U v A

23 February 2017

Court of First Instance

CFI

Construction and Arbitration Proceedings No 34 of 2016

HCCT 34/2016

Citations:	[2017] HKEC 468 English Judgment
Presiding Judges:	Mimmie Chan J in Chambers
Phrases:	Arbitration - arbitral award - enforcement - leave to enforce award - setting aside - whether stated grounds for setting aside made out
Counsel in the Case:	Mr Howard Chan [Solicitor Advocate], of Peter Yuen & Associates, for the applicantMr David Tsang, instructed by TH Koo & Associates, for the 1st & 3rd respondents
Cases cited in the judgment:	Belize v Belize Social Development Ltd Case No 15- 830 Figueiredo Ferraz E Engenharia de Projeto v Republic of Peru 663 F4d 384 Imperial Leatherware Co Pty Ltd v Macri and Marcellino Pty Ltd (unrep., Supreme Court of New South Wales No 50798 of 1980) Unistress Building Construction Ltd v Humphreys Estate (Forrestdale) Ltd [1992] 2 HKLRD 145 A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389 Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1 Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1) [2012] 4 HKLRD 1 Grant Thornton International Ltd v JBPB & Co (unrep., HCCT 13/2012, [2013] HKEC 477) Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111 Luck Continent Ltd v Cheng Chee Tock Theodore & Others [2013] 4 HKLRD 181 Pacific China Holdings Ltd v Grand Pacific Holdings Ltd (unrep., FAMV 18/2012, [2013] HKEC 248)

S Co v B Co (unrep., HCCT 12/2013, [2014] HKEC 1345)

Tronic International Pte Ltd v Topco Scientific Co Ltd (unrep., CACV 235/2013, [2016] HKEC 1780)

Judgment:

Mimmie Chan J in Chambers

Background

1. On 27 September 2016, the Applicant (" U ") obtained an order (" Order ") whereby the court granted leave to U to enforce an ICC arbitral award published in Hong Kong by a sole arbitrator (" Arbitrator ") in arbitration proceedings which were commenced in Hong Kong by U against the Respondents (" Arbitration ").

2. On 24 October 2016, the 1st Respondent and the 3rd Respondent applied to set aside the Order, on the stated grounds that enforcement of the Award should be refused under ss 86 (1) (c) (ii), 86 (1) (d) (i) and (ii), and 86 (2) (b) and (c) of the Arbitration Ordinance Cap 609 (" Ordinance "). The grounds relied upon are that the Respondents were unable to present their case; the Award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission; it would be contrary to public policy to enforce the Award under s 86(2)(b); and it would be just to refuse enforcement of the Award under s 86(2)(c). In respect of the last ground, it is claimed that since it will be contrary to public policy in the PRC to enforce the Award, and since Hong Kong is not an appropriate forum for enforcing the Award (according to paragraph 28 of the affirmation of Liu Kai filed on behalf of the Respondents), it would be just to refuse enforcement.

3. U is a company incorporated and existing under the laws of Luxembourg. The 1st Respondent is a company incorporated and existing under the laws of Hong Kong. The 2nd Respondent is a company incorporated and existing in Fujian on the Mainland, which is controlled by the 3rd Respondent, said to be generally resident on the Mainland. The 4th Respondent is a Singaporean citizen. The application to set aside the Order is made on behalf of the 1st and 3rd Respondents only.

4. The dispute between the parties in the Arbitration relates to an agreement made between the Applicant and the Respondents, referred to as the Preliminary Assignment Contract (" PAC ") dated 28 August 2007. Under the PAC, U agreed to purchase from the 1st Respondent 51% of the shareholding in a company in Fujian (" JV Company "), at a price of RMB 62,125,000 (" Price "). The 3rd Respondent and the 4th Respondent were to hold 49% of the shares in the JV Company as a result of the transaction under the PAC.

5. Under the PAC, the Price was to be adjusted following the completion of the audited accounts of the JV Company for the years 2007 and 2008, to reflect the financial performance of the JV Company in those years.

6. Article 7 of the PAC provided for the composition of the board of directors of the JV Company (" JV Board ") to be changed to reflect the shareholding structure, whereby U was to become the majority shareholder. Article 7.2 provided that contemporaneously with the transfer of the shares to U:

"a new board of directors shall be elected for a term of 2 years, and it will be made up of 3 members of whom 2 will be nominated by U. One of the directors appointed by U will oversee, directly or by proxy, the management and administrative control of the (JV Company)."

7. Article 7.3 of the PAC provided that the articles of association of the JV Company (" Articles ") should be adapted to reflect the new shareholding structure.

8. Subsequent to the date of the PAC, the parties executed various addenda to the PAC, including Addendum C which was signed on 28 November 2007 (" Addendum C ").

9. So far as is material to the present application to set aside the Order granting leave for the enforcement of the Award, Article 7 of Addendum C made provision for the interim arrangements for the composition of the JV Board, for the period until the completion of the adjustment of the Price payable. Article 7.2 of the PAC was substituted by the following:

"Contemporaneously with the transfer of the said shares, the first new Board of Directors shall be elected with a term until fulfillment of Article 5 of the present addendum. The first new Board of Directors shall be made up of 4 members, of whom 2 will be nominated by (U) and 2 by (the 1st Respondent) (of which one will be (the 3rd Respondent). (The 3rd Respondent) shall serve as the Chairman of the first new Board of Directors, organizing daily operation and management of the (JV Company) during the term of service. After the above term, the Board of Directors could be made up of 3 members (of whom 2 appointed by (U) and one appointed by (the 1st Respondent) or of 5 members (of whom 3 appointed by (U) and 2 appointed by (the 1st Respondent) ." (Emphasis added)

10. Article 8 of Addendum C also provides for the amendment of Article 19 of the JV Contract, to the effect that the JV Company "shall establish the board of directors which shall consist from 3 to 5 directors".

11. Article 17 of Addendum C states that the parties agreed that the PAC and the addenda including Addendum C "will be considered as the final contract that bind all the parties involved". Under Article 18, the parties agreed as follows:

"In order to start the procedures of share transfer in China as soon as possible for the purpose of administrative registration in China, the Parties agree to sign a share transfer agreement which is considered as an extract of the Final Contract before (the 1st Respondent) will provide the bank guarantee according to Article 4 of this Addendum. The parties confirm to be bound by the Final Contract."

12. In accordance with their agreement, and in order to finalize the share transfer under the PAC, U and the 1st Respondent signed an agreement on 11 December 2007 (" December Agreement "). The December Agreement referred to the PAC and the transfer of 51% of the share capital of the JV Company contemplated thereunder. Under clause 2 of the December Agreement, the parties agreed to submit a share transfer agreement (in accordance with an agreed draft enclosed) to the competent authority "in order to finalize the share transfer and to obtain the issuance of the new certificates and registrations of the JV Company", including but not limited to State Administration of Foreign Exchange Registration.

13. A Share Transfer Agreement (in the form of the draft attached to the December Agreement) was executed by the parties on 18 January 2008. On the same day, the 1st Respondent and U signed a Joint Venture Contract and the Articles of the JV Company. A Chinese version of the Share Transfer Agreement, the Joint Venture Contract and the Articles were submitted and approved by the Mainland authorities, as required under PRC law.

14. It is not in dispute that the PAC and Addendum C have never been submitted for approval by the relevant Mainland authorities. According to the Respondents, applying Mainland legal terminology, the PAC was a "Black Contract" and the Share Transfer Agreement was a "White Contract". In short, the provisions in the PAC and Addendum C which concern the composition of the JV Board (namely, Articles 7.2 and 7.3 of the PAC and Article 7 of Addendum C) were not contained in the Share Transfer Agreement approved by the authorities.

The disputes and the Arbitration

15. Disputes arose between the parties as to the composition of the JV Board and as to the transfer of various assets from the 2nd Respondent to the JV Company as contemplated under the PAC. On 30 September 2014, U filed a Request for Arbitration (" Request "), alleging various breaches on the Respondents' part of the PAC and Addendum C. At paragraph 13 of the Request, U refers to the Respondents' breach of their obligations under the PAC and Addendum C, to change the composition of the JV Board so that U can have the majority number of directors, and to sell or procure the sale of the plant and warehouse in Fujian (" Plant ") from the 2nd Respondent to the JV Company. The breaches were particularized in paragraphs 50 to 63 of the Request.

16. The relief claimed by U in the Request includes the following:

an order that the Respondents take all necessary steps to amend the relevant terms of the Articles of Association of the JV Company, so as to ensure that U has control over the board of directors and is entitled to appoint a majority of its members, in accordance with their obligations under Article 7 of the PAC, as amended by Article 7 of Addendum C; and

(2) an order that the 1st, 3rd, and 4th Respondents procure the 2nd Respondent to sell the Plant to the JV Company on the terms provided under Article 11 of the PAC.

17. In the Statement of Defence dated 1 June 2015 served in the Arbitration, the Respondents claimed that under PRC law, the PAC including its enclosures and addenda, as a contract for the transfer of shares of a foreign-invested enterprise, can only be legally valid and effective with the approval of the competent Chinese authorities. The Respondents referred to clause 2 Article 44 of the Contract Law of the PRC, Article 3 of the Provisions for the Alteration of Investors' Equities in Foreign-Funded Enterprises, clause 88 of the Notice of Supreme People's Court on the Summary of the 2nd National Working conference on Foreign-related Commercial and Maritime Trials, and other judicial interpretations and regulations applicable under PRC law. The Respondents alleged that the PAC, its enclosures and addenda are invalid and ineffective under PRC law.

18. The Respondents also claimed in their Statement of Defence that U's Request did not raise the issue of the election of the Chairman of the JV Board (" Chairman "), and that the issue as to the party which should appoint the Chairman is not within the scope of the Arbitration.

19. In the Terms of Reference dated 16 September 2015, submitted to the Arbitrator and signed by the parties to the Arbitration, the parties agreed that the issues to be determined by the Arbitrator in the Arbitration "shall be all issues arising from the Parties' submissions, including forthcoming submissions, statements and pleadings of the Parties which are relevant and necessary for the adjudication of the Parties' respective claims and defences". The parties further agreed a joint list of issues for the Arbitrator, which issues include the following:

1.1 "Are the PAC and its Addenda invalid on account of the parties' failure to register the PAC for approval by the competent Chinese authority (the Fuzhou division of the Ministry of Commerce)?

…

3.1 Did Article 7 of Addendum C require a transition to a (U)-controlled board of directors following the adjustment of the purchase price for the share transfer at the end of 2008, or did Article 7 provide for the possibility that the parties might decide to change the composition of the board after that point?

3.2 If Article 7 of Addendum C did require a transition to a (U)-controlled board of directors, was this agreement subsequently revised and/or superseded by (i) the Articles of Association of the JV registered with the competent Chinese authorities on 18 January 2008 and/or (ii) the shareholders' meeting of 16 October 2013?

4.1 Does (U's) request for the JV's Articles of Association to be revised so as to confer the right of appointment of the Chairman upon (U) fall within the jurisdiction of the Tribunal in the present proceedings?"

20. By a procedural order made in August 2015, the Arbitrator gave directions for the admission and exchange of expert evidence on PRC law, on the validity of the PAC and its addenda under PRC law. In accordance with such directions, the parties duly filed their respective expert reports.

21. On 11 September 2015, the Respondents submitted to the Arbitrator a judgment of the Fuzhou Intermediate Court dated 21 August 2015 (" FZ Judgment "). The FZ Judgment was issued in proceedings between the 2nd Respondent as plaintiff and the JV Company as defendant (" FZ Proceedings "), relating to a notice issued by the JV Company to the 2nd Respondent (" Notice "), requiring the 2nd Respondent to cease use of the mark or trade name of the 2nd Respondent. The 2nd Respondent claimed in the FZ Proceedings that the issue of such Notice constituted a tortious

act, and sought an order of the court that such tortious act should cease. In the FZ Judgment, the court ruled that the Notice had been issued in reliance on provisions in the PAC, but that since the PAC did not have the requisite approval by the Mainland authorities, the PAC and the Notice issued were ineffective. The claim made by the 2nd Respondent in the FZ Proceedings was however dismissed, as the court was not satisfied that the Notice constituted an actionable tort.

22. The Respondents claimed in the Arbitration that in view of the delivery of the FZ Judgment as an authoritative and enforceable judgment on the effectiveness of the PAC under PRC law, the parties should be bound by it, and that any award to be issued in the Arbitration should be in line with the FZ Judgment. U objected to such contention of the Respondents, claiming instead that the Fuzhou court had no jurisdiction with respect to the matters referred to the Arbitration. U objected to the admission of the FZ Judgment in the Arbitration.

23. By her Procedural Order No 6, the Arbitrator refused the application to admit the FZ Judgment as evidence. She found that the Respondents' submission of the FZ Judgment was belated, and that the FZ Judgment was in any event irrelevant to the determination of the dispute submitted to the Arbitration. In particular, the Arbitrator found that the parties to the FZ Judgment were the 2nd Respondent and the JV Company which is not a party to the Arbitration, and that the claim made by the 2nd Respondent in the FZ Proceedings was tortious in nature, as distinct from the contractual claims referred to the Arbitration. The Arbitrator further pointed out that despite being a party to the FZ Proceedings, the 2nd Respondent had failed to inform the Arbitrator of the existence of such proceedings prior to the issue of the FZ Judgment.

24. Notwithstanding the Arbitrator's refusal to admit the FZ Judgment as evidence, the parties were able to and did file and rely on their respective expert evidence as to the validity and effect of the PAC and its addenda under PRC law.

The Award

25. In the Award, the Arbitrator found that the PAC and its addenda including Addendum C are effective. Analyzing the scope of the PAC, she considered that the undertakings under the PAC go beyond the terms of a share transfer agreement, including commitments as to the governance and assets of the JV Company, and the intent to list the JV Company, "of a purpose beyond the rights and duties under a seller/purchaser relationship". The Arbitrator further considered that the PAC demonstrated the intention of the parties to conclude subsequent distinct contracts, including the Share Transfer Agreement, and concluded that the PAC should be analyzed as a framework contract, and not a share transfer contract, because the PAC was to be followed by the conclusion of other additional contracts, which separate contracts would then be submitted separately for approval, if such approval is required under PRC law. The Arbitrator noted that the subsequent additional documents (such as the Share Transfer Agreement) were indeed submitted for approval, and were approved.

26. The Arbitrator considered the effect of the Provisions on Several Issues concerning the Trial of Cases Involving Disputes Relating to Foreign-invested Enterprises issued by the Supreme People's Court on 8 May 2010, Judicial Interpretation No 9 [2010] (" SPC Provisions "), referred to by the experts in the Arbitration. She considered that Article 2 of the SPC Provisions applied to the PAC, as "a supplemental agreement reached by the parties on the issues concerning a foreign-funded enterprise" which "does not constitute any significant or substantial change to the approved contract". Where Article 2 is applicable, the PAC as a supplemental agreement would not be determined as ineffective on the ground that it had not been approved. The Arbitrator considered that any change concerning the number of directors and the method of appointment of these directors does not constitute "significant or substantial change". She also considered that Article 2 referred to "supplemental agreement", and not "subsequent agreement". Accordingly, she found that Article 2 of the SPC Provisions applies to the PAC and Addendum C, which were executed in parallel with the Share Transfer Agreement, despite their being signed 2 months before the Share Transfer Agreement.

27. The Arbitrator found that as U's claim to appoint the Chairman was included in the relief sought by U in the Terms of Reference, and in the agreed list of issues, she had jurisdiction to determine such a claim which is based on the interpretation of Article 7 of Addendum C of the PAC - a matter referred to the Arbitrator for determination in the Arbitration.

28. She found, on her interpretation of Article 7 of Addendum C, that U is entitled to control of the JV Board after the end of the term of the first board of directors, and that such a right was not revised or

superseded by the Articles dated 18 January 2008. The Arbitrator considered that Article 7 of Addendum C required a transition to a U-controlled board of directors, and that the shareholders' resolutions of 16 October 2013 actually reflected the shareholders' mutual understanding, that the 3rd Respondent's resignation as Chairman be accepted, and that the replacement be appointed by U.

29. On the foregoing basis, the Award made by the Arbitrator was that the 1st Respondent should execute shareholders' resolutions to amend the Articles of the JV Company, changing the composition of the JV Board and the appointment of the Chairman; and that the 1st, 3rd and 4th Respondents should take all steps required by the PRC authorities to ensure U's right to appoint a majority of the 3 members of the JV Board and its power to elect the Chairman. The 2nd Respondent was further ordered to sell the Property to the JV Company, and the 1st Respondent to procure such sale. The Award also included monetary orders against the Respondents, in the form of payment of damages and the costs of the Arbitration.

The delay in the application to set aside

30. The Order required any application to set it aside to be made by the Respondents within 14 days from the date of service of the Order. The Order was served on the 1st and 3rd Respondents at their Hong Kong addresses on 29 September 2016. By an order for substituted service, the Order was also sent to the 3rd Respondent's email address. The application to set aside should have been made by 13 October 2016, but was only made on 24 October 2016. According to U, such application is 11 days out of time, whereas according to the 3rd Respondent, the Order was only brought to his actual notice on 17 October 2016, and that the application made on behalf of the 3rd Respondent was only out of time by 9 days.

31. I do not accept that the 1st Respondent had given a good reason to justify its delay. Nor do I agree that in the context of enforcement of arbitral awards, a delay of 9 days should be readily ignored. Bearing in mind that the merits of the application to set aside the Order had all been presented for argument and no prejudice has been established by U, I will entertain the Respondents' application to set aside the Order out of time.

The application to set aside the Order: Whether the Respondents were unable to present their case

32. The Respondents' complaint is that the Arbitrator had unjustifiably refused to admit the FZ Judgment as evidence in the Arbitration, such that the Respondents were deprived of a full opportunity to present their case on the key issue of the invalidity of the PAC and Addendum C.

33. I reject the Respondents' submissions on this ground. The Arbitrator was fully entitled to impose timetables for the filing of evidence (including expert evidence) in the proper exercise of her case management and procedural discretion (

Grand Pacific Holdings Ltd v Pacific China Holdings Ltd FAMV 18/2012

, 21 February 2013, at para 5 per Chief Justice Ma). The Arbitrator had explained why she considered the Respondents' application to adduce the FZ Judgment as belated, and referred expressly to the fact that the Respondents had failed to draw her attention to the existence of the FZ Proceedings before their application to admit the FZ Judgment in September 2015. The Arbitrator also considered that the FZ Judgment was irrelevant to the issues for her determination in the Arbitration.

34. In any event, notwithstanding the Arbitrator's rejection of the Respondents' application to adduce the FZ Judgment as evidence in the Arbitration, the Respondents were allowed and were fully able to present expert evidence, and to make their full submissions on PRC law governing the registration and approval requirements for foreign-invested enterprises, and the effect of PRC law on the PAC and Addendum C. The Respondents had ample notice of the issue concerning the validity of the PAC and Addendum C under PRC law. Having been given the fair and full opportunity to give expert evidence and to address the Arbitrator on the PRC law governing and affecting the PAC and Addendum C, the Respondents suffered no prejudice by reason only of the Arbitrator refusing to admit the FZ Judgment as evidence. In

Tronic International Pte Ltd (Singapore) v Topco Scientific Co Ltd (Taiwan) & Others CACV 235/2013

, unreported, 15 August 2016, the Court of Appeal made it clear that the concern of the court is to ensure the fairness of the overall process of the arbitration, and so long as the parties are able to make representations in respect of any decision that might affect the arbitration, whether procedurally or substantively, they will have been afforded due process and will have been given a fair hearing.

35. As the Court of Appeal also pointed out in

Grand Pacific Holdings Ltd v Pacific China Holdings Ltd [2012] 4 HKLRD 1

(CA), the conduct complained of must be serious, even in egregious, before a court could find that a party was unable to present his case. The Respondents' complaint falls far short of such a standard.

Whether the Award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission

36. The Respondents' case is that the issue of whether U is entitled to appoint the Chairman is not within the scope of the reference to the Arbitration. According to the Respondents, the Request did not include any reference to the dispute concerning the appointment of Chairman. It was only in the Statement of Claim dated 20 April 2015 served in the Arbitration that the relief was included, for an order that the provisions concerning the election of the Chairman be amended.

37. As Au J found in

Grant Thornton International Limited v JBPB & Co (A Partnership) HCCT 13/2002

, unreported, 5 April 2013, the phrase "decisions on matters beyond the scope of the submission to arbitration" (as used in Article 34 (2) (iii) of the Model Law for setting aside an award, and applied by s 81 (1) (2) (iii) of the Ordinance) should be narrowly construed. Section 86 (1) (d) (ii) of the Ordinance adopts the same wording as a ground for refusal of enforcement of arbitral awards. In Grant Thornton, Au J held that the phrase "decisions on matters beyond the scope of the submission to arbitration" only includes decisions which are clearly unrelated to or not reasonably required for the determination of the subject dispute, matters or issues submitted to arbitration.

38. The phrase "a difference not contemplated by or not falling within the terms of the submission to arbitration" should likewise be narrowly construed. To do otherwise would just as likely impede arbitration proceedings and increase costs, encouraging parties to segregate satellite or ancillary issues from an arbitration for separate court determination, and encourage unwarranted, microscopic and truncated challenges to an arbitral award, all of which is contrary to the objectives of the Ordinance, to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense. This was explained in Au J's decision on Article 34 (2) (iii), and was also my finding in

S Co v B Co HCCT 12/2013

, unreported, 24 July 2014.

39. The scope of the parties' submission and reference to arbitration is to be determined by the arbitration agreement, the request for arbitration and the pleadings served by the parties, however informal they may be.

40. Under the PAC, the parties agreed (by clause 16) that " all disputes arising from the present Agreement, including those relating to its validity, interpretation, execution and resolution " will be submitted to arbitration.

41. Clause 16 of the PAC does not specify any particular form of the notice of or request for arbitration, nor of the form of claim to be made in the reference.

42. As this court explained in S Co v B Co, a claimant is only required, in the document initiating an arbitration, to set out brief particulars of the general nature of the dispute and of the claim referred to arbitration, an indication of the amount involved, and the relief or remedies sought. In this case, the Arbitration was an ICC arbitration governed by the ICC Arbitration Rules. Article 4 (3) of these rules requires the request for arbitration to contain "a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made", and a "statement of the relief sought".

43. By virtue of s 49 of the Ordinance, Article 21 of the Model Law has effect, and this provides that unless otherwise agreed, the arbitral proceedings in respect of a particular dispute commences on the date on which a request for that dispute to be referred to arbitration is received by the respondent. Section 51 of the Ordinance adopts Article 23 of the Model Law, which applies to statements of claim and defence in an arbitration. Article 23 (1) provides that the claimant shall state the facts supporting his claim, the points at issue and the relief or remedies sought, and the respondent shall state his defence in respect of these matters. Under Article 23 (2), either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it

inappropriate having regard to the delay.

44. In the Request which initiated the Arbitration, U referred to the PAC and the addenda including Addendum C as the agreements under which the dispute referred to the Arbitration arises. It referred to clause 16 of the PAC as the arbitration agreement. In paragraph 13, the Request referred to the dispute relating to the Respondents' breach of their obligations under the PAC and Addendum C, namely, their obligation to change the composition of the JV Board, so that U has a majority number of directors on the JV Board, and their obligation to sell or procure the sale of the Plant by the 2nd Respondent to the JV Company. The Request states that "in broad summary", the dispute referred to the Arbitration is "about enforcing the PAC and the Addenda in the terms agreed ".

45. The Request sets out the disputed Article 7 of the PAC, and in particular Article 7.2 thereof. It refers to Article 7 of Addendum C, and how Article 7.2 of the PAC was substituted by an amended version providing for the composition of the JV Board after the first term of the directors. From paragraph 15 of the Request, U sets out the Respondents' alleged breach of the terms of the PAC, as amended by the addenda. U claims in paragraph 56 that in breach of their obligations under the terms of the PAC and Addendum C, the 1st, 3rd and 4th Respondents failed to cooperate with U "in amending the Articles of the (JV Company) and appointing a new three or five-member board, in which a majority of the directors are appointed by (U)".

46. At paragraph 68 of the Request, U claims for an order that the Respondents take all necessary steps to amend the Articles of the JV Company "so as to ensure that (U) has control over the board of directors and is entitled to appoint a majority of its members, in accordance with their obligations under Article 7 of the PAC, as amended by Article 7 of Addendum C". The other relief sought by U in the Request includes an order that the 1st, 3rd and 4th Respondents procure the 2nd Respondent to sell the Plant to the JV Company, on the terms provided under Article 11 of the PAC.

47. The Request sets out the nature of the dispute between the parties and of the claim which was referred to the Arbitration: namely a contractual dispute as to the effect of the PAC and its addenda including Addendum C, the obligations of the Respondents and the rights of U under Article 7 of the PAC as amended by Article 7 of Addendum C, concerning the composition of the JV Board. Clearly, the Request gives notice of U's claim that the Respondents were in breach of Article 7 of the PAC, as amended by Article 7 of Addendum C. It is correct that the Request made no express mention of U's claim as to its entitlement to appoint the Chairman, but it is clear that the claim made in the reference to the Arbitration is that the Respondents were in breach of Article 7 of the PAC as amended by Article 7 of Addendum C, in their refusal to cooperate with U to amend the Articles of the JV Company, and to appoint a board in which the majority of the directors are appointed by U. The Request sets out the nature of the relief sought in the Arbitration, namely an order that the Respondents should "take all necessary steps to amend" the Articles of the JV Company, "so as to ensure that (U) has control over the board and is entitled to appoint a majority of the board, in accordance with (the Respondents') obligations under Article 7 of the PAC, as amended by Article 7 of Addendum C".

48. There is no doubt that by the time of the commencement of the Arbitration, the parties were already in dispute as to U's claim of entitlement to appoint the majority of the directors on the JV Board, and as to the appointment of U's candidate as Chairman to replace the 3rd Respondent. This is evident from the Statement of Claim served in the Arbitration and dated 20 April 2015 (" SOC ").

49. The SOC sets out the background of the dispute, including the attempts made by U to implement the parties' agreed arrangements under the PAC and the addenda. Paragraphs 108 to 114 set out the events of the shareholders' meeting held on 16 October 2013 (" Meeting "). The signed minutes of the Meeting record the 3rd Respondent's resignation as Chairman of the JV Board; the shareholders' agreement that the members of the board would be replaced; and that U would appoint the Chairman in replacement of the 3rd Respondent. The SOC referred to the correspondence exchanged between the parties in December 2013, in relation to the arrangements for the 3rd Respondent to depart from the management of the JV Company, and his commitments to resign from his position as director and Chairman of the JV Board.

50. U specifically pleads, in paragraph 126 of the SOC, that in breach of the PAC and the shareholders resolution made at the Meeting, the Respondents refused to cooperate with U in implementing the agreed changes to the JV Board. From paragraph 126, the SOC sets out the 3rd Respondent's breach, including (in paragraph 127) his informing U of his decision to remain as Chairman and director, and the 3rd Respondent's refusal to sign the resolutions to be passed to provide, inter alia, for the amendment of the Articles of the JV Company concerning the appointment

of the Chairman of the JV Board.

51. The relief set out in detail at paragraph 154 of the SOC includes an order that the 1st, 3rd and 4th Respondents execute the applicable shareholders' resolutions and amendments to the Articles, and take all necessary steps "so as to ensure (U)'s right to appoint a majority of the members of the board of directors and to amend the provisions concerning the election of the Chairman, in accordance with their obligations under Article 7 of the PAC, as amended by Article 7 of Addendum C and further supplemented by the shareholders' resolution of 16 October 2013".

52. The claims made in the SOC are denied by the Respondents in their Statement of Defence dated 1 June 2015 ("Defence"). The Respondents deny that the PAC and its addenda are valid or effective without the necessary approval by the competent PRC authorities. They deny that they were in breach of their obligations under their agreements with U, and seek the dismissal of the requests for relief sought by U. At paragraph 51 of the Defence, the Respondents claim that U did not raise the issue of the election of the Chairman in the Request, and that the request to amend the provisions of the Articles concerning the election of the Chairman was only added to the list of requests for relief in the SOC.

53. The courts in Hong Kong have consistently emphasized that opposition to enforcement of arbitral awards based on unmeritorious technical points or minor procedural complaints will be viewed with disfavor. In

Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No 1) [2012] 4 HKLRD 1

(CA), which is a case of an application to set aside an award on the ground of inability to present one's case, the Court of Appeal pointed out that the conduct complained of must be serious, and that "an error would only be sufficiently serious if it has undermined due process". The courts are concerned with the structural integrity of the award.

54. As early as in 1991, Kaplan J had highlighted in the case of

Unistress Building Construction Ltd v Humphreys Estate (Forrestdale) Ltd [1992] 2 HKLRD 145

that procedural justice in arbitral proceedings does not require the technicalities of court proceedings to be followed. In his judgment, Kaplan J expressed agreement with the following observations made by the court in

Imperial Leatherware Company Pty Ltd v Macri and Marcellino Pty Ltd (Supreme Court of New South Wales No 50798 of 1980

, unreported, 11 April 1991):

> "I would venture to suggest that one reason why parties submit to arbitration is so that they should avoid 'pre-trial pleading, discovery and other procedures of the Court'. This is so whether the arbitration is long and complex, or short and simple. The heart of the arbitral procedure lies in its ability to provide speedy determination of the real issues. Those aims, to a large extent, are made impossible of achievement if the procedures of a Court are mimicked. Nor is there anything in the requirement to provide 'procedural justice' which requires adoption of the pleadings and procedures of Courts. What is required is that the parties enjoy the benefits of natural justice consistently with the requirements of arbitrators for dispensing with technicalities, with discovery, and doing away with interrogatories. The proper requirement that each party have full notice of the case to be made by the other and a full opportunity to prepare and to answer that case does not require pretrial pleading, discovery and other procedures of the Court ."

55. Viewed as a whole, and as analyzed in paragraph 44 above, the Request has identified the dispute referred to the Arbitration as a claim of the Respondents' breach of their obligation under Article 7 of the PAC as amended by Article 7 of Addendum C, in the context of the parties' rights and obligations concerning the composition and the control of the JV Board. The relief claimed is an order to compel the Respondents to co-operate and to perform in accordance with their obligations under the contracts relied upon.

56. The purpose of the SOC and the Defence in the Arbitration is to identify the issues of the dispute for determination by the Arbitrator in the Arbitration. The facts relied upon by U in support of its allegation of the Respondents' breach of their obligations under the PAC and Addendum C have been adequately set out in the SOC. Even in the context of court proceedings, it is not necessary for a pleading to contain the precise legal formulation or characterization of the forensic analysis relied upon. Once the factual allegations are pleaded and established, it is a question of law whether they are sufficient to support the claim for relief (

Luck Continent Limited v Cheng Chee Tock Theodore & Others [2013] 4 HKLRD 181

).

57. Even if the issue of U's right to appoint the Chairman is not within the original terms of reference, the Arbitrator in this case has the power under Article 23 (4) of the ICC Arbitration Rules to authorize new claims to be made. As the Court of Appeal held in Tronic (on the applicability of Article 34 (2) (a) (iii) in the context of an application to set aside an award), so long as the parties are made aware that the issue will be considered and have been given the opportunity to make submissions on the issue, there is no denial of due or fair process.

58. Considered as a whole, therefore, I am of the view that the Respondents have been given fair and ample notice of the claims which have been referred to the Arbitration which they have to meet, and the full opportunity to prepare and answer the claims as to the amendment of the Articles to ensure U's control of and appointment of its candidates to the JV Company Board, which candidates include the Chairman.

59. The questions as to the effect of Article 7 of the PAC and Article 7 of Addendum C, and the rights and obligations of the parties thereunder, turn on the interpretation of the relevant articles in the context of the agreements made between the parties. The Terms of Reference signed by the parties and by the Arbitrator on 16 September 2015 identify, as the agreed issues for determination, the issue of the interpretation of Article 7 of Addendum C, and whether the agreement made between the parties had been revised or superseded by the Meeting. The Terms also include "all issues arising from" the parties' statements, pleadings and submissions which are relevant and necessary for the Arbitrator's adjudication of the parties' claims and defences.

60. As held in

Grant Thornton International Limited v JBPB & Co (A Partnership) HCCT 13/2012

, unreported, 5 April 2013, only decisions which are "clearly unrelated to or not reasonably required for the determination of the issues that have been submitted to arbitration" can be considered to be outside the terms of the submission. After deciding on the effect of Article 7 of Addendum C, U's right to the control of the JV Board and its entitlement to appoint a majority of the members of the JV Board, it was within the Arbitrator's power, as part of the jurisdiction conferred on her to decide the dispute referred to the Arbitration, to order the Respondents to take steps to amend the Articles to ensure U's right to appoint the majority and concerning the election of the Chairman as disputed by the 3rd Respondent. These are matters "clearly related to and reasonably required" for the determination of the issues submitted by the parties to the Arbitrator in the Arbitration, and are contemplated within the terms of the submission to the Arbitration.

61. To the extent that the Arbitrator's decision that she can decide U's right to appoint the Chairman is one on her jurisdiction, such that the Court has to be satisfied as to its correctness, I am so satisfied for all the reasons set out in the preceding paragraphs.

Whether enforcement of the Award should be refused on ground of public policy

62. In

Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111

, the Court of Final Appeal explained that "contrary to public policy" means contrary to the fundamental conceptions of morality and justice of the forum, and that in an application to resist enforcement of an award in Hong Kong, the public policy to be considered is that of Hong Kong.

63. The Respondents argued that it would be contrary to the public policy of Hong Kong to enforce the Award, as the PAC and Addendum C are invalid and ineffective for lack of registration and approval by the Mainland authorities, as the Fuzhou court so held in the FZ Judgment.

64. In essence, the Respondents are arguing that the Arbitrator had made an error of law in holding that the PAC and Addendum C are effective and valid, and that they do not require approval by the Mainland authorities, either by virtue of the PAC not being a mere share transfer agreement, or by virtue of its constituting a supplemental agreement to which Article 2 of the SPC Provisions applies. On an application to oppose enforcement of an award, the Hong Kong court as the enforcement court is not concerned with the merits of the Award. An error of fact or law made by the tribunal is not a ground to resist enforcement. It is not against the public policy of Hong Kong to enforce the Award whereby the Arbitrator ruled (rightly or wrongly) that the PAC is not one which by its nature requires registration and approval by the Mainland authorities. This Court will not go into reviewing the

correctness of the Arbitrator's decision to uphold the validity and binding effect of the PAC and Addendum C. The concept of "one country two systems" on which Counsel for the Respondents seeks to rely does not assist the Respondents, when the grounds of refusal of enforcement of arbitral awards are so clearly prescribed under Hong Kong law - which is the only law to be applied in these proceedings for the recognition and enforcement of the Award.

65. As the Hong Kong courts have repeatedly emphasized, the "public policy" ground is to be narrowly construed, and must not be seen as a catchall provision to be used whenever convenient. It is limited in scope and is to be sparingly applied. I see nothing which is shocking to the Hong Kong court's conscience in this case, so as to render enforcement of the Award repugnant (

A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389

.

Whether enforcement of the Award should be refused on ground that it would be just

66. The Respondents rely on the same ground propounded for public policy, claiming that refusal of enforcement of the Award would be just, within the meaning of s 86 (2) (c) of the Ordinance, since it would be contrary to PRC law and against the public policy of the PRC to enforce the Award which requires performance of the Respondents' obligations under the PAC and Addendum C on the Mainland. The Respondents emphasized that the JV Company is incorporated on the Mainland and subject to PRC laws which require the PAC and Addendum C to be registered and approved. They further claim that it would be contrary to the FZ Judgment of the Fuzhou court to enforce the PAC and Addendum C which were held by the Fuzhou court to be ineffective.

67. The Respondents further argue that the courts on the Mainland are in a better position to decide on the enforceability of the Award and the validity and effect of the PAC and Addendum C which are governed by PRC law, and that the Hong Kong Court is not the forum conveniens . It would accordingly be just, they argued, to refuse enforcement of the Award.

68. Again, the Arbitrator has ruled that the PAC and Addendum C do not require registration and approval under PRC law. This Court does not have to rule on the validity or effect of the PAC and Addendum C, and does not assert to be the forum for such a determination, which is not required. The orders made by the Arbitrator are for the 1st Respondent, a company incorporated in Hong Kong, to take steps pursuant to the Award, ie to execute a shareholders' resolution for amendments to be made to the Articles, and to take such steps required by the Mainland authorities to ensure U's rights to appoint directors and the Chairman. These steps can be taken by the 1st Respondent in Hong Kong. The 1st Respondent is a company incorporated in Hong Kong, with a registered office in Tai Po, Hong Kong. Its directors, secretary and shareholders are stated in its Annual Return to be the 3rd Respondent and the 4th Respondent, who have registered addresses in Hong Kong. I have not been referred to any specific act which the 1st Respondent cannot, by itself or through its officers, perform in Hong Kong in compliance with the Award.

69. As authority for the proposition that enforcement should be refused on the ground of forum non conveniens, Counsel for the 1st and 3rd Respondents referred to the case of

Figueiredo Ferraz E Engenharia de Projeto v Republic of Peru 663 F4d 384

(2ndCir 2 2011). In that case, the US court refused enforcement of a Peruvian arbitral award on the ground of forum non conveniens, that it would be appropriate for the US court in enforcement proceedings to defer to a foreign jurisdiction to ascertain the meaning of a Peruvian statute. Counsel did not however refer to the conflicting decision of the US courts in

Belize v Belize Social Development Ltd Case No 15- 830

. There, the tribunal had found breaches of a contract which was held by the tribunal to be valid and binding on Belize. In 2015, the DC Circuit upheld the federal court's ruling to confirm the award, and refused the request of Belize for dismissal on the ground of forum non conveniens (in reliance on the 2nd Circuit ruling in Figueiredo Ferraz E Engenharia de Projeto v Republic of Peru), on the basis that its own courts in Belize were better suited to hear the enforcement proceedings. The appeal by Belize to the US Supreme Court was recently declined. The persuasiveness of Figueiredo as an authority is far from clear.

70. It is for a party in whose favor an arbitral award is given to take steps to seek enforcement of the award in any suitable and appropriate jurisdiction. To the extent that enforcement of the Award and any order made under the Award has to be sought on the Mainland, it is for U to take such enforcement action on the Mainland, and for the Respondents to resist and oppose enforcement on

the Mainland on such grounds as may be open to them. This is not within the control of the courts in Hong Kong.

71. So far as Hong Kong is concerned as the court of enforcement of the Award in Hong Kong, the impossibility of performance of the PAC and Addendum C on the Mainland by virtue of any alleged non-compliance with PRC law is not a ground to resist enforcement in Hong Kong. Considering the public policy interests in favor of enforcing arbitration agreements and arbitral awards in Hong Kong, and the fact that resisting enforcement of the Award on the Mainland is an option open to the Respondents, I cannot agree that it would be just to refuse enforcement of the Award in Hong Kong, on the Respondents' assertion that enforcement of the Award on the Mainland would be against the public policy on the Mainland or against PRC law - expressly contrary to the findings made by the Arbitrator applying PRC law.

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

72. The Respondents claim that in its ex parte application for leave to enforce the Award, U failed to disclose the facts that the Respondents had made payment of the monetary parts of the Award; the FZ Judgment had been made, and that U had in fact applied to the Fuzhou court to be joined as a party in the FZ Proceedings to challenge the correctness of the FZ Judgment.

73. Under s 84 of the Ordinance, if the court grants leave for the enforcement of an arbitral award as a judgment of the court, it enters judgment "in terms of the award". If any part of the award has already been complied with and payment made, the party in whose favor the award was entered should not take steps to seek recovery or by way of enforcement of the part of the award which has been complied with. It is for the respondent to resist and oppose any steps taken by the judgment creditor by way of recovery under the satisfied part of the judgment or award.

74. Since the court is to enter judgment in terms of the Award upon granting leave, it is immaterial whether or not the monetary parts of the Award had been paid by the Respondents at the time of the ex parte application.

75. As for the alleged failure to disclose the facts of the FZ Judgment, the FZ Proceedings and U's steps taken, they are similarly irrelevant to the application for leave to enforce the Award. The merits of the Award and the steps taken by U on the Mainland in relation to the FZ Proceedings or the FZ Judgment are irrelevant to the exercise of the court's discretion to grant leave to U to enforce the Award in Hong Kong.

76. There is accordingly no merit in the Respondents' application to set aside the Order on the ground of any material non-disclosure.

Conclusion on application to set aside the Order

77. For all the above reasons, the 1st and 3rd Respondents' application to set aside the Order under s 84 is dismissed, with costs to be paid by the 1st and 3rd Respondents on an indemnity basis (

A v R (Arbitration: Enforcement) [2009] 3 HKLRD 389

).

Application by U for supplemental order

78. By its summons of 21 November 2016 ("November Summons"), U applied to the court under O 45 r 6 (2) for an order to supplement the Order. The November Summons seeks a supplemental order (" Supplemental Order"), to specify the time within which the acts required to be done under the Order should be executed. The Supplemental Order seeks to specify that the 1st Respondent is to execute the shareholders' resolutions referred to in the Order, namely to amend the Articles of the JV Company, within 7 days of the Supplemental Order.

79. On 29 November 2016, the 1st and 3rd Respondents applied to strike out the November Summons, on the ground that U's issue of the November Summons is in breach of the terms of an order made by the parties' consent on 4 November 2016 (" Consent Order "). The Consent Order is that "the Award … shall not be enforced" until after the Respondents' summons to set aside the Order has been finally disposed of.

80. The 1st and 3rd Respondents argued that the November Summons issued under O 45 is a preliminary step to the enforcement of the judgment in terms of the Award, thus constituting breach of the Consent Order.

81. In substance, the November Summons seeks a further order to be made, specifying in clear terms that the relevant acts to be performed by the 1st and 3rd Respondents under the Order should be carried out within a specified time. It does not by itself seek to compel the performance of the Order. I do not agree that the November Summons is in substance enforcement of the Award. Breach and non-compliance with a court order is a serious matter and should be clearly established. I am not satisfied that the November Summons constitutes breach of the terms of the Consent Order.

82. The Respondents' application to strike out the November Summons is dismissed, with costs to U.

83. Upon considering the November Summons, I grant an order in terms of that application, with costs in the cause of HCCT 34/2016.