IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 116 OF 1997
(ON APPEAL FROM HCMP No.2083 OF 1996)

BETWEEN

HEBEI IMPORT & EXPORT CORPORATION	Plaintiff (Respondent)
and	
POLYTEK ENGINEERING COMPANY LIMITED	Defendant (Appellant)

Coram : Hon Chan CJHC, Nazareth V.-P and Keith J.

Dates of Hearing : 29th - 30th October 1997

Date of Handing Down Judgment : 16th January 1998

J U D G M E N T

Chan, CJHC (delivering the judgment of the Court) :

Background

The appellant ("defendant") is a company in Hong Kong and the respondent ("plaintiff") a company in the Mainland. By an agreement dated 29th April 1993, the defendant agreed to sell to the plaintiff a set of equipment for the production of rubber powder. The plaintiff had almost fully paid the purchase price. By two shipments in January and February 1994, the equipment was delivered to the plaintiff' s end user factory in China. The plaintiff alleged that itwas defective. On 15th May 1995, the parties referred

their dispute to the China International Economic and Trade Arbitration Commission ("CIETAC") for arbitration. A Chief Arbitrator was appointed in addition to two arbitrators who were appointed by the parties respectively. On 10th October 1995, there was a hearing before the Arbitration Tribunal. What exactly happened at the hearing before the Tribunal and thereafter is somewhat in dispute. On 29th March 1996, the Tribunal made an award which ordered, amongst other things, that the defendant should refund the purchase price and pay compensation to the plaintiff together with interest and costs. It also directed that the equipment be returned to the defendant.

In July 1996, the plaintiff applied *ex parte* to Leonard, J. for leave to enforce the award and to enter judgment in terms of the award. On 23rd July 1996, the judge granted leave and the plaintiff entered judgment on the same date. On 13th August 1996, the defendant applied by way of summons to set aside the leave and judgment. The summons was adjourned at the request of the defendant pending the determination of its application to the Beijing No. 2 Intermediate Court to set aside the arbitral award. That application was not successful. The hearing of the summons was resumed before Findlay J. On 15th May 1997, he refused to set aside the leave and judgment. This is an appeal against that decision. The plaintiff has filed a Respondent's Notice (which was amended on 7th October 1997) in support of that decision.

Whether a Convention award

During the hearing of this appeal, leading counsel for the defendant queried whether the arbitration award in question *is still* a Convention award to which the provisions of Part VI of the Arbitration Ordinance apply. As we understand it, this is an argument which counsel feels obliged to raise but does not strongly pursue. It is this. Both the United Kingdom and the PRC were

parties to the New York Convention. Prior to 1st July 1997, the provisions of the Convention applied to Hong Kong since it was a colony of the UK. An arbitration award made in Beijing under the CIETAC was then considered by the Hong Kong courts as a Convention award. Since 1st July 1997, Hong Kong has become part of the PRC. Hence, it is doubtful whether such an award which was made in one part of the PRC can still be enforced in another part of the same country as a Convention award.

With respect, we do not think this argument can be sustained in the present case. The award was made in March 1996. The application to enforce it was made, leave was granted and judgment entered before 1st July 1997. Findlay, J. heard and dismissed the application to set aside the leave and judgment before that date. There was at that time no doubt that the award was a Convention award. It had already been converted into a Hong Kong judgment before the change of sovereignty. This is an appeal from the decision refusing to set aside the leave and judgment. This court is asked to consider whether that decision was right. If it was wrong, the leave and judgment would be set aside. But if it was right, they stand. The question of whether the award is still a Convention award does not arise in this appeal.

If a Beijing award were sought to be enforced in Hong Kong after 1st July 1997, we think that perhaps the position would not be as straight forward. Article 1of the New York Convention provides as follows:

> "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of the State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement is sought."

In our view, the relevant time to decide whether an award is a Convention award (and hence the Convention applies) is the time when a party seeks to enforce it. That is the time when that party wants to invoke the jurisdiction of another place to enforce the award. See also the observations of Lord Brandon in *Kuwait Government v. Sir Frederick Snow & others* [1984] 1 AC 427 at 433-434.

Beijing is of course a territory of the PRC. Hong Kong is not a State, and after 1st July, 1997, it is similarly a territory of the PRC. If a Beijing award was sought to be recognised and enforced in Hong Kong now, it might be difficult to argue that the Convention was applicable under the first sentence of Article 1.

It would also seem, at first sight, that the second sentence of Article 1 literally embraces HKSAR awards sought to be enforced in the rest of China and possibly vice versa. However, it is quite clear that under the "one country two systems" concept, Hong Kong has a different legal system. If it is the intention of the Convention, as we think it is, to facilitate the recognition and enforcement of arbitral awards made in a territory where there is one legal system in another territory with a separate (or even different) legal system, it would seem that a purposive meaning should be given to the words "domestic awards" in the second sentence of Article 1. In that case, it can be strongly argued that a Beijing award would not be considered as a domestic award in Hong Kong and hence the Convention should also apply to it after 1st July 1997. Applying such an interpretation to the sentence of Article 1, it would seem that the Convention would apply so that the arbitral award in the present case can still be recognised and enforced in Hong Kong even if it were sought to be enforced here now.

Although this point does not arise in this case, we think that in order to put the matter beyond doubt, it is desirable that the relevant authority should consider appropriate amendments to the Arbitration Ordinance.

The issues in this appeal

In the present appeal, the defendant seeks to rely on three main grounds to show that the judge was wrong. First, the defendant was not given proper notice of an inspection which took place in the plaintiff's factory and was attended by the Chief Arbitrator and three experts in the presence of the plaintiff's representatives but in the absence of the defendant's representatives. It is submitted that the defendant was deprived of an opportunity to properly present its case to the arbitrators. Second, the award was tainted with apparent bias in that there were communications by the plaintiff's staff to the Chief Arbitrator in the absence of the defendant. It is submitted that it would be contrary to public policy if the award is to be enforced. Third, the award should not be enforced without regard to the plaintiff's corresponding obligation under the award to return the equipment in an acceptable condition.

The plaintiff contends that the defendant is estopped from raising in the Hong Kong courts points which had or could have been raised in proceedings in another court, namely the Beijing No.2 Intermediate People's Court.

The facts

The defendant's complaints are based on certain alleged facts relating to the conduct of the arbitration proceedings. It is submitted that what happened gives rise to legitimate grounds for the Hong Kong courts to refuse enforcement of the award under s.44 of the Arbitration Ordinance.

Some of the facts are not in dispute. It transpired that at the defendant's request, the Arbitration Tribunal appointed three experts to inspect and examine the equipment in question. The Chief Arbitrator and the experts went to the plaintiff's factory with a representative of VETAC (the body which arranged the appointment of the experts) and a representative of CIETAC for the inspection which lasted a whole day. During the inspection, two of the plaintiff's technicians were present. However, the defendant was not informed of the inspection and was therefore absent.

The facts which are in dispute centre around two matters. First, whether the Tribunal had promised that the inspection would be conducted in the presence of both parties, but had breached such promise by failing to inform the defendant. Second, whether during the inspection, the plaintiff's technicians were merely assisting in the testing and examination of the equipment and only showing records of previous testings to the Chief Arbitrator and the experts or whether they had also been briefed by the technicians or staff of the plaintiff.

On the first matter, according to the defendant, at the hearing of the arbitration on 10th October 1995, the evidence was not completed. The Tribunal adjourned for the purpose of appointing its own experts and inspecting the equipment and promised that the parties could attend such inspection. But the defendant was never notified of the date of the inspection and was therefore not able to attend or to brief its own experts. Hence, it had no opportunity to call the manufacturer of the equipment to give evidence or to comment on the experts' report. It is also alleged that the defendant was wrongly refused a second hearing.

On the other hand, the plaintiff alleges that the Tribunal never undertook to invite the parties to be present at the inspection and that the parties had agreed to make written submissions to the Tribunal. The defendant had indeed made its supplemental written submission on 24th November 1995. After obtaining the experts' report, the Tribunal invited the parties to make further supplemental submissions on the report. This the defendant did on 20th January 1996. Its request to call the manufacturer either to give evidence or to comment on the report was refused by the Tribunal. A deadline was set at 16th February 1996 for the parties to make further submissions. The defendant made a second further supplemental submission on 14th February 1996. In that submission, the defendant asked for the Tribunal to postpone its decision since it was still waiting for the comments of the US manufacturer. This was not granted since the matter had been delayed for a long time. There was no request for a second hearing.

As to the second matter, the defendant alleges that the documentation showed that the Chief Arbitrator and the experts had been given "seminars" by the plaintiff's technicians and staff on the equipment. But there was no independent record of what went on at the inspection and the defendant was kept ignorant of what happened. The plaintiff denies that its technicians and staff had briefed the Chief Arbitrator and the experts. It is said that they just assisted in the testing of the equipment and showing records of previous testings to the Chief Arbitrator.

Estoppel

We shall first deal with the issue of estoppel because if the plaintiff succeeds on this point, the defendant would in effect be barred from taking the two main points raised in its grounds of appeal.

The plaintiff's contention is based on facts which are hardly in dispute. On 1st November 1996, when the defendant sought an adjournment of its summons to set aside the leave and judgment, the reason given to Leonard J. was that it had applied to the Beijing No.2 Intermediate People's Court to set aside the award on grounds which were similar to those relied on for the summons. Counsel submits that the defendant chose to apply to the Beijing Court to revoke the arbitration award and went as far as to apply for an adjournment pending the outcome of that application. All the matters raised by the defendant here were or should have been raised with due diligence before the Beijing Court. Since there was already an adjudication by that court on the same or similar issues, the defendant is now estopped from taking these issues again.

As we understand it, there are two limbs in the plaintiff's argument. First, the defendant is estopped from re-opening the same grounds again in Hong Kong after it had failed on these grounds in Beijing. Leading counsel submits that the PRC is a party to the New York Convention and has adopted a system of domestic law in this area which follows closely the provisions of the Convention. Art 70 and 71 of the PRC Arbitration Law allow its courts to revoke or refuse enforcement of a foreign related award in the circumstances as set out in Art 260 of the Civil Procedure Law which closely resemble those provided in the New York Convention and which have been adopted in Hong Kong in s. 44 of the Arbitration Ordinance. Since the defendant had failed to

set aside the award on those grounds in Beijing, it should not be allowed to rely on them again in Hong Kong.

The second limb of the argument is that it would be an abuse of the process of the court for the defendant to try and raise new points which should and could have been litigated in the proceedings before the Beijing Court. It is submitted that the defendant's objection before the Beijing Court was that the Chief Arbitrator and experts were present at the end user's factory in the absence of the defendant and hence, the defendant was not able to present its case. In the present appeal, the defendant has shifted its arguments by taking a new point which is based not only on the presence of the Chief Arbitrator but also the alleged communications he had with the plaintiff's employees during the inspection in the factory. The plaintiff says that this alleged fact was always known to the defendant and that there was no reason why this point could not have been taken before the Beijing Court. The plaintiff relies on the wider concept of res judicata as pronounced in the landmark decision of *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd.* (1973-1976) HKC 194.

Leading counsel also refers to *Dallal v. Bank Mellat* [1986] 1 QB 441 which, she submits, supports her contention. In that case, there was an international agreement between the US and Iran Governments whereby an arbitration tribunal was established to deal exclusively with all litigation between one Government and the nationals of the other and that all decisions and awards of the tribunal would be final and binding. The tribunal was set up in the Hague although the awards of the tribunal were not valid arbitral awards under Dutch law. The plaintiff, a US citizen, referred to the tribunal a claim against an Iranian bank in respect of two dishonoured cheques. His claim was dismissed by the tribunal. The plaintiff then commenced an action in England against the same defendant and his claim relied on a cause of action based on

the same transaction which formed the basis of his claim before the tribunal. Hobhouse, J. held that the English court could exercise its discretion to strike out an action for abuse of process on a plea of res judicata where in the absence of special circumstances, factual issues were raised which had or should have with reasonable diligence been raised in the previous litigation and which had been adjudicated upon by a court or tribunal of competent jurisdiction.

In the present case, the learned judge, while he was not able to discern the precise extent of the issues taken by the defendant in the Beijing Court, accepted that the defendant was advancing before him the same kind of complaint and taking the same issues as it did before the Beijing Court. He commented that if this did not happen, it must be the fault of the defendant because it would have been easy for it to have done so. The judge further said :

> "I cannot think of any reason, and none has been advanced before me, why the defendant should be permitted to reopen the same point again; more especially as it was the defendant who obtained an adjournment of the proceedings in this court so that he could argue this point, amongst others, before the Beijing court. However, in view of my finding that there is no substance in the point, this aspect of the argument is academic."

Leading counsel for the defendant submits that the proceedings in the PRC and those in Hong Kong are different and no issue estoppel can arise. He argues that there is no provision either in the Arbitration Ordinance or in the New York Convention barring an application to resist enforcement after an application to set aside the award in the country of origin has failed. In fact, it is, he submits, anticipated that there would be different proceedings in the two different countries : one to set aside the award and the other to resist enforcement. He says that the res judicata doctrine in the *Yat Tung* case is aimed at preventing an abuse of process but that this is not the case here.

Counsel further argues that not only are the issues before the Beijing Court and those before this court different, the defendant was in fact not able under the provisions of the Civil Procedure Law and Arbitration Law in China to raise the same issues. He points out that public policy in China (which was argued in the Beijing Court) is clearly different from public policy in Hong Kong. It is submitted that the present case does not fall within either the narrower or wider sense of res judicata in the *Yat Tung* case.

The Arbitration Ordinance makes provision for the implementation of the New York Convention which deals with the recognition and enforcement of foreign arbitral awards. Section 44 of the Ordinance which is in line with Art 5 and Art 6 of the Convention sets out the various grounds upon which a foreign arbitral award may be refused enforcement. It also anticipates that an application for enforcement of foreign award may be adjourned pending the outcome of an application for setting it aside in the place where it was made. It is therefore clear, as counsel for the defendant submits, that neither the Convention nor the Arbitration Ordinance prohibits a party aggrieved by an arbitral award from seeking to set it aside and at the same time trying to resist enforcement in different places. However, we do not exclude the possibility that in appropriate cases, the doctrine of issue estoppel may be applicable. If exactly the same grounds which were relied upon to set aside an award in the place where it was made are relied on to resist enforcement in a foreign jurisdiction, we should think that an adjudication on those grounds in one competent jurisdiction should be binding between the same parties in another jurisdiction. The doctrine is aimed at preventing an abuse of the process of the court and it would be difficult to argue that it is not an abuse for a party against whom the adjudication was made to seek to argue over the same grounds again. The principles of the comity of nations and finality of adjudication should not be easily overlooked. In this connection, we

do not consider the case of *Owens Bank Ltd v. Bracco & another* [1992] 2 WLR 621 to be of assistance in the present case. In the *Owens Bank* case, the court held that the doctrine of issue estoppel had no application in the enforcement of foreign arbitral awards since it dealt with awards which were obtained by fraud. This is not a case involving fraud.

Similarly, if there are issues which could have been raised in the earlier proceedings but were for one reason or another not raised, we should also think that in appropriate cases, the wider principle of res judicata in the *Yat Tung* case may also apply. The position would be otherwise if, because of the differences between two jurisdictions, it was not open to a party to raise these other points in the previous proceedings.

It would seem that before the Beijing Court, the defendant applied to set aside the award pursuant to Art 70 of the Arbitration Law in the PRC. That article refers to Art 260 of the PRC's Civil Procedure Law which deals with the refusal of enforcement of an arbitral award. These articles provide as follows :

> **Art 70** Where the parties provide evidence to testify that the foreign-related arbitration award involves one of the circumstances prescribed by the Paragraph 1 of the Article 260 of the Civil Procedure Law, the collegiate bench organized by the People's Court should make an adjudication to revoke the award after its examination and verification.
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> **Art 260 of the Civil Procedure Law** A People's Court shall, after examination and verification by a collegial panel of the court, make a written order not to allow the enforcement of the award rendered by an arbitral organ of the People's Republic of China handling cases involving foreign element, if the party against whom the application for enforcement is made furnishes proof that:
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> (1) the parties have not had an arbitration clause in the contract or have not subsequently reached a written arbitration agreement;

> (2) the party against whom the application for enforcement is made was not given notice for the appointment of an arbitrator or for the inception of the arbitration proceedings or was unable to present his case due to causes for which he is not responsible;
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> (3) the composition of the arbitration tribunal or the procedure for arbitration was not in conformity with the rules of arbitration; or
>
> (4) the matters dealt with by the award fall outside the scope of the arbitration agreement or which the arbitral organ was not empowered to arbitrate.
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> If the People's Court determines that the enforcement of the award goes against the social and public interest of the country, the People's Court shall make a written order not to allow the enforcement of the arbitral award.

It can be seen that sub-paragraphs (1), (2), (3), (4) in the first paragraph of Art 260 and the second paragraph thereof are somewhat similar to the respective provisions of s. 44(2)(b), (c), (d), (e) and s. 44(3) of our Arbitration Ordinance although there are, we hasten to add, some differences.

In the present case, the defendant's main contention is that it would be contrary to public policy to enforce the award under s. 44(3) of the Ordinance. We doubt whether the defendant would have been able to rely on this ground when it applied to set aside the award before the Beijing Court. The nearest equivalent in the statutory provisions of the PRC is the second paragraph of Art 260 which refers to the "social and public interest of the country". The concept of public policy in Hong Kong is something which is generally part of the common law and it is difficult to see how it could be the same as that relating to the "social and public interest" of the PRC. In our view, leading counsel for the defendant is right in saying that it would be almost impossible for the defendant to argue before the Beijing Court in an application to set aside the award that it would be against public policy in Hong Kong to enforce the arbitral award. That would not be open to the defendant. The Beijing Court would not be concerned with enforcement in

Hong Kong. Nor would it be interested in the public policy of Hong Kong. The rationale behind the doctrine of issue estoppel or res judicata is to prevent abuse of the process of the court. In our view, there is no question of any abuse in this case. The defendant is entitled under the Convention and the Ordinance to apply to set aside the award in Beijing where it was made and to apply to resist enforcement in Hong Kong where it was sought to be enforced. The issue as to whether it is against public policy of Hong Kong to enforce the award which was made under the circumstances as alleged by the defendant was not and could not have been determined by the Beijing Court. We do not think that issue estoppel or the *Yat Tung* principle applies in the present case.

Public policy ground

Before Findlay, J., the defendant relied mainly on s. 44(2)(c) of the Arbitration Ordinance. The complaint was that the experts appointed by the Tribunal inspected the equipment in question at the plaintiff's factory in the presence of the plaintiff's employees but in the absence of the defendant. The defendant was not even given notice of the date and time of the inspection. As a result of this, the defendant was deprived of an opportunity to properly present its case. Before this court, while the ground under s. 44(2)(c) is still relied on, the main complaint is, as we see it, based on the ground under s. 44(3), namely, it would be contrary to public policy to enforce the award.

The defendant's complaint is threefold : (1) the Tribunal was in breach of its undertaking to invite the parties to be present at the inspection of the equipment; (2) the Chief Arbitrator went with the experts to the plaintiff's factory to inspect the equipment in the absence of the defendant; and (3) the Chief Arbitrator received communications from only one party, i.e. briefing in the form of seminars by the plaintiff's technicians and staff. It is submitted that as a result of what happened, there was a serious breach of natural justice

and a strong case of apparent bias. The Tribunal, particularly the Chief Arbitrator, was guilty of misconduct. In view of such breach of natural justice, misconduct and apparent bias against the defendant, it would clearly be contrary to public policy to enforce the award.

Counsel for the plaintiff argues that this is a new point which has never been raised in writing with the Tribunal. The defendant must be taken to have waived this point since it was not raised before although this was known to the defendant for some time. Counsel for the defendant submits that there is nothing to show that the defendant had full knowledge of the facts or had waived this point. In any event, since this involves a matter of public policy, the court should not feel inhibited from dealing with this point. We agree. We do not think that the defendant should be taken as having waived this argument.

With regard to the alleged breach of "undertaking" by the Tribunal, there is a conflict in the evidence. The defendant alleges that at the hearing on 10th October 1995, the Tribunal had agreed to notify the parties of the details of the proposed inspection. On the other hand, the plaintiff denies that the Tribunal had ever said that the inspection of the equipment would be attended by the parties or had ever promised to notify the parties of the date of the inspection.

It is of course difficult for the court to resolve this conflict in evidence on affirmations. However, as the defendant has pointed out, in one of its letters and/or submissions to the Tribunal, the defendant made the allegation that the Tribunal had breached its undertaking to notify the parties of the inspection. This was a very strong allegation. Yet, in its reply to the defendant, the Tribunal, for some reasons or another, failed to answer this

allegation. This is quite surprising and tends, in our view, to support the defendant's case.

It is not in dispute that the Chief Arbitrator and the experts attended the factory and inspected the equipment in the presence of the plaintiff's staff but in the absence of the defendant. The plaintiff argues that the inspection of the equipment was not conducted and the subsequent experts' report was not compiled for the purpose of determining whether and how the equipment was defective. The purpose of the exercise was to enable the experts to ascertain whether it was possible to modify the equipment in order to make it capable of complying with the contractual requirements. Hence, counsel argues, the inspection and the experts' report did not affect the Tribunal's determination. On the other hand, the defendant submits that the condition of the equipment was one of the matters in dispute, namely, whether the equipment had failed to comply with the contractual requirements or whether it was due to the failure of the plaintiff's staff to maintain the equipment which resulted in it not being able to comply with the required standard.

We do not think it is necessary or desirable for the present purpose to go into the merits of the award. Suffice it to say that even accepting the plaintiff's argument, it would seem that whether the equipment could be modified was an important factor in deciding the sort of award which the Tribunal should make, such as whether the purchase price should be refunded and whether compensation should be paid by the defendant and if so, how much. The condition of the equipment upon inspection is clearly relevant to the dispute between the parties. It would seem that such an inspection was very much part of the arbitration proceedings during which both parties should be present. In our view, the defendant should have been notified and allowed to be present at the inspection.

It is also important to note that only the Chief Arbitrator was present at the inspection but the other two arbitrators were not. It is not clear what arrangement, if any, they had among themselves. We should think that the other two were equally interested to find out the condition of the equipment as the Chief Arbitrator. After all, they were members of the Tribunal and the award was not only that of the Chief Arbitrator but an award of all three persons.

With regard to the alleged private communications to the Chief Arbitrator, the plaintiff says that there is no evidence that he had received any communication from the plaintiff's technicians or staff. According to the plaintiff, it was made clear to those present before the inspection that there was to be no private communication with the arbitrators, there would be no plaintiff's representative except two technicians who were there only to assist the testing of the equipment and there would be no treatment of hospitality. It is denied that there was any private communication between the plaintiff's employees and the Chief Arbitrator. It is said that because the defendant did not raise this point before the judge, the facts relating to this point had not been explored or investigated in the evidence. On the other hand, the defendant submits that there were no minutes of what happened during the inspection, particularly on the sort of communications between the plaintiff's employees and the Chief Arbitrator. The plaintiff however points out that the defendant never sought discovery of any record or minutes.

Again it is not easy to resolve this conflict in the evidence. But it is important to look at what the Tribunal said in its reply to the defendant dated 4th January 1996 (Bundle E page 647) :

> "Upon listening at the spot to the *seminars* of the technicians who participated in the installation and testing, they (those involved in the inspection including the Chief Arbitrator) only made records of the same and did not give any comments."

The experts' report also referred to this (Bundle E page 654) :

> "The testing operation and the problem existed (this section is compiled in accordance with the records of the *seminars* with the managing staff and technicians of the end user)"

It is therefore quite clear both from the Tribunal's own reply and the experts' report that during the inspection, there were indeed "seminars" given by the plaintiff's technicians to the inspectors, including the Chief Arbitrator. There is of course no evidence before the court of any "records of seminars". It is immaterial as to whether such record or minutes existed, why the defendant had not asked for them or why they were not provided by the Tribunal or the plaintiff. The significance of the reference to the seminars and the record and minutes thereof in the Tribunal's reply and the experts' report is that the Tribunal in the course of the proceedings and deliberation, did receive communications from only one party in the absence of the other. There is no reference in the documents as to what they were. The defendant was kept in the dark as to what those communications were. It would seem that, using the analogy adopted by counsel and the learned judge, there were indeed "whispers in the ears" not only of the experts but also of the Chief Arbitrator. Such whispers are not known and the defendant did not have the opportunity of commenting on them.

Whether and how far the Tribunal in its deliberation had taken into consideration such communications is another matter. But this is not known either. We do not accept that the inspection had little or no effect on the

outcome of the arbitration. The result of the inspection might affect the quantum of the award if not also the liability of the defendant.

Leading counsel for the defendant refers to the decided cases on the question of apparent bias. We do not think there is any dispute as to what the correct test is, namely, whether in all the circumstances of the case, there appears to be a real danger or possibility of bias (see *R v Gough* [1993] AC 646 and *Re Otis Elevator Co (HK) Ltd* [1994] 1 HKC 740). Applying such test to the present case, there is, in our view, such a danger or possibility.

We have also been referred to a number of cases regarding the "misconduct" of an arbitrator in receiving evidence or communication from one party to the arbitration. We do not think we need to go into these cases. In our view, they simply illustrate that the principle of natural justice demands that arbitration proceedings, like litigation, must not only be conducted fairly but also be seen to be conducted fairly, lest this undermines the public's confidence in the arbitration process.

It is quite clear from the authorities that "public policy"in the context of the relevant provision of the Convention is to be construed narrowly. It was decided in the American case *Parsons & Whittemore v. RAKTA* 508 F.2d 969 that :

> "... the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."

This was accepted in the Hong Kong case of *Paklito Investment Ltd v. Klockner East Asia Ltd* [1993] 2 HKLR 39.

The test we would therefore adopt is : whether, in all the circumstances of the case, it would violate the most basic notions of morality and justice of the Hong Kong system if the foreign award in question is to be enforced. The cases in which the court would come to such a conclusion would not be, we venture to say, very common. We would be slow to condemn what happened before an arbitration tribunal in a foreign jurisdiction as having violated the most basic notions of morality and justice of our system unless it is quite clearly the case. But having considered carefully all the circumstances of this case, we cannot help coming to the conclusion that the defendant has established that there was a serious breach of natural justice and a strong case of apparent bias. What happened falls short of our standard of fairness. It would be against public policy to enforce the award in these courts.

Inability to present case

As a second ground, it is further argued by the defendant that it did not have the opportunity to properly present its case. In its affirmations, the defendant alleged that there had been a number of breaches of the CIETAC Arbitration rules and the Arbirtation Law for the PRC. In his submissions, counsel relied mainly on Art 38 of the Arbitration rules. The relevant provisions in the Arbitration rules and the Arbitration Law are as follows :

> **CIETAC Arbitration rules**
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> **Art 32** The arbitration tribunal shall hold oral hearings when examining a case. At the request of the parties or with their consent, oral hearings may be omitted if the arbitration tribunal also deems that oral hearings are unnecessary, and then the arbitration tribunal may examine the case and make an award on the basis of documents only.
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> **Art 38** The parties shall produce evidence for the facts on which their claim, defence and counterclaims are based. The arbitration tribunal may undertake investigations and collect evidence on its own initiative, if it deems it necessary.
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> If the arbitration tribunal investigates and collects evidence on its own initiative, it shall accordingly timely inform the parties to be present at

> the place where the arbitration tribunal deems it necessary. Should one party or both parties fail to appear at the place directed, the investigation and collection of evidence shall by no means be affected.
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> **Art 40** The expert's report and the appraiser's report shall be copied to the parties so that they may have the opportunity to give their opinions thereon. At the request of any party to the case and with the approval of the arbitration tribunal, the expert and appraiser may be present at the hearing and give explanations of their reports when the arbitration tribunal deems it necessary and appropriate.
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> **PRC Arbitration Law**
> **Art 45** The evidence should be demonstrated only at the tribunal section, and the parties have the right to question the evidence.
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> **Art 47** The parties to the case have the right to argue for their own claims in the process of the arbitration. On the completion of the debate, the first arbitrator or the sole arbitrator should ask the parties to the case for their final statements.

It is argued by the plaintiff that the defendant had made at least three further and/or supplemental submissions to the Tribunal after the compilation of the experts' report. It had ample opportunity to call the US manufacturer to give evidence and to comment on the report. The defendant did not do so. It had only itself to blame and could not complain that it had been deprived of a fair opportunity to make representations or call witnesses.

Under Art 38 of the Arbitration rules, the Tribunal has the power to make investigation and collect evidence on its own initiative and it can do so without informing the parties. We do not think that the defendant can validly complain that there is a breach of this article. There is no breach of Art 40 either. A copy of the experts' report was provided to the defendant which was invited to make comments thereon. It is within the Tribunal's discretion to call or not to call the experts to attend and give an explanation on their report.

Nor was there any breach of Art 47 of the PRC Arbitration Law. The parties were permitted to make further and supplemental submissions to the Tribunal before it made its final award and they did.

On the other hand, we think it is quite clear that the defendant did not have the opportunity of hearing what was presented to the Chief Arbitrator by the plaintiff's employees during the inspection of the equipment and hence was not able to present its side of the case before the experts prepared their report. This was to some extent mitigated by the provision of a copy of the experts' report and the chance to comment on it. But neither the reply from the Tribunal or the report mentioned what transpired during the briefing session. In the peculiar circumstances of this case, we think that the Tribunal should have held further hearings with regard to the matters which had arisen from the inspection and the experts' report. There was no request or consent that an oral hearing could be omitted. In our view, the defendant has a legitimate complaint that there was a breach of Art 32 of the Arbitration rules and Art 45 of the PRC Arbitration Law. It can be said that the defendant did not have a proper opportunity to present its case to the Tribunal after the inspection and the compilation of the experts' report.

Discretion

Counsel for the plaintiff argues that even if the court is satisfied that the defendant has established one of the grounds under s.44 of the Arbitration Ordinance, the court still has a discretion in ordering enforcement of the award. This is particularly the case if the result of the arbitration proceedings could not have been affected.

Section 44 of course uses the word "may" which indicates that the court has a discretion when deciding whether to order or refuse to order

enforcement even if a Convention ground is proved. In *Paklito Investment Ltd v. Klockner East Asia Ltd* [1993] 2 HKLR 39, counsel (Mr Tang S.C.) pointed out that the court's discretion could only come into play in relation to some but not all of the grounds. We think that this argument must be right. It would be most surprising if the court were to enforce the award even though this would be contrary to public policy. It the court finds that it would be violating the most basic notions of morality and justice to enforce the award, it should enforce such award.

It was suggested that in cases falling within the other grounds of s.44, the court should still order enforcement if it could be shown "beyond any doubt that the decision could have been the same". (See Professor Albert Jan Van den Berg , the New York Arbitration Convention, 1958, p.302.) We accept that there must be cases in which the court would exercise its discretion and enforce an award if it takes the view that the decision of the arbitration tribunal would have been the same in any event. The burden of showing that this is such a case must be on the party resisting enforcement.

Counsel for the plaintiff submits that this principle was accepted in *Apex Tech Investment Ltd v. Chuang's Development (China) Ltd* [1996] 2 HKC 293. We doubt if that was the effect of the *Apex Tech* case. In that case, the judge of first instance accepted that there was a procedural irregularity which prevented the defendant in that case from presenting its case before the tribunal but exercised his discretion in ordering enforcement of the award on the basis that on the materials before him, the result of the arbitration could not have been different. What the Court of Appeal decided in that case was that "the court should meticulously avoid any consideration of the merits of the award". The appeal was allowed because on the materials before him, the judge could not have come to the conclusion that he did.

In the present case, the award involved the refund of the purchase price and the payment of compensation and was apparently based on the condition of the equipment as assessed by the experts and the Chief Arbitrator during the inspection. How far they were influenced by the briefing of the plaintiff's staff in the absence of the defendant is unknown. As in the *Apex Tech* case, it would be difficult to say that there was no actual bias practised against the defendant or that the result would have been the same if the defendant had been able to properly present its case before the Tribunal. The burden is on the plaintiff to satisfy the court that this was the case. We do not think that it has succeeded in doing so.

Further, as we said, it would be wrong in principle to enforce the award if it is contrary to public policy to do so. We do not think the court should still exercise its discretion and order enforcement in such circumstances.

That would have disposed of this appeal. But for the sake of completeness, we shall also deal with the last ground of appeal.

Concurrent obligations

The defendant submits that the court should refuse enforcement of the award because it imposes a concurrent obligation on the plaintiff to return the equipment upon the defendant refunding the price and paying compensation to the plaintiff. It is submitted that the equipment is outside the jurisdiction and there is evidence that it is not in the required condition to be delivered to the defendant. Counsel argues that the court should not require or order the defendant to make payment to the plaintiff unless there is a means to ensure that the equipment is returned in the appropriate condition to the

defendant. Since this cannot be done, or since the court is not in a position to ensure that, enforcement of the award against the defendant should be refused.

On the other hand, it is submitted on behalf of the plaintiff that the obligation to return the equipment and the obligation to pay compensation and refund the price are not concurrent obligations. It is argued that the plaintiff, as the purchaser of the equipment, is under no obligation to deliver the equipment to the defendant and that it is for the defendant to collect the equipment. The risk is on the defendant before the equipment is returned. It is further submitted that the Tribunal could not have intended that the two obligations should be concurrent or conditional upon one and other. A number of indicators are relied on : there is a deadline for the defendant to refund the price and to pay compensation whereas there is no time limit for the return of the equipment; since the equipment is in the PRC, any enforcement action for the return of the equipment would be taken in the PRC whereas since the defendant is a Hong Kong company, the payment obligation should take place in Hong Kong. It is pointed out that in any event, the defendant has refused to take delivery of the equipment or has failed to take steps to do the same. That being the case, the plaintiff would suffer if the payment obligation is concurrent with the obligation to return the equipment.

In our view, if an award is severable into different and separate parts and only one part of it is held to be bad, the valid parts may still be enforced while the part which is bad can be rejected. See Russell on Arbitration (20th ed.) and *J.J. Agro Industries (P) Ltd (a firm) v. Texuna International Ltd* (No.2) [1992] 2 HKLR 391. This is also envisaged by s.44 (4) of the Arbitration Ordinance (see Art VI(c) of the Convention). It is necessary to consider whether the questionable part of an award is an integral part of the whole award or severable from the remainder in the light of what the Tribunal

had decided. If it is part and parcel of the whole award, it would be difficult to hold that only that part is not enforceable while the other parts are.

The arbitration award in this case contains the following relevant provisions :

> **Clause 1** It is adjudicated that the rubber powder production equipment for recycling vehicle tyres sold to the claimant (the plaintiff) by the respondent (the defendant) shall be returned. All costs arising from returning the goods including the costs of dissembling and transportation, etc. shall be borne by the (defendant). The (plaintiff) shall give its assistance to the (defendant) regarding relevant procedures such as dissembling work and customs declaration. The (plaintiff) shall be responsible to clean the equipment prior to returning it. The (plaintiff) shall not be liable for returning to the original state of those parts of the equipment which have been modified during the installation and testing process according to the opinion and instructions of the (defendant).
>
> The (defendant) shall refund the price of the equipment already paid in the sum of US$1,186,910.09 to the (plaintiff).
>
> **Clause 9** All the above mentioned sums awarded shall be settled within 45 days from the date of this award. In the event of late payment, an annual interest of 9% shall be charged for payment in US dollars and an annual interest of 14% shall be charged for payment in Renminbi. If there is a delay in the dissembling and loading [of the equipment] to be returned, the (defendant) shall keep the equipment in custody and such expenses shall be borne by the (defendant).

Clauses 2 to 5 direct the defendant to compensate the plaintiff interest, economic loss and expense. Clause 6 deals with the arbitration fees. Clause 7 deals with the expert assessment fees and Clause 8 with the charges of overseas arbitrators.

It can be seen from these provisions that the award only provides for the equipment to be returned. It does not say who has the obligation to undertake such task. However, the defendant has to bear the costs of the return and the plaintiff has the obligation to give assistance with regard to the

procedures and to clean the equipment before returning. The defendant is also obliged to keep the equipment in custody and pay for the expenses for doing so in case there is a delay in the dissembling and loading of the equipment. There is no deadline for the return of the equipment whereas the payment obligation has a deadline, i.e. within 45 days from the date of the award. Any delay will attract the payment of interest. It would seem from these indications that the principal obligation in dissembling, loading and keeping the equipment in custody would be on the defendant. Upon a true construction of the award, it is clear that the Tribunal took the view that it was the defendant which was the responsible or defaulting party and hence should be obliged to refund the purchase price, pay compensation and take back the equipment. There is no obligation on the part of the plaintiff to deliver the equipment to the defendant. That being the case, the question of the plaintiff failing its obligation to deliver the equipment to the defendant does not arise. In other words, there is no question of any concurrent obligation which may give rise to a difficulty in enforcement.

In any event, there is nothing in the award which may suggest that the obligation to return the equipment depends on the repayment of the purchase price and/or compensation. In our view, it is a separate obligation. Hence, if we were to hold that the award was enforceable in Hong Kong, we would not withhold the refund of the purchase price or payment of compensation simply because there might be some problem in the return of the equipment.

Conclusion

For the reasons which we have given above, we have come to the conclusion that the appeal must be allowed. However, this implies no criticism of the judge below. The defendant's case before him had been that it was

simply the experts appointed by the Tribunal who had attended the inspection of the equipment in the absence of the defendant. It had not been suggested that the Chief Arbitrator had been present as well. As the judge himself noted, "if ... the experts had whispered what they were told into the ears of the arbitral tribunal, the defendant would have had a legitimate complaint."

We set aside the leave to enforce the award and the judgment entered pursuant thereto. There would be an order nisi that the defendant should have the costs of the appeal and that the costs order in the court below should stand. Finally we would express our gratitude to all counsel for the assistance which they have provided to this court.

(Patrick Chan)	(G P Nazareth)	(Brian Keith)
Chief Judge, High Court	Vice President Court of Appeal	Judge of the Court of First Instance

Mr Ronny Tong SC & Mr Godfrey Lam, instructed by Messrs W T To & Co for the defendant

Ms Audrey Eu SC & Mr Horace Wong, instructed by Messrs Simmons & Simmons for the plaintiff