HCCT 13/2015

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 13 OF 2015

IN THE MATTER of an Agreement in writing dated 12 April 2006 called "意向書" and made between the Applicant and the 1st, 2nd and 3rd Respondents (the "LOI")

and

IN THE MATTER of an Arbitration in respect of the Agreement (the "Arbitration")

and

IN THE MATTER of the Enforcement of the Second Arbitration Award made on 25 January 2014 (as corrected on 14 March 2014) and the Third Arbitration Award made on 16 December 2014

BETWEEN

KB	Applicant
and	
S	1st Respondent
and others	2nd Respondent
	3rd Respondent

Before : Hon Mimmie Chan J in Chambers
Date of Hearing : 7 September 2015
Date of Reasons for Decision : 15 September 2015

REASONS FOR DECISION

Introduction

1. The attitude of the Hong Kong Court towards enforcement of arbitration awards and parties' agreements to submit their disputes to arbitration has been made demonstrably clear in the authorities. In summary:

(1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.

(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 mechanistic as 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 Limited* [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 HKCFAR 111, 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 120I and p 137B of the judgment).

2. The above principles are of importance and are highly relevant to the determination of the applications before me.

Background

3. In this case, the Applicant (KB) entered into an agreement consisting of a Letter of Intent dated 12 April 2006 ("**LOI**") with the 3 Respondents (S and others). The Applicant and the 1st Respondent are BVI companies. The 2nd Respondent is a Hong Kong company wholly owned by the 1st Respondent. The 3rd Respondent is a Mainland company, wholly owned by the 2nd Respondent. The LOI is for the sale and purchase

of the shares in the 2nd Respondent (the Hong Kong company), with the objective that assets in Zhuhai (and in particular a hotel complex) ("**Assets**") should be transferred to the 3rd Respondent (the Mainland company), and with the 2nd Respondent (the Hong Kong company), holding the Mainland company, being sold to the Applicant. Under the LOI, the 1st Respondent agreed to sell to the Applicant the 1st Respondent's entire shareholding in the 2nd Respondent, on the basis that the 2nd Respondent would be holding the 3rd Respondent, which would own the Assets.

4. In 2010, disputes arose between the parties under the LOI, which provides for Hong Kong law to be the governing law and for disputes and controversies arising from or related to the LOI to be arbitrated in Hong Kong. The Respondents appeared to have claimed that the LOI had been terminated because the Assets had not been transferred to the 3rd Respondent. They also rely on clauses 6.1 and 7.3 of the LOI, which provide for the LOI to terminate in the event that the parties fail, within 360 days of the execution of the LOI, to sign corresponding definitive contracts for the further performance of the LOI, or if the transaction under the LOI is not eventually completed.

5. On 3 March 2010, the Applicant commenced arbitration in Hong Kong pursuant to the LOI ("**Arbitration**"). The Tribunal was constituted on 7 October 2010. The issues for determination in the Arbitration included whether the LOI had been terminated by 12 April 2008 as the Respondents contend (after the expiry of the extension of time agreed to by the parties for the duration of the LOI) by virtue of clauses 6.1 and 7.3 of the LOI, whether the Applicant had by its conduct repudiated

the LOI on about 13 January 2010, or whether the LOI remained valid and subsisting, as the Applicant contends.

6. In October 2010, the Respondents mounted a jurisdictional challenge in the Arbitration, which was heard by the Tribunal on 19 March 2011. The jurisdiction challenge was dismissed, with the Tribunal finding on 14 April 2011 ("**1st Award**") that it had jurisdiction to deal with the dispute.

7. The parties had also commenced proceedings on the Mainland in relation to the LOI. On 21 September 2012, the Guangdong Provincial Higher People's Court ("**Guangdong Court**") handed down its judgment dated 28 August 2012, whereby the Guangdong Court held that under PRC laws, the LOI had automatically terminated on 12 April 2008. The Respondents therefore obtained leave of the Tribunal in October 2012 to argue in the Arbitration whether the validity or subsistence of the LOI has been finally determined by the Guangdong Court, such that the Applicant is prevented from re-litigating in the Arbitration that the LOI was valid or subsisting after 12 April 2008.

8. The substantive hearing of the Arbitration took place in January, February and March 2013. After hearing submissions from leading counsel for the parties, the Tribunal issued its Award on 25 January 2014 ("**2nd Award**"). The Tribunal held that the Applicant succeeded on liability, finding that the LOI was valid and subsisting, and dismissed the Respondents' counterclaim which was based on the invalidity of the LOI beyond April 2008. In reaching its 2nd Award, the Tribunal found that the Guangdong Judgment is not a final and conclusive

judgment, since it is under appeal to the PRC Supreme Court, and that it was open to the Tribunal to decide on the LOI in favor of the Applicant.

9. In the 2nd Award, the Tribunal raised queries as to the appropriate remedies and relief to be granted to the Applicant (including the claim of specific performance of the LOI sought), consequent upon the finding of liability in its favor. Amongst the matters considered by the Tribunal were questions of delay, the difficulties raised by freezing orders which had been placed on the Assets by third parties, and concerns as to the performance of the LOI on the Mainland in view of the Guangdong Judgment. The parties were directed to agree on a further hearing, so that the Tribunal can determine the appropriate remedies and relief to be ordered.

10. Consequently, a further hearing took place before the Tribunal on 18 and 19 August 2014, when the Tribunal heard expert evidence and further legal submissions from the parties, and on 16 December 2014, the Tribunal issued its 3rd Award. Under the 3rd Award, the Tribunal held that the Respondents should specifically perform the LOI, and issued an order in terms (inter alia) that the Respondents should execute or cause the execution of stamped instruments of transfer and contract notes for the transfer of all the shares in the 2nd Respondent in favor of the Applicant or its nominees, and further cause the appointment of the Applicant's nominees as directors of the 2nd and 3rd Respondents.

11. It is pertinent to note that prior to the hearing which led to the making of the 3rd Award, on 11 April 2014, the Respondents had applied to the Hong Kong Court (under HCCT 18/2014) to set aside the 2nd Award.

On 29 July 2014, Hon L Chan J handed down his judgment ("**7/14 Judgment**"). According to the 7/14 Judgment, the grounds relied upon by the Respondents for the setting aside application were that they had been unable to present their case, that the 2nd Award dealt with a dispute not contemplated by or not falling within the terms of the submission to arbitration, that the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the Model Law, and that the 2nd Award is in conflict with the public policy of Hong Kong. For the detailed reasons given by L Chan J, the Respondents' application to set aside the 2nd Award was dismissed.

12. After the 3rd Award was issued on 16 December 2014, the Applicant applied to this court for leave to enforce the 2nd Award and the 3rd Award as a judgment or order of the court. Leave was granted on 17 June 2015 ("**Order**").

13. On 4 August 2015, the Respondents issued a summons to set aside the Order ("**Summons**"). The Summons was supported by and served with the affirmation of Tang Tsz Pun filed on the same day ("**Tang 1**"). The Summons states the grounds of the application to set aside as follows :

> "the Awards in question are not valid and/or those Awards are not in a form which can be entered as a judgment; and such further grounds as may be advised by Counsel upon sight of the evidence adduced by the Applicant in support of the application".

14. Tang 1 states the same grounds, on identical terms. It states nothing else.

15. On 24 August 2015, the Applicant applied to dismiss or strike out the Summons, on the ground that the Respondents' setting aside application was made out of time, and/or that the application is frivolous, vexatious and otherwise an abuse of the Court's process.

16. At the 1st hearing on 7 September 2015 of the Summons, and of the application to strike out the Summons, after hearing submissions from counsel, I ordered that the Summons should be dismissed and struck out. The following are my reasons.

Requirements under O73 r10 (6) & (6A)

17. The Arbitration was commenced in March 2010, before the Arbitration Ordinance (Cap 609) ("**Cap 609**") came into effect on 1 June 2011. The Arbitration Ordinance (Cap 341) ("**Cap 341**") applies to the Arbitration. The Order was made on the Applicant's application for leave to enforce the 2nd Award and the 3rd Award under and pursuant to s 2GG of Cap 341.

18. Under O 73 r 10 (6) of the Rules of the High Court ("**RHC**"), the debtor may apply to set aside the Order within 14 days after service of the Order. O 73 r 10 (6A) provides that an application to set aside the Order "must be made by summons supported by affidavit", and such affidavit "must be filed at the same time as the summons".

19. Leading Counsel for the Applicant relies on the decision of the Court in *Free Form Construction Co Ltd v Shinryo (Hong Kong) Ltd* [2008] 3 HKC 415, to argue that the Respondents are abusing the court process in issuing the Summons without a proper supporting affidavit. In that case,

the applicant filed a Notice of Motion for leave to appeal against an arbitral award under s 23 of Cap 304, but contrary to the provisions of O 73 r 5(5) RHC then prevailing, no affidavit in support of the Motion was filed at the time when the Motion was filed. The applicant only applied to file the affirmation 2 months late. In dismissing the application to adduce the late affirmation, and in dismissing the Motion for leave to appeal, Reyes J noted:

> "3. I do not think that it would be right to grant relief for the reasons which I set out below.
>
> 4. First, I believe that the cause of action taken here amounts to an abuse of procedure.
>
> 5. It is normally bad practice, often amounting to an abuse of process, to file a Motion or Summons (whether originating or interlocutory) without a supporting affidavit. A respondent to such application is entitled to know of the facts and matters said to support such application at the earliest opportunity.
>
> 6. In the case of applications for leave to appeal against an arbitration award, it seems to me not just bad practice, but an abuse, to file a holding Motion or Summons without any supporting affirmation. Appeals against an arbitration award must be made promptly within a short time, 21 days, after an award is published. This is because parties resort to arbitration as it is supposed to be speedier and less expensive than conventional litigation as a means of resolving disputes. There is thus all the more reason here why a given party should know as soon as possible where he stands in relation to a published award.
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> 7. (Reference to O73 r5)
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> 8. To my mind, the present application is tantamount to an application to extend the time for launching a Motion seeking leave to appeal against an award. Such leave should, in principle, only be given in exceptional circumstances and then only for compelling reason."

20. Although *Free Form Construction* deals with an application for leave to appeal against an arbitral award, the same considerations apply where a party seeks to set aside an award, or to resist enforcement or

recognition of an award. Under an arbitration agreement, the parties agreed to refer their disputes to arbitration, and further agreed that the arbitral award should be final and binding upon them. Once an award is made, the parties are entitled to expect the award to be final, and binding, and if any permissible recourse is to be made to the Court, it should be made promptly, so that any challenge to the award can be clarified and disposed of quickly, and parties know without unnecessary delay where they stand in relation to the award, and its recognition and enforcement. The aim of O 73 rr 5 and 10, and their provisions setting out the timetable and the summonses and affidavits in support to be filed, is to achieve this early resolution of the status of the award.

21. The current form of O 73 r 5 which applies to applications made under Cap 609 provides, in no uncertain terms, that for an application to set aside an arbitral award under s 81 of Cap 609, the originating summons or summons "must state the grounds of application", and that "a copy of every affidavit intended to be used must be served with the originating summons or summons".

22. I see no basis why an application to set aside an order granting leave to enforce an arbitral award should be treated less stringently than an application to set aside an award. The grounds for setting aside an arbitral award under Article 34 of the Model Law, and the grounds for refusing recognition or enforcement of an arbitral award (whether under Cap 341 or under Cap 609) are essentially the same. These are exclusive or exhaustive grounds, and for Article 34, the only recourse to a court against an arbitral award.

23. O 75 r 10 RHC applies to enforcement of an arbitral award under s 2GG of Cap 341 and s 84 of Cap 609. The application for leave to enforce an arbitral award is made ex parte, unless the Court directs a summons to be issued. So long as the application for leave is supported by affidavit in accordance with the provisions of O 73 r 10 (3), leave will be granted, almost mechanically, as a matter of administrative procedure.

24. It is for the debtor to apply, within 14 days after service of the order granting relief, to set aside the order for enforcement. Save for exceptional cases, the debtor would normally have been served with the notice of arbitration as a party to the proceedings, would have participated in the arbitration proceedings, and would have been served with the award. It would have knowledge of any alleged irregularity in the arbitral process, and of any other matter which would constitute a ground of complaint, to justify an application to set aside the order of the Court granting leave to enforce the award. It is therefore not unreasonable or harsh to expect and require an applicant to state the grounds of the application in the summons initiating the application under O 73 r 5 (6), and in the affirmation in support to be filed at the same time as the summons.

25. I would echo and endorse the views of Reyes J that it is an abuse of process to issue a summons to set aside an order granting leave to enforce an arbitral award, without a proper supporting affidavit. It is obviously an abuse of process to issue a summons to set aside an order granting leave to enforce an arbitral award, if the summons does not even disclose a ground for setting aside. I agree with Mr Chan SC that proceedings relating to arbitration have their own unique procedural regime. These proceedings should further not only the underlying

objectives of the Civil Justice Reform, but importantly, the object and principles of the Model Law and the Arbitration Ordinance: namely, to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense, that parties to a dispute should be free to agree on how their dispute should be resolved, and that the Court should intervene in the arbitration only as expressly provided for in the Model Law, or in Cap 609 (when it is applicable).

26. I also remind parties to litigation, and their legal advisers, that the Courts have already on different occasions made it clear that it is bad practice for solicitors to make affidavits on behalf of their clients, when facts pertinent to a dispute have to be deposed to. These reminders do not appear to have been heeded. The factual matters relied upon by the Respondents in this case have been largely, if not entirely, dealt with by the Respondents' solicitors, in Tang 1 and in the 2nd affirmation of Tang Tsz Pun ("**Tang 2**").

Whether the application by Summons was out of time

27. The Order was served on 15 July 2015 at the registered office and the office of the registered agent of the 1st Respondent in the BVI. It was likewise served at the registered office address of the 2nd Respondent in Hong Kong, on 30 June 2015. There is no evidence disputing the address of service as that of the registered offices of the 1st and 2nd Respondent, or of the office of the registered agent of the 1st Respondent. Whether the registered agent was authorized to accept service of documents is not relevant to the question of the validity of the service of the Order, when it was duly served at the registered office address.

28. The Order was served at the registered office of the 3rd Respondent on the Mainland on 27 July 2015.

29. The Summons was only issued on 4 August 2015, after the expiry of 14 days from the service of the Order at the registered offices of the 1st and 2nd Respondents. The Order, and O 73 r 10 (6), refer to service of the Order only, and not to service of the evidence in support of the application to enforce the Awards. The Summons to set aside the Order was clearly made out of time, so far as the 1st and 2nd Respondents are concerned.

30. The 1st and 2nd Respondents never sought to apply for leave to make their setting aside application out of time. Even if I were to treat the affirmation of Mr S ("**S**") made on 2 September 2015 and Tang 2 as the Respondents' application for leave to set aside the Order out of time, the Respondents should furnish to the Court good reasons for their delay in making the application, and satisfy the court that their application has merits.

31. The matters raised in S's affirmation serve, at most, as attempts to explain the Respondents' delay or inactivity to take steps to apply to set aside the Order between the date of service of the Order on the 1st and 2nd Respondent on 15 July and 30 June 2015 respectively, and 4 August 2015 when the Summons was issued. It is claimed that S, the sole director of the 1st and 2nd Respondents, only received notice of the Order on 23 July 2015, that the Order served at the registered office addresses had never been forwarded to him, and that it was only on

6 August 2015 that the Respondents obtained, through their solicitors, copies of the Applicant's affirmations.

32. Throughout the Arbitration, the 1st and 2nd Respondents at least were represented by the same solicitors who act for them in these proceedings ("**CKI**"), and as late as January 2015, these solicitors were still in correspondence with the Tribunal and the solicitors for the Applicant in relation to the 3rd Award against all 3 Respondents. The 3rd Respondent (wholly owned by the 2nd Respondent) had also been represented by solicitors, who were present at the hearing of the Arbitration as observers, by agreement of all the parties. It was only when CKI failed to confirm that they had instructions to accept service of the Order and the documents in support of the application for the Order, that the relevant documents were served on the Respondents directly and separately.

33. Even if I should accept the explanation given by S for the inactivity up to 23 July 2015, when S was given a copy of the Order by CKI, it was not until 7 pm on 2 September 2015, nearly a month after the issue of the Summons and less than 1.5 working days before the hearing on 7 September 2015, that S's affirmation and Tang 2 were served on the Applicant. It was only in Tang 2 that the Respondents purported to set out the alleged grounds on which they rely for the application to set aside the Order. I am not satisfied that there are compelling reasons to extend time to the 1st and 2nd Respondents to make their application out of time, particularly in view of the lack of merits in their application.

34. The 3rd Respondent's application to set aside the 2nd and 3rd Awards was made within 14 days of the service of the Order on it. Its application was made in time, but the more pertinent question is whether it has shown that there are grounds to set aside the Order, and for enforcement of the 2nd and 3rd Awards to be refused.

Whether there are merits to the application to set aside the Order

35. In pursuing the application to strike out or dismiss the Summons, Leading Counsel for the Applicant highlighted Reyes J's reminder given in *G v M* HCCT 36/2009, 14 September 2009 :

> "A 30 minute initial hearing should not be treated by parties as a simple call over for directions. There is no point in wasting time giving directions for the filing of further affidavits, if the evidence filed by an Applicant in support of a Summons discloses no arguable grounds for appealing against an Award or setting aside an Order for the enforcement of an Award. During an initial 30 minute appointment, the Court is entitled to scrutinise an Applicant's supporting affidavit to see whether a case to appeal an Award or set aside an enforcement Order is made out. If there is a case, the Applicant (if it has not already had the chance to do so) should be permitted to file a final affidavit dealing with points raised in a Respondent's affidavit. On the other hand, if an Applicant's supporting affidavit discloses no viable case, than in the interests of saving time and cost the Court can dispose of the relevant Summons even in an initial 30 minute hearing."

36. The Summons seeks the setting aside of the Order on the grounds that the 2nd and 3rd Awards "are not valid and/or are not in a form which can be entered as a judgment", and on "such further grounds as may be advised by counsel upon sight of the evidence adduced by the Applicant" in support of the application for the Order.

37. In Tang 2, the Respondents' solicitor repeated (in paragraph 2) the grounds stated in the Summons, ie that the Awards are not valid and not in a form which can be entered as a judgment. To elaborate on the alleged "invalidity" of the 3rd Award, Tang claimed that:

(1) the Tribunal had, in breach of its mandate, ignored the presence of the 3rd Respondent at the hearing of the issues which constituted the subject matter of the 3rd Award;

(2) the Tribunal had failed to consider the position of the 3rd Respondent properly, or at all, and to consider the position between all the parties to the Arbitration;

(3) as a result, the 3rd Award and any order of the Court made in connection therewith will not be recognized or enforced by any court on the Mainland, bearing in mind that there is a similar dispute pending judgment from the Supreme Court on the Mainland; and

(4) the 3rd Respondent had been deprived of the right to present its case in the Arbitration and to raise its concerns as to the enforceability of the 2nd and 3rd Awards on the Mainland.

38. The Respondents further sought to argue, in Tang 2 and at the hearing, that the 3rd Award was uncertain and incomplete, that the Tribunal had raised questions as to whether a decree of specific performance would assist in the performance of the LOI on the Mainland, but had proceeded to issue the 3rd Award and ordered specific performance. It was claimed that the 3rd Award was not in a form which could be entered as a judgment and be enforced on the Mainland, and that it was unclear as to its terms, to be unenforceable in any event.

39. It is not for the Court, or the other party to the arbitral proceedings, to contemplate and speculate on the grounds of the Respondents' application to challenge the enforcement of the Awards. The burden is on the Respondents to clearly formulate and state the precise grounds of their application to set aside the Order. None of the matters referred to in Tang 2 (summarized in paragraph 37 above) can establish the claim of the alleged "invalidity" of the Awards, as a ground to set aside the Order and to refuse enforcement of the 2nd and 3rd Awards.

40. In the 7/14 Judgment, the Court as the supervisory court rejected the claims made by the Respondents, that the 2nd Award on liability dealt with a dispute not falling within the terms of the submission to the Arbitration, that the arbitral procedure was not in accordance with the parties' agreement or the Model Law, and that the 2nd Award is in conflict with the public policy of Hong Kong. Having rejected the Respondent's application to set aside the 2nd Award, the 2nd Award remains as a valid arbitral award in Hong Kong, and there is no basis for the Respondents to claim that the 2nd Award is invalid. The 3rd Award, and the relief granted by the Tribunal thereunder, was founded on the 2nd Award and the Tribunal's findings on the subsistence of the LOI, and the liability of the Respondents thereunder.

41. Tang 2 referred to the 3rd Respondent's alleged inability to present its case in the Arbitration. This is not a ground stated in the Summons, and there should be an application to amend the Summons to raise this new ground. In *Woon Lee Construction Co Ltd v Holyrood Ltd* [2011] 1 HKC 458, Saunders J held that an application to amend an Originating Summons by adding an entirely new ground of appeal is, in

effect, an application to extend time, for which leave should only be given in exceptional circumstances and only for compelling reasons. No compelling reason has ever been proferred by the Respondents in this case, nor has any application been made by them to amend the Summons. Even if I were to allow the Respondents to amend the Summons to include the 3rd Respondent's inability to present its case as a ground to set aside the Order, on the evidence adduced on behalf of the Respondents, they have failed to establish this ground.

42. According to the 2nd Award, the 3rd Respondent was represented by their solicitors, Messrs Lo, Wong & Tsui ("**LWT**"), at the hearing of the Arbitration, and had indicated to the Tribunal that "it would remain as an observer as long as the 3rd Respondent continued to be a party" in the Arbitration. The 1st and 2nd Respondents were represented by their solicitors, CKI, and their team of counsel throughout the Arbitration.

43. The Respondents have not, in any of their affirmations filed for the setting aside application, identified how the 3rd Respondent could have presented its case, distinct from and separate to the defence and counterclaim filed by the 1st and 2nd Respondents in the Arbitration, and the submissions made on behalf of the 1st and 2nd Respondents by their counsel in the Arbitration, and how this could have affected the outcome of either the 2nd Award, or the 3rd Award. The issues which had been raised by the parties in the Arbitration, and dealt with by the Tribunal, included the construction of the LOI, whether the LOI was terminated on 12 April 2008, whether the Applicant had repudiated the LOI, and the effect and issues arising from the Guangdong Judgment. The 3rd Respondent has not identified any issue which it claims is relevant to its liability and rights

under the LOI, but which had not been presented to and dealt with by the Tribunal (as a result of its having been "ignored" by the Tribunal, or prevented from participating in the Arbitration), such that the 3rd Respondent can be said to have been prejudiced in a material way.

44. The 2nd Award was handed down on 25 January 2014. The 1st, 2nd and 3rd Respondents applied to the Court in April 2014 to set aside the 2nd Award, on grounds which included the fact that all the Respondents had been unable to present their case, that the Award had dealt with a dispute not contemplated by the terms of the submission to arbitration, that the arbitral procedure was not in accordance with their agreement, and that the 2nd Award is in conflict with the public policy of Hong Kong. All these grounds were rejected by the Court in the 7/14 Judgment. The 3rd Respondent did not argue before the Court that it had been "ignored" by the Tribunal, or that the Tribunal had failed to consider the position of the 3rd Respondent.

45. Subsequent to the 7/14 Judgment and the Court's dismissal of the Respondents' application to set aside the 2nd Award, the Respondents participated in the hearing which led to the issue of the 3rd Award. According to the 3rd Award, the 3rd Respondent was again represented by LWT, and had indicated that it would remain as an observer in the Arbitration. It did not draw to the attention of the Tribunal the fact that its position had been "ignored", or that it had not been able to present its case in any way, such that it had been prejudiced by the 2nd Award. If it had made such complaint, the Tribunal may have dealt with such claim of irregularity, or prejudice. By staying silent and keeping such complaint up its sleeve, the 3rd Respondent was not acting bona fide.

46. After hearing full submissions and arguments made on behalf of the parties as to whether an order for specific performance should be made, and whether an order of specific performance is enforceable on the Mainland, the Tribunal made its 3rd Award. Again, the Respondents have failed to identify how the 3rd Award could have been different, if the 3rd Respondent had been able to participate in the hearing, otherwise than as an "observer", and had been able to present its case.

47. All the claims now made on behalf of the Respondents are essentially attempts to reargue their case before the Tribunal, and to seek the Court's review and determination of the merits of the 2nd Award and the 3rd Award: whether it is right to order specific performance on the facts of the case. That is never permissible in an application to set aside an arbitral award or an order granting leave to enforce an award. Whether the 2nd Award or the 3rd Award can be performed or enforced, whether by reason of uncertainty, or impossibility of performance (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA)), or any inconsistencies with the Guangdong Judgment, and whether the 3rd Award can or will be recognized on the Mainland, are not grounds for this Court to refuse enforcement of the 2nd Award and the 3rd Award in Hong Kong.

48. In *Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604, the Court of Appeal re-iterated what the Court of Final Appeal recognized in *Democratic Republic of the Congo v FG Hemispher Associates LLC* [2011] 4 HKC 151, that there were 2 different stages in the enforcement of an arbitral award: the recognition stage at which an award was converted into a judgment, and the execution stage at which the judgment was enforced. At the recognition stage, the task of the Court was

to decide whether leave should be granted to "enter judgment in terms of the award, order or direction" (within the meaning of s 2GG of Cap 341). The Court respected the plain intent behind the relevant provisions to make the applicable awards enforceable with ease "almost as a matter of administrative procedure". The Court's task should be as "mechanistic as possible" and it was not entitled to go behind the award by exploring the reasoning of the tribunal or second-guessing its intention. Under s 2GG, an award entered as a judgment had to be entered "in terms of the award".

49. What the Respondents are saying, in truth, in this application is that the Tribunal made an error of law in granting specific performance and making the 3rd Award. As Tang VP (as he then was) unequivocally stated in *Grand Pacific Holdings Limited v Pacific China Holdings Limited (in liq)* (No 1) [2012] 4 HKLRD 1, at paragraph 7:

> "The Court's approach to (applications to assist enforcement of arbitral awards) is not controversial. The Court is concerned with "the structural integrity of arbitration proceedings". The remedy of setting aside is not an appeal, and the Court will not address itself as to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. It will address itself to the process."

50. In *A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389, the court explained the rationale, as follows:

> "Public policy itself leans towards the enforcement of foreign arbitral awards as a matter of comity. Parties agreed to resolve the disputes by arbitration rather than by the court. 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."

51. The Respondents had the reasonable opportunity to present their case before the Tribunal, on specific performance, the Guangdong Judgment, and other relevant issues. They have failed to identify any "serious, even egregious" conduct which can persuade the Court that they had been denied due process (*Grand Pacific Holdings Limited v Pacific China Holdings Limited (in liq)* (No 1) [2012] 4 HKLRD 1, para 94). Clearly, there are no merits in the Respondents' application to set aside the 2nd Award and the 3rd Award on the grounds they have stated.

52. Nor is there any merit in the Respondents' claims that the Applicant had failed to make full and frank disclosure as to the uncertainties alleged in the 3rd Award, and the Tribunal's alleged concerns over the remedy of specific performance. Whatever concerns the Tribunal had, it was satisfied, after hearing the parties' submissions, that the 3rd Award should be issued, and it did issue the 3rd Award which is self explanatory. The Tribunal expressly stated, in paragraph 60 of the 3rd Award, that "there is little or no concern with regard to enforceability" of the order for specific performance.

53. To the extent that the Respondents argue that the Court has any residual discretion (relying on *Margulies Brothers Ltd v Dafnis Thomaides & Co (UK) Ltd* (1958) WLR 398) to remit or set aside an arbitral award for uncertainty at this stage of enforcement, such argument is rejected. Article 5 of the Model Law, which applies to international arbitrations under Cap 340, s 2 of Cap 340 itself, and s 3 (2) (b) of Cap 609 (when it applies) clearly state that the Court should interfere in the arbitration of a dispute only as expressly provided for in the Model Law, in Cap 340, or in Cap 609 where it applies. Even if there is any residual

discretion, I would not have exercised such discretion on the facts of this case, in view of the Respondents' conduct as particularized below.

Whether the Respondents have breached their duty of good faith

54. The Respondents applied by the Summons to set aside the 2nd Award (on liability under the LOI, held to be valid and subsisting) and the 3rd Award (on the basis of the 2nd Award), despite having applied unsuccessfully to the Court to set aside the 2nd Award in HCCT 18/2014.

55. The Respondents failed to raise any objection to the Tribunal, at the hearing leading to the 3rd Award, in relation to the 3rd Respondent having been "ignored" in the Arbitration and the 3rd Respondent's alleged inability to present its case, depriving the Tribunal of the opportunity to rectify any alleged irregularity of which complaint is now made.

56. The Respondents made their application to set aside the Order without stating in the Summons or in the affidavit served with the Summons the precise grounds on which they rely, despite their knowledge of and their participation in the Arbitration, and their notice and knowledge of the 2nd Award and the 3rd Award.

57. The above features, and the lack of merits in their application to set aside the Order, demonstrate that the Respondents have simply been employing delaying tactics, to delay and frustrate the enforcement and recognition of the 2nd Award and the 3rd Award.

58. For the above reasons, I conclude that the Summons is an abuse of Court process and that the Respondents have failed to act bona fide, and are in breach of their duty of good faith.

59. Even if any valid ground had been established for setting aside the Order, I would have exercised my discretion to enforce the 2nd Award and the 3rd Award.

Conclusion

60. The Respondents' Summons to set aside the Order was accordingly dismissed and struck out. The costs of the Summons and the costs of the Applicant's application to strike out are to be paid by the Respondents to the Applicant, on an indemnity basis (*A v R (Arbitration: Enforcement)* [2009] 3 HKLRD 389, *Wing Hong Construction Ltd v Tin Ho Engineering Co Ltd* HCCT 13/2000, 3 June 2010), with certificate for 2 counsel.

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

Mr Edward Chan SC and Mr Kenny Lin, instructed by F Zimmern & Co, for the applicant

Miss Carrie Chow, instructed by Christine M Koo & Ip, for the 1st to 3rd respondents