TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2010/007

On appeal from the Commercial Division

BETWEEN:

PACIFIC CHINA HOLDINGS LTD

Appellant

and

GRAND PACIFIC HOLDINGS LIMITED

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins	Chief Justice
The Hon. Mde. Janice George Creque	Justice of Appeal
The Hon. Mr. Davidson Baptiste	Justice of Appeal

Appearances:

Mr. Richard Millett, QC, Mr. Mark Forte and Ms. Tameka Davis for the appellant
Mr. Jack Husbands for the respondent

2010: May 20;
September 20.

Civil Appeal - Convention award, application to appoint liquidators based on award - The Arbitration Ordinance Section 36(2) – Convention defences – whether debt genuinely disputed on substantial grounds - the scope of the court's discretion under section 36(2) of the Arbitration Ordinance.

The respondent company sought the winding up of the appellant company, claiming that the appellant owed the respondent over US$55 million based on a Convention award made by an arbitration tribunal in Hong Kong. The appellant, in disputing the debt raised Convention defences under section 36(2) and (3) of the Arbitration Ordinance and argued in respect of the arbitral proceedings that: (1) it was unable to present its case; (2) the arbitral process was not in accordance with the parties' agreement, and accordingly (3) enforcing the award would contravene public policy, and that for these reasons the court ought to exercise its discretion and refuse to appoint liquidators in respect of the appellant. The trial judge having concluded that the grounds raised by the appellant could not be

dismissed as being incapable, on full argument in an application to set aside an order for enforcement, of being developed so as to give rise to a substantial dispute as to enforceability, went on further to conclude that the irregularities giving rise to those grounds, had they not occurred would not have in any event impacted the outcome. Accordingly, he granted the order in favour of the respondent and appointed liquidators in respect of the appellant. From this order the appellant appealed in essence on the basis that the trial judge had erred as a matter of law in exercising a broader discretion than that accorded under section 36(2) and (3) of the Arbitration Ordinance.

Held: allowing the appeal and setting aside the order of the learned trial judge and awarding costs to the appellant, that:

1. The court's discretion under section 36(2) of the Ordinance is a narrow one in which a court is justified in overriding a Convention defence where there has been waiver or circumstances giving rise to an estoppel on some such legally recognised principle, or where the error is minor and prejudicially irrelevant;

   Dardana Ltd v. Yukos Oil Co. [2002]1 All ER (Comm) 819, **Kanoria v. Guinness** [2006] 2 All ER (Comm) 413, **Dallah Real Estate and Holding Co.v. Ministry of Religious Affairs of the Government of Pakistan** [2009] EWCA Civ 755; approved; dictum of Kaplan J made obiter in **Paklito Investment Ltd v Klockner East Asia,** [1993] HKLR 39, doubted;

2. Where a real question of enforceability of an arbitration award is raised and thus a real or bona fide dispute on substantial grounds on the debt has arisen it is not open to the court to proceed to make a winding up order on the debt grounded on the award;

   Dictum of Byron CJ in **Sparkasse Bregenz Bank v Associated Capital Corporation,** British Virgin Islands Civil Appeal No. 10 of 2002, applied;

3. The learned trial judge, having concluded that defences had been raised which on full argument in an application to enforce the award was capable of giving rise to a substantial dispute as to enforceability, erred in exercising a broader discretion than permitted under section 36(2) by undertaking a merits review of the Convention award and importing therein a consideration as to whether, the matters complained of in respect of the defences raised, were material to or would have impacted the outcome.

JUDGMENT

[1] **GEORGE-CREQUE, J.A.:** On 11th January 2010, the trial judge of the Commercial Division, in effect, made an order for the winding up of Pacific China Holdings Limited ("PCH") by the appointment of joint liquidators. The order is

based on a debt said to be due by PCH to Grand Pacific Holdings Limited ("GPH") in a sum in excess of US$55 million, plus costs and arbitration fees, pursuant to an ICC arbitration award dated 24th August 2009, ("the Convention award") published by a tribunal in Hong Kong ("the HK tribunal").

[2] PCH, being dissatisfied with that order, has appealed. The trial judge, pending the outcome of an appeal of his decision, in effect, stayed his order. However, the joint liquidators are entitled to take over the management of PCH.

[3] The Virgin Islands has incorporated into its **Arbitration Ordinance**[1], (**"the Ordinance"**) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitrations on 10th June 1958 ("the Convention") Section 36(2) of the Ordinance sets out instances (normally referred to as Convention defences) in which the court may refuse to enforce a Convention award. Section 36(2) and (3) of **The Ordinance**, as relevant to this appeal, are as follows:

> "36. (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves -
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> (a) ...
>
> (b) ...
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> (c) that he was not given proper notice of the appointment of the arbitrator... **or was otherwise unable to present his case;**
>
> (d) ...
>
> (e) that the composition of the arbitral authority or **the arbitral procedure was not in accordance with the agreement of the parties** or failing such agreement, with the law of the country where the arbitration took place;
>
> (f) ...
>
> (3) Enforcement of a Convention Award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or **if it would be contrary to public policy to enforce the award.** (my emphasis)

[1] The Arbitration Ordinance Cap. 6 Laws of the Virgin Islands

[4] It must be noted however, that GPH has not sought enforcement of the Convention award. Rather, GPH has sought to wind up PCH based on the Convention award although no steps have been taken to enforce it. The application to appoint liquidators, as the learned trial judge correctly reminded himself, is not an application to enforce the Convention award. It is recognised however, that the principles to be applied in determining whether to wind up based on a Convention award are analogous to those on an application for enforcement.[2]

[5] Before the trial judge, PCH argued that it was not insolvent and that the debt was disputed on bona fide and substantial grounds in that the Convention award was open to challenge either directly in the Hong Kong courts or indirectly by application of Convention defences in any enforcement proceedings taken by GPH. This, it says, is based on the manner in which the HK tribunal conducted the proceedings before it. PCH relied on three main grounds falling within the Convention defences namely, that:

(1) it was unable to present its case [s.36(2)(c)];

(2) the arbitral procedure was not in accordance with the agreement of the parties [s.36(2)(e)]; and

(3) it would be contrary to public policy to enforce the HK award.

[6] The **Insolvency Act 2003 of the Virgin Islands**, section 10(3), in effect, says that unenforceable claims are not admissible in a winding up, and further says [s. 9(1)], that the holder of an unenforceable arbitral award is not a creditor for the purposes of the said Act.

[7] The relevant and undisputed test in determining whether the debt is genuinely disputed is well settled and is as stated by Byron CJ in **Sparkasse Bregenz Bank v Associated Capital Corporation** where at paragraph 3 he stated it this way:

> "The reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should

[2] See: Re; Affluence Pictures Ltd. [2008] HKCU 1807; Bulk Chartering & Consultants Australia Pty Ltd. vT&T Metal Trading Pty Ltd ("The Krasnagrosk") 114 ALR 189

ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a genuine question to be decided."

Trial judge's findings/conclusions

[8] The trial judge, after setting out the background of the claim and the challenge to the application made by PCH, at paragraph 6 of his judgment, stated in part as follows:

> "... It follows that under the scheme of the Act[3] itself a dispute about enforceability involves a dispute about whether the Applicant [GPH] is a creditor. If such a dispute is substantial (in the sense of being other than flimsy) the court should not appoint liquidators."

[9] At paragraph 7 of his judgment the trial judge set out the approach to be adopted in determining whether he should appoint liquidators based on the Convention award debt. He formulated the approach in this way:

> "... I do not have to be satisfied, in order for the Company [PCH] to succeed on this part of its case, that I would have refused enforcement if that had been the application before me. **I have to be satisfied merely that sufficiently substantial grounds are identified by the Company to raise a real question whether the award is one that should be enforced.** If that point is reached, I should refuse to appoint the liquidators and leave the Applicant to establish enforceability in an application brought for that purpose." (my emphasis)

Neither side takes issue (nor could they) with this approach. Indeed, GPH in its skeletal arguments, at paragraph 18 stated that 'the point for determination by Bannister J was whether the "Convention defences" were capable of amounting to a bona fide dispute on substantial grounds.' This says the same thing though formulated more succinctly.

[10] At paragraph [14] the trial judge then had this to say:

> "Consistently with the approach which I have explained in paragraph [7] of this judgment, I do not think that on an application for the appointment of liquidators I can or should resolve the question whether or not the tribunal

[3] Referring to the Insolvency Act, 2003 of the Virgin Islands.

acted unfairly towards the Company in the respects complained of. "Although I think that the Company's points in relation to the agreed procedural protocol are thin and that the elements of unfairness upon which it relies may have been to a greater or lesser extent self- induced, I do not think that either ground, taken in isolation, can be dismissed as being so flimsy that it would be incapable, on full argument in an application to set aside an order for enforcement, of being developed so as to give rise to a substantial dispute as to enforceability."

[11] I think it useful at this stage to quote a passage from **Redfern and Hunter on International Arbitration** on the role of the enforcement court. At paragraphs 11.72 and 11.73 the authors say this:

> "11.72 ... It is generally enough if the court is satisfied that the hearing was conducted with due regard to any agreement between the parties and in accordance with the principles of equality of treatment and the right of each party to have a proper opportunity to present its case.
>
> 11.73 The national court at the place of enforcement thus has a limited role. Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing."

By analogy, I consider it may be said that on an application to appoint liquidators based on a Convention award where Convention defences are raised which goes to the question of procedural fairness, the function of the winding up court must be to decide whether a real question arises as to whether there was a fair hearing and not to determine that question, it being one for the enforcement court. This is the point I consider that the learned judge was making in his opening sentence in paragraph 14 of his judgment.

[12] The trial judge then went on at paragraph 15 to say that these points could not be taken in isolation and that they must be considered in light of the HK tribunal's total reasoning and overall findings on the Taiwanese law point, and that the HK tribunal having considered the Taiwanese law point had concluded that if Taiwanese law was relevant it would not have assisted PCH's case. On this basis, at para. 16, he went on to hold as follows:

> "Given the basis for the Tribunal's decision on this point, it is plain that even if it were established that its ruling as to the provision of expert evidence was in some measure unfair or made it impossible for the

company to present its best case or was in breach of the parties' procedural protocol, that can have had no impact on the outcome."

[13] At paragraph 17 he went on to hold that:

> "If it is plain that a procedural error, even an error which has prevented a party from presenting a part of his case, had no impact upon the outcome, it seems to me that the court should not, absent exceptional circumstances, refuse enforcement."

[14] The learned trial judge then went on in paragraphs 18, 19, 20 and 21 of his judgment to assess the impact the various matters complained of by PCH would have had on the outcome as considered and found by the HK tribunal. On the Hong Kong law point, (which related to the due execution of the loan agreement) he took the same approach and further concluded at paragraph 28 that:

> "... even if the Company was wrongly prevented by the Tribunal's rulings from making its best case upon this issue, the Company's position became untenable once it conceded... that ratification would cure any invalidity in the conclusion or execution of the agreement on the part of the Applicant. The evidence of ratification relied upon by the Tribunal in paragraph 5.15 of the award is overwhelming. Once that point is reached, ... even if ... the Tribunal unfairly prevented the company from making its case on the Hong Kong law point, there was no unfairness in the outcome"

[15] The trial judge accordingly concluded that no issue of substance had been raised by PCH, capable on an application to enforce the award, of bringing into play the discretion of the court under section 36(2) or 36(3) of **The Ordinance**.

The Appeal

[16] PCH contends that:

(1) the learned judge erred in law or in principle in holding that "If it is plain that a procedural error, even an error which has prevented a party from presenting a part of his case, had no impact upon the outcome, it seems to me that the court should not, absent exceptional circumstances, refuse enforcement" and that he should have held as a matter of law or principle that once a

Convention defence under the Ordinance, section 36(2) or (3)[4] had been made out by a party against whom a Convention award was sought to be enforced, the court's discretion nonetheless to enforce the award under section 36(2):

> "(i) was very narrow and should be exercised in accordance with principle;
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> (ii) in any event, did not extend to permitting the court to enforce the award on the ground that the court considered that the result of the arbitration could have or would have been the same or on the grounds that the facts giving rise to the Convention defence to enforcement were immaterial to the outcome of the award."

(2.1) Further or alternatively, the views of the HK tribunal itself, as expressed or implicit in the award as to relevance or otherwise of an issue is not a consideration which could ever justify enforcing a Convention award where the respondent [PCH] had proved departure from due process in respect of that issue.

(2.2) A fortiori, where the views of the HK tribunal about the relevance of such an issue were not expressed in the award, it was not open to the learned trial judge to form his own conclusions about relevance.

(3) In respect of both Taiwanese law issues, the learned judge erred in law in according any weight to the fact that the HK tribunal had concluded that the issue did not arise, and in respect of the HK law issue, the learned judge erred in law in forming his own views about what the HK tribunal thought about the relevance of that issue, and then according weight to that view.

(4) Having rightly concluded that there was (for the purposes of the application before the court) a genuine and substantive issue

[4] i.e. Art. V.1 and V.2 (b) of the New York Convention

about whether the Convention defences relied on by PCH would (if enforcement of the award were to be sought by GPH) be made out, the learned judge, accordingly, ought not to have embarked on a consideration of the question of materiality and causation, and that had he not so done, he would have been bound to conclude or ought to have concluded that there was a real as opposed to a frivolous issue to be decided by the court which precluded the making of the order sought by GPH and accordingly the application to wind up PCH ought to have been dismissed.

[17] There is no cross-appeal by GPH.[5]

[18] PCH says that the learned trial judge was correct in his reasoning, approach and conclusions up to paragraph 14 of his judgment and thereafter, in particular at paragraph 17, went wrong when, in essence, after formulating the law as he did, proceeded on the basis of that formulation to undertake a 'merits review' of the Convention award/arbitral proceedings, and then to conclude in essence, that notwithstanding the availability of Convention defences in favour of PCH, it was nonetheless open to him to override those defences (and so did) as being immaterial or as causing no prejudice viewed in the context of the eventual outcome on the award. The learned judge was right, PCH says:

> "(i) in holding that if a company had an arguable non-frivolous defence to enforcement of an arbitral award, then that is a bona fide defence on substantial grounds, and the application for appointment of liquidators must be dismissed and
>
> (ii) in concluding that PCH had a bona fide arguable defence to the enforcement of the Convention award; but went wrong in the exercise of his discretion in that he considered that the ambit of his discretion was a broad one which allowed him to undertake a materiality or causation assessment and so to decide that notwithstanding these defences that the outcome on the award would have been the same and on this basis to order the appointment of liquidators. This, PCH says, was an error of law.

[5] GPH's application to extend time for filing a Counter-Notice was dismissed.

> PCH describes the formulation of the law as stated by the trial judge at paragraph 17 as being dangerous in that it is tantamount to saying that a departure from due process is justifiable where the party's case is not a good one. If this is indeed the construction to be placed on the learned judge's formulation then it would seem to be a departure from the principle of due process which is largely regarded as a universal concept having nothing to do with whether a party's case is good or bad."

The discretion under section 36 of the Ordinance

[19] This brings me to the central issue in this appeal which is the breadth of the discretion under s 36 of **The Ordinance**. It is common ground that section 36(2) imports a discretion. The question is: how is that discretion to be exercised? PCH's case, shortly put, is that the trial judge, having concluded that PCH had bona fide arguable Convention defences to the enforcement of the Convention award ought to have stopped at that point and dismissed GPH's application for the appointment of liquidators. Both sides point out that the case law on this issue is in a state of evolution. PCH relies, in the main, on English decisions whilst GPH relies, in the main, on Asian decisions. Such case law and other authoritative sources as there are, must be considered in an effort to derive some guidance as to the scope of the discretion to be exercised in such circumstances. PCH contends that the section 36(2) discretion is a narrow one. GPH contends that it is wider and that the trial judge was correct in his approach. I propose to consider firstly, the authorities on which PCH relies or otherwise makes reference and then those on which GPH places reliance, and where necessary compare them.

The 'no merits review' principle

[20] A convenient starting point is the text by **Joseph "Jurisdiction and Arbitration Agreements and their Enforcement"**[6] to which the learned judge referred at paragraph 17 and on which he appears to have placed some reliance in arriving at his formulation of the law. In paragraph 15.82, **Joseph** makes this statement:

[6] By Albert Jan van den Berg – published in 1981

"Finally, it is suggested that it remains open to a court to enforce an award notwithstanding the establishment of a violation of due process, if the enforcing court **is plainly satisfied that the failure complained of was immaterial to the outcome.**" (my emphasis)

PCH says that this statement made by **Joseph** is not supported by any authority whatsoever and is put forward merely as his personal suggestion and not as a general statement of the law and that unfortunately, sufficient legal material on the point had not been made available to the learned trial judge to enable him to form a fully considered view thereon.

[21] Secondly, PCH points to section 36 of **The Ordinance** which contains no provision to the effect that failure to follow due process must be shown to have an effect or impact the outcome. PCH accordingly submits that there is no 'causation' or 'materiality' element in the Convention or in s 36(2) of **The Ordinance**.

[22] Thirdly, PCH points out that the statement made by **Joseph** does not appear in other texts on the subject, including those of more recent vintage, and refers to **Redfern and Hunter "on International Arbitration**[7]" paragraphs, 11.56, 11.70 and 11.73 where the author, in essence, makes the following statements respectively:

"(a) the Convention does not permit any review on the merits of a Convention award;

(b) the challenge to enforcement of a Convention award on the ground that the party 'was unable to present its case' is the most important ground for refusal as it is directed at ensuring procedural fairness. That is, that the requirements of 'due process' are observed. This requires 'like courts of justice' that the arbitral proceedings should not only be conducted in a manner that is fair but also in a manner which is seen to be fair.

(c) the enforcement court thus has a limited role. 'Its function is not to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing."

[7] Published 2009.

[23] PCH also refers to the text **Comparative Law of International Arbitration** by **Poudret and Besson**[8] where at paragraph 10.3.4(4), after saying that the discretionary power of the court is not to be overestimated, the authors state as follows:

> "With the exception of an abuse of right by the party or the waiver of the right to raise a particular ground by participating in the procedure without making an objection, one does not see how the judge could, on the one hand, rule that a ground for refusal affecting the award exists and, on the other hand, refuse to take it into account on the basis of his discretionary power which is even denied by English case law.[9] Such a reasoning would lead the decision on recognition and enforcement to be arbitrary. In fact, the discretionary power of the judge is justified only in the case where the ground for refusal depends on a decision of a foreign judge, i.e. in the context of an award being set aside or suspended by the court of the seat."

[24] These authorities, PCH says, establish that the discretionary power is a narrow one limited to the circumstances where it may be successfully argued that the party relying on a Convention defence is either estopped from so relying or has otherwise waived its right to do so. A 'merits review' of a Convention award is accordingly not allowed. This was made clear in **Karaha Bodas Co. LLC v Pertamina.**[10] Mr. Jan van den Berg also makes this point in his text at para.111 - 3.1 where he states:

> "A further main feature of the grounds for refusal is that no review of the merits of the arbitral award is allowed. He also refers to the principle of estoppel as being one of the bases on which the court may exercise its discretion in overriding a Convention defence.

The 'procedural fairness' principle

[25] PCH submits that the principle of fairness is universal; that the fact that the result would be the same does not sanction a breach of natural justice; that procedural fairness embodied in the principles of natural justice or due process, (whichever

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[8] 2nd Ed. published in 2007

[9] Reference is made to the case of Yukos -v- Dardana YCA 2002 pg. 570 at pg 575 – where the verb "may" was said not to mean that the judge had a discretionary power to disregard without serious reasons a ground for refusal.

[10] [2008] HKUC – unreported per Ribeiro PJ para.47; and also at para. 92

term one chooses to describe it) requires that the party must be allowed to present its case even where it may be considered that the party's case is bad; that it is in the principle of procedural fairness that section 36 of **The Ordinance** is rooted. I agree. PCH further complains that the learned judge arrived at his conclusions on materiality without the benefit of New York Law, Hong Kong Law or Taiwanese Law and in essence used the conclusions of the tribunal to go further than the tribunal, and this was wrong. For example, he concluded that the evidence of ratification was overwhelming. The tribunal however considered the point by reference to New York Law and not based on a concession on ratification.

The case law

[26] PCH relies on the cases of **Dardana Ltd v Yukos Oil Co.**[11], **Kanoria v Guinness**[12] and the more recent case of **Dallah Real Estate and Holding Co. v Ministry of Religious Affairs of the Government of Pakistan**[13] all decisions of the English Court of Appeal.[14] PCH urges the court to follow these English decisions in holding that:

(1) the court's discretion to refuse to enforce a Convention award must be exercised in accordance with principle and is not open-ended.

(2) the discretion is a narrow one which permits enforcement of a Convention award where a Convention defence has been made out to cases where the defence has been waived or where an estoppel has arisen precluding the party from advancing the defence at all.

Though conceding that these decisions do not rule out other possibilities for overriding a Convention defence, PCH says that what may be gleaned from those decisions is that there is no hint or suggestion that immateriality to the result in the Award itself is a proper basis for overriding a defence.

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[11] [2002]1All ER (Comm) 819
[12] [2006] 2 All ER (Comm) 413
[13] [2009] EWCA Civ 755
[14] The **Dallah** case is on appeal to the UK Supreme Court.

The Dardana decision

[27] This case involved a Convention award made by an arbitral tribunal in Sweden. An application had been made in Sweden (the seat) to set aside the award. The party in whose favour the award was made applied ex-parte in England for permission to enforce the award as a judgment of the English Court under the English **Arbitration Act 1996**. The other party applied to set aside the order on the basis that there was no written agreement to arbitrate and in the alternative a stay of the order for enforcement pending the determination of the Swedish proceedings. At paragraph 8 of the judgment Mance LJ in speaking of section 103 (2) of the **Arbitration Act 1996** which is in similar terms to section 36(2) of **The Ordinance**, had this to say:

> "Section 103(2) cannot introduce an open discretion. The use of the word 'may' must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost, by for example another agreement or estoppel. Support for this is found in **Van den Berg-The New York Arbitration Convention of 1958: towards a uniform judicial interpretation (1981) p. 265**"

Later at paragraph 18 in addressing counsel's submissions to the effect that the court could allow enforcement even if a defence was made out Mance LJ reiterated the position as follows:

> "The word 'may' at the start of section 103(2) does not have the "permissive", purely discretionary, or I would say arbitrary force that the submission suggested. Section 103(2) is designed, as I have said in paragraph [8] above, to enable the court to consider other circumstances, which might on some recognisable legal principle affect the prima facie right to have the award set aside arising in the cases listed in section 103(2)."

May L.J observed that section 103(2) is concerned with the fundamental structural integrity of the arbitration proceedings and expressed the view that the court is unlikely to allow enforcement of an award if it is satisfied that its integrity is fundamentally unsound.

The Kanoria decision

[28] This case arose out of an arbitral clause contained in a business agreement which provided for the creation of a joint venture company between the first claimant and the first defendant. The first defendant became ill. Subsequently he received notice of arbitration. The statement of claim alleged that a company of which he was majority shareholder had failed to pay certain monies due to the joint venture company. There was no allegation that the first defendant had failed to make payments to the joint venture company or to anyone else. The first respondent responded by letter to say he was ill and not in a position to respond and also pointed out that any financial arrangements was with the company and not him personally. The arbitration took place in the first defendant's absence and an award was made inter alias against him. The claimants applied for and obtained permission to enforce the award. The first defendant subsequently applied to set it aside relying on section 103(2) on the bases that he was not given proper notice of the arbitration proceedings and that he had been unable to present his case. The judge set aside the enforcement order. The claimants appealed. At the hearing of the appeal a document was produced which contained the oral submissions made by the claimants to the arbitrator which included that the first defendant had acted with deliberate and mala fide intent. It was held that it was clear on the natural wording of section 103(2)(c) that a party to an arbitration was unable to present his case if he was never informed of the case which he was called upon to meet; that the first defendant had never had a fair chance to meet the case which was presented to the arbitrator and accordingly there was a good ground for applying the provision that enforcement or recognition of the award might be refused. Lord Phillip of Worth Matravers CJ at paragraphs 24 of his judgment had this to say:

> "[24] ... I find that there is good ground for applying the provision that recognition or enforcement of the award may be refused. Mr. Flannery has emphasised that the provision says 'may' and submitted that this court has a jurisdiction whether to refuse enforcement, which it should not exercise ... he submits because Mr. Guinness failed to take advantage of the opportunity that had been open to him to challenge the award before the Indian court. That is correct. Mr. Guinness made such a challenge, but it was ruled out as being out of time.

> [25] As to that submission, I would first express doubt as to whether the broad discretion that Mr. Flannery suggests exists is available to the court... .."

He then cited the dictum of Mance LJ in **Dardana** at paragraph 8.

The Dallah decision

[29] This case also involved a Convention award made by an arbitral tribunal in Paris in favour of Dallah and against the Government of Pakistan. The Government had argued that it was not a party to the arbitration clause in the agreement and had challenged the jurisdiction of the arbitral tribunal. The tribunal decided to determine the question of jurisdiction first. The Government provided some written submissions under protest, but otherwise declined to take part in the proceedings. The arbitral tribunal held that the Government was bound by the arbitration clause and in its subsequent awards found the Government liable and awarded damages against the Government. Dallah brought enforcement proceedings under section 101(2) of the **Arbitration Act 1996** [UK]. An ex-parte order of enforcement was granted. The Government applied to set it aside on the basis that the arbitration agreement was not valid within the meaning of section 103(2)(b) of the Act. Aikens J. held that the Government was not a party to the arbitration clause in the agreement and therefore no valid agreement between it and Dallah and that the award should therefore not be enforced.

[30] Moore-Bick LJ agreed with the observations of Mance LJ, Lord Phillips CJ and May LJ in **Dardana** and **Kanoria** to the effect that section 103(2) does not import a broad or open ended discretion.[15]

[31] Rix L.J in considering the section 103(2) discretion *(articleV.I New York Convention)* referred to a number of cases. He referred to **Paklito Investment Ltd v Klockner East Asia,** [16] a decision of the High Court of Hong Kong in which

[15] See: paras. 58 and 59 of judgment.
[16] [1993] HKLR 39

Kaplan J, notwithstanding refusal to enforce a Chinese award stated obiter, on the support of the statement in Professor Van den Berg's book, (at 48/49), as follows:

> "In relation to the ground relied on this case, 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. This view is supported by Professor Van den Berg in his book, The New York Convention 1958 at p. 302

This would appear to import a 'materiality' element in the exercise of the discretion in relation to Convention awards.

[32] He also referred to **China Agribusiness Development Corporation v Balli Trading**[17], an English decision in which a Chinese award was enforced although a Convention defence had been made out. At issue was a change in the arbitration rules between the time of the arbitration agreement and the time when the dispute arose. The change affected the fee structure. The point however was not raised until enforcement. Longmore J held, in effect, that although the '*arbitral procedure was not in accordance with the agreement of the parties,*' the change was insufficient to prejudice the defendant. In so doing he followed Kaplan J in the ***Chen Jen*** case [1992] 1HK Cases 328. Longmore J then had this to say at pg. 80:

> "A party who only at the door of the enforcing Court, dreams up a reason for suggesting that a Convention award should not be enforced is unlikely to have the court's sympathy in his favour, and for this reason also, I would not on the facts of this case be prepared to refuse enforcement of the award"

[33] Rix LJ then turned to consider the cases of **Dardana** (2002), **IPCO(Nigeria) Ltd v Nigerian National Petroleum Corporation**[18] (2005), the **Svenska Petroleum** decisions[19] (2005/ 2006), and **Kanoria** and thereafter had this to say:

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[17] [1998] Lloyd's Rep. Vol. 2 76
[18] [2005] EWHC 726 (Comm
[19] (1) Svenska Petroleum Exploration AB v Government of the Republic of Lithuania [2005] EWHC 9 (Comm)
(2) Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2) [2006] EWCA 1529

> "These authorities as a whole, in my judgment, do not favour a broad discretion such as Ms. Heilbron would need to pray in aid of her submissions in this case. It is true that in **China Agribusiness** Longmore J exercised a discretion to enforce even where an article V defence had been made out, and that in **Svenska** at first instance Mr. Teare QC (as he then was) came closest in a situation somewhat similar to the present case, of being willing to recognise an award even on the assumption that a Convention defence had been made out. However, in this court, the dicta of **Dardana** (sic) and in **Kanoria** suggests that any discretion is narrow and would be unlikely to be exercised where the award in question was subject to a fundamental or structural defect. There can hardly be a more fundamental defect than an award against someone who was never a party to the relevant contract or agreement to arbitrate"

He then concluded at paragraph 89 thus:

> "In sum, I see no reason arising out of the interesting arguments put before the court in this appeal to doubt, even if it was open to do so, this court's views in **Dardana** and **Kanoria** that any discretion to enforce despite the establishment of a Convention defence ...is a narrow one. Indeed, it seems to me that in the context of the expression "may be refused... only if" (article V), ... , especially against the background of the French text ('...') and the expressions of the English Statute "shall not be refused except" and "may be refused if" (section 103(1) and (2)), are really concerned to express a limitation on the power to refuse enforcement, rather than to grant a discretion to enforce despite the existence of a proven defence. What one is left with therefore is a general requirement to enforce, subject to certain limited defences. There is no express provision however as to what is to happen if a defence is proven, but the strong inference is that a proven defence is a defence. It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor Van den Berg's view, see **The New York Convention 1958** at 265), **or that a minor and prejudicially irrelevant error** (my emphasis) albeit within the Convention or statutory language might not succeed as a defence (as in **China Agribusiness**). But it is difficult to think that anything as fundamental as the absence of consent or some substantial and material unfairness in the arbitral proceedings could leave it open to a court to ignore the proven defence and instead decide in favour of enforcement."

[34] PCH points out that Professor Van den Berg appears to have revised his view regarding the discretion to enforce in the presence of a Convention defence and

refers to his more recent statement at para. 7 p.55 of his work[20] where he made this statement:

> "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."

[35] Mr. Husbands on behalf of GPH says, and I agree, that there is a pro enforcement policy in respect of Convention awards. That, to my mind, is clear from the very wording of the language of section 36 of **The Ordinance** and article V of the Convention. (see also dictum of Gross J in **IPCO** para. 11). GPH accepts that the section 36(2) discretion can be exercised where there is waiver or estoppel but says that, in addition, it may also be exercised where the breach is de minimis. GPH finds support for this in Rix L.J's dictum at para. 89 of **Dallah** recited above, and no doubt from the statement in Professor Van den Berg's book recited above.

[36] GPH also says that at paragraph 14 of his judgment, the learned judge said nothing more than that those points or matters raised by PCH can give rise to a substantial dispute but that the learned judge did not make a finding that any of the Convention defences had been made out and merely made an assumption to that effect for the sake of argument. I will return later in this judgment to this point and the de minimis principle in the context of the learned judge's judgment.

[37] On the Hong Kong Law point, GPH says that it mattered not what law the learned judge applied to the question of authorization of the loan agreement since it was based on a concession by PCH. PCH however refutes that there was any such concession that there had been ratification but rather *'if'* there was ratification[21]. Further, PCH says that the HK tribunal did not rely on any concession in respect of ratification but rather relied on New York Law.[22] And further, the finding by the learned judge [judgment para. 28] that the evidence of ratification was overwhelming (as compared to para. 5.15 of the arbitral award) and without the

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[20] Published - 2008
[21] See; Main Bundle 1 – PCH's Post – hearing submissions para. 48.10
[22] See; HK Arbitral Award para. 5.11

benefit of New York Law on the point was plainly wrong. In light of the tribunal's findings and PCH's submissions, it would appear to me that the criticism levelled at the learned judge for going further on this point than the tribunal is justified.

[38] I now turn to consider the cases in which GPH relies in advocating for a broader sectioin 36(2) discretion and which it says provide some authority for the position the learned judge took.

Apex Tech Investment Limited v Chuang's Development (China) Limited[23]

[39] This is a decision of the Hong Kong Court of Appeal. The claimant obtained a Convention award in China and obtained an order ex parte in the court of Hong Kong to enforce the award. The defendant's application to set aside the ex parte order of enforcement was dismissed and the defendant appealed. The defendant complained that there was a procedural irregularity in that it ought to have been given notice of the results of enquires made by the arbitral tribunal and then ought to have been given an opportunity to make further submissions and if necessary call further evidence - in short, raising the Convention defence that it had been '*unable to present its case.*' The enforcing judge agreed that the defendant had been unable to present his case but still ordered enforcement on the basis that:

> "Having examined the material put forward by the defendant which it submitted would have been available to put before the tribunal, he came to the conclusion that the result of the arbitration could not have been different even if the opportunity to be heard had been granted"

It was there said by Mortimer JA that the judge relied upon **Paklito** and the principles in Professor Van den Berg's paper who in turn relied on a court of appeal decision in Hamburg in saying that:

> "If it is clear that the arbitral decision could not have been different, had the irregularity in the procedure not occurred, it would make no sense to refuse enforcement."

The court, acting on this principle, concluded on the facts that it could not say that if the defendant had been given the opportunity to make further representations to

[23] CACV 000231/1995 – judgment delivered 15th March 1996

the arbitral tribunal after it had made its inquiries that it could not have affected the outcome of the award and allowed the appeal. It is fair to say that **Apex** simply proceeded on the basis that **Paklito** was right in requiring a 'materiality' element notwithstanding that such a requirement is not expressed in the New York Convention article V discretion with regard to enforcement of Convention awards.

Soh Beng Tee & Co Pte Ltd v Fairmont Development Pte. Ltd[24]

[40] This is a decision of the court of appeal of Singapore and involved a domestic Singapore arbitral award and an application in the Singapore court to set it aside. The arbitral award was therefore not a Convention award. Furthermore, the circumstances for setting aside an award under the Singapore **Arbitration Act** required the element of prejudice to be shown by a party seeking to set aside an award. Accordingly, I do not consider that much assistance can be derived from this case which was clearly based on the arbitration laws of Singapore and its unique provisions vis-à-vis the provisions of the Convention or section 36(2) of **The Ordinance.**

Shandong Textiles Import and Export Corporation v Da Hua Non Ferrous Metals Limited[25]

[41] In this case the Chinese arbitral tribunal known as CIETAC published an award in respect of parties to a contract for raw cotton. The plaintiff sought enforcement of the award in Hong Kong being a Convention award. Leave to enforce was granted ex parte and the defendant applied to set it aside raising various Convention defences including that the defendant was unable to present its case. May J, following **Paklito,** in paragraph 37 of his judgment had this to say:

> "... In order to make good a submission under section 44(2)(c) of the Ordinance, a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings or an important part of them have been conducted unfairly. The lack of fairness and equality is the key here: ..."

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[24] [2007] 3 SLR 86

[25] HCCT 80/1997 – Judgment – 6th March 2002

[42] PCH submits that **Shandong** should not be followed for these reasons:

(1) it is a decision of a court of first instance;

(2) it predates the **Dardana, Kanoria** and **Dallah** decisions;

(3) the trial judge there simply applied **Paklito** without analysis as to whether it was right or wrong; and

(4) bearing in mind that what was said in this regard in **Paklito** was said obiter.

Brunswick Bowling & Billiards Corporation v Shanghai Zhonglu Industrial Co. Ltd.[26]

[43] This is a decision of the High Court of Hong Kong. The case involved an arbitral award of a tribunal in Hong Kong governed by the UNCITRAL Model Law but was not a Convention award. The party against whom the award was made applied to the High Court in Hong Kong to set it aside relying on grounds stated in article 34(2) of the Model Law which are not unlike some grounds under article V of the Convention or section 36(2) of **The Ordinance**. Lam J, in seeking guidance on the exercise of the discretion from authorities applying the Convention, followed **Paklito** (which had in turn relied on Professor Van den Berg's statement) and concluded on that basis that, where any one of the reasons put forward were sufficient for the Tribunal's decision that the court may decline to set aside the award even if the Tribunal had not heard the parties on one of the reasons provided the court is satisfied that the result would be the same. PCH advances more or less similar reasons as those advanced in respect of **Shandong** in urging the court not to follow this decision. In addition they point out that this was not a Convention award and made no reference to the English cases of **Dardana** and **Kanoria.**

[44] It is worthwhile pointing out that in **Brunswick,** Lam J, in being urged to follow certain English decisions and on submissions made to him to the effect that in

[26] HCCT 66/2007

order for a party to succeed in setting aside an award it is necessary for the party to show that the inability to present a case led to substantial prejudice, drew attention to the difference between the English legislative framework and that of Hong Kong under the Model Law. He noted, in essence that whereas the English **Arbitration Act 1996** there was no such corresponding provision under the Hong Kong Model Law and did not consider that the English requirement of causation of substantial injustice could be imported into Hong Kong law. He concluded at para. 35 of his judgment that a party applying to set aside an award does not have to show that a violation under article 34(2) has caused substantial injustice. It is a worthwhile reminder in considering the case law to ensure that the legislative provisions being applied in particular countries where enforcement is sought, accord with the Convention and does not contain other qualifying provisions or elements bearing on the exercise of the discretion.

[45] Mr. Husbands posits that this court must decide which line of cases to follow - whether the English line of cases or the Asian line of cases all of which are of persuasive authority only. He says that Rix LJ in **Dallah** seemed prepared to go further along the lines of the Hong Kong cases. I do not agree. Rix LJ, in my view, was in agreement with the **Dardana** and **Kanoria** decisions and allowed for the instance where the violation may be said to be minor and prejudicially irrelevant. He has certainly not gone to the extent of importing a materiality requirement which appears to be the thrust of the **Paklito** line of decisions.

The approach to be adopted

[46] On the exercise of the discretion I, for my part, am more comfortable adapting the approach expressed by the law lords in the English decisions of **Dardana, Kanoria and Dallah** as to the breadth of the section 36 discretion rather than the Asian decisions which follow the obiter dictum of Kaplan J in **Paklito** which in turn appears to have been based on the opinion expressed by Professor Van den Berg, unsupported by authority in respect of a Convention award. Further, the Convention and section 36 of the Ordinance is silent as to requiring a materiality

element in the establishment of Convention defences. Were it a consideration, no doubt it would have been so stated. The materiality requirement would also in my view potentially whittle down the "No Merits review" principle with which all the distinguished authors including Professor Van den Berg and the case law accepts as inviolable as regards an enforcement court for fear of usurping the very function and role of the arbitral tribunal or that of the supervisory court.

[47] Accordingly, I would hold that the section 36 (2) discretion is a narrow one in which a court is justified in overriding a Convention defence where there has been waiver or circumstances giving rise to an estoppel on some such legally recognised principle or where, as Lord Rix LJ said in **Dallah,** the error is minor and prejudicially irrelevant. It does not permit the enforcing court and a fortiori a winding up court on a Convention award yet to be enforced, to undertake a merits review of the award and to import into the exercise of the discretion the consideration as to whether, had the irregularity not occurred or the material taken into account, the outcome would have been unaffected.

Waiver

[48] At this juncture, I propose to address the question whether PCH waived its rights to present its case or any part of it. GPH contends [para. 60 of its skeletals] that after the alleged procedural breach occurred, PCH continued to participate fully in the arbitration and never suggested that it was unable to raise any complaint it may have had arising out of the alleged procedural breach and that accordingly PCH waived its right to complain on the ground of a procedural defect. GPH relies on **Minmetals Germany GmbH v Ferco Steel**[27] for the principle that if a party had an opportunity to present its case but did not do so he may not thereafter raise it as a section 36(2)(c) Convention defence. In reply, PCH says this principle is not engaged here as PCH was deprived of the opportunity and objected vociferously at the time; that PCH continued to participate but under reservations of all its rights. PCH having objected and reserved all its rights on the issue, whilst

[27] [1999] 1All ER 315

continuing to participate in the arbitration cannot, in my view, amount to a waiver of its rights. Accordingly this does not afford a basis for overriding the Convention defences justifying an enforcement order. GPH said nothing further on this point at the hearing and I do not consider that any further elaboration is warranted.

The principles in Minmetals

[49] At this stage I think it useful to set out the principles gleaned from **Minmetals** and referred to and adopted by the learned judge and also because GPH contends that the trial judge was applying in particular the second stated principle in **Minmetals** and its further contention that the trial judge had in essence concluded that the violations complained of were de minimis. I do not consider that I need do no more than recite them from paragraph 11 of the judge's judgment:

(1) it is for the party resisting enforcement to prove matters going to the exercise of the discretion under subsections (36)(2)(c) or (e) or the public policy limb of section 36(3) of the Ordinance;

(2) a court asked to enforce an award or set aside an order for enforcement (which must involve precisely the same principles) is free to take its own view as to the overall limits of the objections taken by a respondent on subsection 36(2)(c) or (e) grounds; and

(3) in addition to the caution of the courts on public policy grounds when it comes to the enforcement of the awards based upon, or the enforcement of which might be productive of some illegality or equivalent vitiating factor, absence of due process may found a public policy objection under section 36(3)

[50] As I alluded to earlier, [at para. 36 above] GPH puts forward different views as to what the learned judge may be said to have concluded or meant in paragraph 14 of his judgment. Apart from this GPH says that the statement of the learned judge in paragraph 14 of his judgment is capable of giving rise to ambiguity but that he makes clear in the succeeding two paragraphs that these grounds cannot be

taken in isolation but must be considered in the light of the tribunal's overall reasoning and findings on the Taiwanese Law point and the similar approach adopted in respect of the remaining two grounds. This approach, GPH says, is in reality, the adoption by the trial judge of the second principle in **Minmetals,** (i.e. that the court is free to take its own view as to the overall merits of the objections advanced by a respondent on the Convention defences in question).

[51] PCH contends that this approach was not an application of the second principle in **Minmetals** as GPH suggests, as the learned judge was not considering the merits of the objections raised but rather the question whether, notwithstanding that Convention defences had been made out, enforcement should be ordered. PCH, also says that there is no ambiguity in the judge's judgment; that paragraphs 14, 17 and 18 make it clear that the learned judge was proceeding on the basis that PCH could make out arguable Convention defences sufficient to pass the "substantial dispute" test as set out in **Sparkasse,** but that the learned judge considered that these points could not be considered 'in isolation' from the other matters decided by the HK tribunal which in his view led to the conclusions reached by the Tribunal and to conclude that it would not have made a difference to the outcome. PCH says that this is plain from paras 15 and 17 and the way in which he reasoned the rest of his judgment. Shortly put, PCH says that the reason why the learned judge made the winding up order was not because he considered that PCH's Convention defences were per se frivolous (indeed PCH says he proceeded on the basis that they were not) but because he considered that the matters which gave rise to those grounds, had they not occurred would not have yielded a different result. He arrived at this conclusion having undertaken a merits review of the award - a course which was not open to him as a matter of law.

[52] Having considered the learned judge's judgment in its entirety, it is quite easy to follow the learned judge's reasoning and his approach through the various stages in considering the issues raised and I agree with PCH's analysis of it. I do not consider that paragraph 14 is ambiguous. Indeed, in my view he was quite clear

in saying that on an application for the appointment of liquidators that he could not or should not decide whether or not the Tribunal had acted unfairly to PCH. Accordingly, I do not accept that the trial judge was applying the second principle in **Minmetals.**

The de minimis principle – what did the learned judge conclude?

[53] I now return to the de minimis principle in determining whether it may be said that the breach or error of procedure was, as Rix LJ termed it in **Dallah,** minor and prejudicially irrelevant or, as Professor Van den Berg puts it, de minimis. This raises the critical question here as to what the learned judge in fact concluded at paragraph 14 of his judgment. GPH contends, in essence, that the learned judge was applying the 'de minimis construction' by considering the merits of the objections raised, when at paragraph 14 of his judgment he described PCH's objections as 'thin' and the elements of unfairness complained of as 'to a greater or lessor extent self – induced'.

[54] PCH says that the learned trial judge did not say that the Convention defences were de minimis, trivial, or so minor that it could be ignored. I agree. Having concluded that the grounds raised were capable of giving rise to a substantial dispute as to enforceability, and thus formed a view as to the merits of the objections, it would be quite odd in my view, for the learned trial judge to then conclude that the objections were de minimis or so minor and trivial and thus of no moment.

[55] Although he expressed the view that the points in relation to the agreed protocol were thin and that the elements of unfairness may have to some extent been self induced he clearly concluded that neither point "taken in isolation can be dismissed as being so flimsy that it would be incapable on full argument in an application to set aside an order for enforcement, of being developed so as to give rise to a substantial dispute as to enforceability." This is clearly in keeping with his stated approach, and with which I agree, in paragraph 7 of his judgment where he said:

> "... I do not have to be satisfied, in order for the company to succeed on this part of its case, that I would have refused enforcement if that had been the application before me. I have to be satisfied merely, that sufficiently substantial grounds are identified by the company [PCH] **to raise a real question** [my emphasis] whether the award is one that should be enforced. If that point is reached, I should refuse to appoint liquidators and leave the Applicant to establish enforceability in an application brought for that purpose".

[56] To my mind, the learned judge reached that point in paragraph 14, based on his stated approach in paragraph 7, where he was satisfied that sufficiently substantial grounds had been identified by PCH which raised the real question as to whether the award was one which should be enforced. However, he considered it necessary to go further and assess whether the violations were material to the outcome. The course from this point onwards led him into error in adopting a materiality test and entering upon a merits review of the award. It seems to me quite clear from his reasoning and conclusions on each of the points raised that the turning point for the learned trial judge in PCH not succeeding on its case was on the basis that he considered that the outcome of the award would have been the same even if the violations had not occurred. It is fair to say that the learned trial judge adopted an approach which accords with Professor Van den Berg's statement relied on by Kaplan J in **Paklito** and the **Paklito** line of decisions which I do not consider, for the reasons given, to be the correct approach.

Conclusion

[57] For the foregoing reasons I would hold that when the learned trial judge reached the point he did at paragraph 14 of his judgment, he ought to have dismissed GPH's application having concluded that a real question of enforceability, and thus a real or bona fide dispute on substantial grounds on the debt had arisen and not go further by undertaking a merits review of the award. This course, on the authorities, was not open to the learned trial judge and in so doing he erred as a matter of law. Having so concluded I do not consider it necessary to enter into a serial discourse on the Convention defences raised by PCH in and of themselves.

[58] Accordingly, I would allow this appeal and set aside the order of the learned trial judge.

Costs

[59] The remaining matter for consideration is that of costs. The general rule is that costs follow the event. There is no suggestion that there should be a departure from the general rule. The **Civil Procedure Rules 2000** do not apply to winding up proceedings. The parties were invited to file submissions on costs. My attention has been drawn however, to the order of my learned brother Baptiste JA made on 21st July, on an application by PCH for a valuation of the claim which application was unopposed. He valued the claim for the purposes of this appeal in the sum of US$55,176,170.48. I take this as a consensual invitation to treat the matter of costs under the prescribed costs regime under **CPR 2000** notwithstanding. Applying the scale of prescribed costs in Appendix B of **CPR 2000**, I would order the respondent GPH to pay the appellant's cost on this appeal fixed at two thirds of the amount which may have been awarded below based on the fixed value of US$55,176,170.48.

[60] Finally, I would be remiss were I not to express my gratitude to counsel on both sides for their well researched and ably presented arguments both written and oral which served to make my task much easier.

Janice George-Creque
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Davidson Baptiste
Justice of Appeal