Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd [2013] SGHC 248

Suit No: Originating Summons No 708 of 2012 (Registrar's Appeal No 33 of 2013)

Decision Date: 14 November 2013

Court: High Court

Coram: Belinda Ang Saw Ean J

Counsel: Sim Chong and Yip Wei Yen (JLC Advisors LLP) for the appellant; Christopher Tan, Marcus Foong and Jacqueline Chua (Lee & Lee) for the respondent.

Subject Area / Catchwords

Arbitration – Enforcement – Foreign award

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Belinda Ang Saw Ean J:

Introduction

1 Beijing Sinozonto Mining Investment Co Ltd ("BSM"), the applicant in Originating Summons No 708 of 2012 ("OS 708/2012"), successfully obtained an order on 17 August 2012 ("the August Order") pursuant to an *ex parte* hearing for leave to enforce an arbitral award ("Award") in Singapore, which Award was made under the auspices of the China International Economic and Trade Arbitration Commission ("CIETAC") on 15 February 2012. Within the time prescribed by the August Order, Goldenray Consortium (Singapore) Pte Ltd ("Goldenray") as the respondent in OS 708/2012 applied by way of Summons No 4709 of 2012 ("SUM 4709/2012") to set aside the August Order, contending that the court should not give leave to enforce the Award because enforcement would be contrary to the public policy of Singapore, reliance being placed on s 31(4)(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA").

2 Goldenray's application was dismissed on 21 January 2013 ("the January 2013 Order"). Goldenray's appeal against the January 2013 Order *vide* Registrar's Appeal No 33 of 2013 ("RA 33/2013") was dismissed on 22 July

2013 as I was not persuaded that the Award was "fraud-tainted" or "corruption-tainted" such that its enforcement would be contrary to the public policy of Singapore. Goldenray's claim that BSM procured the Award by fraud or corruption was an unavailing and unsupported assertion in the absence of cogent evidence that BSM committed a fraud that could have influenced the arbitrator's decision. As matters stood, there was no material to make good Goldenray's assertions.

Background facts

3 Sometime in April 2011, BSM and Goldenray agreed to enter into a joint investment to develop a crocodile farm in Chaoyang District, Beijing, People's Republic of China ("PRC") known as the Beijing Jinzhan Township Eco Village Project ("the Project"). The company involved in the Project was Beijing Goldenray Eco-Technology Development Co Ltd ("Beijing Goldenray"). Pursuant to the joint investment, BSM and Goldenray each held 45% of the shares in Beijing Goldenray, while the remaining 10% shareholding was held by the Beijing Municipality Chaoyang District Jinzhan Township Shawo Village Economic Cooperative.

4 The joint investment produced four agreements. They were:

(a) The Beijing Goldenray Share Transfer and Loan Agreement dated 5 April 2011 between BSM and Goldenray, with Goldenray's director, Mr Zhang Shikeng, acting as guarantor of Goldenray. Under this agreement, BSM would, *inter alia*, contribute working capital in the sum of RMB45m to the joint venture.

(b) The Beijing Goldenray Share Transfer Agreement dated 15 April 2011 between BSM and Goldenray.

(c) A loan agreement dated 15 April 2011 between BSM and Beijing Goldenray.

(d) A loan agreement dated 15 April 2011 between BSM and Goldenray, with Mr Zhang Shikeng acting as guarantor of Goldenray ("the BSM/Goldenray Loan Agreement"), whereby BSM granted to Goldenray a loan of RMB50.2m secured by:

(i) a pledge of shares comprising Goldenray's 45% shareholding in Beijing Goldenray; and

(ii) a personal guarantee furnished by Goldenray's director, Mr Zhang Shikeng.

Of this loan amount of RMB50.2m, BSM agreed to disburse RMB35.2m to Beijing Goldenray before 18 April 2011, while the remaining RMB15m would be disbursed to Beijing Goldenray before 29 June 2011. Only the first sum of RMB35.2m was disbursed. Goldenray was to repay the loan of RMB35.2m after six months as well as contribute its share of the investment amounting to about RMB10m.[note: 1] BSM later discovered that Goldenray was not in a financial position to resolve its outstanding obligations, including repayment of the RMB35.2m loan just mentioned.

Commencement of arbitration up to the Award

Preliminaries and appointment of the arbitrators

5 Differences arose between BSM and Goldenray under the BSM/Goldenray Loan Agreement, and on 3 August 2011, BSM submitted a Request for Arbitration dated 1 August 2011 under the CIETAC rules, claiming repayment of the loan of RMB35.2m together with interest and legal fees. Prior to taking that step, BSM's lawyer in Beijing, Mr Zhao Pan, sent Goldenray a letter of demand on 26 July 2011 that, *inter alia*, requested for further security to be furnished to BSM, failing which Goldenray would have to repay the loan of RMB35.2m under the BSM/Goldenray Loan Agreement.

6 A Notice of Arbitration (under Case No F20110372) was sent by the Secretariat of CIETAC to BSM and Goldenray on 19 August 2011 ("the Arbitration"). On 8 October 2011, Mr Xia Jun, Mdm Hu Wanru and Mr Li Yong accepted appointment as arbitrators ("Tribunal"), and a copy of the Notice of Formation of the Arbitral Tribunal and Declaration for Acceptance of Appointment signed by the arbitrators was sent to the parties on the same date. I should mention that Mr Xia Jun was appointed by BSM; Goldenray and Mr Zhang Shikeng appointed Mdm Hu Wanru. The president of the Tribunal, Mr Li Yong, was appointed by the Chairman of CIETAC.

7 I gathered from reading the terms of the Award that Goldenray submitted its Statement of Defence and Statement of Counterclaim to the Tribunal on 9 October 2011 and its amended Statement of Counterclaim on 22 November 2011; that the Tribunal agreed to accept and hear Goldenray's counterclaim together with BSM's claim; and that BSM's Statement of Defence to the Counterclaim was submitted on 16 December 2011.

8 On 28 November 2011, CIETAC notified the parties that the Arbitration was fixed for hearing on 18 January 2012.

Attempts at settlement between August and October 2011

9 Even though BSM submitted its Request for Arbitration on 3 August 2011, the parties nevertheless held settlement discussions without suspending the arbitral process put in motion by BSM. This fact is relevant to the merits of the appeal in RA 33/2013.

10 Returning to the chronology and narrative of how the relevant events unfolded, Goldenray proposed to BSM on 1 August 2011 that the matter be settled amicably. On 9 August 2011, BSM proffered a draft settlement agreement for Goldenray's consideration, which agreement touched only on the repayment of the RMB35.2m loan. Goldenray responded on 11 August 2011 with changes, most notably with a proposal to buy over BSM's entire 45% shareholding in Beijing Goldenray.

11 Goldenray's desire to buy out BSM was repeated in an amended draft settlement agreement which Goldenray sent to BSM on 9 October 2011 ("the October draft settlement agreement"). In effect, the October draft settlement agreement concerned two major proposals: (a) that Goldenray would repay BSM the RMB35.2m loan; and (b) that Goldenray would, in addition, purchase BSM's entire stake in Beijing Goldenray for RMB45m.

12 BSM was agreeable in principle to the terms of the October draft settlement agreement, and, on 13 October 2011, informed Goldenray that it wanted the settlement agreement to be recorded in an arbitral award. Goldenray disagreed. On 21 November 2011, Goldenray sent a further draft settlement agreement for review but that draft did *not* accommodate BSM's condition to record any executed settlement in an arbitral award; it sought, instead, the withdrawal of the Arbitration.[note: 2] This omission of BSM's condition was the deal breaker.

The Award

13 Both BSM and Goldenray were represented by their PRC lawyers, Mr Zhao Pan and Ms Zhang Ying respectively, at the arbitration hearing on 18 January 2012. In the course of the hearing, the Tribunal purportedly asked the PRC lawyers whether they could reach a settlement. The PRC lawyers agreed to try; negotiations on this front then began, and on the same day (*viz*, 18 January 2012) the PRC lawyers managed to arrive at an in-principle agreement on a settlement which they brought back to their respective clients. Following that, a draft settlement agreement was drawn up by the PRC lawyers. On 20 January 2012, the settlement agreement was signed by the PRC lawyers − Mr Zhao Pan on behalf of BSM, and Ms Zhang Ying on behalf of Goldenray and Mr Zhang Shikeng ("the January 2012 Settlement Agreement"). The recital to the January 2012 Settlement Agreement stated that:[note: 3]

> … [BSM, Goldenray and Mr Zhang Shikeng] agreed to conciliation for the disputes arising from the four aforesaid agreements by the Arbitral Tribunal for No. F20110372, and rendering of the arbitral award in accordance with the terms of the Settlement Agreement.

14 Slightly less than four weeks later, on 15 February 2012, the Tribunal issued the Award "in accordance with the terms of the … [January 2012] Settlement Agreement and Paragraph 6 of Article 40 of the Arbitration Rules [of CIETAC]".[note: 4] Part III of the Award stated that:[note: 5]

> Both parties consented to conciliation by the Arbitral Tribunal for the disputes arising from the Beijing Goldenray Eco-Technology Development Co., Ltd. Share Transfer and Loan Agreement, Beijing Goldenray Eco-Technology Development Co., Ltd. Share Transfer Agreement, Loan Agreement, as well as Loan Agreement concluded between [BSM], [Goldenray], [Mr Zhang Shikeng], and third-party Goldenray Eco-Technology Development Co., Ltd. separately on April 5, 2011 and April 15, 2011.

15 The relevant terms of the Award were as follows:[note: 6]

> (a) Goldenray was to pay RMB80.2m to BSM, and the latter was to transfer its 45% shareholding in Beijing Goldenray to the former. I note here that the figure of RM80.2m was derived from adding the repayment of the RMB35.2m loan to the RMB45m consideration for BSM's 45% stake in Beijing Goldenray.
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> (b) Goldenray was to pay BSM according to the following schedule: RMB3m by 20 February 2012; RMB10m by 31 March 2012; RMB10m by 30 April 2012; RMB20m by 31 May 2012; and RMB37.2m by 30 June 2012.
>
> (c) As security for payment, Goldenray would pledge its 45% shareholding in Beijing Goldenray in BSM's favour ("the Pledge").
>
> (d) Upon full payment of RMB35.2m, BSM would cancel the registration of the Pledge, and upon receipt of RMB45m, transfer the shares to Goldenray.
>
> (e) The Award was to take effect on 15 February 2012.

16 As stated in the recital to the January 2012 Settlement Agreement, the Award was to reflect the terms of the settlement. Furthermore, there was nothing on the material before me to show, and it was not Goldenray's case, that following the settlement the Tribunal was required to hear and determine BSM's claim for interest and Goldenray's counterclaim for RMB1,380,822. It was thus not surprising that the Tribunal in its Award dismissed BSM's residual claim for interest and the counterclaim submitted by Goldenray.

Enforcement proceedings in China and Singapore

17 In relation to payments under the Award, BSM took out enforcement proceedings against Goldenray in PRC on 21 February 2012. The enforcement proceeding were subsequently discontinued as the latter paid RMB3m on 29 February 2012. When Goldenray defaulted on the second instalment payment, BSM started enforcement proceedings again on 10 April 2012. On that occasion, Goldenray paid RMB4m on 3 May 2012, but not the remaining RMB6m due under the second instalment.[note: 7]

18 There were no further payments thereafter, leaving the sum of RMB73.2m due and outstanding. BSM took out enforcement proceedings in PRC for the entire outstanding sum of RMB73.2m on 9 July 2012, and an enforcement order was granted on 18 July 2012.[note: 8]

19 In addition, BSM sought to enforce the Award in Singapore. By the August Order, BSM was granted leave to enforce the Award against Goldenray.

SUM 4709/2012 and the January 2013 Order

20 The assistant registrar hearing SUM 4709/2012 ("the AR") dismissed Goldenray's application to set aside the August Order. The AR held that in order to prove that the Award was "tainted" by fraud or corruption (the word "tainted" was used by Goldenray's counsel, Mr Sim Chong ("Mr Sim"), in these proceedings), Goldenray needed to show that one Mr Mu Zili ("Mr Mu") had acted in a corrupt manner pursuant to an agreement between BSM, their lawyer, Mr Zhao Pan, and his colleague Mr Mu, and that Mr Mu did in fact try to influence the Tribunal in BSM's favour. The AR held that Goldenray did not make out its case since it failed to produce any evidence of communications between Mr Mu and the Tribunal.

Arguments of the parties on the issues for decision in RA 33/2013

Goldenray's allegations of fraud and corruption

21 Goldenray argued that the August Order should be set aside on the ground that the Award was tainted by fraud or corruption such that enforcement of the Award in Singapore would be contrary to the public policy of Singapore.

22 Goldenray's case in this respect is most conveniently summarised in its skeletal arguments dated 22 July 2013. Mr Sim argued that:[note: 9]

> BSM, through its representatives or intermediaries, had unilaterally entered into an improper arrangement with the Tribunal to get the Tribunal to issue an award that supports BSM's claim and issue an award as soon as possible.

I will hereafter refer to Mr Sim's contention as "the improper arrangement argument".

23 Mr Sim relied on 14 e-mails (collectively referred to as "the E-mails") which he described as "extraordinary", and he invited this court to infer from the contents of the E-mails the following facts to support the improper arrangement argument and to conclude that the Award was tainted by fraud and/or corruption:[note: 10]

(a) that BSM paid certain monies to its lawyers in PRC;

(b) that Mr Zhao Pan (BSM's lawyer from Beijing Kangda Law Firm) asked his partner, Mr Zhao Xiaolong, to release part of the monies to him;

(c) that Mr Zhao Pan received these monies;

(d) that part of these monies were given to Mr Mu (a consultant in Beijing Kangda Law Firm), who then approached the Tribunal and entered into an improper arrangement as set out in the E-mails; and

(e) that the Tribunal must have received some gratification for pressuring Goldenray to settle with BSM.

24 The discovery of the E-mails was significant to Goldenray. I noted that, at the beginning, BSM challenged the authenticity of most of the E-mails. For the purposes of the hearing of RA 33/2013, BSM's counsel, Mr Christopher Tan ("Mr Tan"), was content to and did meet Goldenray's arguments on the E-mails squarely. I shall discuss the E-mails in due course. It suffices to say for now that Goldenray's contention is that the E-mails showed that BSM and/or its PRC lawyer, Mr Zhao Pan, had agreed to pay Mr Mu in return for Mr Mu influencing or affecting the Tribunal and the Arbitration.

25 Related to the late discovery of the E-mails is Mr Zhang Shikeng's first affidavit which alleged (at para 39) that during the arbitration hearing, the Tribunal repeatedly pressed the parties to settle, and that Mr Zhang Shikeng felt that he had no choice but to do so in light of the Tribunal's actions and behaviour. He further deposed in his affidavit to the following matters (at para 40):

> After discovering the Emails, I now understand why the Tribunal acted the way it did. I would not have entered into any settlement with BSM if I had known about these arrangement(s) among/between Zhao Pan and/or Mr Mu. I would also have asked for the Tribunal to recuse itself immediately and demand [*sic*] for the dispute to be determined in a neutral venue or forum such as arbitration under the International Chamber of Commerce or the Permanent Court of Arbitration.

26 In other words, Goldenray's point is that the fraud or corruption that could be inferred from the E-mails was not discoverable by due diligence before or during the arbitration hearing. According to Mr Zhang Shikeng, the E-mails were discovered in his office computer around the time his office was being renovated, and when copies of e-mails in the hard disks were made. It was explained that Mr Zhao Pan had used Goldenray's office computers on the occasions when the former visited Goldenray's office in Beijing to persuade Mr Zhang Shikeng to settle with BSM.[note: 11]

27 Mr Sim cited *Quek Tiong Kheng and another v Chang Choong Khoon Mark and others* [2012] SGDC 76 for the District Court's observation that in cases of fraud, direct evidence would be rare and circumstantial evidence would suffice, and for the district judge's approval of Pollock CB's statement in *R v Exall* (1866) 4 F & F 922 (at 929) in relation to circumstantial evidence:

> It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus it may be in circumstantial evidence—there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion, but the whole, taken together, may create a conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

BSM's case

28 BSM rejected Goldenray's allegation of the existence of an agreement between BSM, Mr Zhao Pan and Mr Mu to improperly influence the Tribunal in BSM's favour (*ie*, the improper arrangement argument). In particular, BSM rejected the allegation that it had tried to pay Mr Mu to get the Tribunal to "support" BSM's claim, or to "influence" the Tribunal and/or the Arbitration in any other way.[note: 12] BSM submitted that the January 2013 Order was correct. First, the Award was based on a settlement reached between the parties on 20 January 2012 (*ie*, the January 2012 Settlement Agreement). As such, the Tribunal was not asked to and did not determine any issue in the Arbitration. The improper arrangement argument was a non-starter. Second, there was no clear and convincing proof of fraud and/or corruption. Third, Goldenray's opposition to enforcement was simply a tactic used to delay payment.

29 Although there was no affidavit from Mr Mu, BSM received a letter from Mr Mu dated 8 November 2012 rejecting as preposterous the accusations levelled against him. In this letter Mr Mu clarified that he had never

signed any document with Mr Zhao Pan and had not communicated with the Tribunal or any of its members.[note: 13] As for Mr Zhao Pan, who was present at the 18 January 2012 arbitration hearing, he filed an affidavit. Besides narrating what happened at the hearing, he also said:[note: 14]

> … I have never entered into any agreement, or attempted to enter into any agreement between BSM, myself and Mu Zili in relation to the arbitration proceedings in China between BSM and Goldenray.

30 In relation to BSM's first contention (see [28] above), BSM explained that there had been previous rounds of negotiations between the parties. The first round of negotiation was prior to the commencement of arbitration. Subsequently, there were further negotiations between 9 August and 21 November 2011. During this second round of negotiations, the October draft settlement agreement was prepared for discussion. BSM's point is that the parties were prepared to settle their differences, and by late 2011 the two main differences pertaining to Goldenray's repayment of RMB35.2m and purchase of BSM's 45% stake in Beijing Goldenray for RMB45m were already in principle resolved.

31 BSM's account of what transpired before the Tribunal on 18 January 2012 and how the January 2012 Settlement Agreement was then reached is revealed in the affidavit evidence of Mr Zhao Pan.[note: 15] On the first day of the arbitration hearing, the Tribunal asked the PRC lawyers on both sides if they could come to a settlement. The PRC lawyers informed the Tribunal that they had explored the possibility of settlement and would continue to negotiate further. Later in the day, an in-principle agreement was reached between the PRC lawyers, and a draft settlement agreement was prepared, which draft was approved by BSM on 18 January 2012. However, Goldenray did not approve the draft until the next day. According to BSM, on 19 January 2012, Mr Zhao Pan received a telephone call from CIETAC informing him that Mr Zhang Shikeng had approved the draft agreement on behalf of Goldenray.

32 The Tribunal required Beijing Goldenray's consent to the settlement as the terms involved the latter. Consent was given by Beijing Goldenray on 20 January 2012.

33 The January 2012 Settlement Agreement was then executed by the PRC lawyers on behalf of the parties to the Arbitration, BSM, Goldenray and Mr Zhang Shikeng, on 20 January 2012.[note: 16]

34 Significantly, BSM pointed out that Mr Zhang Shikeng, who claimed that he felt pressured by the Tribunal to settle, was not even at the hearing on 18 January 2012. When this fact was pointed out by BSM, Mr Zhang Shikeng changed his story. He then claimed that he had formed his impression from what was conveyed to him by his PRC lawyer, Ms Zhang Ying, namely that "the Tribunal had indicated that it would issue a severely

adverse award against Goldenray if we did not agree to settle with BSM".[note: 17] Thus, BSM argued that no weight should be given to this aspect of his hearsay affidavit evidence. In addition, Goldenray did not file an affidavit from Ms Zhang Ying to explain what exactly had transpired at the arbitration hearing on 18 January 2012. Thus, Mr Zhao Pan's affidavit evidence on this aspect of the case was unchallenged.

Applicable legal principles under s 31(4) of the IAA

35 The grounds on which a foreign arbitral award may be refused enforcement in Singapore are found in ss 31(2) and 31(4) of the IAA. For convenience, s 31 of the IAA is reproduced as follows:

> **Refusal of enforcement**
>
> **31.**—(1) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the party against whom the enforcement is sought may request that the enforcement be refused, and the enforcement in any of the cases mentioned in subsections (2) and (4) may be refused but not otherwise.
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> (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that —
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> (*a*) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;
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> (*b*) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
>
> (*c*) 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 in the arbitration proceedings;
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> (*d*) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;

(*e*) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

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

(3) When a foreign award referred to in subsection (2)(*d*) contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted.

(4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that —

(*a*) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or

(*b*) enforcement of the award would be contrary to the public policy of Singapore.

(5) Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may and may —

(*a*) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and

(*b*) on the application of the party seeking to enforce the award, order the other party to give suitable security.

The concept of public policy in s 31(4)(b) of the IAA

36 RA 33/2013 is concerned with an award of a competent tribunal to which s 31(4)(*b*) of the IAA applies. That provision states that enforcement of a foreign arbitral award may be refused if such enforcement would be

contrary to the public policy of Singapore, and gives legislative effect to Art V(2)(*b*) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").

37 The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*Dexia Bank*") (at [59]) has stated that the concept of "public policy" under the IAA is to be given a narrow scope of operation. It operates in instances where the upholding of an arbitral award would shock the conscience, was clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public, or would violate the forum state's most basic notions of morality and justice (*Dexia Bank* at [59]). While *Dexia Bank* was concerned with the setting aside of an award made in a Singapore-seated arbitration, under Art 34(2)(*b*)(ii) of the UNCITRAL Model Law on International Commercial Arbitration, the court cited with approval (at [59]) a passage from para 297 of the *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (3–21 June 1985) (A/40/17):

> [T]he term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.

38 Following the Court of Appeal's subsequent clarification in *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") (at [37]), there can be no doubt that the discussion of "public policy" in *Dexia Bank* is equally applicable to a case where the enforcement of a foreign arbitral award is being resisted under s 31(4)(*b*). This echoes the decision of Quentin Loh Sze-On JC (as he then was) in *Strandore Invest A/S and others v Soh Kim Wat* [2010] SGHC 151 ("*Strandore*") (at [26]), where *Dexia Bank* was held to apply in the context of a refusal to enforce an award under s 31(4)(*b*).

39 In another case which touched on s 31(4)(*b*), Choo Han Teck J said that the "public policy" ground for refusing enforcement would be triggered if such enforcement offended notions of justice and morality, or if there were exceptional circumstances to justify a refusal of enforcement (*Galsworthy Ltd of the Republic of Liberia v Glory Wealth Shipping Pte Ltd* [2011] 1 SLR 727 ("*Galsworthy*") at [17]; see also *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 at [75]).

40 While the formulation in *Galsworthy* is worded slightly differently from that enunciated in *Dexia Bank*, it is clear that the gist and import of these decisions are consistent.

41 Public policy is capable of covering a wide variety of matters. Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of s 31(4)(*b*). However, in the present case,

the argument advanced is that the forum state's most basic notions of morality and justice would be violated if an arbitral award procured through fraud was enforced there; and "fraud" in this context encompasses a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or wilful destruction or withholding of evidence. I agree entirely with what Chan Seng Onn J said in *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 (at [139]), that if a party bribes the tribunal into giving a decision in its favour, or does anything to corrupt, subvert or compromise the professional integrity, impartiality and independence of the tribunal, that would certainly shock the conscience and be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public. Judith Prakash J in *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [48]) appeared to share a similar view that an award obtained by corruption, bribery or fraud would violate the basic notions of morality and justice and amount to a breach of the public policy of Singapore .

The threshold test: the applicable standard of proof

42 Section 31(4)(*b*) states that the court may refuse to enforce the award "if it finds that" enforcement would be contrary to the public policy of Singapore. What is the standard of proof against which the court makes such a finding? Is a "finding", in this context, based on the civil standard of a balance of probabilities (that is, more likely than not) or on something less than that, and if the latter, what exactly is the standard? Mr Sim did not draw the court's attention to any judicial pronouncement in Singapore on this point. Mr Tan, on the other hand, referred to *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573, which considered and adopted the meaning of the phrase "obtained by fraud" as used in the UK Arbitration Act 1996 (c 23).**[note: 18]**

43 In my view, it is helpful to refer to the position in Australia. The Australian equivalent of s 31(4)(*b*) is s 8(7) of the International Arbitration Act 1974 (Act 136 of 1974) (Cth) ("Australian IAA"). Both provisions are *in pari materia*, and both give effect to Art V(2)(*b*) of the New York Convention. In *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 282 ALR 717 (at [192]), the majority of the Victorian Court of Appeal held in respect of s 8(7) of the Australian IAA that:

> 192 … [T]he Act neither expressly nor, in our opinion, by necessary intendment provides that the standard of proof under s 8(5) and (7) is anything other than the balance of probabilities, as one would expect in a civil case. Section 8(5) requires proof 'to the satisfaction of the Court' ***whereas s 8(7) refers to a finding***. ***But in either case, it is on the balance of probabilities.*** It is thus seen that the legislature has adopted different language in these provisions, which serves to emphasise not only the deliberate use of language but also the absence of language such as 'heavy onus', 'extremely onerous and a heavy burden', and 'clear, cogent and clear proof'. The true

> position, in our view, is that what may be required, in a particular case, to produce proof on the balance of probabilities will depend on the nature and seriousness of that sought to be proved. … [emphasis added in bold italics]

Therefore, the view taken in Australia is that the party seeking to resist enforcement under s 8(7) of the Australian IAA must persuade the court on a balance of probabilities that enforcement would be contrary to the public policy of the enforcing State.

44 Apart from this Australian decision, there are some local cases which have discussed the standard of proof required under s 31(2) of the IAA. It is necessary to consider these decisions because the procedure by which the s 31(4)(*b*) ground is invoked is the same as that where it is s 31(2) which is relied upon.

45 I start with the opening words of s 31(2), which read as follows:

> A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought *proves to the satisfaction of the court* that … [emphasis added].

The provision then goes on to list grounds (*a*) to (*f*). Section 31(2) by its terms requires proof to the *satisfaction* of the court, while s 31(4) refers to a *finding* of the court. In my view, this difference is in the terminology and not to the applicable standard of proof which remains the same.

46 As far as s 31(2) is concerned, it has been suggested in three recent High Court decisions that a party who seeks to prove the matters under s 31(2) has to convince the court on a balance of probabilities (*Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] 3 SLR 661 at [43] and [45]; *Strandore* at [23]; *Galsworthy* at [11]).

47 The High Court in these decisions cited some English cases in support. The English analogue to our s 31(2) is s 103(2) of the Arbitration Act 1996, the opening sentence of which reads: “Recognition or enforcement of the award may be refused if the person against whom it is invoked *proves* …” [emphasis added]. In the now well-known *Dallah* litigation, Aikens J (as he then was) at first instance and Moore-Bick LJ in the Court of Appeal both held that this must mean proof of the existence of the relevant matters on a balance of probabilities (*Dallah Real Estate and Tourism Holding Co v The Ministry Of Religious Affairs, Government Of Pakistan* [2008] 2 Lloyd’s Rep 535 at [82]; *Dallah Estate and Tourism Holding Company v Ministry of Religious Affairs of the Government of Pakistan* [2010] 2 WLR 805 at [20]). At the UK Supreme Court, Lord Mance JSC held that the language of s 103(2) of the Arbitration Act 1996 (“proves”) pointed strongly to ordinary judicial determination of

the issue (*Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] 1 AC 763 at [28]).

48 In my view, the phrase "if it finds" in the opening sentence of s 31(4) connotes satisfaction on the balance of probabilities, like the opening words of s 31(2) ("proves to the satisfaction of the court"). This view is reinforced so far as the standard of proof is concerned by the fact that the issues in s 31(4)(*b*) must be decided once and for all in the present proceedings, and as such, it would be proper to hold that the preliminary facts making out the grounds relied upon must be proved to the satisfaction of the court on a balance of probabilities. Adopting the words of Lord Hoffmann in *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 ("*Rehman*") (at [55]), the level of probability for civil cases "always means more likely than not".

Hearing based on affidavit evidence

49 The mode of commencement of enforcement proceedings by way of originating summons to the High Court is obligatory in that it is prescribed by O 69A r 3(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the RC"), and the hearing is based on affidavit evidence (O 69A r 6 and O 28 r 3 of the RC).

50 I indicated earlier that the issues in s 31(4)(*b*) are to be decided once and for all by this court. With this in mind I make two points. First, the order giving or refusing leave to enforce an award is a final order in the sense that it disposes of the challenge against enforcement and thus marks the end of the life of the originating summons (*Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 at [18]). To borrow a phrase from a slightly different context (but the import is the same), once the application is determined the entire subject matter of the originating summons is spent, and there is nothing further for the court to deal with (*Dorsey James Michael v World Sport Group Pte Ltd* [2013] 3 SLR 354 at [64]).

51 The second point that arises from the first is that the affidavit evidence filed by either party has to contain facts which are within the deponent's personal knowledge to prove (see O 41 r 5(1) of the RC). As such the rules of evidence must be observed. This is stated in O 38 r 2(5) of the Rules of Court. It is observed in *Singapore Court Practice 2009* (LexisNexis, 2009) (at para 38/2/7) that O 38 r 2(5) preserves the rules of evidence in the affidavit procedure. This sub-rule states that the affidavit must contain evidence which, if given orally, would be admissible. Thus, information in the affidavit that is not within the personal knowledge of the deponent is not admissible in evidence. It must be remembered that an affidavit containing hearsay evidence is permissible for use only in interlocutory proceedings (see O 41 r 5(2)).

52 The originating summons hearing itself differs from the trial of an action begun by writ mainly with regard to the evidence in that all the evidence will have been given on affidavit alone as there is no need for cross-examination of the deponents or further oral evidence. That said, a party may seek leave of court to lead oral

evidence and/or for the deponents of affidavits to be ordered to attend for cross-examination (see O 28 r 4 and O 38 r 2(2) of the RC). In addition, the originating summons may be converted into a writ action and continue as such if there are substantial disputes of fact (see O 28 r 8). Whilst these procedural avenues are available in principle, it is in the nature of arbitral awards that findings of fact by the tribunal are generally indisputable, such that the aforesaid procedures are not usually resorted to in applications made under O 69A of the RC by originating summons for leave to enforce an arbitral award. This principle that the court will not review a tribunal's findings of fact may not apply, and the findings of the tribunal may be reopened, in the limited circumstances of fraud, breach of natural justice or some other recognised vitiating factor (see, *eg*, *AJU* at [65]), in which case the procedures in O 28 can be deployed, if required. It was accepted by Lai Kew Chai J in *Sumitomo Bank Ltd v Thahir Kartika Ratna and others and another matter* [1992] 3 SLR(R) 638 ("*Sumitomo Bank*") (at [88]) that the law of evidence does not require fraud to be proved by oral and admissible evidence; in appropriate cases, fraud can be inferred from circumstantial evidence.

53 Based on my experience of the originating summons procedure under O 69A, and from reports of similar cases in the Singapore Law Reports, setting aside and enforcement hearings were by and large decided without the need to resolve conflicting evidence on affidavits by calling for oral evidence and cross-examination of deponents of affidavits pursuant to O 28 rr 4(3) and 4(4) (see also O 38 r 2(2)). And if the court does not (or is not asked to) hear the originating summons on oral evidence with cross-examination of the deponent of affidavits, this does not mean that the threshold test of a balance of probabilities cannot apply, or that a different standard of proof is applicable where a final order is sought.

54 In relation to actions begun by writ, the Rules of Court provide that any fact required to be proved at trial is proved by examination of a witness in court (see O 38 r 1). This remains the case even though nowadays a witness's oral evidence-in-chief often consists of little more than a confirmation of the truth of his affidavit of evidence-in-chief (see O 38 r 2). Hence, as a general approach to a writ action, questions of fact to be decided are subject to the threshold test of a balance of probabilities in the course of a full trial.

55 In specific situations where the mode of commencement by originating summons is obligatory (like in this case), and the statutory threshold of proof is whether an event "more likely than not" happened, the applicant has to meet this threshold test before the court embarks on the exercise of its discretion to make a final order duly taking into account the statutory purpose and affidavit evidence alone. From this perspective, the threshold test is workable in practice where the court, guided by the rules of evidence, makes a final order based on affidavit evidence applying the civil standard of proof. This approach in practice is aptly illustrated by Lord Templeman in *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 WLR 413 (at 418–419):

> In civil proceedings the trial judge has no power to dictate to a litigant what evidence he should tender. In winding up proceedings the trial judge cannot refuse to read affidavits which have been properly sworn, filed and produced to him unless some opposing party has applied for the attendance for cross-examination of the deponent and that application has been granted and the deponent does not attend. The court cannot give a direction about evidence unless one of the litigants desires such direction to be made. *Of course a judge may indicate to a petitioner that unless he calls oral evidence or applies to cross-examine the deponents of the opposition so as to prove a disputed fact, his petition is likely to fail. The judge may equally indicate to a respondent that unless he calls oral evidence or applies to cross-examine the petitioner's deponents for the purposes of disproving an allegation made by the petitioner, then the petitioner is likely to succeed.* ***At the end of the day the judge must decide the petition on the evidence before him. If allegations are made in affidavits by the petitioner and those allegations are credibly denied by the respondent's affidavits, then in the absence of oral evidence or cross-examination, the judge must ignore the disputed allegations. The judge must then decide the fate of the petition by consideration of the undisputed facts.*** [emphasis added in italics and bold italics]

56 The hearing of RA 33/2013 in OS 708/2012 was concluded based on affidavit evidence alone, applying the threshold test of a balance of probabilities without resorting to oral evidence and/or cross-examination of deponents of affidavits. I should state that even though Goldenray had alleged fraud or corruption, the latter was content for the hearing to proceed on the affidavit evidence, and this was acceptable bearing in mind the rules of evidence, and the rules of court.

Fraud and corruption in the context of s 31(4)(*b*)

Application of the threshold test of a balance of probabilities

57 With the principles set out above in mind, I now come to the approach and application of the threshold test in s 31(4)(*b*) when an allegation of fraud or corruption is made against a party to the arbitration and/or against an arbitrator.

58 I begin with the burden of proof, which is on the party opposing the enforcement of the award. That said, whenever the forum state's public policy is engaged, the court may take a point of public policy on its own motion (*Gater Assets Ltd v Nak Naftogaz Ukrainiy* [2008] Bus LR 388 at [15]).

59 Since the allegation in the present case was that fraud or corruption was involved in the procurement of the Award, the burden of proof was on Goldenray to show by cogent evidence that BSM through its representatives or intermediaries had "an improper arrangement with the Tribunal to get the Tribunal to issue an award that supports BSM's claim" (see [22] above). This is, as mentioned, the improper arrangement argument.

60 If authority is required for the proposition that cogent and compelling evidence is needed to make good an allegation of fraud or dishonesty, see, *eg*, *Sumitomo Bank* at [88]; *Chua Kwee Chen and others (as Westlake Eating House) and another v Koh Choon Chin* [2006] 3 SLR(R) 469 at [22]–[23], [28] and [39]; *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and others* [2013] 1 SLR 1254 at [72]; *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 ("*Alwie Handoyo*") at [161].

61 I now come to the application of the civil standard of proof. In this case, the required standard of proof is on a balance of probabilities, that is, was it more probable than not that what Goldenray said happened was true.

62 Lord Nicholls of Birkenhead in *In re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 ("*In re H*") (at 586) said that "a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not". Based on Lord Nicholls' approach, the inherent probability or improbability of an event is itself a factor to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence. All this is more a matter of common sense than law, as was recognised in *In re B (Children) (Care Proceedings: Standard of Proof) (CAFCASS intervening)* [2009] AC 11 (at [15]).

63 Recently, our Court of Appeal in *Alwie Handoyo* approved (at [160]) of Lord Hoffmann's formulation in *Rehman* (at [55]) focussing on the inherent likelihood of an event in a serious allegation:

> The civil standard of proof always means more likely than not. The only higher degree of probability required by law is the criminal standard. But, as Lord Nicholls of Birkenhead explained in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 586, some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian. On this basis, cogent evidence is generally required to satisfy a civil tribunal that a person has been fraudulent or behaved in some other reprehensible manner. But the question is always whether the tribunal thinks it more probable than not.

64 Richards LJ in *R (N) v Mental Health Review Tribunal (Northern Region) and others* [2006] QB 468 (at [59]) said that the civil standard of proof was "flexible in its application". He further explained as follows (at [62]):

> Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities. [emphasis in original omitted]

65 This passage was approved of by Lord Carswell in *In re D (Secretary of State for Northern Ireland intervening)* [2008] 1 WLR 1499 (at [27]) as a concise statement of the English law on this topic; and "the seriousness of the consequences" mentioned by Richards LJ was to be regarded as a factor relevant to the likelihood or unlikelihood of the allegation being unfounded. Lord Carswell elaborated (at [28]):

> It is recognised by these statements that a possible source of confusion is the failure to bear in mind with sufficient clarity the fact that in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. The standard itself, however, finite and unvarying. Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place (Lord Hoffmann's example of the animal seen in Regent's Park), the seriousness of the allegation to be proved or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established. The seriousness of consequence is another facet of the same proposition: if it is alleged that a bank manager has committed minor peculation, that could entail very serious consequences for his career, so making it the less likely that he would risk doing such a thing. These are all matters of ordinary experience, requiring the application of good sense on the part of those who have to decide such issues. They do not require a different standard or a specially cogent standard of evidence, merely

> appropriately careful consideration by the tribunal before it is satisfied of the matter which has to be established.

66 As to the "seriousness of the consequences" factor referred to above by Lord Carswell, a different view was taken by Lord Brown of Eaton-under-Heywood in the same case (at [47]). His Lordship made clear that if the court is satisfied on the evidence that the allegation of dishonesty is true, there is no room for applying the "serious adverse consequences" factor to save the person from the serious consequences of a finding against him – for example, to save a bank manager from a finding of dishonesty.

67 As far as s 31(4)(*b*) is concerned, there are two levels of inquiry in this case. At the first level, the court must determine whether the allegation of BSM's PRC lawyer(s) improperly influencing the Tribunal was more likely than not to be true. It is the court's finding on this first question that enables it to then embark on the second-level inquiry: should it exercise its discretion to make a final order refusing the applicant leave to enforce its arbitral award?

68 I should add that fraud is one of the most serious types of wrongful conduct and behaviour. It is the common experience of most people that fraud should generally be regarded as less probable occurrences than, for example, negligence. This means that it will take more to persuade the court, on a balance of probabilities, that an allegation of fraud is true than if it were one of negligence. The complainant must adduce evidence which is more persuasive (cogent is the word often used), this aforesaid requirement being commensurate with the gravity and seriousness of the allegation made against the defendant, before the court will find the allegation of dishonesty to be true.

69 In summary, to discharge the legal burden and succeed on the issue of fraud or corruption, the rule of evidence requires, in the context of this case, cogent evidence (*ie*, clear and convincing) to be adduced by Goldenray.

Assessment of the affidavit evidence

Observations

70 The question here is whether Goldenray's case – that BSM's PRC lawyers improperly influenced the Tribunal in BSM's favour – is more probably true than untrue. Although Mr Sim accepted that there was no direct evidence, he maintained that the strength of the circumstantial evidence pointed to fraud or corruption on the part of BSM's representatives or intermediaries. Mr Sim placed reliance on the E-mails to infer the existence of the alleged improper arrangement. I was not persuaded by his submissions even on the assumption that all the E-mails were authentic and admissible in law. First, Goldenray must, as I have stated earlier, establish the

allegation of fraud by clear and convincing evidence. Second, even though the E-mails were not discovered until after the Award was issued, the dishonesty was on the part of BSM's PRC lawyers who through Mr Mu supposedly influenced the Tribunal privately. As explained earlier, the law views this sort of assertion at the start as an improbable event that requires cogent evidence of dishonesty to convince the court otherwise. In other words, the inherent improbabilities mean that, even on the civil standard of proof, the evidence needed to prove dishonesty must be clear and convincing to persuade the court that the allegation of BSM's PRC lawyers and Mr Mu as well as the Tribunal being dishonest and corrupt was probably true. Third, the requisite evidence must bear out the existence of the improper arrangement, and that the improper arrangement prevented or deprived Goldenray of a fair hearing in presenting its case or defence. Specifically, the improper arrangement argument in itself required Goldenray to show a necessary causative link between the E-mails (assuming them to be authentic), the corruption of the Tribunal, the bad faith that permeated the arbitration hearing, and the conclusions made in the Award. Those elements, in my view, were not present since the alleged improper arrangement was purely an argument; it was an assertion unsubstantiated by the E-mails or other evidence that was available. It was also hard to see how the fraud related materially to an issue in the Arbitration when the Tribunal made no determination on the merits but essentially turned the terms of the settlement into an award pursuant to Art 40(6) of the CIETAC Arbitration Rules.

71 In my view, it was quite wrong for Goldenray to make what is a serious allegation against BSM and its legal advisors in Beijing without cogent evidence to back up its assertions. In these circumstances, the opposition to enforcement did not get off the ground or satisfy the threshold test, seeing that "the court will have in mind the factor, to whatever extent is appropriate in the particular case, that the more serious the allegation, the less likely it is that the event occurred, and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability" (*In re H* at 586).

Significant features of this case

72 In my judgment, the allegation of dishonesty on the part of BSM's legal advisor, Mr Zhao Pan, his colleague, Mr Mu, and the Tribunal was made the more improbable by the following facts in this case.

73 First, the improper arrangement argument accuses two PRC lawyers in Beijing Kangda Law Firm of giving and taking bribes to influence the tribunal to rule in favour of BSM. Apart from the unlikelihood of two lawyers descending to fraud for what was a straightforward dispute over an unpaid loan that the other side had never disputed their obligation to repay, the other factor pointing to the improbability of dishonesty was the existence of two agreements referred to by Mr Sim, namely, the "Legal Service Contract" and the "Legal Advisor Agreement". I will deal with the two agreements in due course. Suffice to say for now that Mr Sim argued that those two agreements were not innocent documents. Instead, he urged the court to infer from those two agreements the

existence of the improper arrangement between BSM, Mr Zhao Pan and Mr Mu. Mr Sim used the expression "improper arrangement" and based on that "improper arrangement' he argued that the Award was tainted by fraud and corruption. It seems to me unlikely that the two lawyers, if they intended to commit fraud, would foolishly document in black and white their involvement in improperly influencing the Tribunal so as to leave behind a paper trail of their dishonesty or some other reprehensible conduct, and more so, in Goldenray's computers. The case of *Do-Buy 925 Ltd v National Westminster Bank Plc* [2010] EWHC 2862 (QB) illustrates and applies the reasoning set out in this paragraph in the context of establishing the threshold test. In that case, Do-Buy claimed that it had sold jewellery to a Mr Shaw who paid with a debit card. The bank which issued the debit card refused to pay the money to Do-Buy, alleging that no sale ever took place and there had been attempted fraud. The sole director of Do-Buy had been convicted of cheating the revenue some years ago. Andrew Popplewell QC (as he then was), sitting as a deputy High Court judge, thought that this fact diminished the inherent unlikelihood of the existence of a dishonest scheme, given the director's antecedents. The court ultimately found for the bank, holding that there had been no genuine sale.

74 Mr Sim submitted (see [22] above) that the Tribunal, meaning all three members thereof, were improperly influenced by Mr Mu to favour BSM. That, he argued, was the inference to be drawn from the documents. His submissions tarnished the entire Tribunal and ignored several salient facts. The Tribunal comprised three individuals, all of whom were nominated and appointed by different parties. Mr Xia Jun was appointed by BSM, and Goldenray and Mr Zhang Shikeng appointed Mdm Hu Wanru. The president of the Tribunal was appointed by the Chairman of CIETAC. For favouritism to be shown to BSM, all three members would have had to be influenced by Mr Mu bearing in mind that it would be a meaningless risk to take if just one member was influenced, who would be in the minority.

75 The Award was based on the in-principle settlement agreement reached on 18 January 2012 during the Arbitration. This settlement agreement was formalised by the PRC lawyers for both sides on 18 January 2012, but it was two days later that the agreement was signed to signify settlement of the terms on 20 January 2012. At all material times, both sides had the benefit of legal advice.

76 Mr Zhang Shikeng claimed that he had felt pressured by the Tribunal to settle, and that had he known that the Tribunal was bribed he would not have settled. The so-called pressure to settle would have had little or no impact on Mr Zhang Shikeng since he was not present at the arbitration hearing on 18 January 2012 to experience first-hand the alleged pressure and coercive bearing of the Tribunal. Notably, he appeared to be unaffected by any alleged pressure to settle on 18 January 2012, seeing that he did not immediately accept the draft settlement agreement prepared on that date, and BSM learned that he wanted some time to think about the

terms. Two days later, the settlement agreement was signed by Ms Zhang Ying on behalf of both Goldenray and Mr Zhang Shikeng on 20 January 2012.

77 The history of the settlement negotiations is a relevant consideration. In fact the parties' negotiations first started even before commencement of the Arbitration. The second time was after the Notice of Arbitration was lodged in August 2011, and those negotiations over several months produced the first draft agreement, namely the October draft settlement agreement that covered Goldenray's repayment of the loan of RMB35.2m, and its buyout of BSM's entire shareholding in Beijing Goldenray for RMB45m. The negotiations resumed on 18 January 2012. The PRC lawyers reached an in-principle agreement and prepared a draft agreement that was eventually signed by all three parties. The settlement agreement of 20 January 2012 was substantially the same as the October draft in that the loan amount due for repayment was RMB35.2m and the sale of BSM's shareholding in Beijing Goldenray was still fixed at RMB45m. The difference was the express provision for the terms of settlement to be recorded in an award. In other words, the parties agreed that the Tribunal should render an award based on the settlement agreement. Thus, by establishing the settlement agreement as the foundation of the Award, in reality, the Tribunal was not required to determine the merits of BSM's claims as well as Goldenray's counterclaim. From this perspective, the alleged dishonest act really did not relate to any issue in the Arbitration.

78 All of the above factors add to the improbability that lawyers from Beijing Kangda Law Firm would have improperly influenced an arbitral tribunal, and militated against the notion that BSM would wish to cheat its joint venture partner, Goldenray. As I have already indicated, BSM and Goldenray had already agreed in principle earlier that BSM would exit the joint venture and Goldenray was to go its own way in relation to the Project in Beijing.

79 It seems to me that not only was the event, namely the alleged fraud, an improbable one, but there were factors over which there was no dispute that made it even more improbable in the context of this case. Read in the context of the improbabilities set out above, the E-mails do not assist Goldenray to infer fraud. Mr Sim's difficulty is in pointing to some cogent evidence that would overcome the improbabilities set out in [73]–[77] above and shift the likelihood of dishonesty more convincingly towards BSM.

The E-mails and the attached documents

80 As mentioned, Goldenray's argument was that BSM and/or its lawyer, Mr Zhao Pan, had agreed to pay his colleague, Mr Mu, a sum of money. In return, Mr Mu was supposed to get the Tribunal to render an award that was favourable to BSM's claims as early as possible. Mr Mu was selected as he was affiliated with CIETAC

(having been appointed to its panel of arbitrators) and was familiar with the members of the Tribunal. To Goldenray, traces of the plot were discernible in the E-mails.[note: 19]

81 The E-mails essentially comprised two sets of (related) correspondence. The first group of e-mails was between Mr Zhao Pan and Mr Mu. The second group of e-mails passed between Mr Zhao Pan and Mr Zhao Xiaolong, a partner in Beijing Kangda Law Firm. I propose to go through the relevant e-mails in chronological order.

82 On 2 September 2011, Mr Zhao Pan sent Mr Mu some documents for the latter's review, including a document titled "Legal Service Contract", the germane portions of which read as follows:

> **Party A: Beijing Sinozonto Mining Investment Co., Ltd.**
>
> **Party B: Mu Zili, Zhao Pan**
>
> In respect of the arbitral case filed by Party A against Goldenray Consortium (Singapore) Pte. Ltd. and Zhang Shikeng (the "Two Respondents"), Party A agrees to entrust Party B to handle said case and after amicable negotiations, both parties hereto enter into the following agreement on the terms and conditions for mutual observance and performance.
>
> …
>
> **2. Objectives of Party B's Legal Service**
>
> *Party B accepts Party A's entrustment to have lawyer Zhan [sic] Pan act as barrister and Mu Zili act as advisor to strive to fulfil the following objectives:*
>
> 1. *The arbitral tribunal renders an award within the legal time limit (6 months after the formation of the arbitral tribunal) or earlier*;
>
> 2. *The arbitral tribunal supports Party A's arbitral claims*.
>
> **3. Legal Service Charges**
>
> Party B shall charge legal service on contingency fee basis through its law firm:
>
> 1. Party A shall make down payment amounting to RMB 300,000 yuan to Beijing Kangda Law Firm within five (5) days after the conclusion of this Agreement …

2. The second lawyer's fee payment shall be as follows:

1) The second lawyer's fee payment shall be RMB 700,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered within 4 months (early award) of the formation of the arbitral tribunal; the same shall apply if a conciliation or mediation is achieved between party A and the Respondents;

2) The second lawyer's fee payment shall be RMB 500,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered within 6 months (on-time award) of the formation of the arbitral tribunal;

3) The second lawyer's fee payment shall be RMB 100,000 to RMB 200,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered more than 6 months after (late award) the formation of the arbitral tribunal;

4) Party B shall impose no further charges if Party A's arbitral claim is dismissed by the arbitral award rendered.

5) Party B shall strive to have the arbitration commission support all of Party A's arbitral claims including claims for interest, arbitration fee, lawyer's fee losses, etc.

…

…

[emphasis added in italics; emphasis in bold and underline in original]

There was also a Cooperation Agreement stating that, of the RMB300,000 down payment paid to Beijing Kangda Law Firm under cl 3(1) of the "Legal Service Contract", Mr Zhao Pan would collect RMB240,000 and pay half of this amount (*viz*, RMB120,000) to Mr Mu.

83 Mr Mu replied on the same day with some suggested amendments to the documents. One of these documents was titled "Legal Advisor Agreement" and its relevant parts read as follows:

Party A: Beijing Sinozonto Mining Investment Co., Ltd. …

Party B: Beijing Shixianzhe Law Firm …

… Party A hereby engages Mr. Mu Zili as its advisor in respect of Party A's loan contract dispute arbitration case.

Article 1 Entrusted Matter

Party B accepts Party A's entrustment and shall designate Mr. Mu Zili as Party A's legal advisor in the following arbitration case:

Claimant: Beijing Sinozonto Mining Investment Co., Ltd. (Principal)

Respondent: Goldenray Consortium (Singapore) Pte. Ltd., Zhang Shikeng

Arbitral Body: China International Economic Trade and [*sic*] Arbitration Commission (CIETAC)

…

Article 3 Party B's Obligations

…

2. *Contact and communicate with relevant parties to make best efforts to achieve the best outcome as agreed between parties thereto*;

…

Article 4 Advisor Fee

Parties hereto agree after consultation that Party A shall pay advisor fee to Mu Zili as follows:

1. The advisor fee shall be RMB 700,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered within 4 months (early award) of the formation of the arbitral tribunal; the same shall apply if the case is settled by conciliation or mediation between party A and the Respondents during this period;

2. The advisor fee shall be RMB 500,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered within 6 months (on-time award) of the formation of the arbitral tribunal;

3. The advisor fee shall be RMB 100,000 to RMB 200,000 yuan if an award supporting Party A's arbitral claim for repayment of RMB 35.2 million yuan is rendered more than 6 months after (late award) the formation of the arbitral tribunal;

4. Party B shall impose no further charges if Party A's arbitral claim is dismissed by the arbitral award rendered.

5. *Party B shall strive to have the arbitration commission support all of Party A's arbitral claims including claims for interest, arbitration fee, lawyer's fee losses, etc.* If this objective is achieved, Party A shall pay Party B reward of RMB 100,000 to RMB 200,000 yuan depending on the circumstances.

[emphasis added in italics; emphasis in bold and underline in original]

I note that Party B of the "Legal Advisor Agreement" was stated to be "Beijing Shixianzhe Law Firm". According to Goldenray, Mr Mu worked for this law firm too.

84 Looking at the "Legal Service Contract" first, it stated that Mr Zhao Pan and Mr Mu were to strive to get an award from the Tribunal soonest possible, and preferably in BSM's favour too. It seems perfectly logical and commercially acceptable for BSM to be result-oriented, to express and set out BSM's expectations and stated objectives to Mr Mu as its appointed legal advisor.

85 As for the "Legal Advisor Agreement", that document stated that Mr Mu was to *contact and communicate with the relevant parties*. Mr Sim submitted that the phrase "relevant parties" referred to none other than the members of the arbitral tribunal, and urged me to infer from this that Mr Mu was asked to contact and communicate with the members of the Tribunal in order to achieve an outcome favourable to BSM. There was nothing before me at all to warrant this inference.

86 I move on to some of the E-mails that came later. In November and December 2011, e-mails passed between Mr Zhao Pan and Mr Zhao Xiaolong in which the former requested for his share of certain fees to be advanced to him. Mr Zhao Pan needed money urgently in order to pay Mr Mu, as revealed in some of the

contemporaneous e-mails. Two e-mails in particular stand out. On 25 November 2011, Mr Zhao Pan wrote to Mr Mu as follows:

> After Lawyer Zhao [Xiaolong] pays me our [*sic*] fee share next week, I will forward it immediately to you.
>
> *Regarding the case, the only requirement of the client now is speed. I hope that you can coordinate with the three arbitrators to fix an early hearing date.*
>
> [emphasis added]

Mr Mu replied to Mr Zhao Pan two days later as follows:

> Please absolutely do not haggle with Xiaolong over the fee issue. If it affects your relationship with him, that would not be good. *You don't have to worry about my end, it's alright if you pay me a little later or even not at all. As for an early hearing date, rest assured that I will do my best to communicate with the arbitral tribunal.* [emphasis added]

87 Goldenray submitted that those e-mails showed BSM's fraudulent intention in securing an award as quickly as possible, while BSM said that they were merely discussions about trying to get the Arbitration to proceed expeditiously. I am unable to say that they evidenced a corrupt or fraudulent intent to influence the Tribunal or the Arbitration. In his e-mail reply Mr Mu wrote only that he would do his best to communicate with the Tribunal regarding the matter of an earlier hearing date. It is entirely within contemplation that Mr Mu was desirous of making representations to CIETAC through *official* channels, and not through private communications. As for the sequence of events, Mr Mu replied to Mr Zhao Pan on 27 November 2011, one day before CIETAC informed the parties of the January 2012 hearing date (see [8] above). The timelines may seem quite close but Goldenray has not shown through more evidence that this was anything other than a coincidence. Finally, Mr Mu was not quite as nefarious as Goldenray at times made him out to be. In his e-mail reply, Mr Mu stated that it was "alright if you pay me a little later *or even not at all*" [emphasis added]. From this sentence it appeared that Mr Mu was willing to forego the down payment of RMB120,000 payable to him, and this did not sit well with the alleged dishonesty of Mr Mu. Considering the totality of the circumstances here, I find that Goldenray's allegations of fraud or corruption on the basis of those two e-mails were not made out.

88 After reading all the E-mails carefully and objectively, and bearing in mind the improbabilities set out in [73]–[77] above as well as asking myself whether they could be said to have evidenced a plot on the part of BSM

and/or its PRC lawyers to influence the Tribunal or the Arbitration through Mr Mu, I was unable to agree with Mr Sim's reading of the E-mails.

The sequence of events

89 Goldenray's case that BSM had hatched a fraudulent or corrupt plan to influence the Tribunal was undermined by the sequence of events which actually took place.

90 According to Goldenray, BSM's lawyer, Mr Zhao Pan, contacted Mr Mu with a view to concluding a "Legal Service Contract" on 2 September 2011 (see [82] above). Goldenray submitted that this "Legal Service Contract" was part and parcel of BSM's stratagem to influence the arbitral tribunal that was hearing the dispute between the parties, and that Mr Mu *in particular* had been engaged because he was familiar with all three members of the Tribunal. However, it was only about *one month later* on 8 October 2011 that CIETAC informed the parties of the composition of the arbitral tribunal. Goldenray did not explain why BSM would have picked Mr Mu in particular to "influence" the arbitral tribunal when its exact membership had not been made known yet at the time. Granted, BSM could under the CIETAC Arbitration Rules have picked *one* of the three arbitrators, but there was no evidence at all to show that BSM had somehow been privy to Goldenray's choice of arbitrator *before* CIETAC's notice of 8 October 2011, not to mention the identity of the presiding arbitrator who was nominated by the Chairman of CIETAC.

91 Indeed, since BSM allegedly recruited Mr Mu even before the composition of the Tribunal was made known to the parties, Goldenray's case that Mr Mu exerted improper influence would appear to entail an allegation that either:

(a) Mr Mu was able to influence the Chairman of CIETAC to nominate a presiding arbitrator favourable to BSM; and/or

(b) Mr Mu was able to somehow influence Goldenray's choice of arbitrator; and/or

(c) Mr Mu knew all the people on CIETAC's panel of arbitrators who could potentially be appointed as an arbitrator in the case between BSM and Goldenray; and/or

(d) Mr Mu would be able to influence the members of the arbitral tribunal no matter who was appointed to constitute the tribunal.

92 All these allegations are so inherently improbable and unlikely that Goldenray would have had to provide cogent evidence in support of the same. No such evidence was shown. In my view, the more reasonable

inference from the conclusion of the "Legal Service Contract" (assuming it was authentic) was that BSM engaged Mr Mu for his qualifications, experience and other reasons and purposes less conspiratorial than those suggested by Goldenray.

Circumstantial evidence that the Tribunal exerted pressure on the parties to settle

93 I turn finally to Goldenray's complaint that it had been pressured by the Tribunal at the arbitration hearing to settle the proceedings. This was, of course, circumstantial evidence. According to Goldenray, the Tribunal had said that a failure to settle would cause "a severely adverse award" to be issued against Goldenray. The reason for the Tribunal's stance, it was argued, must have been that Mr Mu somehow got to the members of the Tribunal and was exerting influence on them. BSM countered by saying that there was no evidence of this at all, and, importantly, it was undisputed that both parties had been represented by their PRC lawyers at the Arbitration and had authorised them to sign the January 2012 Settlement Agreement.

94 Goldenray's argument was tenuous: it could only succeed if the court was persuaded to infer that Mr Mu's alleged machinations behind the scenes was the *sole* reason for the Tribunal having inquired on the possibility of a settlement. There is nothing in the material before this court to call for such an inference to be made.

95 Furthermore, Goldenray's averments that it was pressured by the Tribunal to settle were hearsay and self-serving statements. I agree with Mr Tan for BSM, that Goldenray was not *pressured* into settling its dispute with BSM:

(a) Both Goldenray and BSM were represented by their respective PRC lawyers at the Arbitration and also in the negotiations leading up to the execution of the January 2012 Settlement Agreement.

(b) While the parties began negotiating a potential settlement on the first day of the arbitration (18 January 2012), the January 2012 Settlement Agreement was only signed *two days later*, on 20 January 2012. Goldenray could hardly argue and it was not its case that it had had no time to consider the legal effect and implications of the agreement it signed.

(c) Neither Goldenray nor its PRC lawyers expressed any misgivings or concerns *at the time of the arbitration or at the signing of the Settlement Agreement* as to the alleged exertion of pressure by the Tribunal.

It therefore seemed to me that this was not a situation where the Tribunal had press-ganged the parties into settling their dispute, contrary to what Goldenray was trying to say.

96 Third, the fact of the matter was that the parties had actually arrived at an in-principle agreement some months *prior* to the Arbitration. It will be recalled that Goldenray sent the October draft settlement agreement to BSM on 9 October 2011, and that BSM was agreeable in principle to this agreement (see [9]–[12] above). As mentioned earlier, the substantive terms of the October draft settlement agreement were to all intents and purposes the *same* as those of the January 2012 Settlement Agreement that was eventually signed:

(a) that Goldenray would repay BSM the RMB35.2m loan; and

(b) that Goldenray would, in addition, purchase BSM's entire stake in Beijing Goldenray for RMB45m.

In fact, the suggestion that Goldenray would buy out BSM's shareholding in Beijing Goldenray *came from Goldenray itself* as early as August 2011 (see [10] above). The bold assertion that Goldenray had been pressured by the Tribunal into signing the January 2012 Settlement Agreement did not appear plausible when: (a) the commercial terms of that agreement had already been discussed and approved of in principle *prior* to the Arbitration; and (b) some of those terms were Goldenray's suggestions.

97 Finally, I note that certain claims the Tribunal was asked to decide on were not mentioned in the January 2012 Settlement Agreement at all – namely, BSM's claim for interest, and Goldenray's counterclaim for RMB1,380,822. The Award, however, which was meant to record the January 2012 Settlement Agreement, actually *dismissed* these residual claims. The Tribunal may have done so because of the lack of mention of these matters in the January 2012 Settlement Agreement. Be that as it may, the dismissal of both Goldenray *and* BSM's residual claims indicated that the Tribunal did not fixate on ruling absolutely in BSM's favour. This suggested again that the Tribunal was not being improperly influenced.

Conclusion

98 For the reasons stated, I dismissed the appeal with costs fixed at $10,000.

[note: 1] Haifu Han's 2nd Affidavit filed on 26/11/12 at para 13.

[note: 2] Haifu Han's 2nd Affidavit filed on 26/11/12 at p 102.

[note: 3] Haifu Han's 1st Affidavit filed on 24/7/12 at p 37.

[note: 4]Haifu Han's 1st Affidavit filed on 24/7/12 at p 69.

[note: 5]Haifu Han's 1st Affidavit filed on 24/7/12 at p 68.

[note: 6]Haifu Han's 1st Affidavit filed on 24/7/12 at pp 69 to 70.

[note: 7]Zhao Pan's 2nd Affidavit filed on 26/11/12 at paras 22 to 25.

[note: 8]Zhao Pan's 2nd Affidavit filed on 26/11/12 at paras 26 to 27.

[note: 9]Skeletal Summary of Goldenray's arguments on 14/3/2013 dated 22/7/13 at para 2.

[note: 10]Skeletal Summary of Goldenray's arguments on 14/3/2013 dated 22/7/13 at paras 5 & 10.

[note: 11]Zhang Shikeng's 1st Affidavit filed on 9/10/12 at para 42.

[note: 12]Haifu Han's 2nd Affidavit filed on 26/11/12 at para 42.

[note: 13]Haifu Han's 2nd Affidavit filed on 26/11/12 at pp 115-116.

[note: 14]Zhao Pan's 2nd Affidavit filed on 26/11/12 at para 12.

[note: 15]Zhao Pan's 2nd Affidavit filed on 26/11/12 at paras 8 to 11.

[note: 16]Haifu Han's 2nd Affidavit filed on 26/11/12 at para 37.

[note: 17]Zhang Shikeng's 3rd Affidavit filed on 11/12/12 at para 12.

[note: 18]BSM's submissions at paras 18 to 19.

[note: 19]Zhang Shikeng's 1st Affidavit dated 9/10/12 at para 35.