FACV No. 10 of 1998

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 10 OF 1998 (CIVIL)

(ON APPEAL FROM CACV No. 116 OF 1997)

Between:

HEBEI IMPORT & EXPORT CORPORATION **Appellant**

- and -

POLYTEK ENGINEERING COMPANY LIMITED **Respondent**

Court:	Chief Justice Li, Mr Justice Litton PJ, Mr Justice Ching PJ, Mr Justice Bokhary PJ and Sir Anthony Mason NPJ
Date of Hearing:	21, 22, 27 and 28 January 1999
Date of Judgment:	9 February 1999

J U D G M E N T

Chief Justice Li :

I have read the judgment of Sir Anthony Mason NPJ. I agree with it and the orders he proposes.

Mr Justice Litton PJ :

Introduction

I have had the advantage of reading in draft Sir Anthony Mason NPJ's judgment. As he has set out fully the background to this appeal, it is unnecessary for me to repeat it.

History of the proceedings

It is important at the outset to bear in mind that the court is here concerned with a Convention award: an award which, in this case, has been determined by a court in the supervisory jurisdiction to have been made in conformity with the rules governing the arbitral process.

It is not in dispute that every fact now relied upon by the seller for saying that there has been violation of the most basic notions of morality and justice in the arbitral process was known to the seller prior to its application to the Beijing Court to set aside the award and prior to the hearing before Findlay J in this jurisdiction. And yet, no point was taken before the Beijing Court to that effect, though points on breaches of arbitration rules were taken.

Before Findlay J, the seller did not rely on the *public policy* ground in s.44(3) of the Arbitration Ordinance, Cap. 341, to contest enforcement. What was invoked was s.44(2)(c) of the Arbitration Ordinance, on the ground that it was unable to present its case. The seller failed before the judge. After that, on appeal, it averred for the first time that a fundamental flaw in the arbitral process had occurred, rendering it expedient as a matter of *public policy* to deny enforcement. A court, and especially an appellate court, ought to view such a case with the utmost suspicion.

Public policy defence

Section 44(3) gives effect to Article V(2)(b) of the New York Convention. In considering the *public policy* ground for refusing enforcement, it is important to view the structure of s.44 as a whole. Subsection (1) gives recognition to mutual recognition of awards by saying: "Enforcement of a Convention award shall not be refused except in the cases mentioned in this section."

Subsection (2) then lists the circumstances, in six paragraphs - (a) to (f) - under which enforcement may be refused, the onus of proof being on the person against whom the Convention award is invoked to prove those circumstances. Para. (f) is particularly noteworthy. The court is empowered under this paragraph to refuse enforcement if the award *"has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made"*. This gives recognition to the principle that the legal validity of an award is, primarily, a matter for the court of the supervisory jurisdiction to decide. We then come to subsection (3) which says:

> "(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." [Emphasis added].

As can be seen, refusal of enforcement on public policy grounds in subsection (3) is a residual remedy. It would be an unusual case where the "competent authority" in subsection 2(f) has ruled in favour of the validity of the award, yet the court in the enforcement jurisdiction nevertheless concludes that enforcement should be denied for public policy reasons. The practical result, as counsel for the appellant Ms Audrey Eu SC points out, can be extremely unjust: The claimant cannot *enforce* the award because the award has, in effect, been nullified in the eyes of the enforcement court, yet it cannot ask for the arbitration to be instituted afresh in the supervisory jurisdiction because the court in that jurisdiction has *upheld* its validity.

The expression *public policy* as it appears in s.44(3) is a multi-facetted concept. Woven into this concept is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction, and such challenge has failed.

The facts

It is an admitted fact that the seller received a copy of the experts' report in mid-December 1995. Sir Anthony Mason NPJ has in his judgment referred to the letter of 4 January 1996 from the tribunal to the seller, where the Chief Arbitrator's presence at the inspection was disclosed. There were further submissions thereafter from the seller, in the course of which the seller asked that the American manufacturer of the equipment Jacobson Inc. be made a party to the arbitration proceedings or be called as a witness to explain the defects in the equipment. Not surprisingly this was declined by the tribunal. In its reply dated 25 January 1996 the tribunal went on to say:

> "If you have any opinion on the contents of the expert assessment report, please submit the same in writing to the Tribunal before 16 February 1996."

The seller responded on 14 February 1996 with lengthy submissions and ended up by saying:

> "The equipment has up to now failed to attain the targets prescribed in the Agreement. Although this was not caused by the deliberate act of … the seller, and [the seller] was in fact a victim, [the seller] is willing to assume its own responsibility of compensation if the equipment is repairable …."

There was then an admission of liability to the tune of US$55,994.38 and RMB 77309.39. This was followed by a request that the tribunal should postpone making an award for two months. Not surprisingly, this was not accepted by the tribunal which then published its detailed award on 29 March 1996.

On the facts I conclude that the seller comes nowhere near

establishing a case for intervention by the court on public policy grounds. As I read the Court of Appeal's judgment, it was led astray by the notion that, at the inspection at the end-user's factory, there was some process of assessment of the state of the equipment by the Chief Arbitrator in the presence of the experts, but in the absence of the other two arbitrators, and of the seller. Whether such a process, had it occurred, might have brought the case within s.44(3) is beside the point. There is no evidence that this had occurred. On the evidence, the Chief Arbitrator was there to ensure propriety of conduct on the part of the experts; he was not there to form any kind of judgment on the state of the equipment, nor whether modification of its design was possible. The arbitral tribunal ultimately based its award on the report of the experts, not on the Chief Arbitrator's evaluation of the state of the equipment. As to the contents of the experts' report, the seller had ample opportunity to comment and to challenge its conclusions.

The Court of Appeal, in my judgment, made far too much of the so-called briefing by the technicians on the history of the equipment, when the experts attended at the end-user's factory, accompanied by the Chief Arbitrator. On the evidence, this was the first view of the equipment by the experts. They had been appointed by the tribunal at the seller's request, and their initial task was to see whether, as the seller contended, the equipment might be modified so as to perform to the contract specification. That was the focus of the "briefing". On these facts, it was not open to the Court of Appeal to conclude that the seller, being absent at the inspection, had been prevented from presenting its side of the case. The inspection at the factory was not a "hearing" nor was it an occasion for either party to present its case.

Article 32 of the CIETAC Arbitration rules and Article 45 of Arbitration

Law of the PRC

The Court of Appeal found as a fact that there had been breaches of Articles 32 and 45 (Article 32 says: "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." Article 45 says: "The evidence should be demonstrated only at the tribunal session, and the parties have the right to question the evidence"). The Court of Appeal made its findings despite the conclusion of the Beijing Court that there had been *no* breaches of the arbitration rules. The Court of Appeal's findings cannot stand. The "rules" which apply in this jurisdiction are those set out in s.44(2) of the Ordinance. Before Findlay J the seller invoked s.44(2)(c) and failed. It did not appeal against that finding but, in the Court of Appeal, invoked a *different* provision, s.44(3), on the basis that *public policy* was a common-law concept which had no equivalence in PRC law. As put by the Court of Appeal:

> " 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."

There was no evidence before the Court of Appeal as to the circumstances under which enforcement of a Convention award might be refused under the second paragraph of Article 260, on the ground that enforcement would be against the "social and public interest of the country". The Court of Appeal simply assumed that the grounds under that rubric must necessarily be very different from those comprised in the

public policy defence in s.44(3) of the Hong Kong Ordinance, and therefore concluded that, despite having taken proceedings in the Beijing Court to contest the award, it was open to the seller to resist enforcement in Hong Kong. I have already explained earlier why that conclusion is, in my judgment, erroneous. Whether that view be right or wrong there was no warrant in my judgment for the Court of Appeal to embark upon a collateral issue, to enquire into alleged breaches of Articles 32 and 45 of the Mainland rules concerning arbitration. Its jurisdiction was confined to entertaining an appeal against Findlay J's finding that the rule in s.44(2)(c) of the Hong Kong Ordinance governing the arbitral proceedings had not been breached. And if there was no appeal against that, the matter should have ended there.

Estoppel

Estoppel, a term developed in the English law of equity, does not lie comfortably in the context of enforcing a Convention award. It is not a legal concept of universal currency among the contracting states to the New York Convention. If what is suggested by *estoppel* is no more than this, that a party invoking s.44(3) must act in *good faith*; that he must not string the claimant along by taking procedural points in contesting the award, and then, when all else has failed, attempts to resist enforcement by taking a *public policy* point for the first time, then this is no more than expressing another facet of public policy, as expressed in s.44(3). In my view *estoppel* as such cannot be an answer to the seller's application to refuse enforcement in this case, and it is fruitless to inquire whether the "issues" now raised are the same as, or similar to, the ones put before the Beijing Court. Rather, the point should be put on a broader basis. Having regard to the seller's conduct, a court in Hong Kong should be slow to entertain its application to refuse enforcement of the award.

Conclusion

In my judgment, on the facts of this case, the seller has come nowhere near proving a case for refusing enforcement based on public policy grounds. I would allow the buyer's appeal and make the orders as Sir Anthony Mason NPJ has proposed.

Mr Justice Ching PJ :

I agree with the judgment of Sir Anthony Mason NPJ, and with the orders he would make.

Mr Justice Bokhary PJ :

This appeal is concerned with the enforcement in Hong Kong of a Convention award i.e. an award made in pursuance of an arbitration agreement in a State or territory, other than Hong Kong, which is a party to the New York Convention. The full facts are set out in the judgment of Sir Anthony Mason NPJ. I respectfully agree with him, and wish only to emphasise the following matters.

In the Court of Appeal's judgment delivered by the Chief Judge, two crucial statements as to the facts are made. The first is that "the award … was apparently based on the condition of the equipment as assessed by the experts and the Chief Arbitrator during the inspection". And the second one, immediately following the first, is that: "How far they were influenced by the briefing of the [appellant buyer's] staff in the absence of the [respondent seller] is unknown". The implication is that the experts and the Chief Arbitrator were — and therefore the award itself was

— so influenced to *some* extent.

If I had felt able wholly to share the Court of Appeal's view of the facts, I might have been disposed to affirm the result which it reached, which was to refuse enforcement of the award. It might be mentioned that if the facts were indeed as the Court of Appeal saw them, the seller may, for all we know, have succeeded in its application to the court in the supervisory jurisdiction, the Beijing No. 2 Intermediate Court, for the setting aside of the award. But the evidence does not support the Court of Appeal's view of the facts. According to the Arbitration Tribunal, the Chief Arbitrator accompanied the experts merely to see that they went about their work properly. There is no evidence that he made any assessment of the condition of the equipment during the inspection. Nor is there any evidence that anybody briefed him during the inspection.

What the evidence suggests is as follows. Two technicians, who were in the end-user's employ but acted as agents for the buyer, assisted the experts to the extent necessary for them to carry out the inspection. (It was of course the seller itself which had wanted an inspection done.) Probably the technicians did tell the experts, in the Chief Arbitrator's hearing, what had gone wrong in the past. But that would have been of limited importance since the experts were not there to consider what the equipment had failed to do. They were concerned to discover what the equipment could be made to do through modification.

Inability to present case?

True it is that the seller did not attend the inspection because it had not been notified of it. And I think that this lack of notice did provide

the seller with some cause for complaint. But in all the circumstances, including the seller's inaction after discovering the existence of this cause for complaint, I do not think that the complaint can legitimately be taken so far as to say that the seller had been unable to present its case.

That is the end of the seller's first submission. This is the submission that enforcement of this award should be refused under s.44(2)(c) of the Arbitration Ordinance, Cap. 341, which provides that enforcement of a Convention award may be refused if the person against whom it is invoked proves that he was unable to present his case. It fails.

Contrary to public policy?

What remains is the seller's second submission. This is the submission that enforcement of the award in question should be refused under s.44(3) of the Arbitration Ordinance which provides that enforcement of a Convention award may also be refused if it would be contrary to public policy to enforce the award. Here the seller's argument runs thus. The Chief Arbitrator had, in the seller's absence, been in contact with the buyer's employees or agents. This involved justice not being seen to be done. And it gave the appearance of bias. Accordingly, the argument concludes, it is contrary to public policy to permit enforcement of the award in Hong Kong.

In my view, there must be compelling reasons before enforcement of a Convention award can be refused on public policy grounds. This is not to say that the reasons must be so extreme that the award falls to be cursed by bell, book and candle. But the reasons must go beyond the minimum which would justify setting aside a domestic judgment or award. A point to similar effect was made in a comparable

context by the United States Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 473 US 614 (1985). There the question was whether an antitrust claim was to be referred to arbitration outside the United States. In holding that it was, the majority said this (at p.629):

> "… concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context".

The considerable strength of this demand for comity is apparent from what it was able to overcome, namely the advantages of dealing with antitrust claims by way of litigation in the United States rather than by way of arbitration elsewhere. These advantages are detailed in the dissenting judgment of the minority.

When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have very different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.

In regard to the refusal of enforcement of Convention awards on public policy grounds, there are references in the cases and texts to what has been called "international public policy". Does this mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely

internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter. If it were the former, it would become so difficult of ascertainment that a court may well feel obliged — as the Supreme Court of India did in *Renusagar Power Co. Ltd v. General Electric Co.* Yearbook Comm. Arb'n XX (1995) 681 at p.700 — to abandon the search for it.

None of this is to say that the proper approach is insular. It is eclectic for this reason. When deciding, under this approach, whether to enforce a Convention award made in circumstances where a domestic judgment or award would have to be set aside, it is appropriate to examine how far the courts of other Convention jurisdictions have been prepared to go in enforcing Convention awards made in circumstances which do not meet their domestic standards. Thus many Convention courts' decisions were cited in this appeal. These decisions include that of the Italian Court of Appeal in *Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s.* Yearbook Comm. Arb'n IV (1979) 289 at p.292. That court permitted enforcement of a Convention award made in the United States even though the award contained no reasons while the giving of reasons for decisions was a principle of the Italian Constitution.

In my judgment, the position is as follows. Before a Convention jurisdiction can, in keeping with its being a party to the Convention, refuse enforcement of a Convention award on public policy grounds, the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the Convention, it cannot reasonably be expected to overlook the objection.

The learned authors of "Mustill & Boyd: The Law and

Practice of Commercial Arbitration in England", 2nd ed. (1989) point out at p.250 that "the general principles of law relating to bias apply in the same way to arbitrations as to other tribunals". They then continue (*ibid*.) by drawing a distinction between, on the one hand, "bias in the strict sense, namely a predisposition to decide a dispute in a particular way" and, on the other hand, "the situation in which the arbitrator conducts the reference in a way which is *said to be* unduly favourable to one party". (Emphasis supplied.)

In the present context, I think that a distinction can and should be made between the effect of actual bias and that of apparent bias. (When I say "bias" I mean a lack of the impartiality required of judges and arbitrators.) Actual bias would be more than our courts could overlook even where the award concerned is a Convention award. But short of actual bias, I do not think that the Hong Kong courts would be justified in refusing enforcement of a Convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or arbitrations are concerned. Our stance must be that something more serious even than that is required for refusing such enforcement. In adopting such a stance, we would be proceeding in conformity with the stance generally adopted in regard to Convention award enforcement by the commercial jurisdictions whose decisions from around the globe have been cited to us by leading counsel for the buyer.

Leading counsel for the seller cited the decision of the House of Lords in *In re Pinochet* (published on the Internet on 15 January 1999). In particular, he places reliance on Lord Nolan's statement that "where the impartiality of a judge is in question the appearance of the matter is just as

important as the reality". That was said in the context of a judge's position where the question was whether a former head of state whose extradition was sought for crimes against humanity could resist liability to such extradition by a plea of immunity based on his having been a head of state at the time of the alleged crimes. In a context like the present, however, I think that the courts cannot avoid the question of whether or not there was *actual* bias. They must decide the matter upon the answer to that question, thorny as such a question can be. I do not think that this is asking too much. After all, where the appearance of bias is strong enough, it can lead to an inference that actual bias existed. Moreover, if things had been so unsatisfactory that the party against whom enforcement is sought had been unable to present his case, that would have provided him with a separate basis for resisting enforcement.

There is no attack on the good faith of the Chief Arbitrator or any of the other arbitrators. That being so, once the seller's argument that it had been unable to present its case breaks down, there remains in the circumstances of this case simply no warrant for saying that it would be contrary to public policy to enforce the Convention award in question. It is unnecessary, therefore, to consider the pleas of waiver and estoppel raised by the buyer against the seller.

Conclusion

Despite the able arguments advanced by leading counsel for the seller, I am of the view that the buyer is entitled to succeed. So I, too, would allow the appeal, with costs here and below, so as to restore the registration of the award and the judgment entered in the buyer's favour pursuant to such registration. Finally, I consider it only fair to the learned judges of the Court of Appeal to say this. One normally expects that the

facts would have been sorted out before a case reaches this Court. But my distinct impression is that the learned judges of the Court of Appeal received considerably less assistance in regard to the facts than we received.

Sir Anthony Mason NPJ :

This appeal arises out of proceedings to enforce an Arbitration Award ("the Award") made by an Arbitration Tribunal within the China International Economic and Trade Arbitration Commission ("CIETAC") on 29 March 1996 in favour of the appellant (plaintiff). The Award ordered the respondent (defendant), a Hong Kong company, to refund the purchase price paid under a contract and to pay compensation to the appellant, a Mainland company, together with interest and costs. The Award also directed the appellant to return to the respondent certain equipment supplied under the contract.

The appellant obtained an order ex parte by Leonard J. on 23 July 1996 granting leave to enforce the Award and the appellant entered judgment on that date. The respondent applied on 13 August 1996 to set aside the grant of leave and the judgment. At the request of the respondent, the application was adjourned pending the determination by Beijing No. 2 Intermediate Court ("the Beijing Court") of an application by the respondent to set aside the Award. That application was refused. On the resumption of the Hong Kong proceedings, Findlay J. refused to set aside the grant of leave and the judgment. The Court of Appeal (Chan CJHC, Nazareth V-P and Keith J.) allowed an appeal from the orders made by Findlay J. and set aside the grant of leave and the judgment.

The questions for determination in the appeal to this court concern issues of natural justice in the arbitration and apparent bias on the part of the arbitrators. These issues arise out of an inspection by experts appointed by the Tribunal of equipment supplied by the respondent under its contract with the appellant. The experts had been appointed to examine the equipment and make a report. The inspection took place at the end user's factory but, as no notice of the inspection was given to the respondent, it did not attend the inspection. The Chief Arbitrator accompanied the experts. The respondent claims that, at the inspection, the technicians who installed the equipment communicated with the Chief Arbitrator. The respondent also claims that, after delivery of the experts' report, it was denied the opportunity of a hearing at which it could contest the report. Other questions which arise in the appeal are whether the respondent is precluded from raising the natural justice and apparent bias issues by reason of the decision of the Beijing Court, the

respondent's conduct in the arbitration and its failure to raise the ground of bias either before the Beijing Court or Findlay J.

The contract

By a contract dated 29 April 1993, the respondent agreed to sell to the appellant a set of equipment, together with accessories, tools, information and drawings, for the recycling of rubber tyres for the total purchase price of US$1,281,029 which included the cost of training, installation, testing and commissioning. The contract provided that the seller guaranteed that

> "under the circumstances of correct installation, normal operation and maintenance, the goods shall be in good operation conditions within 18 months from the date when the goods arrive at the port of destination or within 12 months after the issuance of the testing and approval certificate…"

The contract provided two sets of rules for inspection and recovery of compensation. The relevant rules in the present case stipulated that if, during the warranty period mentioned above, the quality or specifications of the goods were found not to be in conformity with the contract, or defects were found in the goods, the buyer should apply to the Import and Export Commodity Inspection Bureau for an inspection of the goods and make a claim for compensation based on the Inspection Bureau's inspection certificate.

The equipment was manufactured by Jacobson Inc. ("Jacobson"), a United States manufacturer. The appellant had paid 93% of the purchase price by the time the two shipments in January and February 1994 of the equipment were delivered to the end user factory of Qinhuangdao Chenggong Rubber Powder Co. Ltd ("Chenggong Rubber")

in China. That company, as well as the appellant and the respondent, signed the contract.

The testing and commissioning of the equipment was delayed by the failure of the respondent to supply equipment drawings on the date specified in the contract. Installation of the equipment was completed on 18 August 1994. It was not until late September 1994 that the respondent and Jacobson's technicians carried out testing and commissioning at the end user factory for three weeks. They were unable to achieve production. Despite further efforts by American engineers sent by Jacobson in December 1994, including the making of modifications to the equipment, it was unable to produce products that could meet the standard stipulated by the contract. They made various proposals of other modifications which would not have resulted in the production of 80 'mu'. The contract stipulated that the equipment would produce rubber powder to the fineness of the standard known as
50 'mu' at a certain rate and 80 'mu' at a lesser rate. The equipment was unable to produce rubber powder conforming to that standard. 80 'mu' is finer in size than 50 'mu'.

The respondent and Jacobson proposed various modifications which involved a lowering of the product specifications. They were unacceptable to the appellant. On 8 May 1995, the Inspection Bureau certified that

> "the quality and performance of the equipment did not comply with the Contract and was caused by defective equipment produced by the seller."

The appellant then decided to seek compensation for breach of contract.

The arbitration

On 15 May 1995, the appellant referred the dispute to CIETAC for arbitration, pursuant to cl. 19 of the agreement. In addition to the two arbitrators appointed by the parties, a Chief Arbitrator was appointed by CIETAC. The appellant claimed that by reason of the equipment's failure to function properly and to meet the stipulated production capacity, the respondent was in fundamental breach of contract. The appellant sought rescission, refund of the price paid, interest and damages.

In its defence filed on 24 July 1995, the respondent admitted that the equipment failed

> "to function properly nor meeting the requirements of production capacity as set out in the agreement."

The defence also stated

> "the main reason why the rubber recycling equipment … could not function normally was that some pieces of the equipment manufactured by the manufacturer were defective in quality, and that valid and timely testing and commissioning work was not provided."

According to the defence, Jacobson was responsible for the failure to resolve problems that arose during the testing and commissioning of the equipment. The defence contained a request that Jacobson be joined as a respondent in the arbitration. The respondent nevertheless denied that there was a *fundamental* breach of contract and claimed that the equipment was not worthless and could be modified to achieve the stipulated production capacity. Accordingly, the respondent requested the Tribunal to appoint "the relevant authoritative organization" to assess the equipment, to confirm its quality and performance and to propose a "reasonable modification plan". The defence asserted that the compensation claimed

by the appellant exceeded the loss it suffered from the breach of contract. It is important to note that the respondent was not, in its defence, putting forward a modification plan proposed by itself or Jacobson. It intended that the organization to be appointed would come forward with such a plan.

At the oral hearing which took place on 10 October 1995, the Tribunal agreed, at the request and at the expense of the respondent, to appoint experts to examine the equipment and to make a report. The Tribunal appointed experts from VETAC (Vision Economic Technology and Consulting Company). When the experts went to the end user's factory for that purpose, the inspection lasted a whole day. Two technicians, described in the Court of Appeal's judgment as "the plaintiff's technicians", were present to demonstrate the installation and operation of the equipment. I leave for later consideration the character of the technicians, what happened at the inspection and whether there was any communication by the technicians to the Chief Arbitrator.

The experts' report was delivered in November 1995, but the respondent did not receive a copy until 15 December. Contrary to the respondent's hopes, if not expectations, the report found that the equipment could not be modified so as to achieve the production capacity stipulated by the contract.

After receiving the experts' report, the Tribunal invited supplemental submissions from the parties. Thereafter the respondent made a further submission on 29 December 1995 and two supplemental submissions on 20 January 1996 and 14 February 1996. The last two submissions were made after the respondent had received from the Tribunal a letter dated 4 January 1996 in which the Tribunal gave an

account of the inspection. The respondent claims that the letter constitutes evidence that there were improper communications between the technicians and the Chief Arbitrator in the absence of the respondent giving rise to a case of apparent bias. Yet the respondent did not raise this point until the matter reached the Court of Appeal. It was not a ground advanced in the application to the Beijing Court or, for that matter, before Findlay J.

The respondent's submission of 20 January 1996 has significance for the outcome of this appeal. The submission stated

> "the Respondent, as a trading company, is unable to understand the technological and functional aspects of the equipment as a professional. Therefore, once the arbitration process was started, the Respondent pointed out that it was absolutely necessary to request the American Company to take part in the hearing (whether the American Company was willing to do so is a separate matter) for the purpose of clarifying the facts … Even if the American Company was unable to act as a respondent … it was still necessary to ask [it] to serve as a principal witness."

In the submission, the respondent requested the Tribunal to require Jacobson, "to serve as the principal witness" and also requested the Tribunal in the arbitration to hear the observations of Jacobson on the assessment made by the experts and to postpone the making of an award until these steps had been taken and the Tribunal was in position to review the defence of Jacobson to the claim which the respondent was to make against it. Otherwise the submission did not challenge any particular part of the report; nor did it seek a hearing so that the respondent could question the experts, call witnesses or present evidence.

The Tribunal responded to the submission by refusing a second hearing, stating that it could not compel or call the American

company to give evidence. The Tribunal sought the respondent's comments on the experts' report before 16 February 1996.

In its last submission of 14 February 1996, the respondent sought a postponement of the making of an award for two months to enable the comments of Jacobson on the experts' report to be procured and sent to the Tribunal. It seems that the respondent had not previously taken steps to obtain such comments. The Tribunal refused a postponement on the ground that the case had already taken too long.

The Award, after reciting the appointment of the experts, at the request of the respondent and with the consent of the appellant, in accordance with article 39 of the CIETAC Arbitration Rules, went on to set out the substance of the experts' report and their conclusion that the modification proposals put forward by Jacobson were "completely unacceptable".

The Award stated

> "It would be good if partial replacement and modification of the existing equipment will satisfy the required performance, product quality and the quantity stipulated in the Contract and will also minimise the loss of both parties."

The Award went on to find that the equipment was not capable of modification in a way that would meet the requirements of the contract in relation to production and that

> "It should be regarded as reasonable for the [appellant] not to have accepted such modification plan which will cause a long-term loss to the factory."

In reaching its conclusions the Tribunal placed reliance on the experts' report, the contents of which were set out in some detail.

It is clear that the experts' findings were based very largely on technical assessments made by experts which took place sometime after the inspection of the equipment at the factory. Chinese experts with relevant experience were invited to study the technical aspects of the equipment and its performance. Comparative analyses with similar equipment in China and other countries were made. Defects in the equipment and the causes of those defects were identified. The possibility of modification was considered and rejected by the experts as stated in these terms in the Award :

> "The several modification proposals made by Jacobson in general retained the original technology and procedure … As the principle and technology of the original system was unreasonable, such modification proposals could not possibly produce expected results. Regarding lowering the quality of the products by only producing products of sizes 40 'mu' or above, it was financially not feasible."

The Court of Appeal

The Court of Appeal accepted, and it is not disputed in this Court, that the Award is a Convention award to which Part IV of the Arbitration Ordinance, Cap. 341, ("the Ordinance") applies. Section 2(1) of the Ordinance defines "Convention award" to mean

> "an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or territory, other than Hong Kong, which is a party to the New York Convention."

I do no more than refer to the discussion of this matter in the judgment of the Court of Appeal.

The Court of Appeal also concluded that, even accepting that the inspection was not conducted for the purpose of determining whether

the equipment was defective, an inspection was material in deciding whether the equipment could be modified and what type of award should be made. It was necessary to determine whether the purchase price should be refunded, whether compensation should be paid and, if so, how much. So the condition of the equipment on inspection was relevant to the outcome of the arbitration and was part of it.

The Court of Appeal held that there were private communications from the appellant's technicians to the Chief Arbitrator, evidenced by the experts' report and the letter dated 4 January 1996 from the Tribunal, and that the inspection might have affected the quantum of compensation, if not also the respondent's liability.

Having dealt with the facts in this way, their Lordships concluded that, in accordance with s. 44(3) of the Ordinance, it would be contrary to public policy in Hong Kong to enforce the Award. This conclusion was based on the perceived departure from natural justice and apparent bias on the part of the Tribunal, which arose from the communications made by the appellant's technicians to the Chief Arbitrator and the experts, and on the view that the respondent was denied a proper opportunity to present its case by reason of the Tribunal's failure to hold a further hearing in relation to the matters which had arisen from the inspection and the experts' report. The Court of Appeal dealt with these matters as policy considerations under s. 44(3). The appellant's argument that the Court should exercise a residual discretion to order enforcement, even in a case where enforcement would be contrary to public policy, was rejected.

Issues of fact

Before turning to the issues of law which arise in this appeal, it is necessary to determine the contested issues of fact. Miss Eu SC for the appellant submits that the Court of Appeal was in error in stating that the inspection took place at the *appellant's* factory and that the reports made to the experts at the inspection were made by the *appellant's* technicians. That the inspection took place at the end user's factory is clearly established by the evidence. It is also clear that the technicians were not members of the appellant's staff.

It is, however, necessary to take account of the relationship between the appellant and the end user Chenggong Rubber. In the contract, to which that company's representative is a signatory, the end user's factory is described as "Buyer's Factory". The seller's guarantee was included in the contract at the request of those controlling Chenggong Rubber, according to the appellant's reply to the respondent's defence in the arbitration. And the appellant's claim to compensation is little more than a reflection of the loss claimed to have been sustained by Chenggong Rubber. In this situation, the inference is irresistible that, in the arbitration, there was a close identity of interest between the two companies. Accordingly, it is of little or no significance that the Court of Appeal may have misdescribed the factory as the appellant's factory.

It seems that much, if not all, of the appellant's evidence relating to the installation, testing, commissioning and performance of the equipment came from the factory. Mr Zhang Shan, the Deputy

President and General Manager of Chenggong Rubber, made the principal affirmation in support of the appellant's case in answer to the respondent's application to set aside the judgment entered by Leonard J.

On a fair reading of that affirmation, it is reasonable to infer that the two technicians, stated by Mr Zhang to be present at the inspection, though not officers of the appellant, were technicians who had been present at the installation and testing of the equipment by Jacobson and contributed their knowledge and experience to the appellant's case that the equipment was defective and that the Jacobson modifications tested in December 1994 did not work satisfactorily. Once this fact is appreciated, it is scarcely to the point to say that the technicians were not employees of the appellant.

Then there is the question whether there was any communication to the Chief Arbitrator. Miss Eu SC for the appellant submits that, on the evidence, the Chief Arbitrator attended the factory on the day of the inspection for the sole purpose of ensuring the impartiality and independence of the experts' examination. The letter dated 4 January 1996 from the Tribunal to the respondent's lawyers, after referring to the appointment of the experts, stated :

> "For the examination at the spot, the … Tribunal selected the Chief Arbitrator, and invited the officers of the Secretarial Office to participate. To ensure the impartiality and the independence of the experts' examination, working conditions were set for the expert people, they were able not to have any unilateral communication with the staff of either party, and refused to accept any treatment of hospitality, meals, gifts… etc. Upon listening at the spot to the seminars of the technicians who participated in the installation and testing, they only made records of the same, and did not give any comments …
>
> According to Article 38 of the Arbitration Rules, the… Tribunal shall have the right to arrange for independent expert investigation, and

> does not necessary be required to inform both parties to be present. Since the equipment in this case could not meet the conditions of the test running, the … Tribunal considered that it was not necessary to inform both parties to be present."

The letter went on to say :

> "As far as the seminars, discussions, compilation printing etc. of the contents of the expert examination report were concerned, the … Tribunal and the staff of both disputing parties had not [been] invited to participate."

The import of the last sentence is by no means clear. It appears, however, to be directed to "seminars" or discussions between experts (rather than a presentation or explanation of installation and testing by the technicians) and to other matters going to the preparation and printing of the report. I do not read the sentence or, for that matter, any other part of the letter as denying that the Chief Arbitrator attended the inspection and heard what the technicians had to say.

The significance of the reference in the letter to Article 38 – Article 39, not Article 38 was mentioned in the Award - is that it authorizes the Tribunal to undertake investigations and collect evidence on its own initiative. The Article would, it seems, enable the Chief Arbitrator on behalf of the Tribunal to collect evidence and listen to statements made by the technicians at the inspection, in the absence of the parties or their representatives. It seems also that, under Article 38, the attendance of the parties at the inspection was required only if the Tribunal deemed it necessary.

The Award itself stated that the experts

> "conducted a detailed inspection of various aspects of the equipment's original design, including technical performance … installation, and testing and commissioning"

and

> "listened to reports made by those technicians who had taken part in the installation and testing of the equipment."

Neither the letter, nor the Award, nor the affirmation of Mr Zhang, asserted that the Chief Arbitrator absented himself from the actual inspection or the presentation and the reports made by the technicians. On these facts, it would be reasonable to infer that the Chief Arbitrator participated in the inspection and heard what the technicians had to say.

Whether the Tribunal indicated, on 10 October 1995, that inspection would be conducted in the presence of the representatives of both parties is an issue that I am unable to resolve. The affirmations filed by the parties are in conflict. It does not appear that attendance by the parties at the inspection formed a part of the order or decision made by the Tribunal appointing the experts; nor was attendance by the parties mentioned in the respondent's defence in which such an appointment was sought.

Application of the CIETAC Arbitration Rules and the PRC Arbitration Law

It is common ground between the parties that the CIETAC Arbitration Rules and PRC Arbitration Law governed the arbitration. The Court of Appeal found that there was no breach of these provisions, except for Article 32 of the Rules and Article 45 of the Law. I am unable to accept the finding that there was a violation of these two Articles. Although Article 32 requires an oral hearing, there was an oral hearing on 10 October

1995, and there is no evidence that what happened subsequently amounted to a breach of Article 32.

Article 45 of the Law provides

> "The evidence should be demonstrated only at the tribunal session, and the parties have the right to question the evidence."

Again there is no evidence that what happened amounted to a breach of this provision. Nor, apart from the belated attempt by the respondent, in its submission of 14 February 1996, to obtain the comments of Jacobson on the report, did the respondent seek to exercise a right to question the report.

The judgment of the Beijing Court records the relevant grounds advanced by the respondent on which the Award should be set aside and rejected them. The Court concluded :

> "[n]o circumstances existed which would require the setting aside of the … Award in accordance with the provisions under the law, and the arbitration procedures were in compliance with the Arbitration Rules."

This conclusion entails that there was no violation of Article 53 of the Rules which required the Tribunal to make its award

> "in accordance with the facts of the case, the law and the terms of the contracts, international practices and the principle of fairness and reasonableness."

There is, accordingly, no basis on which we could decline to accept the conclusion reached by the Beijing Court that there was compliance with the relevant provisions of Chinese law.

There is no evidence that it was open to the respondent to take action under Chinese law to require the Chief Arbitrator to withdraw or to enforce his withdrawal on the ground of misconduct. In the absence of evidence, we would be justified in presuming that Chinese Law on the topic is the same as that of Hong Kong. The matter is dealt with in Articles 34 to 37 of the Rules, in which provision is made for removal for misconduct. But there is no evidence as to the precise operation of these Rules.

Article 45 of the Rules provides that a party who knows or should have known that a provision of the Rules has not been complied with yet proceeds without raising his objection in a timely manner shall be deemed to have waived his right to object. Article 45 gives effect to an important principle, not confined to Chinese law, namely that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there had been no non-compliance, keeping the point up his sleeve for later use after an award is made, should that course prove to be expedient.

PRC law makes provision for the setting aside and the non-enforcement of foreign-related arbitration awards in various circumstances (Arbitration Law, Articles 70, 71 and Civil Procedure Law, Article 260). The grounds for non-enforcement are similar to those stated in s. 44 of the Ordinance. They include the grounds that the party resisting

enforcement "was unable to present his case due to causes for which he is not responsible", that the composition of the tribunal was not in conformity with the rules of arbitration and that enforcement is contrary to "the social and public interest of the country" (Article 260(2), (3) and (4)).

The importance of the Rules and the Arbitration Law is that the parties entered into the arbitration knowing that it was governed by the provisions of the Rules and the Law. Thus, the appointment of experts and the inspection were necessarily governed by Articles 38 and 39 of the Rules. As already mentioned, Article 38 appears to contemplate that the Tribunal may collect evidence otherwise than in the presence of the parties; further, it appears to contemplate that the Tribunal *may* thereafter appoint a time and place at which the parties can deal with the evidence so collected.

Questions of law in this appeal

On facts as I have stated them, the questions of law which arise this appeal are :

(1) whether, in the light of the Beijing proceedings and the failure to raise in those proceedings the ground that enforcement would be contrary to public policy by reason of the communications to the Chief Arbitrator, it was open to the respondent to raise the grounds relied upon, more particularly the ground just mentioned;

(2) whether, in the light of the respondent's conduct in the arbitration, it was open to the respondent to resist the enforcement of the Award on a ground arising out of the communications to the Chief Arbitrator;

(3) whether the respondent has established a ground based on s. 44(2)(c) of the Ordinance for not being able to present its case; and

(b) whether the respondent made out the public policy ground under s. 44(3) of the Ordinance by establishing that enforcement of the Award would violate the most basic notions of justice and morality in Hong Kong;

(4) whether, in any event, the Court should exercise a discretion to enforce the Award.

The Hong Kong statutory provisions

Section 2AA of the Ordinance provides :

"(1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.

(2) This Ordinance is based on the principles that –

(a) subject to the observance of such safeguards as are necessary in the public interest, the parties to a dispute should be free to agree how the dispute should be resolved; and

(b) the Court should interfere in the arbitration of a dispute only as expressly provided by this Ordinance."

Section 44, so far as it is material, provides

"(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 –
> …
> (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; …
>
> (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.
> ….
>
> (5) Where an application for the setting aside or suspension of a Convention award has been made to … a competent authority …, the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

(1) *Whether, in the light of the Beijing proceedings and the failure to raise in those proceedings the ground that enforcement would be contrary to public policy by reason of the communications to the Chief Arbitrator, it was open to the respondent to raise the grounds relied upon, more particularly the ground just mentioned?*

In the Court of Appeal and in argument before this Court, reference was made to the possible application of the doctrine of issue estoppel arising from the decision and the proceedings in the Beijing Court and the similarity of the grounds on which an arbitration award can be set aside under PRC law and the grounds on which enforcement of an award can be resisted under the Ordinance. I have difficulty with the notion that the questions here are to be resolved by issue estoppel. The application of the doctrine would require a precise comparison to be made of the relevant provisions of PRC law and the law of Hong Kong with a view to ascertaining whether the respective laws give rise to identical or similar

issues. In the absence of evidence of the effect of PRC Law, the Court cannot undertake such an exercise. Nor is the difficulty lessened by the suggestion that the doctrine of issue estoppel should be applied flexibly, whatever that suggestion may be intended to mean.

On the other hand, it is appropriate that the courts should have regard to the principles of finality and comity to the extent to which they are consistent with the provisions of the Ordinance and the Convention. Both the Ordinance and the Convention give effect to the principles of finality and comity by prohibiting refusal of enforcement of a Convention award except in the cases for which they provide (Ordinance, s. 2AA(2)(b), s. 44(1); Convention, Articles VI.). But both provide for exceptions to that prohibition by stating the grounds on which enforcement *may* be refused.

Under the Ordinance and the Convention, the primary supervisory function in respect of arbitrations rests with the court of supervisory jurisdiction as distinct from the enforcement court (see Ordinance, s. 44(5); Convention, Article VI; *Westacre Investments Inc v. Jugoimport-SPDR Holding Co. Ltd.* [1998]3 WLR 770 at 808). But this does not mean that the enforcement court will necessarily defer to the court of supervisory jurisdiction.

The Convention distinguishes between proceedings to set aside an award in the court of supervisory jurisdiction (Articles V 1(e) and VI) and proceedings in the court of enforcement (Article V1). Proceedings to set aside are governed by the law under which the award was made or the law of the place where it was made, while proceedings in the court of enforcement are governed by the law of that forum. The Convention, in providing that enforcement of an award may be resisted on certain

specified grounds, recognizes that, although an award may be valid by the law of the place where it is made, its making may be attended by such a grave departure from basic concepts of justice as applied by the court of enforcement that the award should not be enforced.

It follows, in my view, that it would be inconsistent with the principles on which the Convention is based to hold that the refusal by a court of supervisory jurisdiction to set aside an award debars an unsuccessful applicant from resisting enforcement of the award in the court of enforcement. See *Firm P v. Firm F* (Year Book of Commercial Arbitration Vol. II, 1977, p. 241 where a German Court of Appeal refused to enforce an award which had been declared to be enforceable by a United States District Court). Even if the proposition stated above should be subject to some limitations, it must apply to a case where the party resisting enforcement is doing so on the ground of public policy. That is because the ground is expressed in the Convention (Article V. 2(b)) as "contrary to the public policy of the country", that is, the country in which enforcement is sought. In the court of supervisory jurisdiction, the public policy to be applied would be a different public policy, namely that of the supervisory jurisdiction.

In *Paklito Investment Ltd v. Klockner East Asia Ltd* [1993] 2 HKLR 39 Kaplan J. expressed (at 48-49) the view that a party faced with a Convention award against him has two options. He can apply to the court of supervisory jurisdiction to set aside the award or he can wait to establish a Convention ground of opposition. In my view, such a party

is not bound to elect between the two remedies, at any rate when, in the court of enforcement, he seeks to rely on the public policy ground, as the respondent did here.

It follows also that a failure to raise the public policy ground in proceedings to set aside an award cannot operate to preclude a party from resisting on that ground the enforcement of the award in the enforcing court in another jurisdiction. That is because each jurisdiction has its own public policy.

What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. Failure to raise such a point may amount to an estoppel or a want of *bona fides* such as to a justify the court of enforcement in enforcing an award (see *Chrome Resources S.A. v. Leopold Lazarus* (Yearbook Comm. Arb'n. XI (1986) pages 538-542)). Obviously an injustice may arise if an award remains on foot but cannot be enforced on a ground which, if taken, would have resulted in the award being set aside.

(2) *Whether, in the light of the respondent's conduct in the arbitration, it was open to the respondent to resist enforcement of the Award on a ground arising out of the communications to the Chief Arbitrator?*

The appellant submits that the respondent's objection to the communications to the Chief Arbitrator should have been advanced, if it was to be advanced at all, in the arbitration itself under the CIETAC Rules and under the Arbitration Law. Once the respondent received the Tribunal's letter of 4 January 1996, it had notice that the Chief Arbitrator

accompanied the experts and was present at the factory when the inspection took place. The information in that letter is the foundation of the respondent's case. The later information that the inspection lasted a whole day, which was contained in Mr Zhan's affirmation, simply reinforced what was in the letter.

Instead of raising the question on receipt of the letter, the respondent continued to participate in the arbitration. By pursuing this course, the respondent precluded an ascertainment in the arbitration of the extent of the Chief Arbitrator's participation in the inspection and of the nature of any communications made to him by the technicians. Moreover, had the question been raised, it is possible that action may have been taken by the Tribunal to remedy the situation, assuming that such action was necessary or desirable. Also precluded was an investigation of what happened at the inspection and the part that it played in the report and the Tribunal's decision. The respondent's failure to raise the objection in the Beijing Court and before Findlay J., though not directly relevant to the question now under consideration, had a similar effect.

The respondent's conduct amounted to a breach of the principle that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there had been no compliance, keeping the point up his sleeve for later use (see *China Nanhai Oil Joint Service Corp Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* [1994] 3 HKC 375 at 387).

There has been some debate as to the legal basis for declining to refuse enforcement of an award in these circumstances. In the context of absence of the formalities required by Article II(2) of the Convention, Dr

van den Berg considers that it is a "question of estoppel as a fundamental principle of good faith". According to Dr van den Berg,

> "[t]he principle of good faith may be deemed enshrined in the Convention's provisions."

See A.J. van den Berg, The New York Convention of 1958 (Kluwer, 1981) at p. 182. That approach gives effect to the objects of the Ordinance as stated in s. 2AA.

The approach was adopted by Kaplan J. in *the China Nanhai Oil Case* [1994] at 384-387, a case concerning the constitution of a CIETAC arbitration tribunal. His Lordship held that the Ordinance and the Convention conferred a residual discretion on the court of enforcement to decline to refuse enforcement, even if a ground for refusal might otherwise be made out. I agree with his Lordship that the use of the word "may" in s.44 and Article V of the Convention enables the enforcing court to enforce an award, notwithstanding that a s.44 ground might otherwise be established. Whether a court would so act in such a case would depend in very large measure on the particular circumstances. If is difficult to imagine that a court would do so, if enforcement were contrary to public policy, but there is no reason why a court could not do so where, as here, the factual foundation for the public policy ground arises from an alleged non-compliance with the rules governing the arbitration to which the party complaining failed to make a prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured.

Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the *bona fide* principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case.

On any one of these bases, the respondent's conduct in failing to raise in the arbitration its objection arising from the communications to the Chief Arbitrator was such as to justify the court of enforcement in enforcing the Award.

Having reached this conclusion, I do not need to deal with the separate question whether failure to raise the point before the Beijing Court was an additional ground for reaching the same conclusion. Without going into that question, I should indicate that I would be disposed to answer it in the affirmative.

In bringing the appellant's argument based on estoppel within the enforcing court's discretion under s.44 (Article V) I have answered question (4).

(3) *The grounds under s.44(2)(c) and (3)*

It has become fashionable to raise the specific grounds in s.44(2) (Article V. 1(b)), which are directed to procedural irregularities, as public policy grounds (Article V. 2(b)). There is no reason why this course cannot be followed. The principal difference between s.44(2) and s.44(3), it is suggested, is that, under s.44(3), the court of enforcement can take the point of its own motion (A.J. van den Berg, The New York Convention of 1958, page 299). If, what the respondent seeks to do is to raise a specific ground under s.44(2) under the guise of public policy, then it is only right that it should bear the onus of establishing that ground.

In some decisions, notably of courts in civil law jurisdictions, public policy has been equated to international public policy. As already mentioned, Article V. 2(b) specifically refers to the public policy of the

forum. No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy. Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum (A.J. van den Berg, The New York Convention of 1958, page 298).

However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506; *Imperial Ethiopian Government v. Barich-Foster Corp.* (1976) 535 F. 2d 334 at 335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of Article V, notably Article V. 2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression "contrary to the public policy of that country" in Article V. 2 (b) means "contrary to the fundamental conceptions of morality and justice" of the forum. (*Parsons and Whittemore Overseas Co. Inc.* v *Societe General de Industrie du Papier (Rakta)* (1974) 508 F. 2d 969 at 974 (where the Convention expression was equated to "the forum's most basic notions of morality and justice"); see A.J. van den Berg, The New York Convention of 1958, page 376; see also *Renusagar Power Co. Ltd.* v *General Electric Co.* (Yearbook Comm. Arb'n. XX (1995) page 681 at pages 697-702)).

The question then is whether the two matters of which the respondent complains, namely the alleged refusal of a hearing and the communications to the Chief Arbitrator were contrary to the fundamental

conceptions of morality and justice of Hong Kong. In this respect, the opportunity of a party to present his case and a determination by a impartial and independent tribunal which is not influenced, or seen to be influenced, by private communications are basic to the notions of justice and morality in Hong Kong.

The critical question, however, is whether what happened in this case was contrary to these basic notions. In approaching this question, it is relevant to take account of the fact that the parties agreed to an arbitration which was to be governed by the CIETAC Arbitration Rules and the PRC Arbitration Law. The fact that the parties agreed to procedures which differ from those which would ordinarily apply in Hong Kong is a circumstance of which we must take account (see Ordinance s. 2AA(2)(a)).

With respect to the argument that the respondent was unable to present its case, the following matters all go to show that the argument is without substance. The respondent was given a copy of the experts' report and an opportunity to deal with it. At no stage did the respondent indicate that it wished to contest any part of the report, to call people from Jacobson or any other experts as witnesses, to question the experts or to present a case that the equipment was capable of appropriate modification. Indeed, the request in the respondent's defence appeared to suggest that its intention was to ask the experts to be appointed to investigate and *determine* whether modification was possible. Instead of taking the steps mentioned above, the respondent requested the Tribunal to call Jacobson as a witness, a course which the Tribunal rightly rejected, and made a belated attempt to seek comments from Jacobson, despite the respondent's declared intention to sue Jacobson.

The Tribunal was quite entitled to regard the respondent as engaging in dilatory tactics, to refuse an extension of time and to deliver the Award. The facts do not support the claim that the respondent was unable to present its case. They support the view that the respondent had no relevant case to present.

With respect to the argument arising from the communications to the Chief Arbitrator, the holding of the inspection at the end user's factory and the presentation by the technicians *in the absence of the respondent* were procedures which in Hong Kong might be considered unacceptable. But once the respondent received the report and the letter of 4 January 1996, it was in a position to explore the significance of what had happened. It failed to do so. It did not apply for a re-inspection in the presence of its representatives. It did not apply for removal of the Chief Arbitrator. It simply proceeded with the arbitration as if nothing untoward had happened. In these circumstances, the respondent has not established that the communications to the Chief Arbitrator gave rise to a case falling within s.44(3) of the Ordinance (Article V. 2(b) of the Convention).

Orders

The appeal to this Court should be allowed with costs. The orders made by the Court of Appeal, other than the order that the costs order in the High Court should stand, should be set aside so as to restore the orders made by Findlay J. The respondent should pay the appellant's costs in the Court of Appeal.

Chief Justice Li :

The Court, being unanimous, allows the appeal with costs and makes the orders set out in the judgment of Sir Anthony Mason NPJ.

(Andrew Li)
Chief Justice

(Henry Litton)
Permanent Judge

(Charles Ching)
Permanent Judge

(Kemal Bokhary)
Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Ms Audrey Eu, SC & Mr Horace Y L Wong (instructed by M/s Simmons & Simmons) for the Appellant
Mr Ronny K W Tong, SC & Mr Godfrey Lam (instructed by M/s W K To & Co.) for the Respondent