**BRITISH VIRGIN ISLANDS**
**EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**COMMERCIAL DIVISION**

**CLAIM NO: BVIHCV 2009/389**

**BETWEEN:**

**GRAND PACIFIC HOLDINGS LIMITED**

**Applicant**

**and**

**PACIFIC CHINA HOLDINGS LIMITED**

**Respondent**

**Appearances:** Mr Jack Husbands for the Applicant
Mr Richard Millett QC and Mr Mark Forte for the Respondent

## JUDGMENT

[2009: 21 December
2010: 11 January]

(Application for appointment of liquidators - applicant holder of ICC arbitration award made in Hong Kong on 24 August 2009 - award in sum of US$55 million – award unpaid – respondent company alleging award not enforceable under Part IX of Arbitration Ordinance 1976 (CAP 6) – whether substantial dispute – whether liquidators should be appointed)

[1] **Bannister J [ag]:** This is an application by Grand Pacific Holdings Limited ('the Applicant') for the appointment of liquidators over Pacific China Holdings Limited ('the Company'). The Applicant is a company incorporated in Hong Kong. The Company is a BVI incorporated company. On 23 May 2001 the Applicant entered into what is described as a loan agreement ('the agreement') with the Company under which the Company was obliged to pay to the Applicant the sum of US$40 million by 31 May 2006, together with interest. Some payments were made by the Company under the agreement but no principal or interest was paid after 31 May 2002. By 31 May 2006 some US$34 million of principal and some US$14 million of interest remained unpaid and outstanding.

[2] The agreement included a choice of law clause providing that it should be construed and governed in accordance with the laws of the State of New York. Clause 14 contained an arbitration clause:

> 'Any dispute or claim arising out of or in connection with or relating to this Agreement, or the breach, termination or invalidity hereof, shall be finally settled by arbitration under the Rules of Conciliation and Arbitration of the International Chamber of commerce (the "Rules") as in force at the time of any such arbitration. There shall be three arbitrators appointed in accordance with the Rules. The place of arbitration shall be in Hong Kong. All arbitration proceedings shall be conducted in English. Each Party shall cooperate in good faith to expedite to the extent practicable the conduct of any arbitral proceedings commenced under this Agreement. The costs and expenses of the arbitration, including, without limitation, the fees of the arbitrators, shall be borne equally by each Party to the dispute or claim, and each Party shall pay its own expenses and the fees, disbursements and other charges of its counsel. Any award made by the arbitrator shall be final and binding on the Parties hereto (and each Party expressly waives the applicability of any laws or regulations that would otherwise give the right to appeal the decisions of the arbitrator), and any Party may apply to a court of competent jurisdiction for enforcement of such award. The Parties agree that any breach of this Agreement will cause irreparable injury to the other Party and that money damages will not provide an adequate remedy to the other Party, and that if any Party breaches any provision of this Agreement, any of the other Party shall have the right to require that this Agreement shall be specifically enforced.'

[3] On 21 March 2006 the Applicant filed a request for arbitration in Hong Kong. The arbitration was under ICC rules. It finally got under way in May of 2007. The arbitral tribunal ('the Tribunal') delivered its award on 24 August 2009. The Tribunal awarded the Applicant US$55 million, US$34 million of which was unpaid principal and the rest interest, together with continuing interest at 5% per annum until satisfaction or entry of a judgment. The Applicant was also given its costs. The Applicant has not taken steps to convert the award into a judgment nor has it taken any other steps by way of enforcement. On 15 September 2009 the Applicant requested the Company to honour the award. The Company has not done so. On 11 November 2009 the Applicant issued this application. No statutory demand has been served. The grounds for the appointment are that the Applicant is a creditor of the Company; that the Company has failed to pay its debt to the Applicant under the award as it fell due; and that the Company is therefore insolvent.

[4] The Company's response is that it is not insolvent and that the indebtedness on which the Applicant relies in support of its application is disputed *bona fide* on substantial grounds. I shall take the last point first.

***Bona fide* dispute on substantial grounds**

[5] At first blush it seems odd that a party which has agreed to submit a dispute to arbitration and been made the subject of a comprehensively reasoned award given at the end of an arbitration process that lasted for more than two years, involving two substantive hearings and the filing of exhaustive written submissions, should be in a position to say that the debt created by the award is disputed. It agreed to the process and to be bound by the result. But Mr Millett QC, who has argued this application on behalf of the Company with conspicuous skill, says that shortcomings in the way in which the Tribunal conducted the proceedings before it mean that the award is open to challenge – either directly, in the Courts of Hong Kong, or indirectly in the course of any proceedings that the Applicant might take to enforce it. He says that the grounds upon which the award is challengeable by the Company mean the debt is disputed. I am not sure that that is correct. Until and unless the award is set aside, its existence, and therefore the existence of the debt which it affirms, cannot, it seems to me, be disputed. At the time of the hearing, the Company had made no application in Hong Kong to have the award set aside, although I fully accept that time for the Company to make such an application is still running. It is true that in enforcement proceedings, the court before which enforcement was sought might refuse, on one or more of the well known grounds which apply to New York Convention awards, to permit it to be enforced, but that would be because the court found something objectionable in the process by which the award had been obtained, or declined to enforce it on public policy grounds. The award, however, would stand. Only its enforcement would be refused. So that it seems to me that as things stand the debt itself cannot be disputed. That dispute has already taken place and has been decided against the Company.

[6] Nevertheless, it does seem to me that consistently with the reasoning and policy underlying the authorities which decide that insolvency courts should refuse to appoint liquidators on the basis of debts which are the subject of challenge, it would be right, where a creditor relies upon an arbitral award which the debtor company claims is open to challenge or ought not to be enforced, for the Court to proceed by analogy to the manner in which it would have proceeded if the Company was

disputing the debt as such or claiming to have a valid cross claim capable of extinguishing the debt constituted by the award. The Court does not appoint liquidators on the application of a creditor unless his debt is free from substantial challenge or (in the cross claim cases) if his ultimate status as a creditor of the company is uncertain. If a company against which an arbitral award for the payment of money has been made shows that there are substantial grounds why the award should not be enforced, that seems to me to amount to, or at any rate to be analogous to a dispute about the status of the successful party as a creditor. Another (and possibly sounder) basis for proceeding in this way is that unenforceable claims are not admissible in a winding up in this jurisdiction: Insolvency Act, 2003 ('the Act') sub-section 10(3). The holder of an unenforceable arbitral award is not, therefore, a creditor for the purposes of the Act: sub-section 9(1). It follows that under the scheme of the Act itself a dispute about enforceability involves a dispute about whether the Applicant is a creditor. If such a dispute is substantial (in the sense of being other than flimsy) the court should not appoint liquidators.

[7] Mr Millett QC submitted that it was important for me to keep in mind that the present application is not an application for enforcement of the award. I agree with that. In my judgment the correct approach is for me to recognize that I am not being asked, under Part IX of the Arbitration Ordinance (CAP 6) ('the Ordinance'), to enforce the award. Instead, I should ask myself whether if that had been the application before me, I would have formed the view that the matters identified by Mr Millett QC were sufficiently substantial (in the sense in which that term is used in the authorities) to form the basis of a challenge to the enforceability of the award. In other words, I do not have to be satisfied, in order for the Company to succeed on this part of its case, that I would have refused enforcement if that had been the application before me. I have to be satisfied merely that sufficiently substantial grounds are identified by the Company to raise a real question whether the award is one that should be enforced. If that point is reached, I should refuse to appoint liquidators and leave the Applicant to establish enforceability in an application brought for that purpose.

[8] On that basis I turn to consider the Company's challenges to the award.

**The Taiwanese law issue**

[9] It was part of the Company's case before the Tribunal that the agreement was illegal under the law of what the Company claimed to be its place of performance (Taiwan) and accordingly under its chosen law (New York), on the grounds that the agreement contained a false statement which violated Taiwanese law. The Company says that while it served its expert evidence on Taiwanese law for the purposes of this submission on 16 October 2007, in good time for the first hearing on the merits fixed for 3 December 2007, the Applicant was allowed (by a ruling of the Tribunal of 19 November 2007) to lodge its reply evidence no later than 5 pm on 30 November 2007. Thus, the Company says that while the Applicant had a generous time in which to digest the Company's evidence of Taiwanese law, the Company had one working day only to consider the Applicant's expert evidence in answer (and no working days to consider the other side's submissions). It is important to notice that it was only on 19 November 2007 that the Tribunal gave the Company conditional permission to plead the point at all and to lead expert evidence in support, commenting as it did so that 'It must also be said that the application could have been brought much earlier'. The Tribunal gave the Applicant 'the maximum time available' to reply to the Company's expert as part of its case management efforts to overcome any prejudice to the Applicant arising out of the fact that the point was taken late. The Company asked the Tribunal to reduce the Applicant's time for expert evidence in answer, but the Tribunal, in a reasoned ruling, refused to do so.

[10] Mr Millett QC says that by proceeding in this way the Tribunal not only flouted the procedure agreed between the parties (by directing that expert evidence should in effect follow submissions – thus departing from the procedural protocol agreed between the parties and engaging sub-section 36(2)(e) of the Ordinance) but also gave the Company inadequate time to develop its answer to whatever the Applicant's expert might say, with the consequence that, for the purposes of sub-section 36(2)(c) of the Ordinance, the Company was unable to present its case. I should set out the relevant parts of the Ordinance:

> '36(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –

. . .

> (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;

. . .

> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;

. . .

(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.'

[11] I was referred to **Minmetals Germany GmbH v Ferco Steel**[1], an authority dealing with an application to set aside leave given by the High Court in England for enforcement of a New York Convention award, made in the PRC. That authority proceeds upon the following principles, which I adopt:

> (1) it is for the party resisting enforcement to prove matters going to the exercise of the discretion under sub-sections 36(2)(c) or (e) or the public policy limb of sub-section 36(3) of the Ordinance;
>
> (2) a court asked to enforce an award or set aside an order for enforcement (which must involve precisely the same principles) is free to take its own view as to the overall merits of objections taken by a respondent on sub-section 36(2)(c) or (e) grounds; and
>
> (3) in addition to the caution of the courts on public policy grounds when it comes to the enforcement of awards based upon, or the enforcement of which might be productive of

[1] [1999] 1 All ER 315

some illegality or equivalent vitiating factor, absence of due process may found a public policy objection under sub-section 36(3).

[12] I might add that as a matter of construction it does not seem to me at all obvious that the concluding limb of sub-section 36(2)(c) is intended to cover the case where, as a result of some procedural decision taken by the tribunal, a party is prevented from saying every mortal thing that it might wish to say in support of its case. Rather, it seems to me to be *eiusdem generis* with the opening two limbs of the sub-section and to cover cases such as prevention by reason of illness or enforced absence or some similar inability to appear and make submissions or, (as in **Minmetals** itself) an inability to deal with material available to and relied upon by the tribunal because it had no means of knowing that the tribunal was going to act upon such material. It is not, however, necessary for me to decide this point for present purposes and I shall proceed upon the footing (without deciding) that the sub-section covers the case where, as a result of a particular procedural course taken by the tribunal, a party is unable to advance every submission which it would prefer, in an ideal world, to advance or to enjoy optimum conditions in which to prepare and present its case.

[13] Applying these principles, it seems to me that one answer to the point on prejudice arising out of the timetable adopted by the Tribunal might be to say that if a party changes its case late in the day, it may have to pay a penalty when the tribunal attempts to accommodate it without also prejudicing the other party. Similar considerations might be thought to apply to the complaint that the Tribunal allowed expert evidence to follow submissions and to Mr Millett QC's submission that the procedure adopted by the Tribunal involved a breach of paragraph 10.4.1 of the procedural protocol agreed between the parties, which provided for the Tribunal to treat the pre-hearing written submissions of the parties as containing their best case on fact and law at the time of the exchange.

[14] Consistently with the approach which I have explained in paragraph [7] of this judgment, I do not think that on an application for the appointment of liquidators I can or should resolve the question whether or not the Tribunal acted unfairly towards the Company in the respects complained of. Although I think that the Company's points in relation to the agreed procedural protocol are thin and that the elements of unfairness upon which it relies may have been to a greater or lesser extent self-induced, I do not think that either ground, taken in isolation, can be dismissed as being

so flimsy that it would be incapable, on full argument in an application to set aside an order for enforcement, of being developed so as to give rise to a substantial dispute as to enforceability.

[15] In my judgment, however, the Company's difficulty on these points is that they cannot be taken in isolation. They have to be considered in the light of the Tribunal's total reasoning and overall findings on the Taiwanese law point. What the Tribunal actually decided was that there was nothing in the Taiwanese law point *at all*. It held that there was nothing in the agreement which required performance in Taiwan; that the requirement of New York law that a vitiating illegality must be one which the parties agreed to commit intentionally was not made out on the evidence; and that accordingly all issues concerning what the effect of a hypothetical performance of the agreement in Taiwan would have been under Taiwanese law were irrelevant. It followed that the assertion that the agreement was void on this ground was without foundation[2]. As a matter of courtesy the Tribunal did proceed to consider the Taiwanese law point, concluding that even if Taiwanese law had been relevant, it would not have assisted the Company's case[3].

[16] Given the basis for the Tribunal's decision on this point, it is plain that even if it were established that its ruling as to the provision of expert evidence was in some measure unfair or made it impossible for the Company to present its best case or was in breach of the parties' procedural protocol, that can have had no impact on the outcome.

[17] Mr Husbands, who appeared for the Applicant, drew my attention to paragraph 15.82 of Joseph's 'Jurisdiction and Arbitration Agreements and their Enforcement' (2005), where the author suggests that it remains open to a court to enforce an award, notwithstanding the establishment of a violation of due process, if the enforcing court is plainly satisfied that the failure complained of was immaterial to the outcome. In my judgment, this puts the matter too low. If it is plain that a procedural error, even an error which has prevented a party from presenting a part of his case, had no impact upon the outcome, it seems to me that the court should not, absent exceptional circumstances, refuse enforcement. A ruling of a tribunal which results in a party being unable to present an immaterial part of his case (even if that was not the ground for the tribunal's decision) is not, in truth, a ruling preventing him from presenting his case, or his best case. It is a ruling which

[2] Paragraphs 6.1 to 6.20 of the award

[3] Paragraph 6.45 of the award

turns out merely to have prevented him from wasting time and costs on irrelevant submissions. There can be nothing unfair about that.

[18] Thus, even assuming that the manner in which the Tribunal proceeded on this point meant that the Company was 'unable to present its case' within the ambit of sub-section 36(2)(c) of the Ordinance or that the Tribunal's approach was not in accordance with the agreement of the parties within the meaning of sub-section 36(2)(e), neither irregularity can have had the slightest effect upon the eventual outcome. That being so, it seems to me that it would be perverse of any court asked to enforce the award to refuse to do so on either or both of these heads. The Company's argument on procedural irregularity affecting the Taiwanese law issue therefore fails, in my judgment, to establish that there is any substantial question arising out of the manner in which the Tribunal handles the issue which could or might conceivably cause an enforcing court to refuse to grant enforcement of the award.

[19] That leaves sub-section 36(3) and the question of public policy. The Taiwanese illegality point having been decided by the Tribunal against the Company, there is no public policy bar to enforcement on that ground. It was not suggested to me that there was any other objection founded on illegality (or any equivalent vitiating factor) to preclude enforcement in this jurisdiction. Given my decision on the natural justice/due process points raised by the Company in relation to the Taiwanese law issue, there can be no conceivable objection to enforcement on that head of public policy.

**The expert evidence on Taiwanese law**

[20] The next issue said to impact on the enforceability of the award is linked to the first. As things turned out, the hearing of the expert evidence on Taiwanese law was put off to May 2008, because the authorities on which the experts relied had not been translated. On 3 April 2008, the Tribunal ruled that no application for leave to adduce additional authorities might be made after 7 April 2008. Leave was refused in respect of three of the additional authorities upon which the Company wished to rely and the relevant portions of the Company's expert's report were struck out. This, says Mr Millett QC, prevented the Company from properly presenting its case on the Taiwanese law issue.

[21] For the same reasons as I gave in paragraphs [15] and [16] above, the Tribunal's refusal to admit this material had no impact upon its decision. The Company's argument on the expert evidence issue therefore fails to raise any substantial question going to the exercise of the discretion whether or not to enforce under either of sub-section 36(2)(c) or sub-section 36(2)(e) of the Ordinance. For the same reasons as those which I have set out in paragraph [19] above, sub-section 36(3) is not engaged.

**The Hong Kong law issue**

[22] The last of the three issues going to the natural justice or due process argument is the so-called Hong Kong law point. In its Pre-Hearing Submissions the Company had put the Applicant to proof that the signatory to the agreement on the Applicant's part had been authorized (in accordance with Hong Kong law – Hong Kong being the place of incorporation of the Applicant) to sign it. The Applicant appears to have ignored this challenge. In its Post-Hearing Submissions the Company pointed out that the challenge had not been taken up and seems to have attempted to take the point (the language of paragraph 48.7 of the submissions is not precisely clear) that there was no specific evidence that the board of the Applicant had resolved that the Applicant should enter into the agreement or that the signatory should execute it on the Applicant's behalf.

[23] There followed exchanges between the parties dealing with procedural matters and with the question whether it was necessary for the Company to prove Hong Kong law on this point. The Company's position was that there was no need for it to prove Hong Kong law, given that Hong Kong was the seat of the arbitration. In its Reply Post-Hearing Submissions the Applicant took the points (a) that since the law of the agreement was New York law and since under New York law the agreement would be treated as validly executed, Hong Kong law was irrelevant and (b) that in any event the Company (in paragraph 48.10 its Post-Hearing Submissions) had accepted that any want of authority on the part of the signatory could have been cured by subsequent ratification on the part of the Applicant[4] and that there was overwhelming evidence that (if ratification was required) the Applicant had ratified the agreement. The Applicant repeated these submissions in a letter of 24 October 2008. In that letter, the Applicant relied on two fresh (New York) authorities and a provision of the New York General Obligations Law. The Company wrote to the Tribunal on

[4] The Company had gone on to submit that there was neither evidence that the agreement had been ratified nor argument on the part of the Applicant to that effect

28 October 2008 with further submissions on the issue whether the procedure established at the outset permitted the Applicant to complain about the absence of evidence as to Hong Kong law and reserving the right to respond to the new authorities mentioned in the Applicant's letter of 24 October 2008.

[24] On 31 October 2008 the Tribunal announced that it had sufficient material 'and arguments' before it to 'decide on the Hong Kong law issue'. In its submissions to this Court the Company interpreted this as meaning that the Tribunal had sufficient information to enable it to decide whether or not to entertain the Hong Kong law issue. I am not at all sure that that is what the Tribunal intended to be understood, although it is clear from an email sent by the Company to the Tribunal on 12 November 2008 that that is what the Company thought the Tribunal meant. The Tribunal replied on 14 November 2008 that it would deal with 'the Hong Kong law issue' within the award, which it was then in the process of drafting.

[25] In paragraphs 2.128 and 2.129 of its award the Tribunal refers to a request by the Company by letter dated 20 November 2008 for leave to make further submissions on the Hong Kong law point and to its refusal of such leave on 25 November 2008.

[26] In the section of the award dealing with the due execution of the agreement, the Tribunal took the view that the law of Hong Kong was irrelevant because the whole question was governed by New York law as the law of choice. Relying (inter alia) on one of the new authorities referred to in the Applicant's letter of 24 October 2008, the Tribunal held that on the available materials before it the agreement must be treated as having been duly executed in accordance with the law of New York. The Tribunal did not stop there, however, but went on the hold that there was ample evidence that the Applicant had ratified the agreement.

[27] On the basis of the facts which I have attempted to summarise above the Company claims that the Tribunal acted in breach of the *audi alteram partem* rule and, thus, unfairly. The Company also complains that the Tribunal conducted its own research and relied upon cases which it had found but without giving the parties the opportunity to make submissions upon them. I was referred to **Fox v Wellfair Ltd**[5] on this point.

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[5] [1981] 2 Ll Rep 514

[28] It seems to me, however, that is wholly immaterial to the outcome. Even if (contrary to the view taken by the Tribunal) the burden was on the Applicant to prove that the agreement had been duly executed on its part in accordance with Hong Kong law and even if that burden was not discharged and even if the Company was wrongly prevented by the Tribunal's rulings from making its best case upon this issue, the Company's position became untenable once it conceded (in my opinion, for what it is worth, inevitably) that ratification would cure any invalidity in the conclusion or execution of the agreement on the part of the Applicant. The evidence of ratification relied upon by the Tribunal in paragraph 5.15 of the award is overwhelming. Once that point is reached, it seems to me that even if (which I am prepared to assume to be the case) the Tribunal unfairly prevented the Company from making its case on the Hong Kong law point, there was no unfairness in outcome.

[29] I therefore conclude that the Company's argument on the Hong Kong law issue fails to raise any substantial question which conceivably could or might engage the discretion under sub-section 36(2) to refuse enforcement of the award. For the same reasons as I have given in paragraph [19] above, sub-section 36(3) of the Ordinance is not engaged.

**Conclusion on the *bona fide* dispute issues**

[30] I am therefore satisfied that no issue of substance has been raised by the Company capable, on an application for enforcement of the award, of bringing into play the discretion of the Court under either of sub-sections 36(2) or 36(3) of the Ordinance.

**Insolvency**

[31] It will be recalled that the Applicant has served no statutory demand upon the Company, nor has it converted the award into a judgment or obtained an order for its enforcement in any jurisdiction.

[32] The Company claims that its assets exceed its liabilities. It relies upon audited financial statements to 31 December 2008 and upon management accounts as at 31 October 2009. Both sets of documents include (in the case of the financial statements, prospectively) the liability under the award. The management accounts also include a claim which the Company says it has against the Applicant in the sum of over US$20 million. If that claim is a good one, then it could be set off

against the award. But that would still leave some US$35 million outstanding and payable. I notice, however, that the claim is fully provided against in the management accounts, so that in my judgment it can safely be ignored for that reason also. Current assets include a small amount of petty cash, some US$1.3 million at bank and some US$6 million on time deposit. There is a dividend of some US$11 million said to be receivable and prepayments of some US$5 million. The remaining assets appear to be largely (perhaps wholly) made up of investments in subsidiaries and are classified as long term investments. Taking all this into account, there is indeed a stated shareholders equity of some US$62 million, but as against that it is clear that the Company is in no position to pay the award, so that commercially speaking it is insolvent.

[33] The Company's answer to this is to say that it has the benefit of a guarantee. In his affidavit in support of the Company's opposition to this application Mr Charles Allen, a solicitor practicing in Hong Kong, says that Far Eastern International Bank ('the Bank') has agreed in principle to issue the Company with a guarantee in favour of the Applicant and he exhibits a copy of a draft guarantee. What he does not produce is any letter from the Bank itself in support of its agreement in principle. The draft guarantee contains wording undertaking upon demand in writing to pay to the Applicant such sums including interest and costs 'as may be mutually agreed or finally adjudged by the BVI Court (and any court of final appeal therefrom) to be due from and enforceable against [the Company] pursuant to [the award] up to . . .US$55,000,000.' The demand must be accompanied by a notarial copy of a final and unappealable judgment of the BVI Court and any court of final appeal therefrom) adjudging that such sums are due from and enforceable against the Company together with a certificate issued by the BVI Court (or court of final appeal) certifying that final judgment has been granted following the exhaustion of all available avenues of appeal. The draft guarantee is to expire six months after the date upon which final judgment is granted or 20 December 2010, whichever is the sooner.

[34] The Applicant objects to being compelled to accept a guarantee in this form, on the grounds, broadly speaking, that there is no reason why it should be precluded from relying upon its award and instead be compelled to take proceedings to enforce its claim by obtaining a judgment in this Court, still less of obtaining a certificate from this (or some higher) Court to the effect that judgment has been granted following the exhaustion of all avenues of appeal. I should add that for my part it seems wholly unreasonable to expect the Applicant to accept a guarantee in terms which will

cause it to expire automatically unless all avenues of appeal have been exhausted by the end of 2010.

[35] In my judgment, even if the draft guarantee were in a form which I considered that the Applicant should be prepared to accept (which I do not), I can place no reliance upon the offer of a draft guarantee unsupported by any correspondence from the Bank undertaking to provide it. In my judgment, the draft guarantee has no relevance to the Company's commercial insolvency.

**Abuse of process**

[36] The Company relies upon the fact that there are or have been criminal proceedings in Taiwan against principals or the relatives of principals of the Applicant. There is also evidence that the Applicant is or may be prepared to settle the award in return for additional shares in the group which controls the Company. The first of these matters seems to me to be scandalous (in the old-fashioned sense of the word) as being wholly irrelevant to the enforceability of the award and in my judgment the second, even if established, would not afford a reason to dismiss the application. It is an abuse of the process to threaten a company with an application for the appointment of liquidators which is ill founded. The present application, for the reasons I have given above, is free from any legal objection. It is not an abuse of process for an applicant to use an undisputed debt to mount a liquidator application against an insolvent company even if it is prepared to withdraw it if terms can be agreed between the parties. Liquidator applications are regularly disposed of by way of compromise.

**Conclusion**

[37] In my judgment the company is unarguably indebted to the Applicant in the amount of the award. There are no, or no substantial grounds for concluding that enforcement of the award would or might be refused upon an application made for that purpose. The Company is commercially insolvent and the evidence provided by the Company that it is in a position to provide a guarantee in terms of the draft does nothing to displace this conclusion or to justify adjourning or dismissing this application. I appreciate that the Company may have been intending to take steps in the Hong Kong courts to have the award set aside and had some sufficient security been offered to enable

the Company to do so I would have considered whether to dismiss or adjourn this application upon such security being provided. Since no acceptable security has been offered and since the Company clearly has no current means of discharging the debt constituted by the award, I shall make the appointments sought.

**Commercial Court Judge**

11 January 2010