HCCT 41/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 41 OF 2015

IN THE MATTER of Enforcement of an Arbitration Award

and

IN THE MATTER of Sections 84 and 87 of the Arbitration Ordinance, Chapter 609 and Order 73 rule 10 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER of a Convention Award made in the Commonwealth of the Bahamas on the 27th day of April 2015 as corrected on the 21st day of July 2015

BETWEEN

L — Applicant

and

B — Respondent

Before : Hon Mimmie Chan J in Chambers

Date of Hearing : 25 April 2016

Date of Decision : 5 May 2016

D E C I S I O N

Background

1. By order made on 22 September 2015 ("**Order**"), I granted leave to L ("**Applicant**"), to enforce a final arbitration award dated 27 April 2015 (and corrected on 21 July 2015) ("**Award**"), made in arbitration proceedings commenced by the Applicant against B ("**Respondent**") in the Bahamas ("**Arbitration**") in around October 2012. The claims made by the Applicant in the Arbitration were that the Respondent was in breach of its obligations under a Non-Recourse Loan Agreement dated 18 July 2011 ("**Agreement**") made between the parties, whereby the Respondent agreed to advance a loan to the Applicant against the Applicant's transfer of his shares in a Hong Kong listed company ("**Shares**") as collateral and security for the loan to be advanced. It is claimed (and not disputed) that the Applicant transferred a total of 800 million Shares to the Respondent, but the Respondent only advanced loans to the Applicant in relation to 200 million Shares transferred. The Applicant claims that the Respondent is in breach of the Agreement, by failing to advance loans in respect of the balance of 600 million Shares transferred to the Respondent pursuant to the Agreement. The

Respondent had also sold 586 million of the Shares which the Applicant had transferred to the Respondent, and had failed to return any of the Shares, or the proceeds of sale of the Shares wrongfully sold. In the Arbitration, the Applicant claims damages from the Respondent in respect of the Respondent's breach of the Agreement, and in respect of the Respondent's breach of its fiduciary duties owed to the Applicant in relation to the Shares which the Applicant had transferred under and in reliance on the Agreement. The Respondent denies any breach, and counterclaims against the Applicant in respect of what the Respondent claims to be (inter alia) the Applicant's breach of the Agreement and its duties of confidentiality.

2. By the Award, the Tribunal found the Respondent liable for breach of contract and breach of fiduciary duties, and awarded to the Applicant damages in the total sum of approximately US$33 million, with interest and costs. On 21 July 2015, the Tribunal corrected the Award by amending the sum awarded to the Applicant to approximately US$41.8 million ("**Corrections**"), in respect of what the Tribunal explained to be computational errors.

3. On 22 September 2015, the Applicant obtained leave from the Court to enforce the Award (as corrected) as a judgment of this Court. On 22 October 2015, the Respondent applied by summons ("**Summons**") to set aside the Order and for the proceedings for enforcement in Hong Kong to be stayed pending the determination of the Respondent's challenge to the Award. No grounds were specified in the Summons, although it was supported by an affidavit of a solicitor of the Respondent

("**Dentice 1**") filed with the Summons. Dentice 1 states that the application to set aside the Order is on "one or more" of the following grounds: namely, that the Respondent was unable to present its case in the Arbitration, that the Corrections dealt with a difference not contemplated by or falling within the terms of the submission to arbitration or on matters beyond the scope of the submission, that the procedure was not in accordance with the agreement of the parties or the law of the Bahamas, that the Award and Corrections have not yet become binding or has been set aside or suspended, that it would be contrary to public policy to enforce the Award, and that the relief set out in the Order did not form part of the relief granted under the Award.

4. On 22 June 2015, the Respondent had issued proceedings in the Bahamian court, to challenge the Award. The application is made under s 90 of the Bahamian Arbitration Act 2009 ("**Act**"), to set aside the Award on the ground of serious irregularity, and under s 91 of the Act, to appeal on a question of law arising out of the Award.

5. On 21 January 2016, the Applicant applied for security of HK$41 million, and security for costs of HK$600,000, to be paid by the Respondent, pursuant to s 89 (5) of the Arbitration Ordinance Cap 609 ("**Ordinance**") and O73 r10A RHC.

6. The Respondent argued that its application to set aside the Order should be adjourned pending the outcome of its setting aside proceedings in the Bahamas. The Applicant's stance is that the Court should either immediately dismiss the Respondent's application to set

aside the Order, on the ground that there are no merits in the application which is a delaying tactic, or should otherwise exercise its power to order security to be furnished by the Respondent for the further conduct of its application to set aside the Order in Hong Kong.

Applicable legal principles

7. The parties are not in serious dispute as to the applicable legal principles for determination of the application for security, which are set out in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208, applied in *Guo Shun Kai v Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484, and in *Dana Shipping and Trading SA v Sino Channel Asia Ltd*, unreported, HCCT 47/2015, 14 March 2016. In *Soleh Boneh*, Staughton LJ stated (at p 212):

> "In my judgment two important factors must be considered on such an application, although I do not mean to say that there may not be others. The first is the strength of the argument that the award is invalid, as perceived on a brief consideration by the Court which is asked to enforce the award while proceedings to set it aside are pending elsewhere. If the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security. In between there will be various degrees of plausibility in the argument for invalidity; and the Judge must be guided by his preliminary conclusion on the point.
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> The second point is that the Court must consider the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult, for example, by movement of assets or by improvident trading, if enforcement is delayed. If that is likely to occur, the case for security is stronger; if, on the other hand there are and always will be (sufficient) assets within the jurisdiction, the ease for security must necessarily be weakened." (Emphasis added)

8. The relevant considerations for the Court, when a party seeks to adjourn or stay enforcement proceedings on the basis of the existence of proceedings to challenge an award in another jurisdiction, are set out in *Dana Shipping and Trading SA v Sino Channel Asia Ltd*, unreported, HCCT 47/2015, 14 March 2016. The Court's discretionary powers under O 73 r 10A are wide. This rule provides:

> "Where a debtor has applied under rule 10 (6) to set aside an order made under rule 10 (4) (*ie an order granting leave to enforce an award)*, the Court may, either of its own motion or on an application made by the creditor, and if, having regard to all the circumstances of the case it thinks it just to do so, impose such terms as to giving security or otherwise, as a condition of the further conduct of the application, as it thinks fit."

The circumstances to which the Court should have regard include the primary aim of the Court under the Ordinance, to facilitate the arbitral process, to assist with enforcement of arbitral awards, and to enforce arbitration agreements made by the parties, whereby they agreed to arbitrate their dispute and to treat the arbitral award as final.

9. As Counsel for the Applicant pointed out, the Respondent has sought to rely on nearly all conceivable grounds to resist enforcement of the Award. The authorities in Hong Kong are clear: the Court has to be satisfied that the conduct complained of is serious, even egregious, before the Court would find that there was an error sufficiently serious as to have undermined due process (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)). Errors of fact or of law are not grounds for challenging an Award for any irregularity, and any failure to make prompt objection to the Tribunal or the supervisory court,

particularly in respect of matters which could have been rectified by the Tribunal, may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytech Engineering Co Ltd* (1999) 2 HKCFAR 111). Even if sufficient grounds are made out to refuse enforcement of an award, the Court has a residual discretion to enforce the Award (*Hebei Import & Export Corp v Polytech Engineering Co Ltd* (1999) 2 HKCFAR 111).

The strength of the argument that the Award was invalid

10. In relation to the Respondent's claims made as to the alleged serious irregularities in the process of the Arbitration, I cannot agree that the Respondent has a strong case in its challenge. Proceedings in the court of enforcement are governed by the law of that forum, and it is for the Hong Kong Court to determine whether a ground has been made out under s 89 of the Ordinance for refusing to enforce a Convention award (*Hebei Import & Export Corp v Polyteck Engineering Co Ltd* (1999) 2 HKCFAR 111).

11. The complaints made as to the Tribunal having rejected and ignored the Respondent's submissions on the appropriate remedies and quantum of damage, the Tribunal's permitting the Applicant to produce at the eve of the hearing additional documents (which had been in the possession of the Respondent but not disclosed), the Tribunal's refusal of the Respondent's application for further discovery, and the Tribunal's rejection of the Respondent's expert evidence, all appear to be case management decisions which are within the authority and power of the

Tribunal to make, after the Respondent had been given the full opportunity to make submissions and to argue its case. From the lengthy Award and the references in the Award to the submissions made by the Respondent in the course of the Arbitration, and the reasons stated by the Tribunal for its findings and decisions, it seems unlikely that the Respondent will be successful in making out a case that there were such irregularities in the Arbitration, that they can be said to be egregious, and to constitute prejudice to the Respondent.

12. As for the Respondent's reliance on s 89 (2) (f) of the Ordinance, and the ground that the Award has not yet become binding on the parties, the mere existence of some challenge made in the supervisory court does not automatically mean that the Award has not become binding. It depends on the nature of the challenge which is available under the law of the country in which the Award was made (*Guo Shun Kai v Wing Shing Chemical Co Ltd*, unreported, HCCT 35/2012, 22 January 2014). An appeal to set aside an award is to be distinguished from an appeal on the merits. An arbitral award is not binding only if it is open to appeal on the merits before a judge or an appeal arbitral tribunal (*Societe Nationale d'Operations Petrolieres de la Cote d'Ivoire-Holding v Keen Lloyd Resources Ltd* [2004] 3 HKC 452).

13. Under Article III of the New York Convention ("**Convention**"), each contracting state shall recognize arbitral awards as "binding" and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the Convention. "Binding" is used, rather than "final", the

intention being that a party is entitled to apply for recognition and enforcement of an award once it was issued by the arbitral tribunal. The fact that there are proceedings in the Bahamian court to set aside the Award on grounds of irregularities, and not on the merits, does not render the Award invalid or not binding.

14. As for the Respondent's application to appeal to the Bahamian court on questions of law, there is no expert evidence on Bahamian law as to the nature and effect of such an appeal.

15. The Agreement contains an arbitration clause, which provides that all disputes concerning the Agreement or any claim arising from or relating to the Agreement shall be resolved solely and exclusively by means of arbitration to be conducted in the Bahamas, in accordance with the Rules of the American Arbitration Association then in force for resolution of commercial disputes ("**AAA Rules**"). The arbitration clause goes on to state:

> "The parties agree that Arbitrators themselves shall have the right to determine and to arbitrate the threshold of arbitrability itself, that the decision of the Arbitrators shall be final, conclusive, and binding upon the parties, and that a judgment upon the award may be obtained and entered into in any federal or state court of competent jurisdiction."

16. On a plain reading of s 90 of the Act, the right of appeal is subject to the parties' contrary agreement, and under the Agreement, the parties had agreed that the Award would be final, conclusive and binding. Further, s 90 of the Act clearly states that an appeal against an award can only be brought with the agreement of all the other parties to the arbitral

proceedings. The Applicant has not consented to the appeal. Section 91 (8) of the Act only refers to the power and the general discretion of the Bahamian court to grant leave to appeal subject to conditions, and the Applicant argued that this does not confer a separate right on a party to appeal with the leave of the court, in the absence of the consent of the other party to the arbitration, nor does the subsection confer any independent power on the court to grant leave to appeal in the absence of consent of all the parties to the arbitration. The Applicant has highlighted that s 3 of the Act adopts the Model Law principle, that the Bahamian court should not intervene in an arbitration, except as provided in the Act itself.

17. Leaving aside the question of the merits of the Respondent's appeal, it has not even been established to my satisfaction that the Respondent has the right to appeal against the Award under the Act, and that such leave will be granted.

18. Despite the Respondent's assertions that the Award is manifestly invalid, by reason of the "obvious errors" in the Tribunal's findings as to the Applicant's rights and entitlement to damages, a careful reading of the Award casts doubts on the merits of some of the Respondent's contentions, as to double recovery under the Award and the Tribunal's alleged inconsistent findings. At most, it may appear that there may be some merits in the argument that the proceeds of sale of the 386 million Shares, in the sum of US$5,816,000, may not be recoverable in light of the damages already awarded for breach of the Agreement. The sum of US$1,603,500, as the profits made by the Respondent on the

wrongful sale of the Shares as found by the Tribunal, may be a separate remedy for the Respondent's breach of fiduciary duty, separate to the award of general damages for breach of contract. The other sum of US$8,290,000 would appear to have been awarded as special damages for breach of contract, and on a reading of the Award, seems to be confined to the Tribunal's assessment of the impact and "lingering effect" of the improper sales of the Shares on the Applicant's own shares in the company.

19. As for the Corrections, it appears from a reading of paragraphs 476 and 480 of the Award that the errors were purely arithmetic, and that the Tribunal is entitled under the governing AAA Rules to make these corrections.

20. Overall, I do not consider that the Award is "manifestly invalid" as the Respondent claims. At the highest, and as the case was argued before me, the Respondent may have some grounds to argue that, if leave to appeal can be obtained from the Bahamian court on a question of law, as to whether the Applicant is entitled to be awarded the proceeds of sale of the 386 million Shares (against which no loans were advanced), and at the same time the value of the 386 million shares (included in the award of US$22,434,100), the sum of US$5,816,000 should be disallowed from the total award of US$41.8 million.

The ease or difficulty of the enforcement of the Award

21. The Respondent's contention is that no security should be ordered, since the Applicant already has an injunction in place over the Respondent's bank account in Hong Kong, into which the proceeds of sale of the Shares had been paid. The Respondent claims that these are its only assets in Hong Kong, and that it should not be obliged to bring further assets into Hong Kong where the Applicant has chosen to enforce the Award.

22. The facts in *Karaha Boda Co LLC v Persusahaan Pertambangan Minydak Dan Gas Bumi Negara* (2003) 2 HKC 200, where security was refused (apart from security for costs), are distinguishable. The application for security in that case was made close to the hearing of the application to set aside the order granting leave to enforce the award in Hong Kong, and the debtor was plainly able to pay the award on the evidence of its worldwide assets. The Court nevertheless indicated in *Karaha Boda* that the application for security was "borderline".

23. In my view, the authorities to which Counsel for the Respondent has referred (in the context of the grant of Mareva injunctions) can be distinguished. In the present case, the Respondent is seeking to resist the enforcement of an Award which is already made in arbitral proceedings, and which the parties agreed to treat as "final and binding", and to be enforced. The Respondent now seeks the indulgence of the Court to adjourn the consideration of whether the Award should be enforced under Hong Kong law, until after the determination of

proceedings in the Bahamas for an indefinite time. By analogy with court proceedings, execution and enforcement is not as a general rule delayed or postponed even when there is an appeal against a judgment of the Court.

24. Article VI of the Convention states:

> "If an application for setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

This gives an unfettered discretion on the authority (this Court), where enforcement is sought, to decide whether to adjourn the decision on enforcement, and to order the provision of "suitable security".

25. Further, the Court has the wide power and discretion under O 73 r 10A RHC to order security generally, taking into consideration such circumstances as the merits of the proposed challenge to be made, the delay likely to be occasioned, the conduct and bona fide of the parties, the risk of there being inconsistent judgments and whether this can be remedied, and balancing the prejudice to the party entitled to enforcement of a binding award against any possible prejudice to the party resisting enforcement.

26. I do not agree with the Respondent's suggestion that there are "conceptual difficulties" if the Hong Kong Court should enforce the Award, but the Respondent is successful in its challenge in the Bahamas.

If the Award is ultimately set aside by the Bahamian court, the Bahamian court can order the Applicant to repay any amount recovered under the Award, and such order will be enforced and recognized by this Court, by principles of international comity, or as a foreign judgment. I have not been referred to any evidence which suggests that the Applicant in this case is not in a position financially to honour such an award or order.

27. Bearing in mind my views on the merits of the challenge to the Award in the Bahamas, I consider that it is appropriate in this case to order the Respondent to provide security for the amount of the Award, and for the Applicant's costs in these proceedings in Hong Kong for setting aside the Order.

28. The conduct of the Respondent was severely criticized by the Tribunal. Despite the commencement of the proceedings in the Bahamas in June 2015 and the Applicant's filing of evidence in October 2015, the Respondent states in the affidavit filed on its behalf in March 2016 that the Respondent is still in the course of reviewing the Applicant's affirmations. I agree that the Respondent has been deploying delaying tactics in its resistance to the recognition and enforcement of the Award, including its apparent attempts to reargue matters raised, argued and decided by the Tribunal.

29. Of the Award of US$41.8 million, the Applicant is seeking security of HK$41 million, and HK$600,000 in respect of its costs. The Applicant has highlighted that it does not in fact require the Respondent to bring more money into Hong Kong, other than what it had in this

jurisdiction. It is not disputed that the Respondent had received HK$70 million in Hong Kong by selling approximately 586 million Shares. The HK$41 million sought by the Applicant represents the proceeds of sale of the Shares (HK$70 million) less the amount already frozen in the Respondent's Macquarie account in Hong Kong (HK$12 million), and the HK$17 million the Applicant had received from the Respondent. The amount of HK$41 million appears to me to be reasonable security.

30. I have not been referred to any evidence of full and frank disclosure by the Respondent of the whereabouts of the proceeds of sale of the Shares, nor of details of the assets acquired by use of the Shares and the proceeds. This is notwithstanding the Order for disclosure made by Deputy High Court Judge Burrell on 15 February 2012.

31. Finality and speedy and efficient enforcement of arbitral awards underpin the principles of the Convention and the Ordinance. It is yet unknown when the Bahamas proceedings can be heard, and when a decision will be available. Enforcement of the Award should not be indefinitely postponed.

32. In all the circumstances of the case, I am satisfied that the Respondent should furnish security of the sum of HK$41 million as sought, and of HK$600,000 as security for the Applicant's legal costs.

Orders made

33. Bearing in mind the principles referred to in paragraph 31 above, I am only prepared to adjourn the application to set aside the Order for a period of 4 months from 25 April 2016 when the application was heard, and on condition that security be provided by the Respondent, by payment into court (or by provision of such other security as is acceptable to the Applicant) of HK $41,600,000 within 21 days of the date of handing down this Decision. I further order that in the event that the security is not duly provided within the period of 21 days, the application to set aside the Order is to be dismissed and the Applicant is at liberty to enter judgment in terms of the Award.

34. If security is provided within the period of 21 days, there be liberty to apply after 4 months from 25 April 2016, as to whether the application to set aside the Order should be restored.

35. The costs of the application for security (including any costs reserved) are to be paid by the Respondent to the Applicant on an indemnity basis, with certificate for counsel.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Douglas Lam SC and Mr David Chen, instructed by Li & Partners, for the applicant

Mr Roger Beresford, instructed by Reed Smith Richards Butler, for the respondent