Grand Pacific Holdings Ltd

and

Pacific China Holdings Ltd (in liq) (No 1)

(Court of Appeal)

(Civil Appeal No 136 of 2011)

Tang V-P, Kwan and Fok JJA

6–8 March, 9 May 2012

Arbitration — arbitration award — application to set aside under art.34(2) — whether tribunal (a) rendered party unable to present its case and/or (b) departed from agreed procedure, per art.34(2)(a)(ii) and/or (iv) of the UNCITRAL Model Law — whether error undermined due process and hence constituted violation of art 18 of Model Law — principles for exercise of discretion by court to permit enforcement notwithstanding violation — Arbitration Ordinance (Cap.341) (repealed) s.34C(4) — UNCITRAL Model Law on International Commercial Arbitration arts.18, 34(2)(a)(ii), (iv)

[UNCITRAL Model Law on International Commercial Arbitration (Arbitration Ordinance (Cap.609) Sch.1) arts.18, 34(2)(a)(ii), 34(2)(a)(iv)]

仲裁 — 仲裁裁決 — 根據第34(2)條申請撤銷 — 仲裁庭是否(a)令致案中一方不能陳述案情及/或(b)偏離《貿法委示範法》第34(2)(a)(ii)及/或(iv)條的商定的程序 — 該錯誤是否損害了正當程序因而構成《示範法》第18條的違反 — 儘管存在違反，法院行使酌情決定權允許強制執行的原則 — 《仲裁條例》(第341章)「已廢除」第34C(4)條 — 國際商事仲裁《貿法委示範法》第18、34(2)(a)(ii)、(iv)條

[《貿易法委員會國際商事仲裁示範法》（《仲裁條例》（第609章）附表1） 第18, 34(2)(a)(ii), 34(2)(a)(iv)條]

Pacific China (X) and Grand Pacific (Y) (respectively, the claimant and the respondent in the arbitration), entered into an alleged loan agreement (the Agreement). The Agreement was to be construed and governed by the laws of the State of New York. It also provided for arbitration in Hong Kong, pursuant to the Rules of Arbitration of the International Chamber of Commerce (ICC). Disputes that arose between the parties were referred to the ICC and a duly constituted tribunal made an award in Y's favour. X applied to the

Court of First Instance to set aside the award under art.34(2) of the UNCITRAL Model Law on International Commercial Arbitration (Fifth Schedule to the Arbitration Ordinance (Cap.341)) on the grounds that it had been unable to present its case (art.34(2)(a)(ii)) and/or that the arbitral procedure was not in accordance with the agreement of the parties (art.34(2)(a)(iv)). X alleged three violations by the Tribunal.

(a) The Taiwanese law issue

An agreed procedural timetable required the parties to exchange pre-hearing submissions containing their best case on fact and law. The day before the due date for exchange, X was granted leave to amend its pleadings in light of a late clarification by Y of its case that the Agreement was illegal for want of valid consideration under both the law of the place of performance (Taiwan) and the governing law (New York). On the due date, however, the Tribunal directed that whilst X must provide pre-hearing submissions containing full argument and best case on all issues, Y was (a) not required to address the matters dealt with in X's amended pleadings; and (b) given a further ten days to file a supplemental submission addressing them.

(b) The joint expert meeting and report issue

The Tribunal ruled that Taiwanese law experts should meet in order to produce a joint report and, by party agreement, new Taiwanese legal authorities could not be introduced without leave of the Tribunal, which would not be granted unless they were "sensational". The Tribunal refused X leave to rely on additional authorities without considering their content or subject matter.

(c) The Hong Kong law issue

In its post-hearing submissions, X alleged for the first time that Y, a Hong Kong company, lacked authority under Hong Kong law to enter into the Agreement. Y, whilst objecting, nevertheless made submissions in response, which X considered went well beyond a response to the points it had made and accordingly sought to file a response to Y's response. The Tribunal refused X's application. The Court of First Instance set aside the award (see [2011] 4 HKLRD 188) and Y appealed.

Held, allowing the appeal and reinstating the award, that:

Principles

(1) The setting aside remedy provided by art.34 of the Model Law was not an appeal. The Court would not address itself to the substantive merits of the dispute or to the correctness or otherwise of the award in fact or law. It would address

itself only to the structural integrity of the arbitration process. (See para.7.)

(2) Alleged non-compliance with art.18 of the Model Law was the primary foundation of an argument that a party was unable to present its case. The conduct complained of must be serious or even egregious before a court might take the view that a party had been denied due process (*Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 considered). (See paras.84–94.)

The Taiwanese law issue

(3) There was no basis for disagreeing with the decision of the Tribunal. The Tribunal had taken the view that Y had been prejudiced by the lateness of X's application to amend its pleadings and was entitled to grant leave on terms and to use procedures appropriate to the case, avoiding unnecessary delay or expense: *per* s.2GA of the Arbitration Ordinance (Cap.341). (See paras.52–56.)

The joint experts and report issue

(4) The Tribunal's refusal to receive and consider the additional authorities did not prevent X from presenting its case. The Judge below was not entitled to interfere with a case management decision that was fully within the discretion of the Tribunal. (See para.68.)

The Hong Kong law issue

(5) The Tribunal was entitled to take the view that this issue had been raised at a late stage, that X had had two opportunities to make submissions on it and that submissions should end with those of Y. The Tribunal could not be faulted in its approach and the Judge below was wrong to conclude that the result might have been different if X had been given leave to respond (*Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707 considered). (See paras.77–81.)

Discretion

(6) Only a sufficiently serious error might be regarded as a violation of art.18 of the Model Law, *viz* one that undermined due process. The court might refuse to set aside the award if it was satisfied that the tribunal could not have reached a different conclusion. How it exercised its discretion depended on its view of the seriousness of the breach, eg whether the party resisting enforcement had not been prejudiced or whether the error was non-material, ie an error that was not material to the outcome and not a merely trivial or non-serious error (*Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, *Brunswick Bowling & Billiards Corp v Shanghai*

Zhonglu Industrial Co Ltd [2011] 1 HKLRD 707 considered). (See paras.98–105.)

(7) The burden was on the party seeking the setting aside of an award to show that it had been prejudiced and that the result could not have been different. (See para.106.)

Appeal

This was an appeal from a decision of Saunders J on 29 June 2011 (see [2011] 4 HKLRD 188) setting aside an arbitral award under art.34(2)(a)(ii) and (iv) of the UNCITRAL Model Law on International Arbitration. The facts are set out in the judgment.

[*Editor's note*: Following this decision to reinstate the arbitral award in Grand Pacific's (Y's) favour, Pacific China (X) applied for leave to appeal to the Court of Final Appeal. The same composition of the Court of Appeal (Tang V-P, Kwan and Fok JJA) unanimously declined to grant leave and ordered indemnity costs against X. The Reasons for Judgment and Decision on Costs will be reported later. X has applied to the Court of Final Appeal for leave to appeal.]

[*Contributor's notes*: The arbitration was governed by the ICC Rules of Arbitration (1998 Ed) and the Arbitration Ordinance (Cap.341). These have since been replaced by, respectively, the 2012 Edition of the ICC Rules and the Arbitration Ordinance (Cap.609). (RJMM)]

Ms Teresa Cheng SC and Mr Adrian Lai, instructed by Herbert Smith, for the defendant/appellant.

Mr Charles Manzoni, instructed by Sidley Austin, for the plaintiff/respondent (Mr Manzoni was appointed Senior Counsel on 3 April 2012).

Legislation mentioned in the judgment

Arbitration Ordinance (Cap.341) (repealed) ss.2GA, 34C(1), 34C(4), Sch.5

New York General Obligations Law [US] s.5-1105

Cases cited in the judgment

Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd [2011] 1 HKLRD 707, [2009] 5 HKC 1

Corporacion Transnacional de Inversiones SA de CV v STET International SpA (1999) 45 OR (3d) 183, (2000) 49 OR (3d) 414

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2009] EWCA Civ 755, [2010] 2 WLR 805, [2010] 1 All ER 592

Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan [2010] UKSC 46, [2011] 1 AC 763, [2010] 3 WLR 1472

Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819, [2002] 2 Lloyd's Rep 326

Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (unrep., Eastern Caribbean Supreme Court, High Court, BVI, Claim No BVIHCV 2009/389, 11 January 2010)

Kanoria v Guinness [2006] EWCA Civ 222, [2006] 2 All ER (Comm) 413, [2006] 1 Lloyd's Rep 701

Other materials mentioned in the judgment

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, art.V

Craig, Park and Paulsson, *International Chamber of Commerce Arbitration* (3rd ed., 2000) p.302 para.16.04

Gaillard and Di Pietro, Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice (2008), pp.56–58 ("The New York Convention of 1958: An Overview" by Albert Jan Van den Berg)

Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989) pp.550, 551, 915, 922, 1003

International Chamber of Commerce Rules of Conciliation and Arbitration, arts.6(2), 15(2)

UNCITRAL Model Law on International Commercial Arbitration, arts.18, 34, 34(2)(a)(ii), 34(2)(a)(iv), 36

Tang V-P

Introduction

1. By a loan agreement made between Grand Pacific Holdings Ltd (GPH), a company incorporated in Hong Kong, and Pacific China Holdings Ltd (PCH), a BVI company, PCH agreed to pay GPH USD40 million on 31 May 2006, with interest at 10% per annum payable in arrears in consideration of the transfer by GPH to PCH of all of GPH's interest in certain Joint Venture Interests described in the loan agreement.

2. Clause 12 of the loan agreement provided that it should be construed and governed by the laws of the State of New York. Clause 14 provided that any dispute or claim should be finally settled by arbitration in Hong Kong under the Rules of Conciliation and Arbitration of the International Chamber of Commerce (the ICC Rules) as in force at the time of any such arbitration.

3. GPH filed a request for arbitration on 21 March 2006, and arbitration proceedings took place before a duly constituted tribunal (the Tribunal).

4. By the award dated 24 August 2009 (the Award), the Tribunal unanimously ordered PCH to pay the sum of USD55,176,170.48, forthwith to GPH as well as interest at a rate of 5% per annum from 1 June 2009 until the award is satisfied or judgment is entered on it by a court, whichever occurred first. The Tribunal also unanimously dismissed the counterclaim by PCH that the loan agreement is unenforceable and that it was entitled to reimbursement of USD9,717,288.69 plus interest paid to GPH. PCH was also ordered to pay costs.

5. By originating summons dated 8 March 2010, PCH applied, pursuant to s.34C(4) of the Arbitration Ordinance (Cap.341), to set aside the award,[1] essentially:

> … on the basis of art.34(2)(a)(ii) and/or art.34(2)(a)(iv) … of the UNCITRAL Model Law on International Commercial Arbitration (the model law).[2]

6. Article 34 provided:

> (2) An arbitral award may be set aside by the court specified in art.6 only if:
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> (a) the party making the application furnishes proof that:
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> …
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> (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
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> …
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; …

[1] The Court of First Instance of the High Court of Hong Kong is the Court to perform the functions in art.34(2).

[2] The Model Law was implemented into Hong Kong law by s.34C(1) on 6 April 1990.

7. The Court's approach to such application is not controversial. The Court is concerned with "the structural integrity of the arbitration proceedings".[3] The remedy of setting aside[4] is not an appeal, and the Court will not address itself 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: see the judgment below of Saunders J, [2011] 4 HKLRD 188, paras.53–59.

Saunders J's judgment

8. On 29 June 2011, Saunders J set aside the award and concluded that PCH had established violations of art.34(2)(a)(ii) and 34(2)(a)(iv).

9. The learned Judge described Mr Manzoni's[5] submissions in these terms:

> [9] Mr Manzoni relied upon three discrete matters in support of his submission. Those matters were set out in his skeleton in the following way:
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> "The award in this case ought to be set aside because the arbitral Tribunal, *inter alia*:
>
> (i) Permitted (GPH) to serve expert evidence on foreign law one working day before an evidential hearing in December 2007, to serve its pre-hearing written submissions zero working days before the hearing, and to review the pre-hearing submissions of (PCH) before it served either, thereby denying PCH an opportunity to present its case. It did this despite an agreed procedural timetable requiring the parties to exchange pre-hearing submissions simultaneously, and bizarrely relied on the proximity of Thanksgiving — a holiday which is not recognised in Hong Kong — to justify its approach,
>
> (ii) Subsequently refused to allow PCH to rely on three foreign law authorities, because it thought that requiring GPH to review them within the three weeks remaining before an evidential hearing in May 2008 was 'unfair', once again denying PCH an opportunity to present its case.

[3] *Per* May LJ in *Kanoria v Guinness* [2006] 2 All ER (Comm) 413, para.30.
[4] Which is not materially distinguishable from refusal of enforcement under art.36.
[5] Who appeared for PCH before Saunders J and in this Court.

In this respect, the Tribunal appears not to have remembered that only a few weeks previously it had thought nothing of requiring PCH to address 50 authorities referred to in GPH's evidence in the space of one working day, and

(iii) Yet again denied PCH an opportunity to present its case by refusing to allow it to respond to GPH's submissions on the relevance of Hong Kong law, and on New York law, and then, when holding against PCH, not only relied on the self-same submissions of GPH, but also on new authorities which it had not shared with either party."

[10] For convenience, Mr Manzoni describes submission (i) as "the Taiwanese law issue" argument; (ii) as the "joint expert meeting and report argument"; and (iii) as the "Hong Kong law issue".

[11] As to the Taiwanese law issue, Mr Manzoni's submission is that the Tribunal departed from an agreed procedural timetable which required the parties to exchange pre-hearing submissions. Instead, the Tribunal required PCH to include its full argument and best case on the Taiwanese law issue in the exchange submissions, and permitted GPH to reserve its full argument and best case on the Taiwanese law issue, including their submissions in that respect, to a supplemental submission to be filed 10 days after PCH filed, and gave to GPH, its submissions. By so doing, Mr Manzoni says, the Tribunal adopted the procedure which was not in accordance with the agreement of the parties. Consequently, he says, there was a breach of art.34(2)(a)(iv). Mr Manzoni further argues that the procedure adopted was inherently unfair in that it gave GPH the advantage of seeing PCH's argument on the Taiwanese law issue before it prepared its own submissions. That unfairness, it is contended, rendered PCH unable to present its best case, contrary to art.34(2)(a)(ii).

[12] As to the joint expert meeting and report argument, Mr Manzoni says that in refusing to permit PCH to adduce three authorities, the Tribunal again rendered PCH unable to present its best case, again contrary to art.34(2)(a)(ii). That is particularly so, Mr Manzoni says, because the Tribunal did not even consider those authorities.

[13] On the Hong Kong law issue, Mr Manzoni says that GPH was permitted to make submissions on Hong Kong law, both as to whether that law had to be proved, and as to relevance, but that PCH was refused permission to respond to those submissions. Further, in respect of the issue to which PCH said Hong Kong law was relevant, the Tribunal, without reference to any of the parties, and without giving either party an opportunity to make any submissions, dealt with the issue by the application of New York law. In particular, authorities were relied upon by the Tribunal which the parties had not seen and upon which the parties had made no submissions at all.

10. In relation to the Taiwanese Law issue, the learned Judge was of the view that PCH "has established a violation of art.34(2)(a)(ii) and 34(2)(a)(iv)", in that:

[121] … the consequence of the procedural order of 20 November 2007 was that the procedure adopted by the Tribunal was not in accordance with the agreement of the parties, and that PCH was thereby unable to present its case. …

11. In relation to the Joint Experts and Report Argument:

[129] … the Tribunal's refusal to receive and consider the additional authorities sought to be cited by PCH prevented PCH from presenting its case. In this respect, PCH has established a violation of art.34(2)(a)(ii).

12. On the Hong Kong Law Argument:

[140] … the failure of the Tribunal to give PCH the opportunity to respond to GPH's submissions on Hong Kong law rendered PCH unable to present its case. A violation of art.34(2)(a)(ii) is established by PCH.

13. This is GPH's appeal.[6]

The arbitral proceedings

14. The procedural history of the arbitration has been set out in some detail at pp.3–29 of the Award. My narration of the procedural history is based on them.

[6] GPH is represented on appeal by Ms Teresa Cheng SC and Mr Adrian Lai.

15. GPH began the arbitration on 21 March 2006 when it filed a request for arbitration and nominated Mr James Carter of Sullivan & Cromwell LLP, New York, as co-arbitrator. By letter dated 28 March 2006, the secretariat of the ICC International Court of Arbitration (the Secretariat) notified PCH that it had been named as the respondent in the request for arbitration. On 12 July 2006, PCH served an answer. It did not object to GPH's nominated arbitrator and nominated Dr Michael Moser as arbitrator. PCH's answer denied any knowledge of the loan agreement and asserted that the Tribunal did not have jurisdiction.

16. The ICC Court, on 22 September 2006, decided to allow this matter to proceed in accordance with art.6(2) of the ICC Rules. The Court confirmed Mr James Carter as the co-arbitrator nominated by GPH and Ms Sally Harpole (who had replaced Dr Moser) as the co-arbitrator nominated by PCH. On 24 November 2006, PCH challenged Mr Carter as a co-arbitrator on the basis that he had engaged in "improper unilateral communications" with GPH's lawyers and that Mr Carter had "failed or refused to disclose such communications". On 15 December 2006, the ICC Court rejected PCH's challenge to Mr Carter's appointment as co-arbitrator.

17. In the meantime, because the parties' appointed arbitrators were unable to make a successful joint nomination within the time limit by the ICC Court, on 29 January 2007, the ICC informed the parties that Mr David AR Williams QC, had been appointed as the chairman.

18. On 30 January 2007, PCH's counsel, Sidley Austin, notified the ICC Court and the Tribunal, that proceedings had been commenced on 17 January 2007 in the Court of First Instance in the High Court of Hong Kong, seeking the removal of Mr Carter as co-arbitrator. The Tribunal was later notified by e-mail dated 20 July 2007 by GPH that PCH's application to remove Mr Carter had been dismissed. In the meantime, PCH pursued its jurisdictional objections but the parties had agreed that they be dealt with as part of the merits determination.

19. By a letter dated 22 March 2007, the Tribunal circulated proposed Terms of Reference and the Procedural Timetable. The procedural conference duly took place on 7 May 2007,[7] when the Terms of Reference and the procedural timetable were signed. The procedural timetable of 7 May 2007 (the "Procedural Timetable") contained a detailed timetable for pleadings, discovery of documents, non-expert and expert witness statements, hearing bundles, and pre-hearing submissions leading to a hearing "over a period of two weeks beginning 3 December 2007": para.12.1.

[7] According to para.2.18 of the Award, it took place on 3 May 2007. It does not matter whether the conference took place on 3 May 2007.

20. Eventually, PCH filed a counterclaim where it sought a declaration that the loan agreement was unenforceable as well as an order for repayment of USD9,717,288.69 by PCH to GPH pursuant to the loan agreement and costs. GPH then filed a reply to the counterclaim on 30 May 2007, and PCH a rejoinder and reply to defence to counterclaim on 19 June 2007.

Procedural Timetable

21. The following clauses in the Procedural Timetable should be noted:

(i) Clause 7.1:

No later than 18 September 2007 the parties should advise the Tribunal and the opposing party of any intention to call expert witnesses and, if so, the field of expertise and general subject matter on which testimony will be offered by any proposed expert.

(ii) Clause 7.2:

All reports of expert witnesses, if any, will be exchanged by the parties no later than 9 October 2007. …

(iii) Clause 7.3:

All supplementary or reply reports of expert witnesses, if any, shall be exchanged by the parties no later than 30 October 2007.

(iv) Clauses 10.1 and 10.2:

10.1 The parties shall exchange pre-hearing submissions which shall summarise the key facts and outline the parties' cases including legal theories or authorities relied upon.

10.2 … no later than 14 November 2007.

(v) Clause 10.3:

The filing of pre-hearing submissions will not preclude or interfere with the right of each party to make an appropriate opening address at the hearing, if so desired.

(vi) Clause 16.1:

The Tribunal may determine any issue as to the law of the State of New York on the basis of the written submissions of the parties and of the legal authorities submitted by the parties to

the tribunal without the need for either party to call expert evidence on the law of New York.

(vii) Clause 18.1:

The parties have liberty to apply at any time, on notice to the other party, to vary or supplement these directions.

Taiwanese Law Issue

22. As the Award explained:

2.45 On 22 October 2007, (PCH) sought leave to file a Re-Amended Answer and Counterclaim and simultaneously filed its Re-Amended Answer and Counterclaim … (which) introduced for the first time the contention that the Loan Agreement was void and unenforceable for reason of the fact that it was illegal as a matter of Taiwanese law.

23. On 23 October 2007, GPH opposed PCH's application:

2.46 … putting particular emphasis on the introduction of new arguments at a 'late stage in proceedings' and the 'tight schedule' before the hearing[8], and applied to have the expert report of Mr Aaron Shay struck out or excluded.

24. I turn first to PCH's pleadings prior to 22 October 2007. PCH's answer which was filed on 12 July 2006 and its amended answer and counterclaim filed on 21 May 2007 can be taken together. PCH asserted that it had no knowledge of the loan agreement, and put GPH to strict proof:

… as to the existence and due execution of the Loan Agreement. Pending such proof, (PCH) denies:

10.1.1 the existence and due execution of the Loan Agreement,
10.1.2 the existence, validity and/or scope of cl.14 of the Loan Agreement, and
10.1.3 that the arbitral tribunal that is to be appointed in these proceedings has jurisdiction in respect of the matters referred to it.

[8] The hearing was set down for five days commencing on 3 December 2007.

25. PCH also asserted that:

> 17. As appears from the recitals and cl.1 of the Loan Agreement, the consideration for the respondent's obligations thereunder is past, namely a transfer by the claimant to the respondent of all of its interests in certain Joint Venture Interests which allegedly took place some three years prior to the Loan Agreement. No admissions are made as to whether such transfer in fact took place, and the claimant is put to proof thereof.
> 18. Consequently, subject to proof as to the existence, due execution and validity otherwise of the Loan Agreement, it is the respondent's case that the Loan Agreement is unenforceable for want of valid consideration.

26. Thus, prior to 22 October 2007, PCH's substantive defence was that there was no valid consideration, because "the consideration ... is past ...".[9]

27. GPH's reply to the counterclaim is dated 29 May 2007 (the Reply). On the defence of invalid consideration, it relied on s.5-1105 of the New York General Obligations Law, which provided:

> … A promise in writing and signed by the promisor or by his agent shall not be denied effect as a valid contractual obligation on the ground that consideration for the promise is past or executed, if the consideration is expressed in the writing and is proved to have been given or performed and would be a valid consideration but for the time when it was given or performed.

28. The Reply went on to plead in some detail other agreements which were said to relate to the loan agreement and asserted that:

> 11. The Loan Agreement was related to, and constituted part of, the package of agreements executed in connection with the Carlyle Transaction. Indeed, the Loan Agreement was made at the suggestion of Carlyle for purposes of reducing its immediate payment obligation for its purchase of the 40% equity interest in (PCH).

29. I turn to cls.7.1 and 7.2 of the Procedural Timetable.[10] **Clause 7.2 required expert witnesses reports to be exchanged no later than 9 October 2007, however, as the learned Judge had noted**

[9] This defence was dropped in November 2007: Award para.2.53.
[10] Para.21(i), 21(ii) above.

an exchange took place on 16 October 2007 after an extension of seven days were granted.

30. At that exchange, GPH filed an expert report on Auditing/Accounting.[11] PCH filed the expert report of Mr Aaron Shay on Taiwanese law, although as of 16 October 2007, Taiwanese Law was not in issue between the parties. I do not believe PCH was entitled to introduce expert evidence on Taiwanese law unilaterally[12]. Naturally PCH could not complain that there was no exchange of expert witness report on Taiwanese law on 16 October 2007.

31. I turn to PCH's application for leave on 22 October 2007 to re-amend its amended answer and counterclaim. The relevant re-amendment is a new para.18A which stated:

> Further or alternatively, subject to proof as to the existence, due execution and validity otherwise of the Loan Agreement, the Loan Agreement is void and unenforceable for reason of the fact that the Loan Agreement is illegal as a matter of Taiwanese law, as set out in the Expert Opinion of Mr Aaron Shay dated 16 October 2007.

32. The expert opinion of Mr Shay dated 16 October 2007 was incorporated by reference into para.18A.

33. That expert opinion is 12 pages long. I note, in particular, paras.6, 7, 8, 13 and 14 in Pt.III of the report:

> 6. In this case, the Loan Agreement was apparently authorised and entered into by the then directors of PCH (the "PCH Directors") and the then directors of GPH (the "GPH Directors"; together with the PCH Directors, the "Directors"). PCH agreed to pay USD40 million to GPH, not by way of additional consideration for the Joint Venture Interests, but rather with the object of reducing the value of PCH in order to reduce the payment obligation of Carlyle. Accordingly, the consideration stated in the Loan Agreement is false.
> 7. The Directors evidently knew that PCH had no obligation to pay GPH additional consideration for the Joint Venture Interests, yet deliberately made a false statement in the Loan Agreement, a document prepared in the course of their occupations.
> 8. The performance of the Loan Agreement would, moreover, necessarily involve the assertion of rights and interests of both parties. GPH would apparently have the right to enforce payment of the principal and interest due under the Loan

[11] Nothing turned on such expert evidence.
[12] See Clause 7.1 Procedural Timetable, para.21(i) above.

> Agreement, and PCH would be obliged to pay the same. As such, performance of the Loan Agreement would constitute a violation of art.216 of the Taiwanese Criminal Code.
>
> …
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> 13. GPH's Reply and Mr Chang's evidence indicate that neither GPH nor PCH ever intended that PCH should pay USD40 million to GPH as additional consideration for the Joint Venture Interests. Instead, the purpose of both parties in executing the Loan Agreement was to reduce the value of PCH in order to reduce the payment obligation of Carlyle.
>
> 14. Conclusion: Considering that no debt was actually owed by PCH to GPH and that the Directors knew that no such debt existed, and considering that they admittedly entered into the Loan Agreement for the purpose of meeting Carlyle's requirements as regards payment, the Directors have committed forgery under Taiwanese law. The Loan Agreement is therefore an illegal forged document under art.215 of the Taiwanese Criminal Code, and its performance, and thus its enforcement would violate Taiwanese law under art.216 of the Taiwanese Criminal Code.[13]

34. In the meantime, by e-mail dated 20 October 2007, GPH applied by a motion for partial summary judgment to strike out PCH's "Lack of Consideration-Past Consideration" defence (Award para.2.42).

35. I will not refer to the parties' submissions regarding leave to re-amend and the introduction of Mr Shay's evidence on Taiwanese law for that purpose. They have been summarised in 2.45 to 2.48 of the Award.

36. By a decision dated 29 October 2007, the Tribunal dismissed GPH's application for summary judgment. In relation to PCH's application for leave to file the re-amended answer and counterclaim, the Tribunal directed PCH:

> 6. … within three days from the date of this Ruling to provide to the Tribunal and the claimant a Memorandum which sets out the precise nature of the new claim made in para.18(a) and in particular how the issue raised in 18(a) is relevant bearing in mind the agreement that New York law applies in this arbitration. Full particulars of the nature of the new

[13] I have difficulty understanding the illegality plea. Mr Manzoni submitted that it was unnecessary for me to understand it. That may be so. According to GPH, "Taiwan law defense is an argument in disguise that past consideration is no consideration". But my difficulty may explain why the Tribunal ordered PCH to file the memoranda mentioned below.

> defence are required so that the claimant can in fairness be informed and also the Tribunal can decide whether to allow the amendment. The particulars must also explain why the application to amend is made at such a late stage in the proceedings bearing in mind the observations of the claimant in its e-mail of 23 October 2007.

37. PCH filed a memorandum on 1 November 2007. On 12 November 2007, the Tribunal issued further directions on PCH's application for leave to amend. This is what the Award said about these further directions:

> 2.52 … It noted that respondent had failed to comply with the Tribunal's 29 October 2007 direction since it had not set out in its Memorandum 'the precise nature of the new claim and in particular how the issue raised in 18(a) [was] relevant bearing in mind the agreement that New York law applies in this arbitration.' Respondent was directed to comply with the Tribunal's earlier directions by submitting a further Memorandum by no later than 5:00 pm London time, 15 November, explaining with appropriate references to New York statutes and any case law the precise nature of the new claim and how it was relevant given the New York choice of law. The Tribunal stated that claimant was not required to file a further Memorandum.

38. PCH then filed its supplemental memorandum on 15 November 2007:

39. Paragraph 2.54 of the Award went on to say:

> … The tribunal noted the delay in bringing the amendment but granted respondent's application and ruled that it would receive the expert evidence of Mr Shay on a provisional basis provided that:
>
> (a) Claimant would be given until 5:00 pm, 30 November 2007 (Hong Kong time) to file a statement in reply; and
> (b) Claimant would be entitled to an award for its costs in respect of the application irrespective of whether the claim succeeded."

40. I set out in full below the "Ruling of Tribunal on (1) (PCH's) Application for Leave to Amend its Amended Answer and Counterclaim; and (2) (GPH's) Motion to Strike (PCH's) Expert Statement (The Shay Statement) dated 19 November 2007":

1. The two matters for decision are interwoven. As to (1), the Tribunal has carefully considered all of the submissions, including the respondent's supplemental memorandum of 15 November 2007.
2. The provisional view of the Tribunal is that the legal foundation for the new plea is tenuous in light of the New York choice of law provision in the Loan Agreement, but it cannot be characterised as unarguable. Again, on a provisional appraisal, it may also be doubted whether there is a sufficient factual foundation for the expert's opinion. However it is inappropriate to decide such matters on an application to amend.
3. It must also be said that the application could have been brought much earlier. However, such prejudice as may arise can be overcome in two ways:

    (a) The claimant, should it feel the need to reply to the Shay statement, shall be given the maximum time available to do so, consistent with the avoidance of any risk to the Hearing (which will definitely proceed on 3 December 2007). Accordingly, any reply affidavit may be lodged no later than 5 pm, Friday 30 November (Hong Kong time).
    (b) The claimant will be entitled to an Award of its costs in respect of this application irrespective of whether its claim succeeds. The quantum of such costs will be determined at a later stage.

4. Passing to (2), the Shay statement will be received provisionally by the Tribunal but subject to (i) a final ruling at the hearing or thereafter as to its admissibility and/or relevance and/or weight and (ii) without prejudice to the claimant's right to renew its application to strike at any later stage whether before or after Mr Shay is called to give evidence.
5. All the Tribunal members have participated in this decision.
6. The Tribunal hereby grants the respondent's Application to Amend its Amended Answer and Counterclaim on the terms set out above and provisionally admits the Shay Statement also on the terms set out above including as to the right of the claimant to reply.
7. Leave to apply to both parties in respect of any aspect of this Ruling, including the right to reply for supplementary directions.

41. These terms were objected to by PCH by its e-mail of 18 November 2007 which asked the Tribunal to reduce the amount of time allowed to GPH to 6 pm on 23 November 2007. The chairman responded to this request on the same day by e-mail explaining the extended time period for GPH:

> The reason for allowing a considerable period for the presentation of a reply to the Shay affidavit was to minimise the interruption to (GPH's) other preparation occasioned not only by the very late filing of the (PCH's) application but also the further delay occasioned by (PCH's) failure to provide the details requested in its first response to the Tribunal's request for such details.

42. However, it went on to add the Tribunal would consider amending the directions. The chairman asked PCH to provide a summary of what amended direction was sought and asked GPH to respond within 24 hours. The chairman urged the parties to reach an agreement on the issue.

43. Further correspondence then followed, resulting in the Tribunal's further directions on 20 November 2007 concerning the filing of pre-hearing submissions and the filing of GPH's reply report on Taiwanese law. The Tribunal stated that no further submission would be entertained on the subject with which the ruling had dealt. I set out in full the Tribunal's "Ruling on (PCH's) Request for Further Directions pursuant to Tribunal's Ruling of 17 November 2007":

> 1. The Tribunal has considered the most recent e-mails from the parties, including the respondent's application (by e-mail dated 18 November 2007) to vary the Tribunal's directions in its Ruling on the respondent's application for leave to amend and now rules as follows.
> 2. Pre-hearing submissions complying with para.10 of the Procedural Timetable shall be exchanged and served on the Tribunal no later than 5 pm Tuesday 20 November 2007, Hong Kong time.
> 3. The respondent's pre-hearing submissions must include its full argument and best case on the Taiwanese law issue and the Shay statement. However, the claimant's pre-hearing submissions need not deal with these matters. Instead, such submissions shall be included in a supplemental submission to be provided by the claimant no later than 5 pm Friday 30 November 2007, Hong Kong time.
> 4. The claimant is to file its reply report on Taiwanese law no later than 5 pm Thursday 29 November 2007, Hong Kong time.

5. The foregoing directions take into account that under the Tribunal's proposed hearing schedule which will be circulated before the forthcoming procedural conference, the claimant's Taiwanese law expert is not likely to be called until the afternoon of Day 3, Wednesday 5 December. Thus, the respondent will have the report for three full days before the hearing starts (ie Friday 30 November, Saturday 1 December and Sunday 2 December) plus the evenings of 3 and 4 December. The Tribunal considers this to be ample time to prepare a cross-examination.
6. The Tribunal has already found prejudice has been caused to the claimant due to the late filing of the respondent's Application for leave to amend its Amended Answer and Counterclaim. The Tribunal sees no reason to depart from that finding and in addition notes the difficulties arising due to Thanksgiving which were foreshadowed at an early stage.
7. This Ruling is made by the full Tribunal and no further submissions will be entertained on the subjects with which it deals until Counsel make their opening oral submissions on Monday morning, 3 December.

44. By e-mail dated 20 November 2007, PCH expressed its objections to the Tribunal's ruling and recorded that, in its view, the directions were unfair, because GPH had been granted an inordinate amount of time to prepare its expert reply and that the directions regarding the pre-hearing submissions on the Taiwanese law issue had the effect of requiring PCH to disclose all of its best case on fact and law on the Taiwanese law issue in advance of GPH being required to do the same and enabled GPH to tailor its expert evidence and submissions to meet PCH's best case. It observed that it would comply with the Tribunal's directions but reserved its rights.

45. GPHs' expert opinion on Taiwanese law issues by Professor Tsung-fu Chen was provided by e-mail dated 29 November 2007, pursuant to the Tribunal's direction of 20 November 2007.

46. I turn now to consider PCH's complaints, upheld by Saunders J that the Tribunal had deviated from the agreed procedure that expert reports and/or pre-hearing submissions should be exchanged when the Tribunal permitted or required sequential filing of submissions relating to the Taiwan Law issue. The learned Judge dealt these complaints at paras.110–124 of the judgment. He regarded the Tribunal's order for the sequential exchange of submissions to have given rise to procedural unfairness. He agreed with Mr Manzoni that PCH was required to state its best case both on fact and law which gave GPH an advantage which was not

available to PCH, and GPH had in such circumstances the opportunity to tailor both its expert evidence and its argument to meet PCH's best case which was a particular advantage because GPH was permitted to file its pre-hearing submissions on the Taiwanese law issue on a Friday afternoon with the hearing due to begin on Monday morning. Thus GPH had 10 days to pursue PCH's submissions, and to prepare to meet PCH's best case submissions at the December hearing when PCH had only two calendar days and no working days to peruse and prepare on the basis of GPH's evidence and submissions on this issue.

47. The learned Judge rejected the submission of Mr Charles Sussex SC (then counsel for GPH), that the amendment to raise the illegality issue was late, as was the filing of Mr Shay's expert evidence on Taiwanese law.

48. The learned Judge said that Mr Shay's report was not late:

> [117] … It was filed in accordance with the amended procedural timetable, with which both parties had agreed, following PCH's application for an amendment. Once the procedural timetable was amended, anything filed in accordance with the amended procedural timetable could not be said to be late.

49. With respect, that is not a sufficient answer to Mr Sussex SC. The directions could not be divorced from PCH's late application for leave to raise the Taiwanese law issue and the Tribunal's grant of leave on terms.

50. I should mention Mr Manzoni's submission to Saunders J that if PCH was late in raising the Taiwanese law issue that was the fault of GPH. A similar argument was made to but not accepted by the Tribunal.[14]

51. In para.119 of the judgment, Saunders J referred to the decision of Bannister J (Ag) in the BVI, in an application by GPH to appoint liquidators over PCH,[15] **and said:**

> [119] … Bannister J (Ag), took the view that the procedural order of 20 November 2007 was in effect a penalty to be paid by PCH in obtaining the leave to amend. He said this at para.13:
>
> "Applying these principles, seems to me that one answer to the point on prejudice arising out of the timetable

[14] See the e-mail of 18 November 2007 quoted at para.41 above and the Ruling of 20 November 2007 (especially para.6) quoted at para.43 above.

[15] *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* (unrep., Eastern Caribbean Supreme Court, High Court, BVI, Claim No BVIHCV 2009/389, 11 January 2010)

> adopted by the Tribunal might be to say that if a party changes its case late in the day, it may have to pay a penalty when the tribunal attempts to accommodate it without also prejudicing the other party."
>
> With respect to the learned Judge, I disagree. As the factual sequence set out above shows, the amendment was required because of the conflicting position adopted by GPH, which was not clarified until late in the piece, thereby giving rise to the need on the part of PCH to seek the amendment. The submission made to the Tribunal that the amendment was "late", was simply not justified on the facts but the way in which it was put by GPH plainly influenced the Tribunal in the manner suggested by Bannister J. It is difficult to see why, once the Tribunal had allowed the amendment, PCH should then be subject to a "penalty" that created an inherent unfairness.

52. With respect, I cannot agree with Saunders J. Whether PCH could be said to have changed its case late in the day was a matter for the decision of the Tribunal. Saunders J should not have questioned the merits of the Tribunal's decision to grant leave to re-amend, and the terms on which such leave was granted. On the material available to Saunders J, I can see no basis upon which he was entitled to disagree with the decision of the Tribunal. The Tribunal clearly took the view that GPH had been prejudiced by the lateness of the application and hence it was only prepared to give leave to re-amend on terms.

53. Saunders J acknowledged in para.120 that if the Tribunal's decision had been made by a court that would have been upheld. However, he felt that the agreement in the Procedural Timetable precluded the Tribunal's order. With respect to Saunders J, I do not believe the Procedural Agreement required the Tribunal, in the event of a late amendment, to require sequential filing of submissions. I believe that the Tribunal when faced with a late amendment was entitled

> … to use procedures that are appropriate to the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for resolving the dispute … (Section 2GA, Arbitration Ordinance (Cap.341).)

54. With respect, I agree with Johnson Lam J, who said in *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] 1 HKLRD 707:

> [88] After hearing submissions from the parties, if the arbitrators were of the view that the procedure agreed by the parties would result in a breach of art.18,[16] they should take steps to conduct the arbitration in such a manner that could redress the problem instead of being constrained by an unworkable agreement of the parties.

55. As the learned authors in Craig, Park and Paulsson in *International Chamber of Commerce Arbitration* (3rd ed., 2000) put it at para.16.04 when dealing with art.15(2)[17] of ICC Rules:

> Except in the most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have been confined by national courts which quite regularly reject the procedural arguments of disappointed parties.

56. It follows that in my view there was no contravention of art.34(2)(a)(ii) or 34(2)(a)(iv) in relation to the Taiwanese law issue.

The three authorities

57. Stage 1 of the arbitral proceedings took place from 3 December 2007 to 7 December 2007. The Tribunal said at para.2.67:

> On the second day of the hearing, it transpired that all the legal authorities relied on in his statement by respondent's Taiwanese Law expert, Mr Aaron Shay, had not been produced. In addition, the sources relied on had not been translated. Therefore, the Tribunal decided that the appropriate course was to have the materials referred to by the experts in their reports produced in full text, in Chinese. Following that, it would be for each side to decide which cases they wish to translate at their own expense and have them put before the Tribunal.

58. The examination of the expert witnesses was adjourned to Stage 2 of the hearing which was set for 2 and 3 May 2008. Two procedural orders were made at the Stage 1 hearing, however, due to oversight these procedural orders were not formally issued until 3 April 2008.[18] The Procedural Order No 2 (Expert Witnesses) ordered the experts to "meet ... with a view to discussing the differences between them on the issues set forth in their existing experts' reports and identifying those issues upon which they are able to agree and those issues upon which they disagree" and:

[16] Article 18 provides: "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[17] Article 15(2) of ICC Rules is the equivalent of art.18 [of Model Law] and provides: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

[18] Nothing material turns on the delay.

3. At the conclusion of such meetings and discussions, the Experts shall prepare a joint report (which shall form part of the record) summarising the matters on which they have been able to agree and those on which they disagree and summarising their respective positions on the matters on which they disagree.

59. On the 5th day of the Stage 1 hearing on 7 December 2007, the transcript showed that, when discussing the forthcoming joint meeting of the experts, the Chairman said:

> We don't mind what the lawyers talk about. The exercise is confined to their reports, as they have been lodged, so we are not allowing this process to result in production of more expert reports. Battle lines have been drawn, so to speak, and they are confined to those reports.
> …
> I think that's all I need to say on that.

60. Then, again, at p.82 line 15, the Chairman said:

> We are not in favour of item 2.[19] These experts have had their statements presented, with reference to certain authorities, and we are opposed to the ambit of the documents they are relying upon being expanded. In other words, they have had their chance. They have expressed their opinions on the basis of certain materials and we do not see any justification for starting all over again and letting them go and find other things.

61. In relation to further authorities, the Chairman said at p.93 in line 18:

> … We would be happy if we have a leave requirement, but the idea of having each side with the ability at this moment to just add authorities is impermissible. …

62. However, the parties were permitted to apply for leave to include additional authorities as the Chairman explained at p.94:

> Because if some professor finds something sensational that will save us time, then we wouldn't exclude it …

63. The joint expert report of Professor Chen and Mr Aaron Shay was filed on 9 April 2008. GPH applied to strike out portions of the experts' joint report relating to those portions that were drafted by Mr Shay and which referred to new authorities. On 6 April 2008, PCH applied for leave to adduce additional authorities.

[19] "Which would have allowed leave to serve further legal authorities 21 days before the hearing".

We are only concerned with three such authorities. They were new in that they were referred to for the first time in that part of the joint report which was drafted by Mr Shay.

64. In its ruling of 22 April 2008, the Tribunal refused leave for the production of the three new authorities and ordered that references to the new authorities be struck out. The Tribunal gave two rulings. The first is dated 16 April 2008 and is 13-page long.[20] At paras.8–39 of the ruling of 16 April 2008, the Tribunal said after referring to the transcript of Day 5:

> [35] These statements indicate that the Tribunal intended a very narrow scope to the leave requirement, a matter which is emphasised even further by the inclusion of the phrase "which the Tribunal is not to be understood as encouraging" in para.4 of the Order.
>
> [36] If any further indication is required of the Tribunal's intended restricted approach to the leave application it may be found in the Chairman's comment on Day 5 at p.94 that the Tribunal would be prepared to grant leave:
>
> "if some professor finds something sensational that will save us time, then we wouldn't exclude it. But I think we should [not] have a leave requirement, where the professor says, "I had overlooked this" or "I have now found this" or something of that nature".
>
> …
>
> 38. As for the remaining three authorities (items 2, 6 and 7), these authorities were not included in the original expert reports and were only raised belatedly by Mr Shay in his lengthy "summary" of his position in the joint report. The Tribunal tends to agree with the claimant's submission that Mr Shay's portion of the expert report contains much more than a summary of his position on the matters set forth in his original report on which there was disagreement.
>
> 39. Moreover, we see considerable force in the complaint of the claimant that to ask Professor Chen to consider these new authorities in the limited time available before the hearing would unfairly prejudice the preparation of the claimant for that hearing by requiring them to direct their attention from their general preparation to confer on the new material. The lateness of the respondent's application also tells against it bearing in mind that the essence of the

[20] The second ruling is dated 22 April 2008 and struck out parts of Mr Shay's portion in the joint report, essentially those which relied on the three authorities: see para.16 of the ruling.

> Procedural Orders 2 and 4 were set out and agreed on Day 5 of the hearing (see pp.89–90).

65. Saunders J dealt with the joint experts and report argument in paras.125–130 of his judgment. The learned Judge said at para.126:

> [126] But the Tribunal did not consider or review the authorities PCH wished to rely upon. Demonstrably therefore, there was no basis upon which the Tribunal could say whether or not those authorities came within the category of 'sensational authorities' which it had indicated would be allowed.

66. Paragraph 38 of the Ruling of 16 April 2008 showed that the Tribunal was aware of the purport of these authorities. Indeed, an e-mail of 9 April 2008 to the Tribunal sent on behalf of PCH stated:

> The additional authorities are intended solely to provide additional support for Mr Shay's opinions in the light of Professor Chen's report dated 28 November 2007 which raised a number of points not addressed by Mr Shay, and to which, pursuant to the Tribunal's various directions, Mr Shay was unable to respond in a supplementary report. In any event, they do not change the thrust of his opinions, or alter the basis of the respondent's defence insofar as it prays Taiwanese law in aid.

67. However in a later letter of 15 April 2008 PCH suggested the three authorities to be "of the type described by Mr Williams" because:

> … Mr Shay believes the authorities provide answers to the points in respect of which they are produced, but Professor Chen has not changed his mind. The fact that he has not done so, however, does not mean that the additional authorities should be excluded.

68. The learned Judge concluded at para.129 that the refusal to receive and consider the additional authorities prevented PCH from presenting its case and therefore a violation of art.34(2)(a)(ii) has been established. With respect, I cannot agree with Saunders J. I do not believe he was entitled to interfere with a case management decision, which was fully within the discretion of the Tribunal to make.

Hong Kong Law Issue

69. This relates to Chang Senior's authority to execute the Loan Agreement on behalf of GPH. PCH submitted that under Hong Kong law, Chang Senior either had no authority or that it had not been proved that Chang Senior had the requisite authority. Also, that although the Loan Agreement was governed by New York law, under New York conflict of laws, Chang Senior's authority to execute the Loan Agreement was governed by Hong Kong law. This is the so-called Hong Kong law issue.

70. GPH in its reply post-hearing submissions dated 6 October 2008, objected to PCH raising the Hong Kong law issue and complained that they were raised for the first time at para.48.1 of its post-hearing submissions dated 1 July 2008 and reiterated at para.44.4 of its reply submissions of 6 October 2008. In response, the Tribunal by its letter of 13 October 2008 stated:

> 2. Respondent's submissions on Hong Kong Law
>
> The Tribunal has noted that submissions on Hong Kong law were raised for the first time by the respondent at para.48.1 of its post-hearing Opening Submissions dated 1 July 2008 and reiterated at para.44.4 of its post-hearing Reply Submissions of 6 October 2008.
>
> Paragraph 3 of the Tribunal's Procedural Ruling of 3 May 2008 clearly states that "the parties will exchange post-hearing written submissions giving their best cases on fact and law, accompanied by references to the agreed bundle, the witness statements and the transcript".
>
> Clearly the expectation was that post-hearing written submissions would refer to the cases already pleaded and presented at the May hearing. There was no mention by either side of Hong Kong law at the May hearing and the respondent's submissions on Hong Kong law appear to fall outside the scope of what was envisaged by the Tribunal at the end of the May hearing and in its Procedural Ruling of 3 May.
>
> In light of the above and taking into account the considerable efforts already made to accommodate the respondent's submissions on Taiwanese law, which were filed extremely late in the course of proceedings and gave rise to a hearing in two stages, the Tribunal considers that at this late stage of the arbitration it may be inappropriate and unfair to admit any new submissions or evidence based on Hong Kong law and it may cause unnecessary delay to do so. The Tribunal's provisional view therefore is that there may be a problem in receiving the Hong Kong law submissions for the reasons given by the claimant in its Reply Post-hearing Submissions at pp.11–13.

However, before taking any final decision on the matter the Tribunal seeks an explanation from the respondent within seven days as to its actions in this respect and also what it says, if anything, in answer to the claimant's protests on this matter as set out in its post-hearing Reply Submissions of 6 October 2008. In the meantime the claimant is asked to advise whether, if the respondent's challenged Hong Kong law submissions are received, it would (i) wish to make any further submissions in addition to those set out "in the alternative" in s.B which is headed "In any event, respondent's lack of authority defence fails as a matter of Hong Kong law", in para.14 *et seq* of its post-hearing submissions; or (ii) wish to adduce any further evidence, expert or otherwise, on the Hong Kong law matter.

71. PCH accepted[21] that "Hong Kong law on the issue of authority" had not been raised previously, but claimed that that was because GPH had failed to meet PCH's

… challenge as to Mr Chang Senior's authority to execute the Loan Agreement on behalf of (GPH). That being so, in order to make the point good, it was incumbent on the respondent to make submissions of Hong Kong law on the issue.

72. Eventually, GPH was given until 24 October 2008[22] to reply to PCH's submissions on the Hong Kong law issue, which was duly supplied.

73. By letter dated 31 October 2008, the Tribunal gave the following ruling:

1. The Hong Kong law issue

1.1 You will recall that in its letter dated 13 October 2008, the Tribunal invited the respondent to provide an explanation within seven days in respect of its submissions on Hong Kong law set out in para.48.1 of its post-hearing Opening Submissions dated 1 July 2008 and reiterated at para.44.4 of its post-hearing Reply Submissions of 6 October 2008 (the Hong Kong law issue).

1.2 The Tribunal also requested that the claimant advise whether it would wish to make any submissions on the Hong Kong law issue additional to those contained in its post-Hearing Reply Submissions of 6 October 2008.

1.3 By letter dated 20 October 2008, the respondent complied with the Tribunal's request.

1.4 The claimant provided its reply by letter dated 24 October 2008.

[21] PCH's e-mail of 20 October 2008.

[22] The Chairman's e-mail of 22 October 2008.

1.5 In a letter dated 28 October 2008, the respondent made further comments on the Hong Kong law issue, in particular in light of the claimant's aforementioned reply. (There was no provision in the Tribunal's directions of 13 October for such a reply).

1.6 The Tribunal thanks the parties for their submissions and considers that it now has sufficient materials and arguments to decide on the Hong Kong law issue.

74. By letter dated 20 November 2008, PCH sought leave to make further submissions on the Hong Kong Law Issue, in reply to GPH's submissions dated 24 October 2008.

75. In its decision dated 25 November 2008, the Tribunal refused PCH's application for leave to make further submissions and stated:

1. In its letter dated 20 November 2008, the respondent sought leave to make further submissions on the Hong Kong law issue, in reply to the claimant's submissions dated 24 October 2008.
2. The parties will recall that the claimant's abovementioned submissions were filed following the Tribunal's invitation to the respondent to provide an explanation as to the Hong Kong law defence raised in its post-hearing Opening Submissions dated 1 July 2008 and reiterated in its post-hearing Reply Submissions of 6 October 2008.
3. The Tribunal notes that by letter dated 28 October 2008 the respondent filed a Reply which was not provided for in the Tribunal's previous directions.
4. The Tribunal further notes that the respondent has thus already had two opportunities to elaborate on the Hong Kong law defence raised in its post-hearing Opening Submissions dated 1 July 2008 and reiterated in its post-hearing Reply Submissions of 6 October 2008.
5. The Tribunal refers to its letter to the parties dated 31 October 2008, in which it acknowledged both parties' submissions on this issue and explicitly stated:

   "The Tribunal thanks the parties for their submissions and considers that it now has sufficient materials and arguments to decide on the Hong Kong law issue".

6. Furthermore, at para.2.9 (vi) of the said letter, the Tribunal also ruled that "once both respondent's closing submissions and the claimant's reply have been provided, the Tribunal considers that it will have more than sufficient material to

make an Award and no further submissions or other material of any kind will be received or considered by the Tribunal".

7. The closing submissions of the respondent and the claimant were filed respectively on 10 and 17 November 2008.

8. The Tribunal has conferred and, after careful consideration, rules as follows:

(a) In light of the above and taking into account (1) the clear and unambiguous directions contained in its ruling of 31 October 2008 and (2) the very advanced stage of proceedings, the Tribunal finds that the parties have had a full and fair opportunity to provide submissions on the Hong Kong law issue,

(b) The respondent's application for leave is therefore refused.

76. In para.131 of the judgment, Saunders J accepted that the issue of Hong Kong law was raised for the first time by PCH in his post-hearing submission. However:

[137] … by not giving PCH the right to respond to the new material from GPH in its 24 October 2008 response, PCH was effectively denied the opportunity to present its case. Once the Tribunal had invited GPH to respond to PCH's Hong Kong law submissions the Tribunal was bound to give PCH the opportunity to reply on those matters of law. PCH were entitled, in my view, to take the position that Hong Kong law need not be proved in the light of the fact that Hong Kong was the seat of the arbitration. …

…

[139] … But it was not until 24 August 2009, ten months later, that the award was delivered. It can hardly be said that there was a need to bring the cycle of submissions to an end.

…

[141] I am unable to say that, had PCH been given the opportunity to respond to the new material raised by GPH, the result could not have been different. Having so found, PCH are entitled to the exercise of discretion in favour of setting aside the award.

77. With respect, I cannot agree with the learned Judge that the Tribunal was not entitled to refuse leave to PCH to reply to GPH's submission of 24 October 2008. Essentially, PCH's complaint

was that they had been denied the right to the last word on the Hong Kong law issue. The Tribunal took the view, as they were entitled to, that the Hong Kong law issue was raised at a late stage of the proceedings and that PCH had had two opportunities to make submissions on the Hong Kong law issue and that submissions should end with GPH's submission of 24 October 2008. Given the circumstances under which the Hong Kong law issue was raised the Tribunal could not be faulted for not allowing PCH another opportunity to deal with the issue. Moreover, I cannot agree with the learned Judge that the result might have been different if PCH had been given leave to respond.

78. In PCH's post-hearing submissions dated 1 July 2008, it stated:

> 48.10 For the avoidance of doubt, the respondent accepts that any want of authority on the part of Mr Chang Senior could have been ratified, but no evidence or submissions on ratification have been provided by the claimant.

79. In its reply post-hearing submissions dated 6 October 2008, GPH dealt at length with ratification and submitted at p.14:

> (PCH's) lack of authority defence still fails as a matter of Hong Kong law, by virtue of (PCH's) admission that under Hong Kong law, "any want of authority on the part of Mr Chang Senior could have been ratified".

80. In the Award the Tribunal decided Hong Kong law issue on at least two bases. First, that New York law governed the loan agreement including any issue as to its due execution: 5.11. In other words, Hong Kong law was irrelevant. Secondly, there was ample evidence of ratification: Award 5.15.[23] Ratification was a sufficient basis for the Tribunal's decision.

81. I agree with the observation by Johnson Lam J in *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* that:

> [40] … if the Tribunal gave several reasons for the award, with any single one of those being sufficient for its decision, the court may decline to set aside the award even if the Tribunal had not heard the parties on one of the reasons provided that the court is satisfied the result would be the same in the light of the other reasons given.

[23] As the Award correctly explained, GPH had brought "claims based on the Loan Agreement in this arbitration, and by accepting benefits under it".

The New York Law issue

82. PCH complained of another violation of art.34(2)(a)(ii) in that the Tribunal had cited in the Award some New York authorities, to which neither party had referred. This complaint was rejected by the learned Judge: paras.142–145. Little was said about this before us although the complaint was repeated in the respondent's notice. I content myself with my respectful agreement with the learned Judge.

Discretion

83. We have had detailed submissions from the parties on the consequence of any breach of art.34(2)(a)(ii) or 34(2)(a)(iv), in particular, whether the Court has any discretion to refuse to set aside an award in such an event and if so, the basis upon which such discretion may be exercised. Mr Manzoni submitted that English authorities show that the discretion to refuse to set aside should be exercised only when there is an estoppel, or some other recognised legal basis to prevent the violation being relied upon. He also submitted that loose language used in various Hong Kong cases has resulted in a wrong expression of the relevant test.

84. PCH's principal complaint is that it "was otherwise unable to present his case": art.34(2)(a)(ii).[24] This should be considered with art.18[25] which regulates the conduct of arbitral proceedings. What does PCH have to show in order to come within this limb of art.34(2)(a)(ii)?

85. It is obvious that a possible consequence of the failure to provide to a party "full opportunity to present his case" under art.18 is the setting aside of the award under art.34.[26] Such an award may be set aside under art.34(2)(a)(ii) or art.34(2)(b)(ii).[27]

86. In *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, Holtzmann and Neuhaus (Holtzmann & Neuhaus), the learned authors said:

> … Article 18 has been rightly described as a key element of the "Magna Carta of Arbitral Procedure." Likewise, it might well be called the "due process" clause of arbitration, akin to similar provisions in national constitutions that establish the requirement of procedural fairness as the indispensable foundation of a system of justice. (at p.550)

[24] Article 34(2)(a)(iv) was relied on in relation to the Taiwanese law issue. I have dealt with that above and will not return to it here.

[25] "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."

[26] I will not deal separately with non-enforcement under art.36.

[27] Where an award may be set aside if it "is in conflict with the public policy of the State": art.36(1)(b)(ii) is its equivalent.

87. As Part Two of the Model Law[28] explains:

> 31. Chapter V provides the legal framework for a fair and effective conduct of the arbitral proceedings. Article 18, which sets out fundamental requirements of procedural justice, and art.19 on the rights and powers to determine the rules of procedure, express principles that are central to the Model Law.

88. There was a suggestion at the drafting stage that the language of art.18 should be incorporated into art.34(2)(a)(ii). Holtzmann & Neuhaus explained at p.915:

> … This change in fact initially was adopted, but the decision was later reversed on the understanding that a violation of art.18 was already covered by the text of art.34 …[29]

89. Then at p.1003, they stated:

> 302 … it was the Commission's understanding that, in spite of the resulting difference between the test of art.18 bis and art.34(2)(a)(ii), any violation of art.18 bis [*sic*] would constitute a ground for setting aside the award under art.34(2) sub-paragraph (a)(ii), sub-paragraph (a)(iv) or sub-paragraph (b) and that the concerns which led to the proposal to amend sub-paragraph (a)(ii) were, therefore, already met.

90. Article 34 has its equivalent in art.V of the "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (The New York Convention) which provides:

> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;[30]

91. In "The New York Convention of 1958: An Overview" by Albert Jan van den Berg, published in "*Enforcement of Arbitration Agreements and International Arbitral Awards, The New York Convention in Practice*", edited by Gaillard and Di Pietro,

[28] "Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration with amendments as adopted in 2006".

[29] "… the grounds for setting aside enumerated in art.34(2) are essentially the same as those in the New York Convention." Holtzmann & Neuhaus at p.915.

[30] The New York Convention does not have its equivalent of art.18, because the New York Convention is concerned with recognition and enforcement of Foreign Arbitral Award and does not regulate the conduct or procedure of arbitration as such.

Professor van den Berg, whilst commenting on art.V of *The New York Convention*, said:

> … the grounds for refusal of enforcement … as enumerated in art.V … are to be construed narrowly. … it means that their existence is accepted in serious cases only …
>
> …
>
> The courts appear to accept a violation of due process in serious cases only, thereby applying the general rule of interpretation of art.V that the grounds for refusal of enforcement are to be construed narrowly. …
>
> …
>
> The proper notice for the appointment of the arbitrator and the arbitration proceedings can be considered as specific categories of the general principle that a party must have been able to present its case. Again, the test is whether a party was in fact precluded from presenting its case in arbitration. The defence of the inability of presenting the case was rarely successful. (at pp.56–58)

92. Professor van den Berg's views were reflected in *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* (1999) 45 OR (3d) 183 (Ont SCJ), a decision of the Ontario Supreme Court. It was concerned with an application to set aside an award under art.34 of the Model Law on the ground, amongst others, that the applicants were denied equality of treatment and the opportunity to present their case, and that the awards were in conflict with the public policy of Ontario. Lax J[31] after observing that:

> [19] Article 18 of the Model Law is the primary foundation of the applicants' case …
>
> [20] Article 18 is linked to art.34(2)(a)(ii) and 34(2)(b)(ii). …

went on to say:

> [26] The grounds for challenging an award under the Model Law are derived from art.V of the New York Convention … authorities relating to art.V of the New York Convention are applicable to the corresponding provisions in arts.34 and 36 of the Model Law. …
>
> …
>
> [32] Guidance as to the kind of conduct which could justify setting aside an award under the Model Law for the failure to observe procedural fairness can be found in commentary on the meaning of public policy under

[31] The judgment of Lax J was affirmed on appeal. (2000) 49 OR (3d) 414 (Ont CA).

art.34(2)(b)(ii) since the latter is intended to include both substantive and procedural aspects. …

[33] Under the Model Law, the concepts of fairness and natural justice enunciated in art.18 significantly overlap the issues of inability to present one's case and conflict with public policy set out in art.34(2)(a)(ii) and 34(2)(b)(ii). Since art.34(2)(b)(ii) is to be interpreted to include procedural as well as substantive justice and is not to exclude the manner in which an award is arrived at, it seems to me that the grounds for challenging an award under art.18 are the same as they are under art.34(2)(b)(ii). Accordingly, in order to justify setting aside an award for a violation of art.18, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice.

[34] Instances of corruption, bribery or fraud referred to in the *Report of the United Nations* would not only offend the essential morality of Ontario, but would offend shared notions of justice that are common to legal systems throughout the world. No court would hesitate to set aside an award arrived at in this manner. In considering other kinds of conduct, it is important to bear in mind that the *Report of the United Nations* may be used as an interpretive aid to the Model Law and it refers to "similar serious cases". In my view, this contemplates that judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state. With all of these principles in mind, I turn to the more detailed arguments advanced by COTISA.

93. In *International Chamber of Commerce Arbitration* (3rd ed., 2000), Craig, Park and Paulsson in discussing art.15(2)[32] of the ICC Rules said at p.302:

16.04 … The application of these requirements has given rise from time to time to controversy, and challenge of arbitration awards before national courts in a number of cases involving such issues as fair notice, the setting of time limits and the handling of hearing and evidence. Except in the most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have

[32] Article 15(2) ICC Rules is the equivalent of art.18 and provides: "In all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."

> been confirmed by national courts which quite regularly reject the procedural arguments of disappointed parties.

94. From the above, I gather that the conduct complained of must be serious,[33] even egregious,[34] before a court could find that a party "was otherwise unable to present his case". It is unnecessary for me to decide, and I do not decide, how serious or egregious the conduct must be before a violation could be established. Nor, do I decide whether "the conduct … must be sufficiently serious to offend … basic notions of morality and justice".[35] I am inclined to the view that the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process. In the present case there was no violation, and in any event, the matters complained of were not sufficiently serious or egregious.

95. Mr Manzoni compared art.15(2) of the ICC Rules with art.18 and submitted that PCH was entitled not merely to a reasonable opportunity to be heard but a full opportunity to be heard. He accepted, however, that full opportunity cannot mean that a party is entitled to present any case it pleases, any time it pleases, no matter how long the presentation should take. That accords with what Holtzmann & Neuhaus said at p.551:

> … It is also submitted that the terms "equality" and "full opportunity" are to be interpreted reasonably in regulating the procedural aspects of the arbitration. While, on the one hand, the arbitral tribunal must provide reasonable opportunities to each party, this does not mean that it must sacrifice all efficiency in order to accommodate unreasonable procedural demands by a party. For example, as the Secretariat noted, the provision does not entitle a party to obstruct the proceedings by dilatory tactics, such as by offering objections, amendment, or evidence on the eve of the award.

96. Moreover, it should be noted that GPH was also entitled a full opportunity to present its case under art.18. In the case of a late application, any opportunity afforded to one party must be balanced against the opportunity to the other.

97. Since I am not satisfied that there has been any violation of art.34(2)(a)(ii) or 34(2)(a)(iv), it is academic whether the Court has a discretion in the event of any violation to refuse to set aside the award. However, since we have been addressed at some length by counsel on the subject, I will briefly state my view.

[33] See para.91 above.

[34] *International Chamber of Commerce Arbitration*, para.16.04: para.93 above.

[35] *Per* Lax J at para.33 of his judgment in *Corporacion Transnacional de Inversiones SA de CV v STET International SpA* cited at para.92 above.

98. **In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763, Lord Mance JSC said at para.68 that art.V of the New York Convention covers:**

> … a wide spectrum of potential objections to enforcement or recognition, in relation to some of which it might be easier to invoke such discretion as the word "may" contains than it could be in any case where the objection is that there was never any applicable arbitration agreement between the parties to the award. …

99. **And that, in such a case:**

> … Absent some fresh circumstance such as another agreement or estoppel, it would be a remarkable state of affairs if the word 'may' enabled a court to enforce or recognise an award which it found to have been made without jurisdiction, …[36]

100. **Article 34 similarly covers a wide spectrum of situations under which an award may be set aside. Here we are concerned with a complaint that PCH:**

> … was … unable to present his case.

101. ***Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* provides no direct guidance on how the Court's discretion might be exercised in such circumstances. Saunders J took the view that the Court may refuse to set aside an award notwithstanding such violation if the Court was satisfied that the outcome could not have been different: see para.90. With respect, I agree. The learned Judge followed a long line of local authorities, which have been reviewed by Johnson Lam J in *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd*, where he said:**

> [37] In *Paklito Investment Ltd v Klockner East Asia Ltd*, p.49, Kaplan J endorsed the view taken by Professor Albert Jan Van Den Berg that:
>
> "Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation."
>
> His Lordship said:

[36] *Dardana Ltd v Yukos Oil Co* [2002] 1 All ER (Comm) 819 was a case which required another "agreement or estoppels".

> "… I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the new material which the defendant wished to put forward, that it would not affect the outcome of the dispute."

[38] Similar approach was adopted by the Court of Appeal in *Apex Tech Investment Ltd v Chuang's Development (China) Ltd*. To the same effect is the following commentary at para.25.197 of *Halsbury's Laws of Hong Kong* Vol.1(2):

> "The court does, however, have a residual discretion to permit enforcement of the award, notwithstanding that a ground of objection has been made out, if satisfied that the arbitral tribunal would not have reached a different conclusion but for the matter complained of."

102. Mr Manzoni submitted that the discretion should be exercised only when there is an estoppel, or some other recognised basis to prevent the violation being relied on. Estoppel is an obvious reason for enforcement notwithstanding a relevant violation. I am further of the view that if the violation had no effect on the outcome of the arbitration that is a good basis for exercising one's discretion against setting aside. In *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*, Lord Collins of Mapesbury JSC gave as a possible example for enforcement notwithstanding a violation:

> [127] … where there has been no prejudice to the party resisting enforcement: *China Agribusiness Development Corpn v Balli Trading* [1998] 2 Lloyd's Rep 76.[37]

103. Such view is consistent with the statement in Holtzmann & Neuhaus at p.922 that:

> … as noted by the Commission Report, a non-material error can give rise to grounds for setting aside the award, but, as noted during the debates, a setting-aside court has discretion not to set aside the award when such grounds are present.

[37] In the Court of Appeal, Rix LJ also expressed the view that "a minor and prejudicially irrelevant error, albeit within the Convention or statutory language, might not succeed as a defence …" *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] 2 WLR 805, para.89.

104. I would regard as a non-material error, an error which is not material to the outcome, and not just an error which is trivial or not serious. I note, however, in "The New York Convention of 1958: An Overview" Professor van den Berg said at p.56:

> Finally, it is arguable that in a case where a ground for refusal of enforcement is present, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is *de minimis*.

105. I am of the view that only a sufficiently serious error could be regarded as a violation of art.18 or art.34(2)(a)(ii). And that an error would only be sufficiently serious if it has undermined due process. A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process. Even so, the Court may refuse to set aside the award if the Court is satisfied that the arbitral tribunal could not have reached a different conclusion. How a court may exercise its discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different.

106. Lastly, Mr Manzoni submitted that the burden is on the party resisting an application to set aside to show that the result could not have been different. With respect, I agree with Saunders J that the burden is on an applicant to show that he had or might have been prejudiced. In some cases, the prejudice is obvious and it matters little who has the burden. Generally speaking, an applicant who complains of a violation is best placed to show that it has been prejudiced and thus, the burden to show prejudice should be on the applicant.

107. For the above reasons, I would allow the appeal, set aside Saunders J's order, so that the Award is reinstated.

Kwan JA

108. I have had the benefit of reading in draft the judgment of the Vice-President. I respectfully agree with the reasons he gave that the appeal should be allowed.

Fok JA

109. I agree with the judgment of Tang V-P.

Tang V-P

110. The appeal is allowed and the order of Saunders J dated 29 June 2011 set aside. Accordingly, the originating summons is

dismissed. We also make a cost order *nisi* in favour of GPH both in this Court and below.

Reported by Robert Morgan