EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVI HC (COM) 2013/55

BETWEEN:

GL ASIA MAURITIUS II CAYMAN LTD.

Applicant

and

PINFOLD OVERSEAS LIMITED

Respondent

Appearances: Mr Oliver Clifton for the Applicant
Mr Robert Christie and Ms Claire Goldstein for the Company

JUDGMENT

(2013: 8, 15 July)

(Application to wind up company on basis of arbitral award – company challenging jurisdiction of arbitral tribunal to determine the subject matter of the award – whether sufficient for company to raise *bona fide* dispute as to jurisdiction on substantial grounds or whether necessary for company to establish on balance of probabilities that section 36(2)(d) of Arbitration Act 1976 ('the Act') applied – section 34(2) of the Act considered)

[1] This is an application by a company called GL Asia Mauritius II Cayman Ltd ('GL Asia') for the appointment of liquidators to a BVI registered company called Pinfold Overseas Limited ('the Company'). The application is based upon the Company's alleged insolvency, to be inferred from the Company's failure to pay GL Asia the amount of INR12,253,193,[1] which the Company was ordered to pay as part of a Partial Award dated 31 August 2012 and made in the course of an arbitration between the Company and GL Asia proceeding under SIAC Rules ('the Partial Award'). Payment of this sum was demanded from the Company on 4 March 2013, but the Company refused to pay on grounds with which this Court is not presently concerned.

[1] approximately US$224,000

[2] On the present application the Company disputes the debt on the grounds that the arbitral tribunal ('the Tribunal') acted in excess of jurisdiction in ordering the Company to pay GL Asia the INR12 million, because that element of the Partial Award dealt with a difference not contemplated by or falling within the arbitration agreement, or was a decision on a matter beyond the scope of the submission to arbitration.[2] The Company also submits that it would be contrary to public policy for this Court to enforce that element of the Partial Award.

[3] The arbitration was initiated by the Company by a request in writing dated 21 February 2009 ('the request for arbitration'). It sought various declarations in respect of the alleged failure on the part of GL Asia to grant the Company a call option for the purchase of the shares of its subsidiary, a company holding valuable land in Goa, India, pursuant to an agreement executed on 19 September 2004 by the Company, GL Asia, and a then subsidiary of GL Asia ('the Call Option Agreement').

[4] The position of GL Asia was that it had ceased to be liable to grant the option for non fulfillment, by 31 December 2008, of a condition to which the obligation was subject. On 28 November 2008, however, the Company had obtained an injunction in the Goan Courts which apparently enjoined (among others) GL Asia from 'taking any other step towards disentitling the Company from exercising its option or rights under [the Call Option Agreement].' GL Asia's response to the request for arbitration included a counterclaim, complaining that 'to the extent that the injunction may be interpreted as restraining [GL Asia] from exercising its right of termination [sc of the Call Option Agreement] . . . [GL Asia] has suffered loss and damage . . arising from having been prevented from exercising its accrued right to terminate [the Call Option Agreement].' GL Asia counterclaimed unparticularised 'damages to be assessed.'

[5] The Tribunal, in giving its reasons for its Partial Award, held, first, that the Goa injunction prevented GL Asia from exercising its right, which the Tribunal found to have accrued on 1 January 2009, to terminate the Call Option Agreement; that the Goa injunction was inconsistent with GL Asia's rights; that that was a breach of contract[3] for which the Tribunal could make an award of damages; and that the Tribunal would award damages in the sum of INR 12,253,193, being the amount which GL Asia had paid its Indian lawyers 'in respect of the Goa proceedings.' To describe this reasoning as idiosyncratic would seem to be an understatement, but, as both Mr Oliver Clifton, who has appeared on this application for GL Asia, and

[2] this formulation tracks the wording of section 36(2)(d) Arbitration Act 1976 – see paragraph [10] below for the text

[3] the Tribunal did not identify the contract, still less the provision which the Company had broken

Mr Robert Christie, who has appeared, together with Ms Claire Goldstein, for the Company, have rightly reminded me, I am not concerned with the intrinsic merits of the Tribunal's reasoning.

[6] Subject to a point raised by Mr Clifton and which I shall have to deal with in a moment, it follows from the decision of the Court of Appeal in **Pacific China Holdings Ltd v Grand Pacific holdings**[4] that if Mr Christie persuades me that there is a real question whether the damages element of the Partial Award is one that is enforceable under Part IX of the Arbitration Act 1976 ('the Act'), I must refuse to appoint liquidators to the Company.

[7] Mr Christie's first point is that the award of the amount of costs spent by GL Asia in relation to the Goa proceedings by way of damages for breach of contract does not fall within the scope of the arbitration agreement pursuant to which the members of the Tribunal were appointed. The arbitration agreement was contained within the Call Option Agreement and was in the following terms:

> 20.3 Any dispute, controversy, claim or difference of any kind whatsoever arising out or in connection with this Agreement (the "Dispute") shall first be attempted to be resolved by discussions and consultations between the [the Company] and [GL Asia] in good faith for a period of thirty (30) days after written notice has been sent by registered mail in the manner as specified in Clause 15 and at the addresses specified therein by any Party to the other Party (the "Consultation Period"). If the Dispute remains unresolved upon expiration of the Consultation Period, then any party may submit the Dispute exclusively to arbitration conducted by the Singapore International Arbitration Centre ("SIAC"), for arbitration in Singapore which shall be conducted in accordance with International Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules") rules in effect at the time the application for arbitration is made, as may be amended by the rest of this section. The language of the arbitration proceedings and written decisions or correspondence shall be English.

[4] HCVAP 2010/007, 20 September 2010, at paragraphs [55], [57]

[8] **Fiona Trust v Privalov**[5] requires a commercial, in the sense of businesslike, approach to the construction of arbitration agreements. Fine linguistic distinctions are to be eschewed as pedantic. The working assumption is that, unless the language clearly provides otherwise, the parties have agreed a dispute resolution process under which all disputes arising out of the contractual relationship to which the agreement relates will be dealt with under one roof, as it were. The limits of the approach are important. It is disputes generated *by the relevant contractual relationship* which the Court will expect to find that the parties have agreed to submit to arbitration.[6]

[9] In this case the parties clearly never intended to submit to the decision of arbitrators questions of the incidence of costs of court proceedings carried on between them without, so I have been told, any objection having been taken that they should have been stayed in favour of arbitration. It does not matter that the backdrop to the litigation was the contractual relationship. The question who should bear the costs of the proceedings was a question generated, not by the contractual relationship between the parties, but by the fact that they had engaged in litigation. In my judgment the Tribunal had no jurisdiction to decide who should bear the costs of such proceedings, any more than it had jurisdiction to decide how much tax GL Asia should pay to the appropriate fiscal authority

[10] Does it make any difference that the Tribunal purported to find that the costs incurred by GL Asia were in the nature of damages for breach of contract? I do not think that it does. The Court, like the parties, is stuck with the Tribunal's decisions, but not if the decision is about a matter which was not properly before it. In my judgment the Court is not obliged to accept the Tribunal's defective reasoning if the result would be to treat as enforceable an award which the Tribunal clearly had no jurisdiction to make. Obtaining an injunction from a Court of competent jurisdiction cannot amount to a breach of contract unless the injunction is obtained in breach of a contractual provision binding the party who obtains it not to do so. No such provision is identified by the Tribunal and none was identified by Mr Clifton in his excellent argument. What the Tribunal did was to decide that the Company should pay GL Asia's costs of the Goan proceedings. In my judgment, it had no jurisdiction to do so and the position does not change because the Tribunal dressed that part of its award up as an award of damages for breach of contract. The Company is entitled to have the question of the costs of the Goan proceedings determined by the Goan Court. It never agreed to refer the question of those costs to arbitration.

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[5] [2008] 1 Lloyds Rep 254

[6] See **Fiona Trust** at paragraphs 6, 7 and 13

[11] In my judgment, therefore, the Company clearly raises a question of substance whether that part of the Tribunal's award was made in excess of jurisdiction. It has shown to my satisfaction that there is a *bona fide* dispute as to its liability to pay the sum awarded by the Tribunal in its Partial Award.

[12] Mr Clifton raised a point based upon the construction of section 34(2) of the Act. Sections 33, 34 and 36(1), (2) and (3) of the Act are as follows:

> 33. This Part applies with respect to the enforcement of Convention awards.
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> 34. (1) A Convention award shall, subject to the other provisions of this Part, be enforceable either by action or in the same manner as the award of an arbitration is enforceable by virtue of section 28.
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> (2) Any Convention award which would be enforceable under this Ordinance shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Territory and any reference in this Ordinance to enforcing a Convention award shall be construed as including references to relying on such an award.
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> 36. (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 incapacity;
>
> (b) that the arbitration agreement was not valid under the law to which parties subjected it or, failing any indication thereon, under the law of the country where the award was made;
>
> (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;

(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;

(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.

[13] Mr Clifton submits that section 34(2) provides that a convention award must be recognized unless the person liable to satisfy it proves that it has a defence to an application for enforcement. He says that that means that for the purposes of an application to appoint liquidators the Court must accept that the company owes the debt established by the award unless the company proves that the award is unenforceable. He submits, correctly, that neither myself at first instance nor the Court of Appeal in **Pacific China Holdings**[7] had this point drawn to our attention.

[14] Section 34(2) is simply providing that an enforceable award creates an estoppel for all purposes. It goes no further than that. Section 36(2), upon which Mr Christie relies and which is concerned, as section 34(2) itself makes clear, with reliance as well as with enforcement, is concerned not with the existence or otherwise of (in the context of this case) a debt, but with the validity and essential fairness of the process by which the award is reached. It seems to me that if a company raises a *bona fide* challenge of substance to the validity or fairness of the arbitral process itself, falling short of proof on a balance of probabilities, it should no more be wound up on the basis of the resulting award than it should be on the basis of a claim in debt which is substantially disputed, but not necessarily proved not to exist. In presenting an application for the appointment of liquidators, an applicant is not enforcing an award. If there is real doubt under section 36(2) whether an award should be relied upon, the Court should not, in my view, appoint

[7] (supra)

liquidators on the strength of it. In the present case the Company demonstrates to my satisfaction that the damages element of the award is sufficiently vulnerable to a challenge of substance to make it inappropriate to wind the Company up in reliance upon it. A company does not have to prove that the award is unenforceable. In my judgment the *ratio* of **Pacific China**,[8] which of course binds me in any event, is unaffected by anything in section 34(2).

[15] Mr Christie advanced an argument that the Tribunal had usurped the power of the Goan Court to make its own determination as to the incidence of costs of its proceedings and that that made it objectionable on grounds of public policy that it should be enforced here in the BVI. It seems to me that there is nothing in the point. Public policy of the BVI favours enforcement, unless it would infringe some principle of policy such as agreements to share the proceeds of crime. It is not designed to protect the imagined sensitivity of a foreign Court to an attempt by an arbitral Tribunal to decide a matter which was properly within that Court's purview.

Conclusion

[16] This application fails.

Commercial Court Judge
15 July 2013

[8] (supra)