HCCT 5/2012

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

ACTION NO 5 OF 2012

IN THE MATTER of
Enforcement of Arbitration
Award dated 10 January 2012

AND

IN THE MATTER of Sections 84
and 92 of the Arbitration
Ordinance (Cap 609)

AND

IN THE MATTER of Order
73 rule 10(1) of the Rules of
the High Court (Cap 4A)

BETWEEN

GRANTON NATURAL RESOURCES CO LIMITED	Plaintiff
and	
ARMCO METALS INTERNATIONAL LIMITED (formerly known as ARMCO & METAWISE (HK) LIMITED	Defendant

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REASONS FOR DECISION

Before: Hon To J in Chambers

Dates of Hearing: 12 July 2012

Date of Decision: 12 July 2012

Date of Reasons for Decision: 7 December 2012

Introduction

1. On 12 July 2012, I dismissed the respondent's application to set aside the order of Au J made on 14 February 2012 granting leave to the applicant to enforce the arbitral award ("Award") made by the arbitrators of the China International Economic and Trade Arbitration Commission ("CIETAC") against the respondent. I reserved my reasons for decision. Hereunder are the reasons.

Background

2. The applicant and respondent are companies incorporated in Hong Kong. On 16 March 2010, they entered into a contract (the "Contract") by which the applicant purchased 27,000 WMT of Malaysian iron ores from the respondent for onward sale to Poly Resources (Asia) Limited ("Poly Resources"). Poly Resources alleged that the iron content of the iron ores were below standard. As a result, Poly Resources resold the iron ores to China National Minerals Co Ltd ("CN Minerals") at a discount and suffered loss. On 14 December 2010, Poly Resources commenced arbitration ("Poly Resources Arbitration") before CIETAC against the applicant for breach of contract and was awarded damages in the amount of US$585,860.14, legal costs and arbitration fee. On 16 February 2011, the applicant commenced arbitration (the "Arbitration") before CIETAC against the respondent seeking to recover the damages paid to Poly Resources. On 10 January 2012, CIETAC gave the Award in favour of the applicant against the respondent.

3. On 9 February 2012, Au J granted the applicant leave to enforce the Award under sections 84 and 92 of the Arbitration Ordinance and Order 73 rule 10(1) of the Rules of the High Court. The respondent applied to set aside the leave pursuant to section 95(3)(b) of the Arbitration Ordinance on the ground that it would be contrary to public policy to enforce the Award; or alternatively, for an order that the proceedings for the enforcement of the Award and the application to set aside the leave to enforce that Award be adjourned until after the final disposal of the respondent's application to set aside the Award in the People's Republic of China ("Mainland").

4. On 6 July 2012, which was shortly before this hearing, the First Intermediate People's Court of Beijing Municipality dismissed the respondent's appeal to set aside the Award. Hence, Ms Wu, counsel for the respondent, confirmed that the respondent would only be seeking to set aside the leave to enforce the Award and would not pursue the application for adjournment.

5. The respondent relied on two grounds in its application to set aside leave: apparent bias of Mr Wang, one of the arbitrators in the Poly Resources Arbitration and the possibility that the Entry-Exit Inspection and Quarantine Certificate ("CIQ Certificate") required under article 10 of the Contract was implicated by corruption.

The law – some general principles

6. The application to set aside leave to enforce the Award is made under section 84 and 92 of the Arbitration Ordinance. The ground relied on is that under section 95(3)(b).

7. Section 3 which sets out the object and principles of the Ordinance reads:

> "(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.
>
> (2) This Ordinance is based on the principles —
>
> > (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and
> >
> > (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."

In the light of this section, when construing this Ordinance, the court has to have regard to its object of facilitating the fair and speedy resolution of disputes, the principles that the parties should be free to agree on how their dispute should be resolved and that the court should not interfere in the arbitration of the parties' dispute except as expressly provided for in the Ordinance.

8. Section 84 relating to enforcement of arbitral awards which is expressly incorporated into section 92 provides:

> (1) Subject to section 26(2), an award, whether made in or outside Hong Kong, in arbitral proceedings by an arbitral tribunal is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.
>
> (2) If leave is granted under subsection (1), the Court may enter judgment in terms of the award.
>
> (3) The leave of the Court is required for any appeal from a decision of the Court to grant or refuse leave to enforce an award under subsection (1).

Section 92 relating to enforcement of Mainland awards provides:

> "(1) A Mainland award is, subject to this Division, enforceable in Hong Kong either —
>
> (a) by action in the Court; or
>
> (b) in the same manner as an arbitral award, and section 84 applies accordingly as if a reference in that section to an award were a Mainland award.
>
> (2) Any Mainland award which is enforceable as mentioned in subsection (1) is to be treated as binding for all purposes on the persons between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong.
>
> (3) A reference in this Division to enforcement of a Mainland award is to be construed as including reliance on a Mainland award."

The effect of sections 84 and 92 is that subject to obtaining of leave a Mainland award is enforceable in Hong Kong in the same manner as a judgment of the court.

9. Insofar as is relevant, section 95 provides:

> "(1) Enforcement of a Mainland award may not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Mainland award may be refused if the person against whom it is invoked proves —
>
> ……
>
> (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."

Section 95 gives the court discretion to refuse to enforce a Mainland award. That discretion is phrased in a negative manner.

10. The primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction, ie the Mainland courts in respect of Mainland awards, as distinct from the enforcement court, ie the Hong Kong courts. Hence, the question of comity between courts of the two jurisdictions arises. In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*(1999) 2 HKCFAR 111, which was a case of enforcement under the former Arbitration Ordinance (Cap 341) of an award made in a state which was party to the Convention on the Recognition and Enforcement of Foreign Arbitral Award done at New York on 10 June 1958 ("Convention"), Sir Anthony Mason NPJ said, in considering an application to resist enforcement of a Convention award, the courts should have regard to the principles of finality and comity to the extent to which they are consistent with the provisions of the ordinance and the Convention. Both the former Arbitration Ordinance and the Convention gave effect to the principles of finality and comity by prohibiting refusal of enforcement of a Convention award except in the cases as provided in that ordinance or the Convention. Sections 2AA and 44 of that ordinance were essentially similar to sections 3 and 95 of the current Arbitration Ordinance. These sections all provide for exceptions to that prohibition by stating the grounds on which enforcement may be refused. Thus, the dicta of Sir Anthony Mason NPJ applies equally to a Mainland award. When section 95 is read together with sections 84 and 92, and bearing in mind the object and principles as set out in section 3 and the principles of finality and comity, it is clear that the legislative intention in section 95 is that a Mainland award is readily enforceable in Hong Kong and refusal to enforce is an exception rather than the rule. Enforcement may only be refused under circumstances specified in section 95(2) and (3). The discretion which the court has in refusing enforcement is a residuary one. Hence, the threshold which a party seeking to resist enforcement against him is a very high one.

The law – public policy

11. The circumstances relied on by the respondent for setting aside the leave to enforce the Award is that under section 95(3)(b), ie it would be contrary to public policy to enforce the Award in that justice was not being seen to be done.

12. The public policy referred to in section 95(3)(b) is the public policy of the country in which the enforcement is sought and not that of the country in which the award was made. The public policy in the two jurisdictions may be different. In view of the principles of finality and comity, the object and principles of the Arbitration Ordinance, the expression "contrary to public policy" in section 95(3)(b) has to be given a narrow construction. In *Hebei Import & Export Corp v Polyteck Engineering Co Ltd*, Sir Anthony Mason NPJ held that the expression "contrary to public policy" in the context of the former Arbitration Ordinance meant contrary to the fundamental conceptions of morality and justice of the forum in which enforcement was being sought, ie Hong Kong. He said at 139D-G:

> "However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (***Scherk v. Alberto-Culver Co***(1974) 417US 506;***Imperial Ethiopian Government v. Baruch-Foster Corp*** (1976) 535 F 2d 334 at 335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of Article V, notably Article V 2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression "contrary to the public policy of that country" in Article V 2 (b) means "contrary to the fundamental conceptions of morality and justice" of the forum. (***Parsons and Whittemore Overseas Co Inc. v Societe General De Industrie Du Papier (RAKTA)*** (1974) 508 F 2d 969 at 974 (where the Convention expression was equated to "the forum's most basic notions of morality and justice"); see A J van den Berg, *The New York Convention of 1958* (Kluwer, 1981) at p 376; see also ***Renusagar Power Co Ltd. v General Electric Co*** (Yearbook Commercial Arbitration. XX (1995) page 681 at pages 697-702))."

13. In the same case, Litton PJ accepted that the expression meant contrary to the most basic notions of morality and justice. He said at 118:

> "The expression *public policy* as it appears in s 44(3) is a multi-faceted concept. Woven into this concept is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction, and such challenge has failed."

Again, in view of the principles of finality and comity, the discretion to refuse enforcement will not be exercised unless the enforcement would violate the most basic notions of morality and justice.

14. In much the same vein, Bokhary PJ held that there must be compelling reasons before enforcement of a Convention award can be refused. The party resisting enforcement has to overcome a hurdle higher than the minimum required to set aside a domestic judgment or award. He said at 122:

> "In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award. A point to similar effect was made in a comparable context by the United States Supreme Court in *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* (1985) 473 US 614 . There the question was whether an anti-trust claim was to be referred to arbitration outside the United States. In holding that it was, the majority said this (at p 629):
>
> "…… concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." "

15. Thus, to invoke this exceptional jurisdiction, the party seeking to resist enforcement of a Mainland award for public policy reason has to show that its enforcement would violate the most basic or fundamental conceptions of morality and justice in Hong Kong. It is not enough for the party to show violation of some conceptions of morality and justice which are being enjoyed in Hong Kong. The violation has to go to the root of our fundamental conceptions of morality and justice; and has to go beyond the minimum which is sufficient to set aside a domestic judgment or award.

16. The very high threshold which a party seeking to rely on public policy ground has to reach is best demonstrated by examining some of the cases in which the court refused to exercise this exceptional jurisdiction. In *Hebei Import & Export Corp v Polyteck Engineering Co Ltd*, the Court of Final Appeal held the fact that the arbitrator had, in the absence of one party, been in contact with the other party's employees or agents, giving the appearance of bias, was insufficient. In *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627, the Court of Appeal held that complaint of collusion between one party and the arbitrators during an unsuccessful mediation by the arbitral tribunal was insufficient. In *A and R (Arbitration : Enforcement)* [2009] HKLRD 389, Reyes J refused not to enforce an award which was made by mistake. The rationale he gave at 395 was:

> "23. By choosing arbitration, the parties must be deemed to have undertaken the risk that an arbitrator might get matters wrong in his decision. An error (whether of law or fact does not matter here) by an arbitrator in an award cannot by itself counterbalance the public policy bias towards enforcement. If the public policy ground is to be raised, there must be something more, that is, a substantial injustice arising out of an award which is so shocking to the court's conscience as to render enforcement repugnant.
>
> 24. Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory.
>
> 25. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that to happen would be to undermine the efficacy of the parties' agreement to pursue arbitration. That by itself would not be conducive to the public good.

Thus, even if the court is of the opinion that a Mainland award was made by mistake, bearing in mind the objects and the principles on which the Arbitration Ordinance is based and the principles of finality and comity, the court will not lightly refuse to enforce the award unless its enforcement would violate our most basic or fundamental conceptions of morality and justice.

The law - apparent bias

17. The specific public policy ground relied on by the respondent was that justice was not seen to be done, ie apparent bias. Mr Wong, counsel for the applicant, argued that a distinction had to be drawn between apparent bias which was relied upon by the respondent and actual bias which was not. He referred to the dicta of Bokhary PJ in *Hebei Import & Export Corp v Polyteck Engineering Co Ltd* in which Bokhary PJ drew a distinction between apparent bias and actual bias and held that apparent bias was not sufficient to justify the enforcement court to refuse enforcement. He said at 124 B-D:

> "In the present context, I think that a distinction can and should be made between the effect of actual bias and that of apparent bias. (When I say "bias" I mean a lack of the impartiality required of judges and arbitrators.). Actual bias would be more than our courts could overlook even where the award concerned is a Convention award. But short of actual bias, I do not think that the Hong Kong courts would be justified in refusing enforcement of a Convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or arbitrations are concerned. Our stance must be that something more serious even than that is required for refusing such enforcement. In adopting such a stance, we would be proceeding in conformity with the stance generally adopted in regard to Convention award enforcement by the commercial jurisdictions whose decisions from around the globe have been cited to us by leading counsel for the buyer."

18. Ms Wu referred to the judgment of Sir Anthony Mason NPJ at 139 H-I:

> "The question then is whether the two matters of which the respondent complains, namely the alleged refusal of a hearing and the communications to the chief arbitrator were contrary to the fundamental conceptions of morality and justice of Hong Kong. In this respect, the opportunity of a party to present his case and a determination by an impartial and independent tribunal which is not influenced, or <u>seen to be influenced</u>, by private communications are basic to the notions of justice and morality in Hong Kong."
>
> (Underline added by Ms Wu)

Based on the underlined part of the above dicta, Ms Wu argued that Sir Anthony Mason NPJ drew no distinction between actual and apparent bias. Hence, she submitted that apparent bias was sufficient to justify refusal to enforce an award.

19. Next, Ms Wu referred to *Gao Haiyan v Keeneye Holdings Ltd*, in which Tang VP, as he then was, reconciled the two apparently conflicting dicta in *Hebei Import & Export Corp v Polyteck Engineering Co Ltd*. Tang VP said at 661:

> " I do not believe there is any conflict between these views. What Bokhary PJ was emphasising was that one should not be too ready to refuse to enforce an award on the basis of one's notion on what may amount to apparent bias. There is nothing in Sir Anthony Mason's judgment which contradicted that."

Ms Wu submitted that based on the dicta of Tang VP, there was no conflict between the views of Sir Anthony Mason NPJ and Bokhary PJ and hence apparent bias could be a sufficient ground for refusing enforcement.

20. The decision of the Court of Appeal is binding on me. It is clear that Sir Anthony Mason NPJ considered apparent bias could be a ground for refusing enforcement. I do not think Bokhary PJ was saying that apparent bias could never justify refusing enforcement. In the later part of his judgment, he said at 124 F:

> " In a context like the present, however, I think that the courts cannot avoid the question of whether or not there was *actual* bias. They must decide the matter upon the answer to that question, thorny as such a question can be. I do not think that this is asking too much. After all, where the appearance of bias is strong enough, it can lead to an inference that actual bias existed."

21. Bias can exist in different forms. In some cases, the line between apparent and actual bias could not be readily drawn. It is a matter of degree. I agree with the view of Tang VP that Bokhary PJ was only emphasising that one should not be too ready to refuse to enforce an award on the basis of one's notion of what may amount to apparent bias. Thus, apparent bias could justify refusal to enforce an award. But, it would require a much stronger case to justify refusal based on apparent than on actual bias.

22. The test for apparent bias is whether an objective fair-minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that the tribunal was biased: *Director General of Fair Trading v Proprietary Association of Great Britain* [2001] 1 WLR 700 (CA), per Lord Phillips at 722-723; *Porter & Another v Magill* [2002] 2 wlr 37 (HL), per Lord Hope of Craighead at pp 83-84; *Deacons v White & Case LLP & Others* (2003) 6 HKCFAR 322 (CFA) at p 332. The same test was held to be applicable to determining apparent bias on the part of arbitrators: *AT & T Corp v Saudi Cable Co* [2000] 2 All ER (Comm) 625 (CA), per Lord Woolf MR at pp 637-638.

Ground 1 - apparent bias: factual basis

23. The basis of the respondent's complaint of bias was that one of the arbitrators in the Poly Resources Arbitration, Mr Wang, was at the material times the senior legal consultant of Minmetals Development Company Limited (五礦發展股份有限公司) ("MDCL") and that MDCL was at the material times and still is one of the two shareholders of CN Minerals, the ultimate buyer of the iron ores from Poly Resources. In breach of the stringent requirements on arbitrators to maintain their impartiality and independence imposed under articles 7 and 8 of the CIETAC Rules, Mr Wang did not disclose his employment with MDCL in the Poly Resources Arbitration and the Arbitration. It was only upon the respondent's application for his recusal that he withdrew from sitting on the Arbitration. The respondent's complaint is not that Mr Wang was one of the arbitrators in the Arbitration, but that in this Arbitration the applicant sought and obtained the Award to "mirror" the award obtained by Poly Resources against it in the Poly Resources Arbitration and that award was implicated by Mr Wang's conduct.

24. In support of the factual basis of its complaint, the respondent produced Exhibit CY-5 which was a summary of the various positions held by Mr Wang obtained from a well known Mainland website ("Summary") According to Ms Wu, the Summary alleged that at all material times Mr Wang held the following senior positions:

(1) deputy general manager of the legal affairs department of China National Metals and Minerals Import and Export Corporation (中國五金礦產進出口總公司) ("CNMM");

(2) deputy general manager of the legal affairs department of China Minmetals Corporation (中國五礦集團公司) ("CMC"); and

(3) senior legal consultant of and Minmetals Development Company Limited (五礦發展股份有限公司) ("MDCL").

25. But a careful reading of the Summary suggested that it did not support the respondent's assertion. The last paragraph of the Summary stated that Mr Wang had been employed as (曾任) deputy general manager of the legal affairs department of CNMM and deputy general manager of the legal affairs department of CMC, and that since April 2008 was employed as senior legal consultant of CMC and MDCL. The last sentence of that paragraph stated that in 2008 Mr Wang passed the open recruitment examination and was appointed the chief legal advisor of China National Machinery Industry Corporation (中國機械工業集團) ("CNMI"). It was also stated elsewhere in that article that was Mr Wang was currently (現任) holding that position.

26. The applicant's solicitor exhibited a notice issued by the State-owned Assets Supervision and Administration Commission of the State Council dated 29 December 2008 ("Notice") and a *curriculum vitae* of Mr Wang. The Notice stated that Mr Wang passed the open recruitment examination and was appointed as the legal advisor of CNMI. It also stated that Mr Wang was previously employed (曾任) in CNMM and CMC, and in April 2008 was employed as senior legal consultant in CMC and MDCL. That Notice was issued by a commission of the State Council and should be authoritative. It was probable that the information contained in the Summary was extracted from this Notice. But by no reading of the Notice or the Summary could it support the respondent's allegation that Mr Wang was an employee of MDCL at the time of the Poly Resources Arbitration. The *curriculum vitae* stated that Mr Wang was currently employed by CNMI. That document does not bear a date and does not contain any reference as to Mr Wang's former employment. It is of no assistance to either party.

27. Ms Wu argued that the Summary and the Notice did not exclude the possibility that Mr Wang could be holding a position in MDCL after his appointment in CNMI. It did not, but neither did it prove Mr Wang was employed by a shareholder of CN Minerals. The respondent bore the burden of proving that Mr Wang's employment conflicted with his position as arbitrator in the Poly Resources Arbitration. The respondent failed to discharge that burden. Ms Wu's argument was just a surmise. In my view, a fair reading of the Summary and the Notice suggested that Mr Wang was only employed by CMC and MDCL prior to his appointment by CNMI in December 2008 when the Notice was published. Thus, there was no evidence that at the material time of the Poly Resources Arbitration in December 2010, Mr Wang was an employee of MDCL. There was no factual basis in support of this complaint.

28. The above would be sufficient to dispose of this ground. But even assuming that Mr Wang was in a position of conflict, the complaint of bias was not directed at the tribunal making the Award. Such bias could not justify the court to refuse enforcement of the Award. Ms Wu sought to circumvent that difficulty by arguing that the Award in this Arbitration was implicated because by blindly adopting the collective ruling in the Poly Resources Arbitration, the subject tribunal had not actually assessed the evidence as to what, if any, loss was suffered by Poly Resources. In effect, the subject tribunal simply adopted the quantum agreed by Poly Resources with CN Minerals wrongly believing that the same had been tested in the Poly Resources Arbitration. But, unbeknown to the subject tribunal, the quantum was not so tested and there had been apparent bias on the part of Mr Wang to favour CN Minerals in the Poly Resources Arbitration. Put at its highest, the complaint was simply that the subject tribunal erred in accepting the erroneous finding on quantum made by the tribunal in the Poly Resources Arbitration. Again, this could not justify refusal to enforce the Award: see *A and R (Arbitration : Enforcement)*.

Ground 2 – the CIQ Certificate might be implicated by corruption

29. Ms Wu referred to the fact that the head of the state authority issuing CIQ Certificates, Le Huasen, had been charged, arrested and sentenced to life imprisonment on 25 April 2012 for corruption involving RMB160 million. She argued that that implicated the genuineness of the CIQ Certificate which was the only evidence to prove the iron ores were sub-standard. She submitted, quoting *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* CACV 136/2011 (unreported, dated 9 May 2012, that instances of corruption, bribery or fraud certainly would offend the shared notions of justice common to legal system throughout the world.

30. I agree with the sentiment expressed in *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd.* But, be that as it may, on the face, the CIQ certificate was not issued by Li Huasen. Thus, on the fact, there was no evidence of any corrupt activity connected with the issue of the CIQ Certificate in question. Furthermore, despite knowledge of the corruption, this issue was not raised in the respondent's application to set aside the Award before the First Intermediate People's Court of Beijing Municipality. It was not raised until the respondent filed the 2nd affirmation of Chong Moon Hing in reply. There was simply no factual basis in support of this ground to set aside the leave granted to enforce the Award.

Conclusion

31. In conclusion, there was absolutely no basis to support the respondent's application to set aside the leave granted to enforce the Award. The respondent's application was accordingly dismissed with indemnity costs.

(Anthony To)
Judge of the Court of First Instance
High Court

Mr Anson Wong, instructed by DLA Piper Hong Kong, for the applicant

Ms Teresa Wu, instructed by Li & Partners, for the respondent