HCCT 33/2011

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO. 33 OF 2011

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IN THE MATTER of an Arbitration Award dated 5 May 2011 made by the Hong Kong International Arbitration Centre

and

IN THE MATTER of section 1(1) of Schedule 3 of the Arbitration Ordinance (Cap 609), section 34C(4) of the Arbitration Ordinance (Cap 341) and Article 34 of the Fifth Schedule to the Arbitration Ordinance (Cap 341)

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BETWEEN

PANG WAI HAK（彭慧克)	1st Applicant
CHU SZE SUM（朱仕森）	2nd Applicant
and	
華允鑒	1st Respondent
XU XIAO LAN（許曉嵐）	2nd Respondent

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Before: Mr Recorder A Chow, SC in Chambers

Date of Hearing: 7 June 2012

Date of Judgment: 22 June 2012

J U D G M E N T

Introduction

1. I have before me an application by way of Originating Summons taken out on 29 July 2011 by the Applicants seeking an order to set aside the Final Award (Save as to Costs) of Mr Fred Kan dated 5 May 2011 (the "Award") made in an arbitration in Hong Kong in so far as it relates to the Respondents' claims in the arbitration.

2. The Applicants in the present application were the respondents, and the Respondents were the claimants, in the arbitration. To avoid confusion, references hereinafter to the "Applicants" and "Respondents" shall be to the Applicants and Respondents respectively in the present application.

3. The present application is made pursuant Sections 1(1) and 34C(4) of the Arbitration Ordinance, Cap.341 and Article 34 of the Fifth Schedule (the "Model Law") to that Ordinance ("Article 34 of the Model Law"). It is not in dispute that the new Arbitration Ordinance, Cap 609, does not apply to the present arbitration as it was commenced prior to its enactment, and that Article 34 of the Model Law is applicable to the present application.

4. Article 34 of the Model Law, so far as material, states as follows:

> "(1) Recourse to a court against an arbitral award may be made only by an application in accordance with paragraphs (2) and (3) of this article.
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> (2) An arbitral award may be set aside by the court specified in article 6 only if:
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> (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".

5. The present application is based on the last few words of Article 34(2)(a)(ii), namely, "was otherwise unable to present his case".

Background

6. The disputes between the parties are of considerable complexity. However, the issue in the present application is a narrow one, and I need only refer to a few background facts to set the scene for determination of that issue.

7. The Applicants and Respondents, amongst others, were parties to a written agreement dated 27 November 2004 relating to the transfer of a 50% interest in a property located in Wuhan City, Hubei Province, PRC (the "Agreement"). It is common ground that the governing law of the Agreement is PRC law, and disputes arising thereunder are to be resolved by arbitration at the Hong Kong International Arbitration Centre.

8. Disputes having arisen between the parties regarding the performance of their respective obligations under the Agreement, the Respondents commenced the present arbitration by notice of arbitration dated 5 December 2008. In due course, Mr Fred Kan was appointed as the sole arbitrator for the purpose of the arbitration, pleadings and witness statements were exchanged, and discovery took place.

9. The first hearing of the arbitration was held on 29 April 2010. At that stage, no issue was taken by either party regarding the question of limitation of action under PRC law. In particular, the question of limitation was not raised on the pleadings.

10. After the first hearing, the Respondents applied to the arbitrator to re-open the arbitration on 2 issues, namely, (1) matters relating to payments made by the Applicants under the Agreement, and (2) the applicable PRC law. The arbitrator acceded to the application and gave directions for the conduct of the further hearing, which took place between 1 and 3 November 2010.

11. Prior to the further hearing, the parties exchanged further witness statements, expert reports and opening submissions. It was contended on behalf of the Applicants, for the first time, in their opening submissions for the further hearing that the Respondents' claim was time barred under PRC law. This contention was supported by the Applicants' expert on PRC law, Mr Jiang, in his first report dated 11 October 2010. Likewise, in the expert report on PRC law of the Respondent's expert, Mr Liu, dated 9 October 2010, it was contended that the Applicants' counterclaim might be time barred under PRC law.

12. In his second expert report dated 19 October 2010, Mr Jiang responded to Mr Liu's opinion that the Applicants' counterclaim might be time barred under PRC law. Likewise, in a written reply dated 19 October 2010, the Respondents' PRC lawyer (not their expert Mr Liu) responded to Mr Jiang's opinion that the Respondents' claim was time barred under PRC law.

13. At the further hearing of the arbitration, the parties' factual witnesses and experts gave evidence and were cross examined. It is not in dispute that there was no examination in chief, cross examination or re-examination of the factual witnesses or experts specifically on the issue of limitation. Mr Shieh SC for the Applicants points out, however, that evidence on various matters of fact relevant to the issue of limitation was given by the factual witnesses in the course of the arbitration hearing. In any event, the limitation issue was addressed in the Applicants' closing submissions and also in their reply to the Respondent's closing submissions. Likewise, the Respondents dealt with the limitation issue in their reply to the Applicants' closing submissions, albeit in a rather cursory manner.

14. The arbitrator gave his Final Award (Save as to Costs) on 5 May 2011. He upheld the Respondents' claim to the extent of RMB3,550,652.72 (with interest), and dismissed the Applicants' counterclaim.

15. On the issue of limitation, he gave 2 reasons for rejecting the limitation defence: (i) it had not been pleaded, and (ii) the factual witnesses of both parties had not given any concrete evidence (确实的证

据) in support of the parties' respective contentions that the claim or counterclaim were time barred. Accordingly, the arbitrator held that both the claim and counterclaim were made within the applicable limitation period.

16. In a nutshell, the Applicants' complaint is that these two reasons given by the arbitrator to find that the Respondents' claim was not time barred had not been raised by either party, or by the arbitrator with the parties at the hearing of the arbitration, but were points taken by the arbitrator himself. The Applicants argue that had those points been raised by the arbitrator with the parties at the hearing of the arbitration, the Applicants could and would have dealt with them easily. In respect of the "pleading" point, it is said that the Applicants would have applied for an amendment of their pleading to raise the limitation defence, and the arbitrator would have allowed the amendment in view of the fact that the limitation issue had been canvassed by both parties in the arbitration without objection. In respect of the "lack of concrete evidence" point, it is said that the arbitrator was wrong to think that witness testimony by the Applicants' factual witnesses was necessary for the Applicants to run the limitation defence, and that on the facts of the case as found by the arbitrator it was clear that the Respondents' claim was time barred under PRC law.

17. I shall first consider the legal principles relating to the setting aside of an arbitration award under Article 34(2)(a)(ii) of the Model Law before turning to examine the validity of the Applicants' arguments.

The court's approach to an application to set aside an arbitration award under Article 34 of the Model Law

18. Mr Shieh SC has referred me to a number of authorities relating to the court's approach to an application to set aside an arbitration award under Article 34 of the Model Law, in particular two recent decisions of the Hong Kong court.

19. The first decision was *Brunswick Bowling & Billards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 709, a judgment of Lam J given on 10 February 2009. In that case, one of the complaints raised against the award made in an arbitration conducted in Hong Kong under the Model Law was that the tribunal had embarked on its own assessment to conclude that a contract was invalid under PRC law without regard to (i) evidence given by the respondent in the arbitration (being the applicant in the application before the court) that the contract was valid under PRC law, and (ii) the contention of the applicant in the arbitration that the validity of the contract should be determined with reference to Illinois law. The only evidence on PRC law on contract before the tribunal was that adduced by the respondent and such evidence was against the view of the tribunal. Further, the tribunal had not identified its undisclosed view on the requirements of contract under PRC law and it was argued that the respondent had been deprived of any opportunity to deal with such view of the tribunal.

20. It was held by Lam J that on primary factual disputes, arbitrators had to act on evidence and give reasonable opportunity to the parties to put forward their respective cases on such evidence. In respect of an arbitration in Hong Kong, the question of contractual validity under

PRC law was a matter which had to be decided on the evidence before the tribunal. The failure of the tribunal to canvass that issue with the parties and to give them an opportunity to respond before making a decision was therefore a valid complaint under Article 34(2)(a)(ii). Nevertheless, Lam J would have exercised his residual discretion under Article 34 to uphold the award notwithstanding this ground of complaint as Lam J was satisfied that the tribunal would not have reached a different conclusion but for the matter complained of. In this regard, Lam J took into account the fact that the tribunal had given several reasons for the award and concluded that the result would be the same in light of the other reasons given. In the end, His Lordship set aside the award on some other grounds.

21. At paragraph 24 of his judgment, His Lordship referred to an earlier decision of Colman J in *Bulfracht (Cyprus) Ltd v Boneset Shipping Co Ltd* [2002] 2 Lloyd's Rep 681 at 686-687:

> "The arbitrators' duty was to give the parties a fair opportunity of addressing them on all factual issues material to their intended decision as to which there had been no reasonable opportunity to address them during the hearings …
>
> It has to be emphasized, however, that the duty to act fairly is quite distinct from the autonomous power of the arbitrators to make findings of fact. Thus, whereas it may normally be contrary to the arbitrator's duty to fail to give the parties an opportunity to address them on proposed findings of major areas of material primary facts which have not been raised during the hearing or earlier in the arbitral proceedings, it will not usually be necessary to refer back to the parties for further submissions every single inference of fact from the primary facts which arbitrators intend to draw, even if such inferences may not have been previously anticipated in the course of the arbitration. … A typical situation is where arbitrators arrive at a conclusion on an issue of expert evidence which differs to some extent from that put forward by either opposing expert. In many cases … the arbitrators have been appointed because of their professional legal, commercial or technical experience and

> the parties take the risk that, in spite of that expertise, errors of fact may be made or invalid inferences drawn without prior warning. It needs to be emphasized that in such cases there is simply no irregularity, serious or otherwise. What has happened is simply an ordinary incident of the arbitral process based on the arbitrator's power to make findings of fact relevant to the issues between the parties."

22. His Lordship continued as follows at paragraphs 26 to 28 of his judgment:

> "26. I readily agree that in the process of fact finding, arbitrators must have autonomy in drawing inferences as they deem fit and in that respect they are entitled to depart from the positions advanced by the parties. However, on primary factual disputes, they have to act on evidence and give reasonable opportunity to the parties to put forward their respective case on such evidence.
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> 27. In my judgment, given that we are dealing with an arbitration in Hong Kong, the requirement of contractual validity under PRC law has to be decided on the evidence before the Tribunal...
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> 28. In such circumstances, the Tribunal should have canvassed with the parties the particular provision in the PRC law on the topic and gave them an opportunity to respond before making a decision on the same. The failure of the Tribunal in this regard furnished the Respondents a valid ground of complaint under Article 34(2)(a)(ii). I prefer to rest my decision on this limb instead of Article 34(2)(a)(iii) because I can contemplate cases where an arbitral tribunal may feel obliged in the interest of justice to canvass issues not raised by the parties for the proper determination of the disputes submitted for arbitration. Provided that the parties were given opportunity to present their case on the 'new' issues, the determination of the tribunal would still be within the scope of submission."

23. On the question of discretion, His Lordship said this:

> "35. Against such background, I do not think one can import the English requirement of causation of substantial injustice into our law. In other words, a party applying to

set aside an award does not have to show that a violation under Article 34(2) has caused substantial injustice.

36. On the other hand, there is much to be said for making reference to the jurisprudence under the New York Convention as a guide to how the discretion under Article 34 is to be exercised. Article V of the New York Convention is worded basically in similar terms and Miss Cheng accepted that the drafters of the Model Law did have regard to the Convention.

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 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) Limited* [1996] 2 HKLR 55. 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 Article 34 is to be exercised. As I put to Miss Cheng in the course of submissions, if the Tribunal said something by way of obiter which really has no bearing on the result, it is difficult to see why a court will set aside the award even though the Tribunal had not given the parties an opportunity to address on a perhaps somewhat unnecessary issue raised in the obiter.

> 40. Likewise, if the Tribunal gave several reasons for the award, with any single one of those being sufficient for its decision, the court may decline to set aside the award even if the Tribunal had not heard the parties on one of the reasons provided that the court is satisfied the result would be the same in the light of the other reasons given."

24. The second decision referred to by Mr Shieh SC is the decision of the Court of Appeal in *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd*, CACV 136/2011 (9 May 2012). That was also a case where the unsuccessful party in a Hong Kong arbitration sought to set aside the arbitral award on the basis of Article 34(2) (a) (ii) of the Model Law. The facts of that case are not relevant for the present purpose. Tang VP, with whom the other members of the Court of Appeal (Kwan JA and Fok JA) agreed, gave the following guidance on the court's approach in an application under that article:

> "7. The court's approach to such application is not controversial. The court is concerned with 'the structural integrity of the arbitration proceedings'. The remedy of setting aside is not an appeal, and the court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. It will address itself to the process …
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> 84. ... What does PCH have to show in order to come within this limb of Article 34(2)(a)(ii)?
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> 85. It is obvious that a possible consequence of the failure to provide to a party 'full opportunity to present his case' under Article 18 is the setting aside of the award under Article 34. Such an award may be set aside under Article 34(2)(a)(ii) or Article 34(2)(b)(ii).
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> 90. Article 34 has its equivalent in Article V of the 'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (The New York Convention) which provides:

> '(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;'

91. In 'The New York Convention of 1958: An Overview' by Albert Jan van den Berg, published in '*Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*', edited by Gaillard and Di Pietro, Professor van den Berg, whilst commenting on Article V of *The New York Convention*, said:

> '… the grounds for refusal of enforcement … as enumerated in Article V … are to be construed narrowly. … it means that their existence is accepted in serious cases only ….
>
> ……
>
> The courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of Article V that the grounds for refusal of enforcement are to be construed narrowly. …
>
> .....
>
> The proper notice for the appointment of the arbitrator and the arbitration proceedings can be considered as specific categories of the general principle that a party must have been able to present its case. Again, the test is whether a party was in fact precluded from presenting its case in arbitration. The defence of the inability of presenting the case was rarely successful.' (at pages 56-58)

94. From the above, I gather that the conduct complained of must be serious, even egregious, before a court could find that a party 'was otherwise unable to present his case'. It is unnecessary for me to decide, and I do not decide, how serious or egregious the conduct must be before a violation could be established. Nor, do I decide whether 'the conduct … must be sufficiently serious to offend … basic notions of morality and justice'. I am inclined to the view that the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process..."

25. In so far as the court's exercise of discretion not to set aside an award even if a violation of Article 34(2)(a)(ii) is found, the learned Vice President offered the following guidance:

> "101 *Dallah* provides no direct guidance on how the court's discretion might be exercised in such circumstances. Saunders J took the view that the Court may refuse to set aside an award notwithstanding such violation if the court was satisfied that the outcome could not have been different: see para 90. With respect, I agree...
>
> 102. Mr Manzoni submitted that the discretion should be exercised only when there is an estoppel, or some other recognised basis to prevent the violation being relied on. Estoppel is an obvious reason for enforcement notwithstanding a relevant violation. I am further of the view that if the violation had no effect on the outcome of the arbitration that is a good basis for exercising one's discretion against setting aside. In *Dallah*, Lord Collins of Mapesbury JSC gave as a possible example for enforcement notwithstanding a violation:
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> > '127 … where there has been no prejudice to the party resisting enforcement: *China Agribusiness Development Corpn v Balli Trading* [1998] 2 Lloyd's Rep 76.'
>
> 103. Such view is consistent with the statement in Holtzmann & Neuhaus at page 922 that:
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> > '… as noted by the Commission Report, a non-material error can give rise to grounds for setting aside the award, but, as noted during the debates, a setting-aside court has discretion not to set aside the award when such grounds are present.'
>
> 104. I would regard as a non-material error, an error which is not material to the outcome, and not just an error which is trivial or not serious. I note, however, in '*The New York Convention of 1958: An Overview*' Professor van den Berg said at page 56:
>
> > '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.'

> 105. I am of the view that only a sufficiently serious error could be regarded as a violation of Article 18 or Article 34(2)(a)(ii). And that an error would only be sufficiently serious if it has undermined due process. A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process. Even so, the court may refuse to set aside the award if the court is satisfied that the arbitral tribunal could not have reached a different conclusion. How a court may exercise its discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different.
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> 106. Lastly, Mr Manzoni submitted that the burden is on the party resisting an application to set aside to show that the result could not have been different. With respect, I agree with Saunders J that the burden is on an applicant to show that he had or might have been prejudiced. In some cases, the prejudice is obvious and it matters little who has the burden. Generally speaking, an applicant who complains of a violation is best placed to show that it has been prejudiced and thus, the burden to show prejudice should be on the Applicant."

26. Mr Shieh SC has also referred me to the judgment of the Privy Council in *Hoecheong Products Co Ltd v Cargill Hong Kong Ltd* [1995] 1 WLR 404 on appeal from a decision of the Court of Appeal of Hong Kong. That case did not concern the setting aside of an arbitration award. The underlying dispute arose out of a contract for the sale and purchase of a quantity of cotton seed expellers. The action was commenced by the buyer against the seller for damages for under-delivery, and the seller sought to rely on a force majeure clause as a defence. The buyer failed at first instance, but succeeded on appeal, the Court of Appeal holding that the force majeure clause did not avail the seller in the circumstances of the case. In addition, the Court of Appeal held, without the issue having been raised or argued by either party, that at the time of contracting the seller had known that that there was a risk

that the buyer would not receive the goods due to force majeure and that, in such circumstances, the clause was not in law effective to excuse the under-delivery.

27. Allowing the appeal from the decision of the Court of Appeal, Lord Mustill, giving the advice of the Privy Council, held that the procedure adopted by the Court of Appeal was impermissible. At 408 to 409, Lord Mustill stated as follows:

> "The principles which inhibit the parties from raising new points on appeal, particularly where the facts have not been investigated at the trial, are so well-established that it is unnecessary to quote from authorities such as *The Tasmania* (1890) 15 App Cas 223, *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473; and *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218. These principles apply equally where it is the court, rather than the parties, which seeks to introduce the new legal issue. If in the present case the matter had been ventilated in open court it would, their Lordships believe, soon have become apparent that there had been insufficient exploration of the facts at the trial to permit the application of whatever law might have emerged from an examination of the authorities. In the event however even this modest examination did not take place. The point appears to have been an afterthought. It does of course happen from time to time that a court comes to learn of a statute or authority bearing importantly on an issue canvassed in argument but through an oversight not then brought forward. The court may wish to take the new matter into account. Before doing so it should always ensure that the parties have an opportunity to deal with it, either by restoring the appeal for further oral argument, or at least by drawing attention to the materials which have come to light and inviting written submissions upon them. The present case required even more meticulous procedures, for what the court introduced was not new material on the existing issue but an entirely new question of law and fact. The occasions when an appellate court would find it proper even to contemplate such a course after the conclusion of the arguments must be rare, but if it were ever to do so the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all. If this had happened here, the sellers should have had little

> difficulty in showing that the case had proceeded too far to enable the question to be taken into account. The judgment would then have proceeded on the basis of the issues which had been in existence throughout, although the court could, if it had wished, have kept the point open for consideration in some future case by emphasising that it had not been argued and did not form part of the decision. In the event however none of this happened. The course taken deprived the sellers not only of the opportunity to argue the point on the merits (which in itself would have required the Board to set aside this part of the judgment) but also of an unanswerable objection on procedural grounds. With the best of intentions the Court of Appeal acted in a way which was unfair to the sellers. The new issue should not have formed a ground for the decision under appeal, and their Lordships propose to say nothing more about it."

28. On the other hand, Mr Laurence Li for the Respondents has reminded me of the general legal policy of according a reasonably generous margin of appreciation to arbitrators in the discharge of their functions and non-intervention by the court of arbitral decisions save in extreme cases, and referred to a number of authorities, including *Warborough Investments Ltd v S Robinson & Sons (Holdings) Ltd* [2003] 2 EGLR 149 at 156 per Jonathan Parker LJ; *Lesotho Holdings Development Authority v Impregilo SpA & Ors* [2006] 1 AC 221 at 234-235 per Lord Steyn; *ABB AG v Hochtief Airport GnbH* [2006] 2 Lloyd's Rep 1 at 17 per Tomlinson J, which fully support his general submissions.

29. Having regard to the above authorities, I consider the following propositions to be justified:

(1) In determining whether to set aside an arbitral award on the ground that a party was unable to present his case under Article 34(2)(a)(ii) of the Model Law, the court is not concerned with the substantive merits of the dispute, or the correctness or otherwise of the award. This is because the

court is not hearing an appeal from the decision of the arbitral tribunal.

(2) To justify setting aside an arbitral award on this ground, the court has to be satisfied that a party has been denied due process.

(3) For this purpose, the conduct complained of must be serious or even egregious.

(4) It is not possible to set out exhaustively all possible situations of denial of due process. Whether there has been a denial of due process must depend on the court's evaluation of the relevant facts and circumstances of each individual case.

(5) One particular instance in which a party can justifiably complain that he was unable to present his case and thus denied due process is where the tribunal carried out its own investigation or inquiry on primary facts, or decided a case based on a wholly new point of law or fact without giving the parties a fair opportunity to consider and respond to such point.

(6) The court has a discretion not to set aside an arbitral award even if a violation of Article 34(2)(a)(ii) of the Model Law has been established, but this discretion should only be exercised where the court is satisfied that the outcome could not have been any different. Put in another way, the party seeking to set aside the arbitral award does not have to show that the outcome would have been different had there been

no violation of that article; it suffices for that party to show that the outcome could or might have been different.

(7) Ultimately, in considering whether a party was "unable to present his case", the question is one of fairness in the arbitral process.

30. Mr Shieh SC has also made 2 further submissions, with which I agree:

(1) it is not necessary for a party seeking to rely upon the "unable to present his case" limb in Article 34(2)(a)(ii) of the Model Law to show any form of dishonesty or reprehensible conduct by the arbitral tribunal or of the other side;

(2) the "unable to present his case" ground is not limited to situations where a party is prevented from presenting legal arguments or deal with evidence on an issue going to the substantive merits of a case, but may extend to a situation where a party is prevented from presenting his case on a procedural issue which is taken by the arbitral tribunal against him of the tribunal's own volition.

The pleading point

31. At paragraph 43 of the Award, the arbitrator stated as follows:

> "虽然<<仲裁规则>>没有就修正或补充的程序作出相关规定，但任何一方均没有向仲裁庭和对方提出修正或补充其申诉或答辩。况且双方的事实证人在主问和盘问中更没有就时效的主张提供任何确实的证据。因此本仲裁庭在处理此案时认为申诉和反诉在时效期内提诉。"

32. The first reason given by the arbitrator to reject the limitation defence is that it had not been pleaded. However, it is clear from the recitation of the background facts above that both parties adduced expert evidence on PRC law on limitation and dealt with the issue of limitation in their opening and/or closing submissions for the further hearing of the arbitration without regard to the fact that the limitation defence had not been pleaded. Had the pleading point been raised by the arbitrator with the parties at some stage prior to the making of the Award, it is certainly possible that the Applicants would have sought to amend the points of defence to formally raise the limitation defence. It is not necessary for me to decide whether such application to amend would have been successful. All that I need to find, and I so find, is that the application might or could have been successful. The pleading point is a distinct procedural point which, if taken and upheld, would be fatal to the Applicants' limitation defence. In the circumstances of this case, it seems to me that the arbitrator ought to have given the parties an opportunity to address the pleading point before dismissing the limitation defence on the basis that it had not been pleaded, and the failure to give the parties such opportunity can properly be regarded as a denial of due process.

33. Had the pleading point been the only reason given by the arbitrator to reject the Applicants' limitation defence, I would have upheld the application and set aside the Award under Article 34(2)(a)(ii) of the Model Law.

The lack of concrete evidence（确实的证据）point

34. The second reason given by the arbitrator to reject the limitation defence is that the factual witnesses of both parties had not given any concrete evidence (确实的证据) in support of the parties' respective contentions that the claim or counterclaim were time barred.

35. Mr Shieh SC points out that the Respondents did not take the point that the Applicants' limitation defence should not be entertained, or should not succeed, simply because the Applicants had not produced any witness to testify on the question of whether the Respondents' claim was time barred. He further points out that the arbitrator never disclosed to the parties that he had this point in mind, or invited the parties to comment on or address this point, and submits that had this point been raised by the arbitrator with the parties, the Applicants would (amongst other things) have presented their case on the basis (as stated in the Skeleton Submissions for the Applicants) that:

> "49.1 The establishment of the time-bar defence does not depend on any witness testimony by the Applicants' factual witnesses (whether during examination in chief or cross examination) at all. The time bar point depends simply on the documents and on a contingent finding to be made by the Arbitrator. The Applicants' time-bar point was run on the basis that (i) if the Arbitrator were to rule that the Applicants were under a duty to pay the last instalment to the Respondents under clause 6(3) of the Agreement, then logically this cause of action would have arisen in May 2005, when the 房产证 for the Property was obtained (in fact the Arbitrator so held at §§11 & 66 of the Award) … (ii) by receiving the Applicant's lawyers' letter dated 1st August 2005, the Respondents were already aware that the Applicants were in breach … (iii) that being the case, on the Respondent's own case (and on the Arbitrator's own Award) the limitation period under PRC law (namely two years) would have expired in

> 2007 and the current arbitration was only commenced in December 2008.
>
> 49.2 In this respect, the Arbitrator also positively rejected the Respondent's evidence that there had been any oral demand made on 2 August 2006 and found that the first valid demand by the Respondents was only made on 17 June 2008, i.e. outside the applicable 2 years limitation period …
>
> 49.3 This is not something which requires a witness from the Applicants to 'speak to it' (whether during evidence in chief or cross examination).
>
> 49.4 The burden, rather, is on the Respondents to adduce evidence of prior valid demand if they seek to 'interrupt' the running of the limitation period."

36. As against this, Mr Li submits that the question of whether the Respondents' claim was time barred is not that straight forward. Mr Li refers me to various findings of fact contained in the Award by the arbitrator, including (i) a part repayment of RMB 2,953,253.46 on 1 September 2005 which was made after the aforesaid letter of 1 August 2005 (paragraph 8 of the Award), (ii) various loans received by the 2nd Respondent from a joint investment company of the parties during the period from 26 May 2005 to 8 September 2006, the amounts of which were ultimately deducted from the sum which the arbitrator found to be due by the Applicants to the Respondents under the Agreement (paragraphs 9, 72 and 73 of the Award), and (iii) various demands on the Applicants for payment of the outstanding amount due under the Agreement (paragraphs 83 and 84 of the Award). It may be noted that the arbitrator's discussion of those demands was in the context of the question of interest, and the arbitrator rejected the Respondents' evidence in respect of an oral demand allegedly made on 2 August 2005 (paragraph 83 of the Award). On the other hand, the arbitrator seemed to have

accepted that demands were made on 15 November 2007, 12 June 2008 and 24 June 2008, but found that they were not made in accordance with the requirements of the Agreement and thus were invalid (paragraph 84 of the Award). Mr Li's purpose of referring me to these matters, as I understand it, is to show that there is in fact some evidence or basis to show that the Respondents' claim was not time barred, because apparently under PRC law the limitation period may be extended or revived (or "re-tolled") by various acts such as demand for payment, part payment, or acknowledgement of debt, and the arbitrator was right to find that the Respondents' claim was not time barred. There is, however, no finding by the arbitrator on whether the matters referred to by Mr Li would have the effect of extending or reviving the limitation period for the Respondents' claim under PRC law.

37. In any event, it appears that at the further hearing of the arbitration, the Respondents were mainly relying on certain alleged repeated assertions of right by the Respondents and/or promises by the Applicants to pay the outstanding amount due under the Agreement to contend that the Respondents' claim was not time barred. This can be seen from paragraph 8 of the written reply from the Respondents' PRC lawyer dated 19 October 2010 and paragraph 14 of the Respondents' reply to the Applicants' closing submissions dated 10 December 2012, although there was also a reference to the part payment of RMB 2,953,253.46 on 1 September 2005.

38. It is apparent from paragraphs 37 and 38 of the Award that the arbitrator was fully aware of the parties' respective contentions on

whether the Respondents' claim was time barred. It is against this context that one should understand the arbitrator's statement that:

> "况且双方的事实证人在主问和盘问中更没有就时效的主张提供任何确实的证据"

39. As I see it, one possible way of reading this statement is that, in so far as the Respondents' claim was concerned, the arbitrator was not satisfied that the Applicants' factual witnesses had given concrete (or sufficient) evidence to rebut the Respondents' case that there were repeated assertions of right by the Respondents and/or promises by the Applicants to pay the outstanding amount due under the Agreement such that the Respondents' claim should not be regarded as time barred under PRC law. Although the arbitrator did not elaborate on his reason for coming to his conclusion, the above reading of the arbitrator's statement would be consistent with the way in which the issue of limitation (in so far as it related to the Respondents' case) was argued by the parties and the conclusion reached by the arbitrator.

40. Another way of reading the arbitrator's statement, as suggested by Mr Shieh SC for the Applicants, is that the arbitrator simply got it wrong in holding that, in order for the Applicants to establish the limitation defence, it was incumbent on the Applicants' factual witnesses "to 'speak to' it (whether during evidence in chief or cross examination)". The arbitrator in the present case is an experienced legal practitioner and it seems to me unlikely that he would have thought that the limitation defence could only be run if there was a witness to "speak to" it. In any event, even if that is the true meaning of the arbitrator's statement, the

highest that can be said is that the arbitrator made a fundamental error when considering whether the Respondents' claim was time barred.

41. It is not necessary for me to come to a final conclusion as to which is the right way of reading the arbitrator's statement because, as clearly established by the judgment of Tang VP in *Pacific China Holdings Ltd (in liquidation) v Grand Pacific Holdings Ltd*, the court does not sit as an appeal court from the decision of the arbitrator and will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. The only basis on which the court may intervene is where a party has been denied due process in the arbitration. In my view, while one may disagree with the second reason given by the arbitrator to reject the Applicants' limitation defence, it would not be correct to characterize the present situation as one where the Applicants were "unable to present [their] case" on the limitation issue, or were denied due process.

Disposition

42. In all, I consider that the Applicants have made out their complaint in respect of the "pleading" point but not in respect of the "lack of concrete evidence" point under Article 34(2)(a)(ii) of the Model Law. Since the two reasons given by the arbitrator to reject the Applicants' limitation defence were independent reasons, it seems to me clear that the arbitrator would have reached the same conclusion even if he had ignored the pleading point.

43. In the circumstances, following the approach of Lam J in *Brunswick Bowling & Billards Corp v Shanghai Zhonglu Industrial Co*

Ltd, I decline to set aside the Award. I would also dismiss the present application with costs to the Respondents, to be taxed if not agreed.

44. Lastly, it remains for me to thank counsel for their clear and cogent submissions in this matter.

(Anderson Chow, SC)
Recorder of the Court of First Instance
High Court

Mr Paul Shieh, SC & Mr Keith Lam, instructed by Huen & Partners, for the Applicants

Mr Laurence Li, instructed by Mayer Brown JSM, for the Respondents