

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL COURT**

CLAIM NO. BVIHC (COM) 2022/0169

BETWEEN:

QU HAIPING

Claimant

and

**[1] WINDOW OF TRADE INTERNATIONAL LIMITED (A British Virgin Islands
corporation with company number 189573)**

[2] WU WEI

**[3] TRIDENT TRUST (BVI) LIMITED (non-cause of action Defendant, as
Registered Agent of First Defendant)**

Defendants

IN CHAMBERS

Appearances: Neil McLarnon for the Claimant
John Carrington, KC for the 2nd Defendant

**2023: 26th July
18th & 29th December**

JUDGMENT

Mangatal J:

[1] This is the adjourned hearing of the Claimant's Fixed Date Claim seeking enforcement of a New York Convention Arbitration Award in favour of the Claimant ordering the Second Defendant ("D2") to restore shares in the First Defendant registered in the D2's name to the Claimant.

- [2] On 24 January 2023, the Court held the first hearing of the Claimant's Fixed Date Claim Form and as a result of D2's opposition to enforcement of the award, made an Order adjourning the enforcement proceedings pending the outcome of an application before the PRC Courts to suspend enforcement of the Arbitration Award.
- [3] On 14 March 2023, the PRC Court delivered its judgment dismissing the application to suspend enforcement of the Arbitration Award.

The Claimant's Submissions

ENFORCEMENT OF NY CONVENTION AWARDS

- [4] Mr. McLarnon submitted that "*The general approach to enforcement of an award should be pro-enforcement.*" (per Lord Clarke, **Cukurova Holding A.S. v Sonera Holding B.V**¹ on appeal from the Eastern Caribbean Court of Appeal, emanating from this territory.
- [5] At paras 4 and 34, the Board opined as follows:
4. *It is important to note the narrow grounds upon which the court can refuse to enforce an award made under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, known as the New York Convention. The Final Award is such an award. In particular, the court cannot refuse to enforce an award on the ground of error of law or fact.*
- ...
34. *The general approach to enforcement of an award should be pro-enforcement. See eg **Parsons & Whittemore Overseas Co Inc v Société Générale** 508 F 2d 969 (1974) at 973: "The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards ... [it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V."*
- In **IPCO (Nigeria) v Nigerian National Petroleum** [2005] 2 Lloyd's Rep 326, Gross J said at para 11, when considering the equivalent provision of the English Arbitration Act 1996: "... there can be no realistic doubt that section 103 of the Act embodies a predisposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of*

¹ [2014] UKPC15 at para 34)

the New York Convention itself ...” The Board agrees. There must therefore be good reasons for refusing to enforce a New York Convention award. The Board can see no basis upon which it should refuse to enforce the award here if Cukurova fails to show that it was unable to present its case for reasons beyond its control.”

(Counsel’s emphasis)

[6] Counsel posits that the **BVI Arbitration Act 2013** (“the Act”) provides for the enforcement of NY Convention awards. Section 86 provides:

“86.

*(1) Enforcement of a Convention award **may 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:

(a) that a party to the arbitration agreement was, under the law applicable to that party, under some incapacity;

(b) that the arbitration agreement was not valid - (i) under the law to which the parties subjected it; or (ii) if there was no indication of the law to which the arbitration agreement was subjected, under the law of the country where the award was made;

*(c) that the person - (i) was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings; or (ii) **was otherwise unable to present his case;***

*(d) subject to subsection (4), that the award - (i) deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or (ii) **contains decisions on matters beyond the scope of the submission to arbitration;***

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with - (i) the agreement of the parties; or (ii) if there was no agreement, the law of the country where the arbitration took place;

or

(f) that the award (i) has not yet become binding on the parties; or (ii) has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if -

(a) the award is in respect of a matter which is not capable of settlement by arbitration under the laws of the Virgin Islands; or

(b) it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that the award contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) If an application for the setting aside or suspension of a Convention award has been made to a competent authority as mentioned in subsection (2) (f), the Court before which enforcement of the award is sought may -

(a) if it thinks fit, adjourn the proceedings for the enforcement of the award;
and

(b) on the application of the party seeking to enforce the award, order the person against whom the enforcement is invoked to give security.

(6) A decision or order made by the Court under subsection (5) is not subject to appeal.”

(Counsel’s emphasis)

- [7] D2 has raised certain objections to enforcement which are discussed below. It was Mr. McLarnon's submission that none of the bases are made out and none provide good reason for not enforcing the award.

D2's OBJECTIONS TO ENFORCEMENT

- [8] On 2 November 2022, D2 filed an Acknowledgement of Service in these proceedings indicating that he intended to defend the Claim against him. On 01 December 2022, D2 filed an application for an extension of time to file his evidence in response to the Claimant's Fixed Date Claim. On 12 January 2023, he filed an Affirmation in which he asked the Court not to proceed to enforce the Arbitral Award or grant any of the other reliefs sought by the Claimant in his Fixed Date Claim Form.
- [9] On 23 January 2023, his counsel filed submissions (sealed and has since, Mr. McLarnon says, refused to share them with the Claimant or his legal practitioners) with the Court. On 24 January 2023, D2 appeared at the first hearing by way of Leading Counsel.
- [10] Part B of D2's Affirmation sets out his "Response to the Claimant's Affidavit". His bases for asking the Court to refuse the Application to enforce the Award are 4-fold:
- (i) "The Award contained matters beyond the scope of the Arbitration" (86(2)(d)(ii);
 - (ii) "Inability to present my case at the arbitration" (86(2)(c)(ii));
 - (iii) "My concerns over the composition of the Arbitration Tribunal" (86(2)(e)(i) and (ii) and Section 86 (3) (b);
 - (iv) "An application has been made to a competent authority in China to suspend enforcement of the award" (86(5)).
- [11] At the hearing on 26 July 2023, Mr. Carrington KC, in addition to arguing and fleshing out the points set out above, also attempted to raise a technical point that the Claimant had not produced a duly authenticated arbitration agreement or award. However, there was no prior suggestion that the arbitration agreement in question was not the arbitration agreement. Further, a quick reference to

Volume 2 of the Bundle showed that the copy of the Award produced had been certified to be a true copy and duly authenticated. These points have not been made good. I therefore turn to concentrate on the four main points raised by D2 as set out in paragraph [10] above.

DISCUSSION AND ANALYSIS

[12] For the reasons which follow, when the facts relied on by D2 are examined closely, I accept Mr. McLarnon's submissions that D2's evidence does not meet the evidential burdens which D2 has to discharge to bring himself within any of the above statutory bases for refusing enforcement of a New York Convention Award. None of his evidence provides "good reasons" for refusing to enforce a New York Convention award. None of his evidence discharges the burden of proof on the party defending against enforcement. There has also been no proper basis to displace the Court's "pre-disposition to favour enforcement of New York Convention awards."

[13] Indeed, as Mr. McLarnon argues, two of the above objections (iii. and iv.) relied on by D2 fall away completely given the contents of the PRC Court's judgment dismissing the application to suspend enforcement.

(i) "The Award contained matters beyond the scope of the Arbitration."

[14] This objection seeks to invoke section 86(2)(d)(ii) of the Act. In three paragraphs (12- 14) of his Affirmation, D2 sets out his evidence for this objection. The evidence goes nowhere and does not provide a good reason for refusing to enforce the Award.

[15] D2's evidence is that - (i) *"Neither Dongfang Fuyun Company nor Zhanling Company was a party to the Master Agreement and I have been advised by PRC Counsel that neither is legally bound by the Arbitral Award and the results of the Arbitration have no impact on the equity in Shenzhen Yihua owned by these two companies because such equity is protected under Chinese Civil Code and the Company Law."* And (ii) *"I am made to understand that in BVI, the legal doctrine of privity of contract is still recognised and upheld. I am further advised that for there to be privity of an arbitration agreement, an Arbitral Tribunal may only arbitrate disputes among the parties to the arbitration agreement. As Dongfang Fuyun Company and Zhanling Company were not parties to the arbitration agreement insofar as the Arbitration Tribunal ruled on matters concerning ownership*

of Shenzhen Yihua, the Award contains decisions on matters beyond the scope of the submission to arbitration and is in respect of a matter which would not be capable of settlement by arbitration under BVI law so the Award should not be enforced.”

[16] D2’s objection, is however, misconceived. D2 was a party to the Arbitration Agreement and the Claimant was a party to the Arbitration Agreement. The Arbitration Award orders D2 to “*return 100% of the equity of Window of Trade International Limited obtained due to the Equity Transfer Framework Master Agreement of Shenzhen Yihua Investment Development Limited and Kong Shun Toys (Shenzhen) Limited to the Third Applicant [the Claimant] and assist in restoring registration in the name of the Third Applicant*”. D2 is the registered member of D1 and therefore an arbitral award ordering him to return equity in D1 and restore it to the Claimant should in my view be enforced by this Court. In enforcing such an award the Court is not making any order against non-parties to the Arbitration Agreement nor is it “impacting” on the equity in Shenzhen Yihua.

[17] Furthermore, D2’s evidence on the objection is not capable of discharging the burden of proof which rests on him. I accept the Claimant’s submission that D2 has adduced no legitimate evidence in support of the objection, other than his own assertions that are essentially self-serving in nature.

[18] In instances where, such as here, the Court is being asked to rule against the enforcement of an arbitral award, made in this case under a foreign law, I agree with Mr. McLarnon’s assertion that the Court would expect the party arguing against enforcement to adduce proper evidence from an independent expert on foreign law compliant with CPR Part 32. The Legal Opinion dated 30 December 2022 and exhibited at pages 7-22 of D2’s Affirmation is an opinion not addressed to this Court and not compliant with an expert’s duty to this Court under CPR Part 32. It is but a Legal Opinion produced by D2’s own lawyers for D2’s own use. Indeed, the Legal Opinion makes clear in its conclusion that “*The above legal opinions are provided for the Client’s reference.*” Clearly, the Legal Opinion was not drafted for the purposes of use in these BVI proceedings. It may even be the case, as Mr. McLarnon surmises, that the lawyers may not even know that it has been relied on in evidence before this Court to try to bolster D2’s case that the BVI Court should not enforce the

Arbitral Award against him. In any event, the Legal Opinion at no point states that the Order ordering D2 to restore the Claimant to D1's register of members was an order outside the scope of the Arbitration. It is indeed telling that the Legal Opinion concludes that *"Therefore, we hold that, concerning the case being on trial at present, the Arbitration Award shall be unenforceable if the non-enforcement application of the Client is sustained by the Peoples Court in the case."*

- [19] As referred to earlier in this judgment, the People's Court has dismissed the non-enforcement application. Thus, even the reasoning in D2's own legal opinion that he has relied on before this Court would suggest that the award is enforceable. This objection also formed a ground in the PRC application, but the PRC Court rejected it in no uncertain terms. It was stated:

*"Regarding the issue that the matters adjudicated are beyond the scope of arbitration of the arbitration institution as proposed by Fanghua Company, with reference to Article 13 of the Provisions of the Supreme Court on Several Issues concerning the Handling of Cases of Enforcement of Arbitral Awards by the People's Court, circumstances which shall be ascertained as "the matters adjudicated are beyond the scope of the Arbitration Agreement or the arbitration institution has no right to adjudicate" include: (I) The matters adjudicated are matters that are not arbitrable in accordance with the law or the arbitration rules chosen by the parties; (III) The content of the award exceeds the scope of the parties' arbitration claims; (IV) The arbitration institution that makes the award is not the one stipulated in the Arbitration Agreement. **There are no aforesaid circumstances in the case. The dispute over the arbitration award is generated from the fulfilment of the Framework Master Agreement on the Transfer of Equity. Shenzhen Court of International Arbitration has the right to accept the arbitration claims of Xitaida Company, Yixin Company and QU Haiping in accordance with the contract arbitration terms. The request for transferring the equity involved to QU Haiping, Xitaida Company and Yixin Company is within the arbitration claims of the parties to the arbitration. The tribunal has the right to adjudicate on this arbitration claim. The content of the award also does not exceed the scope of the arbitration claims.** As for whether there are facts and reasons for the award, it belongs to the substantive jurisdiction of the tribunal over the case, and it is not within the scope of judicial review of the*

arbitration. The reason for the application of Fanghua Company will not be supported by the Court.”

(Emphasis added)

[20] I reject D2’s ground of objection on this basis as being totally without merit and unsupportable on the face of the evidence on which D2 relies.

(ii) “Inability to present my case at the arbitration.”

[21] D2’s second ground of objection is also bad. It is obviously based on Section 86(2)(c)(ii) of the Act. Again, D2’s evidence on this point falls far short of what the Court expects a party to adduce in order to succeed under section 86(2)(c)(ii). The relevant evidence is at paragraphs 15- 25 of D2’s Affirmation.

[22] First, it is noted that D2 does not in fact have evidence that he was “unable to present his case” to the Arbitration. His evidence is rather that the Tribunal rejected his attempt to adduce and admit further (late) evidence into the arbitration, which he says was in violation of the Arbitration Rules.

[23] This Court has also noted that D2 has not adduced in these proceedings the submissions he made to the Arbitral Tribunal when he tried to admit further (late) evidence to it or copies of the exchanges with the Tribunal on the matter. Furthermore, there is nothing before the Court on which the Court can conclude that had this further evidence been admitted it would have made any difference to the Tribunal ruling that D2 “*return 100% of the equity of Window of Trade International Limited (i.e. the above-mentioned “Window of Trade”) obtained due to the Equity Transfer Framework Master Agreement of Shenzhen Yihua Investment Development Limited and Kong Shun Toys (Shenzhen) Limited to the Third Applicant [the Claimant], and assist in restoring registration in the name of the Third Applicant.*”

[24] This objection was also relied on before the PRC Court in the petition to suspend enforcement. The PRC Court rejected the objection. The PRC Court held: “*According to Item I, Article 42 of the Arbitration Rules ‘The tribunal may decide on the deadline for evidence. The parties shall submit*

evidence before the deadline. If any evidence is submitted overdue, the tribunal has the right to reject”, the tribunal has the right not to accept the evidence submitted by the parties after the deadline for evidence expires. In conclusion, the reason for application of Fanghua Company cannot be established and will not be supported by the Court.”

[25] Given that the PRC Court has already considered the issue and rejected it, it would follow, I accept, that the Legal Opinion that D2 relied on in his affirmation that “*Therefore, we hold that the Arbitral Tribunal’s refusal to accept the materials submitted by the Client after the time-limit violates Article 36(1) of the Arbitration Rules.*” cannot be given any real weight by this Court. Again, it is telling that even D2’s own PRC Legal Opinion does not say that failure to admit the further (late) evidence renders the Award unenforceable or liable to be set aside.

[26] In any event, it is clear that the Court interprets section 86(2)(c)(ii) narrowly. In **Cukurova** at para. 31 the JCPC stated:

*“31. Section 36(2)(c) is in the same terms as section 103(2)(c) of the Arbitration Act 1996 in England. They reflect Article V(1)(b) of the New York Convention. In **Minmetals Germany GmbH v Ferco Steel Ltd** [1999] CLC 647, 658 Colman J said that the subsection contemplates **that the enforcee has been prevented from presenting his case by matters outside his control**, which will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. In **Kanoria v Guinness** [2006] EWCA Civ 222 Lord Phillips CJ held in the Court of Appeal that, on the ordinary meaning of section 103(2)(c), a party to an arbitration is **unable to present his case if he is never informed of the case he is called upon to meet**. He referred to the statements in *Minmetals* referred to above with approval.”*

(Emphasis added)

[27] D2’s evidence before this Court does not demonstrate that he did not participate in the Arbitration or that he did not know of the arbitration. It is plain that D2 participated throughout the Arbitration and presented his case to the Arbitral Tribunal. The domestic PRC Court found that the Tribunal acted within its powers in rejecting further (late) evidence outside of the timetable. Therefore, D2 is

clearly wrong to seek to raise it as an objection to enforcement of the Arbitration Award by this Court.

- [28] I would just add that in oral submissions Mr. Carrington KC sought to make a distinction about the capacity in which D2 participated in the arbitration, whether as a legal representative, and not as a party. However, such a point has no force when it is considered that even at the First Hearing of the Fixed Date Claim Form, the application for the adjournment was by D2 himself and it was said to the Court on his behalf that it was important to have regard to his Petition for Non-Enforcement. I also accept the Claimant's submission that all along, the grounds raised by D2 have been raised in his own right, for example, at Part B of D2's Affirmation, he clearly states that the matters he raises are "**My** response to the Claimant's Affidavit" (My emphasis). In short, there was no basis on the facts and on the evidence to support this capacity point.

(iii) "D2's "concerns over the composition of the Arbitration Tribunal"

- [29] D2's third ground of complaint is also flawed. It is based on section 86(2)(e) of the Act. D2's evidence in support of this objection is at paragraphs 26-30 of his Affirmation. There are 2 objections, (i) that Mr. Lu Chao's law firm had previously acted for a company known as Shenzhen Yihua in earlier proceedings, and (ii) that Mr. Lu Chao failed to disclose that he was "close friends and alumni from the same PRC law school" as C's legal representatives in the arbitration.
- [30] In his evidence before this Court D2 seeks to rely on comments from his PRC Counsel. D2 says "*In my opinion the above circumstances demonstrate a real risk of apparent bias on the part of Arbitrator Lu Chao and it illustrates that the composition of the Arbitral Tribunal was not in accordance with a necessary term of the arbitration agreement that the arbitrators should be independent and unbiased and/or PRC law and practice and international standards in light of the foregoing advice of PRC Counsel on this issue.*"
- [31] D2's evidence on this objection is not capable of discharging the burden of proof which rests on him. Once again, I accept Mr. McLarnon's submission that he has adduced no legitimate evidence in support of the objection, other than his own self-serving assertions.

[32] Here too, the Court would expect the party arguing against enforcement to adduce proper evidence from an independent expert on foreign law and process compliant with CPR Part 32.

[33] As already stated above, the Legal Opinion dated 30 December 2022 and exhibited at pages 7-22 of D2's Affirmation is an opinion not addressed to this Court, not compliant with an expert's duty to this Court under CPR Part 32 but is a Legal Opinion produced by D2's own lawyers for D2's own use.

[34] In any event, the Legal Opinion at no point states that the Order ordering D2 to restore the Claimant to D1's register of members is liable to be set aside because of D2's "concerns". It is notable that the Legal Opinion goes no further than stating D2's lawyers' opinion that *"Therefore, we hold that Mr. Lu Chaos failure to disclose that the law firm where he practiced provided legal service to Yihua Company (an affiliate of the claimant and the respondent), violates Article 32(2) of Arbitration Rules, which is biased and unfair."*

[35] In rejecting the composition of the arbitral tribunal objection, the PRC Court said:

"Its application in the case that QU Haiping's consignment formalities in the arbitration stage violated arbitration rules and caused the arbitration procedure to violate the statutory procedure lacks foundations and cannot be established. Regarding the applications raised by Fanghua Company in the case that the arbitrator LU Chao's failure to disclose relevant matters and the tribunal's failure to accept the new evidence it submitted caused that the arbitration procedure violated the statutory procedure, they were proposed in the award withdrawal application case to the Court and rejected in (2022) Y 03 NO. 512 Civil Ruling. Pursuant to paragraph 1, Article 20 of the Provisions of the Supreme Court on Several Issues concerning the Handling of Cases of Enforcement of Arbitral Awards by the People's Courts, a People's Court will not support it if a party proposes an application for non-enforcement on the same grounds in the enforcement procedure after its application for withdrawing the arbitration to the People's Court was rejected. According to the evidence submitted by Fanghua Company, Zhao Jianbo is practicing in Guangdong Guanghe (Longhua) Law Firm. Fanghua Company presented that lawyer ZHAO Jianbo

*handled matters that had nothing to do with the arbitration case as the agent of Yihua Company. **There is no basis for Fanghua Company's claim that the arbitrator Lu Chao shall perform the disclosure obligation. And the fact that the arbitrator and the agents of the parties to the arbitration are alumni of a same university and take positions in the Alumni Association, does not necessarily constitute a statutory avoidance fact stipulated in Article 34 of the Arbitration Law of the People's Republic of China.** The Arbitration Rules of Shenzhen Court of International Arbitration have not clarified that there are obligations of disclosure and avoidance under such circumstance (Emphasis added)*

- [36] D2's objection that the composition of the arbitral authority and the arbitral procedure was not in accordance with the agreement of the parties and as such the Arbitral Award should not be enforced either on this ground or on the basis that it would be contrary to the public policy of the BVI to enforce an Award where there was apparent bias on the part of one of the arbitrators, is entirely without merit. It would indeed be surprising if BVI public policy could be breached on such tenuous grounds as advanced by D2 under this head. In **Cukrova** the JCPC observed at paragraph 33:

*"33. The Board accepts Cukurova's submission that, if a particular breach of natural justice does not fall within section 36(2)(c) because it was not one which meant that the party could not present its case, it is in principle open to the court to refuse to enforce the award on the ground of public policy. However, it follows from the above that the question under section 36(2)(c) is whether Cukurova was unable to present its case for reasons which were beyond its control. On the facts here, the Board is of the view that, only if Cukurova succeeds under section 36(2)(c) should the court refuse to enforce the award. As Sir John Donaldson MR observed in **Deutsche Schachtbauund Tiefbohrgesellschaft mbH v R'As al Khaimah National Oil Co** [1990] 1 AC 295, 316 considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution."*

- (iv) "An application has been made to a competent authority in China to suspend enforcement of the award."

[37] D2's final ground for objecting the enforcement was the application made to the PRC to suspend enforcement. That objection can be given short shrift. The application was dismissed by the PRC Court and therefore it is no longer open to D2 to rely on it.

DISPOSITION

[38] For the reasons discussed above, there are simply no good reasons not to enforce the Award. The BVI, like many others, is a pro-enforcement jurisdiction. I therefore make an Order in the form, substantially as set out in the Draft Order at Tab 13 of Volume 4 of the Hearing Bundle, subject to any minor modifications when reviewing the draft judgment. I order as follows:

1. The First Defendant's register of members be rectified to remove the Second Defendant and restore the Claimant to the register.
2. Further, an order pursuant to the Arbitration Act enforcing the Arbitration Award of the Shenzhen Court of International Arbitration that the Second Defendant do return 100% of the equity in the First Defendant to the Claimant and do assist the Claimant in restoring registration in the Claimant's name;
3. Further and/or alternatively an order that in default of the Second Defendant assisting in restoring registration in the Claimant's name within 14 days of the date hereof, the First and/or Third Defendants do immediately rectify the Company's register to remove the Second Defendant from the register of members and restore registration in the Claimant's name.
4. Costs to the Claimant against the Second Defendant to be assessed if not agreed within 21 days.

[39] I thank Counsel on both sides for their concise but effective submissions.

Ingrid Mangatal
High Court Judge

By the Court

Registrar