IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 86

Originating Application No 725 of 2022 (Registrar's Appeal No 23 of 2023 and Summons No 4435 of 2022)

Between

CZD

… *Claimant*

And

CZE

… *Defendant*

GROUNDS OF DECISION

[Arbitration — Enforcement — Foreign award]

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v
CZE

[2023] SGHC 86

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Chua Lee Ming J
10, 20 February 2023

5 April 2023

Chua Lee Ming J:

Introduction

1 HC/SUM 4435 of 2022 ("SUM 4435") was the defendant's application to set aside an order made by the High Court (the "Enforcement Order") granting the claimant permission to enforce an arbitration award made in Beijing, the People's Republic of China ("PRC") (the "Award"). HC/RA 23 of 2023 ("RA 23") was the defendant's appeal against the Assistant Registrar's order dismissing his application to file a further affidavit to respond to the reply affidavits filed by the claimant and its PRC lawyer in SUM 4435.

2 I dismissed the defendant's appeal as well as his application to set aside the Enforcement Order for the reasons set out below.

Background facts

3 In September 2017, the claimant, the defendant and a PRC company ("TargetCo") entered into a loan agreement (the "Loan Agreement"), under which the claimant was to lend certain sums to the defendant for the defendant to terminate the variable interest entity structure of, and to restructure, TargetCo and another related PRC company.

4 Subsequently, the claimant, the defendant and TargetCo entered into another agreement (the "Cooperation Agreement"), under which the claimant was to provide a loan to the defendant for the same purpose; the claimant was to also assist in introducing other investors to become shareholders of TargetCo. Under the Cooperation Agreement, the loan could be converted into shares of TargetCo at the claimant's option, if certain conditions were met.

5 In December 2017, the defendant, TargetCo, company [X], and six other companies entered into an investment agreement (the "Investment Agreement"), under which [X] was to provide loans to TargetCo. Under the Investment Agreement, [X] was entitled to convert the loans to TargetCo shares. The claimant was not a party to the Investment Agreement.

6 As a supplement to the Cooperation Agreement and the Investment Agreement, the claimant, the defendant, TargetCo, [X] and four other parties signed a memorandum (the "Memorandum") to "clarify the investment rights and capital relationship between [the claimant] and [the defendant]".

7 In 2020, the claimant commenced arbitration proceedings in the Beijing Arbitration Commission against the defendant pursuant to an arbitration clause in the Loan Agreement. The claimant claimed that the defendant had failed to

repay the loans made by the claimant under the Loan Agreement. In 2021, the arbitration tribunal (the "Tribunal") issued the Award in favour of the claimant.

8 In 2021, a PRC court issued a Notice of Enforcement Assistance to the China Securities Depository and Clearing Co., Ltd Shenzhen Branch to freeze the defendant's bank accounts and his shares in a public listed company on the Shenzhen Stock Exchange (the "Listed Company") from June 2021 to June 2024.

9 The defendant brought several legal challenges against the Award in the PRC.

(a) In 2021, the defendant applied to the Fourth Intermediate People's Court of Beijing Municipality (the "Fourth Intermediate Court") to set aside the Award; this application was rejected in 2021;

(b) In 2021, the defendant applied to the Second Intermediate People's Court of Beijing Municipality for an order that the Award not be enforced; this application was rejected in 2021; and

(c) In 2022, the defendant applied to the Fourth Branch of the Beijing Municipal People's Procuratorate (the "Fourth Branch, People's Procuratorate") for a procuratorial order for civil supervision of the decision of the Fourth Intermediate Court; this application was rejected in 2022 (after SUM 4435 was filed).

10 The defendant stated that he intended to apply to the People's Procuratorate of Beijing Municipality (the "People's Procuratorate") to review

the decision of the Fourth Branch, People's Procuratorate. No such application had been made as of 20 February 2023, when I gave my decision.

11 On 1 November 2022, the claimant filed the present originating application without notice in HC/OA 725 of 2022 ("OA 725") to enforce the Award in Singapore pursuant to s 29(1) of the International Arbitration Act 1994 (2020 Rev Ed) (the "IAA"). On 2 November 2022, the Assistant Registrar granted the Enforcement Order.

12 On 14 December 2022, the defendant filed SUM 4435 to set aside the Enforcement Order. In his affidavit filed in support of his application, the defendant argued that the Enforcement Order should be set aside on the following grounds:

(a) The Award had been fully and/or effectively satisfied in enforcement proceedings by the claimant in the PRC, including by way of freezing the defendant's shares in the Listed Company.

(b) The Award dealt with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contained a decision on the matter beyond the scope of the submission to arbitration (s 31(2)(*d*) IAA).

(c) The claimant breached its duty of full and frank disclosure.

(d) The enforcement of the Award would be contrary to the public policy of Singapore (s 31(4)(*b*) IAA).

13 The defendant applied in the alternative to adjourn the claimant's application in OA 725 pursuant to s 31(5)(*a*) of the IAA until after his

application to set aside or challenge the Award had been fully dealt with by the courts of the PRC (including by way of an application to the People's Procuratorate, and a potential protest to the Beijing High People's Court).

14 After both parties had filed their respective affidavits in SUM 4435, the defendant sought permission to file a further affidavit. The Assistant Registrar dismissed the application on 31 January 2023. On 1 February 2023, the defendant lodged an appeal (RA 23) against the Assistant Registrar's decision.

RA 23

15 The claimant filed two affidavits to contest the defendant's application in SUM 4435. One of the affidavits was by a PRC lawyer whose legal opinion on PRC law included the following:

(a) The enforcement proceedings in the PRC had not resulted in payment of the amount due under the Award. In particular, the freezing order on the defendant's shares did not mean that the defendant had satisfied the Award because the shares had not yet been sold or transferred to the claimant.

(b) The PRC courts had concluded that the matters decided by the Tribunal were well within the scope of the arbitration clause. The ruling by the Fourth Intermediate Court was valid and binding and the defendant had no right to apply to the Beijing High People's Court for a retrial.

(c) The chances of an application to the People's Procuratorate (to review the decision of the Fourth Branch, People's Procuratorate) being supported was "far less" than the chances of the application being

rejected. Further, even if such an application were to succeed, it was the decision of the Fourth Branch, People's Procuratorate that would be revoked and a retrial would be initiated. The Award itself would not be revoked and the retrial would not suspend the enforcement of the Award.

(d) The defendant's statements, about the formulation of the agreements that had been entered into, were in conflict with a report by an independent third party.

The other affidavit was by the claimant's Executive Partner who also challenged the defendant's statements regarding the context and purposes of the agreements that had been entered into and referred to the same report mentioned in (d) above.

16 The defendant argued that the claimant's expert's opinion raised the following new issues on PRC law:

(a) whether the Award was considered fully and/or effectively satisfied due to the freezing order against the defendant's shares in the PRC;

(b) whether the Tribunal acted within its jurisdiction in rendering the Award;

(c) whether an application to the Fourth Branch, People's Procuratorate could have led to suspension or termination of enforcement of the Award or the Award being set aside/revoked, and the basis and the chances of success of such an application;

(d) whether an application to the People's Procuratorate would lead to suspension or termination of enforcement of the Award or to

the Award being set aside/revoked, and the basis and the chances of success of such an application; and

(e) whether any statements of the defendant were in conflict with those of the independent third party.

The defendant submitted that he should be permitted to file reply affidavit(s) on these issues "so as to present the Court [with] a full picture of the contents of PRC law".

17 In my view, an expert opinion on issues (b) and (e) were plainly irrelevant. Whether the Tribunal acted within its jurisdiction in rendering the Award and whether any statements of the defendant conflicted with those of an independent party were matters for this Court to consider and decide without the aid of an expert. Issue (c) was moot, since the Fourth Branch, People's Procuratorate had since rejected the defendant's application for civil supervision. Any expert affidavit would have been relevant only in respect of issues (a) and (d).

18 Order 3 r 5(6) of the Rules of Court (2021 Rev Ed) ("ROC 2021") provides that "[e]xcept in a special case", the court will not allow an applicant to file further affidavits after the other party has filed its reply affidavit.

19 Order 3 r 5(6) ROC 2021 is a new rule which has no equivalent in the previous Rules of Court (2014 Rev Ed). I agreed with the Assistant Registrar that the intent is clear: there is to be only one round of affidavits from each party, except in a "special case". The term "special case" should be interpreted with the Ideals set out in O 3 r 1 in mind. The present case involved the enforcement of an arbitral award; an important Ideal was that of achieving expeditious proceedings.

20 The term "special case" in O 3 r 5(6) should also be interpreted bearing in mind O 3 r 5(7), which provides that an affidavit "must contain all necessary evidence in support of or in opposition (as the case may be) to the application".

21 The fact that new issues are raised in affidavits filed to contest an application may constitute a special case for the purposes of O3 r 5(6) if these issues could not reasonably have been within the applicant's contemplation when he filed his affidavit in support of his application. It is incumbent on the applicant to ensure that his affidavits filed in support of his application deal with all matters that are relevant to his application. An applicant cannot adopt a wait-and-see approach.

22 In the present case, issue (a) (*ie*, whether the freezing order meant that the Award had been satisfied) and issue (d) (*ie*, the effect and chances of success of the defendant's intended application to the People's Procuratorate) were clearly not new issues. In fact, they dealt with two of the very grounds that the defendant relied on in his application in SUM 4435 (see [12(a)] and [13] above). I rejected the defendant's submission that he was not obliged to raise these issues of PRC law in his affidavit filed in support of his application. The purpose of the defendant's affidavit was to support his application. Obviously, he had to adduce the relevant expert opinion on PRC law to make good the grounds that he relied on. The defendant had included an expert opinion from a PRC lawyer in his affidavit. For reasons best known to the defendant, he did not obtain an opinion dealing with issues (a) and (d). The defendant must accept the consequences of his decision not to do so.

23 The defendant further argued that no expert evidence may be adduced without the court's approval pursuant to O 12 r 2(1) of the ROC 2021 and that the claimant's expert report had "impermissibly jump[ed] the gun". However, I

noted that the defendant had himself adduced expert evidence in his earlier affidavit without the court's approval. It did not lie in his mouth to raise this objection to the claimant's expert report. In any event, in my view, this did not constitute a special case for the purposes of O 3 r 5(6). Practitioners should however take note of O 12 r 2(1). Where applications relating to arbitration awards involve questions of foreign law, approval to file expert evidence is likely to be given. In such cases, approval may be obtained retrospectively if it is not practicable to obtain approval before filing the expert evidence.

24 In conclusion, I dismissed RA 23 and ordered the defendant to pay costs fixed at $1,500, including disbursements.

SUM 4435

Whether the Tribunal exceeded its jurisdiction

25 Section 31(2)(*d*) of the IAA provides:

> (2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that –
>
> …
>
> (*d*) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;
>
> …

26 In assessing whether an arbitral tribunal has acted in excess of its jurisdiction, first, the court must identify what matters were within the scope of submission to the arbitral tribunal; and second, whether the arbitral award involved such matters, or whether it involved a "new difference … outside the

scope of the submission to arbitration and accordingly … irrelevant to the issues requiring determination": *CDM and another v CDP* [2021] 2 SLR 235 at [17].

27 The claimant had referred the dispute to arbitration based on Art 4.2 of the Loan Agreement, which provided that "[a]ny dispute arising from the interpretation or performance of this Agreement shall … be settled through arbitration in Beijing in accordance with the rules of Beijing Arbitration Commission". The thrust of the defendant's argument was that the Tribunal acted in excess of jurisdiction because the Tribunal found the defendant liable for a total of RMB 140m not for a breach of the Loan Agreement, but under the Cooperation Agreement, Investment Agreement and Memorandum.

28 The claimant submitted that:

(a) the Tribunal did not exceed its jurisdiction because it found the defendant liable under the Loan Agreement; and

(b) the defendant was estopped from arguing excess of jurisdiction because the same argument had been rejected by the seat court in the setting aside proceedings in the PRC.

Whether the Tribunal found the defendant liable under the Loan Agreement

29 The defendant argued that the Tribunal did not find the defendant liable under the Loan Agreement and had instead impermissibly found the defendant liable on an analysis of the Cooperation Agreement, the Investment Agreement and the Memorandum. It is true that in the Award, the Tribunal dealt quite extensively with the Cooperation Agreement, the Investment Agreement and the Memorandum. However, that did not mean that the Tribunal did not find the defendant liable under the Loan Agreement. As the defendant conceded during

oral submissions, there was nothing in the Award that expressly stated that the defendant's liability to pay the claimant was founded on the Cooperation Agreement and/or Investment Agreement. The Award must be read in context. It was necessary for the Tribunal to deal with the Cooperation Agreement, the Investment Agreement and the Memorandum because the claimant's case was that the payments that were made under the Cooperation Agreement and Investment Agreement were disbursements of the loan given by the claimant under the Loan Agreement.

30 In addition, as the claimant pointed out, the Tribunal awarded liquidated damages based on a term in the Loan Agreement. I agreed with the claimant that this showed that the finding of liability in the Award was based on the Loan Agreement.

31 In my view, the Tribunal did not exceed its jurisdiction. Reading the Award in its totality, I was of the view that the Award meant that the defendant was liable on the Loan Agreement.

Whether issue estoppel applied in this case

32 Having decided that the Tribunal did not exceed its jurisdiction, it was unnecessary for me to decide whether issue estoppel applied in this case. The question whether the principles of transnational issue estoppel apply to the "re-litigation of identical issues in different fora in the context of arbitration" is "less than clear": *BAZ v BBA and others and other matters* [2020] 5 SLR 266 ("*BAZ*") at [33]. In *BAZ*, the High Court held that jurisdictional challenges to the powers of the tribunal attracted a *de novo* review from the seat court and issue estoppel arising from the determination of a foreign enforcement court "should not

feature" although the decision of the foreign enforcement court may have persuasive effect (at [51]–[52]).

33 The present case concerned the reverse scenario, the question being whether issue estoppel arising from decisions of a foreign *seat* court applies in proceedings before an enforcement court. The claimant relied on the following:

(a) *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("*PT First Media*") in which the Court of Appeal noted that there was authority that the New York Convention permits a party to resist enforcement even after an unsuccessful active challenge, "save and except for the operation of any issue estoppel recognised by the enforcing court" and that "it is generally for each enforcing court to determine for itself what weight and significance should be ascribed to the omission, progress or success of an active challenge in the court of the seat" (at [75]).

(b) *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd and another* [2006] 3 SLR(R) 174 ("*Aloe Vera*"), in which the High Court held that except to the extent permitted by s 31(2) of the IAA, the court could not look into the merits of the award and allow the award debtor to "relitigate issues that he could have brought up either before the Arbitrator or the supervisory court" (at [56]).

(c) *Newspeed International Ltd v Citus Trading Pte Ltd* [2003] 3 SLR(R) 1 ("*Newspeed*"), in which an application to set aside an enforcement order was made on the same ground that had been rejected by the Intermediate People's Court in the PRC hearing the award debtor's appeal. The High Court dismissed the application on the ground

that the losing party in an arbitration could either apply to the seat court to set aside the award or wait until enforcement was sought and then oppose the enforcement; the two options were alternatives, not cumulative (at [26]–[28]).

(d) Darius Chan, Paul Tan and Nicholas Poon, *The Law and Theory of International Commercial Arbitration in Singapore* (Academy Publishing, 2022) ("*International Commercial Arbitration*"), in which the authors expressed the view that when resisting enforcement proceedings, the award debtor will be estopped from contending anything that is contrary to the decision of the seat court (at para 9.68).

34 In *BAZ* (at [41]), the High Court expressed doubt over the decision in *Newspeed* given the ruling of the Court of Appeal in *PT First Media* (at [75]) that the Model Law provides for a system of "double-control". At any rate, *Newspeed* did not deal with issue estoppel. As the court observed in *BAZ* (at [41]), the decision in *Newspeed* was driven by the notion that a party should not have two bites at the cherry. That said, it has been suggested that *Newspeed* could still probably be justified on the ground of issue estoppel (see Sundaresh Menon *et al*, *Arbitration in Singapore: A Practical Guide* (Sweet & Maxwell, 2nd Ed, 2018) at para 14.080).

35 I also noted that in *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* [2013] FCAFC 109, the Federal Court of Australia recognised that the question whether issue estoppel operates during enforcement proceedings is one of importance and potential difficulty and expressly refrained from deciding the question, stating instead that it will "generally be inappropriate for this court, being the enforcement court of a Convention country, to reach a different

conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration" (at [65]).

36 The question whether transnational issue estoppel applies during enforcement proceedings is indeed a difficult one. It deserves fuller submissions. As it was unnecessary for me to decide this question, I left it to be decided in some other appropriate case in future.

Whether enforcement of the Award would be contrary to public policy

37 Section 31(4)(*b*) of the IAA provides:

> (4) In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that –
>
> …
>
> (*b*) enforcement of the award would be contrary to the public policy of Singapore.

38 An award obtained by fraud would violate the basic notions of morality and justice, thus amounting to a breach of the public policy of Singapore: *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 at [41]. Indeed, the fact that "the making of the award was induced or affected by fraud or corruption" is a ground for setting aside the award under s 24(*b*) of the IAA. "Fraud" referred to under s 24(*b*) of the IAA "must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award": *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 at [41]. This should be no different in the context of resisting the enforcement of an award.

39 The defendant contended that the Award was procured through procedural fraud because the claimant had maintained inconsistent evidential positions before the Tribunal and in subsequent PRC court proceedings. The allegation of procedural fraud concerned a Letter of Undertaking issued by [X] that warranted that the loan to be given by it to the defendant would be from its own funds. The defendant argued that the Letter of Undertaking meant that the loan from [X] could not be a roundabout loan from the claimant to the defendant under the Loan Agreement.

40 During the arbitration, the claimant and [X] rejected the authenticity of the Letter of Undertaking. [X] issued two Explanatory Statements to clarify that it had provided funds to the defendant to fulfil the claimant's loan obligation under the Loan Agreement. However, subsequently, in separate proceedings before the Third Intermediate People's Court of Beijing Municipality, [X]'s lawyers expressly admitted that [X]'s seal on the Letter of Undertaking was authentic. This, the defendant argued, meant that the claimant took inconsistent evidential positions amounting to procedural fraud.

41 I rejected the defendant's submission that the Enforcement Order should be set aside on the basis that there was procedural fraud. The defendant's submission was not supported by the evidence. At all times, the claimant did not accept the contents of the Letter of Undertaking. In any event, the Letter of Undertaking was just one piece of evidence which was before the Tribunal. The tribunal found that the funds that [X] transferred to TargetCo had come from the claimant. In my view, the defendant had not shown how the Award had been procured through procedural fraud. The substance of the defendant's submission appeared to be a challenge against the merits of the Tribunal's finding, which was not a ground for refusing enforcement.

42 The claimant also argued that the defendant was estopped from relying on the ground of procedural fraud because it was argued in the defendant's setting aside application in the PRC and rejected by the PRC court. Again, as I had rejected the defendant's submission on procedural fraud, it was not necessary for me to decide whether issue estoppel applied. I noted however that procedural fraud fell within the public policy ground and as the High Court stated in *BAZ* at [50]:

> 50 It is plain that issue estoppel would not arise with regard to the grounds of arbitrability and public policy under Arts 34(2)(*b*)(i) and 34(2)(*b*)(ii) respectively, because the public policy and the test for arbitrability are unique to each state. Therefore, there would be no identity of subject matter even if the ground of arbitrability or public policy has been raised before a different court.

In *BAZ*, the court was concerned with the public policy ground in setting aside applications under Art 34(2)(*b*)(ii) of the Model Law. However, there is no reason in principle why the position should be any different with respect to the public policy ground in enforcement proceedings under s 31(4)(*b*) of the IAA.

Whether the Award should not be enforced because it had been satisfied

43 The defendant argued that the Award had been fully and/or effectively satisfied, in part because its shares in the Listed Company had been frozen pursuant to enforcement proceedings by the claimant in the PRC. In the course of oral submissions, the defendant withdrew his reliance on this ground.

44 In any event, in my view, this ground was a non-starter. It was unarguable that the fact that the defendant's shares were frozen in enforcement proceedings in the PRC did not mean that the Award had been satisfied.

45 Further, the fact that an Award has been satisfied is not a recognised ground of challenge under s 31 of the IAA, which provides an exhaustive list of grounds for refusal of enforcement: *Aloe Vera* at [46]; *International Commercial Arbitration* at para 9.52.

Whether the Enforcement Order should be set aside because the claimant failed to provide full and frank disclosure of material facts

46 It is trite that in an application without notice, the applicant must disclose to the court all matters within his knowledge which might be material even if they are prejudicial to the applicant's claim: *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The "Vasiliy Golovnin"*") at [83]. So long as the facts are matters that the court should take into consideration in deciding whether to grant the application, they are material: *The "Vasiliy Golovnin"* at [86].

47 In its application without notice for permission to enforce the Award, the claimant did not disclose the defendant's then pending application to the Fourth Branch, People's Procuratorate for civil supervision of the decision by the Fourth Intermediate Court (see [9(c)] above) (the "Pending Application"). The question in this case was whether the Pending Application was a matter that the Court should take into consideration in deciding on the application without notice for permission to enforce the Award.

48 The claimant submitted that the Pending Application was not material to its application because:

(a) the process of applying without notice for permission to enforce the Award was a formalistic and mechanistic one: *Aloe Vera* at [39]–[42];

(b) the Pending Application was not a ground for refusing enforcement of the Award under s 31 of the IAA;

(c) the question whether the proceedings for enforcement should be adjourned under s 31(5) of the IAA because of the Pending Application did not arise at the stage of the hearing of the application without notice; this question would arise only if the defendant subsequently applied for the adjournment; and

(d) in any event, the Pending Application was not "an application for the setting aside or for the suspension" of the Award within the scope of s 31(5) of the IAA; even if it was successful, it would not have resulted in the Award being set aside or suspended; instead, it would have led only to the Fourth Intermediate Court re-hearing the application to set aside the Award.

49 The propositions in [48(a)] and [48(b)] above are not controversial. However, they did not assist the claimant. The holding in *Aloe Vera* does not detract from the claimant's duty to give full and frank disclosure of the relevant facts: *AUF v AUG and other matters* [2016] 1 SLR 859 ("*AUF*") at [163]. In *AUF*, the High Court also held (at [165]) that a pending application to set aside an award and appeal on questions of law were facts that were material in deciding on an application without notice to enforce the award. I respectfully agreed. The applicable statute in *AUF* was the Arbitration Act (Cap 10, 1985 Rev Ed), not the IAA. Nevertheless, the principle in *AUF* is equally applicable under the IAA.

50 The Pending Application was also relevant to s 31(5) of the IAA, which states as follows:

> (5) Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under which, the award was made, the court may —
>
> (a) if the court considers it proper to do so, adjourn the proceedings or (as the case may be) so much of the proceedings as relates to the award; and
>
> (b) on the application of the party seeking to enforce the award, order the other party to give suitable security.

51 I disagreed with the claimant's proposition (in [48(c)] above) that s 31(5) did not apply at the stage of the hearing of the application without notice. The language in s 31(5) of the IAA is broad enough for it to apply at the stage when the court is considering an application without notice for permission to enforce an award. It is also logical that the decision to adjourn the proceedings (if warranted) should be made before permission to enforce the award is granted. After all, if the award should be set aside, there would be no award to enforce (see *PT First Media* at [77]).

52 A consideration of s 31(5) of the IAA would require a hearing with notice. There would be no reason to adjourn the enforcement proceedings if the pending application is clearly without merit. In addition, s 31(5) contemplates the possibility that the adjournment of the enforcement proceedings may be conditioned upon "suitable security" being given by the defendant. In either case, the defendant ought to be heard. The court has the power to direct that the application without notice be converted into a hearing with notice.

53 The claimant relied on *CKR and another v CKT and another* [2021] SGHCR 4. In that case, the Assistant Registrar expressed the view (at [30]) that a pending application to set aside an arbitral award was "not an issue to be determined at the first *ex parte* stage in deciding whether leave to enforce an

award should be granted". I noted that the Assistant Registrar was not dealing with s 31(5) of the IAA and *AUF* did not appear to have been brought to her attention. In any event, in my view, s 31(5) of the IAA is also relevant at the stage of the hearing without notice. Therefore, facts that are material to a consideration of s 31(5) of the IAA are also material to an application without notice for permission to enforce an award.

54 As for the claimant's submission in [48(d)] above, it was correct that, technically, the Pending Application was not an application to set aside or suspend the Award but an application to review the decision of the Fourth Intermediate Court. However, if the Pending Application succeeded, it would have required the Fourth Intermediate Court to re-hear the defendant's application to set aside the Award. In my view, the Pending Application was in substance an application that fell within the scope of s 31(5) of the IAA.

55 In the circumstances, in my view, the claimant breached its duty to make full and frank disclosure of material facts because it failed to disclose the Pending Application in its application without notice.

56 However, despite a finding that the applicant has failed to make full and frank disclosure, the court still retains an overriding discretion not to set aside the court order granted without notice: *The "Vasiliy Golovnin"* at [108]. Whether the court would exercise such discretion "depends on factors such as the particular relief sought, how serious the material non-disclosure is or how important the undisclosed facts are, and the overall merits of the plaintiff's case": *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng* [2009] 4 SLR 365 at [26].

57 In *AUF*, the applications to set aside the award and for leave to appeal failed. Consequently, the High Court concluded that the failure to disclose these

applications was "technical and inconsequential" and declined to set aside the enforcement order (at [166]).

58 Even if the court sets aside the order granted without notice, it retains a discretion to re-grant the court order if it is just to do so: *Unión Fenosa Gas SA v Arab Republic of Egypt* [2020] EWHC 1723 (Comm) at [110]. In *Lin Chien Hsiung v Lin Hsiu-Fen* [2022] HKCFI 1270, the High Court of Hong Kong discharged an *ex parte* order for the enforcement of an arbitral award on the ground of failure to make full and frank disclosure of a pending setting aside application, which was similarly dismissed before the High Court delivered its decision. The High Court went on to re-grant the enforcement order because there were no grounds to refuse enforcement in Hong Kong (at [53]). The High Court of Hong Kong was of the view that the discretion to re-grant the order was "indisputable" (at [24]).

59 In the present case, by the time I heard SUM 4435, the Fourth Branch, People's Procuratorate had rejected the defendant's application for civil supervision. In the circumstances, the claimant's failure to disclose the Pending Application was rendered inconsequential. There was no reason why the Award should not be enforced. I was also of the view that there was no necessity to set aside the Enforcement Order and re-grant the order. It was sufficient to penalise the claimant for its breach of its duty of full and frank disclosure by denying it costs in SUM 4435 despite SUM 4435 being dismissed. Accordingly, I dismissed SUM 4435 and ordered each party to bear its own costs.

Conclusion

60 For the reasons above,

(a) I dismissed RA 23 and ordered the defendant to pay costs fixed at $1,500, including disbursements; and

(b) I dismissed SUM 4435 and ordered each party to pay its own costs.

Chua Lee Ming
Judge of the High Court

Melvin See Hsien Huei, Alexander Kamsany Lee and Zheng Yangyou (Dentons Rodyk & Davidson LLP) for the claimant;
Chang Qi-Yang, Tan Ee Hsien and Tsin Jenny (WongPartnership LLP) for the defendant.