

Cordells Rompotis

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International Arbitration

Hong Kong Court rejects set aside application U v A and others [2017] HKCFI 398

The High Court dismissed an application to set aside an order enforcing an arbitration award rendered in Hong Kong. Consistent with recent decisions, the Court emphasised that challenges to enforcement based on technical grounds or procedural complaints would not be entertained unless due process was seriously undermined.

Facts

The dispute arose in relation to an agreement (referred to as the Preliminary Assignment Contract ("PAC")) made between U as the purchaser and A as the seller for the sale and purchase of 51% of the shareholding in a company in Fujian (the "JV Company").

Subsequently, the parties executed various addenda, including Addendum C which made provisions for the interim arrangements for the composition of the board of directors of the JV Company (the "JV Board"). Neither the PAC nor Addendum C was approved by the relevant Mainland authorities.

In accordance with the above and to finalise the share transfer under the PAC, U and A signed an agreement on 11 December 2007 (the "December Agreement"), which made reference to the PAC. The Share Transfer Agreement, which was attached to the December Agreement, was executed on 18 January 2008, when the Joint Venture Contract and Articles of the JV Company were also signed. These documents were all submitted and approved by the Mainland authorities in compliance with PRC law.

Disputes arose between the parties in relation to the composition of the JV board and the transfer of various assets from the 2nd Respondent (a PRC company controlled by a PRC national, the 3rd Respondent who held the remaining 49% of the shares in the JV Company together with the 4th Respondent, a

Singaporean national) to the JV Company as contemplated by the PAC.

The sole arbitrator found that the PAC and its addenda, including Addendum C, were effective and created undertakings that go beyond the terms of the share transfer agreement, including commitments as to the governance and assets of the JV Company. Therefore, the arbitrator determined that

- A (the 1st Respondent) was to execute shareholders' resolutions to amend the Articles of the JV Company to change the composition of the JV Board and appointment of the chairman;
- the 1st, 3rd and 4th Respondents should take all steps required under PRC law to ensure U (the Applicant)'s right to appoint a majority of the 3 members of the JV Board and power to elect the chairman;
- the 2nd Respondent was to sell, and U was to procure as such, the various assets to the JV Company pursuant to the PAC; and monetary orders in the form of payment of damages and costs of the arbitration were to be made against the Respondents.

The 1st and 3rd Respondents subsequently made an application to set aside the Order enforcing the Award. The application was made out of time (by 11 or 9 days, according to U and Respondents respectively), but the application was entertained because the merits to set aside the Order had all been presented for argument and no prejudice has been established by U.

Grounds for set aside application

The 1st and 3rd Respondents advanced the following grounds:

- that they were unable to present their case;
- that the Award deals with a difference not contemplated within the terms of

the submission to arbitration or contains decisions on matters beyond the scope of the submission;

- that enforcement should be refused on the ground of public policy;
- that it should be refused on the ground that it would be just;
- that the Award should be set aside for material non-disclosure.

Decision

Respondents' inability to present their case

The Respondents contended that the arbitrator unjustifiably refused to admit a judgment of the Fuzhou Intermediate Court dated 21 August 2015 and, as a result, they were deprived of a full opportunity to present their case on the key issue of invalidity of the PAC and Addendum C.

The argument was categorically rejected by the Court. It held that the rejection was within the full rights of the arbitrator's case management and procedural discretion. The Court went on to say that in any event, the Respondents were given ample notice and were able to fully present expert evidence, and therefore suffered no prejudice. Citing the Court of Appeal's decision in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd*[2012] 4 HKLRD 1, the Court highlighted that for such claims to be successful, the conduct complained of must be serious, even egregious, before a court could find that a party was unable to present their case.

Award dealing with differences not contemplated by parties/outside the scope of reference

The Respondents argued that U's right to appoint the chairman was not within the scope of the reference to the arbitration since it was only included in the statement of claim as an order for relief.

The Court held that differences not contemplated by the parties or outside the terms of the submission to arbitration are to be narrowly construed, citing *Grant Thornton International Limited v JBPB & Co (A Partnership)* (Unreported, HCCT 13/2012, 5th April 2013) so as not to impede arbitration proceedings and increase costs. Therefore, the Court determined that since there was no doubt that by the time arbitration commenced the parties were already in dispute in respect of U's right to appoint directors to the board and to appoint a candidate as chairman, and that the arbitrator had decided that she had jurisdiction to decide on the matter, the Court had to be satisfied as to its correctness.

Whether enforcement should be refused on the grounds of public policy and/or that it would be just

The Respondents' case on both issues was based on the finding in the Fuzhou judgment that the PAC and Addendum C were invalid and ineffective for lack of registration and approval by the Mainland authorities, and that the arbitrator had therefore made an error of law in holding that both agreements were valid and effective.

The Court held that it was not concerned with the merits of the Award. Citing *A v R* [2009] HKLRD 389, the "public policy" ground was to be narrowly construed and not used as a catchall provision since it is limited in scope and is to be sparingly applied. Accordingly, the Court held that this argument failed.

On the justice of enforcement, the Respondents included a further argument of *forum non conveniens*, contending that the Chinese courts were the appropriate forum since the PAC and Addendum C were governed by PRC law. This was also rejected by the Court, which held that it was for U to decide where to take enforcement action, and for the Respondents to resist and oppose such enforcement on grounds available to them in the jurisdiction chosen by U.

Whether the Award should be set aside for material non-disclosure

On the allegation of material non-disclosure, the Respondents claim that U failed to disclose the facts that the Respondents made payment of the monetary parts of the Award. The Court held that those facts were irrelevant to the application for leave to enforce the Award.

Accordingly the Court found that there was no merit in the Respondents' application to set aside the order enforcing the Award, ordering indemnity costs against them.

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