HCCT 53/2017

[2018] HKCFI 1147

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS NO 53 OF 2017

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IN THE MATTER of section 87 of the Arbitration Ordinance, Cap 609 and Order 73, rule 10 of the Rules of the High Court, Cap 4A

and

IN THE MATTER of an Arbitral Award dated 6 August 2014 by Takeo Kosugi, Kazuo Iwasaki and Takafumi Ochiai

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BETWEEN

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| PALOMA COMPANY LIMITED | Applicant / Claimant in the Arbitration (Judgment Creditor) |
| and | |
| CAPXON ELECTRONIC INDUSTRIAL COMPANY LIMITED | Respondent / Respondent in the Arbitration (Judgment Debtor) |

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Before: Deputy High Court Judge Keith Yeung SC in Chambers

Date of Hearing: 2 May 2018

Date of Decision: 2 May 2018

Date of Reasons for Decision: 25 May 2018

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REASONS FOR DECISION

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*THE APPLICATIONS*

1. There are two matters before the court:

(a) the substantive hearing (the"**Charging Order Hearing**") for the Charging Order: Notice to Show Cause dated 23 November 2017 (the "**Charging Order *Nisi***"); and

(b) the hearing for the summons dated 13 March 2018 taken out by Capxon (the "**Setting Aside Summons**") for setting aside the Order of Mimmie Chan J dated 12 October 2017 (the "**Enforcement Order**") granting leave to enforce the Arbitral Award dated 6 August 2014 (the "**Award**").

*BACKGROUND LEADING TO THE APPLICATIONS*

2. Paloma Company Limited ("**Paloma**") is a company which business address is in Japan.

3. Capxon Electronic Industrial Company Limited ("**Capxon**") is a subsidiary of Capxon International Electronic Company Limited, a company listed on the Main Board of the Hong Kong Stock Exchange. The registered address of Capxon is in Taiwan.

4. Capxon and Paloma engaged in the sale and purchase of electrolytic capacitors. Disputes arose between them in respect of certain capacitors that Capxon had supplied to Paloma. They were defective. Pursuant to the terms and conditions governing those sales, Paloma on 17 November 2011 commenced arbitration at the Japan Commercial Arbitration Association against Capxon. Japan is a contracting state of theNew York Convention. The matter was before a three-member tribunal (the "**Arbitral Tribunal**"). After 11 meetings (for variably oral arguments, technical explanations and examination of witnesses), and having received written submissions, the Arbitral Tribunal on 6 August 2014 delivered the **Award** in favor of Paloma in the sum of JPY2,427,186,647 plus interest and costs.

5. Subsequent to the Award, Capxon sought to have the same set aside in a number of courts. Its attempts in Japan were dismissed firstly by the Tokyo District Court (on 22 January 2016), then Toyko High Court (on 16 February 2017), and finally Japan Supreme Court (on 31 May 2017). Its attempt to resist the recognition of the Award in Taiwan was also rejected by the Taiwan Shilin District Court on 9 March 2018.

6. On 12 October 2017, Mimmie Chan J gave leave to enforce the Award in Hong Kong pursuant to section 87 of the Arbitration Ordinance Cap 609 and Order 73, rule 10(1) of the Rules of the High Court (ie the Enforcement Order).

7. On 23 November 2017, the Charging Order *Nisi* was granted in respect of 85,137,200 shares in Lancom Limited held by Capxon (the "**Lancom Shares**"). The hearing to show cause was originally set to take place on 22 December 2017.

8. On 19 December 2017, evidence was filed on behalf of Capxon alleging that the service of the Charging Order *Nisi* was "ineffective and illegal". On that basis, Capxon craved that the Court should either refuseto make the Charging Order *Nisi* absolute, or alternatively that the hearing of 22 December 2017 be adjourned so that further evidence could be filed.

9. On 22 December 2017, the hearing to show cause was adjourned.

10. On 13 February 2018, Capxon filed further evidence (affirmation of Ms Chou Chiu-Yueh) concerning the alleged ineffective service of the Charging Order *Nisi*. Ms Chou also revealed in her affirmation that Capxon intended to make application to have the Enforcement Order set aside. She claimed that as the service of the Enforcement Order on Capxon was also ineffective, the time for Capxon to apply to set aside the Enforcement Order had not started to run, and the intended application was therefore not out of time.

11. On 13 March 2018, Capxon ultimately took out the Setting Aside Summons. The grounds upon which the application is premised are stated as follows:

> " 1. There was conflict with public policy by virtue of the following:
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> a. the tribunal unfairly formed a presumption that the defects of the Applicant's products were attributable to contamination of the Respondent's capacitors by chlorine (the '**Chlorine Contamination**') as a result of the bare hand operation of the Respondent's workers during the manufacturing process,on the sole basis of an alleged admission or confession by the Respondent in certain reports prepared by it in response to the Applicant's queries (the '**Report**');
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> b. the Respondent did not made admission to the Chlorine Contamination in the Report, and did raise this as an issue;
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> c. the tribunal failed to consider the issue, and came to a conclusion in favour of the said admission and presumptionwithout giving justification. On the other hand, there werefacts which clearly contradicted the Chlorine Contamination;
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> d. with the said unjustified presumption, the tribunal reverses the burden of proof to the prejudice of the Respondent, clearly in violation of Japanese law and also a serious procedural irregularity under Hong Kong law;
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> e. the tribunal also refused to accept evidence proffered by the Respondent which suggested that chlorine contamination was the result of the Applicant's manufacturing process, without giving any reason; and
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> f. in the premises, the manner in which the tribunal conducted the Arbitration was clearly against the fundamental conception of morality and justice.
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> 2. In the event that the presumption was not unfairly established orthe Respondent's evidence pointing to a default on the part of the Applicant's manufacturing process as the cause of the chlorine contamination was not unreasonably rejected, the ruling of the tribunal could have been very different."

12. On 13 March 2018, Ms Chou Chiu-Yueh filed her 2nd affirmation in support of the Setting Aside Summons (which was further supplemented by her 3rd affirmation of 24 April 2018).

13. Until 16 April 2018, the only basis which Capxon had put forward to resist the Charging Order *Nisi* being made absolute was the alleged defective service of the same. That changed on 16 April 2018. On that day, Mr Lin Chin Tsun, the chairman of Capxon up to 10 April 2018 and since that date its liquidator, filed an affirmation. He disclosed that pursuant to a board meeting dated 19 March 2018, an extraordinary general meeting of shareholders of Capxon was convened on 10 April 2018. During that EGM, it was resolved that Capxon be dissolved, and Mr Lin be appointed as the liquidator for the conduct of the dissolution and liquidation procedure. He produced the financial statements and accountant's report of Capxon as at 31 December 2017. He said that whilst Capxon was on the face of those statements solvent, "if the Lancom Shares are charged and removed from its assets, [Capxon] will not have enough assets to satisfy its outstanding liabilities owed to its other creditors as at 31 December 2017." He further said that "The balance sheet and property inventory of [Capxon] is now being prepared by Deloitte & Touche for the purpose of the dissolution and liquidation process. I shall make further affirmation to exhibit such document to his Honourable Court once it is ready."

14. On 24 April 2018, Ms Chou Chiu-Yueh filed her 3rdaffirmation in support of the Setting Aside Summons.

*ADJOURNMENT OF THE CHARGING ORDER HEARING*

15. Mr Maurellet SC, who appears for Capxon together with Mr Mike Yeung, invites the Court to initially deal with the issue as to whether Capxon's liquidation on 10 April 2018 would *on its own* be a sufficient ground for the Court to decline to make the Charging Order *Nisi* absolute. If the Court considers that it is not, the Court is invited not to proceed with the Charging Order Hearing before determination of the Setting Aside Summons.

16. Mr Jason Yu, counsel for Paloma, takes issue with the late filing of Mr Lin's affirmation, on the basis that Mr Lin has raised a new point based upon the recent liquidation of Capxon, in respect of which Paloma has had no realistic opportunity to respond. He submits that the voluntary winding up of Capxon was engineered by its management. He further submits that whilst the new point cannot be sustained, he reserves the right to file evidence should the matter be adjourned.

17. Whilst comments can be made on the timing of Capxon's liquidation and its revelation, I am not prepared to rule on the matter at this stage. As has been revealed by Mr Lin in his affirmation, the balance sheet and property inventory of Capxon for the purpose of the dissolution and liquidation process is now being prepared by Deloitte & Touche. Mr Maurellet has informed me that that may take about 6 weeks. A lot of things are going to hinge on the information that will be disclosed by that set of balance sheet and inventory. Apart from anything else, the legal principles to be applied may differ depending upon the state of solvency of Capxon. Further, third party interests' (ie interests of other creditors) are potentially at stake. In the end, I have decided to adjourn the Charging Order Hearing with directions on the filing of further evidence.

*THE SETTING ASIDE SUMMONS*

18. I proceed to hear the Setting Aside Summons.

*The applicable legal principles*

19. The Award is a Convention Award. The Enforcement Order was sought and granted pursuant to section 87 of the Arbitration Ordinance, Cap 609.

20. The attitude of the Hong Kong Court towards enforcement of arbitration awards and parties' agreements to submit their disputes to arbitration has been summarized by Mimmie Chan J in *KB v S & Ors* [2016] 2 HKC 325, at 328 – 329, that:

> " (1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
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> (2) Under the Arbitration Ordinance (**Ordinance**), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.

(3) 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 their dispute should be resolved.

(4) Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanisticas possible' (*Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604).

(5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way(*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Ltd* [2009] 4 HKLRD 353 (CA)).

(8) Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).

(9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import &Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR111, 136A–B).

(10) The Court of Final Appeal clearly recognized in *Hebei Import&Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act *bona fide* (p 120Iand p 137B of the judgment)."

21. Specifically in respect of an objection to enforcement based on public policy (which Capxon is doing by the Setting Aside Summons to do), the relevant sections in the Arbitration Ordinance are section 81(1) (Article 34 of the UNCITRAL Model Law) and section 89 (Convention awards).

22. In *Hebei Import & Export Corp v Polytek Engineering Co Ltd*(1999) 2 HKCFAR 111 (which Mr Maurellet has fairly and properly highlighted for my attention), the Court of Final Appeal held and observedunder the old Arbitration Ordinance, Cap 341 (but equally applicable to the current Arbitration Ordinance, Cap 609) that:

" The expression *public policy* as it appears in s.44(3) of the Ordinance 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 thesubject of challenge in proceedings in the supervisory jurisdiction,and such challenge has failed." (*per* Litton PJ at 118D–E)

" In my judgment, the position is as follows. Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.

….

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 justifiedin refusing enforcement of a Convention award on public policygrounds as soon as appearances fall short of what we insist uponin 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." (*per* Bokhary PJ at 123H–I and 124B–D)

" …The Convention, in providing that enforcement of an award may be resisted on certain specified grounds, recognises that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.

….

However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standardsby which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v Alberto-Culver Co* (1974) 417 US 506; *Imperial Ethiopian Government v Baruch-Foster Corp* (1976) 535 F 2d 334 at p.335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art.V, notably art.V2(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 art.V2(b) means 'contrary to the fundamental conceptions of morality and justice' of the forum. (*Parsons & Whittemore Overseas Co Inc v Societe Generale De L'Industrie Du Papier (RAKTA)* (1974) 508 F 2d 969 at p.974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see AJ 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) 681 at pp.697–702))."

(*per* Sir Anthony Mason NPJ at 136E–F and 139D–H)

23. On the principles applicable where a party seeks leave to resistenforcement of a Convention award out of time, the Court of Final Appeal in the recent case of *Astro Nusantara v PT Ayunda Prima Mitra* [2018] HKCFA 12 held that the proper test involves looking at all relevant matters and considering the overall justice of the case, eschewing a rigid mechanistic approach (section E.2 of the Judgment).

24. When considering the Setting Aside Summons, I apply the principles and considerations set out above.

*Discussions*

25. The grounds which Capxon seeks to rely upon are set out in the Setting Aside Summons which I have reproduced above. In gist, the allegations are that as Paloma was the petitioner, it had the onus of provingthe defects and their causes. But the Arbitral Tribunal relied upon certainalleged admissions made by Capxon in some reports ("**Reports**") that it hadmade and formed a presumption against Capxon for its rebuttal, to the effectthat the defects of the Capxon's products were attributable to contamination by chlorine as a result of the bare hand operation of Capxon's workers during the manufacturing process. The Arbitral Tribunal also ignored a lot of contrary evidence in Capxon's favour (which Ms Chou endeavored to set out in her 2nd and 3rd affirmations). The Arbitral Tribunal had therefore, Capxon claims and Mr Maurellet submits, reversed the onus of proof. That wrongful reversal of burden of proof, it is further submitted, "clear shows an actual bias" on the part of the Arbitral Tribunal towards Capxon. As the manner in which the tribunal conducted the Arbitration was clearly against the fundamental conception of morality and justice, to enforce the Award would be contrary to public policy.

26. I have considered those Reports. There is no dispute that they were indeed prepared by Capxon in response to Paloma's complaints about the capacitors concerned. Mr Yu has taken me through some of their contents, which in my view clearly contain matters and information which were capable of being accepted by the Arbitral Tribunal as evidence against Capxon:

- “ Defects in the manufacturing process: When the production records were investigated, there were orders submitted for a short term delivery for large volume in February of 2006, and our company responded through urgent production. In the assembly process, there was a defect caused by inappropriate tasks conducted by a worker. According to the dissection analysis, the life will be shortened if the task of bending the aluminum lead board is conducted inappropriately and the term is used for a long period of time because the aluminum lead board is damaged.” [1]

- “ In the 6th week of 2006 (C606), the number of orders accepted for LP series (including LP220uF00V 20x26) increased significantly, which caused the response to become tense in the Production Management due to urgent production. It is estimated that the workers will touch the elements by hand carelessly in the assembly process.” [2]

- “ In the assembly process in lot C606 of LP220M200L260 which is the aluminum electrolytic capacitor manufactured by our company, individual defects occur due to inappropriate tasks conducted by workers. Furthermore, there are no defects in the products of other lots. Our company will take all responsibilities if there are defects in other lots.” [3]

- “ The aluminum electrolytic capacitor manufactured by us with the specification LP220M200L260 and cycle C606 has a few flaws due to improper operations by personnel during the assembly process, but there are no faults in other cycle. If there are faults in other cycles, we would like to take full responsibility.” [4]

- “ The chlorine does not have a very good effect of the characteristic of capacitors. There is possibility that the quality may be affected if the capacitor is produced by hand, since sweat contains chlorine.” [5]

27. It is also important to note that Capxon had been afforded opportunities to challenge those Reports. The authors of those Reports were called as live witnesses before the Arbitral Tribunal. The witnesses sought to explain that the material contents of the Reports were untrue. Despite their evidence, but having considered the same, the Arbitral Tribunal decided to place weight upon the Reports. The material parts of the Arbitral Tribunal's observations and findings are as follows:

> " Lin I Chu and Factory Manager Lu Yan Cheng who had been in the leading positions in creating the reports for the respondent, endlessly explained that the content of the reports is false and does not reflect the facts as well as the motive leading to the falsification and the circumstances in the report creation, but they cannot be trusted. The statements of Lin I Chu stating that 'you should really conduct self-examination when pointingout issues in our customers,' and 'the problem is in the customers. I instructed to not write in any key words which insinuate that or the keyword chlorine' in relation to Petitioner's Evidence 68 does not logically explain why Lin I Chu took this action as a response by a businessman. The statement that 'there was no defects in the transactions with Higashibara Company" by Lin I Chu clearly contradicts the Respondent's Evidence 33 which states that there was a defect; this document was created by Hin I Chu himself. Moreover, Lu Yan Cheng gave instructions to Lin I Chu to send a photo of the LP product that was corroded by soaking it in salt water and then applying a large electrical current as the Attachment of Petitioner's Evidence 56, posing this photo to be the product that was actually corroded; Lu Yan Cheng also agreed to these instructions and contributed to the lie as well. The arbitral tribunal cannot place their trusts in the words of Lin I Chu and Lu Yan Cheng, who conducted actions outside of the realm of common businessmen, and who deny thecontent of the documents they created themselves. The reasons for withdrawal of submitted evidence to the arbitral tribunal (Respondent's Evidence 11, Respondent's Evidence 12, and Respondent's Evidence 15 through Respondent's Evidence 19) is not entirely convincing. Even with the other evidence submitted by the Respondent, it is not enough to state that the content of the report created by the respondent is false." [6]

28. Having considered the evidence and counsel's submissions, I do not accept Mr Maurellet's submissions that there has been any impermissible reversal of burden of proof. I further reject the submissionsthat the evidence or the reasoning of the Arbitral Tribunal shows any actual bias on its part against Capxon. I do not intent to look further at or into the merits of the Award or the Arbitral Tribunal's reasoning which led to it. In fact, I ought not to: *KB v S & Ors* (paragraph 49). I accept Mr Yu's submissions that "the inescapable conclusion is that Capxon is inviting the Court to review errors or explore the reasoning of a tribunal. This is not permissible."

29. On the evidence, I cannot see any error or matter of the naturewhich, according to the elucidations by the Court of Final Appeal in *Hebei*, come close to justifying the setting aside of the Enforcement Order on the public policy ground.

30. For completeness sake, I should also mention the question of leave to extend time. In the Setting Aside Summons, Capxon seeks "leave to extend the time within which the application for the order under this Summons should be made until the date hereof *should this Honourable Court consider that such application is made out of time*" (emphasis added). Capxon's primary contention is that as the service of the Enforcement Order was ineffective, the time for it to apply to have it set aside has not started to run. I do not intend to go into the issue of service unnecessarilyand on such contingency basis. I will only say this. If extension of timeis required, I will refuse to grant any. I have considered the overall justice of the case. I avoid the application of any rigid mechanistic approach. On the basis of my conclusion expressed above on the lack of any basis to challenge the Enforcement Order, it would have been futile for me to grant any extension.

*Disposal*

31. At the end of the hearing on 2 May 2018, I dismissed the Setting Aside Summons with costs to Paloma on an indemnity basis. I promised to hand down my reasons when ready, which I have now done.

(Keith Yeung SC)
Deputy High Court Judge

Mr Jason Yu, instructed by Norton Rose Fulbright Hong Kong, for the applicant (judgment creditor)

Mr Jose-Antonio Maurellet SC, leading Mr Mike Yeung, instructed by Minter Ellison, for the respondent (judgment debtor)

[1] page 496 of the Hearing Bundles

[2] page 511 of the Hearing Bundles

[3] page 511 of the Hearing Bundles

[4] page 512 of the Hearing Bundles

[5] page 515 of the Hearing Bundles

[6] pages 117 – 118 of the Hearing Bundles