CACV 31/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 31 OF 2011

(ON APPEAL FROM HCCT NO 45 of 2009)

BETWEEN

SHANDONG HONGRI ACRON CHEMICAL JOINT STOCK COMPANY LIMITED	Appellant/ Creditor
and	
PETROCHINA INTERNATIONAL (HONG KONG) CORPORATION LIMITED	Respondent/ Debtor

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Before : Hon Cheung CJHC, Kwan JA and Lam J in Court

Date of Hearing : 13 July 2011

Date of Judgment : 25 July 2011

J U D G M E N T

Hon Cheung CJHC:

Facts

1. This is an appeal from the order of Saunders J dated 25 January 2011 relating to an application to enforce an arbitral award dated 21 September 2009.

2. The Applicant, Shandong Hongri Acron Chemical Joint Stock Company Limited, a company incorporated in the Mainland, carries on business as a manufacturer of fertilizers. The Respondent, Petrochina International (Hong Kong) Corporation Limited, a local company, is a supplier of chemical products and commodities. The parties entered into a contract dated 4 July 2008 for the supply of lump sulphur with defined specifications. A total of 3,937.448 tonnes of sulphur were supplied under the contract, and USD3,051,522.20 was paid as purchase price. The Applicant accepted and used 126.87 tonnes but rejected the rest (3,810.578 tonnes) as being of the wrong specifications. It claimed for the return of the balance purchase price in the sum of USD2,953,198 in respect of the rejected sulphur.

3. Pursuant to an arbitration clause in the contract, the parties' dispute was heard by an arbitral tribunal of the China International Economic and Trade Arbitration Commission ("CIETAC") in Beijing. By an arbitral award dated 21 September 2009 given by the majority of the Arbitral Tribunal, the Tribunal found in favour of the Applicant and made the following awards:

> "(1) The Applicant shall return 3,810.578 tonnes of sulphur to the Respondent.

(2) The Respondent shall return USD2,953,198 (being the payment received for the goods) to the Applicant.

(3) The Respondent shall pay RMB11,126.18 (converted from USD1,624.26) as damages, the amount being insurance premium paid by the Applicant.

(4) The Respondent shall indemnify the Applicant's costs incurred on the relevant goods under the Sales/Purchase Contract at the destination port, which included 14 expenses such as 'service fees', in the amount of RMB350,002.58 (calculated up to December 2008).

(5) The Respondent shall pay an examination and certification fee to the Applicant in the amount of RMB65,400.00 as damages.

(6) The costs of this arbitration is RMB347,372. The Respondent shall bear 70% of the costs (it being RMB243,160.4), and the Applicant shall bear 30% of the costs (it being RMB104,211.6). As the Applicant has already prepaid the arbitration fee in full, the Respondent shall reimburse the Applicant the sum of RMB243,160.4.

(7) Other claims made by the Applicant in the arbitration are dismissed.

The sums mentioned in (2), (3), (4), (5) and (6) above, which are payable to the Applicant, shall be fully paid by the Respondent to the Applicant within 30 days from the date of this Award. Should payment be made after the deadline, interest shall be added in accordance with the law.

This is the final award, and is effective on the date when the award is made." (English translation)

4. After the arbitral award was made, the parties could not agree on the inspection and return of the sulphur still in the possession of the Applicant. The Respondent took the stance that repayment of the balance purchase price ordered under paragraph (2) of the arbitral award and payment of other sums ordered were conditional upon the return of the

rejected sulphur to the Respondent "in the same status and quality" as and when the same was delivered to the Applicant.

5. The Applicant disagreed and on 17November 2009, applied for leave to enforce paragraphs (2) to (6) of the arbitral award in Hong Kong.

6. This was opposed by the Respondent, who in due course also applied for leave to enforce paragraph (1) of the award in Hong Kong. Saunders J was seized of the matter as well as a number of interlocutory applications made by the parties respectively. In substance, the Respondent argued that repayment of the balance purchase price and payment of the other sums were conditional upon the return of the rejected sulphur. The Respondent relied on the arbitral award itself as well as the nature of the dispute between the parties and of the awards in support of its contention. Further, the Respondent relied on two letters from the CIETAC Secretariat dated 18 November 2009 and 20 November 2009 and a third letter from the Arbitral Tribunal dated 30 March 2010 (collectively "the CIETAC letters"), which the Respondent claimed were additional/supplemental awards made by the Arbitral Tribunal, in support of its argument. The three CIETAC letters suggested that the Respondent's understanding of the position was the correct one (see below).

7. After eleven hearings, Saunders J handed down a Ruling on 25 January 2011. The Judge accepted the Respondent's argument that under the arbitral award, the obligation of the Respondent to make payment of the sums awarded to the Applicant was not "concurrent" with

(used in the sense of "independent of") the obligation of the Applicant to return the sulphur, but was subsequent to, and conditional upon, due performance of that obligation. However, the Judge did not base his decision on the three CIETAC letters. He found that they did not constitute additional or supplemental awards by the Arbitral Tribunal, and in any event, so far as the second and third letters were concerned, they were issued without affording the Applicant any opportunity to be heard.

8. Paragraph 1 of the sealed Order of the Judge gave leave to the Respondent to enforce paragraph (1) of the arbitral award relating to the return of the sulphur. Whilst the Ruling was silent on the matter, paragraph 2 of the Order ordered that the Applicant do forthwith return to the Respondent the original 3,810.578 tonnes of sulphur "in the same status and quality" as and when the same were received by the Applicant. Paragraphs 3 and 4 of the Order gave leave to the Applicant to enforce paragraphs (2) to (6) of the arbitral award but the judgment so entered shall require payment of the various sums awarded in paragraphs (2) to (6) only "upon due performance" of the Applicant's obligation to return the sulphur in the manner described above.

9. From that Ruling and Order, the Applicant appeals to this Court.

General principles

10. Section 2GG(1) of the old Arbitration Ordinance (Cap. 341) (which continues to apply to arbitrations commenced before 1 June 2011) provides that :

> "An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the

> same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction."

11. As the majority of the Court of Final Appeal in *Democratic Republic of the Congo v FG Hemisphere Associates LLC*, FACV 5-7/2010, 8 June 2010, a case concerned with state immunity, recognized, there are two different stages in the enforcement of an arbitral award. That is, the recognition stage at which an award is converted into a judgment and the execution stage at which the judgment is enforced :

> "382. An application for the grant of leave to enforce the award, often referred to as the 'recognition' phase of enforcement, therefore involves discretionary adjudicative proceedings in which the impleaded State may claim state immunity.
>
> 383. It is furthermore clear, as stated above, that even where the recognition proceedings are successful, when the applicant subsequently seeks to execute the award (now treated like a judgment of the court), the impleaded State has a further right to object to execution against the targeted property on the ground of state immunity. The parties have jointly requested the Court to focus only on the recognition proceedings, leaving aside questions of execution."

12. Furthermore, at the recognition stage, the court's task is to decide whether leave should be granted to "enter judgment in terms of the award, order or direction". The court respects the plain intent behind the relevant provisions to make awards to which they apply enforceable with ease, subject to the narrowly confined exceptions, "almost as a matter of administrative procedure" : *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2007] 2 Lloyd's Rep 588, para 59. As has been pointed out by Gross J in *Norsk Hydro Asa v State Property Fund of Ukraine* [2002] EWHC 2102 (Comm), paras 17 to 19, there is an important policy interest in ensuring the effective and speedy enforcement of international arbitration awards;

the corollary, however, is that the task of the enforcing court should be "as mechanistic as possible". The enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitral tribunal or second-guess its intention. Therefore, under section 2GG(1) if an award is entered as a judgment then it has to be entered "in terms of the award" : *Walker v Rowe* [2000] 1 Lloyd's Rep 116, 121.

13. These principles, advanced forcefully by Ms Teresa Cheng SC, Mr Adrian Lai with her, for the Applicant, have indeed been followed in this jurisdiction, a jurisdiction which, like many other jurisdictions, adopts a "pro-arbitration" approach. See, for instance, *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 4 HKLRD 972, paras 46-47 (Reyes J); affirmed on appeal : [2009] 4 HKLRD 353, para 28. This is not to say that no practical difficulties can arise or may have to be dealt with by the court in the execution of the arbitral award as a judgment. Practical issues may arise in executing the judgment. However, as a rule, those issues are to be resolved, if necessary, only at the execution stage : *Xiamen Xinjingdi*, paras 128-131 (Reyes J).

Arbitral award imposes no condition precedent

14. Bearing in mind these general principles, which are not really disputed by Mr Peter Ng SC for the Respondent, one turns to the arbitral award in the present case. I have extracted the dispositive part of the arbitral award. Putting aside the CIETAC letters for the time being, it is plain that the award does *not* say that the payment obligations in paragraphs (2) to (6) are conditional or dependent on paragraph (1) (return of the sulphur). It is true that the award gives the Respondent 30 days after the making of the award to perform paragraphs (2) to (6). It is also true

that whilst the award does not impose any time limit for the performance of paragraph (1), Article 49(1) of the CIETAC Arbitration Rules provides that in such an event the parties shall execute the arbitral award "immediately". Yet, it does not follow that performance of paragraph (1) by the Applicant is a condition precedent to the Respondent's performance of paragraphs (2) to (6).

15. Plainly, the award does not say so. Nor does Article 49(1), or indeed any other rules, in the CIETAC Arbitration Rules.

16. Therefore, in the context of enforcing paragraphs (2) to (6) by means of entering a judgment "in terms of the award", there is no question of imposing a delivery condition in terms of paragraph (1) to the payment obligations under paragraphs (2) to (6). To do otherwise would be to alter, rather than to enforce, the award, something that the enforcement court is not entitled to do.

17. Mr Ng argues that the nature of the obligations created under paragraphs (1) and (2) respectively, namely, return of the remaining sulphur following rejection and repayment of the corresponding price previously paid, indicates that the respective obligations are not independent ones. Paragraphs (1) and (2) of the award deal with a restitution situation and seek to restore the matter to its original status.

18. The law of restitution may vary from one jurisdiction to another. It is for the Arbitral Tribunal seized of the arbitration to apply the applicable law. So far as Hong Kong as the enforcement jurisdiction is concerned, it should adopt as mechanistic approach as possible, and should not second-guess the intention of the Arbitral Tribunal.

19. Moreover, even if one were to assume that return of the goods and repayment of the price already paid are not mutually independent of each other, still it does not follow that the respective awards requiring the buyer to return the rejected goods and the seller to repay the price received must be conditional on each other. It is perfectly possible for a tribunal, or for that matter, a court, to order respectively the buyer to return the rejected goods and the seller to repay the price received, failing which the seller may seek enforcement of the return obligation from the court or, as the case may be, the buyer may apply to court to execute the award/order for repayment against the seller who has failed to comply with the same. One must not confuse rights and obligations under the law of restitution with awards and orders as means to give effect to those substantive rights and obligations.

20. It is therefore dangerous and indeed wrong to go behind an arbitral award and get embroiled in the underlying dispute between the parties or an arbitral tribunal's reasoning for its decision. Put another way, this case illustrates the importance of adhering to the mechanistic approach at the recognition stage.

21. By the same token, there is no justification for imposing the further condition that the 3,810.578 tonnes of sulphur must be returned "in the same status and quality as and when the same were received" by the Applicant to the payment obligations under paragraphs (2) to (6) of the award. Even under Hong Kong law, the court adopts a very flexible and practical approach in a restitution situation, particularly when the subject matter to be returned is liable to change over time. Any practical difficulties arising should be dealt with, where necessary, at the execution

stage at which the judgment is executed. There is no basis for imposing an inflexible condition precedent at the recognition stage.

The CIETAC letters

22. Mr Ng prays in aid the three CIETAC letters. Senior Counsel essentially argues that the three letters are or amount to additional or supplemental awards made by the Arbitral Tribunal, and they form an integral part of the original arbitral award. To fully understand Mr Ng's argument, it is necessary to outline the events leading to the issue of these three letters and the underlying regulatory regime.

23. Article 56 of the Arbitration Law of the Peoples' Republic of China provides that :

> "對裁決書中的文字、計算錯誤或者仲裁庭已經裁決但在裁決書中遺漏的事項，仲裁庭應當補正;當事人自收到裁決書之日起三十日內，可以請求仲裁庭補正。"
>
> "Where a clerical or calculation error is contained in the award or certain matter is omitted from the award after the decision is made by the arbitration tribunal, the arbitration tribunal must make a supplement or rectification; a party to the arbitration may, within 30 days of the receipt of the award, request the arbitration tribunal to make a supplement or rectification." (English translation)

24. Article 48 of the CIETAC Arbitration Rules reads (in English and in Chinese – both are official versions) :

> "**Article 48 Additional Award**
>
> Within thirty (30) days from the date on which the arbitral award is received, either party may request the arbitral tribunal in writing for an additional award on any claim or counterclaim which was advanced in the arbitration proceedings but was omitted from the award. If such omission does exist, the arbitral tribunal shall make an additional award within thirty (30) days from the date of receipt of the written request. The arbitral tribunal may also make an additional award on its own initiative within a reasonable period of

> time after the arbitral award is issued. Such additional award shall form a part of the arbitral award previously rendered."
>
> "第四十八條　補充裁決
>
> 如果裁決有漏裁事項，任何一方當事人可以在收到裁決書之日起 30 天內以書面形式請求仲裁庭就裁決中漏裁的仲裁事項作出補充裁決;如確有漏裁事項，仲裁庭應在收到上述書面申請之日起 30 天內作出補充裁決。仲裁庭也可以在發出裁決書後的合理時間內自行作出補充裁決。該補充裁決構成原裁決書的一部分。"

25. Furthermore, Article 43(3) and (6) of the CIETAC Arbitration Rules stipulate that the CIETAC stamp shall be affixed to the award and the arbitral award shall be signed by a majority of arbitrators respectively.

26. As mentioned, the arbitral award was dated 21 September 2009. On 9 October 2009, the Respondent's Chinese lawyers applied under Article 48 of the CIETAC Arbitration Rules to the Arbitral Tribunal to make a supplemental award to the effect that the Applicant had to return the rejected sulphur in its original status and quality to the Respondent, failing which the Respondent would have no obligation to make any payment awarded under paragraphs (2) to (6) of the award.

27. The Respondent did not copy its application to the Applicant. However, CIETAC did so on 19 October 2009. On 22 October 2009, the Applicant's Chinese lawyers submitted to the Tribunal its written objections to the application.

28. On 17 November 2009, the Applicant's lawyers in Hong Kong applied *ex parte* to the court for leave to enforce paragraphs (2) to (6) of the arbitral award.

29. On the following day, the CIETAC Secretariat issued the following letter (English translation):

"CHINA INTRNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

(2009)中國貿仲京字第 020486 號

Dispute arising from a Sales/Purchase Contract of Sulphur (Case No. G20080536)

Applicant: Shandong Hongri Acron Chemical Joint Stock Company Limited
Arbitration Agents: Zhang Qikun, Zhang Hongwei, Qiao Dongsheng, Sun Shunli

Respondent: PetroChina International (Hong Kong) Corporation Limited
Arbitration Agents: Gao Yifeng, Jiang Jingye

In relation to the arbitration of the captioned dispute, we acknowledge the receipt of the Respondent's 'Application for Supplementary Award', which was sent to us on 12th October 2009. We also acknowledge the receipt of the 'Opposition to the Respondent's Application for Supplementary Award', in which the Applicant commented on the said application.

The arbitral tribunal holds the view that the rulings on the return of the goods and the return of the payment for the goods in this case is actually the result of the termination of the disputed contract. This is a restoration of the subject matter to its original condition under Article 97 of the Contract Law. The Respondent brought up the issue of the time limits for the compliance with the first item of the award and the second to sixth items of the award. According to Article 49 of the Arbitration Regulations, the first item of the award regarding the return of goods should be carried out immediately after the arbitral award comes into effect. The time limit for the compliance with this matter had not been indicated in the award previously. Regarding the second to the sixth items of the award, the obligation to make the payments should be discharged within the period indicated in the arbitral award, that is, within 30 days from the date of the arbitral award.

Notice of the above matters is hereby given to the parties.

18th November 2009

Enclosure: as stated

[Stamp mark of the CIETAC Secretariat]"

30. By a letter dated 19 November 2009, the Respondent's Chinese lawyers wrote to the Tribunal again. The material part of the letter reads (English translation) :

> "We acknowledge receipt of CIETAC Beijing Document No. 020486 of 2009 issued by the Arbitration Commission on 18 November 2009 with regard to the application for additional award filed by the Respondent in the above-mentioned case, PetroChina International (Hong Kong) Corporation Limited.
>
> Based on the aforesaid document issued by the Arbitration Commission, it is the understanding of Respondent PetroChina International (Hong Kong) Corporation Limited that the Arbitration Tribunal interprets CIETAC Beijing Arbitral Award No. 0305 of 2009 as follows: Applicant Shandong Hongri Acron Chemical Joint Stock Company, Ltd. and Respondent PetroChina International (Hong Kong) Corporation Limited shall first execute item (i) of the Award; after completing the full execution of item (i) of the Award, the parties shall continue to execute items (ii) through (vi) of the Award.
>
> We ask the Arbitration Commission and the Arbitration Tribunal kindly to confirm our understanding by replying to this letter."

31. Neither the Respondent nor CIETAC copied this letter to the Applicant. Rather, on 20 November 2009, the CIETAC Secretariat issued its second letter (English translation):

> **"CHINA INTRNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION**
>
> (2009)中國貿仲京字第 022143 號
>
> **Dispute arising from a Sales/Purchase Contract of Sulphur (Case No. G20080536)**
>
> **Applicant:** Shandong Hongri Acron Chemical Joint Stock Company Limited

Arbitration Agents: Zhang Qikun, Zhang Hongwei, Qiao Dongsheng, Sun Shunli

Respondent: PetroChina International (Hong Kong) Corporation Limited
Arbitration Agents: Gao Yifeng, Jiang Jingye

In relation to the arbitration of the captioned dispute, we acknowledge the receipt of a faxed letter from the Respondent to us on 20th November 2009. In that letter, the Respondent requested us to clarify the sequence of compliance with the award items in the arbitral award numbered 0305 of this case.

We refer to our letter numbered 020486. Regarding the relationship between the return of sulphur and the return of the payment for the goods as stated in the arbitral award numbered 0305 of this case, the arbitral tribunal is of the view that if the Applicant fails to return to the Respondent the goods under the disputed contract in this case at the status when the goods were originally received, then the Applicant does not have the right to demand the return of the payment for the goods from the Respondent.

Notice of the above matters is hereby given to the parties.

20th November 2009

Enclosure: as stated

[Stamp mark of the CIETAC Secretariat]"

32. On 24 March 2010, the Respondent's Chinese lawyers wrote to CIETAC asking the latter to confirm that the two previous letters were supplemental awards to the original award, binding on the parties. This letter was prompted, apparently, by an argument in the proceedings below that the two earlier letters only came from the CIETAC Secretariat, rather than the Arbitral Tribunal.

33. Again, neither the Respondent nor CIETAC copied this last letter to the Applicant, who remained ignorant of it.

34. On 30 March 2010, a third letter was issued (English translation) :

> " (2009) China Mao Zong Jin Zi No. 005046
>
> **Re: G20080536 Dispute arising from a Sales/Purchase Contract of Sulphur**
>
> **Applicant** Shandong Hongri Acron Chemical Joint Stock Company Limited
> **Agents for the Arbitration** Zhang Qikun, Zhang Hongwei, Qiao Dongsheng, Sun Shunli
>
> **Respondent** PetroChina International (Hong Kong) Corporation Limited
> **Agents for the Arbitration** Gao Yifeng, Jiang Jingye
>
> In relation to the arbitration proceedings of the captioned dispute, we confirm having received and forwarded a copy of the Respondent's letter received by this Commission on 26 March 2010 to the Applicant. In the said letter, the Respondent requested this Commission to specify clearly whether the Letter No. 020486 and the Letter No. 022143 constituted supplementary awards which are binding on both parties.
>
> The Arbitral Tribunal confirms that the Letter No. 020486 and the Letter No. 022143 as mentioned above are supplementary explanations of the Arbitral Award of the arbitration proceedings No. 020080536 and form part of the said Arbitration Award.
>
> For your attention.
>
> Chief Arbitrator: [signature]
> Arbitrator: [signature]
>
> 30th March 2010
> [Stamp mark of the CIETAC Secretariat]"

Supplemental awards?

35. As mentioned, Mr Ng relies on these three letters to say that the payment obligations created under paragraphs (2) to (6) of the original arbitral award are qualified by two conditions precedent, that is, return of the rejected sulphur in its original status and quality.

36. Mr Ng does not dispute that as a general principle, an arbitral tribunal becomes *functus officio* after publication of the award. It has no inherent jurisdiction to vary the final and binding award it has published. He nonetheless argues that the Tribunal has jurisdiction to issue the three letters by way of supplemental awards pursuant to Article 56 of the Arbitration Law and/or Article 48 of the CIETAC Arbitration Rules.

37. Mr Ng's reliance on Article 56 of the Arbitration Law is, with respect, misplaced. Amongst other things (which are not relevant), Article 56 deals with the situation where the Tribunal has reached a decision on a particular matter or issue uder arbitration but has omitted or otherwise failed to set out its decision thereon in the award. This is to be contrasted with the situation catered for under Article 48 of the CIETAC Arbitration Rules. The relevant situation dealt with under Article 48 is where the Tribunal has omitted or failed to deal with and decide upon a matter or issue under arbitration at all. Therefore, the two Articles deal with totally different and indeed mutually exclusive scenarios, and Mr Ng cannot rely on both at the same time.

38. On the materials available, plainly, one is not concerned with the former situation covered by Article 56. There is no evidence to suggest that the Arbitral Tribunal has dealt with and decided on the suggested

relationship between the payment obligations imposed under paragraphs (2) to (6) of the arbitral award and the prior return of the rejected sulphur in its original status and quality, but has somehow failed to set its decision out in the arbitral award published.

39. Furthermore, all correspondence between the parties or the Respondent on the one part and CIETAC on the other referred only to Article 48 of the CIETAC Arbitration Rules, but not Article 56 of the Arbitration Law.

40. Turning to Article 48 of the CIETAC Arbitration Rules, one does find a Chinese and an English version of the same rule; both are, we are given to understand, authentic versions. The Chinese version refers to "漏裁事項" whereas the English version is more informative : "any claim or counterclaim which was advanced in the arbitration proceedings but was omitted from the award".

41. In my view, given that both versions are authentic, it is reasonable to read the two together, with the more elaborate English version informing the proper understanding of the more succinct Chinese version. If this be the correct approach, it is immediately apparent that the present case does not fall within Article 48. It is common ground that the inter-relationship, if any, between the return of the rejected goods and the payment obligations was never raised as a claim, counterclaim or even as an issue before the Arbitral Tribunal prior to the publication of the award. It was not "a claim or counterclaim which was advanced in the arbitration proceedings but was omitted from the award".

42. In fact, even if one were to focus on the Chinese version only, it is difficult to turn a matter that had never been raised before the Tribunal during the proceedings as one that the Tribunal had "omitted to arbitrate on", which is what "漏裁" suggests literally.

43. In any event, even assuming that Article 48 applies to the present situation, Mr Ng's reliance on Article 48 and the three letters is still fraught with difficulties.

44. First, with the exception of the original application for a supplemental award under Article 48 and the first letter, everything else was done out of time. Article 48 requires an application to be made within 30 days after the making of the award, and the additional or supplemental award to be made within 30 days from the date of receipt of the application. Based on the chronology of events given above, it is clear that both the second and third letters were issued out of time. As regards the first letter, by itself it is insufficient for Mr Ng's purpose, as it simply refers to Article 49 of the Arbitration Rules and does not say that the payment obligations under paragraphs (2) to (6) are conditional on compliance with the return obligation under paragraph (1), not to mention the further condition that the sulphur shall be returned in the same status and quality. It is plain that the second letter is a much more important letter from the Respondent's perspective. However, it is equally plain that it was issued out of time.

45. Secondly, both the first and second letters were actually issued by the CIETAC Secretariat. They were not signed by anybody but the stamp of the Secretariat was affixed to each of them. This falls foul of the

requirement under Article 43 of the CIETAC Arbitration Rules which requires the stamp of CIETAC to be affixed to the award and the award to be signed by a majority of arbitrators. The third letter was obviously an attempt to rectify these defects. At best, the third letter, when read together with the first and second, might be taken to mean that an additional or supplemental award was eventually made by the Tribunal on 30 March 2010, the date of the third letter. One could read the third letter as incorporating the contents of the first and second letters. But then the third letter was issued way out of time. Equally fatally, whilst it was signed by a majority of arbitrators, CIETAC's stamp was not affixed to it – rather, one still finds the stamp mark of the CIETAC Secretariat on this letter.

46. Thirdly and even more fundamentally, as mentioned, apart from the first letter, the Applicant never had an opportunity to make submissions to the Arbitral Tribunal before the second and third letters were issued. Given the importance of the subject matter concerned, it was a gross breach of the rules of natural justice. The Applicant never had sight of the two letters dated 19 November 2009 and 24 March 2010 which led to the issue of the second and third letters.

47. Mr Ng seeks to overcome the time point by arguing that Article 48 permits the Arbitral Tribunal, on its own initiative, to make an additional award "within a reasonable period of time after the arbitral award is issued".

48. This argument must be rejected. First, it is plain from the three letters and the correspondence leading to the same that the three

letters were all issued in response to requests made by the Respondent. They were not issued by the Arbitral Tribunal "on its own initiative".

49. Secondly, if the second and/or third letters were indeed issued by the Arbitral Tribunal "on its own initiative", it would only make the breach of the rules of natural justice in the present case even more serious. If the Tribunal was thinking of issuing a supplemental award in the form of the second or third letter "on its own initiative", it ought to have afforded the Applicant an opportunity to be heard. Matters that no doubt the Applicant, if given such opportunity, would have addressed the Tribunal on would include, amongst other things, whether the Tribunal ought to do so under Article 48, whether the period of reasonable time had already lapsed by then, and the prejudice to the Applicant in view of the fact that enforcement proceedings had already been commenced in Hong Kong.

50. As a last attempt to save the three letters, Mr Ng argues that as the enforcement court, the court in Hong Kong must not usurp the function of the supervising court in Beijing. All questions about the validity of the three letters as supplemental awards should have been dealt with in Beijing. The local court should accept the three letters as supplemental awards at their face value.

51. There is of course a distinction between the role of the supervising court and that of the enforcement court. That has been clearly explained by the Court of Final Appeal in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136–137, in the context of resisting enforcement on the "contrary to public policy" ground under section 44(3) of the old Arbitration Ordinance.

52. Admittedly, one is dealing with the recognition stage in the enforcement of a Mainland arbitral award here. Nonetheless, first, the role to be played by the enforcement court and the extent to which it may overlap with that played by the supervising court must depend on the circumstances. I do not accept that the enforcement court must accept every piece of paper placed before it that is said to be an arbitral award or supplemental award as such, despite glaring discrepancies between the description of what amounts to an arbitral award or supplemental award in the relevant law or rules and what the court finds on the face of the so called award or supplemental award. Secondly, there can be no dispute that the enforcement court is entitled to look at its own public policy relating to enforcement of foreign or Mainland awards. As mentioned, public policy, in terms of observance of the rules of natural justice, is in issue in the present case, so far as the second and third letters are concerned.

53. It is for the Respondent, who relies on the three letters as additional or supplemental awards, to satisfy the Court that indeed they are such awards.

Conclusion

54. For all these reasons, I do not accept any of the three letters constitute an additional or supplemental award. In those circumstances, the views expressed by the Arbitral Tribunal or the CIETAC Secretariat in the three letters are simply inadmissible in the enforcement proceedings in Hong Kong. They must be ignored. What one is left with is the arbitral award. As explained, under the award, there is no place for the imposition

of the suggested conditions on the payment obligations under paragraphs (2) to (6), the enforcement of which is sought in Hong Kong.

Outcome

55. I would therefore allow the appeal and set aside paragraphs 1 to 4 of the Order dated 25 January 2011 of the Judge. In substitution thereof, I would order that judgment be entered in favour of the Respondent in terms of paragraph (1) of the arbitral award dated 21 September 2009, and judgment be entered in favour of the Applicant in terms of paragraphs (2) to (6) of the arbitral award and for interests on the sums of USD2,953,198 and RMB669,689.16, both at judgment rate from 22 October 2009 to the date of payment.

56. As for the declaratory relief sought in paragraph 3 on page 3 of the Notice of Appeal, this judgment speaks for itself and there is no reason for the grant of such declaratory relief.

57. As for the costs below, it would be noticed that I have kept intact the original paragraph 5 of the Order dated 25 January 2011, namely, that there be a hearing on costs if agreement cannot be reached between the parties. Hopefully, the parties will reach an agreement on costs following the Court's judgment, failing which the matter will be decided by the Judge at a further hearing, no doubt in accordance with this judgment. For the same reason, it is not for this Court to deal with all outstanding applications and summonses and their costs. They should be disposed of by agreement, if possible, failing which by the Judge at a further hearing, again in accordance with this judgment.

58. As for the costs of this appeal, I would make a costs order *nisi* that they be paid by the Respondent to the Applicant, to be taxed if not agreed, with a certificate for two counsel. The only exception is the costs of preparation of Bundles A1 to A6 and Bundle B. For reasons canvassed towards the end of the hearing, I do not consider that the bundles were required at all for the purposes of this appeal. I would disallow those costs so far as party and party taxation is concerned.

Hon Kwan JA :

59. I agree with the judgment of the Chief Judge.

Hon Lam J :

60. I also agree.

(Andrew Cheung)	(Susan Kwan)	(Johnson Lam)
Chief Judge, High Court	Justice of Appeal	Judge of the Court of First Instance

Ms Teresa Cheng SC and Mr Adrian Lai, instructed by Hogan Lovells, for the Appellant

Mr Peter Ng SC, instructed by Mayer Brown JSM, for the Respondent