JONES DAY

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SETTING ASIDE WARS: THE ARBITRATOR STRIKES BACK

In 2006, Grand Pacific Holdings Ltd ("Grand Pacific") commenced an ICC arbitration against Pacific China Holdings Ltd (In Liquidation) ("Pacific China") in an attempt to enforce a loan agreement worth US$40 million. On August 24, 2009, a three-member tribunal made an award in favor of Grand Pacific.

Pacific China then took the rare step of commencing court proceedings in Hong Kong seeking to set aside the award in 2011, based on three grounds that were identified as the Taiwanese Law issue, the Joint Experts and Report issue, and the Hong Kong Law issue.[1] This application was successful in the Court of First Instance (the "CFI"), which set aside the award due to the tribunal's breaches of Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law; namely, that Pacific China was unable to present its case, and that the procedure adopted by the tribunal was not in accordance with the parties' agreement. In 2012, Grand Pacific appealed to the Court of Appeal, which released its judgment in May 2012, overturning the lower court's judgment and reinstating the arbitral award.[2]

TAIWANESE LAW ISSUE

During the arbitration, the parties had agreed to a procedural timetable stating that prehearing submissions containing each party's best case on fact and law would be exchanged simultaneously. Despite this, the tribunal ordered that Grand Pacific file its full argument and best case on the Taiwanese law issue in a supplemental submission made 10 days after Pacific China had made its prehearing submissions.

The CFI held that this resulted in Grand Pacific having advance notice of Pacific China's best case before it filed its own submissions, which was not in accordance with the parties' agreement. In addition, it meant that Pacific China was not able to present its case. As such, the court found breaches of Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law.

1 *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2011] HKCFI 424.

2 *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd* [2012] HKCA 200.

However, the Court of Appeal found that Pacific China had made a late application for leave to raise the Taiwanese law issue, and that this late application was taken into account by the tribunal when it amended the procedural timetable. The Court of Appeal decided that this was a decision that the tribunal was entitled to make, despite the prior agreement over the procedural timetable between the parties, due to the flexible nature of arbitration that encourages arbitrators to use procedures appropriate to each specific case.

JOINT EXPERTS AND REPORT ISSUE

In the arbitration proceedings, the tribunal requested that the two parties' experts produce a joint report and also stated that no new authorities could be introduced without leave, which would be granted only if they were "sensational." Later, Pacific China applied to introduce three additional Taiwanese judgments, which the tribunal refused to allow.

The CFI found that the tribunal had not reviewed the judgments that Pacific China sought to adduce, so they had no basis for determining that the authorities were not sensational. The court had "no doubt at all" that this prevented Pacific China from presenting its case on the Taiwanese law issue, falling within Article 34(2)(a)(ii) of the UNCITRAL Model Law.

The Court of Appeal rejected this finding, simply stating that the CFI was not entitled to interfere with the tribunal's case management decision, which was fully within its discretion to make.

HONG KONG LAW ISSUE

The first argument made by Pacific China in relation to this issue was that Pacific China had been denied the right to respond to post-hearing submissions made by Grand Pacific on the applicability of Hong Kong law. The tribunal in fact informed Pacific China that it had enough material to decide the Hong Kong law issue.

However, the CFI found that this failure to allow Pacific China to respond to Grand Pacific's new material again denied Pacific China the right to present its case, falling within Article 34(2)(a)(ii) of the UNCITRAL Model Law. It was further mentioned that the tribunal had sufficient time before releasing its award to allow Pacific China to make further submissions.

The Court of Appeal again disagreed with the CFI. It held that Pacific China had already had two opportunities to make submissions on the Hong Kong law issue (even though the issue was raised at a late stage by Grand Pacific), which the tribunal was entitled to take into account. Further, the tribunal was also entitled to decide that the submissions should end with Grand Pacific's submissions. The court stated that the conduct of the tribunal would need to be serious, even egregious, to the extent that one would say that a party was denied due process, before a court would find that a party was not able to present its case. As long as there was a reasonable opportunity to present its case, it would be difficult for a party to establish a denial of due process. In this case, the Court of Final Appeal found that the conduct was not sufficiently serious or egregious.

CONCLUSION

In obiter, the Court of Appeal also discussed the consequences of a breach of Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law. It found that the grounds for refusing to enforce an award would be construed narrowly; in fact, even if the court found violations of Article 34(2)(a)(ii) and (iv) of the UNCITRAL Model Law, such an award would still be enforced if the court was satisfied that the outcome could not have been different. If the violation had no effect on the outcome of the arbitration, then the court should deny the application to set aside the award.

LAWYER CONTACTS

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