HCCT 62/2018

[2020] HKCFI 2782

(edited version for publication)

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO 62 OF 2018

IN THE MATTER OF Section 84 of the Arbitration Ordinance (Cap 609) and Order 73, rule 10 of the Rules of the High Court (Cap 4A)

and

IN THE MATTER OF an Arbitral Award dated 4 January 2018 by Teresa Cheng (鄭若驊), Chung-Teh Lee (李宗德) and Peter Thorp

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BETWEEN

X	Applicant / Claimant in the Arbitration
and	
Y	Respondent / Respondent

in the Arbitration

Before: Hon Mimmie Chan J in Chambers

Dates of Hearing: 17, 18 and 21 August 2020

Date of Decision: 5 November 2020

D E C I S I O N

Background

1. By order made on 9 October 2018 ("**Enforcement Order**"), leave was granted to the Applicant ("**X**"), to enforce an arbitral award published on 4 January 2018 ("**Award**") and rendered in an arbitration seated in Taiwan ("**Arbitration**"). The Arbitration was commenced by X against the Respondent ("**Bank**"), pursuant to an arbitration agreement contained in a Discretionary Investment Management Mandate ("**Mandate**") which was granted by X to the Bank on 7 April 2008, for the Bank to manage all the assets held by X directly or indirectly in an account maintained with the Singapore branch of the Bank in the name of VC Trustee Limited, known as the "AB Unit Trust account" ("**Account**").

2. Under the Award, the Bank was ordered to pay a sum of approximately US $194 million plus interest to X, together with 95% of the arbitration related expenses.

3. On 24 October 2018, the Bank applied by summons to set aside the Enforcement Order under section 86 of the Arbitration Ordinance ("**Ordinance**"). Although the summons did not set out the precise grounds of the application to set aside, the affidavit in support of the summons, which was filed at the same time as the summons, clearly specified the grounds of the setting aside, in no uncertain terms. These are that the Award dealt with matters or differences not falling within the terms of the submission to arbitration, and/or contains a decision on matters beyond the scope of the submission to arbitration; that the Bank had been unable to present its case in the Arbitration; and that enforcement of the Award would be contrary to public policy and/or it would be otherwise unjust to enforce the Award. As the grounds are clearly set out in the affidavit served with the summons, I do not consider that there is abuse of process.

The Facts

4. X is a company incorporated under the laws of Taiwan in 1993, and carried on business as a life insurance company there. It was acquired by 2 individuals, **ET** and **JH**, in 2007 who became respectively X's Executive Chairman and Vice Chairman. In 2014, X was put into receivership under the Taiwan Insurance Act, as a result of its deteriorating financial position. In 2016, it was further put into rehabilitation, with the Taiwan Insurance Guaranty Fund acting as its receiver and subsequently rehabilitator.

5. Under the investigations of the Taiwanese authorities, it was discovered that in early 2007, ET the Executive Chairman, Director and majority shareholder of X and JH the Vice Chairman had procured loans to be made by the Bank to a company, Y Ltd ("**Y**"), a BVI company and a subsidiary of X. The receiver/rehabilitator claims that Y was in fact a private corporate vehicle controlled by ET/JH, and that the Bank had conspired with ET and JH to defraud X and to misappropriate the assets of X, being the insurance premiums paid by policyholders, through investment structures which were allegedly planned, devised and implemented by the Bank. ET, JH and an employee of the Bank were subsequently charged of criminal offences in Taiwan for fraud perpetrated on X.

6. On the part of the Bank, it is claimed that ET had procured a loan of approximately US$240 million to be made by the Bank to Y, on fraudulent misrepresentations made by ET. The money was misappropriated by ET, who was convicted and is now serving a 10 year sentence in Taiwan, and the loan advanced by the Bank has not been repaid, thus rendering the Bank (on its case) an innocent victim of the fraud committed by a senior officer of X.

7. On X's case, a series of investment structures were set up and a set of instruments were entered into between the related parties, all for the purpose of procuring X to pledge its assets in favour of the Bank, to secure loans which were advanced by the Bank solely for the benefit of ET and JH, and all without the knowledge and proper approval of X. As highlighted by the Bank, the Award is premised upon an arbitration clause contained in the Mandate, which is only one of the series of agreements executed by the parties.

8. According to the Bank, ET and JH had approached the Bank in early 2007, to discuss ways of expanding the scope of X's investments. As a Taiwanese life insurance company, the investment and lending options of X were limited by regulations, and ET, JH and the Bank were at the material time exploring ways by which the Bank could manage the assets of X under a discretionary management mandate, with the managed assets to be pledged by X as security for loans to be made to X. In May 2007, Y and another BVI company were acquired for the purpose of these investments, and X was made the beneficial owner of both companies. A series of transactions were then entered into to implement the structure whereby the investments of X were made, and a number of agreements were executed by the parties to record these transactions and to reflect and regulate the relationship created.

The August 2007 transactions

9. First, in August 2007, a trust fund named CD Portfolio, SA ("**CD Trust**") was established under the laws of the Bahamas. X made a subscription of US$50 million in CD Trust, which in turn pledged its assets as security for the loans advanced by the Bank to Y, which included a loan facility of US$30 million granted by the Bank to Y.

10. The CD Trust is not directly concerned in the issues in dispute in these proceedings.

The March 2008 transactions

11. On 7 March 2008, a similar trust structure named AB Portfolio SA ("**AB Trust**") was established, pursuant to a Trust Deed executed by VC Trustee Limited ("**Trustee**") and expressed to be governed by Jersey law. The Trust Deed recited that the Trustee had determined to establish an investment unit trust scheme, and to issue units on the terms set out in the Trust Deed. The Trustee acknowledged under the Trust Deed that it was to hold the AB Trust fund upon trust for the unit holders.

12. The Trust Deed provides that the AB Trust was to be governed by and construed in accordance with the laws of Jersey. It has no separate clause providing for the manner of dispute resolution.

13. On the same day as the establishment of the AB Trust, the Trustee opened the Account (numbered 362176) in its name with the Bank and executed, in favour of the Bank, a Pledge of Assets in writing ("**Pledge**") over its assets in the Account, as continuing security for any money and current and future obligations of either Y or the Trustee, as may be due to the Bank.

14. Under the Pledge which was executed by the Trustee under its common seal, the Trustee pledged in favour of the Singapore branch of the Bank all its assets in which it has any right or interest, which were in or which come into the possession or under the control of the Bank for the account of the Trustee, whether alone or jointly with others. The Pledge was stated to be in consideration of the Bank continuing with current advances and/or making new advances to Y as the named Borrower, or giving credit or affording banking facilities to the Borrower. The Trustee represented and warranted under the Pledge that it was the legal and beneficial owner of the pledged assets.

15. Clause 24 of the Pledge states that the Pledge was to be construed in accordance with the laws of Singapore and that the Trustee irrevocably submits to the non-exclusive jurisdiction of the courts of Singapore, provided that the Bank may bring proceedings against the Trustee in the competent courts of any other jurisdiction in which the Trustee resides or may have assets.

16. On 8 March 2008, X as the sole unit holder of the AB Trust issued letters addressed to the Trustee and the Bank, confirming its agreement and consent to the pledge of all its assets held by the Trustee under the AB Trust, in favour of the Bank. Such agreement and consent to the pledge was expressed to be for the purpose of securing bank facilities granted or to be granted by the Bank to X's affiliate, Y, on such terms and conditions as may be agreed between the Bank and Y as borrower from time to time. Further, as the sole unit holder and the initial investor under the AB Trust, X had separately acknowledged under the Trust Deed (clause 2.10 e) thereof) its agreement to the Trustee entering into a pledge agreement with the Bank, in respect of the securing of the obligations of a third party as permitted under clause 8.2.16 of the Trust Deed. That sub-clause expressly empowered the Trustee to borrow, grant guarantees, give indemnities and grant security by way of pledge for obligations of third parties not connected with the trust.

The April 2008 transactions

17. Shortly following the March transactions, on 7 April 2008, ET on behalf of X subscribed for US$148,800,800 ("**Amount**") worth of units in the AB Trust. This was reflected in a letter of instructions dated 7 April 2008 from X to the Bank ("**7/4 Instructions**"), referring to "the formal instruction to buy" units in the AB Trust of the Amount, and to settle the subscription by transferring all the securities and cash which were held in X's bank account No 352163 with the Hong Kong branch of the Bank, and as named in the 7/4 Instructions, to the Account of the Trustee maintained with the Bank at its Singapore branch.

18. Also on 7 April 2008, X signed the Mandate with the Bank, for the Bank's management of all the assets held, directly or indirectly, in the Account which the Trustee had established with the Bank. The management of such assets was in the absolute discretion of the Bank, and the Mandate was recited to be supplemental to the account conditions applicable by the Singapore branch of the Bank which govern the Account. Under clause 2 of the Mandate, the Bank agreed to undertake the investment of the assets with its discretion, within the investment parameters stipulated in the Mandate.

19. Clause 17 of the Mandate provides that it may be terminated by X by written consent of both parties, or by either party with three-month written prior notification to the other. It states simply that upon termination, X shall take complete charge of managing the assets to the full discharge of the Bank and that X shall promptly take all such actions as are necessary to effect the discharge of the Bank.

20. Clause 22 of the Mandate ("**Arbitration Clause**") provides for resolution of disputes and jurisdiction, stating that "any dispute out of or in connection with this Mandate, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by The Arbitration Association of the Republic of China", and that the Mandate shall be construed and take effect in accordance with the laws of Taiwan.

21. Subsequent to the March and April 2008 transactions, a second loan facility for up to US$90 million was granted by the Bank to Y.

The dispute and claims made

22. After X was put into receivership in 2014, the receiver issued a letter of notification to terminate the Mandate, and demanded the Bank to return all the monies of X in the Account. The Bank refused, claiming that it was entitled to the assets in the Account pursuant to the Pledge executed in its favour by the Trustee.

23. It is not disputed that between April and June 2015, the Bank returned a sum in excess of US$64 million to X, representing the balance in the AB Trust Account excepting the sum of US$193,841,493.19, which represented the outstanding loan due from Y to the Bank, which the Bank claims is subject to the Pledge.

24. Arbitration proceedings were accordingly commenced by X against the Bank on 1 August 2016, in reliance on the Arbitration Clause of the Mandate.

25. It is necessary to consider the claims made in the Arbitration, bearing in mind that the Bank's case is that the Award dealt with matters beyond the scope of the submission to arbitration, and that it had not been given the opportunity to deal with the claims made against it.

26. In the Request for Arbitration ("**Request**"), X as Claimant relied on the fact that pursuant to paragraph 4 of Article 17 of the Mandate, it may terminate the Mandate by giving three months' prior written notice to the Bank and that upon termination, X may request the Bank to return the money and assets entrusted to it for management and operation, namely the amounts deposited in the Account. X claimed that the Bank had failed to respond to its requests for return of the said amounts.

27. X further claimed in the Request that employees and officers of the Bank had colluded with ET and/or JH, to entrust X's assets to the Bank for management, set up the AB Trust and pledge all the assets of the AB Trust in the Account, as the collateral for loans made by the Bank to Y, a company set up by ET and JH. X claimed in the Request that ET and JH had borrowed money from the Bank in the name of Y, and had procured X to pledge its assets for Y without any underlying reasons, or without X obtaining any commercial interest. The Request pleads that the Pledge was void under the law of Singapore, being the law governing the Pledge, for lack of consideration, such that the Bank was liable to return the balance in the Account to X.

28. In the Request, X claimed that even if the Pledge was valid, it had resulted from the collusion between the employees of the Bank and ET and JH to assist, conceal and cover the acts of ET and JH which violate the Taiwanese regulation, that an insurance company shall not provide guarantees for the debts of others. X claimed alternatively that there was negligence on the part of the Bank, and that X had sustained loss caused by the tortious acts of ET and others.

29. Prior to the commencement of the Arbitration in August 2016, the Bank had in fact, in July 2016, commenced proceedings in Singapore against X, Y and the Trustee of the AB Trust ("**Singapore Proceedings**"), in reliance on the jurisdiction clause contained in the Pledge. In the Singapore Proceedings, the Bank seeks a declaration from the Singapore Court that the Pledge is valid and enforceable under Singapore law, the choice of governing law in the Pledge.

30. In the Arbitration, the Bank had applied, unsuccessfully, to the tribunal for a stay of the Arbitration pending resolution by the Singapore Court of the validity of the Pledge. The Bank highlighted the fact that throughout the Arbitration, it had consistently maintained that the determination of the validity of the Pledge should be decided, not by the tribunal, but by the Singapore Court. The Bank highlights that X has submitted to the jurisdiction of the Singapore Court, and that the trial of the Singapore Proceedings is listed for a 14-day substantive hearing in August **2020**.

31. After a hearing of 5 days in the Arbitration conducted in November 2017, the tribunal rendered the Award in favour of X. By the Award, the tribunal held that:

(1) X, as a life insurance company incorporated in Taiwan, is subject to the insurance laws and regulations of Taiwan.

(2) Since the AB Trust was established under Jersey law, it was a foreign fund.

(3) X had subscribed to the AB Trust and transferred its own assets to the AB Trust Account, resulting in a loss of ownership and control of assets. X's subscriptions to the AB Trust constituted an investment under Taiwan law.

(4) Under Article 146-4 of the Taiwan Insurance Act ("**Article 146**"), the permissible range of foreign investment activities of insurance companies are limited to particular types ("**Prohibition Against Investment**"), and the subscription to the AB Trust was outside the scope of permissible investments, and hence violated Article 146.

(5) As a matter of law, the Taiwan Insurance Laws are "mandatory prohibitive rules". According to Article 71 of the Taiwan Civil Code, a legal act in violation of a mandatory prohibitive rule is in principle void.

(6) Accordingly, the provisions of the Taiwan Insurance Laws, including Article 146, are "validity provisions" as opposed to "enforcement provisions", which have the effect of invalidating X's investment in the AB Trust.

(7) Because X's subscription to the AB Trust violated the Taiwan insurance regulations, it was void *ab initio*, and the assets which X had transferred to the Account of the AB Trust therefore remained the assets of X (paragraph II C1 of the Award).

(8) The deployment of X's assets is a question of Taiwanese law, and therefore the Pledge of its assets should naturally be decided by relevant Taiwan rules and regulations.

(9) Article 143 of the Taiwan Insurance Act ("**Article 143**") prohibits the assets of an insurance company to be pledged to secure the debts of a third party ("**Prohibition Against Guarantee**"), and therefore the Pledge of X's assets to secure the debts of Y was in violation of Article 143.

(10) Article 143 is likewise a validity provision, and the effect of violating Article 143 is that the Pledge of assets by the Trustee is invalid (paragraph II C1-4 of the Award).

(11) Since the Mandate was terminated by X, the Bank was under a duty to return the discretionary assets to X. Because X's subscription to the AB Trust was invalid *ab initio*, there was no trust relationship created between X and the Trustee, and no issue on X's redemption of the units in the AB Trust in accordance with the Trust Deed (paragraph II D2a of the Award).

(12) Given that X's subscription to the AB Trust and the Trustee's execution of the Pledge were both void *ab initio,* the Bank must directly request the Trustee to return the assets for delivery to X (paragraph II D2b of the Award). Even if any question remains about the redemption of the AB Trust units to recover the discretionary assets, X should itself request the redemption from the Trustee in order to recover and return such assets to X, bearing in mind that the Trustee was a subsidiary of the Bank and the Bank should have the capacity to procure recovery.

(13) It was not necessary for the tribunal to examine the remaining issues on the validity and enforceability of the Pledge under Singapore law, or other arguments with respect to the tort claims, since the tribunal had been able to conclude that the Bank is obliged to return the assets to X to restore it to its original position (paragraph II G of the Award).

32. On the basis of the above findings, the tribunal ordered the Bank to pay to X US$193,848,116.19, interest, and 95% of the costs of the Arbitration.

33. The Bank has emphasized the fact that the tribunal's findings of the invalidity of X's subscription to the AB Trust and its deployment of assets, on the basis that Article 146 is a validity provision, is contrary to the common ground and agreed view of the Taiwan law experts of X and the Bank in the Arbitration, that Article 146 (ie the Prohibition Against Investment) is an enforcement provision, rather than a validity provision. Violation of enforcement provisions of Taiwanese statutes results in the imposition of penalties such as fines, but does not render the transaction invalid. This common ground was recognized by the tribunal, and referred to in paragraphs II B2 and II B3d of the Award. It was also common ground of the parties in the Arbitration that although Taiwanese law was relevant, Singapore law is the governing law of the validity of the Pledge. The tribunal's finding on the invalidity of the deployment of X's assets including the Pledge, on the basis of Article 146 of the Taiwan Insurance Act being a validity provision, took the Bank by surprise, and forms the basis of its claim of the tribunal's jurisdictional overreach, and that it did not have the opportunity to present its case.

Whether the Award dealt with difference not contemplated by or not falling within the terms of the submission to arbitration/contains decisions on matters beyond the scope of the submission (s 86 (1)(d))

34. The governing law of the Mandate (and of the Arbitration Clause) is the law of Taiwan (as provided for in Article 23 of the Mandate). The Taiwanese law experts of X and the Bank agree that the exercise of contractual interpretation under the law of Taiwan is to ascertain the real intention of the parties, as manifested objectively. There does not appear to be any significant difference between Hong Kong and Taiwanese law in this respect.

35. To recap, the Arbitration Clause in the Mandate provides as follows:

> "Any dispute out of or in connection with this Mandate, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by 'The Arbitration Association of The Republic of China'. Mandate shall be construed and take effect in accordance with the laws of Taiwan. Any disputes, controversies, differences or claims out of or in connection with this Mandate, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration referred to the Arbitration Association of Taiwan, Republic of China in accordance with the Arbitration Law of Taiwan and the Arbitration Rules of Chinese Arbitration Association, Taipei. The place of arbitration shall be in Taipei, Taiwan. The award rendered by the Arbitrator(s) shall be final and binding upon both parties concerned." (emphasis supplied)

36. According to X, the scope of the Arbitration Clause is wide, covering "any dispute out of or in connection with" the Mandate. The Mandate was the only governing agreement between X and the Bank in relation to the operation of the Account and the handling and management of the funds therein. According to X, the dispute and claims in the Arbitration relate to X's termination of the Mandate, and the duty of the Bank upon such valid termination to return to X the balance of the assets in the Account. This clearly falls, on X's case, within the ambit and scope of the Arbitration Clause, as a dispute or claim "out of or in connection" with the existence, validity or termination of the Mandate.

37. Counsel for X highlighted the fact that the Request itself pleads that the Pledge is void under Singapore law, and that the pledging of X's assets in favour of the Bank and as collateral for the Bank's loan to Y violated the Prohibition Against Guarantee under the Taiwan Insurance Act. These averments were denied in the Bank's Statement of Defence in the Arbitration, on the basis that the Pledge was executed by the Trustee, and not by X. The Bank pleaded in the Statement of Rejoinder that the AB Trust structure did not violate the Taiwan Insurance Act as X only owned units in the AB Trust.

38. X further highlighted the fact that the Bank had made submissions and adduced expert evidence in the Arbitration that the Pledge did not violate Taiwan law, and in particular, that violation of Taiwan law would not render the Pledge invalid as a matter of Singapore law, since the Prohibition against Guarantee is an enforcement provision, and not a validity provision. According to X, the Bank and its expert had made extensive submissions in the Arbitration as to whether the investment structures concerned violated Taiwanese insurance law, and whether the consequence of such violation would render the whole transaction void *ab initio*.

39. In these premises, X argued that on the basis of (1) the scope and the language of the Arbitration Clause, and (2) the Request and the pleadings in the Arbitration, all the questions relating to the validity of the Pledge and the subscription had been clearly put in issue before the tribunal, and that the tribunal's decision was on the precise issues raised by the parties in their submission to the Arbitration. Leading Counsel for X pointed out that X's case in the Arbitration had always been that the entire investment structure, which included X's subscription to the AB Trust and the pledging of X's assets to the Bank, was illegal and that X had no capacity at all under Taiwanese law to pledge its assets for the debt of a third party. Capacity is a matter of Taiwanese law, and since the tribunal found that X did not have capacity to pledge its assets in violation of the Taiwan Insurance Law, the issue of enforceability under Singapore law (which the Bank contends to be the issue outside the jurisdiction of the tribunal) did not even arise for determination by the tribunal.

40. This is a reference to paragraph G of the Award, where the tribunal stated:

> "In summary, given that from examining the relevant arguments of both parties with respect to the Mandate, the Tribunal has already been able to arrive at the conclusion that (the Bank) is obliged to return the discretionary assets to X to restore it to its original position, it would be needless for the Tribunal to further examine the remaining issues on the validity and enforceability of the AB pledge under Singapore law, or other agreements of the parties with respect to tort claims. Any disputes of the findings arising from new factual and legal allegations after the hearing, or any progress of other cases before the courts of Taiwan or Singapore, would not affect this arbitral award, and thus will not be examined."

41. On X's case, therefore, there was no finding by the tribunal on the Pledge, as it was not necessary to do so, to form any basis for the Bank's complaint that the tribunal's Award was beyond the scope of the submission to the Arbitration.

42. The focus of the submissions made by Leading Counsel for the Bank, which I accept, is that the Mandate and the Pledge are separate, independent and distinct agreements, made between different parties and governing totally different transactions. The Pledge was entered into between the Bank and the Trustee (as the legal owner of the assets in the AB Trust held in the Account), with Y named as the Borrower. Mr Man pointed out that the Pledge was exclusively concerned with the credit side of the AB structure, and was security for the facilities granted by the Bank to Y, whereas the Mandate was executed and granted by X to the Bank on the investment side of the AB structure, for the confined purpose of the Bank's management of investment of the assets in the Account opened by the Trustee. As emphasized by Mr Man, the Mandate did not create the AB Trust structure, nor was it the document under which X parted with any of its assets.

43. As a matter of interpretation of the Mandate, and the construction of the intention of the parties as to the meaning and scope of the Arbitration Clause, these have to be construed in the context of the facts known to the parties at the time when the Mandate was entered into. In this regard, the Bank highlighted the fact that at the time when X signed the Mandate on 7 April 2008, X and the Bank both knew that a month before, on 7 March 2008, the Trustee had executed the Pledge in favour of the Bank, of all the assets it held under the AB Trust, and which the Bank was to manage under the Mandate. X and the Bank further knew that X had in fact written to the Bank on 8 March 2008 to confirm that it agreed to and consented to the Pledge being executed. Under the Pledge, the parties agreed that the Pledge was to be construed in accordance with the laws of Singapore, and the Trustee submitted to the non-exclusive jurisdiction of the Singapore courts. The Bank further pointed out that it was also known to X, at the time of the Mandate on 7 April 2008, that it had parted with the property in the assets by the Trust Deed, which expressly stated that the governing law was Jersey law. On behalf of the Bank, it was submitted that all these ought to be taken into consideration as to what the parties to the Mandate had known at the time the Mandate was executed, and as part of the factual matrix in the construction of the parties' intention under the Mandate, and the Arbitration Clause therein contained. Both X and the Bank would have known that different agreements had been entered into to set up the proprietary structures, and that there were different dispute resolution mechanisms under the separate agreements.

44. In short, the Bank's case is that the Award was premised on the findings made by the tribunal that the Pledge of X's assets and X's subscription to the AB Trust were invalid as being in violation of the Taiwan Insurance Laws, and these findings fall outside the scope of the Mandate. Questions as to the validity of the Pledge fall within the scope of the jurisdiction clause agreed between the Trustee and the Bank as the proper parties to the Pledge, to be determined by the Singapore Court under Singapore law, and should not have been determined in the Arbitration of the dispute between X and the Bank as to their rights and liabilities under the Mandate governing the management of the assets in the Account. Nor does the tribunal have jurisdiction to make findings on the legality or otherwise of the AB Trust, particularly when the Trustee (the proper party to the Pledge and the Trust Deed) was not even a party in the Arbitration.

45. Mr Man also pointed out that the dispute between the Bank and X in relation to the Mandate was not on the circumstances of the termination of the Mandate, such as the validity of the notice of termination (which would fall within the Arbitration Clause). The real issue in dispute has always been the validity of the Pledge, and whether the Bank can rely on the Pledge to retain the assets upon termination of the Mandate.

46. Despite the breadth of the language used in the Arbitration Clause, which has been highlighted by Mr Chang on behalf of X, I accept the submissions made by Mr Man, that on the facts of this case, where the parties had entered into multiple related commercial agreements, which deal with different aspects of their relationship and dealings, the proper test in ascertaining the parties' intention on how their disputes should be dealt with is to identify the nature of the claim, and the agreement which has the closest connection with such dispute and claim (the agreement "at the centre of gravity of the dispute", as referred to in *Trust Risk Group SpA v AmTrust Europe Ltd* [2017] 1 CLC 456, or at the "commercial centre of the transaction" in question, as referred to in para 4.59 in *Joseph on Jurisdiction And Arbitration Agreements And Their Enforcement,* 6th edition).

47. As the learned author stated on page 881 of *Lewison on The Interpretation Of Contracts*:

"It is generally to be assumed on these principles that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals…. The presumption may be rebutted in a case in which the parties have entered into different agreements relating to different aspects of an overall transaction where the agreements contain clauses conferring jurisdiction on the courts of different countries. As Rix J put it in *Credit Suisse First Boston (Europe) Ltd v MLC Bermuda Ltd*:

> 'where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it would seem to be applying too broad and indiscriminate a brush simply to ignore the parties' choice of palette.' "

48. In *Trust Risk Group SpA v AmTrust Europe Ltd* [2017] 1 CLC 456, the case before the court concerned an overall agreement package containing two express choice of law and jurisdiction clauses, one of English law and jurisdiction, the other of Italian law and arbitration. The authorities were analyzed and Beatson LJ summarized the applicable principles, as follows:

"46. Where the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements, however, the position differs in that one does not approach the construction of those arrangements with a presumption. So, the 14th edition of *Dicey, Morris and Collins on the Conflict of Laws* stated (para. 12-094):

> 'the decision in *Fiona Trust* has limited application to the questions which arise where parties are bound by several contracts which contain jurisdiction agreements for different countries. There is no presumption that a jurisdiction (or arbitration) agreement in contract A, even if expressed in wide language, was intended to capture disputes in contract B; the question is entirely one of construction ...'

That reflects *inter alia* the statement of Rix J in *Credit Suisse First Boston (Europe) Ltd v MLC (Bermuda) Ltd* [1999] CLC 579 at 777 that:

> 'where different agreements are entered into for different aspects of an overall relationship, and those different agreements contain different terms as to jurisdiction, it should seem to be applying too broad and indiscriminate a brush simply to ignore the parties' careful selection of palette.'

47. In *Deutsche Bank AG v Sebastian Holdings Inc* [2010] EWCA Civ 998; [2010] 2 CLC 300, a case involving a complex series of eight agreements, Thomas LJ referred with approval (at [42] and [49]) to the passages from *Dicey, Morris and Collins* and the judgment of Rix J I have set out. He summed up the position as follows:

> '… [I]n construing a jurisdiction clause, a broad and purposive construction must be followed': see [39];

> '… [A]n agreement which [is] part of a series of agreements [should be construed] by taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme': see [40];
>
> 'It is generally to be assumed … that just as parties to a single agreement do not intend as rational businessmen that disputes under the same agreement be determined by different tribunals, parties to an arrangement between them set out in multiple related agreements do not generally intend a dispute to be litigated in two different tribunals': see[41]; but
>
> '… [W]here there are multiple related agreements, the task of the court in determining whether the dispute falls within the jurisdiction clauses of one or more related agreements depends upon the intention of the parties as revealed by the agreements as against these general principles': see [42].

48. The current (16th) edition of *Dicey, Morris and Collins* states (at para. 12-110) that:

> 'Where a complex financial or other commercial transaction is put in place by means of a number of interlinked contracts, and each has its own provision for the resolution of disputes, the point of departure will be that it is improbable that a jurisdiction clause in one contract, even expressed in ample terms, was intended to capture disputes more naturally seen as arising under a related contract. … Even if the effect is that there will be a risk of fragmentation of the overall process for the resolution of disputes, this is not by itself sufficient to override the construction, and consequent giving of effect to the complex agreements for the resolution of disputes which the parties have made.'

In short, what is required is a careful and commercially-minded construction of the agreements providing for the resolution of disputes. This may include enquiring under which of a number of inter-related contractual agreements a dispute actually arises, and seeking to do so by locating its centre of gravity and thus which jurisdiction clause is 'closer to the claim'. In determining the intention of the parties and construing the agreement, some weight may also be given to the fact that the terms are standard forms plainly drafted by one of the parties."

49. In *Joseph's Jurisdiction And Arbitration Agreements And Their Enforcement* at para 4.58, the learned editor stated:

"More complex issues arise in the not infrequent situation where parties conclude a series of related and interlinked agreements covering a business relationship over time. The principles in *Fiona Trust* are always subject to consideration of the presumed intention of the parties. Where, the dispute in question potentially arises under or in connection with one of several agreements it is a question of construction in each case as to which disputes are covered by which dispute resolution agreement. Specifically where the contracting parties have expressed different parts of their relationship in multiple agreements, with different and potentially conflicting dispute resolution provision then it is much easier for the courts to conclude that the presumption of "one-stop adjudication" should be cast to one side. The better view is that in such a case it is simply a matter of broad purposive contractual construction of the various bargains in question. Nevertheless, the courts will strive to avoid the conclusion that one dispute falls within the scope of two inconsistent dispute resolution provisions. Sensible or rational business people would not have intended that such a dispute would at one and the same time be within the scope of two inconsistent dispute resolution agreements. To this extent, the Fiona Trust presumption applies even in the cases of multiple bargains."

50. It is true that only decisions which are clearly unrelated to, or not reasonably required for the determination of the subject dispute or issues submitted to arbitration can rightly be labeled as "decisions on matters beyond the scope of the submission to arbitration" (*U v A*, HCCT 34/2016, 23 February 2017). On this analysis, it may be said that in deciding the disputes in the Arbitration, namely, whether X was entitled to the return of its assets upon termination of the Mandate, and whether the Bank was entitled to rely on the security in the Pledge, the tribunal's decision and findings that the subscription to the AB Trust and the deployment of X's assets (by the transfer of its assets to the Trustee's Account with the Bank) were matters governed by Taiwanese law, ***and*** that such deployment of assets by the subscription, transfer and creation of the Pledge contravened the provisions of the Taiwan Insurance Law, were reasonably required to be made. However, any decision and finding as to the validity or enforceability of the Pledge had clearly been agreed by the parties privy to the series of connected agreements made in March and April 2008 to be governed by Singapore law, and to be subject to the jurisdiction of the Singapore Court. Disputes as to the legality, effect and validity of the Pledge have the closest connection with the Pledge, executed by the Trustee in favour of the Bank, upon the instructions and with the knowledge and written consent of X. The Pledge is undisputedly the "centre of gravity" and at the commercial centre of the security relationship created amongst the Bank, the Trustee, X and Y, with the intention that security was to be provided by X to the Bank, for the advances made or to be made by the Bank to Y.

51. As Counsel stressed throughout, Taiwanese law was referred to and argued by both parties in the course of the Arbitration, and in the context of the Pledge. This was because the validity of the Pledge under Taiwanese law is relevant, when the validity of the Pledge under its governing Singapore law is considered. However, the fact that the Pledge may be invalid under Taiwanese law is not the conclusive determination of its enforceability or validity under Singapore law. On the Bank's case, the validity of the Pledge cannot be determined based on Taiwanese law alone. According to the expert evidence on Singapore law, which was adduced in the Arbitration, any effect of Taiwanese law on the Pledge is relevant only for the purpose of addressing the issue of whether the Pledge can be said to be tainted by foreign illegality under its governing Singapore law. This involves consideration of whether the foreign illegality is relevant to the transaction, and whether there is a sufficient connection between the transaction and the illegality, so as to amount to a taint. Illegality in Taiwan is not equated with illegality in Singapore, if the place of performance is not Singapore. To put it shortly, illegality under Taiwanese law is the first part of the analysis under consideration of the validity of the Pledge under Singapore law, but it is not the final step of the analysis.

52. So far as the validity of the Pledge is concerned, Mr Man was quick to point out that there was never any submission by the Bank to the jurisdiction of the tribunal, as the Bank had consistently made it clear to the tribunal that that issue should be reserved to the Singapore Courts, and that the Bank's submissions made in the Arbitration were without prejudice to such primary stance. The Bank had applied for stay of the Arbitration on the basis that the Singapore Courts should determine the validity of the Pledge, which application amounted under the Taiwan Code of Civil Procedure to an unequivocal objection to the jurisdiction of the Tribunal over the validity of the Pledge. After its application for stay was refused by the tribunal, the Bank submitted its Statement of Defence on the validity of the Pledge, but reiterated in such Defence that this was not to be construed as a waiver of its jurisdictional objections and procedural applications.

53. It is important to bear in mind that having found that the deployment of X's assets is governed by Taiwanese law, the tribunal found in paragraph II C of the Award that the Trustee's pledge of X's assets was invalid, as it was in violation of Article 143 of the Insurance Act. It stated in paragraph II C1 that the deployment of X's assets is a question of Taiwanese law, and "therefore the (Trustee's) pledge of the discretionary assets is naturally decided by relevant Taiwan rules". Finding that violation of Article 143 as a validity provision resulted in invalidity, the tribunal proceeded in paragraph II C4 to find that the pledge by the Trustee was invalid. It is clear that the tribunal's finding on the invalidity of the Pledge was purely based on Taiwanese law. As Mr Chang for X pointed out, the tribunal deliberately refrained from examining and deciding on the issues on validity and enforceability under Singapore law.

54. In view of the findings expressed in paragraph II C of the Award, I cannot agree that the tribunal did not make any determination at all on the enforceability of the Pledge - as suggested by X. It did, and only from the perspective of Taiwanese law.

55. In paragraph II D, the tribunal then decided that as X had terminated the Mandate, the Bank was under a duty to return the assets held in the Account. This was on the basis that the subscription to the AB Trust and the Trustee's execution of the Pledge were void *ab initio*, and no trust relationship was established. It follows from these findings that the tribunal considered that no property interest had been vested in the Trustee for it to execute any valid Pledge.

56. Having carefully considered the findings made in the Award, and giving due regard to the structure of the various agreements executed by the parties to govern the different relationships created in the context, my view is that after finding that the deployment of X's assets is governed by Taiwanese law, and is in contravention of the relevant provisions of the Insurance Act, the tribunal had no jurisdiction to make further findings, to bind the Bank and X, that the Pledge of X's assets was invalid, and that consequently, the Bank was under the duty, upon and by reason of the termination of the Mandate, to return the assets in the Account to X. The illegality under Taiwanese law of X's pledging and the manner of deployment of its assets by the subscription to the AB Trust do not *ipso facto* render the Trustee's execution of the Pledge illegal under its governing law. That question has to be determined according to the jurisdiction clause in the Pledge, which has the closest connection with the dispute on the validity of the Pledge. The capacity of the Trustee to enter into the Pledge may also have to be determined according to the law of Jersey. It does not "naturally follow" (the Chinese term "**自得**" used by the tribunal for the translation of "accordingly" at paragraph II D2b of the Award) from the termination of the Mandate, that the Bank has to return the assets. The return does not follow, if the assets had been validly secured under, and are subject to the Pledge which is enforceable under its governing law, which the parties had agreed to be Singapore. This is not a question of reviewing the correctness of the tribunal's decision on the merits on the validity of the Pledge. The parties' "choice of palette" for the Pledge and its validity was litigation in the Singapore courts, under Singapore law. Such a choice should be recognized, and given effect to, by the tribunal as the limits to its jurisdiction under the Arbitration Clause, and the confines of the parties' submission to the Arbitration.

57. In conclusion, I agree with Mr Man that although the termination of the Mandate and the rights and liabilities of the parties to the Mandate are subject to the submission to the Arbitration, the validity of the security created by the Pledge is not, and if the consequence of the termination of the Mandate brings into question the validity of the Pledge and the effectiveness of the Bank's right to hold on to the assets pledged, that question must be referred to and be subject to the final determination by the Singapore Court.

58. The tribunal's findings on the invalidity of the Pledge and X's subscription to the AB Trust were the critical basis of the tribunal's determination, that the Bank was liable to return the assets in the Account to X upon the termination of the Mandate. As these were beyond the scope of the Arbitration Clause and the parties' submission to the Arbitration, the Award cannot be upheld for enforcement.

Whether the Bank was unable to present its case (s 86(1)(c)(ii))

59. The Bank's complaint is that it was unable to present its case in the Arbitration on 2 key issues: the nature of Article 146 and its effect on the validity of X's subscription to the AB Trust; and the consequences of such subscription being held to be invalid. These include questions of whether the assets transferred to the Account were assets owned by X, whether the deployment of the assets was governed by Taiwanese law and can be ordered to be returned to X, whether the validity of the Pledge could be decided based on Taiwanese law, and the relevance and effect of Article 143 on the validity of the Pledge even if the Pledge was governed by Taiwanese law.

60. On the ground of the Bank's alleged inability to present its case, the thrust of X's arguments is that the validity of the Pledge was at all material times in issue and had been raised in the pleadings served in the Arbitration. The Bank had the opportunity to make, and did in fact make, submissions before the tribunal on Article 143 and Article 146 of the Taiwan Insurance Act, and the effect of these provisions on the transactions, the Pledge and the assets transferred into the Account. The effect of Article 146 as a validity provision on the transactions and transfer of X's assets were issues "in play" or "in the arena" in the Arbitration (*N v C* [2019] **HKCFI** 2292, paras 26 - 27), such that the Bank could not have been surprised by the findings made in the Award, that the Pledge was void under Taiwanese law.

61. X particularly highlighted the fact that the Bank's Taiwanese law expert (Professor Chang) had, in his reports served in the Arbitration, specifically addressed the consequences of the breach of Articles 143 and 146, pointing out amongst other things that Article 146 was an enforcement provision, and that violation of enforcement provisions was only an "administrative violation" which subjects the conduct in question to an administrative fine or sanction, but does not result in the conduct or transaction in question being void. According to Professor Chang's report, even if X's investments in the AB Trust, the Pledge and the loans to Y violated the Articles of the Taiwan Insurance Act, the transactions themselves would not be invalid.

62. It is not disputed between the parties that in deciding whether a ground is established to set aside or refuse enforcement of an arbitral award, the Court is not concerned with the merits of the award or the correctness of the reasoning of the tribunal. It has been emphasized, that what concerns the Court is the due process and structural integrity of the arbitral proceedings (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liquidation) (No 1)* [2012] 4 HKLRD 1). The conduct complained of, when a party complains of its inability to present its case, must be "serious or even egregious" before a court might take the view that a party had been denied due process. The fundamental basis underlying the ground of setting aside for inability to present one's case is that there should be a fair hearing, and that the arbitral tribunal is required to act fairly and impartially as between the parties, giving them a reasonable opportunity to present their cases and to deal with the cases of their opponents, a duty expressed under Article 18 of the Model Law and incorporated by section 46 of the Ordinance.

63. The Court might refuse to set aside an award if the error complained of was not material to the outcome, and the burden is on the party seeking the setting aside to show that it had been prejudiced.

64. In this case, the parties chose to arbitrate their dispute out of or in connection with the Mandate by the Arbitration Association of Taiwan, in accordance with the Arbitration Law of Taiwan and the Arbitration Rules of the Chinese Arbitration Association, Taipei. The Arbitration Law of Taiwan and the rules of the chosen arbitral association govern the manner of conduct of the Arbitration. However, in deciding whether there was a fair hearing to establish a ground for the enforcement court to exercise its discretion not to enforce the Award, standards of due process under Hong Kong law must also be considered. As the court pointed out in *Paklito Investment Limited v Klockner East Asia* [1993] 2 HKLRD 39, at 50, "there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve".

65. In this case, there does not appear to be substantial difference between Hong Kong law and Taiwanese law. The Taiwanese law experts agree that under Article 23 of the Taiwan Arbitration Law (which is a mandatory regulation protecting the right of the parties to be heard in arbitral proceedings), it is the duty of the tribunal to ensure that each party has a "full opportunity to present its case".

66. The Bank's Taiwanese law expert, Professor Shen, considered that to protect the party's right to be heard in arbitration proceedings, surprise decisions and surprise application of laws should be avoided by the tribunal. According to X's expert, this is abstract theory, and there is no expressed prohibition on surprise judgments - the question is simply whether the tribunal has given the parties sufficient opportunity to present their case.

67. It is true that in this case, both X and the Bank had put the validity of the Pledge in issue in the Arbitration, X claiming that the Pledge was invalid under Singapore law for lack of consideration, and that the act of pledging the assets of X violated the Prohibition Against Guarantee and under the Taiwan Insurance Act - at least in the context of its claim against the Bank for colluding with ET and JH, to conceal the unlawful acts of ET and JH. As X sought to emphasize, the Bank's expert had given evidence that Article 146 was an enforcement provision, and not a validity provision. There was no surprise judgment, when the tribunal ruled that the subscription and the deployment of X's assets under the Pledge violated Article 146 and was consequently void.

68. However, I accept the submissions made on behalf of the Bank, that it is important not only to consider the case which was presented by the Bank, but to bear in mind the case presented by X, which the Bank had been given notice to meet in the Arbitration. All parties to an arbitration are entitled to know the case that they have to meet, to test and challenge its opponent's case as presented, to comment upon the case and to prepare the evidence to meet such case. The pleaded case and the evidence which the Bank had been notified that it was to meet was that: the Pledge was invalid under Singapore law for lack of consideration or commercial benefit to X; that as a Taiwanese insurance company, X's investments are regulated; but that, on the common view of the Taiwanese experts, Article 146 and the Prohibition Against Investment was an enforcement provision only under Taiwanese law.

69. The fact is that the Bank's Taiwanese law expert had stated his opinion in his evidence that Article 146 was only an enforcement provision, which does not have the effect of invalidating the transaction which is said to have violated the Prohibition Against Investment, and this view was accepted by X's expert in the evidence adduced in the Arbitration. As such evidence was not challenged, the Bank's expert did not have to further advance his case on Article 146, and the Bank did not have to make submissions to challenge any view contrary to the common ground of the experts.

70. Where there is a contested case, the criticisms to be made of a party's case are usually provided by its opponent to the claim. The attack will be mounted by the respondent to the claim, and the claimant will have the opportunity of dealing with any potential defects in its claim, to meet the attack. The rules of natural justice ensuring a fair hearing aim to prevent ambush. As the Court pointed out in the first instance judgment in *Fox v Wellfair Ltd* [1981] 2 Lloyd's Rep 514 at 520:

> "It is of the very essence of a fair hearing that the parties should have an adequate opportunity of dealing with any substantial criticism of their claim or defence, whether the source of that criticism comes from the opposing party or the tribunal who makes the decision. It must, however, always be a question of fact and decree, whether or not such an opportunity has been denied."

71. The claims of contravention of the Insurance Act, made by X in its pleadings and evidence, and the Defence of the Bank, only put in issue the effect of Article 143 (the Prohibition Against Guarantee) as a validity provision, and the resulting invalidity of the Pledge as security for a loan to Y. The Bank has emphasized the fact that it was only when X served its post-hearing submissions in the Arbitration, that X argued, for the first time, that contravention of Article 146 should render the transactions amounting to breach to be deemed as void (paragraph 150.9-150.10 of the post-hearing brief) under Taiwanese law, citing and relying upon the provisions of Article 71 of the Civil Code. The parties had exchanged post-hearing submissions simultaneously and there was no further opportunity for the Bank to deal with this "volte-face" on the part of X. The submissions made on behalf of the Bank in its post-hearing brief were on the basis that there was no disagreement between the parties and their experts as to Article 146 being an enforcement provision.

72. In the Award, the tribunal rejected the experts' shared view that Article 146 was an enforcement provision, and concluded that the submissions made on behalf of X in its post-hearing brief, as to Article 146 being a validity provision, should be accepted. On that basis, the tribunal found that the subscription to the AB Fund, and the Pledge of X's assets, were void on the basis that X remained the owner of such assets. The tribunal's finding that the *deployment of X's assets* was governed by Taiwanese law, and that such deployment by the subscription to the AB Trust was void for violation of Article 146 was essential to and the basis of the tribunal's finding that the Pledge was invalid, as the assets allegedly pledged remained X's property, and there was no proprietary interest which could be transferred by the Trustee. As the proprietary interests in the assets remained vested in X, the Pledge of X's assets violated Article 143 and was found to be invalid under Taiwanese law.

73. The fact that the Bank and its experts had made submissions and given evidence on Article 143 and Article 146, and their effect as enforcement provisions, must also be understood in the context in which the claims were pleaded and argued in the Arbitration, at least before the post-hearing brief. Other than in the post-hearing brief, Counsel for X had not been able to refer to any expert report, pleading, or submissions in which X had claimed that the initial subscription in the AB Trust was in violation of Taiwanese law, and was void and of no effect. On the other hand, Counsel for the Bank identified and prepared a detailed analysis of the submissions and arguments raised in the Request, the pleadings, the expert evidence and the submissions made in the Arbitration, to highlight and demonstrate the arguments which *had* been advanced by the parties, on the validity of the Pledge under Taiwanese law and Singapore law. From that summary, it can be seen that (prior to X's post-hearing brief) the arguments on the relevance and effect of Article 143 and Article 146 were *not* made by either party in the context of the validity of the Pledge as a result of the deployment of X's assets.

74. First and foremost, the claim made by X in the Request was that the Pledge was void for lack of consideration *under Singapore law*. Taiwanese law was pleaded only in the tortious claim made against the Bank, on the basis that the Pledge resulted from the Bank's collusion with ET and JH (to set up companies for loans, to change the ultimate beneficiaries of such companies etc), in order to *assist and conceal the unlawful acts* of ET and JH "which violate the regulation that an insurance company shall not provide guarantees for others' debts", or that there was *negligence* on the part of the Bank in relation to these unlawful acts. The reference to the regulation being violated could only be Article 143. No finding was made in the Award on the collusion/negligence claims in the context of which Article 143 was raised.

75. It was in answer to these pleaded claims that the Bank asserted in its Statement of Defence that the Pledge was valid, as it was executed as a deed, and that consideration had been provided by the loans to Y. In answer to the tortious claim, the Bank pleaded that the Pledge was granted not by X, but by the Trustee, and that the Pledge was lawful under Jersey law which governed the Trust Deed. The Bank further pleaded that X's investment in the AB Trust was permitted under Taiwanese law. Taiwanese law was raised in the Statement of Defence and the pleadings subsequent thereto in relation to the tortious claim, including X's reply that the Bank was clear in its knowledge that the assets in the AB Trust belonged to X, that the Pledge should be deemed to be entered into by X through the Trustee acting only as a nominee, and the Bank's claim that the Pledge did not contravene Article 143, as X's assets were the shares in the AB Trust, and these were not pledged.

76. The expert evidence focused on whether there was capacity on the part of X to consent to the Pledge by the Trustee, and whether this was a matter of Singapore law, or Taiwanese law for breach of Article 143, or to be governed by the law of Jersey; and whether any lack of capacity of X to consent to the Pledge meant that the Pledge was invalid. The expert evidence adduced on behalf of the Bank was that the Pledge did not violate Article 143, because the Trustee is not a Taiwanese insurance company, the AB Trust is a foreign entity to which Article 143 is not applicable, Singaporean law governs the Pledge, and any violation of Articles 143 and 146 by insurance companies are administrative violations only, with no consequence of the transactions being void.

77. In X's pre-hearing brief, it contended that the AB Trust violated Taiwanese insurance laws (including Article 146), **but** there was no claim that this was a validity provision. The argument remained that there was a tort because of the collusion between ET/JH and the Bank, and that the Bank should be liable in tort when it failed to detect the illegality under Taiwanese law. There was no argument that no property interest had passed as a result of any alleged illegality. X also claimed in the pre-hearing brief that the provision of X's assets for the AB Trust violated *Article 143*, which was claimed to be a validity provision, with the result that X had no capacity to consent to the Trustee's pledging of assets. The contention was that as a result, the Pledge was unlawful *for foreign illegality under Singapore law*.

78. It was in the post-hearing brief, that X contended that the subscription to the AB Trust violated Article 146, which is also a validity provision. It further claimed that X had no capacity to pledge or consent to the pledge of the assets in the Account as collateral for Y because of the Prohibition Against Guarantee under Article 143. On the tortious claim, X contended that the Bank had failed to carry out due diligence, which would have alerted it to the fact that under Taiwanese law, X was not permitted to consent to the Pledge which is illegal under Taiwanese law, and therefore unenforceable and invalid *under Singapore law*.

79. On its part, the Bank maintained in its post-hearing brief that the investment structures did not contravene Article 146, which both parties agreed was an enforcement provision and not a validity provision. It maintained that X had capacity to consent to the Pledge, and that even if the consent was illegal, it was not invalid as Article 143 was also an enforcement provision only. Under Singapore law, contravention of an enforcement provision would not be regarded as an illegal act, and would not be unenforceable for the purposes of foreign legality.

80. It is therefore clear from the analysis that at no time had the Bank and its expert ever considered, or sought to argue, whether the subscription to the AB Trust by way of investment was invalid, or illegal for contravention of Article 146, because it was common ground that Article 146 was an enforcement provision only, meaning that a breach could not have the effect of rendering the investment, or the subscription, void. Neither had X's expert presented such a case, that breach of Article 146 rendered the subscription void and of no effect, with the result that the assets remained the assets of X at the time of the Pledge.

81. X's case in the Arbitration had been presented to the tribunal on the basis that the Prohibition Against Investment in Article 146 was an enforcement provision only, the consequence of any breach of which only rendered the party in breach liable for payment of a fine, or to a sanction. That was not in issue. Firstly, in rejecting the experts' evidence, and finding to the contrary, and as argued by X in the post-hearing brief, that Article 146 was a validity provision which invalidated the subscription as an investment; and secondly, by deciding that such a finding of illegality under Taiwanese law was sufficient to dispose of the Bank's rights and remedies arising under the Pledge; without first giving any opportunity to the Bank to make submissions on these effects, the tribunal had failed in its duty to give to the Bank the fair opportunity to present its case to meet X's.

82. It is accepted that the arbitrators do not have the obligation to point out to the parties each and every aspect of the claim or evidence which they consider unsatisfactory, but in respect of matters which have never been in issue between the parties, and which do feature significantly in the arbitrators' decision, great care should be taken to ensure that the parties are given a fair and ample opportunity to comment and deal with such matters.

83. In *OAO Northern Shipping v Remolcadores de Marin* [2007] 2 Lloyd's Rep 302, Gloster J referred to the judgment of Ackner LJ in *The Vimeira* [1984] 2 Lloyd's Rep 66 at page 76:

> "The essential function of an arbitrator is … to resolve the issues raised by the parties. The pleadings record what those issues are thought to be and, at the conclusion of the evidence, it should be apparent what issues will remain live issues. If an arbitrator considers that the parties or their experts have missed the real point … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they have an opportunity of dealing with it…" (Emphasis added)

84. In *Zemalt Holdings SA v Nu Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 at page 15, Bingham LJ also stated:

> "If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way, then that again is something that he should mention so that it can be explored. It is not right that his decision should be based on specific matters which the parties never had the chance to deal with, nor is it right that a party should first learn of adverse points in a decision against him. That is contrary both to the substance of justice and to its appearance…" (Emphasis added)

Gloster J explained, at paragraph 22 of his judgment in *OAO Northern Shipping*, that these principles apply to unargued points of law or construction as they do to unargued questions of fact, observing:

> "In such cases, whilst it is not necessary for the tribunal to refer back to the parties each and every legal inference which it intends to draw from the primary facts on the issues placed before it, the tribunal must give the parties "a fair opportunity to address its arguments on all of the essential building blocks in the tribunal's conclusion" (*ABB AG v Hochtief Airport GmbH* [2006] 2 Lloyd's Rep 1 at para 70)."

85. Further, *Societe Franco-Tunisienne D'Armement-Tunis v Government of Ceylon* [1952] 2 Lloyd's Rep 1 was cited in the judgment of Dunn LJ in *Fox v Wellfair Ltd* [1981] 2 Lloyd's Rep 514 at page 529. There, it was held that the umpire had misconducted himself in a technical sense:

> "… since his view of the law as applied to the facts before him involved a radical departure from the cases as presented by the parties, and raised complicated issues of law on which further evidence might be required; and as on the evidence before the court it did not appear either that the change was made sufficiently clear to the owners, or that they were given a sufficient opportunity to reframe their case in the light of an unexpected development, the proceedings were unsatisfactory and contrary to natural justice."

86. In these respects, the position under Taiwanese law does not appear to substantially differ from that under Hong Kong law, according to the expert evidence of Professor Shen. She considered that if any point of law adopted by the tribunal has not been mentioned or debated by the parties, it should be deemed as an act of surprise by the tribunal. She pointed out that the tribunal has no duty to express or remind the parties of all existing legal views on the disputed legal issues, or to discuss such issues with the parties, but the duty to give each party the full opportunity to present its case requires that parties be made aware of any different legal views held by the tribunal, and be given the opportunity to present their cases before the arbitral decision is made, in order to avoid the making of surprise decisions. This is particularly when the application of law is an important issue in dispute, or when an issue which is not disputed, or is ignored by the parties, forms an important basis for the decision of the tribunal.

87. I agree with the Bank, that the tribunal's finding in this case of Article 146 being a validity provision, with the effect that the subscription to the AB Trust and the pledging of X's assets were void *ab initio* under Taiwanese law, involved a significant departure from the cases presented by the parties prior to the post-hearing submissions. The Bank was not given the fair opportunity to present its case on the consequences of the subscription being held to be invalid under Article 146: in particular, whether the discretionary assets remained X's assets as a result of the void subscription, whether the deployment of X's assets by the subscription and the Pledge (or the consent to the creation of the Pledge) was a matter of Taiwanese law, and whether the validity of the Pledge could be decided purely based on Taiwanese law. I accept on the evidence, that throughout the Arbitration, the arguments advanced on behalf of both X and the Bank were on the basis that the validity of the Pledge was governed by Singapore law, and not Taiwanese law. This is clear from X's Request, the preliminary issues identified by the Bank and the Bank's submissions on the application for stay of the Arbitration (that the Pledge shall be construed in accordance with the laws of Singapore), the pleadings of both parties, and even X's post-hearing brief.

88. On behalf of X, Leading Counsel sought to rely on the transcript of the Arbitration which shows that towards the end of the hearing, on the conclusion of the evidence and before the service of post-hearing briefs, both members of the tribunal (Mr Thorp and Dr Lee) and the Chief Arbitrator (Ms Teresa Cheng) had discussed with the parties the post-hearing submissions to be made by them. In the course of these exchanges, the tribunal had invited the parties to address them on "the validity of the investment" under Taiwanese law, and the "effect and validity" of a violation, with respect to both Singapore law and Taiwanese law. Mr Chang highlighted the fact that Dr Lee had specifically referred to the fact that there was "some degree of relevance in between the two laws", and that he had invited submissions from the parties on how Taiwanese law "would impact the understanding and interpretation under Singaporean law". According to Mr Chang, this was invitation to and opportunity given to the Bank to present whatever arguments and submissions it may have on these issues identified, and the Bank cannot later complain if it chose not to make the necessary submissions as directed.

89. On reading the transcript relied upon by X, there was no indication at all from the tribunal that it was considering the possibility of their rejecting, or taking a view which contradicts the experts' common ground as to Article 146 being an enforcement provision. Nor did the tribunal indicate in any way that the validity of the Pledge could be determined purely on the basis of its validity or invalidity under Taiwanese law alone, and that it would not be necessary to consider the governing law of the Pledge (as it so determined in the Award).

90. A general requirement from the tribunal, for post-hearing briefs and closing submissions, on the effect of Taiwanese law on the investment, and on violation of Taiwanese provisions, naturally led to the Bank making submissions on the distinction between validity and enforcement provisions, and on Article 143 and Article 146 being enforcement provisions, with no effect on the validity of the transactions. The Bank did make separate closing submissions on Taiwanese law and Singapore law, but I accept the submissions of Mr Man, that in view of the common ground between the parties, as to Singapore law being the governing law of the Pledge, and Article 146 being an enforcement provision, the Bank could not reasonably have envisaged, from the indications of the tribunal, the need to make further submissions that Taiwanese law was not the proper law to determine the validity of the Pledge, in an attempt to dissuade the tribunal from deciding that the Pledge was void and of no effect for contravening Article 146, as the material and governing provision on the legal effect of the Pledge. The parties were entitled to make their submissions only on the basis of the issues as framed in the pleadings served, and as presented in the evidence during the course of the Arbitration - and not beyond.

91. The situation in the present case is more akin to the facts in *Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015] EWHC 361(Comm). There, the transcript of the arbitral proceedings indicated that the tribunal had asked the defendants what their view would be if the tribunal were to find that there was no proven evidence of the claims of fraud or forgery, and to find instead that there had been a misrepresentation. The court maintained the view that this did not show that the defendants had any notice of the tribunal's proposal to award damages under the Egyptian Civil Code, when there was no pleaded claim against the defendants for damages under the Code, nor any argument made for such damages. The award of damages was held to be a complete surprise, and set aside.

92. In the present case, the tribunal did not indicate or suggest to the parties that submissions should be made on the basis that the arbitrators disagree with the Taiwanese law experts, and that in the arbitrators' view, Article 146 could by itself render the subscription and the Pledge to be void for contravention of Taiwanese law.

93. Professor Wu, the Taiwanese law expert called by X in this case, took the initial view that even if the common ground of the parties is that "position X" represented the law, there is no surprise if the tribunal ultimately decides that the law is not "X", because both parties had known "X". However, in the course of cross-examination at the hearing, the expert modified his position and accepted that if the tribunal used "Y", instead of "X", as the law without telling the parties, that would constitute a surprise within the meaning of Taiwanese law. He accepted that the essence is whether the parties could expect "Y" to be relied upon as the basis of the tribunal's decision, and if they could not expect that, it would be a surprise to the parties.

94. Coupled with the opinion of Professor Shen as elaborated upon in the earlier parts of this Judgment, the evidence of the Taiwanese law experts in this case also shows that when the Bank and X had been in agreement that Singapore law governed the validity of the Pledge, and that Article 146 is an enforcement provision, it was a surprise to the parties, when the tribunal applied Taiwanese law to conclusively dispose of the parties' dispute on the validity of the Pledge, and effectively rejected on such basis the Bank's defence to the claim for the return of the assets in the Account upon termination of the Mandate.

95. In conclusion, I find that the tribunal's findings on Taiwanese law involved a departure from the cases presented by the parties, and that the Bank had **not** been given the reasonable opportunity to present its case and to meet the case of X. There was substantial injustice to the Bank as a result, by reason of the fact that it had not been able to adduce evidence and make submissions on the consequences of the subscription being held invalid for contravention of Article 146, which submissions were at least reasonably arguable.

96. Having found that the Bank had been deprived of the fair opportunity to present its case in the Arbitration, there is nothing in the evidence to persuade me to exercise my discretion to enforce the Award. I reject the argument that the Bank had submitted to the jurisdiction of the tribunal and had in any way waived its procedural objections. Having been denied the fair opportunity to the heard, it is a breach of the rules of natural justice and contrary to the fundamental conceptions of morality and justice for this Court to enforce the Award. It is not necessary to decide on the other grounds relied upon by the Bank to support the ground of public policy.

Disposition

97. The application to set aside the Enforcement Order is allowed on both the grounds relied upon under s 86(1)(c)(ii) and s 86(1)(d) of the Ordinance. The order nisi is that X is to bear the costs of the application to set aside, with certificate for 2 counsel.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Jonathan Chang SC, Mr Martin Ho and Ms Esther Mak, instructed by MinterEllison LLP, for the applicant

Mr Bernard Man SC, Mr Justin Ho and Mr John Leung, instructed by Jones Day, for the respondent