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HCCT28/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO.28 OF 2002

BETWEEN

KARAHA BODAS COMPANY LLC Plaintiff

and

PERUSAHAAN PERTAMBANGAN MINYAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA) Defendant

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Before : Hon Burrell J in Chambers

Dates of Hearing : 7-9, 17 January and 12 March 2003

Date of Handing Down of Decision : 27 March 2003

D E C I S I O N

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1. On 15 March 2002, this court granted the plaintiff ("KBC") leave, *ex parte*, to enforce an arbitration award made in Geneva on 18 December 2000 in the same manner as a judgment and to enter judgment in the amount of the award. On the same date a judgment was entered pursuant to that leave. By this summons, the defendant ("Pertamina") applies under Order 73, rule 10 to set aside the order.

2. The court has had the benefit of extensive legal argument over five days on a number of issues from Mr Jat Sew-tong, SC leading Ms Grace Chow (for KBC) and Mr Mark Strachan, QC (UK) and Mr Charles Manzoni (for Pertamina).

3. The matter has a long and fairly complex history. There have been and there continue to be proceedings in a number of different countries. Very large sums of money are at stake. A thumbnail sketch, in so far as it relates to the Hong Kong proceedings, is as follows.

4. In November 1994, two contracts were executed in Indonesia. Firstly, there was a Joint Operation Contract ("JOC") between KBC and Pertamina. This contract, according to its own terms was "governed by the laws and regulations of the Republic of Indonesia". KBC is a Cayman Islands Company with its centre of operations in the USA. Pertamina is an Indonesia state-owned oil and natural gas exploration company. By the JOC Pertamina appointed KBC as the sole contractor for the exploration and development of geothermal energy in West Java. It also required KBC to build, own and operate electricity generating facilities.

5. Secondly, there was an Energy Sales Contract, ("ESC"). This was made between P.T. PLN (Persero) ("PLN") on the one hand and Pertamina and KBC on the other. PLN is another Indonesian state-owned electricity enterprise. The ESC was also "governed by the laws and regulations of the Republic of Indonesia". By the ESC any energy that was developed by the exploration would be sold to PLN.

6. The project came to a halt as a result of Indonesian Government decrees in 1997 and 1998. It was suspended and remains suspended. On 30 April 1998, KBC served a notice of arbitration upon Pertamina, PLN and the Government of Indonesia. An arbitration was convened, its legal seat was Geneva (as found by this decision) but, for convenience, the Tribunal sat in Paris. A preliminary award was issued on 30 September 1999 which found in KBC's favour. This application is the Hong Kong part of international enforcement proceedings of the award.

7. The award is a New York Convention award. Accordingly, Pertamina must establish one or more of the grounds, upon which a Hong Kong court may refuse enforcement, found in sections 44(2)(a)-(f) and (3) of Cap. 341, the Arbitration Ordinance. The relevant provisions are as follows :

> "**44. Refusal of enforcement**
>
> (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-
>
> (*a*) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
>
> (*b*) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (*c*) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*d*) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

(*e*) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or

(*f*) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award."

8. By its summons, Pertamina contends that this is a case in which enforcement should be refused in Hong Kong. The matters upon which they rely and thus, the issues which fall for consideration and resolution by this court are, in summary form, as follows (as contended by Pertamina) :

(1) The award has been set aside by the Central Jakarta District Court being a competent authority of the country under the laws of which the Award was made, namely Indonesia.

(2) There was no written agreement which permitted the claims made under the JOC and the ESC to be consolidated in a single arbitration with a single arbitrator being appointed jointly for Pertamina and PLN.

(3) The Tribunal wrongly permitted the Claims made under the JOC and the ESC to be adjudicated in a single arbitration.

(4) The arbitrators were not appointed in the manner prescribed by the JOC and the ESC

(5) The Tribunal refused Pertamina an adjournment that was necessitated by a significant change in KBC's case shortly before the hearing, as a result of which Pertamina was unable properly to present its case.

(6) The Tribunal denied Pertamina an application for discovery of documents relevant to the said change in KBC's case, as a result of which Pertamina was unable properly to present its case.

(7) The Tribunal failed to apply Indonesian law, being the governing law of the JOC and the ESC, to issues which were central to the dispute between the parties.

(8) Enforcement of the award would be contrary to the public policy of Hong Kong.

9. Before dealing with each of these issues, some of the general principles which underlie the court's approach in enforcement proceedings such as these should be set out.

(i) Provided certain requirements are met the Hong Kong courts grant an order of enforcement *ex parte*. It is then up to the other party to apply to set aside the *ex parte* order. This demonstrates a pro-enforcement starting point in Hong Kong. As stated by the authors in *Redfern & Hunter's Law and Practice of International Commercial Arbitration*, most national courts have recognized and approved a "pro-enforcement" bias.

(ii) The only grounds upon which an award can be refused are those contained in Cap. 341, section 44. The burden is on the defendant to persuade the court that one of those grounds apply.

(iii) The task of the court is confined to deciding whether or not one of the section 44 grounds apply. In carrying out this task it should not be concerned with the merits of the award.

(iv) If the defendant discharges the burden of proof on it, the court retains a residual discretion to, nonetheless, enforce the award.

(v) Section 44(3) (the "public policy" ground) is to be construed narrowly. Its application is confined to those cases where it would be "contrary to the fundamental conceptions of morality and justice" to enforce the award. (*per* Mason NPJ in *Hebei Import and Export Corp. v. Polytek Engineering Co. Ltd* [1999] 2 HKCFAR at p.139).

10. I turn now to the individual grounds.

1. SECTION 44(2)(f)

11. Pertamina contend that the award has been set aside by a competent authority under the laws of which the award was made.

12. On 27 August 2002, a court in Jakarta set aside the award. Pertamina contend that the award was made under Indonesian law and an Indonesian court has set it aside therefore sub-section (2)(f) applies.

13. KBC say the law under which the award was made was Swiss law therefore (2)(f) does not apply.

14. Reference to "the law" in sub-section (2)(f) undoubtedly refers to the law which governed the procedural law of the arbitration, not the substantive law of the contract. A variety of expressions are used to describe this such as, *lex arbitri*, curial law and procedural law. For consistency I shall use the expression *lex arbitri*. What is not meant by "law" in sub-section (2)(f) is the substantive law of the contract being arbitrated. In this case that was indeed Indonesian law.

15. The contract itself does not expressly state what the *lex arbitri* should be in the event of an arbitration. However, in this case, in my judgment "the law" to which sub-section 2(f) refers is plainly Swiss law. I have come to this conclusion both as a matter of fact and as a matter of law.

(a) As a matter of fact

16. Sub-section (2)(f) ends with the words "… under the law of which it was made". This logically means "the law of which it was, in fact, made". This court must decide which *lex arbitri* did the Swiss Tribunal actually apply. An examination of the facts demonstrates clearly that it applied Swiss law. The following factors, taken together, lead to this conclusion.

(i) The parties chose a neutral place to arbitrate. They chose one of the leading arbitral centres in the world, Geneva. Had they intended the *lex arbitri* to be Indonesian law, they would have simply arbitrated in Indonesia. The Tribunal itself was

international in its make-up and of the highest calibre. Geneva would not have been chosen as the seat of the arbitration for convenience but because of its neutrality. The neutrality aspect would have been diluted had Indonesian law been the *lex arbitri*.

(ii) It is a fact that Swiss law states that the *lex arbitri* of arbitrations conducted in Switzerland shall be Swiss law. This is a mandatory provision. Such a situation is commented on by the authors of *Redfern & Hunters* in the following terms.

> " In an international commercial arbitration, the proceedings are under the general supervision of the national law of the country in which the arbitration has its seat. Any mandatory provisions of the law that governs the conduct of the proceedings must be taken into account. … If the parties prefer the law of a particular country (country A) to the law of the place of arbitration (country B) they should either :
>
> > move to country A; or
> >
> > adopt as rules governing their arbitration the particular provisions that they admire in the law of country A.
>
> To attempt to conduct an arbitration in country B according to the supervisory arbitration law of country A merely adds another tier of rules of law to those to which the parties (and the arbitral tribunal) must pay heed. International commercial arbitration is complicated enough without such flights of fancy; fortunately, however, it appears that in practice such a choice is rarely if ever made."

Lord Hodson in *James Miller & Partners v. Whitworth Street Estates (Manchester) Ltd* [1970] AC quoted, at p.606, to the same effect from *Dicey & Morris, Conflict of Laws*, 8th edn :

> "Where the parties have failed to choose the law governing the arbitration proceedings, those proceedings must be considered, at any rate prima facie, as being governed by the law of the country in which the arbitration is held, on the ground that it is the country most closely connected with the proceedings."

(iii) The conduct of the parties.

References to and reliance on Swiss law as the *lex arbitri* can be found throughout the proceedings. The following are examples :

(a) On 10 January 1999, Pertamina filed a "Memorial regarding Preliminary Issues" document. For present purposes the issues therein are not important. What is of significance however are *Pertamina's* statements such as :

"Reference to Swiss Law supports this conclusion …. As a result, arbitration proceedings under both contracts are governed by Chapter 12 of the Swiss Private International Law Statute …"

"Indeed, the Swiss Courts have required that parties strictly adhere to the precise terms of their arbitration agreement, …"

"The arbitrators do not, under the arbitration agreements … and (under) the Swiss law in force at the seat of the arbitration, have the power to …"

"… It would be subject to setting aside in Switzerland under Articles 179 and 190 of the Swiss PIL."

(b) On 30 September 1999, the Tribunal made its preliminary award. It contains statements such as :

(when setting out *Pertamina's* submission)

"… The arbitration proceedings are governed by Chapter 12 of the Swiss Private International Law Statutes."

"The Respondents also state that under … Swiss law, the arbitrators have no power to …"

"Such solution is not acceptable under applicable Swiss law."

(c) On 19 February 2001, the Tribunal stated, in a Post award decision :

"a relief which is neither contemplated by the UNCITRAL Rules nor by the *lex arbitri*, Swiss law". This ruling was made twice in the same decision in relation to two separate issues.

(d) Pertamina's initial response to the award was entirely consistent with their acceptance of Swiss law as the *lex arbitri*. They, firstly, attempted to set aside the award in Switzerland. Had they believed the *lex arbitri* was Indonesian law they would not have done so. (There is thus force in KBC's submission that they only went to Indonesia to set it aside as a last resort).

(e) The enforcement proceedings which followed in the USA are littered with references *by Pertamina* to Swiss *lex arbitri*. In their written answer to KBC's petition they say :

"… in an arbitration conducted under the procedural laws of Switzerland and the substantive law of Indonesia".

"Pertamina appealed to the Swiss Supreme Court, the relevant authority in the formal situs of the arbitration …"

"The applicable law and treaties governing international arbitration give courts of the arbitration situs, here Switzerland, authority to vacate …".

Similarly, in Pertamina's "Discovery and Joint Management Plan" dated 29 May 2001 they say "The arbitration is subject to Swiss arbitration law…" In their Motion to Stay dated 19 June 2001, they say "The award was conducted subject to the arbitration laws of Switzerland". These examples are not an exhaustive list. There are more.

(f) Pertamina's stance that the *lex arbitri* is Indonesian law has come very late in the day. It's first appearance as Pertamina's position came when they went to Indonesia to seek an annulment of the award (described by Judge Atlas in the US enforcement proceedings as a "last ditch effort"). As is pointed out by KBC, Pertamina's position on the *lex arbitri* only changed 30 months after the preliminary award was published, 15 months after the Final award (December 2000) and seven months after the Swiss Court dismissed the petition for revision (August 2001).

(g) All the above conduct, namely a consistent acceptance and reliance on Swiss law by Pertamina, is not only relevant as evidence that the *lex arbitri* was in fact Swiss but is also relevant in support of KBC's submission that Pertamina are now estopped from contending otherwise. In *China Nanhai Oil Joint Service Corp. v. Gee Tai Holdings* [1995] 2 HKLR 215, Kaplan J gave careful consideration to the issue of estoppel and decided that :

> "The doctrine of estoppel can apply to the grounds of opposition set out in Article V of the New York Convention. The question of estoppel is a fundamental principle of good faith. On a true construction of the Convention there is 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 the tribunal. Its failure to do so and its obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that is consistent with the obligation of good faith nor with any notions of justice and fair play."

Pertamina submit that the *Gee Tai Holdings* principle is not applicable because they had not been "keeping the point up their sleeve". They submit that the lateness in taking the point was due to the fact that the time for commencing proceedings in Indonesia does not begin to run until the Award has been registered. This is far from Pertamina's best point. There was nothing to prevent them from stating their position that the *lex arbitri* was Indonesian law at any time. Not only did they fail to do so, they did the opposite. It was a *volte-face*.

(h) By the same token, because the court's consideration of section 44(2)(f) is a question of fact Pertamina's lengthy and interesting submissions on expert evidence on Indonesian law are not matters with which this court is concerned. Similarly, the fact that the court in Indonesia has now annulled the award under its own law is also a matter which has no effect on this court's task.

(b) As a matter of law

17. If, contrary to KBC's primary submission that determination of the *lex arbitri* is a question of fact, it is necessary to construe the arbitration clauses in the contracts to determine the *lex arbitri*, then this court places reliance on the following matters, in coming to the conclusion that the answer remains, Swiss law.

18. From the wealth of authority cited by both counsel on this issue can be gleaned the following starting point : "The curial law (*lex arbitri*) is normally, but not necessarily, the law of the place where the arbitration proceedings are held" (*per* Hobhouse J in *Dallal v. Bank Mellat* [1980] at p.252. "The place" plainly refers to the legal seat of the arbitration (here Geneva) not a random city of convenience for the arbitrators (here Paris). For the normal situation not to apply there must be strong pointers to the contrary. Such pointers as there may be in this case cannot, in my view, be regarded as strong when put in context and balanced against the following factors.

(1) Had the parties wanted to, expressly, depart from the norm they could have said so in the contracts but they did not. The contracts are specific as to the substantive law (Indonesian) but silent as to the lex arbitri. Lord Mustill in *Channel Group v. Balfour Beatty Ltd* [1993] AC at p.357 said :

> " Certainly there may sometimes be an express choice of a curial law which is not the law of the place where the arbitration is to be held: but in the absence of an explicit choice of this kind, or at least some very strong pointer in the agreement to show that such a choice was intended, the inference that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place is irresistible."

Clearly, Pertamina and KBC did not make an "explicit choice". There are many other authorities in support of this general proposition, one being Potter J in *Sumitono v. Oil & Natural Gas Commission* [1994] 1 Lloyd's Reports, at p.57 :

> "… There is, it is true, no express choice of curial law. However, there is a clear requirement that the arbitration proceedings be held in London. In the absence of express agreement, there is a strong prima facie presumption that the parties intend the curial law to be the law of the 'seat' of the arbitration, i.e. the place at which the arbitration is to be conducted, on the ground that that is the country most closely connected with the proceedings —"

It is acknowledged that the presumption may be rebutted by matters other than an express provision to the contrary, however, it seems to me that in the present case Pertamina's attempt to do so is forlorn.

(2) The drafters of the contracts were explicit on many matters such as the choice of a neutral place (Geneva), the adoption of the UNCITRAL rules in the arbitration and the choice of Indonesian law as the law of the contracts. It is not a difficult inference to draw that had Pertamina insisted on an express provision stating that the *lex arbitri* was to be Indonesian law, the contracts would not have been signed. I find it irresistible that the choice of Geneva as the "place" was also a choice that it was the formal "seat" in the legal sense. By the same token it is plain that the choice of an independent neutral seat of arbitration carried with it an intention to be bound by the *lex arbitri* of that place.

(3) The UNCITRAL rules require that an award is made at the place (or seat) of the arbitration. Accordingly, the preliminary award, the award itself and the post-award decision were all expressly stated to be made in Geneva. All

these were done as a matter of course. It was never argued that it should be otherwise.

(4) Pertamina, as evidence of "strong pointers" to rebut the presumption rely, *inter alia*, on the fact that the contracts themselves are "replete with references to the provisions of Indonesian law". The expression "replete with" somewhat overstates the position but they point out that the contracts expressly provide for the modification of, in particular, four Articles of the Indonesian Code of Civil Procedure. Article 650.2 (appointment of arbitrators) and 620.1 (time limit on arbitrations) have been modified, Article 631 (authority to arbitrators to decide on "amiables compositeurs") has been invoked and Article 641 (rights of appeal) has been waived.

In my judgment the existence of these provisions barely dents the fundamental principle in favour of Swiss law. Both parties to this application have produced lengthy and learned academic expert opinions on the issue, and both counsel have argued the strengths and weaknesses of the competing opinions. I propose to be extremely sparing in my citation of the various opinions because of the overwhelming weight to be attached to the underlying factual truth that the parties' choice of a neutral seat together with the absence of an express choice of different *lex arbitri* are the dominant factors in the equation which, in this case, results in the answer that commercial common sense demands that Indonesian law was not to be the *lex arbitri*. I merely select one passage from the opinion of Mr Robert Hornick, an American lawyer and academic of great experience in this field. It is a passage

with which I agree and which I consider to be admissible as it does not purport to construe the parties intentions :

> "Strictly speaking, I do not think it was necessary for the parties to mention the referenced provisions because, in my view, those provisions do not apply to arbitrations where the place of arbitration is outside Indonesia and the applicable rules of arbitration are international rules (such as the UNCITRAL Rules). However, it is my experience that, in practice, parties often mention these provisions anyway, because there is no Indonesian law or case expressly stating that the said provisions do not apply to foreign arbitrations, and foreign parties are often concerned that Indonesian courts may seize upon one or more of such provisions to block enforcement of a foreign arbitral award in Indonesia if such arbitration has been conducted in a manner contrary to one of these provisions. Enforcement of foreign arbitral awards in Indonesia has always been problematic; courts may, and do, refuse to enforce on public policy grounds that are broadly construed. The concern has been that if provisions such as these are not mentioned, the enforcing court may deem them applicable as a matter of public policy.
>
> Indeed, in my approximately thirty years of representing foreign clients in connection with contracts with Indonesian parties containing international arbitration clauses, I have repeatedly been advised by local counsel that my clients should waive provisions of Indonesian arbitration law that indicate a different result from that intended by the parties, notwithstanding that the place of arbitration specified was outside Indonesia and that the parties did not intend for Indonesian law to apply to the arbitration proceeding. The reason given was always that it would facilitate enforcement because Indonesian courts would likely (albeit incorrectly) apply Indonesian law anyway and therefore it was best to waive provisions that could otherwise be invoked to thwart enforcement.
>
> This approach to Indonesian contract drafting is not limited to arbitration clauses. Over the years, I have seen many dozens of Indonesian contracts where, notwithstanding an express choice of foreign substantive law, the contract also contained waivers of Indonesian Civil Code provisions.
>
> I definitely do not regard mention of these provisions as indicating, or creating any presumption, that the lex arbitri should be Indonesian arbitral law."

(5) Pertamina's attempt to rebut the normal principle encounters further difficulties when faced with the fact that the law of Switzerland mandatorily applies its own law as the *lex arbitri* for arbitrations within its jurisdiction. "*Redfern and Hunter*" specifically refers to Chapter 12 of the Swiss Private International Law Act, Article 176(1) :

> " Amongst modern laws on arbitration, those of Switzerland and of England are perhaps particularly clear on the link between the seat of the arbitration and the *lex arbitri*. Swiss law states:
>
> > 'The provisions of this chapter shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland.'"

(6) I agree with the opinion of KBC's experts on Swiss Law, Professor Kanfman-Kohler and Ellest Geisigner, who in their joint opinion stated, quite simply :

> "It is of the greatest importance to understand that, by choosing Switzerland as the seat of the arbitration, parties from abroad trigger the application of the provisions of chapter 12 PIL — by operation of law — as the *lex arbitri*. This is trite law in Switzerland. It should also be stressed that Swiss law requires no connecting factor with Switzerland in addition to the seat of the arbitration … Moreover, several authorities correctly point out that the circumstance that the seat of the arbitration is in Switzerland not only triggers the application of chapter 12 PIL as the law of the arbitration, but also means that the award is deemed to have been rendered in Switzerland within the meaning of the New York Convention of 1958. A Swiss judge would therefore have no hesitation as considering Switzerland as the country of origin of the award within the meaning of Article V.(e) of the New York Convention. This is entirely consistent with the overall trend favouring the seat of the arbitration as the factor identifying the law of the arbitration …
>
> Therefore, the seat of the arbitration (or 'place of arbitration' in the legal sense) was without doubt located in

> Switzerland. Consequently, the law of the arbitration or *lex arbitri* was Swiss law, more specifically chapter 12 PIL."

This is a statement of foreign law and, as such, is a factor that this court may take into account when carrying out its task of construing the arbitration clauses, in particular as to what was the *lex arbitri*. The relevance of such statements was put succinctly by Ma J in *Shandong Textiles Import and Export Co. v. Da Hua Non-ferrous Metals Co.* [2002] 2 HKC at p.131 :

> " In my judgment, I am not bound to follow Professor Liu's views on the application of PRC law to the two contracts. The true effect and application of foreign law to the facts of any case, especially when the construction or analysis of contracts is concerned, is a matter ultimately for the court itself to resolve: see *Dicey & Morris: The Conflict of Laws* (13th Ed) Vol 1 at para 9-019."

19. For all the above reasons Pertamina's attempt to come with section 44(2)(f) must fail.

2. SECTION 44(2)(d), (e) and (3)

20. Grounds 2, 3 and 4 come within these sub-sections to section 44. Two separate points are made.

(a) Wrongful consolidation

21. Pertamina point out that the two contracts, the JOC and the ESC, are separate contracts containing separate arbitration clauses. The parties to the contract are different. Under the JOC they are KBC and Pertamina and under the ESC they are PLN on the one hand and Pertamina and KBC on the other. On 30 April 1998 KBC served a single notice of

arbitration on Pertamina, PLN and the Government of Indonesia arising out of disputes under both contracts. Pertamina and PLN objected to a single arbitration. In support of their objection they submitted that the UNCITRAL rules did not provide for such consolidation, the contracts had different parties and different timetables for performance and contains no provisions for consolidated arbitrations. In fact, there was no consolidation in the sense that two arbitrations were heard together. The Tribunal merely ruled that one notice of arbitration was sufficient for disputes arising from both contracts.

22. The Tribunal permitted a single arbitration and in doing so, stated as follows :

> "… As the position and responsibility of each party under the ESC are different, disputes were likely to arise not only between KBC and PERTAMINA on the one hand and PLN on the other hand, but also between two of the parties or between KBC and PLN against PERTAMINA or between KBC on the one hand and PERTAMINA and PLN on the other. This last configuration was the more probable as both PERTAMINA and PLN are owned by the (Government of Indonesia) and, thus, have common interests.
>
> The question to solve is only whether KBC could validly act against PERTAMINA and PLN in a single arbitration pursuant to the two arbitration clauses included in the two contracts.
>
> The Arbitral Tribunal accepts KBC's position according to which a party may act against several parties bound by different but similar arbitration clauses. As explained by Swiss Federal Tribunal in its decision of July 19, 1988 in the famous Westland Case (Rev. Arb. 1989, p.514), the validity of such a single action depends on the connexity of the claims and of appropriateness (《 *opportunité* 》). However, as stressed by the Swiss Federal Court in this decision, the positions of the parties in the disputes remain independent as to the substance of the claims.
>
> Consequently, KBC's action in a single arbitration would be admissible in case of connexity of the legal relations between KBC and PERTAMINA on the basis of the JOC on the other

hand, and between KBC, PERTAMINA and PLN on the basis of the ESC on the other hand. However, the use of the word connexity to describe the relationship between the JOC and the ESC would be an understatement. In reality, the two contracts are integrated."

23. Fundamental to Pertamina's argument is the submission that the contracts are sequential. The JOC provides for the production of energy, the ESC provides for the sale of energy if it is ever produced. Thus, it is said, the ESC must follow the JOC and to this extent they are fundamentally different contracts and not "integrated". On closer analysis however this difference is comfortably outweighed by their connexity.

24. The JOC contains the following provisions :

"'Effective Date' means the date this Contract is approved by the Minister of Mines and Energy of the Republic of Indonesia.

Article 2.1 This Contract shall become effective on the Effective Date, and the term of this Contract (the 'Term') shall be for a period ending five hundred and four (504) Months after the Effective Date, unless extended or earlier terminated as provided herein."

Identical provisions appear in the ESC.

25. The JOC states :

"… Each such Energy Sales Contract shall be an integral part of this Contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this Contract for all purposes.

Article 6.3 PERTAMINA shall regularly consult with CONTRACTOR on all matters pertaining to the Energy Sales Contracts and shall promptly provide to CONTRACTOR a copy of any notice or communication received thereunder or with respect thereto. PERTAMINA shall not cause or allow any

> termination, amendment, modification, waiver, renegotiation or renewal of any Energy Sales Contract or any provision thereof without the prior express written consent of CONTRACTOR."

26. The ESC states :

> "This Contract is an Energy Sales Contract whereby PLN agrees to purchase from PERTAMINA, upon the terms and conditions contained in this Contract, all Electricity produced by and delivered from, or made available by, the Generating Facilities constructed by (KBC) … as contractor to PERTAMINA pursuant to the Joint Operation Contract."

27. The contracts are plainly integrated as found by the Tribunal. Perhaps most importantly the ESC concludes :

> "The terms of this Contract and the Joint Operation Contract constitute the entire agreement between the Parties."

28. A further factor supporting the "connexity" or integrated nature of the two contracts is that throughout the arbitration both Pertamina and PLN were represented by the same lawyers. They did not suggest any embarrassment or potential conflict in so doing. Thus Pertamina's argument in this application that the "consolidation" compromised privacy or confidentiality, which is an essential feature of arbitration, is of little or no substance. Similarly, the complaint that Pertamina was forced to arbitrate with a third party as a result of the consolidation is not made out because PLN, in the context of the contractual arrangements, could not be regarded as a third party.

29. It also goes against Pertamina that once the decision was made to have a single arbitration, they proceeded to the main hearing and have only revived this point in the enforcement proceedings. I shall deal

with this submission in a little more detail when I consider the next issue (appointment of arbitrators). KBC rely on it for both issues and seek support from the case of *Minmetals Germany v. Ferco Steel* [1999] 1 All ER 315.

30. Having decided to have a single arbitration it is plain from the award that Pertamina and PLN were given careful and separate consideration. KBC are able to highlight many references in the award which clearly demonstrate this separate consideration. Given therefore the connexity of the contracts, the separate consideration by the Tribunal, the lack of prejudice to Pertamina and failure to appeal the decision at the time, KBC's position as stated from the very outset in May 1999 namely :

> "Where, as here, the disputes involve not only a single Project consisting of two closely related parts (the JOC part and the ESC part), but also contracts with virtually identical arbitration clauses, the case for allowing disputes under the one agreement to be arbitrated in the same arbitration with disputes under the other would seem to be even more compelling."

is well made.

(b) The arbitrators were not properly appointed

31. The two contracts contains provision for the appointment of arbitrators as follows :

(1) Art 13.2 of the JOC provided that each of Pertamina and KBC would appoint an arbitrator within 30 days after the date of a request to initiate arbitration. The two arbitrators would then appoint a third arbitrator to act as Chairman. If arbitrators were not appointed as aforesaid the same should be appointed

by the Secretary General of the Internation Centre for Settlement Disputes (ICSID).

(2) Section 8.2 of the ESC provided that PLN, on the one hand, and KBC and Pertamina, on the other hand, would each appoint one arbitrator within 30 days after the date of a request to initiate arbitration. The provisions dealing with appointment of the Chairman and default appointments were in the same terms as the JOC.

32. The ESC provision is plainly intended for disputes between KBC and Pertamina on the one hand and PLN on the other, the two contracting parties being KBC and Pertamina on the one hand and PLN on the other. However, in this arbitration KBC and Pertamina were on opposite sides. The Tribunal's solution was entirely logical and correct. It ruled that in such a situation Article 8 had no application therefore the UNICTRAL rules for the appointment of arbitrators should be applied. The *lex arbitri*, Swiss Law Article 179(1) Private International Law Act provides that :

> "The arbitrators shall be appointed removed or replaced in accordance with the agreement of the parties."

33. In this particular situation there was no agreement to which accord could be given. The agreement in section 8 was for a different situation. The Tribunal said :

> "According to the Respondents, this provision would mean that in any dispute arising from the ESC, KBC and PERTAMINA should appoint jointly one arbitrator and PLN should appoint one arbitrator. The Arbitral Tribunal, one the basis of the above mentioned principles of interpretation, cannot accept that such has been the intent of the parties. Indeed, as the ESC

arbitration clause does not apply only to disputes opposing KBC and PERTAMINA to PLN, it would defy common sense in case of a dispute between two parties only or in case of disputes opposing KBC to PERTAMINA and PLN, that KBC and PERTAMINA be obliged to appoint jointly one arbitrator. The parties may not be considered as having reasonably envisaged such a solution.

It results from this analysis that the provision of Section 8(2) of the ESC according to which KBC and PERTAMINA should appoint jointly an arbitrator applies only to disputes opposing PLN to KBC and PERTAMINA. The consequence is that for disputes between two parties only or disputes opposing KBC to PLN and PERTAMINA or disputes opposing PERTAMINA to PLN and KBC, the parties have not expressly agreed in the ESC arbitration clause on the procedure relating to the appointment of the arbitrators. Thus, the appointment of the arbitrators must be made according to the UNCITRAL Arbitration Rules.

Pursuant to Article 5 of the UNCITRAL Arbitration Rules, the number of arbitrators must be three if the parties have not previously agreed on the number of arbitrators. Pursuant to Article 7 of the UNCITRAL Arbitration Rules, « if three arbitrators are to be appointed, each party shall appoint one arbitrator». In case of disputes opposing more than two parties, it implies that two groups of parties must be constituted, each group being treated as a party for the purpose of appointing arbitrators. Such regrouping may be difficult and even impossible in the case of parties with different interests.

There is no such difficulty in this case where the parties have considered with the constitution of the Arbitral Tribunal in a specific case of tripartite arbitration, i.e. disputes opposing PLN to KBC and PERTAMINA. They have expressly admitted that a group of two parties, KBC and PERTAMINA, which have not necessarily common interests, should appoint jointly an arbitrator. It is thus implicit that they were admitting that in the case of disputes opposing one party to a differently constituted group of two parties, the same solution should apply by analogy.

On the basis of the above, the Arbitral Tribunal is satisfied that when the Secretary General of ICSID appointed an arbitrator, failing an appointment by the Respondents, he was respecting the intention of the parties. This conviction is strengthened by the fact that when the Respondents were requested to nominate an arbitrator they did not decline the invitation on the rationale that they were requested to make a joint nomination. Their argumentation was that the Notice of Arbitration was premature as KBC had neglected the amicable consultation provisions of the JOC and the ESC.”

34. It is significant also that the Tribunal pointed out, in the final paragraph above, that neither Pertamina nor PLN objected to the arbitrator who was appointed as a result of this procedure, Dr El-Khoseri, and neither did they seek to challenge the Preliminary Award on this issue. They accepted Dr El-Khoseri who became one of a three member Tribunal of the highest international reputation and calibre.

35. Finally, as with the "consolidation" issue, KBC submits that having failed to challenge the Tribunal's decision Pertamina are deemed to have waived any irregularity (if there was any). KBC rely, in part, on the judgment of Colman J in the *Minmetals* case (*infra*). In answer Pertamina say two things. Firstly, the facts of the *Minmetals* case are very different and secondly, Pertamina did object to the method of appointing the arbitrators. They did so as a preliminary argument to the Tribunal before its preliminary award, they did so in the Indonesian annullment proceedings and they are doing so now, in the enforcement proceedings.

36. Taking the second point first, KBC accepts that Pertamina has objected at those times but that is not the point. The point is that once the Tribunal had made its decision (on consolidation and on the appointment of the arbitrators) Pertamina made no challenge to the decision to the supervisory court. KBC has never accepted that Indonesia was the supervisory court, and this court has agreed with that stance, and so Pertamina's submission to the Jakarta court is neither here nor there. The argument is, and this court agrees, that, having been ruled against on a preliminary issue, remaining silent thereafter until the enforcement stage may be construed as a waiver, if indeed there had been an irregularity.

37. As to the application of the *Minmetal*'s case, KBC do not put it forward as an identical or even substantially similar situation to the present case. The facts are indeed different. It does however lend support to the principle being advanced by KBC and it is persuasive in that context. Colman J said :

> "… In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award."

3. SECTION 44(2)(c)

38. The complaint here is that sub-section 2(c) applies because Pertamina was "unable to present its case" due to two factors (Grounds 5 and 6). Firstly, it had applied for an adjournment to the Tribunal but had been refused and secondly that it had made an application for discovery of documents which was not resolved.

39. The applications for adjournment and discovery were made at the same time and arose because of KBC's rebuttal pleading which was filed on 8 May 2000, 16 weeks before the hearing was due to commence. This rebuttal was filed in accordance with the timetable set down by the Tribunal. Pertamina and PLN also filed its rejoinder within time, on 9 June, the application for adjournment and discovery had been made by

letter on 16 May and the adjournment was refused by letter from the Tribunal dated 23 May 2000.

40. Pertamina submit that the application should have been granted because KBC, in its rebuttal had raised "a fundamentally new case" concerning their funding of the project and Pertamina needed both time and further discovery to properly investigate the matter.

41. The primary reason that Pertamina must fail in this attempt to invoke section 44(2)(c) and persuade this court not to enforce the award is that their description of a "fundamentally new case" is an overstatement of the position. It was not so new as to cause this court to depart from the basic principle that procedural matters are essentially matters for the Tribunal. These were procedural matters, upon which decisions were made, from which it cannot be shown that Pertamina did not get a fair hearing.

42. Put briefly, KBC's "new" case on financing, as pleaded in the rebuttal, was that if third party financing was not available (the original intent) KBC would have relied on its investors to provide or continue financing. This was not a "new" case but came as an answer to a claim in Pertamina's reply that KBC were not entitled to future loss of profit because they would not have been able to continue to finance the project in Indonesia after the contracts were terminated. KBC's "loss of profit" stemmed from the Statement of Claim. Pertamina could have sought discovery then. It had not done so.

43. Having been denied an adjournment Pertamina prepared its rejoinder which is a comprehensive 53-page pleading. The funding issue was dealt with in evidence during the hearing. On the final day of the hearing Pertamina's counsel was involved in the following exchanges : (the Tribunal had refused an adjournment but left open the discovery request)

> " Mr. CHAIRMAN : May we, before departing have a discussion on what is going to be done now in these proceedings, and we see two items on this particular agenda. There were first a certain number of procedural objections which have been made before this hearing, and in the procedural order we said that this would be decided after the hearing. In summary, there was a request for discovery from one side, and there was objection to the submission of this arbitral award and the business of confidentiality. You remember this discussion.
>
> MR. MISHKIN : (for Pertimina) I think there was request for discovery from both sides.
>
> MR. CHAIRMAN : Our first question is are these requests maintained, all of them, part of them, because we would like to know on what we have to decide.
>
> MR. MISHKIN : May I just give you my views on that question.
>
> MR. CHAIRMAN : Yes.
>
> MR. MISHKIN : And that is that the purpose of discovery is to prepare for the hearing, it is not to supplement the record after the hearing. So I think the discovery requests are moot, and if discovery is now permitted, then you have to re-open the proceedings and so on. So I treated, notwithstanding the fact that it was theoretically open, I treated this request as effectively being denied, and we went forward. Our request went to the purported financial ability, the purported financing that would have been made available and other things, and I think the record on that has been fully made. I am prepared to rest on that record, and so I think the discovery requests should no longer be in the picture.
>
> MR. SCHILLER : I agree.
>
> PROF. BERNARDINI : And you agree on their withdrawing their request. What about yours?

MR. SCHILLER : I withdraw my request."

44. The fact of the matter is therefore, that Pertamina were given the opportunity to argue for discovery and elected not to do so. The fact that this opportunity was afforded to them at the end of the hearing does not make the fact go away. They were not refused discovery, they decided to treat their application as having been effectively denied. The issue could have been re-opened. The Tribunal itself could have also invited further submissions on the issue had it thought it fair and necessary to do so. None of these things happened. Pertamina cannot complain now.

45. Some consideration must also be given to precisely what discovery Pertamina was seeking. KBC make the point now, as they did at the time and as, no doubt, the Tribunal had in mind at the time they shelved the request, that the request was in very wide and vague terms. I do not propose to set out the entire schedule herein. It is sufficient to say that KBC's submission that it amounts to a general, wide ranging, non-specific, belated request is well made.

4. SECTION 44(2)(d)

46. Pertamina claim to come within sub-section 2(d) in a second sense (Ground 7) on the ground that the Tribunal failed to apply Indonesian law, being the law of the contracts, to issues which were central to the disputes between the parties and thus exceeded its jurisdiction. In other words, the award contains decisions "on matters beyond the scope of the submission to arbitration".

47. I can deal with this ground shortly because it seems to me to be misconceived. Sub-section (2)(d) envisages a situation where a Tribunal has trespassed outside the scope of the issues being arbitrated. It has exceeded its jurisdiction by deciding non-arbitral issues. Pertamina have sought to come within sub-section (2)(d) by complaining that arbitral issues have been resolved incorrectly, namely by a failure to apply Indonesian law to contract issues. Such a failure (if it is made out) is not a matter envisaged by sub-section (2)(d). It is not for this court to revisit how the Tribunal resolved such issues in the enforcement proceedings. Pertamina's complaint that substantive law was wrongly applied (which KBC do not accept) cannot be transformed into a point of jurisdiction. I do not therefore consider it necessary to embark on an investigation as to whether or not the Tribunal did in fact fail to apply the substantive law.

RES JUDICATA

48. Before moving on to the final ground advanced by Pertamina, namely public policy, it is necessary to deal with KBC's submission on the application of the principle of *res judicata* to all of grounds (2) to (7) inclusive (that is, headings 2, 3 and 4 above).

49. I have left it to the end of the court's consideration of grounds (2) to (7) because I have regarded it as important to set out the court's decisions on each ground separately, regardless of the question of *res judicata.* My decision on *res judicata* is therefore an additional, separate and discrete matter.

50. KBC's argument is that reliance on sub-sections (2)(c), (d) and (e) on the issues of consolidation, appointment of arbitrators, due

process and substantive law (grounds (2) to (7)) are matters of arbitration procedure which have, in effectively identical terms, been previously argued unsuccessfully in other enforcement proceedings in another jurisdiction, namely the USA. It is not argued that this court is bound by the USA decision but that, provided certain conditions apply, Pertamina are estopped from raising the issues again. In order to succeed on this issue KBC must demonstrate that the present situation is a case of issue estoppel, or, more fully, issue estoppel per *rem judicatam*.

51. The conditions which must be satisfied for issue estoppel to apply were set out by Lord Brandon in *The Sennar (No. 2)* [1985] 1 WLR at page 499 :

> "... The first matter is that, if an estoppel exists at all, it is that kind of estoppel which is known as issue estoppel per rem judicatam. The second matter is that, in order to create an estoppel of that kind, three requirements have to be satisfied. The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the same issue as that decided by the judgment in the earlier action."

52. In that case Lord Brandon concluded :

> " In the result I would hold that this is a classic case of issue estoppel created by the judgment of a foreign court of competent jurisdiction, in which all three of the requirements for the existence of such an estoppel laid down in the *Carl Zeiss* case are fully satisfied."

53. The arguments for coming to a similar conclusion in the present case are compelling. It seems to me that the above requirements are indeed satisfied. Thus, if it were necessary in this case to make such a determination, it would be in KBC's favour. However, it is not necessary to go so far as to state such a conclusion because the various grounds have been individually dealt with.

5. SECTION 44(3) PUBLIC POLICY

54. In *Hebei Import & Export v. Polytek Engineering* [1999] 2 HKCFAR 111 Sir Anthony Mason NPJ defined "public policy" in this context as follows :

> "It has been generally accepted that the expression 'contrary to the public policy of that country in Art. V2(b) means 'contrary to the fundamental conceptions of morality and justice of the forum."

55. The same case is also support for the proposition that grounds that have been raised in section 44(2) can also be included under policy considerations within section 44(3). In this case however the grounds under section 44(2) have not been made out. Pertamina however have raised two additional public policy grounds.

56. The first is put in the following terms : "the condemnation of Pertamina to pay when all it was doing was complying with the law governing the contract". This ground stems from the fact that the contracts were terminated as a result of Decrees made by the government of Indonesia. The Tribunal specifically found that it was the Decrees which prevented the parties from performing the contracts. The Tribunal applied the terms of the contracts and made a finding that the consequence

of a "Government Related Event" was a risk which only Pertamina and PLN and not KBC, had to bear.

57. The Tribunal's decision therefore did not make Pertamina liable for compliance with Indonesian law, it did no more than apply the terms of the contract which placed the risk of the event which actually occurred on one party but not the other.

58. The decision of the court in the USA has also ruled on this matter in the following terms :

> " Pertamina lastly contends that the Tribunal held it liable for refusing to violate governing Indonesian law. As discussed *supra* in Section IV.B.2, at 30-32, this contention mischaracterizes the Final Award. The Tribunal did not find Pertamina liable for refusing to break the law. Rather, in the Final Award, consistent with the Preliminary Award, the Tribunal found that Pertamina had a contractual responsibility to make KBC whole for a 'Government [R]elated Event.' The Tribunal thus found Pertamina liable for damages based on the parties' express contractual allocation of the risk of loss. As the Tribunal pointed out, the risk of loss was rational based on Pertamina's close relationship with the Indonesian Government.
>
> Pertamina accordingly has not satisfied its burden to show that the Final Award offends the 'most basic notions of morality and justice.'"

59. By the same reasoning, enforcement of the award is not contrary to public policy in Hong Kong, on this ground.

60. Secondly, and finally, Pertamina contends that KBC's failure to disclose their political risk insurance cover was "contrary to the fundamental conceptions of morality and justice of the forum".

61. The court has been informed, but without evidence in support, that the political risk policy has paid out up to US$75 million, in part, to KBL's investors who had invested US$40 million in the project up to its termination. KBC's pleaded case had been that its investors could have continued to invest in the project should non recourse financing cease to be forthcoming as a result of the Indonesia political turmoil.

62. Without knowledge of the political risk cover the Tribunal held :

> "'... there is no reason ... to cast doubts about the Claimant's readiness, directly and/or through its shareholders, to make provision' of 'the financing necessary for the Project development ...'"

63. Pertamina's main complaint is that had the Tribunal known of the policy there may have been reason to "cast doubts". In short, they submit that the very existence of insurance is relevant and should have been disclosed. With respect, it is difficult to understand why Pertamina now argue forcefully that the existence of insurance generally was relevant. The complaint is not that a particular policy was not disclosed, but the fact that insurance cover generally was not disclosed.

64. The fact is that Pertamina never asked any questions about insurance cover at the arbitration hearing. There was evidence from a Pertamina witness statement that it was alleged that the Notice of Arbitration was served "for insurance purposes" but this allegation was never followed up. The Tribunal raised the issue on one occasion, but again Pertamina did not pursue it at all. Had they regarded it as relevant and been concerned about it, they would have done so. It is additionally

worthy of note that KBC was not a party to the particular policy in question. Moreover, there was no guarantee that the insurers would pay up under the policy in any event.

65. In these circumstances it is difficult for Pertamina to argue that the Tribunal would either have "cast doubts" or that it would have come to a different decision. It does not offend fundamental concepts of morality and justice. As events turned out, KBC had been most prudent to arrange political risk insurance. Failure to disclose that arrangement, which was designed to protect their investors, cannot, in my view, be regarded as breaching an "obligation of candour" as submitted by Pertamina. I can discern no intention to mislead by KBC. It seems to be another example of significance being attached to an issue, after the event.

DISCRETION

66. In view of the court's decision, thus far, that Pertamina have failed to establish any grounds for sections 44(2)(a) to (f) or (3) being applied, the issue as to whether the award should nonetheless be enforced in the face of a successful ground being established, does not arise.

67. It is appropriate however to make some general observations in conclusion.

68. Firstly, had Pertamina been successful in coming within sections 44(2)(c), (d) or (e), this court would have exercised its discretion and granted the order sought by KBC.

69. Secondly, had Pertamina come within (2)(f) or (3), KBC's task in persuading the court to exercise its discretion would have been more difficult. The issues under (2)(f) and (3) are more fundamental and more important in nature. Normally, a court would be inclined not to exercise the discretion in such circumstances. In this case, however, the balance would have been tipped against the norm for just one reason. That reason being the lateness of the emergence of Pertamina's contentions. The argument that the *lex arbitri* arbitration is Indonesian law and the complaint that the political risk policy was not disclosed, can both be described as "11th hour" challenges. Such lateness would, in my judgment, dilute the strength of the arguments to the extent that it would have been appropriate to exercise the discretion to, nonetheless, enforce the award.

70. For all the above reasons, I refuse an order under paragraph 1 of Pertamina's summons dated 5 September 2002. I make no order in respect of paragraph 2 seeking a discharge of Master Yuen's orders dated 23 May 2002. I make a costs order *nisi* in KBC's favour for the costs of and arising from this application with a certificate for two counsel. Counsel on both sides of this application and those instructing them have been of the greatest assistance both in the depth of their research and manner of their presentation of what is, undoubtedly, an important case.

(M.P. Burrell)
Judge of the Court of First Instance,
High Court

Mr Jat Sew Tong, SC, leading Ms Grace Chow, instructed by Messrs Clyde & Co., for the Plaintiff

Mr Mark Strachan and Mr C. Manzoni, instructed by Messrs Haldanes, for the Defendant