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HCCT 15/2010

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO. 15 OF 2010**

IN THE MATTER of an Arbitration
Award dated 24 August 2009 in case
No. 14291/EBS/VRO made by the
International Court of Arbitration,
International Chamber Of Commerce

and

IN THE MATTER of section 34C(4) of
the Arbitration Ordinance (Cap 341)
and Article 34 of The UNCITRAL
Model Law on International
Commercial Arbitration

BETWEEN

PACIFIC CHINA HOLDINGS LTD (In Liquidation) Applicant

and

GRAND PACIFIC HOLDINGS LTD Respondent

Before: Hon Saunders J in Court

Dates of Hearing: 13-14 February 2011

Date of Decision: 29 June 2011

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DECISION

The application

1. This is an application to set aside an award delivered by an arbitral tribunal (the Tribunal) on 24 August 2009. The arbitration was an international commercial arbitration undertaken pursuant to the auspices of the International Court of Arbitration of the International Chamber of Commerce, pursuant to the UNCITRAL Model Law on International Arbitration.

2. An application for setting aside pursuant to Article 34(2) is the exclusive method of recourse for a dissatisfied party in an arbitration conducted under the UNCITRAL Model Law. Pursuant to s 34C(4) Arbitration Ordinance Cap 341, (AO) the Court of First Instance of the High Court of Hong Kong is the court to perform the functions in Article 34(2). That Article, so far as it is relevant, provides:

“(2) An arbitral award may be set aside by the court specified in article 6 only if:

(a) the party making the application furnishes proof that:

.....

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

.....

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not

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in accordance with this Law, or

(b) the court finds that;

.....

(ii) the award is in conflict with the public policy of this State.”

The factual background

3. In 1998, Pacific China Holdings Ltd, (PCH), and Grand Pacific Holdings Ltd (GPH) were both wholly owned by Pacific Construction Company Ltd, (PCC). From November 2000, GPH owned 10.9% of PCH, with the balance continuing to be held by PCC.

4. In around May 2001, a 40% stake in PCH was acquired by the Carlyle Group (Carlyle). A number of documents effecting the acquisition were executed including a Loan Agreement (the Loan Agreement) under which PCH was said to be indebted to GPH in the sum of US\$40 million in respect of certain joint-venture interests, previously transferred to PCH in 1998. The document comprising the Loan Agreement was signed by Mr Chang Sr., a director of both PCH and GPH, on behalf of those two companies. The Loan Agreement was expressly governed by New York law (clause 12) and contained an arbitration clause.

5. In February 2004, GPH began making demands of PCH to pay the sums apparently due under the Loan Agreement. PCH refused to pay, pending the provision of further information. The parties were unable to resolve the issue, and so GPH commenced arbitration proceedings to enforce the Loan Agreement against PCH by filing a formal Request for Arbitration on 21 March 2006. On 12 July 2006, PCH filed its Answer to

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the Request for Arbitration. On 26 January 2007, Mr David Williams QC, a very experienced international arbitrator, was appointed chairman of the Tribunal. Mr James H Carter was nominated as co-arbitrator by GPH, and Ms Sally Harpole as co-arbitrator by PCH. Both are experienced international arbitrators.

6. The primary case of PCH was that the Loan Agreement was illegal under the law of the place of its performance, (Taiwan), and hence also under its governing law, (New York). The illegality arose, PCH said, because the consideration in the Loan Agreement, (the transfer of the joint-venture interests), was false. The true purpose of the Loan Agreement, PCH said, was to reduce the value of PCH, and accordingly the amount of consideration payable by Carlyle, in acquiring its 40% stake in PCH.

7. Consequently, central to PCH's case was expert evidence and submissions on Taiwanese law which related to the issue of consideration.

8. The argument for PCH in this application is that the evidence furnishes proof that it was unable to present its case and/or the arbitral procedure was not in accordance with the agreement of the parties. Consequently, says PCH, the award ought to be set aside.

9. Mr. Manzoni relied upon three discrete matters in support of his submission. Those matters were set out in his skeleton in the following way:

“The award in this case ought to be set aside because the arbitral Tribunal inter alia:

(i) Permitted (GPH) to serve expert evidence on foreign law

one working day before an evidential hearing in December 2007, to serve its pre-hearing written submissions zero working days before the hearing, and to review the pre-hearing submissions of (PCH) before it served either, thereby denying PCH an opportunity to present its case. It did this despite an agreed procedural timetable requiring the parties to exchange pre-hearing submissions simultaneously, and bizarrely relied on the proximity of Thanksgiving – a holiday which is not recognised in Hong Kong – to justify its approach,

(ii) Subsequently refused to allow PCH to rely on three foreign law authorities, because it thought that requiring GPH to review them within the three weeks remaining before an evidential hearing in May 2008 was “unfair”, once again denying PCH an opportunity to present its case. In this respect, the Tribunal appears not to have remembered that only a few weeks previously it had thought nothing of requiring PCH to address 50 authorities referred to in GPH’s evidence in the space of one working day, and

(iii) Yet again denied PCH an opportunity to present its case by refusing to allow it to respond to GPH’s submissions on the relevance of Hong Kong law, and on New York law, and then, when holding against PCH, not only relied on the self-same submissions of GPH, but also on new authorities which it had not shared with either party.”

10. For convenience, Mr. Manzoni describes submission (i) as the “the Taiwanese law issue” argument; (ii) as the “joint expert meeting and report argument”; and (iii) as the “Hong Kong law issue”.

11. As to the Taiwanese law issue, Mr. Manzoni’s submission is that the Tribunal departed from an agreed procedural timetable which required the parties to exchange pre-hearing submissions. Instead, the Tribunal required PCH to include its full argument and best case on the Taiwanese law issue in the exchange submissions, and permitted GPH to reserve its full argument and best case on the Taiwanese law issue, including their submissions in that respect, to a supplemental submission to be filed 10 days after PCH filed, and gave to GPH, its submissions. By

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so doing, Mr. Manzoni says, the Tribunal adopted the procedure which was not in accordance with the agreement of the parties. Consequently, he says, there was a breach of Article 34(2)(a)(iv). Mr. Manzoni further argues that the procedure adopted was inherently unfair in that it gave GPH the advantage of seeing PCH's argument on the Taiwanese law issue before it prepared its own submissions. That unfairness, it is contended, rendered PCH unable to present its best case, contrary to Article 34(2)(a)(ii).

12. As to the joint expert meeting and report argument, Mr. Manzoni says that in refusing to permit PCH to adduce three authorities, the Tribunal again rendered PCH unable to present its best case, again contrary to Article 34(2)(a)(ii). That is particularly so, Mr. Manzoni says, because the Tribunal did not even consider those authorities.

13. On the Hong Kong law issue, Mr. Manzoni says that GPH was permitted to make submissions on Hong Kong law, both as to whether that law had to be proved, and as to relevance, but that PCH was refused permission to respond to those submissions. Further, in respect of the issue to which PCH said Hong Kong law was relevant, the Tribunal, without reference to any of the parties, and without giving either party an opportunity to make any submissions, dealt with the issue by the application of New York law. In particular, authorities were relied upon by the Tribunal which the parties had not seen and upon which the parties had made no submissions at all.

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The ICC Rules

14. The arbitration agreement required that the arbitration be conducted in accordance with the ICC Rules of Arbitration. These Rules provide for the drawing up of “Terms of Reference” (Article 19) and a “procedural timetable” (Article 18).

15. Article 19 provides:

“After the Terms of Reference have been signed or approved by the Court, no party shall make new claims or counterclaims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the Arbitral Tribunal, which shall consider the nature of such new claims or counterclaims, the stage of the arbitration and other relevant circumstances.”

Article 22.1 is in the following terms:

“When it is satisfied that the parties have had a reasonable opportunity to present their cases, the Arbitral Tribunal shall declare the proceedings closed. Thereafter, no further submission or argument may be made, or evidence produced, unless requested or authorized by the Arbitral Tribunal.”

Article 15.2, entitled ‘Rules Governing the Proceedings’, is also relevant:

“In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.”

16. The requirement in Articles 15.2 and 22.1 of the ICC Rules are similar in terms to Article 18 of the Model Law, the *lex arbitri*, which provides:

“The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.”

The requirement under Article 15.2 to act “fairly and impartially” clearly equates with the requirement under Article 18 to treat each party with equality. I accept Mr. Sussex’s submission that the distinction between a

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“reasonable opportunity” under the ICC Rules, and a “full opportunity” under the Model Law is a distinction without a difference.

The factual basis of the challenge

17. The challenge made to the award is a procedural challenge, and accordingly it is necessary to recite the procedural circumstances leading to the issues in detail. I draw the following factual background leading to the award from the affidavit of the solicitor for PCH, Mr. Allen, particularly as summarised by Mr. Manzoni’s skeleton, these facts not being in dispute, unless indicated.

The procedural timetable is established

18. On 7 May 2007, a procedural conference was held, and an agreed procedural timetable was issued. The procedural steps from the close of pleadings to the evidential hearing were expected to take place in less than seven months. Consequently, the proceedings had a somewhat tight timetable. The procedural steps, including discovery of documents, exchange of factual witness statements, exchange of expert reports, dealing with any amendments that might arise, and any prehearing submissions or any other interlocutory steps which take place, were all required to be completed within that seven month period.

19. The procedural timetable¹ included the following statement as to “Pre-hearing submissions”:

“10.1 The parties shall exchange pre-hearing submissions which shall summarise the key facts and outline the parties’

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cases including legal theories or authorities relied upon.

10.2 The parties shall exchange, and provide to the Tribunal, their pre-hearing submissions no later than 14 November 2007.

10.3 The filing of pre-hearing submissions will not preclude or interfere with the right of each party to make an appropriate opening address at the hearing, if so desired.

10.4 Unless otherwise ordered by the Tribunal pre-hearing submissions shall be taken as read and shall not be read out at the hearing.

10.4.1 Tribunal will treat the pre-hearing written submissions as containing each party's best case on fact and law at the time of exchange.

10.4.2 The length of each party's submissions shall not exceed 50 pages."

20. Not surprisingly, it was necessary for there to be a number of extensions of time in respect of various steps within the procedural timetable. All were granted by the Tribunal, usually subject to the condition that all other deadlines in the procedural timetable, especially the dates fixed for the evidential hearing, should not be affected.

The Taiwanese law issue

21. Of particular importance was an extension of seven days for the parties to file expert reports on Taiwanese law, those reports being required to be filed by 16 October 2007. The filing of these reports was to follow the exchange of witness statements and statements in reply.

22. It was Mr. Manzoni's submission that in the pleadings, the Reply filed on the part of GPH, filed in May 2007, contradicted its Request for Arbitration, filed in March 2006. The contradiction was as to the

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position taken by GPH on the consideration point. The Request² had asserted that the sum of US\$40 million was:

“additional consideration for the Joint Venture Interests”,

whereas the Reply³ asserted that:

“The Loan Agreement was made at the suggestion of Carlyle for purposes of reducing its immediate payment obligation for its purchase of the 40% equity interest in PCH.” (sic)

23. Mr. Manzoni submitted, and I accept, that it was not until 7 September 2007, when the first affidavit of Mr. Chang Jr. was filed that PCH was able to determine that it was the latter position that GPH intended to adopt in the arbitration. A second affidavit filed by Mr. Chang Jr. on 21 September 2007, confirmed GPH’s position.

24. Mr. Sussex did not dispute Mr. Manzoni’s submission as to this contradiction, but acknowledged that the facts pleaded by GPH in its Reply were subsequently confirmed by Mr. Chang Jr. in an affidavit dated 4 September 2007.

25. On 16 October 2007, in accordance with the agreed procedural timetable, as extended, the parties exchanged expert reports. That for PCH, from a Mr. Shay, dealt with the issue of the lack of consideration.

26. On 20 October 2007, having seen Mr. Shay’s expert report, GPH made an application to the Tribunal to strike out PCH’s lack of consideration defence. PCH, in response, applied to the Tribunal for leave

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³ C 475.

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to amend its Amended Answer, as it had indicated it may wish to do, when filing its expert report on 16 October 2007. The purpose of the amendment was to enable PCH to respond to the now clarified position of GPH on the issue of the consideration for the Loan Agreement.

27. Mr. Manzoni submitted that the application by GPH to strike out PCH's "lack of consideration" defence was a procedural abuse, GPH having waited until less than two months before the evidential hearing, and well after discovery and the exchange of witness statements and expert reports, before making the application. The argument between the parties as to whether or not the lack of consideration defence should be struck out, or PCH should be allowed to amend its Amended Answer is not relevant to the issues in this application. The Tribunal declined to hear GPH's strikeout application, directing instead that the arguments on that issue should be dealt with by GPH in its pre-hearing submissions.

28. As to PCH's application to amend, the Tribunal directed PCH to provide the Tribunal, and GPH, with a memorandum, within three days, setting out the precise nature of what was described by the Tribunal as "the new claim". The argument as to whether or not the proposed amendments constituted a new claim or not is again not relevant to the issues in this application. What is relevant is that on 19 November 2007, the Tribunal granted PCH leave to make the amendments sought. The Tribunal, describing the amendment as a "new claim", to which it gave leave, was plainly acting pursuant to Article 19 of the ICC Rules.

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29. In the course of the ruling⁴ upon which that leave was given the Tribunal said this:

“3. It must also be said that the application (for leave to amend) could have been brought much earlier. However, such prejudice as may arise can be overcome in two ways:

(a) (GPH), should it feel the need to reply to the Shay statement, shall be given the maximum time available to do so, consistent with the avoidance of any risk to the Hearing (which will definitely proceed on 3 December 2007). Accordingly, any reply affidavit may be lodged no later than 5 PM, Friday 30 November (Hong Kong time).”

30. On 20 November 2007, following submissions from the parties, the Tribunal gave the following directions⁵:

“2. Pre-hearing submissions complying with paragraph 10 of the Procedural Timetable shall be exchanged and served on the Tribunal no later than 5 pm Tuesday, 20 November 2007, Hong Kong time.

3. (PCH’s) pre-hearing submissions must include its full argument and best case on the Taiwanese law issue and the Shay statement. However (GPH’s) pre-hearing submissions need not deal with these matters. Instead, such submissions shall be included in a supplemental submission to be provided by (GPH) no later than 5 pm Friday, 30 November 2007, Hong Kong time.

4. (GPH) is to file its reply report on Taiwanese law no later than 5 pm Thursday, 29 November 2007, Hong Kong time.”

31. It is pertinent to note that the following statement was included in its ruling by the Tribunal:

“5. The foregoing directions take into account that under the Tribunal’s proposed schedule which will be circulated before the forthcoming procedural conference, (GPH’s) Taiwanese law expert is not likely to be called until the afternoon of Day 3, Wednesday 5 December. Thus, (PCH) will have the report for 3 full days before the hearing starts (i.e. Friday 30 November, Saturday 1 December and Sunday 2 December) plus the evenings of 3 and 4 December. The Tribunal considers this to be

⁴ B 214.

⁵ B 234.

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ample time to prepare a cross-examination.”

32. The solicitors for PCH immediately protested by e-mail addressed to the Tribunal, and copied to those advising GPH⁶. The protest was in the following terms:

“Please accept this as a formal notification of (PCH’s) objections to this order, which are as follows:

First, (GPH) has been granted an inordinate amount of time in which to prepare its expert reply.

Second, the directions with respect to the pre-hearing submissions have the effect of requiring (PCH) to disclose all of its “best case on fact and law” in advance of (GPH) being required to do the same, and moreover enables (GPH) to tailor its expert evidence and submissions to meet (PCH’s) best case.

This is inconsistent with the approach adopted in the Procedural Timetable (para 10.1) which requires the parties to “exchange” pre-hearing submissions.

All in all, (PCH) regards the directions is being unfair and reserves its rights accordingly.

We regret the need to write in these terms, but we wish the Tribunal to be aware of our client’s deep concerns.

The Tribunal has made it clear that it will not entertain further submissions on these issues, and accordingly, unless we hear otherwise between now and 5 pm HK, (PCH) will comply with today’s directions but subject to an appropriate reservation of its rights.”

33. Just prior to 5 pm HK on 20 November 2007, the solicitors for PCH sent their pre-hearing submissions to those advising GPH, duly recording that their action in so doing was subject to the reservation set out above.

34. This direction of 20 November 2007, and what PCH says is the consequence of it, is central to the complaint made by PCH on the

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Taiwanese law issue.

35. In the event, the Taiwanese law issue was not dealt with at the hearing which began on 3 December 2007. Apart from anything else, it was necessary to have the Taiwanese authorities translated so that they could be understood by the entirely English speaking Tribunal.

The joint experts and report argument

36. On the fifth day of the hearing the Tribunal adjourned the cross-examination of the Taiwanese law experts, which included Mr Shay, to May 2008. At same time as the Tribunal adjourned that issue, it indicated that it wished that the Taiwanese law experts should meet, without lawyers, and produce a joint report which set out where they agreed and where they did not agree. No formal orders were made at the time of the adjournment, it being left to the parties to settle the terms of the orders. In the course of the discussions the Tribunal said that the parties could not seek to introduce new Taiwanese legal authorities without leave, which would not be granted unless the authorities in question were “sensational”. This was agreed to by the parties.

37. On 10 December 2007, Mr. Allen, the solicitor for PCH, circulated draft copies of the orders. On 21 December 2007, in accordance with the draft order, the parties exchanged the Chinese versions of the Taiwanese law authorities. The English translations of those authorities were circulated on 3 April 2008. That exchange was in accordance with the draft terms that had been agreed.

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38. The two procedural orders were not formally endorsed by the Tribunal until 3 April 2008. When they were issued⁷, without any discussion with the parties, the order, in so far as it related to the authorities, was in the following terms:

“4. Leave to apply on 7 days notice on any matters arising from this Procedural Order provided that no application for leave in respect of the inclusion of additional authorities in either expert report may be lodged any later than 7 April 2008 and if any such application is made, which the Tribunal is not to be understood as encouraging, it will be accompanied by an English translation of the proposed additional authority.”

39. On 6 & 7 April 2008, PCH made an application to the Tribunal for leave to rely on three proposed additional judgments and two statutory provisions, referred to by Mr. Shay. English translations were immediately available. The application by PCH was opposed by GPH. In considering the issue, the Tribunal did not consider the content or the subject matter of the new authorities.

40. The Tribunal, in a formal ruling delivered on 16 April 2008⁸, refused leave to PCH to use the three authorities. Certain paragraphs of that ruling are relevant.

“33. The Tribunal regards the statement it made on Day 5 (at page 82) as stating in clear and unambiguous terms what was its attitude as to the scope of the materials to be considered by the experts in their discussions and to be examined by the Tribunal at the May hearing. It considers that the language of paragraph 4 of Procedural Order No. 4 (the leave provision) must be read in the light of the comments made at the hearing when the draft order was being considered. Reference is first made to the statement on Day 5 at page 82 which for convenience is set out again below:

“We are not in favour of item 2. These experts have had

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⁸ B 334

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their statements presented, with reference to certain authorities, and we are opposed to the ambit of the document they're relying on being expanded. In other words, they've had their chance. They've expressed their opinions on the basis of certain materials and we do not see any justification for starting all over again and letting them go and find other things."

34. Secondly, the Chairman had earlier made the comment to the same effect page at 78:

"THE CHAIRMAN: We don't mind what the lawyers talk about. The exercise is confined to their reports, as they have been lodged, so we're not allowing this process to result in production of more expert reports. Battle lines have been drawn, so to speak, and they are confined to those reports." (underlining added)

35. The statements indicate that the Tribunal intended a very narrow scope to the leave requirement, a matter which is emphasised even further by the inclusion of the phrase "which the Tribunal is not to be understood as encouraging" in paragraph 4 of the Order.

36. If any further indications required of the Tribunal's intended restricted approach to the leave application it may be found in the Chairman's comment on Day 5 at page 94 that the Tribunal would be prepared to grant leave:

"if some professor finds something sensational that will save us time, then we wouldn't exclude it. But I think we should [not] have a leave requirement, where the professor says, "I had overlooked this" or "I have now found this" or something of that nature."

37. Against this background, there is no difficulty in granting leave to (PCH) to adduce those authorities which have already been addressed by Professor Chen in his report, including judgments and statutory references. Indeed, this should have been done by (GPH). Therefore, the Tribunal will grant leave to (PCH) to adduce those authorities referred to in Professor Chen's report which (GPH) has not already included in its bundle of translated authorities:

(authorities identified)

38. As for the remaining three authorities (items 2, 6 and 7), these authorities were not included in the original expert reports and were only raised belatedly by Mr Shay in his lengthy "summary" of his position in the joint report. The Tribunal tends to agree with (GPH's) submission that Mr. Shay's portion of the expert report contains much more than a summary of his position on the matters set forth in his original report on which there was

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disagreement.

39. Moreover, we see considerable force in the complaint of (GPH) that to ask Professor Chen to consider these new authorities in the limited time available before the hearing would unfairly prejudice the preparation of (GPH) for that hearing by requiring them to direct their attention from their general preparation to confer on the new material. The lateness of (PCH's) application also tells against it bearing in mind that the essence of the Procedural Orders 2 and 4 were set out and agreed on Day 5 of the hearing (see pages 89-90).

40. Leave is therefore granted to (PCH) to adduce items 1 and 8. Leave is refused in respect of items 2, 6 and 7. As already noted above, leave was not required to adduce items 4 and 9 as these authorities already form part of the record in some form or another. (PCH) is free to include those items if it chooses."

41. The case for PCH is that this decision constitutes a denial of PCH's right to respond to and contravene the matters raised in GPH's expert evidence. It was, says Mr. Manzoni, a lack of equality of treatment, with PCH not being given an opportunity to present its case, and not being treated with procedural fairness.

The Hong Kong law issue

42. One of the defences raised by PCH in the arbitration was that Mr. Chang Sr. lacked authority to execute the Loan Agreement on behalf of either PCH or GPH. In the course of its post-hearing submissions, PCH referred to Hong Kong law, because GPH was a Hong Kong company. GPH objected to the reference to Hong Kong law and any evidence seeking to prove Hong Kong law in its post-hearing submissions. Notwithstanding that objection, it made submissions as to Hong Kong law⁹.

⁹ C726-7.

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43. On 13 October 2008¹⁰, whilst the Tribunal was considering its decision, the Chairman wrote to the parties in the following terms:

“The Tribunal has noted that submissions on Hong Kong law were raised for the first time by (PCH) in paragraph 48.1 of its post-hearing Opening Submissions dated 1 July 2008 and reiterated in paragraph 44.4 of its post-hearing Reply Submissions of 6 October 2008.

Paragraph 3 of the Tribunal’s Procedural Ruling of 3 May 2008 clearly states that “the parties will exchange post-hearing written submissions giving their best cases on fact and law, accompanied by references to the agreed bundle, the witness statements and the transcript”.

Clearly the expectation was that post-hearing written submissions would refer to the cases already pleaded and presented at the May hearing. There was no mention by either side of Hong Kong law at the May hearing and (PCH’s) submissions on Hong Kong law appear to fall outside the scope of what was envisaged by the Tribunal at the end of the May hearing and in its Procedural Ruling of 3 May.

In light of the above and taking into account the considerable efforts already made to accommodate (PCH’s) submissions on Taiwanese law, which were filed extremely late in the course of the proceedings and gave rise to a hearing in two stages, the Tribunal considers that at this late stage of the arbitration it may be inappropriate and unfair to admit any new submissions or evidence based on Hong Kong law and it may cause unnecessary delay to do so. The Tribunal’s provisional view therefore is that there may be a problem in receiving the Hong Kong law submissions for the reasons given by (GPH) in its Reply Post-hearing Submissions at pages (C725-6).

However, before taking any final decision on the matter the Tribunal seeks an explanation from (PCH) within 7 days as to its actions in this respect and also what it says, if anything, in answer to (GPH’s) protests in this matter as set out in its post-hearing Reply Submissions of 6 October 2008. In the meantime (GPH) is asked to advise whether, if (PCH’s) challenged Hong Kong law submissions are received, it would (i) wish to make any further submissions in addition to those set out “in the alternative” in Section B which is headed “In any event, (PCH’s) lack of authority defence fails as a matter of Hong Kong law”, in paragraph 14 et. seq. of its post-hearing submissions; or (ii) wish to adduce any further evidence, expert or otherwise, on the Hong

¹⁰ B 377.

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Kong law matter.”

44. On 20 October 2008, by letter¹¹, PCH provided its explanation on the Hong Kong law issue. The letter dealt with the issue as to whether or not it was necessary to prove Hong Kong law in the arbitration. The letter asserted that as Hong Kong law, being the *lex arbitri*, need not be proved, and accordingly could be dealt with by submission. The letter did not add to the submissions already made, and objected to GPH being given an additional opportunity to respond to PCH’s Hong Kong law submissions. A request was made, in accordance with the Procedural Ruling, that PCH wished to make additional submissions in relation to the Taiwanese law issue, replying to an assertion by GPH that Mr Shay’s legal conclusions were not supported by legal authorities and the question of statutory interest under New York law. It was proposed that the additional submissions be in writing.

45. On 24 October 2008, GPH responded by letter¹², first making substantive submissions on the Hong Kong law issue, and second, substantive submissions on the application of Hong Kong law to PCH’s lack of authority defence. The solicitors for PCH protested¹³, the letter including the following paragraph:

“In its latest letter, (GPH) has also sought to bolster its submissions with respect to the question of whether Hong Kong law is relevant to Mr. Chang Sr.’s authority to execute the Loan Agreement, citing two new cases and one new statutory provision. (PCH) reserves the right to respond to this new material.”

¹¹ B 384.

¹² B 399.

¹³ B 406.

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46. Those advising GPH objected to PCH's application to respond to the new material and sought permission to file a response to rebut what it described as PCH's "sur-reply"¹⁴.

47. The Chairman of the Tribunal responded to the parties on 31 October 2008¹⁵, first referring to its letter dated 13 October 2008¹⁶, when it had invited (PCH) to provide an explanation within seven days in respect of its submissions on Hong Kong law, then saying:

"1.2 The Tribunal also requested that (GPH) advise whether it would wish to make any submissions on the Hong Kong law issue additional to those contained in its post-Hearing Reply Submissions of 6 October 2008.

1.3 By letter dated 20 October 2008, (PCH) complied with the Tribunal's request.

1.4 (GPH) provided its reply by letter dated 24 October 2008.

1.5 In a letter dated 28 October 2008, (PCH) made further comments on the Hong Kong law issue, in particular in the light of (GPH's) aforementioned reply. (There was no provision in the Tribunal's directions of 13 October for such a reply).

1.6 The Tribunal thanks the parties for their submissions and considers that it now has sufficient materials and arguments to decide on the Hong Kong law issue."

48. On 12 November 2008, by e-mail¹⁷, the solicitors for PCH wrote to the Tribunal saying:

"On the Hong Kong law issue, it is unclear when the Tribunal intends to communicate its decision regarding (PCH's) Hong Kong law submissions. We should be grateful if Tribunal would let us know."

The Tribunal responded to all parties on 14 November 2008, in the

¹⁴ B 409.

¹⁵ B 411.

¹⁶ See §33 above.

¹⁷ B 416.

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following terms¹⁸:

“The Tribunal has conferred and intends to decide the Hong Kong law issue in the Award, which it is drafting at the present time.”

49. On 20 November 2008,¹⁹ the solicitors for PCH wrote to the Tribunal setting out the sequence of the events that had occurred in respect of Hong Kong law issue. The letter contained the following:

“However, in its letter dated 24 October 2008, (GPH) made submissions that went well beyond a response to (PCH’s) explanation. In particular, this letter contained additional submissions that Hong Kong substantive law does not apply to (PCH’s) lack of authority defence. This was not permitted by the Tribunal’s letters of 13 and 15 October 2008.

In those circumstances (PCH) seeks to be given a fair opportunity to respond to (GPH’s) improper additional submissions.”

50. On 25 November 2008,²⁰ the Chairman responded to that letter, refusing the application for leave to make further submissions. The letter contained the following statement:

“The Tribunal further notes that (PCH) has thus already had two opportunities to elaborate on the Hong Kong law defence raised its post-hearing Opening Submissions dated 1 July 2008 and reiterated in its post-hearing Reply Submissions of 6 October 2008.”

51. On 27 November 2008,²¹ the solicitors for PCH formally recorded an objection to the ruling of 25 November 2008, pursuant to Article 33 of the ICC Rules of Arbitration, that the ruling deprived PCH of its ability to present its case on the Hong Kong law issue.

¹⁸ B 416.

¹⁹ B 421.

²⁰ B 424.

²¹ B 426.

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52. On 24 August 2009, the Award was rendered by the Tribunal. In the Award the Tribunal referred to, and relied upon the additional authorities that had been cited by GPH in its letter of 24 October 2008. The Tribunal also cited other, New York, authorities in the Award in support of its view that the applicable law in deciding due execution of the Loan Agreement was not Hong Kong law. The New York authorities had not been cited by any of the parties nor were any submissions made by any of the parties on those authorities.

The merits of the award

53. There are two circumstances in which a Convention award will come before a court for consideration. The most common is an application by the successful party for enforcement pursuant to s 44 AO. The other, less common in Hong Kong, is an application to set aside an award under Article 34 of the Model Law.

54. It is well established that the court, whether an enforcing court or a court that is asked to set aside an award, will not consider the substantive merits of the dispute, or the correctness of the award, whether concerning errors of fact or law.

55. In *Apex Tech Investment Ltd v Chuang's Development (China) Ltd*, [1996] 2 HKLRD 155, [1996] 2 HKC 293, the judgment of Mortimer JA dealt first with the approach of the Court of Appeal, the judge saying:

“In considering this matter on appeal – as it was at first instance – it is important that the court should meticulously avoid any consideration of the merits of the award. This the judge made clear in his reasoning and his finding when he said:

‘I find that I cannot say that the result could have been different had the Defendant had an opportunity to make

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representations or call evidence on the material obtained by the tribunal of its own volition.’

The word ‘could’, in my judgment, is of some importance. The word ‘could’ rather than ‘would’, to my mind, properly indicates the way in which the court must keep out of the merits. Of course, this is particularly so when the court is considering an award under a foreign system of law.”

56. *Qinhuangdao Tongda Enterprise Development Co & Anor v Million Basic Co Ltd* [1993] 1 HKLR 173, was a case in which the respondent sought to set aside an ex parte order for enforcement on the ground that they were not given an opportunity to present their case. In the course of his judgment, Kaplan J said this:

“In arguing now that the plaintiff misled the Tribunal, the defendant wants another chance to argue the merits of the case. It is too late for that. The New York Convention is clear that it is not for the enforcing court to rehear the case on the merits. It makes no difference that the defendant couches his submissions in terms of public policy and an attempt to mislead the arbitral tribunal. He is trying to appeal the merits of the case and that is not allowed.”

57. In *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2009) 12 HKCFAR 84 at 99, para 47, Ribeiro PJ said this, when dealing with s 44:

“It is of course well-established that the Hong Kong court, sitting as an enforcing court, does not review the merits of the Tribunal’s award.”

58. The rationale for excluding a review of the merits of the award may be found in a passage from Professor van den Berg in his book, *The New York Arbitration Convention of 1958*, at p. 302, where he said:

“A court before which enforcement of a Convention award is sought may, in my opinion, not go further as this would amount to an extensive examination as to how an arbitrator would have decided if the violation had not occurred. The latter would yield

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to a review of the merits of the arbitral award which is excluded under the Convention.”

59. It is accordingly quite plain that the merits of the award are quite irrelevant in an application to enforce an award. The merits of the award must be equally irrelevant in an application to set aside an award.

The exercise of the discretion

60. Before I turn to consider whether or not breaches of Article 34 are established, it is necessary to consider the manner in which the discretion to refuse to set aside an award should be exercised, even when an Article 34 ground is established. This issue arises from dicta in a small number of cases following the decision of Kaplan J in *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39, which, Mr. Manzoni submits, indicate that the court may exercise the discretion to enforce a procedurally unfair award if the court satisfied that the unfairness has not made a difference to the result.

61. Mr. Manzoni’s submission is that this proposition is contrary to principle, and to arbitration law worldwide, and is based upon a misunderstanding of the authorities. Mr. Manzoni says that the discretion is very narrow, and is limited to circumstances not connected to the merits of the dispute itself or the effect of procedural irregularity on the award itself.

62. That there is a discretion is beyond doubt; that is plain from the use of the permissive word “may” in Article 34(2). The Award in the present case is a Convention award, and the terms of Article 34(2)(a)(ii)

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and (iv), (the setting aside provision), are identical to s 44(2)(c) and (e), (the enforcement provision). In *Karaha Bodas*, Ribeiro PJ went on, immediately following the passage cited at §57 above, to say:

“Moreover, it is clear that even though a case comes within a s 44 category where refusal of enforcement is permitted, the court has a discretion nevertheless to permit enforcement.”

63. The identical phraseology in both Article 34 and s 44 justifies Mr. Sussex’s submission that the discretion exists under Article 34.

64. In *Paklito*, Kaplan J was dealing with a situation where a CIETAC Tribunal, entirely in accordance with CIETAC rules, appointed its own expert to investigate various issues, but refused to allow Klockner to comment or make submissions on the expert report produced. The tribunal produced an award against Klockner. Paklito sought to enforce award in Hong Kong, which Klockner resisted. Kaplan J found that a serious irregularity had occurred, and that Klockner was prevented from presenting its case, and denied a fair and equal opportunity of being heard. As to the discretion Kaplan J, at p 49, said this:

“In relation to the ground relied upon in this case I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute. This view is supported by Professor Albert Jan Van den Berg in his book, the New York Arbitration Convention of 1958, at p. 302, where he states;

‘Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation.’

It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due

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process violation.” (sic)

65. The passage cited from Professor van den Berg’s book, while giving support to the proposition that enforcement might still be permitted when the s 44 ground was established, was not adopted by Kaplan J, who deliberately avoided attempting to define with the circumstances where the discretion might be exercised.

66. In *Paklito* Kaplan J concluded that he should not exercise the discretion to enforce the award in that case. In reaching that conclusion he declined to consider whether the result would, or even may, have been different. He said at p 49:

“Having concluded that a serious breach of due process has occurred I cannot see that it would be right or proper to exercise my discretion in favour of enforcement. I am quite satisfied that even when one takes into account that the parties have chosen an arbitral law and practice which differs to that practised in Hong Kong there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve. Regrettably, this case is a classic example of such a situation.”

67. Consequently, Mr. Manzoni submitted, Kaplan J did not consider whether the arbitral tribunal would have come to the same conclusion even if the parties had been permitted to comment on, or make submissions on, the expert report. Mr. Manzoni said that Kaplan J took the view that the right to be heard was such a fundamental right according to the Hong Kong court’s own principles of fairness and due process that the court should not exercise its discretion in favour of enforcement, irrespective of what the outcome would have been.

68. The same principle, Mr. Manzoni says, applies directly to the

present case. Thus, Mr. Manzoni says, if a serious breach of due process is established, the court should not, with a view to exercising its discretion not to set aside the award, examine the award to see whether or not, notwithstanding that breach of due process, the Tribunal would have come to the same decision.

69. Mr. Manzoni referred me to the relevant passage from Professor van den Berg's book, at 301-2:

"The fourth and last question is whether a serious violation of due process may lead to a refusal of enforcement of the award if the arbitral decision would not have been different in case the irregularity in the procedure had not occurred. This question was considered by a Court of Appeal²² in a case in which the arbitrator had not forwarded a letter, submitted to him by the claimant, to the respondent, who was, consequently, unable to express his views on this letter. The Court of Appeal considered that a violation of due process cannot be cured as soon as it cannot be excluded that the arbitral decision would have led to a more favourable decision for the respondent, which the Court found to be the case. This would mean that if it were beyond doubt that the arbitral decision would have been the same, a serious violation might not lead to a refusal of enforcement of the award.

The point of view of the Court of Appeal of Hamburg is a pragmatic one. If it is clear that the arbitral decision could not have been different, had the irregularity in the procedure not occurred, it would seem to make no sense to refuse enforcement. A legal justification for this point of view can be found in the opening line of paragraph 1 of Article V: "Recognition and enforcement of the award **may** be refused..." It is to be approved that the Court of Appeal was very cautious to this effect by exercising a marginally negative control. It considered that a serious violation due process could have led to a different arbitral decision as soon as this could not be excluded. Thus only if it is beyond any doubt that the decision could have been the same, would a court be allowed to override the serious violation. A court before which enforcement of a Convention award is sought may, in my opinion, not go further as this would amount to an extensive examination as to how an arbitrator would have

²² The Oberlandesgericht in Hamburg.

decided if the violation had not occurred. The latter would yield to review of the merits of the arbitral award which is excluded under the convention.” (original italics, my emphasis).

70. Mr. Manzoni submitted that the Hong Kong cases have dealt with *Paklito* on the basis that a test was established by Kaplan J that there is a presumption that the discretion to enforce will be exercised, notwithstanding that a respondent has a “Convention Defence”, or, to use Kaplan J’s words from *Paklito*, a serious due process violation is established, unless the party seeking to resist enforcement can prove that the result would not have been the same. This, says Mr. Manzoni, turns any test that there might be on its head. It is accordingly necessary to examine the Hong Kong cases following *Paklito*.

71. The first case decided after *Paklito* was *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, (unreported, 13 July 1994 HCMP 2411/1992), again a decision of Kaplan J. There, the judge was dealing with a situation where a party appreciated that there was an issue with the composition of the tribunal, but made no formal submission to the tribunal about its own jurisdiction, or to the arbitration commission which constituted tribunal. Instead, it proceeded to fight the case on the merits, and then two years after the award, attempted to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list.

72. The argument made by the successful party, seeking to enforce the award, was that the respondent was, by its conduct, estopped from raising the procedural point. In dealing with the issue of discretion the judge said this:

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B	“If the doctrine of estoppel can apply to arguments over the written form of the arbitration agreement under Article II(2), then I fail to see why it cannot also apply to the grounds of opposition set out in Article V.	B
C		C
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E	I think there is much force in Dr van den Berg’s point that even if a ground of opposition is proved there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement. If the enforcing court was obliged to refuse enforcement in the event of establishing a ground of opposition, I believe that it would be far harder to import the doctrine of estoppel. But a discretion there is, and I for myself are prepared to hold that on a true construction of the Convention there is indeed a duty of good faith which in the circumstances of this case required the Defendant to bring to the notice of the full tribunal or the CIETAC Commission in Beijing its objections to the formation of this particular arbitral tribunal. Its failure to do so and it is obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that I find consistent with the obligation of good faith nor with any notions of justice and fair play.”	E
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M	73. The enforcement of the award was permitted by the court, upon the exercise of discretion, a violation having been established.	M
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O	74. In <i>Apex Tech</i> the judge at first instance found that there was a procedural irregularity which prevented the defendant from presenting his case before the tribunal, but exercised his discretion to enforce, notwithstanding that irregularity. The judge had said:	O
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R	“I find that I cannot say that the result could have been different had the Defendant had an opportunity to make representations or call evidence on the material obtained by the tribunal of its own volition.”	R
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T	The issue before the Court of Appeal was whether the judge was wrong	T
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when he decided that it was clear that even if an opportunity to be heard further had been given to the defendant, any submissions made could have no effect on tribunal's award. The Court of Appeal was unable to agree with judge.

75. It is significant in my view that Mortimer JA, with whom Mayo JA and Wong J agreed, expressed the conclusion in this way:

“...I am unable to say that if the defendant had been given the opportunity to make further representations to the arbitral tribunal after it had made its own inquiries, that it could not have affected the outcome of the award.”

76. Having so concluded, the court exercised its discretion to refuse enforcement of the award.

77. In *Zhanjiang City Qiming Industrial Corp v Fumei Ltd* (unreported, 11 November 1996, MP 2765/1995), Keith J was considering a situation in which the defendant, a party to a Convention award contended that its lawyers had not received a copy of the plaintiff's supplementary submissions to the tribunal, and did not become aware of those submissions until after receiving the award. Consequently, it said that it had been unable to present its case. However the evidence before the court did not demonstrate what steps the defendant's then lawyers might have taken, had they received the submissions. The judge said that it would only be that, if there were to be reply submissions, the result could be different.

78. In the course of his judgment, under the title “the Court's Discretion,” the judge said this:

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“As I have already said, if the Defendant proves that it was unable to present its case, that triggers the court’s discretionary power under s 44(2) of the (AO) to refuse to enforce the award. If I was not prepared to exercise my power to do so, there would again have been no point in adjourning the application (to enforce). It is well established that the court’s power to exercise its discretion to set aside the award should be exercised if the result could have been different if the procedural irregularity had not occurred: see *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 and *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd*, [1996] 2 HKC 293. I cannot exclude the possibility that the result in this case would have been a different one if the procedural irregularity had not occurred, provided that the submissions which the Defendant says ought to have been made would have been made.”

79. The judge adjourned the proceedings seeking advice from the defendant’s former solicitors whether or not submissions would have been made. There is no information available to me to indicate the outcome following the adjournment.

80. More recently, in *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Company Ltd & Anor*, [2009] 5 HKC 1, Lam J gave consideration to the decision in *Apex Tech*. He said, at §32:

“As a further alternative, counsel advocated the test set out in *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd*, [1996] 2 HKLRD 155, [1996] 2 HKC 293: even where the was a violation, the court may exercise its discretion to uphold the award if the party attacking it could not show the result would have been different if there was no violation.”

And at §37-39:

“37. In *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39 at p.49 Kaplan J endorsed the view taken by Professor Albert Jan van den Berg that,

“Thus only if it is beyond any doubt that the decision could

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have been the same would a court be allowed to override the serious violation.”

His Lordship said,

“.... I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute.”

38. Similar approach was adopted by the Court of Appeal in *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd* [1996] 2 HKLR 155, [1996] 2 HKC 293. To the same effect is the following commentary at para. 25.197 of *Halsbury’s Laws of Hong Kong Vol 1(2) (2008 Reissue)*,

“The court does, however, have a residual discretion to permit enforcement of the award, notwithstanding that a ground of objection has been made out, if satisfied that the arbitral Tribunal would not have reached a different conclusion but for the matter complained of.”

39. I am of the view that the same approach is appropriate when one considers how the discretion under art 34 is to be exercised.”
(sic)

81. Mr. Manzoni submits that in these paragraphs, the judge has gone wrong.

82. For reasons that are irrelevant to the present issues, the award was partially set aside but otherwise, the application was dismissed.

83. *Brunswick Bowling* is unusual in that the tribunal gave several reasons for the award, with any single one of those being sufficient for its decision. Thus, where a violation was established which might impact upon some, but not all, of those reasons the case gave rise to a situation

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where the court might properly exercise its discretion and uphold the award.

84. Mr. Manzoni referred me to a number of decisions of the English courts²³ on cases involving the English legislation in respect of enforcement, (s 103 Arbitration Act 1996, in similar terms to s 44 AO). Whilst in broad terms those decisions support the proposition that the discretion is narrow and limited, and that the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound, the legislation is sufficiently different that I prefer not to place any weight upon those decisions.

85. Mr. Manzoni referred me to two further authorities, but these do not assist. *Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd* [1992] 1 HKC 328 at 336, was a decision of Kaplan J, which decision predates *Paklito*, but has not subsequently been considered in the context of the authorities on the point. *Shandong Textiles Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd* [2002] 2 HKLRD 844 at §37, a decision of Ma J (as he then was), on the enforcement of a CIETAC award. The issue before the court was one of jurisdiction, turning upon a period between 1 July 1997, and February 2000, when Mainland arbitral awards did not qualify as Convention awards for the purpose of enforcement in Hong Kong. As a secondary argument, it was contended that there was a s 44(2)(c) AO violation. However, the judge did not find the violation established, and did not have to deal with the exercise of discretion. Accordingly any reference to the exercise of

²³ *Dardana Ltd v Yukos Oil Company* [2002] 1 All ER (Comm) 819 CA; *Kaniora v Guinness* [2006] 2 All ER (Comm) 413 CA; and *Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2009] EWCA 755 (20 July 2009).

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discretion was obiter.

86. Mr. Manzoni also pointed out that Professor van den Berg has himself changed the view expressed in his book. In a recent essay entitled “The New York Convention of 1958: an Overview”, in a publication entitled, “Enforcement of Arbitration Agreements and International Arbitral Awards, the New York Convention in Practice”, 2008, he said:

“The overall scheme of Articles IV-VI is the facilitation of the enforcement of the award. The scheme reflects a ‘pro-enforcement bias’ as certain courts have said. This is also the manner in which Articles IV-VI are generally interpreted by the courts. As far as the grounds for refusal of enforcement of the award as enumerated in Article V are concerned, it means that they are to be construed narrowly. More specifically, concerning the grounds for refusal of Article V(1) to be proven by the respondent, it means that their existence is accepted in serious cases only.

....

Finally, it is arguable that in a case where a ground for refusal of enforcement is present, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is de minimis.”

Discussion:

87. It is beyond argument that the overall scheme of both the AO and the Model Law reflect a view of arbitration that the award will generally be upheld and enforced: see *Heibei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111 at 136A-B, [1999] 1 HKLRD 665 at 688, D-E, per Sir Anthony Mason NPJ:

“... it is appropriate that the courts should have regard to the principles of finality and comity to the extent to which they are consistent with the provisions of the (AO) and the Convention. Both the (AO) and the Convention give effect to the principles of

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finality and comity by prohibiting refusal of enforcement of a Convention award except in the cases for which they provide (AO s 2AA(2)(b), s 44(1); New York Convention, arts. VI.). But both provide for exceptions by stating the grounds on which enforcement *may* not be refused.” (original emphasis)

88. Consequently, consistently with the pro-enforcement bias of the legislation, in my view, the onus in establishing the basis for the appropriate exercise of the discretion will be on the party seeking to attack the award. In an enforcement situation, that will be the losing party, asking that the discretion be exercised against enforcement. In the setting aside situation, again that will be the losing party, asking that the discretion be exercised in favour of setting aside.

89. Thus, where a violation is established in an enforcement case, the party resisting enforcement must say to the court; the result may not remain the same if the violation had not occurred, and accordingly the discretion must be exercised against enforcement. Where a violation is established in a setting aside case, the party seeking setting aside must say to the court; the result may not remain the same if the violation had not occurred, and accordingly the discretion must be exercised in favour of setting aside.

90. In order to determine the answer to the proposition required to be put by the losing party as described above, the court must ask itself this question:

“Is the court able to say that it can exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different?”

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I am fortified in this approach by Professor van den Berg's understanding of the judgment of the Court of Appeal of Hamburg²⁴: namely, that it is only if it is beyond any doubt that the decision could have been the same, that the court would be allowed to override a serious violation.

91. If the court cannot exclude the possibility - a real as opposed to a remote possibility that cannot be sensibly ignored - that the result might be different, then it will not be beyond any doubt that the decision would have remained the same.

92. In assessing whether it can exclude such a possibility, the court will take into account the type of violation, the nature of the violation, and the result of the award.

93. As to the type of violation for example, if the court found that the arbitration agreement was not valid under the law of the relevant state, or that the award was in conflict with its public, (the examples cited by counsel in *Paklito*), it may be thought that it would be unlikely that the court would exercise its discretion in favour of enforcing the award, or against setting aside. In such a case, it may not even be necessary to consider whether the violation could not affect the outcome of the award.

94. As to the nature of the violation, if the court finds a serious violation of due process or fundamental principles of fairness, (as in *Paklito*, *Apex Tech* or *Zhanjiang City*), it may be thought that it would be unlikely that the court could be able to exclude the possibility that if the violation established had not occurred, the outcome of the award would not

²⁴ §69 above.

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be different.

95. As to the result of the award, if the award is based upon several reasons, and any one of those reasons would justify the result, (as in *Brunswick Bowling*), and a violation established impacted upon only some of those reasons, it might be thought that the court could be able to exclude the possibility that if the violation established had not occurred, the outcome of the award would not be different. Such cases are, I think, likely to be rare.

96. In *Apex Tech* Mortimer JA expressed the conclusion in the manner set out in §75 above. In so doing the judge expressed the matter using a double negative: “unable to say” and “could not have affected”. In using a double negative the Court of Appeal was doing precisely what the Court of Appeal of Hamburg did, see §69 above. In order to make the statement set out in §75 above, the question the Court of Appeal had asked itself was, in effect that posed at §90 above. The issue on that appeal was very limited. The trial judge at first instance held that notwithstanding the violation “it was clear” to him that it could not have had an effect upon the tribunal. The Court of Appeal disagreed, saying it could not exclude the possibility that the violation could have affected the outcome. The difference between the trial judge and the Court of Appeal was whether the possibility of a different outcome could be excluded.

97. But, it is I do not think that it is a mere matter of semantics. By being required to express the test in terms of it’s view as to whether a different outcome can be excluded as suggested in §90, the court is recognising the essential elements of a valid arbitral award under the

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UNCITRAL Model Law by a narrowly negative control of the court's residual discretion not to set aside where a violation of a Article 34 ground is established, and that it can only be met if it is beyond any doubt that the decision would be the same, when the court could then override a serious violation.

98. In *Zhanjiang City*, it is plain that Keith J asked the correct question, albeit in slightly different terms from that in *Apex Tech*, when he said that the court's power to exercise its discretion to set aside the award should be exercised if the result could have been different if the procedural irregularity had not occurred, (see §76 above).

99. The judge, out of an abundance of caution, sought advice as to whether or not the submissions which the defendant said ought to have been made, would have been made. It is, I think, unlikely that the response would have been that there would have been no submissions. Once the judge was informed that submissions would have been made, setting aside or refusal of enforcement, in other words the exercise of the discretion in favour of the party attacking the award, was inevitable. It was inevitable because the court would not be able to say that the result would not have been different, (i.e. that the court could not say that the result would have been the same), if the submissions had not been made. The court could not examine the content of those submissions in the light of the award, because to do so would be to usurp the function of the tribunal.

100. Just as Keith J asked the correct question, so did Lam J, first, in setting out the *Apex Tech* test at §32 of his judgment, and second in the manner in which he posed the issue in §38.

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101. For these reasons I do not accept Mr. Manzoni's submission that the Hong Kong courts have turned the test "on its head". Both *China Nanhai Oil* and *Brunswick Bowling* are consistent with *Paklito*, being cases which illustrate circumstances in which the court might refuse to exercise a discretion in favour of a losing party to the award who has established a violation. *Apex Tech* and *Zhanjiang City* are equally consistent with *Paklito*, both being cases where the proper test from *Paklito*, as explained by *Apex Tech*, resulted in the discretion being exercised in favour of a losing party to an award, who had established a violation.

102. I am satisfied that the onus must be on PCH, first to establish one or more of the grounds under Article 34(2), and second to establish that it cannot be said that if the violation had not occurred the result could not have been different.

103. Whether or not the result could have been different, is a determination which must be made, not by examining the merits of the award, but by examining the nature of the violation and the potential consequences that flow from the violation.

104. If a party has been denied the opportunity to make a submission on a matter central to its case on the award, it will, in my view, rarely be that the court will be able to say that the result could not be different. In other words, the court will come to the conclusion that it cannot say that the result could not be different. In so doing, the court cannot examine the submission that might have been made, and apply that to the result to which the tribunal has arrived, because to do so would be to

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pre-empt the tribunal's decision-making power to the court. It is the quality of the violation that must be examined rather than the materiality and the effect on the outcome of the arbitration.

105. That position is entirely consistent with Professor van den Berg's revised opinion. In this respect I accept Mr. Manzoni's submission that there is no suggestion in any of the authorities that materiality to the result in the award itself is a proper basis on which to exercise the discretion not to set aside an award where an Article 34 violation has been established. I note in particular Professor van den Berg's assertion that it is only if it is beyond any doubt that the decision could have been the same that a court would be allowed to override a serious violation.

106. In my view the denial of opportunity to make a submission in reply on a matter of law will invariably constitute a serious violation. It is a matter of basic fairness. In a civil trial, where a defendant calls evidence, at the conclusion of the evidence each party has the right to make only one speech, the defendant first, then the plaintiff: see RHC O 35 r 7(4). But the usual practice, arising out of simple fairness, is that counsel for the defendant may respond to any matters of law arising from the speech of counsel for the plaintiff. Counsel for the plaintiff has, of course, has had the opportunity to respond to the matters of law raised by the defendant.

107. On the same basis, it seems to me that basic fairness between parties to an arbitration requires that when new material is raised by the party who would normally have the last word, an opportunity must be given to the other party to respond, even if only by way of a short written submission.

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Are breaches of Article 34 established:

108. Article 34(2)(a)(ii) only requires a party seeking to set aside the award to show that it was unable to present its case. I accept Mr. Manzoni's submission that there is no requirement that it must be shown that the case that he would have presented was such that it would have resulted in a different conclusion by the Tribunal. That that is so is best demonstrated by the decision of the Court of Appeal in *Apex Tech*, where a violation was established. There, upon the correct application of the test, enforcement of the award was refused.

109. Just as Kaplan J in *Paklito* declined to decide the parameters of the circumstances where the exercise of the discretion might be appropriate, it is not appropriate for me to attempt such an exercise. What I must do is determine whether or not there has been a violation in terms of Article 34(2) and then examine the quality of any violations established to see whether or not I can say, without reference to the award itself, the result would not be different. If I am satisfied that, notwithstanding the violation, there could be no possibility of a different outcome then it is not an appropriate case to the exercise of the discretion in favour of PCH.

The Taiwanese law argument

110. The facts relied upon by Mr. Manzoni in respect of the Taiwanese law issue are set out at §§21-35 above. The agreed procedure, contained in §10 of the procedural timetable required not only the exchange of prehearing submissions, but required that those pre-hearing submissions would contain each party's "best case" on both fact and law at the time of the exchange. The effect of the directions of 20 November

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2007, (see §30), was that GPH would have PCH's best case on the Taiwanese law issue for ten days prior to being required themselves to file their best case on that issue.

111. This change in the procedural timetable was not a change with which both parties agreed, and the Tribunal did not respond to the strong protest made by PCH to these directions.

112. Mr. Sussex argued that it was difficult to understand how the substitution of a sequential exchange of submissions for the previously ordered contemporaneous exchange could give rise to procedural unfairness, particularly having regard to the fact that PCH bore the burden of proof in relation to the issue of illegality and Taiwanese law.

113. With respect to Mr. Sussex, I do not find it difficult to understand the procedural unfairness. The submissions were required to state PCH's "best case", both on fact and law at the time of the exchange. By having that best case for ten days prior to having to file their own submissions GPH was given an advantage that was not available to PCH. They could prepare their best case in the full knowledge of the case they had to answer. GPH, in those circumstances, had the opportunity to tailor both its expert evidence and its argument to meet and pre-empt PCH's best case. PCH was, by the terms of the procedural order, bound to confine its case, and was subsequently limited by, the "best case" it had filed. That case could not be further developed during the hearing, even in the light of GPH's submissions. That is the effect of the "best case" rule.

114. That was a particular advantage to GPH, when it is noted that

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GPH would be filing its pre-hearing submissions on the Taiwanese law issue, on a Friday afternoon, with the hearing due to begin on Monday morning. Thus, GPH had ten days to peruse PCH's submissions, and to prepare to meet PCH's "best case" submissions at the December hearing, when PCH had only two calendar days and zero working days to peruse and prepare on the basis of GPH's evidence and submissions on this issue.

115. Mr. Sussex's argument against the 20 November 2007 ruling constituting a breach of Article 34(2)(a)(ii) depended upon an argument that the amendment to the reply by PCH, in which the illegality issue was raised, was late, as was the filing of Mr Shay's expert evidence on Taiwanese law. Consequently, he implies, the Tribunal were fully justified in making the changes made to the procedural timetable.

116. The evidence shows that on numerous occasions, particularly when dealing with timetable issues, counsel for GPH was to assert to the Tribunal both that PCH's amendment to the Reply, with the introduction of the illegality argument, and Mr Shay's expert report, were late. It is clear from the content of the Tribunal's procedural decisions that the Tribunal accepted that submission and weighed that fact into account in reaching a number of the procedural conclusions.

117. It is right that Mr Shay's report was filed later than the required time in accordance with the original procedural timetable. But it was not late. It was filed in accordance with the amended procedural timetable, with which both parties had agreed, following PCH's application for an amendment. Once the procedural timetable was amended, anything filed in accordance with the amended procedural

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timetable could not be said to be late.

118. With respect to the Tribunal, once the Tribunal had agreed to allow the amendment to the Reply, and varied the timetable, no complaint should have been made or entertained as to the consequences of the timing of the amendment to the Reply or the filing of Mr Shay's report. That is especially so in light of the fact that the amendment to the Reply was required by reason of the contradictory position adopted by GPH, a position that was not clarified until 4 September 2007, as Mr. Sussex was obliged to acknowledge, albeit indirectly in his acceptance that Mr Chang Jr's affidavit which clarified the position, was filed on that date.

119. In an unreported decision of the British Virgin Islands, Eastern Caribbean Supreme Court, in an application by GPH to appoint liquidators over PCH²⁵, Bannister J (Ag), took the view that the procedural order of 20 November 2007 was in effect a penalty to be paid by PCH in obtaining the leave to amend. He said this at §13:

"Applying these principles, seems to me that one answer to the point on prejudice arising out of the timetable adopted by the Tribunal might be to say that if a party changes its case late in the day, it may have to pay a penalty when the tribunal attempts to accommodate it without also prejudicing the other party."

With respect to the learned judge, I disagree. As the factual sequence set out above shows, the amendment was required because of the conflicting position adopted by GPH, which was not clarified until late in the piece, thereby giving rise to the need on the part of PCH to seek the amendment. The submission made to the Tribunal that the amendment was "late", was

²⁵ *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd*, unreported, 11 January 2010, Claim No BVIHCV 2009/389

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simply not justified on the facts but the way in which it was put by GPH plainly influenced the Tribunal in the manner suggested by Bannister J. It is difficult to see why, once the Tribunal had allowed the amendment, PCH should then be subject to a “penalty” that created an inherent unfairness.

120. Such a “penalty” might be justified in litigation in the courtroom, where there is no “best case” rule which prevents a party from revising and developing its case in the light of that advanced by the other party. But such a penalty cannot be justified in an arbitration where the parties set the procedural rules by agreement. The obligation on the Tribunal was to conduct the proceedings in accordance with the agreement of the parties, as reflected in the procedural timetable. Neither party sought a change to the procedural timetable by way of a departure from the requirement of exchange of submissions, and the timing of the amendment could not, in the circumstances, possibly have been a reason for giving an advantage to GPH which they did not have under the procedural timetable.

121. I am accordingly satisfied that the consequence of the procedural order of 20 November 2007 was that the procedure adopted by the Tribunal was not in accordance with the agreement of the parties, and that PCH was thereby unable to present its case. In that respect, PCH has established a violation of Article 34(2)(a)(ii) and (iv).

122. I am unable to say that if this violation had not occurred, and GPH had not had the unfair advantage of seeing GPH’s best case on the Taiwanese law issue before making its own submissions, the result could not have been different. Having so found, PCH are entitled to the exercise of discretion in favour of setting aside the award.

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123. Mr. Manzoni raised also the effect of the 20 November 2007 ruling being that PCH would receive GPH's Taiwanese law authorities zero working days, and only two days prior to the commencement of the case. However, the Taiwanese law argument was adjourned for the translation of the authorities. Any prejudice there might have been to PCH in receiving the authorities with so little time prior to the hearing was consequently ameliorated to the extent that it cannot be argued that any prejudice arose from the timing of the supply of the authorities.

124. Were that the only violation established I doubt that it would be appropriate to exercise the discretion in favour of setting aside, because the prejudice had gone. But that is not a matter I need to deal with in the light of the conclusions I have reached.

The joint experts and report argument

125. The facts in respect of the joint experts and report argument are set out in §§36-41 above. The essence of the complaint is that by refusing to consider, and subsequently refusing to receive, the three additional authorities that PCH wished to rely upon, the Tribunal effectively denied PCH the ability to present its case as it wished.

126. But the Tribunal did not consider or review the authorities PCH wished to rely upon. Demonstrably therefore, there was no basis upon which the Tribunal could say whether or not those authorities came within the category of "sensational authorities" which it had indicated would be allowed.

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127. Other than submitting that it was not intended that the experts should launch into a renewed round of submissions and cases, Mr. Sussex, sensibly in my view, did not seek to contend that the ruling of the Tribunal properly enabled PCH to present its case. Instead, he pointed to the Tribunal's ruling, and in particular §§6.14-6.19 thereof, to contend that in fact Taiwanese law was irrelevant and accordingly the authorities which were rejected were rightly rejected.

128. For the reasons given in §§53-59 above, I am satisfied that I should not, as Mr. Sussex invites me, have regard to the basis in the award itself upon which the Tribunal determined the issue of Taiwanese law.

129. I am left in no doubt at all that the Tribunal's refusal to receive and consider the additional authorities sought to be cited by PCH prevented PCH from presenting its case. In this respect, PCH has established a violation of Article 34(2)(a)(ii).

130. I am unable to say that if this violation had not occurred, and the Tribunal had considered the additional authorities sought to be relied upon by PCH, the result could not have been different. Having so found, PCH are entitled to the exercise of discretion in favour of setting aside the award.

The Hong Kong law argument

131. The facts in relation to the Hong Kong law argument are set out at §§42-52 above. The issue of Hong Kong law was raised for the first time by PCH in its post-hearing submissions. GPH in its reply

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submissions protested PCH raising the Hong Kong law issue, but notwithstanding that protest, responded substantively to PCH's submissions on that issue.

132. On 13 October 2008, (see §43 above), by letter, the Tribunal sought an explanation from PCH as to these submissions, suggesting that the issue was outside of the scope of the procedural ruling of "3 May 2007"²⁶. It is clear from the letter that what was sought was a procedural explanation from PCH as to why they were entitled to raise the issue at that stage of the proceedings. The explanation was provided by a letter dated 20 October 2008²⁷. That letter, plainly deliberately, did not add to the submissions that had been made, but was confined to a procedural explanation.

133. In its letter, as is shown in §43 above, the Tribunal sought advice from GPH whether, if PCH's Hong Kong law argument was received by the Tribunal, GPH would wish to make any further submissions in addition to those already made. GPH accepted this offer and, on 24 October 2008, made further substantive submissions both on the Hong Kong law issue and on the application of Hong Kong law to PCH's lack of authority defence. In those submissions two new cases were cited.

134. PCH sought the right to respond to that new material, but did not make a substantive response, properly awaiting the leave of the Tribunal. The basis upon which PCH sought leave to respond was that

²⁶ The reference should have been to the procedural ruling of 7 May 2007, that had followed the conference on that day, (see paragraphs 18 above).

²⁷ B 384.

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GPH had remained silent on Hong Kong law throughout the hearing, and consequently PCH took the view that Hong Kong law was not in dispute.

135. The Tribunal did not give leave to PCH to make a response. This refusal can only be seen in the light of the fact that although GPH submitted two new authorities, which were duly received and considered by the Tribunal, the Tribunal had refused to allow PCH to submit new authorities on the Taiwanese law issue.

136. Instead of allowing PCH the opportunity to respond, the Tribunal informed the parties that it had sufficient material to decide the Hong Kong law issue. This it proceeded to do. In so doing it relied upon the new authorities that had been referred to by GPH, and referred to other New York authorities, to which neither party had been referred, and about which neither had made submissions.

137. The Tribunal was right when it said that no provision was made in the directions of 13 October 2008, for PCH to respond. But by not giving PCH the right to respond to the new material from GPH in its 24 October 2008 response, PCH was effectively denied the opportunity to present its case. Once the Tribunal had invited GPH to respond to PCH's Hong Kong law submissions the Tribunal was bound to give PCH the opportunity to reply on those matters of law. PCH were entitled, in my view, to take the position that Hong Kong law need not be proved in the light of the fact that Hong Kong was the seat of the arbitration. They were unable to present argument in response to the opposite position taken by GPH in its substantive submissions of 24 October 2008.

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138. Again, Mr. Sussex does not seek to argue against the proposition that in adopting the procedure that was adopted, the Tribunal denied PCH the opportunity to present its case. Instead, again, he argued that by reference to the award, the Tribunal was plainly right, and consequently any complaint was groundless. It is not open to me to look at the award in the sense sought by Mr. Sussex.

139. The Tribunal had set a tight timetable for the conduct of the arbitration. It may be that that timetable was required because of the commitments of the Mr. Williams, but that is not a matter I am required to decide. The Hong Kong law issue, having arisen subsequent to the completion of the oral submissions hearing, would easily have been dealt with by way of a short round of written submissions, thereby ensuring that each party had had a proper opportunity to present its case. Certainly, by that stage, there was no issue of time pressure. In this respect, I note that the post-hearing written submissions were completed by 7 October 2008, with the Tribunal ruling on 25 November 2008, following the exchange of correspondence and substantive submissions from GPH, as set out in §§42-52 above, that there should be no further submissions. But it was not until 24 August 2009, ten months later, that the award was delivered. It can hardly be said that there was a need to bring the cycle of submissions to an end.

140. In the whole of the circumstances, I am satisfied that the failure of the Tribunal to give PCH the opportunity to respond to GPH's submissions on Hong Kong law rendered PCH unable to present its case. A violation of Article 34(2)(a)(ii) is established by PCH.

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141. I am unable to say that, had PCH been given the opportunity to respond to the new material raised by GPH, the result could not have been different. Having so found, PCH are entitled to the exercise of discretion in favour of setting aside the award.

142. In its award, when dealing with the Hong Kong law issue, the Tribunal cited other New York authorities, to which neither party had been referred, and about which neither party had made any submissions. I have always understood that the practice was that, when a judge, in the course of preparing his judgment, came upon authorities not cited by the parties which the judge considered that might be relevant, he should refer them to the parties and seek either written or oral submissions on those authorities. That said, I can find no direct authority to support the proposition. That may be because it is self evident.

143. Mr. Sussex pointed to the procedural timetable which expressly provided that the parties would not need to call expert evidence on the law of New York. That is correct, that provision was not an abandonment of the right of the parties to make submissions on New York law. It merely meant that New York law did not have to be proved. Mr. Sussex cited the following passage from Mustill & Boyd on the Law and Practice of Commercial Arbitration in England (2nd Edn.), at 360-1:

“(c) Arbitrator using own knowledge

As a matter of general principle, an arbitrator should not rely on his own knowledge of facts relating to the issues before him without telling the parties that he proposes to do so and giving them an opportunity to comment on it or call rebutting evidence. There is, however, an important exception to the general principle where the arbitrator has been chosen for his special experience or knowledge in a particular field, for here it is clear

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that the arbitrator not only may but ought to make use of his own experience and knowledge, and may do so without reference to the parties and without the benefit of evidence on the matter in hand.”

144. The chairman Mr. Williams QC received legal education at Harvard Law School. Mr. Carter, the arbitrator appointed by GPH, is licensed to practice law in New York. Ms Harpole, the arbitrator appointed by PCH, is licensed to practice law in the State of California, USA. While the more prudent course might have been for the arbitrators to refer the new New York authorities to the parties for a brief round of written submissions on the point, having regard to the background of the arbitrators, I am satisfied that they were perfectly capable of dealing with the New York law issue, without further submissions.

145. In those circumstances I am satisfied that the failure of the Tribunal to refer the New York authorities it had identified to the parties for further submissions was not such a serious matter and as to constitute a violation of Article 34(2).

Conclusion:

146. For the foregoing reasons I am satisfied that PCH has established violations of Article 34(2), and that in the circumstances it is appropriate that the discretion should be exercised in favour of setting aside the award. I so order.

Costs

147. There will be an order nisi that GPH must pay PCH’s costs on

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a party and party basis.

(John Saunders)
Judge of the Court of First Instance
High Court

Mr Charles Manzoni, instructed by Messrs Sidley Austin, for the Applicant
Mr Charles Sussex SC, leading Mr Samuel Wong, instructed by Messrs Sit
Fung Kwong & Shum, for the Respondent

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