singapore court. I did not accept that argument. First, the seizure was made in relation to an arbitral award, not a Singapore court judgment. The opinions rendered by the Chinese lawyers suggested that the Chinese court would be very unlikely to recognise or enforce a Singapore court judgment directly like the Shanghai Court did for the arbitral award. It is significant that China is a party to the 1958 New York Convention on the Registration and Enforcement of Foreign Arbitral Awards whilst, as previously stated, there is no such treaty allowing enforcement of Singapore judgments. Second, the direct enforcement of the arbitral award took close to two years (and indeed the process has not yet ended). Doubtless, even if a direct enforcement of a Singapore court judgment were possible, it would take just as long.

23 For the above reasons, I decided that it was just to grant the defendant's application for security for costs. Counsel for both parties urged me to take into account the merits of the plaintiff's case in the present suit. However, the merits of the plaintiff's case were only relevant if it could be demonstrated that there was a very high probability that the plaintiff would or would not succeed: see *Porzelack KG v Porzelack (UK) Ltd*, [1987] 1 WLR 420 at 423. I was not of the view that this was so in the present case. Although cognisant that costs of defending the case are likely to be high as all relevant evidence is outside the jurisdiction and has to be brought here, I was of the view that the requested sum of S$100,000 as security for costs was excessive and the suggested 14 days for furnishing of such security too short. Accordingly, I ordered security for costs in the sum of S$75,000 to be paid within 8 weeks instead.

**Unless order**

24 In addition to a stay of the plaintiff's action, the defendant also prayed for the action to be struck out if the order with regard to security for costs was not complied with. I did not agree that an unless order was appropriate at the present time. In *Syed Mohamed Abdul Muthaliff and Another v Arjan Bisham Chotrani*, [1999] 1 SLR 750, the Court of Appeal approved of Ward LJ's views in *Hytec Information Systems Ltd v Coventry City Council*, [1997] 1 WLR 1666, that "[a]n unless order is an order of last resort. It is not made unless there is a history of failure to comply with other orders."

25 I was not of the opinion that the plaintiff had failed to comply with other court orders in the present case. The plaintiff may have made it difficult for the defendant to enforce the arbitral award but the plaintiff had not failed to comply with any court order yet. Hence, an unless order was not appropriate here.