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HCCT28/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO.28 OF 2002

IN THE MATTER OF THE ARBITRATION ORDINANCE (CAP.341)

and

IN THE MATTER OF AN ARBITRATION AWARD DATED 18 DECMEBER 2000 MADE IN AN ARBITRATION

BETWEEN

KARAHA BODAS COMPANY LLC Plaintiff

and

PERSUSAHAAN PERTAMBANGAN MINYDAK DAN GAS BUMI NEGARA (otherwise known as PERTAMINA) Defendant

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Before : Hon Burrell J in Chambers

Date of Hearing : 17 December 2002

Date of Decision : 20 December 2002

D E C I S I O N

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1. The plaintiff ("KBC") is a Cayman Island company. It possesses an arbitration award for US$282 million against the defendant ("Pertamina") an Indonesian company. The seat of the arbitration was in Geneva, Switzerland although it was actually heard in Paris. In Hong Kong KBC have an *ex parte* order enabling it to enforce the award in Hong Kong. Pertamina have applied to set aside the *ex parte* order. That application is due to be heard on 7 January 2003 with four days reserved.

2. By this application KBC seeks an order for security both for the estimated value of the enforcement in Hong Kong (said to be "at least US$50 million") and for costs in the sum of HK$3 million.

JURISDICTION

3. Pertamina's preliminary point is on jurisdiction. The summons is brought under Order 73, rule 10A. Mr Charles Manzoni for Pertamina submits that rule 10A only applies to section 44(2)(a)-(e) of Cap.341 and not to section 44(2)(f). He submits therefore that the court has no jurisdiction to award security in relation to section 44(2)(f) and therefore the hearing on 7 January 2003 must proceed in any event. Thus, an order for security would be pointless.

4. Section 44 provides :

> "44. Refusal of enforcement
>
> (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapability; or

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(d) subject to subsection (4), that 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 to arbitration; or

(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; or

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(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.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(*f*), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

5. Order 73, rule 10A was introduced as result of the ruling of Kaplan J in *JJ Agro Industries (P) Ltd v. Texuna International Ltd* [1992] 2 HKLR 391. In so far as it is relevant to the question of security that decision was that section 44(5) only enabled a court to order security in respect of section 44(2)(f) and that the court had no jurisdiction, under section 44(5) to order security under section 44(2)(a)-(e). Order 73, rule 10A was therefore introduced. It provides as follows :

> "Where a debtor has applied to set aside an order made under rule 10, the Court may, either of its own motion or on an application made by the creditor, and if, having regard to all the circumstances of the case it thinks it just to do so, impose such terms, as to giving security or otherwise, as a condition of the further conduct of the application, as it thinks fit."

6. Mr Manzoni submits that the jurisdiction for security under (a)-(e) is found in rule 10A only and the jurisdiction for security under (f) is found under section 44(5) only. I do not agree.

7. In my judgment there is no valid argument for excluding section 44(2)(f) from the provisions of rule 10A. The suggestion that section 44(2) was to be carved up as a result of the introduction of rule 10A is, in my view, without merit. I accept also Mr Jat Sew Tong SC's additional submission (for KBC) that section 44(5) simply does not apply here because the court is not being asked to adjourn anything and it is fundamental to KBC's case that there is no application which has been made for the setting aside of the award to a competent authority of the country in which, or under the law of which, the arbitration was made.

8. In short, this is an application solely under rule 10A which governs the whole of section 44(2). I regard the commentary in the Hong Kong Civil Procedure on rule 10A, which is as follows :

> " **Effect of rule** — This provision places the court's power to order security of its own motion or on the application of the creditor in relation to applications under s.44(2)(a)–(e) and (3) of the Arbitration Ordinance on the same footing as the powers vested in it by s.44(5) of the Ordinance in relation to applications under s.44(2)(f). In so doing, it negatives the decision of the former High Court in *JJ Argo Industries (P) Ltd (a firm) v. Texuna International Ltd* [1994] 1 H.K.L.R. 89. It is therefore submitted that the court will apply the same principles in r.10A cases as apply to applications under s.44(5) of the Arbitration Ordinance (see *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corp* [1993] 2 Lloyds's Rep.208)."

simply to mean that as a result of the introduction of rule 10A security can now be ordered in respect of all the subsections to section 44(2) whereas before, it was only possible in relation to subsection (f). Moreover, when exercising the court's discretion the same principles apply.

THE DISCRETION

9. The court must now decide if it just to order security in all the circumstances of the case. The two main considerations under the heading of "the circumstances of the case" are :

(i) the merits of Pertamina's challenge to the award; and

(ii) the ease or difficulty of enforcement and whether it will be rendered more difficult as enforcement is delayed.

(*Soleh Boneh International Ltd v. Uganda* [1993] 2 Lloyd's Reports, at p.212.1 and *Dardana Ltd v. Yokos Oil* [2002] 1 Lloyd's Reports, at p.230.1.)

A. The merits of the challenge

10. Mr Manzoni submits that there are many complex legal issues in Pertamina's challenge. Four days have been set aside to argue them. There are lengthy competing expert opinions as to the law in other jurisdiction. His primary submission is that the only safe course on the application is to form no view, either way, on the merits of the challenge. Failing that he submits that if any view is taken it should be no more than to acknowledge, in view of the wealth of material to be placed before the court in January 2003, that there are serious legal issues to be canvassed. Thus, at this stage, any view should be a neutral one.

11. Mr Jat on the other hand submits that the court should not close its eyes to the merits. If the court can come to a view in KBC's favour, albeit on a preliminary and non-detailed analysis, that the merits are very much on their side, it would be unjust not to take account of the fact.

12. I decline the request to close my eyes completely to the merits at this stage. The following points are reasonably and properly made by KBC.

13. The first and primary ground to resist the award is as follows :

> "Ground 1 : the award has been set aside by the courts in Indonesia, a competent authority of the country "under the laws of which" the award was made within the meaning of s 44(2)(f)."

14. The award was very recently annulled by the courts in Indonesia. Pertamina now argue that Indonesia is a competent authority

under whose laws the award was made. Mr Jat describes this ground as "utterly devoid of merits". In short he points to the following factors :

(i) The arbitration agreement does not state that the arbitration shall be governed by Indonesian law.

(ii) The parties chose Switzerland, a very neutral country, as the seat of the arbitration and there is a very strong inference that Swiss law would apply.

(iii) The arbitration agreement made express provisions incorporating certain laws of Indonesia which there would be no need to do if it was to be governed by Indonesian law. (It is true that it also made express provisions waiving certain provisions of Indonesian law.)

(iv) Pertamina relied on Swiss law in the arbitration itself.

(v) Pertamina relied on Swiss law in the enforcement proceedings in the USA.

(vi) the argument that Indonesian law was the law governing the arbitration has only been advanced at the 11th hour as a last resort. It has not been argued before and Pertamina should be estopped from arguing now by virtue of such previous conduct.

15. The remaining grounds upon which Pertamina seek to resist the award, according to Mr Jat, have less merit than Ground 1. He submits that they are largely technical and procedural and amount to "whingeing after the event". If the affirmation evidence of Mr Issacson for KBC is accepted then there would be merit in such a description. Mr Manzoni, naturally, strongly refutes such a suggestion.

16. The court's approach to a consideration of the merits on all the grounds is to be cautious. A preliminary view may turn out to be an incorrect view. Any preliminary view should certainly not be construed as a pre-judgment. However, I feel able to say that such preliminary view as the court has been able to make on the merits, on the limited information available at this stage, is that it appears to weigh in favour of KBC's application for security.

B. Ease or difficulty of enforcement

17. KBC point to the following factors in support of the exercise of the court's discretion in their favour.

(1) Lack of good faith. Pertamina only returned to Indonesia to apply to set aside the award (successfully) relatively recently. It is submitted that this belated application shows a lack of good faith. Moreover the history of the litigation worldwide demonstrates conduct in which every point is taken at every stage. For example, the unsuccessful application in Hong Kong to challenge the validity of the service of the award in Indonesia.

An alternative view of this conduct is that Pertamina are merely fighting every corner. They are fighting strenuously and have every right to do so.

(2) The assets in Hong Kong are insufficient to satisfy the award. The present position is that Pertamina's assets in Hong Kong (which are shares in three private companies) are "frozen" by an injunction and Garnishee and charging orders *nisi*. The value of the shares is said to be $US40-65 million. Mr Jat submits that the true value of these assets is by no means certain because it is a matter of some conjecture and, in any

event, the *nisi* charging and Garnishee orders are the subject of independent challenges.

(3) The funds secured under orders in the USA are insufficient to meet the award.

(4) There is a risk that such assets as there are will grow smaller as a result of the passage of time. Pertamina's litigious conduct exacerbates this risk if for no other reason than the delay it causes.

18. Mr Manzoni's answers, on Pertamina's behalf, to these submissions are briefly these :

(a) Lack of good faith? As already stated, Pertamina are doing no more than exercising their legal rights.

(b) Insufficient assets? The right of a party to seek enforcement in a different jurisdiction depends on there being assets within that jurisdiction. It is said that there are US$45-60 million worth of shares in Hong Kong. What if they are wrong and in fact there is nothing in Hong Kong? Would they still be entitled to security? If so, KBC could benefit by claiming a substantial amount of security in a jurisdiction where there had been little or no assets. Why, it is submitted, should Pertamina have to bring more money into Hong Kong, which would possibly double their assets here? The fact that the alleged assets are fragile (denied by Pertamina) makes no difference. Should a party be ordered to pay into a court an extra sum equivalent in value to the alleged assets already here, simply because there may be some difficulty (as alleged by the enforcing party) in realizing those assets when the time to enforce the award eventually arrives?

I think there is some substance in the argument that this would, in effect, be doubling the existing protection and therefore improving KBC's position beyond what is intended by a provision for security. The existing protection being the injunction.

(c) Pertamina is plainly *able* to pay the award. Its assets worldwide are over US$7 billion and it profits over US$350 million. There is no evidence of any dissipation of assets in Hong Kong. The substantive hearing is only three weeks away.

(d) The time factor. I agree that the fact that this application for security pre-dates the substantive hearing by only 21 days is a practical factor against making an order for security in respect of the claim (but not costs, see *infra*). If security for many millions of US dollars is ordered it would have to be a condition of the order that the action be dismissed if it is not paid within 7 or 14 days. No other order would be sensible. It is unfortunate, but nonetheless a fact, that this application is close in time to the substantive hearing. Two sets of public holidays intervene. It may be an onerous task to expect Pertamina to comply with such an order in such a large amount within the time available. An order which might put them out of court simply because of its size and the administrative problems arising in trying to comply with it within time, may be regarded as unjust. Or, at least, a factor weighing against the exercise of the discretion.

(e) Although the parties disagree as to whether or not KBC are adequately protected in other jurisdictions, particularly USA, on the information presently available to this court it seems at least arguable, that there is substantial security elsewhere.

Even though it has recently been upheld in the USA that only 5% of the net operating income in the Adjudicated Restrained Accounts is beneficially owned by Pertamina, the full amount remains frozen by court order. However, the figures are keenly disputed both here and abroad and this court is not in a position to comment further.

CONCLUSION ON SECURITY ON THE CLAIM

19. The "merits of the challenge" factor is in KBC's favour. However, the remaining factors, outlined above, leave this court with a feeling of unease about ordering security in such a large sum so close to the hearing. It has been a balancing exercise but I have decided not to accede to the application. I am satisfied that, on balance, a failure to award security will have little adverse affect on KBC's position in the Hong Kong litigation. The making of such an order, however, at this particular time, could have a seriously adverse and unnecessarily unjust effect on Pertamina's position.

SECURITY FOR COSTS

20. I consider this application to be significantly different. The arguments for and against the ease or difficulty of enforcement have less relevance to the issue of security for costs. The arguments concerning the apparent merits of the case however, remain relevant.

21. Pertamina have chosen to resist enforcement thereby exposing KBC to considerable legal costs which they may not recover should they succeed. The application is for HK$3 million. There is affidavit evidence in support. There has been no evidence to challenge the

quantum. I have no doubt that the court may make an order for security for costs under Order 73, rule 10A and I have no hesitation in doing so. The application for security on the claim was borderline. The factors which tipped the result in Pertamina's favour have little relevance to the costs argument. What is left is a strong case for ordering security for costs. Mr Manzoni's described the security for costs as "*de minimis*" when compared to main claim. Hopefully therefore any problems encountered in bringing HK$3 million into the jurisdiction of this court will also be "*de minimis*" compared to US$50 million.

22. I make an order in terms of paragraphs 2 and 3 of the plaintiff summons dated 24 September 2002 in the sum of HK$3 million as security for the plaintiff's legal costs, save that paragraph 3 be amended by inserting the words "by 5.00 p.m. Monday 30 December 2002" instead of "within 7 days of the date of this Order".

23. The costs order *nisi* I make is that the costs of this summons be in the cause.

(M.P. Burrell)
Judge of the Court of First Instance,
High Court

Mr Jat Sew Tong, SC instructed by Messrs Clyde & Co., for the Plaintiff

Mr C. Manzoni, instructed by Messrs Haldanes, for the Defendant