

HCCT 35/2012

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 35 OF 2012**

BETWEEN

GUO SHUN KAI 郭順開

Applicant

and

WING SHING CHEMICAL CO LTD
永成化工有限公司

Respondent

Before: Hon G Lam J in Chambers

Date of Hearing: 18 December 2013

Date of Judgment: 22 January 2014

J U D G M E N T

1. There are before me a summons by the respondent (“Wing Shing”) seeking to vary a previous order of mine requiring security to be paid during the adjournment of an application to set aside an order enforcing an arbitral award, and an opposite summons by the applicant (“Guo”) seeking an unless order for security to be given. To set the

reasons below in context it is necessary to outline the procedural steps leading to the hearing on 18 December 2013.

The proceedings

2. These proceedings have as their origin an *ex parte* originating summons issued by Guo on 30 August 2012 for leave to enforce against Wing Shing an arbitral award which falls within the meaning of “Mainland award” under the Arbitration Ordinance (Cap 609) (“the Ordinance”).¹ The award was made by the South China Sub-Commission of China International Economic and Trade Arbitration Commission (“CIETAC”) on 1 June 2012. It requires Wing Shing to pay Guo several sums in Renminbi equivalent to over HK\$53 million in aggregate.

3. The enforcement of Mainland award in Hong Kong is governed by ss 92 to 98 of the Ordinance (Division 3 of Part 10).² Under s 92, a Mainland award is enforceable in Hong Kong either by an action instituted in the Court of First Instance or summarily by obtaining leave from that court to enforce it in the same manner as a judgment of the court.

¹ S 2 of the Ordinance defines “Mainland award” as an arbitral award made in the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People’s Republic of China.

² The relevant provisions were previously found in ss 40A to 40G of the former Arbitration Ordinance (Cap 341) and gave effect to the agreement reached between the Mainland and Hong Kong on the arrangement for the reciprocal enforcement of arbitral awards: see Memorandum of understanding on the arrangement for the reciprocal enforcement of arbitral awards between the Mainland and Hong Kong signed by the Secretary for Justice and the Vice-President of the Supreme People’s Court on 21 June 1999.

4. S 95 provides exhaustively for the circumstances in which enforcement of a Mainland award may be refused:

“(1) Enforcement of a Mainland award may not be refused except as mentioned in this section.

(2) Enforcement of a Mainland award may be refused if the person against whom it is invoked proves—

(a) that a party to the arbitration agreement was under some incapacity (under the law applicable to that party);

(b) that the arbitration agreement was not valid—

(i) under the law to which the parties subjected it; or

(ii) (if there was no indication of the law to which the arbitration agreement was subjected) under the law of the Mainland;

(c) that the person—

(i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or

(ii) was otherwise unable to present the person’s case;

(d) subject to subsection (4), that the award—

(i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or

(ii) contains decisions on matters beyond the scope of the submission to arbitration;

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with—

(i) the agreement of the parties; or

(ii) (if there was no agreement) the law of the Mainland; or

(f) that the award—

(i) has not yet become binding on the parties; or

(ii) has been set aside or suspended by a competent authority of the Mainland or under the law of the Mainland.

(3) Enforcement of a Mainland award may also be refused if—

(a) the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong; or

(b) it would be contrary to public policy to enforce the award.

(4) If a Mainland award contains, apart from decisions on matters submitted to arbitration (*arbitral decisions*), decisions on matters not submitted to arbitration (*unrelated decisions*), the award may be enforced only in so far as it relates to the arbitral decisions that can be separated from the unrelated decisions.”

5. It can be seen that these grounds are similar, though in the case of s 95(2)(f)(ii) not identical, to those available for refusing enforcement of a Convention award³ under s 89(2) of the Ordinance.

6. Leave to enforce the award in this case was given by Au J on 20 September 2012 pursuant to s 92 of the Arbitration Ordinance (Cap 609), with the proviso that the award shall not be enforced if Wing Shing applied within 14 days to set aside the order, until after the application is disposed of.

7. Meanwhile, on about 30 August 2012, Wing Shing had applied to the Shenzhen Intermediate People’s Court for an order “dismissing” the award. That application was heard by the Shenzhen

³ S 2 of the Ordinance defines “Convention award” as “an arbitral award made in a State or the territory of a State, other than China or any part of China, which is a party to the New York Convention”.

court on 18 September 2012 whose judgment was reserved and is still awaited.

8. By a summons taken out in Hong Kong dated 4 October 2012, Wing Shing sought to set aside or vary the order of Au J (“the setting aside summons”). The ground for the application was set out in the supporting affirmation, which alleges that the award “has not yet become binding on the parties at this stage” and exhibits a copy of a legal opinion from Mr Chen Hanqi, a Mainland lawyer. The reference to the award not having become binding shows that the ground for resisting enforcement is s 95(2)(f)(i) of the Ordinance.

9. On 12 November 2012, Guo filed an affirmation made by his solicitor in opposition to the setting aside summons, attaching a legal opinion from another Mainland lawyer, Mr Li Jun, and stating, on the basis of that legal opinion, that the award “is in full force and binding ... and is enforceable in Hong Kong” and that “there is no valid cause for the enforcement of the Award in Hong Kong to be declined”.

10. By order dated 16 November 2012, the setting aside summons was adjourned for argument before a judge in chambers on a date to be fixed. Directions were given for the filing of evidence in reply by Wing Shing. On 11 December 2012, Wing Shing filed an affirmation in reply, wherein its manager Mr Yang stated that the application to set aside was made on the ground of s 95(2)(f) of the Ordinance. He also exhibited a second legal opinion of Mr Chen Hanqi.

11. Further affirmations were filed by the parties. In an affirmation filed on 2 May 2013, Guo's solicitors pointed out that the sole ground relied upon by Wing Shing was s 95(2)(f) of the Ordinance. No issue was taken with this in Wing Shing's affirmation in response filed on 28 May 2013.

12. When the parties came before me on 5 June 2013, the primary position of Wing Shing was that its setting aside summons should be granted and the order of Au J giving leave to enforce set aside on the basis of s 95(2)(f), whereas Guo's primary position was that the setting aside summons should be dismissed. This turns on the question whether the award had not yet become binding, or had been set aside or suspended by a competent authority or under the law of the Mainland. Written submissions were lodged by both parties on that basis. Having considered the evidence and the parties' submissions, I was not persuaded that s 95(2)(f) was fulfilled. But having regard to all the circumstances, for reasons I have endeavoured to explain in my decision of that date, I adopted the fall-back position of both parties and, pursuant to the power under RHC Order 73 rule 10A, adjourned the setting aside summons on terms requiring Wing Shing to provide security in the amount of HK\$20 million (slightly less than 40% of the amount of the award).

13. At that hearing, I specifically asked but, despite being given an opportunity to take instructions, Wing Shing's counsel told me that he had no submissions to make on the amount of security that would be beyond the capacity of Wing Shing to pay (see §14 of my decision on 5 June 2013). Coupled with the proviso to Au J's order as referred to

above, the adjournment of the setting aside summons had the effect that Guo could not enforce the award in Hong Kong in the meantime.

14. I ordered the security to be provided within 30 days in the form of payment into court or by such other security as is acceptable to the court. I also gave liberty to the parties to apply, having in mind the possibility that the parties (especially Guo) might wish to be heard if an inordinate period of time had passed without any decision of the Shenzhen court being in sight (see §15 of my decision on 5 June 2013).

15. No application was made by Wing Shing to vary my order before the expiry of 30 days (on 5 July 2013) or before the order was sealed (on 12 July 2013).

16. No security whatsoever was provided by Wing Shing within the 30 days. Instead, on 4 July 2013, one day before the deadline, Wing Shing's solicitors wrote to Guo's solicitors asking for his consent that Wing Shing pay only HK\$200,000 as security. An "opinion" of its corporate director, Huge Power Group Ltd was attached, together with an income statement, a balance sheet and a cashflow statement.

17. On 12 July 2013, not surprisingly, Guo's solicitors rejected the proposal, but still Wing Shing did not make any application to me, until 23 July 2013 (shortly before the court vacation), when it issued a summons seeking a variation of my order so as to reduce the amount of security to HK\$200,000 or an order that "the amount, mode, time and etc. of the security ... be amended in such terms as the Court thinks fit" [sic] ("the variation summons"). This summons was fixed to be heard before

me on 12 September 2013. No supporting evidence of any kind was filed at the time.

18. In response, on 15 August 2013, Guo also took out a summons, seeking an order that unless Wing Shing pays HK\$20 million into court within 7 days, its setting aside summons dated 4 October 2012 which had been adjourned be dismissed. This was also returnable on 12 September 2013.

19. Still no evidence was filed by Wing Shing for its own summons or to oppose Guo's summons. The two summonses were each fixed for 15 minutes on 12 September 2013. It was not until 11 September 2013, the day before the hearing of those two summonses, that Wing Shing filed the 5th affirmation of Yang Hanqiang which together with the exhibits was 129 pages long.

20. That left Guo with little choice but to consent to an adjournment when the parties appeared before me on 12 September 2013. They jointly requested me to make an order adjourning both summonses to a date to be fixed for argument subject to a number of undertakings given by Wing Shing, which I shall presently describe. An order was therefore made in terms agreed by the parties.

21. When those two summonses came on for argument on 2 December 2013, they had to be adjourned again because of the lateness of the skeleton argument and the absence of properly prepared hearing bundles on the part of Wing Shing. In order not to prejudice Guo, I gave

an early date for hearing the summonses, which were eventually heard before me on 18 December 2013.

The variation summons

22. Ms Chih who appears for Wing Shing (but not on 5 June 2013) submits that I should vary my order so that Wing Shing should be required to pay into court only HK\$200,000 and to “pledge with the court assets estimated to be of the value of around HK\$28.54 million”.

23. The “pledge” of “assets” is a reference to certain steps taken pursuant to the undertakings I have mentioned above. In short, Wing Shing says that Guo should accept the following as “security”:

- (1) HK\$200,000 already paid into court;
- (2) Share certificates for two Hong Kong stocks (stock code 274 and 674 respectively) (with an estimated aggregate value of HK\$91,800) deposited with Wing Shing’s solicitors as stakeholder;
- (3) Certified copies of title deeds (the originals having apparently been lost) for car parking space no. 93 on G/F, Site A, 11-13 On King Street, Garden Vista, Shatin, New Territories (with an estimated value of HK\$350,000) deposited with Wing Shing’s solicitors as stakeholder;
- (4) Wing Shing has prepaid tax to the Inland Revenue Department of Hong Kong in the amount of HK\$16,203,056.40 accumulated since 2003. A letter of instruction has been sent by Wing Shing to the Revenue directing that if any of the tax prepaid is to be returned, then

it should be paid to Wing Shing's solicitors as stakeholder. On the evidence, however, the value of this "asset" is highly doubtful. The audited accounts of Wing Shing for the financial year ended 31 March 2013 stated as follows:

"Up to 31st March 2012, the Hong Kong Inland Revenue Department ("IRD") has issued protective profits tax assessments of HK\$16,267,602 in aggregate for the years ended 31st March 1997 to 2005 (i.e. assessment years 1996/97 to 2004/05) against the Company. In prior years, the Company paid and recognised Hong Kong profits tax amounting to HK\$5,069,447, and lodged objections with the IRD against the protective assessments. Pending the outcome of the objections, the IRD agreed to completely hold over the taxes in dispute of HK\$11,198,155 on the condition that the tax reserve certificates ("TRC") in the aggregate amount were purchased for respective assessment years 1996/97 to 2004/05. During the year ended 31st March 2013, the Company further purchased TRC in the amount of HK\$5,004,901. These TRCs were accounted for as prepayments, deposits and other receivables under current assets in Note 15.

On 30th March 2012, the IRD issued protective profits tax assessments of HK\$1,890,034 for the year ended 31st March 2006 (i.e. assessment year 2005/06). Subsequent to year ended 31st March 2012, on 18th April 2012, the Company lodged an objection with the IRD against the protective assessment, and on 9th May 2012, the IRD agreed to hold over the tax in dispute unconditionally."

Although the directors of Wing Shing took the view that no Hong Kong profits tax was payable, the pre-paid tax could in my view hardly be considered meaningful "security" for Guo;

- (5) Any amount received by Wing Shing in respect of its accounts receivable (estimated to amount to about HK\$2.6 million) and future rental income would be paid to its solicitors as stakeholders. As at November 2013 the amounts paid over totalled HK\$73,803;

(6) Further, Wing Shing originally undertook to deposit the title deeds relating to its factory premises in Dongguan, Guangdong Province, as security (though it mentioned in the affirmation of 11 September 2013 that the transferability of the land was in doubt). The current value of the property is said to be HK\$8,115,893. On the evidence, however, the title deeds had been lost and there was no procedure for replacement. Further, the nature of the land was such that under the laws of the Mainland it is incapable of being used as security.

24. In essence, Wing Shing submits two reasons for the variation of my order: first, it is said that the above is the best security that it could give and that payment of HK\$20 million into court as originally ordered was beyond its ability; secondly, it is said that the arbitral award is manifestly invalid.

25. In my view, apart from the cash, stocks and the car parking space in Hong Kong, the rest of what Wing Shing has offered cannot properly be said to provide any “security” to Guo. The amount of credit owing from the Revenue on account of prepaid tax, if any, is unknown and wholly uncertain. The Dongguan property is as a matter of Mainland law incapable of being the subject matter of any security arrangement. The accounts receivable have not been assigned to Guo and in any event their recoverability is at best speculative.

26. It seems to me Wing Shing’s application is in substance an attempt to discharge the requirement in the original order for it to put up

HK\$20 million worth of security, and to substitute the above-mentioned jumble of assets and promises, the vast majority of which are of doubtful value, with a view to maintaining the adjournment. It is said that this is justified by Wing Shing's impecuniosity and by the manifest invalidity of the arbitral award.

27. In my judgment it is not open to Wing Shing to make this application on these grounds. First, while the order I made on 5 June 2013 required Wing Shing to pay HK\$20 million into court or give "such other security as is acceptable to the court", that is not an avenue for Wing Shing to re-open the argument in the way it seeks to do now. What was intended was that instead of payment into court, other *forms* of security might be acceptable with an equivalent value such as bank guarantee or perhaps the deposit of liquid securities akin to cash. There is no merit in Ms Chih's submission that the court "invited" Wing Shing to return to argue about the amount of security if it had any difficulty. This is clear from the following passages in my decision on 5 June 2013:

"14. Mr Kong, who appears on behalf of Wing Shing, has no instructions to make submissions on the specific amount of security that would be beyond the capacity of Wing Shing. In my view, an appropriate amount of security would be HK\$20 million which is somewhat less than the sum of HK\$32.1 million that Mr Yuen asks for but which I consider to be a sum that would give Guo some protection against any deterioration of his prospects of successfully enforcing the award in Hong Kong as a result of the adjournment.

(Submissions on the terms of the order and costs)

15. I would direct that the security be provided in the form of payment into court or by such other security as is acceptable to the court. I will order costs to be in the cause of Wing Shing's summons, and I will give liberty to apply. What I have in mind is if, after an inordinate period of time, no judgment is still

forthcoming from the Shenzhen Court, then the parties may feel appropriate to apply to this court again.”

The phrase “such other security as is acceptable to the court” is not intended to enable Wing Shing to offer instead a hotchpotch of minor assets and personal undertakings of dubious value.

28. Secondly, as I have already mentioned, my order of 5 June 2013 had been sealed. Wing Shing made no attempt to re-open the matter before that time. Once the order was perfected I no longer have any jurisdiction to discharge it or vary the substance of it (at any rate in the absence of any material change in circumstances): *Preston Banking Co v William Allsup & Sons* [1895] 1 Ch 141; *Sanyo Electric Trading Co Ltd v Leung Kwok-hing* [1993] 1 HKLR 253, 256. Wing Shing had the option of seeking leave to appeal my decision, but it had not seen fit to do so. (I note that under ss 86(5) and 89(5) of the Arbitration Ordinance (Cap 609), a decision to adjourn proceedings for the enforcement of an award or a Convention award and to require security is expressly stated to be not subject to appeal, but this provision does not apply to a Mainland award, of which the award against Wing Shing is one: see s 85.) In these circumstances, as a matter of general principle Wing Shing’s variation summons seems to me to fail *in limine*.

29. Thirdly, the grounds now relied upon are not new developments. It is not suggested that there has since 5 June 2013 been a substantial change in the financial position of Wing Shing, or in the merits of the challenge to the award in the Shenzhen proceedings. Yet not a word was said at the previous hearing about Wing Shing’s impecuniosity or inability to give security, despite my specific invitation

to Wing Shing's counsel to address the court in that regard. Likewise, Wing Shing made no submission to me on 5 June 2013 in relation to the merits of its application to set aside the award in Shenzhen. In fact the documents filed for impugning the award in the pending Shenzhen proceedings were not disclosed in evidence then, even though Wing Shing had itself asked the court as an alternative to deal with the matter on terms pursuant to Order 73 rule 10A: see §5 of Yang Hanqiang's 2nd affirmation filed on 11 December 2012.

30. Wing Shing subsequently filed evidence, in an affirmation of 11 September 2013, of the grounds of attack on the award, exhibiting certain documents including its own submissions to the Shenzhen court (but not Guo's submission) and certain underlying contracts, and Ms Chih has now sought to submit on the basis of those materials that the award is manifestly invalid. There is no explanation however why these matters were not advanced at the hearing on 5 June 2013. In my view, it is not open to Wing Shing to have a second bite of the cherry now.

31. Fourthly, while my order of 5 June 2013 gives the parties liberty to apply, it is impermissible to attempt under that rubric to discharge the order or fundamentally alter its substance: *Leung Yee v Ng Yiu Ming* [2001] 1 HKLRD 309; *Louvet v Modern China Development Ltd* [1991] 1 HKC 144. (Although these cases concern consent orders, the principle they enshrine seems to me to be applicable to the present case.) In my decision of 5 June 2013 I specifically mentioned a scenario representing new circumstances which might justify revisiting the original order. This cannot avail Wing Shing as there has been no

material change of circumstances whatever to justify its variation summons.

32. Fifthly, even if there is a change in circumstances it does not mean that a party should be allowed to reopen the argument in its entirety, which is what Wing Shing is in my view seeking to do. In this connection, what Tomlinson J said in *IPCO (Nigeria) Ltd. v Nigerian National Petroleum Corporation* [2008] 2 Lloyd's Rep 59 at §§73-76, approved by the English Court of Appeal on appeal in the same case [2009] 1 Lloyd's Rep 89 at §24, is instructive:

"73. ... a change of circumstances cannot ordinarily justify a variation of an earlier order unless at the least the change in circumstances impinges on or relates to the reason for seeking the variation. There must be some causative link between the change in circumstances and the variation sought.

74. An adjournment granted pursuant to section 103(5) of the Arbitration Act 1996 is by its nature a temporary holding measure. The appropriateness of maintaining such a measure in place will be dependent, crucially on developments before the supervisory court... A paradigm situation in which the court, exercising its jurisdiction under section 103(5), must reconsider its earlier decision by embarking on a consideration whether the adjournment of the decision on enforcement remains appropriate is where there has been a significant relevant development in the proceedings before the supervisory court, the pendency of which is the prerequisite to the court having jurisdiction even to consider adjourning the decision to enforce an award. ...

75. I would however emphasise that the court will not lightly entertain a suggestion that the discretion under section 103(5) must be considered for a second or subsequent time. Because the jurisdiction is responsive to developments before the supervisory court it would be unwise and it is probably in any event impossible to attempt to fashion some threshold test as to what will be required in order to justify this course. It will certainly require sufficient change in circumstances ...

76. I do not consider that the change in circumstances ... should of itself be the occasion for a complete re-run of the exercise ... Ordinarily a party should not in these circumstances be permitted to develop arguments or to deploy evidence which could equally well have been developed or deployed on the earlier occasion. Ordinarily a change in circumstances should most emphatically not be an excuse for a second bite at the cherry. Ordinarily, the court will simply be concerned to consider whether the exercise of discretion which appeared proper in the circumstances which obtained earlier remains proper in the ex hypothesi, significantly different circumstances. That ought not ordinarily to require any revisiting of the court's earlier decision as to the strength of the challenge of the award. That decision should have been reached on a brief consideration – see ... *Soleh Boleh*. The need to reconsider the discretion must not ordinarily be regarded as an opportunity to re-run the argument on the strength of the challenge.”

33. Furthermore, it can be seen from what I have said earlier that there has been considerable and, in my view inexcusable, delay on the part of Wing Shing in bringing the variation application and in substantiating it with proper evidence. Leaving aside the fact that it said nothing at the hearing on 5 June 2013 about the amount of security that should be required, once it was realised that there were difficulties with what had been ordered, it behoved Wing Shing to act with some urgency in seeking the indulgence of the court. Instead, it did not make an application to vary until almost 7 weeks after the order, and filed no evidence until more than three months after the order, and then only on the eve of the scheduled hearing of the application to vary. It is not surprising that Guo has complained of deliberate delaying tactics. But even if there is no subjective intention to play such tactics, the delay that has occurred is in my view unacceptable in the present context.

34. There is a pre-disposition in the policy of the law, especially under the Ordinance, in favour of enforcement of arbitral awards. The

order I made on 5 June 2013 represents a balance struck between this policy and the prejudice to Guo in delaying enforcement of the award on the one hand, and considerations arising from the existence of a challenge to the award in Shenzhen on the other hand, including the desire to allow the Shenzhen court as the competent authority in the “country of origin” to come to a decision in the proceedings before it within a reasonable time before the award is permitted to be enforced as a judgment in Hong Kong. I see no warrant in all the circumstances to upset that balance.

35. For these reasons, I consider that Wing Shing’s variation summons should be rejected.

The setting aside summons

36. Ms Chih has confirmed that in the event the variation summons fails, she would not ask for any further time in which to meet the condition imposed for the adjournment under the order of 5 June 2013. It follows that Wing Shing’s setting aside summons ceases to be adjourned pending resolution of the Shenzhen proceedings and falls to be dealt with by this court.

37. Ms Chih, however, submits that all that the parties were concerned with at the hearing on 5 June 2013 was the adjournment of the setting aside summons and the security required. As the setting aside summons was adjourned then, Wing Shing should be permitted to re-argue the matter now. Moreover, notwithstanding that Wing Shing has hitherto relied solely on s 95(2)(f) of the Ordinance, she submits that Wing Shing is entitled to argue that enforcement of the award should be refused on additional grounds under s 95(2)(d), ie that the award:

“(i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or (ii) contains decisions on matters beyond the scope of the submission to arbitration”, and also under s 95(3)(b), ie that “it would be contrary to public policy to enforce the award”.

38. It seems to me that, with respect, Ms Chih’s submissions fly in the face of what had gone on before in these proceedings as I have sought to explain above. Contrary to her assertion, the parties were not arguing merely about the security for the adjournment on 5 June 2013. It was a hearing of the setting aside summons itself with submissions on the merits having been made in respect of the ground in s 95(2)(f). Wing Shing then sought primarily an order on the setting aside summons itself and made submissions accordingly. For Wing Shing to argue the new grounds would be to change the goalposts completely now. It would mean Wing Shing could file further affirmations or rely on the new affirmations filed for the purposes of the variation summons alleging manifest invalidity of the award. It would necessitate Guo’s filing new affirmations in response, to which Wing Shing will no doubt claim an opportunity to reply. Quite probably, further legal opinions from Mainland lawyers would be filed on both sides. Another substantial hearing would have to be scheduled. It would delay the disposal of the setting aside summons very considerably, and thereby delay enforcement of the award by Guo in Hong Kong, all the while without any meaningful security being provided to Guo. Having regard to the history of the matter I have set out above, it is clear that Wing Shing knew it was relying solely on s 95(2)(f). There has been no explanation whatever why Wing Shing has hitherto chosen to rely solely on that ground and why the

new allegations are only sought to be raised now. I refuse to countenance such an abuse of the process of the court. I reject the submission that Wing Shing is entitled to insist on a further hearing of the setting aside summons for the purpose of arguing those new grounds.

39. It follows that the setting aside summons falls to be disposed of on the basis of the evidence already filed by 5 June 2013 and the submissions already made, to which I shall turn.

40. S 95(2) of the Ordinance makes it quite clear that the burden lies squarely on Wing Shing, as the person resisting enforcement of the award, to establish the ground relied on, namely, that the award “(i) has not yet become binding on the parties, or (ii) has been set aside or suspended by a competent authority of the Mainland or under the law of the Mainland”. It is for Wing Shing to prove either of these limbs on the balance of probabilities, before the discretion arises for the court to refuse enforcement.

41. As regards the limb “has not yet become binding on the parties”, in *Societe Nationale D’operations Petrolieres De La Cote D’ivoire-Holding v Keen Lloyd Resources Ltd* [2004] 3 HKC 452, Burrell J accepted as a correct statement of the law the following passage from the work *Redfern and Hunter, Law and Practice of International Commercial Arbitration* (3rd edn):

“The fifth ground of refusal of recognition and enforcement under the New York Convention is as follows:

‘(e) 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, that award was made ...'

This fifth ground for refusal of recognition and enforcement of an arbitral award (which, like the others, also appears in the Model Law) has given rise to more controversy than any of the previous grounds. First, there is the reference to an award being 'not binding'. In the Geneva convention of 1927, the word 'final' was used. This was taken by many to mean that the award had to be declared as 'final' by the court of the place of arbitration; and this gave rise to the problem of the *double exequatur*, which has already been discussed. It was intended that the word 'binding' would avoid this problem, particularly since many international and institutional rules of arbitration state in terms that the award of the arbitral tribunal is to be accepted by the parties as final and 'binding' upon them. However, some national courts still consider it necessary to investigate the law applicable to the award to see if it is 'binding' under that law - although the better position appears to be that an award is 'binding' if it is no longer open to an appeal on the merits, either internally (that is to say, within the relevant rules of arbitration) or by an application to the court."

42. Burrell J, who was there concerned with s 44(2)(f) of the former Arbitration Ordinance (Cap 341) which provided that

"[e]nforcement of a Convention award may be refused if the person against whom it is invoked proves ... (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",

held that the relevant question is whether the award is no longer open to an appeal on the merits. Burrell J's decision was referred to in *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] 2 Ll R 475 at §§20 and 22 in support of the correct interpretation. Although *Societe Nationale* concerned a Convention award, I see no reason why the same phrase in s 95(2)(f)(i) as regards Mainland award should be interpreted differently.

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43. Likewise, in *Dowans Holding*, Burton J stated:

“17. [van den Berg’s] view that there was and should be an *autonomous* interpretation of *binding*, is best analysed by differentiating between *ordinary recourse* and *extraordinary recourse*. The former, which may not be permitted by the terms of the relevant agreement between the parties or the law governing the arbitration, would ordinarily be subject to a time limit, after which no such ordinary recourse (if otherwise available) would be permitted. Then there is the possibility of *extraordinary recourse*, which would be some limited challenge to the award, in the courts of its home jurisdiction, by reference to the restrictive terms of the New York Convention. Once *ordinary recourse* is excluded, the possible availability of *extraordinary recourse* does not prevent an award from being, or having become, *binding*. ...

26. ... As I conclude, the *binding* effect of an award depends upon whether it is or remains subject to ordinary recourse. Once it is *binding*, it does not cease to be so as a result of some event in the home jurisdiction ...”

44. The arbitration in the present case is governed by CIETAC Arbitration Rules. Article 47(9) of those rules provides:

“The arbitral award is final and binding upon both parties. Neither party may bring a lawsuit before a court or make a request to any other organization for revision of the award.”

45. Article 9 of the Arbitration Law of the Mainland provides that:

“The arbitration award is final. After the award is given, the arbitration commission or the people’s court shall not accept the re-application of the suit concerning the same dispute by any of the parties concerned.

Whereas the award cancelled or put in void under a rule by the people’s court, the parties concerned for the dispute may reach another agreement for arbitration and apply for arbitration or bring a suit in the people’s court.”

46. Article 58 of the Arbitration Law of the People's Republic of China provides that:

"The parties may apply to the intermediate people's court at the place where the arbitration commission is located for cancellation of an award if they provide evidence proving that the award involves one of the following circumstances:

1. there is no arbitration agreement between the parties;
2. the matters of the award are beyond the extent of the arbitration agreement or not within the jurisdiction of the arbitration commission;
3. the composition of the arbitration tribunal or the arbitration procedure is in contrary to the legal procedure;
4. the evidence on which the award is based is falsified;
5. the other party has concealed evidence which is sufficient to affect the impartiality of the award; and
6. the arbitrator(s) has (have) demanded or accepted bribes, committed graft or perverted the law in making the arbitral award.

The peoples' court shall rule to cancel the award if the existence of one of the circumstances prescribed in the preceding clause is confirmed by its collegiate bench.

The people's court shall rule to cancel the award if it holds that the award is contrary to the social and public interests."

47. It seems to me on the basis of the evidence of Mainland law before me that the award is only open to challenge in the Mainland on grounds extraneous to the merits of the award, and is not subject to any appeal on merits. Accordingly the award is binding and has not ceased to be so merely because Wing Shing has applied to the court in Shenzhen for the award to be "dismissed".

48. I turn to the second limb of s 95(2)(f). It permits refusal of enforcement if "the award has been set aside or suspended by a

competent authority of the Mainland or under the law of the Mainland”. It is to be noted that the wording is slightly different from the corresponding provision in the New York Convention, as reflected in s 89(2)(ii), which provides a ground for refusal of enforcement where the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made”.

49. Under the wording of the New York Convention, it is clear that a ground for refusing enforcement arises only if the suspension of the award has been ordered by a court of the country of origin, being either the country where the award was made or the country under the law of which the award was made. This is made clear in *van den Berg, The New York Convention of 1958* (1981), at p 352, which states as follows:

“Whatever may be, in order for the suspension of the award to be a ground for refusal of enforcement of the award, the respondent must prove that the suspension of the award has been effectively ordered by a court in the country of origin. This rule is clearly laid down by the text of Articles V(1)(e) as it states ‘has been ... suspended by a competent authority ...’. The automatic suspension of the award by operation of law in the country of origin therefore is not sufficient.” (Original italics)

50. In *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] 2 Lloyd’s Report 326, which concerned s 103(2)(f) of the (UK) Arbitration Act 1996, Gross J held at §12:

“... s.103(2)(f) is only applicable when there has been an order or decision suspending the award by the court in the country of origin of the award ("the country of origin"). S.103(2)(f) is not triggered automatically by a challenge brought before the court in the country of origin. This conclusion flows from the wording of s.103(2)(f) itself, it is supported by leading commentators (*Van den Berg, The New York Convention of 1958* (1981), at p.352, *Fouchard, Gaillard, Goldman on*

International Commercial Arbitration (1999), at pp. 980-1) and it is consistent with the provisions of s.103(5) of the Act – which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended.”

This passage was adopted by Burton J in *Dowans Holding SA, supra*, at §25(iii).

51. S 95(2)(f)(ii) of the Ordinance however refers to the award being “set aside or suspended by a competent authority of the Mainland *or under the law of the Mainland*”. So did s 40E(2)(f)(ii) of the former Arbitration Ordinance (Cap 341). This form of wording appears to have been derived from paragraph 7(5) of the “Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region”, which sets out the following as one of the situations in which the relevant court may refuse enforcement:

“The award has not yet become binding on the parties, or has been set aside or suspended by the court or in accordance with the law of the place where the arbitration took place”.

52. It is plain in this case that the award has not been set aside or suspended by a competent authority of the Mainland. Wing Shing however contends that the award has been “suspended ... under the law of the Mainland”. It contends that this is the effect of principally two provisions of Mainland law, namely:

(1) Article 64 of the Arbitration Law of the People’s Republic of China (《中華人民共和國仲裁法》), which provides:

「一方當事人申請執行裁決，另一方當事人申請撤銷裁決的，人民法院應當裁定中止執行。人民法院裁定撤銷裁決

的，應當裁定終結執行。撤銷裁決的申請被裁定駁回的，
人民法院應當裁定恢復執行。」

which may be freely translated as:

“Where one party applies for enforcement of an award and the
other party applies for cancellation of the award, the people’s
court should rule to suspend enforcement. If a people’s court
rules to cancel an award, it should rule to terminate
enforcement. If the people’s court dismisses the application for
cancellation of the award, it should rule to resume
enforcement.”

- (2) Article 25 of the Supreme People’s Court’s Explanation to
Certain Problems Applicable to the Arbitration Law of the
People’s Republic of China (《最高人民法院關於適用
〈中華人民共和國仲裁法〉若干問題的解釋》(法釋
(2006) 7 號)), which states:

「人民法院受理當事人撤銷仲裁裁決的申請後，另一方當
事人申請執行同一仲裁裁決的，受理執行申請的人民法院
應當在受理後裁定中止執行。」

which may be freely translated as:

“Where after a people’s court has accepted an application by a
party concerned for cancellation of the arbitral award, the other
party concerned applies for enforcement of the same arbitral
award, the people’s court which has accepted the enforcement
application should after the acceptance make a ruling to
suspend the enforcement.”

53. It seems to me, having regard to the terms of these
provisions themselves and the written opinions on Mainland law adduced
by the parties, that article 64 of the Arbitration Law and article 25 of the
Supreme People’s Court’s Explanation concern the situation where
enforcement has been applied for in the courts of the Mainland. They do

not purport to tell the courts of other jurisdictions seised of an application for enforcement of the award what they should do if an application has been made to a Mainland court to set aside the award. As no application for enforcement of the award has been made to a Mainland court in this case, these provisions have in my view no direct application.

54. Furthermore, what the two provisions stipulate is that the people's court faced with an enforcement application should suspend *enforcement* of the award in the situation prescribed. They do not automatically suspend the award itself or its effect upon an application being made to set aside the award. Article 57 of the Arbitration Law of the People's Republic of China provides that an award takes legal effect from the date it is issued. Article 62 provides that the parties should perform the award. There is nothing in Mainland law referred to by Wing Shing that suggests that the award somehow becomes inchoate or suspended generally once an application has been made to a Mainland court to have it set aside.

55. The conclusion above is supported by the decision of Kwan J (as she then was) in *Re China Medical and Bio Science Limited*, HCCW 198/2008, 24 October 2008. There a creditor served a statutory demand on the debtor company on the basis of a Mainland award made by a CIETAC tribunal. The company then applied to the Beijing Second Intermediate People's Court for an order to dismiss the arbitral award. The creditor presented a petition to wind up the company in Hong Kong and the company applied for security for costs against the petitioner in respect of the costs of the winding up proceedings. The petitioner resisted the application on the ground that the petition had a high

probability of success. In riposte, the company argued that the petitioner was not entitled to enforce the award in Hong Kong by virtue of s 40E(2)(f) of the then Arbitration Ordinance (Cap 341) (the equivalent of s 95(2)(f) of the Ordinance). On this argument, Kwan J said:

“15. Mr Maurellet contended that by virtue of the Dismissal Application, which is pending, the award “has been suspended under the law of the Mainland.” The law of the Mainland he referred to is Article 25 of the Supreme People’s Court’s Explanation to Certain Problems Applicable to the Arbitration Law of the People’s Republic of China (Legal Explanation [2006] No. 7). ...

...

18. Mr Maurellet submitted that by making the Dismissal Application, this has the effect of staying or suspending the arbitration award.

19. No expert evidence on Chinese law was adduced. I would interpret Article 25 according to my understanding of the Chinese language. On the plain wording of Article 25, I do not agree with Mr Maurellet that the pending Dismissal Application would have the effect of staying the award.

20. The wording in Article 25 is clear. Firstly, there must be an application to the People’s Court for the dismissal of the arbitration award. Secondly, the People’s Court must have accepted jurisdiction to entertain the application for dismissal of the award. Thirdly, the other party to the arbitration must then apply to the People’s Court for enforcement of the same award. In the event such an application is made, the People’s Court in which the application for enforcement is brought shall rule [or should rule as submitted by Mr Cheung] that such enforcement shall be stayed.

21. In the present situation, we only have steps one and two. As mentioned earlier, the petitioner did not make any application to the People’s Court for the enforcement of the award. That being the case, the pre-condition for the People’s Court to rule that the enforcement of the award shall be stayed is not met. At the first inquisition hearing before the Beijing Court on 3 June 2008, the court only requested the parties to file further evidence to supplement their submissions. No ruling was made by that court or by any other People’s Court to

stay enforcement of the award, as apparently there was no application by the petitioner to enforce the award.

...

23. The wording in section 40E(2) is clear. Unless the award has been set aside or suspended by a competent authority of the Mainland or under the law of the Mainland, there is no basis to contend that the award is unenforceable under Hong Kong law.

...

25. I regard the pending Dismissal Application as irrelevant. There is no evidence before me to suggest that a pending Dismissal Application would have the effect of suspending the award. If the Dismissal Application had been determined, with an outcome in the Company's favour in that the award is set aside, the position would have been different, as the Company would then be able to rely on that part in section 40E(2)(f) that the award has been set aside. But the fact there is a pending Dismissal Application is of no assistance to the Company, as it does not appear to have the effect of staying the award under PRC law. If the winding-up petition is heard tomorrow, I do not think the court would grant an adjournment or stay the petition pending the outcome of the Dismissal Application, particularly as no hearing date has been fixed after the first inquisition hearing and there is no knowing when the Beijing Court will determine the matter."

56. In the result, her Ladyship declined to order security for costs for the reason that the petitioner had demonstrated a high probability of success in the petition.

57. Accordingly, it does not follow from the mere fact that Wing Shing has made an application to the Shenzhen Intermediate People's Court to dismiss or set aside the award that the award has been "suspended ... under the law of the Mainland" within the meaning of s 95(2)(f)(ii) of the Ordinance. Wing Shing has failed to prove the ground in s 95(2) on which it relies. Its setting aside summons must therefore fail.

Orders

58. For the above reasons, there will be the following orders:

- (1) Wing Shing's variation summons be dismissed;
- (2) Leave be given to Guo to withdraw his summons for unless order; and
- (3) Wing Shing's setting aside summons be dismissed.

59. As an order *nisi*, I would direct that there be no order as to costs on Guo's summons for unless order and that Wing Shing do pay Guo's costs on its two summonses. These costs are to be taxed on an indemnity basis since in *Gao Haiyan v Keeneye Holdings Ltd (No 2)* [2012] 1 HKC 491 and *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 2)* [2012] 4 HKLRD 569, the Court of Appeal have stated that in the absence of special circumstances, costs are normally to be ordered on an indemnity basis where a party was unsuccessful in an application to set aside or resist enforcement of an arbitral award.

(Godfrey Lam)
Judge of the Court of First Instance
High Court

Mr Lincoln Cheung, instructed by Stevenson, Wong & Co, for the applicant

Ms Vivien Chih, instructed by Wong & Co, for the respondent