IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 119 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA HOSPITALS, INC.

CAUSE NO: FSD 120 OF 2018 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF CHINA HEALTHCARE INC

IN OPEN COURT

Appearances:

Mr Tom Lowe QC of counsel and Mr Brett Basdeo of Walkers, for the Petitioner

Mr Louis Mooney and Ms Christina Kish of Forbes Hare on behalf of the Companies

Before:	**The Hon. Justice Kawaley**
Heard:	**13 September 2018**
Date of Decision:	**13 September 2018**
Reasons Circulated:	**26 September 2018**
Reasons Delivered:	**3 October 2018**

HEADNOTE

Winding-up petition based on final arbitration award-pending appeal by parties in interest-whether petition debt disputed- duty of court to support reliance on foreign award-Foreign Arbitral Awards Enforcement Law- whether petition should be dismissed or adjourned-whether appointment of joint provisional liquidators should be discharged or varied-

REASONS FOR WINDING UP ORDER

Background

1. On June 15, 2018, the Petitioner obtained a Final Award against each of the Companies and other respondents in an arbitration proceeding held in Hong Kong under Hong Kong law ("the Final Award"). The sums awarded to the Petitioner amounted to US$231,805,125.09 ("the Debt"). The Petitions herein were presented to this Court on June 29, 2018 and they sought the Companies' winding-up on either insolvency or just and equitable grounds.

2. Following an ex parte hearing on July 3, 2018, McMillan J appointed Cosimo Borrelli of Borrelli Walsh Limited in Hong Kong and Samantha Wood of Borrelli Walsh (Cayman) Limited as joint provisional liquidators of the Companies (the "JPLS"/the "JPL Orders"). By a Consent Order dated August 9, 2018, the JPLs' appointment was continued until the *inter partes* hearing of the Petitioner's Summonses dated July 12, 2018. Those Summonses were listed for hearing together with the Petitions on September 13, 2018.

3. At the hearing of the Petitions the Petitioner sought winding-up Orders. The Companies sought to dismiss the Petitions and to discharge the JPLs' appointments on the grounds that the Debt was disputed. In the alternative, the Companies sought:

    (a) an adjournment of the Petitions pending the determination of the 'appeal' against the Final Award in Hong Kong; and

    (b) a variation of the JPL Orders to permit the directors to instruct the Companies to join the appeal against the Final Award and to contest the costs orders made in certain earlier winding-up proceedings in favour of the Petitioner.

4. At the conclusion of the hearing I granted the winding-up Orders sought by the Petitioner against the Companies and refused the adjournment applications. In the result there was no need to formally determine the balance of the relief sought by the Companies. These are the reasons for that decision.

The Final Award

5. The Arbitration Tribunal was presided over by Professor Bernard Hanotiau, with Dr Michael Pryles and Dr Michael Moser the two party arbitrators. The panel's decision runs to 190 pages. The Petitioner was the Claimant and the fourteen Respondents

included the Companies (the 2nd and 11th Respondents). Dr Hu, the Companies' principal, was the 1st Respondent and his wife was the 14th Respondent.

6. The dispute arose out of the Claimant investing US$175 million for a 19.77% stake in China Hospitals, Inc. ("China Hospitals"). On May 6, 2015 the Claimant commenced proceedings in Hong Kong seeking to rescind the key transaction agreements (the "SPA" and the "SHA" together with other ancillary documents, the "Transaction Documents") and was granted interim injunctive relief by the Hong Court. The Hong Kong Injunction restrained certain of the Respondents, including Dr Hu and Mrs Hu (the 14th Respondent) and each of the companies from disposing of their assets. On May 6, 2015, the Claimant commenced proceedings in this Court and obtained interim injunctive relief freezing the assets of the Companies on 11 May 2015. On June 30, 2015 the Respondents applied to stay the proceedings in favour of arbitration pursuant to the Transaction Documents. The Claimant contended that the arbitration agreement in the Transaction Documents was invalid, and on December 17, 2015 the parties signed the Arbitration Agreement which was governed by Hong Kong law.

7. The Claimant's central allegation was that Dr Hu personally and through the respondents falsely represented that the Claimant's investment monies would be applied for the benefit of China Hospitals in which the Claimant was acquiring shares. In fact, the investment monies were applied for the benefit of China Healthcare Inc ("China Healthcare") in which the Claimant had no interest. It was falsely represented that the China Hospitals Group had entered into binding agreements to acquire two hospitals in China (the Puyang and Qingfeng Hospitals). In fact, the China Healthcare Group had contracted to and did acquire the investment targets.

8. The Respondents denied any fraudulent intent or misrepresentations and complained that the injunctions obtained by the Claimant and the failed initial public offering (IPO) of China Hospitals, for which the Claimant was alleged to be responsible, had caused them substantial financial loss. They counterclaimed for relief in relation to this alleged loss. The Counterclaim was dismissed.

9. The main hearing took place over five days commencing on December 4, 2017 and ending on December 8, 2017. The Final Award is based on the following principal findings on the two main claims:

(1) "*463. ...Dr Hu, China Hospitals, the Warrantors and the Existing shareholders are liable for fraudulent misrepresentation. The Arbitral tribunal declares that the SHA and the SPA have therefore validly been rescinded by the Claimant…*"

(2) The Respondents were liable for a tortious conspiracy to inflict damage on the Claimant by unlawful means. "*Those means were fraudulent misrepresentation, unlawful use of the Subscription proceeds, and dishonest assistance to cause fraudulent misrepresentation…*" (paragraph 511);

10. One aspect of the Respondents' Counterclaim was particularly relevant to one strand of the Companies' case before this Court on the hearing of the Petitions. The Respondents requested the Tribunal to compel the Claimant to discharge the Hong Kong and Cayman Islands Injunctions. This request was rejected on the following grounds:

> "*559. The Respondents did not provide any argument in support of this claim. Moreover, as established above, the Respondents participated in a conspiracy with the intent to divert the funds invested by the Claimant in China Hospitals. The Arbitral Tribunal therefore considers that the Claimant's actions before the Courts in Hong Kong SAR and Cayman Islands were plainly justified and do not necessitate being ceased…*"

11. The Tribunal also itself explicitly addressed the fact that the Respondents had complained that the Injunctions were impairing their defence of the proceedings in the Final Award:

> "*399. The Arbitral Tribunal wishes to note in the first place that the Respondents filed very limited submissions in defence, without expert evidence in reply to the Claimant's forensic expert reports on the misuse of funds, or any evidence but for the written statement of Ms Cici Liang. Moreover, while Ms Cici Liang was called by the Claimant to be cross-examined, she did not come to the hearing nor did Dr Hu appear at the hearing. The Respondents justified their laconic defence and lack of witness and expert evidence by the fact that they had been starved by the Injunction Orders, which ultimately froze their assets. The Claimant offered the Respondents to release funds so that their Counsel could be paid, provided that they submit evidence that Dr Hu had no available funds. These issues were discussed at the outset of the hearing, as well as the possibility requested by the Respondents to submit new evidence at this late stage…*
>
> *400. It follows from the above that although the Claimant offered to the Respondents to release funds so that their Counsel could be paid, their offer was subject to the condition that the Respondents could prove that Dr Hu had*

no available funds. As admitted by the Respondents' counsel, no evidence was so provided, without any justification."

The Petition

12. The concisely pleaded Petition averred that the Debt was due based on the Final Award and remained unpaid. It was verified by the First Affidavit of Mr Jeffrey Davis, a director of the Petitioner. He swore a Second Affidavit in support of the Petition and the application to appoint the JPLs. The case for appointing the JPLs was summarised as follows:

> "*46. The Petitioner considers that, notwithstanding the above injunctions, it is now necessary to appoint provisional liquidators in respect of the Company and China Healthcare for the following reasons:*
>
> *(a) It has now been conclusively determined by the arbitral tribunal that Dr Hu and the Arbitration Respondents' conduct in respect of the Transactions was dishonest and fraudulent, as set out in Section D below. This necessarily indicates there is a real risk that Dr Hu may take additional steps to dissipate assets in order to defeat the interests of the Petitioner.*
>
> *(b) Dr Hu presently remains in control of the Hospitals Group and the Healthcare Group. The value in the Groups lies in the Five Hospitals, in particular the Puyang and Qingfeng Hospitals. The interests of both the Hospital Group and the Healthcare Group in the Five Hospitals are held through companies incorporated in China. Notwithstanding the injunctions, there remains a real risk that Dr Hu will cause the Groups' shareholding in the Five Hospitals to be transferred out of the Groups. There are at present no injunctions made by the Chinese Court to prevent this occurring and consequently that risk remains a serious concern, particularly in light of the magnitude of the Award; I am advised (without waiving privilege) that the authorities in China are unlikely to pay heed to orders made by foreign courts. Dr Hu has already caused one entity, Puyang Yiren, to be moved out of the Healthcare Group, which is arguably in breach of paragraph 1(3) of the Cayman Injunction. I refer to this further in Section C below.*

(c) *As matters stand, the Petitioner has no visibility as to the operations of the Hospitals Group and Healthcare Group or the movement of funds within and out of these Groups. As a result of the events set out in Section C below, the Petitioner has grave concerns that, notwithstanding the injunctions, Dr Hu and the Arbitration Respondents have taken, and will continue to take, steps to dishonestly siphon assets out of the Groups in order to frustrate enforcement of the Award.*"

The case for appointing the JPLs

13. The case for appointing the JPLs was accordingly advanced on two grounds. Firstly, a risk of dissipation arising from the determinations set out in the Final Award, and secondly a risk flowing from suspected acts of dissipation before and immediately after the arbitration hearing. There was, as regards the concerns about pre-hearing dissipation, an overlap with the Final Award in one respect. The Petitioner relied on the fact that the Tribunal itself had required disclosure of the allegedly suspicious transaction (Amended Procedural Order No.6 (19 February 2018). This demonstrated, as a matter of logical inference, that the Tribunal agreed with the Claimant that the transaction required further scrutiny.

14. 'The Petitioner's Skeleton Argument re Appointment of Provisional Liquidators' also placed primary reliance on the findings of the Final Award and an obvious risk of dissipation and an obvious need to gain managerial control, supplemented by expressing concerns that actual dissipation may have occurred or been attempted. The application was opened in the following way:

> "*31. This is the plainest possible case for the appointment of provisional liquidators. Following an arbitration in which all parties participated, findings of outrageous fraud have been made against Dr Hu and, through him, the Companies. Those findings are final and not subject to appeal. However, the Companies remain in the control of the wrongdoer who, in circumstances where he is now indebted to the tune of almost a quarter of a billion dollars to the Petitioner, has the strongest motivation to try and cling on to as great a portion of the misappropriated funds as he can. Indeed, it is clear from recent events that such efforts are not merely hypothetical but factual.*"

15. As will be seen below, the Companies sought to persuade the Court that the JPLs' appointments could and should be discharged, if the Petition was adjourned pending

the determination of the appeal against the Final Award, since their appointment was based on unmeritorious allegations of acts of dissipation.

Evidential support for the Companies' contention that the Debt is disputed on substantial grounds

16. Dr Hu Chuanping Frank made an Affirmation dated September 7, 2018 ("the Dr Hu Affirmation") in which he deposed that he and his wife, Madam Zhou Yu, had applied by Originating Summons dated July 17, 2018 to the High Court of Hong Kong to have the Final Award set aside. The grounds set out in the exhibited Originating Summons are that:

> "*The Final Award dated 15th June 2018 in the Arbitration held in Hong Kong International Arbitration Centre (HKIAC Arbitration No. A16006) between the said parties be set aside pursuant to Section 81 of the Arbitration Ordinance on the grounds that (i) the Respondents in the Arbitration was* [sic] *unable to present their case, and (ii) the Award is in conflict with the public policy of Hong Kong.*"

17. The Petitioners and the Companies are named as Defendants to the Originating Summons. The Dr Hu Affirmation is by its terms made on behalf of the Companies:

(a) in opposition to the winding-up petitions;

(b) in opposition to the JPLs continuing in office;

(c) alternatively to (b), that the appointment orders be varied so the directors are authorised to (i) cause the Companies to support the application in Hong Kong to set aside the Final Award, and (ii) respond to the bills of costs authorised by this Court on April 19, 2018 (the "Bill of Costs").

18. Less than a quarter of the Dr Hu Affirmation deals directly with the substance of the application to set aside. The Affirmation runs to 60 paragraphs which may be described in outline as follows:

(a) **introductory**: paragraphs 1-8 and 60;

(b) **background to the arbitration and the deponents assertions as to the merits of the Respondents case**: paragraphs 9-34;

(c) **impact of the injunctions**: paragraphs 35-36;

(d) **inability of the respondents to present their case**: paragraphs 37-49;

(e) **allegations of breaches of the injunctions**: paragraphs 50-56;

(f) **the Bill of Costs**: paragraphs 57-59;

(g) **joining the Companies to the Originating Summons**: paragraph 60.

19. The first limb of the case for setting aside the award is based on the alleged impact of the Injunctions:

> "*35. As a result of the injunctions, I was unable to obtain funds to settle legal bills and to engage lawyers to represent me at the arbitration. As I shall further explain below, I was unable to settle the bills of Sinowing. I suspect that it was because of this that Sinowing defied my express instructions not to appear at the arbitration hearing and falsely represented that it had authority to represent the Respondents.*
>
> *36. I accept that Kirkland*[1] *was prepared to agree to release funds upon my showing that I have no other assets or sources of funds. I was at that time not properly advised by lawyers familiar with Cayman and/or Hong Kong laws. Kirkland's proposal appeared to me to be creating an obstacle which I could not possibly overcome, because logically it is almost impossible to prove the negative. I did not think it was possible to prove the absence of other sources of funds. Kirkland would raise challenges which would be difficult to disprove. Therefore, I understood the proposal of Kirkland to be a rejection in disguise. With the benefit of proper advice after the event, I might have understood it erroneously.*"

20. Dr Hu beguilingly accepted that he may have misunderstood that it was possible for him to obtain relief from the Injunctions and properly pay his lawyers. However, the only party he blames for this is his own lawyers and/or by necessary implication himself

[1] The Claimant's attorneys in the arbitration proceedings.

for failing to obtain proper advice. At first blush, the complaint about the effect of the Injunctions does not appear to be a freestanding basis for impugning the Final Award on fair hearing grounds. Such complaints do not ordinarily have any legal traction in the absence of some alleged failure on the part of the tribunal to ensure that the complainant's fair hearing rights are protected. There is no averment at this stage that the Tribunal wrongly refused an application to vary the Injunctions to ensure that the Respondents could properly instruct their attorneys.

21. The second limb of the attack on the Final Award, which in fairness was always advanced as the main plank of the Companies' case, had more superficial appeal in that it at least advanced some criticism of the Tribunal. Dr Hu's key averments were the following:

> "*37. Before the commencement of the arbitration hearing, I instructed Sinowing not to...represent the Respondents at the arbitration hearing. I even sent an email to Zou of Sinowing, asking him to tell Kirkland and the Tribunal that they should not assume that Sinowing would be there at the hearing since it did not have the Respondents instructions yet. This email... stated:*
>
> *Zou Iv,*
>
> *You should tell Kirkland that they cannot assume you and Sun Lv will be there in the hearing since you did not have our instruction yet regarding this and they should wait to hear from you and you should wait our instruction.*
>
> *38. The email was forwarded by Zou of Sinowing to Kirkland and the Tribunal on 27 November 2017. While Kirkland and the Tribunal did send an email expressing their concerns, and reiterating that the hearing would go on whether the Respondents had legal representatives or not, they did not say that they would assume that Sinowing had authority to represent us. I was at that time preoccupied with raising funds to achieve an amicable settlement with Classroom.*
>
> *39. Nonetheless, Sinowing appeared at the hearing, purporting to represent the Respondents. Over the 5 days of hearing, the Tribunal did not try to ask me whether Sinowing had authority. They did not request Zou or Mr Sun to produce proof of authority. They were allowed to represent the Respondents throughout the hearing....*
>
> *43. In fact, as must be apparent to the Tribunal, Sinowing had in fact been heavily involved in the transactions which were the subject matter of*

Classroom's complaint and was in serious conflict of interest. In the course of the arbitration hearing, Sinowing made concessions purportedly on behalf of the Respondents. Such concessions were directly contrary to the defence of the Respondents and were against the Respondents' instructions."

22. In brief, it is effectively averred that the Tribunal was put on notice that the Respondents' attorneys, Sinowing, had no authority to represent them and that the Tribunal proceeded with the hearing nonetheless, making no efforts to investigate the obvious lack of authority concerns. However, on careful scrutiny of the short email which it was common ground the Tribunal received, it is apparent that Dr Hu only instructed Sinowing to:

(a) advise the Kirkland that Sinowing might not appear at the hearing; and

(b) await his further instructions before appearing.

23. On the face of this complaint, it is not clear what grounds the Tribunal would have had for believing that Sinowing had not been instructed to appear when they did in fact appear at the hearing. Nevertheless, Dr Hu also deposed as follows:

"*49. I have read the expert opinion on Hong Kong law of Raymond Lau, barrister-at-law and I do verily believe that I have a reasonable prospect of success in my application to set aside the Award.*"

24. Although Mr (Raymond) Wai-Man Lau's 'Hong Kong Legal Opinion' professes to be an independent one, Mr Lau properly discloses that he is the lawyer instructed by Dr and Mrs Hu to settle the Originating Summons seeking to set aside the Final Award. Sensibly, no leave was sought to formally admit the Opinion as evidence of its contents as opposed to confirming the assertion of Dr Hu as to the purport of the advice he has received. Although the admissibility of the contents of the Opinion (in particular the opinion expressed on the merits of the application to set aside the Final Award) was disputed, it does confirm the agreed position that Hong Kong is an UNCITRAL Model law jurisdiction with restraints on the reviewability of arbitration awards.

25. Mr Lau in paragraph 29 of his Opinion describes the governing test for setting aside which the Hong Kong Court will apply[2] as including the following:

> "*a. The remedy of setting aside is not an appeal and the Court will not address itself to the substantive merits of the dispute, or to the correctness or otherwise of the award, whether concerning errors of fact or law. It will address itself to the process. It is concerned with the structural integrity of the arbitration proceedings;*
>
> *b. The conduct complained of must be serious, even egregious, before a court could find that a party was otherwise unable to present his case. It must be sufficiently serious to offend basic notions of morality and justice.*"

26. Mr Lau also opined that:

> "*31. In relation to public policy, the Court of Final Appeal held in Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) HKCFAR 111 that 'contrary to public policy' means 'contrary to the fundamental conceptions of morality and justice' of the forum.*"

27. In short, the restrictive legal test Mr Lau states the Hong Kong Court will apply in reviewing the Final Award corresponded to the legal position contended for by the Petitioner as reflecting the mirror image of the position under Caymanian law.

The Petitioner's evidence in opposition to the Disputed Debt argument

28. Kelly Naphtali of Kirkland & Ellis deposed in her Affidavit in response to Dr Hu's Affirmation that she was present at the arbitration hearing at which three witnesses were called by the Claimant and cross-examined by Sinowing. The Petitioner's counsel however primarily relied on the fact that it could not be disputed (based on the arbitration record) that:

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[2] Following *Grand Pacific Holdings Ltd.-v-China Pacific Holdings Ltd. (in liq)(No.1)* [2012 4 HKLRD 1 and later cases.

(a) although the arbitration hearing took place in December 2017 (December 4-8), the proceedings continued to be open until May 2018 with the Respondents actively involved in exchanges through Sinowing;

(b) Dr Hu himself on December 24, 2017 signed a document providing information in response to a December 14, 2017 procedural order;

(c) there was no contemporaneous support for Dr Hu's belated assertion that Sinowing had no authority to act as it did on the Respondent's behalf.

Legal findings: when is an arbitration award a disputed debt under Cayman Islands law?

Did the mere filing of an application to set aside the Final Award make the Debt a disputed one?

29. It was essentially common ground that the Court would ordinarily refuse to wind-up a company when the petition debt is disputed in good faith on substantial grounds. However, a threshold question (which was canvassed in oral argument) was whether or not the mere fact that the Final Award was being sought to be set aside was sufficient without more to justify concluding that the Debt was disputed. I had little difficulty in resolving this question in favour of the Petitioner who contended that the mere fact of an 'appeal' was not enough to establish grounds for refusing to grant a winding-up order.

30. Mr Mooney relied extensively on extracts from French, '*Applications to Wind Up Companies*'[3], which I regard as a usually helpful and reliable guide to this area of the law. The highpoint of support for the Companies' counsel's submission was the following statement (at paragraph 7.511):

> "*Exceptionally, the Malaysian Court of Appeal has held that the fact that an appeal has been lodged against an arbitration award is sufficient to justify an injunction against presenting a petition based on the award.*[4]" [Emphasis added]

[3] 3rd edition.

[4] *Mobikom Sdn Bhd-v-Inmiss Communications Sdn Bhd* [2007] 3 MLJ 316. This authority was not placed before the Court.

31. Mr Lowe QC submitted that it was impossible to discern from the brief summary of the case why this conclusion was reached. I agreed, noting in the course of the hearing that it was entirely possible that Malaysian law permitted more generous appellate review of arbitration awards than under Hong Kong and Cayman Islands law. In my judgment the word "*exceptionally*" is used advisedly by the learned author in the passage upon which Mr Mooney relied. Because in an earlier passage (at paragraph 7.500), the learned author opined that:

> "[i]*f the petitioner's claim arises from a judgment against the company in legal proceedings, the fact that the company has appealed against the judgment, without needing permission to appeal, does not necessarily mean that there is a dispute on substantial grounds.*"

32. *Re Amalgamated Properties of Rhodesia* [1917] 2 Ch 115 was referred to by the Petitioner's counsel as clearly demonstrating that a judgment creditor is entitled to wind-up the judgment debtor even if an appeal has been filed. However, the English Court of Appeal was minded to give the company in that case, which had offered to provide security for the debt pending appeal, the opportunity to secure the debt and pursue the appeal.

33. The Petitioner's counsel handed up in the course of the hearing a supplementary authority which resolved this threshold question beyond doubt. In *Commissioners for HM Revenue & Customs-v-Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116' [2013] B.C.C. 419, Rimer LJ (Lewison LJ and Pill LJ concurring) opined as follows:

> "*85. The fact, however, that the assessment raised by HMRC was one that could be the subject of an appeal by RDD (and it has now launched an appeal, although it had not done so at the time of the hearing before the judge) does not mean that the assessment could not found the basis for a petition for the winding up of RDD. Put another way, it was not open to RDD to challenge and defeat the petition merely on the basis that it had a statutory right of appeal against the assessment before another forum. The existence of a right of appeal says nothing as to whether any appeal will have merit; and it was open to HMRC, as they did, to present their petition against RDD on the basis that their claimed debt, or at least a material part of it, was not capable of serious dispute and so could properly found the basis for a winding up order.*" [Emphasis added]

General approach to determining whether or not a debt based on an arbitration award is disputed

34. Two issues of principle arose in relation to this aspect of the submissions:

(a) what test should the Court apply in deciding whether or not the debt was disputed on substantial grounds; and

(b) did the Court possess the discretion to determine the dispute in the winding-up proceedings?

35. The second issue can be dealt with shortly as it did not strictly arise for determination in light of my finding that the Debt was not disputed on substantial grounds. The Companies submitted in their Skeleton Argument (paragraph 19):

> "*(i) The procedure of a winding up petition is not an appropriate course by which to attempt to resolve such a dispute. As such the Court will restrain presentation of a creditor's winding up petition if it finds that the existence of the intending petitioner's debt is disputed.*"

36. Reliance was placed on French, '*Applications to Wind Up Companies*', at paragraphs 7.445, 7.569. The cited paragraphs do not support the Companies' implication that this Court has no power at all to decide whether or not a substantial debt exists in the present proceedings. This is merely the general rule, which is stated correctly by French at paragraph 7.450 as follows:

> "*On hearing an application to prevent a disputed debt petition proceeding, the court is not normally concerned to decide the dispute, only to determine whether a dispute on substantial grounds exists…*"

37. As far as the test for deciding whether or not a dispute is substantial is concerned, the Petitioner rightly submitted (without any or any credible challenge) that the burden lay on the Companies to establish the substance of the dispute they raised. This is also the position contended for by French (paragraph 7.451), despite some inconsistency in the

authorities. More persuasively still, this is the position acknowledged by the English Court of Appeal in *Commissioners for HM Revenue & Customs-v-Rochdale Drinks Distributors Ltd* [2011] EWCA Civ 1116 [2013] B.C.C. 419 where Rimer LJ held:

> "*86. There is no doubt that HMRC's evidence raised serious questions as to the genuineness of the invoices. If RDD was to challenge the basis of the petition, and therefore the appointment of the provisional liquidator, the burden was therefore upon it to show that it at least had a good arguable case that its claimed trade with all the disputed traders was genuine. It sought to do so, although, so it seems to me, by adducing evidence of breathtaking inadequacy...*" [Emphasis added]

38. This test was formulated in the context of an appealable administrative tax assessment, not a final arbitration award which was not appealable on the merits at all. I found that in the context of an arbitration award which was not appealable on the merits, the Companies had to clearly demonstrate a good arguable case for setting aside the Final Award. French (at 7.510)) noted:

> "*In Cowan-v-Scottish Publishing Company Co*[5] *the petitioner had obtained a judgment in respect of an arbitration award. The company disputed liability for £15 of the amount awarded, but had taken no steps to set aside the judgment or the arbitration award and the Lord President said that he could not see a 'high or immediate probability' that the court would set aside either of them…*"

39. Here, admittedly, steps have been taken by parties in interest with the Companies to challenge the Final Award. But I accepted the Petitioner's central thesis that the strong legal policy in favour of upholding arbitral awards should dissuade the Court from accepting at face value the Companies' overly optimistic assertions about the prospects of the Final Award being set aside. Even in circumstances where there is no award or judgment, Neuberger J (as he then was) in Re *Richbell Strategic Holdings Ltd* [1997] 1 BCL 429 noted that:

> "*a judge…should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity [are] not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law.*"

[5] (1892) 19 R 437.

40. It ought ordinarily to be more onerous (accepting that the legal test remains the same in strict legal terms) to establish a substantial dispute about a judgment debt or a debt based on an arbitral award than it is in relation to mere assertions that certain sums are due. Why would creditors take the trouble to obtain judgments or arbitration awards if they were to be treated by the courts as constituting debts which are indistinguishable from merely contingent claims? In the same way that clear evidence is required to prove serious allegations such as fraud, clear evidence must be required to demonstrate a good arguable case for setting aside a final judgment or arbitral award.

The relevance of enforcement of arbitration award principles to assessing the substance of the alleged dispute

41. Mr Lowe QC submitted that assessing the substance of the dispute raised by the Companies (i.e. an arguable prospect of setting aside the Final Award) required careful analysis of the legal rules governing enforcement and reliance upon foreign arbitration awards under Cayman Islands law. Although the Petitions were not a means of enforcement in the usual sense, the governing Law equated reliance to enforcement. The statutory rules were also particularly relevant because the grounds for refusing enforcement corresponded to the Hong Kong statutory rules on setting aside awards.

42. The Foreign Arbitral Awards Enforcement Law (1997 Revision) supports the enforcement of arbitration awards made in foreign States which are party to the New York Convention[6] ("*Convention award*[s]"). It was not in controversy that the Final Award having been granted in Hong Kong was a "Convention award" for the purposes of the Law. Section 5 ("*Effect of Convention awards*") crucially provides as follows:

> "*5. A Convention award shall, subject to this Law, be enforceable in the Grand Court in the same manner as an award under section 22 of the Arbitration Law (1996 Revision) and shall be treated as binding for all purposes on the persons between whom it was made and may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands and any reference in this Law to enforcing a Convention award shall be construed as including references to relying upon such award.*"

[6] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in New York in 1958.

43. Section 5 accordingly provides, in addition to enforcement narrowly defined, that Convention awards:

> (a) "*shall be treated as binding for all purposes on the persons between whom it was made*"; and
>
> (b) "*may accordingly be relied upon by any of those persons by way of defence, set off or otherwise in any legal proceedings in the Islands*" [emphasis added].

44. Section 5 proceeds to explain that "*any reference in this Law to enforcing a Convention award shall be construed as including references to relying upon such award.*" Mr Lowe QC argued that the Petitioners were not only entitled to rely on the Final Award under section 5, but that a burden lay on the Companies to prove that grounds for refusing enforcement and/or reliance existed. Section 7 of the Law provides:

> "*(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-*
>
> *(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case….;*
>
> *(3) Enforcement of a Convention Award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.*"

45. These provisions give effect to Article 5 of the New York Convention. Article 34 of the UNCITRAL Model Law on International Commercial Arbitration transforms what are grounds for refusal under Article V of the New York Convention (and section 5 of the Law) into limited grounds for setting aside an award. The similarity between the New York Convention grounds for refusing enforcement (which must be established by the party opposing enforcement) and the Model Law grounds for setting aside (which must be established by the party seeking to set aside an award) has been recognised by the Hong Kong Court of Appeal in Grand *Pacific Holdings Ltd.-v-China Pacific Holdings Ltd. (in liq) (No.1)* [2012] 4 HKLRD 1 (at paragraph 92).

46. Under Cayman Islands law, therefore, the position was as follows. The Final Award could be relied upon unless the Companies proved that grounds for depriving the Petitioner of its right to rely upon the Award existed. The Companies positively argued that this Court should not decide this question, contending that the question should be

determined by the Hong Kong Court in the review proceedings. In my judgment, it having been asserted that the Debt was disputed on substantial grounds, the critical question remained whether there were substantial grounds for believing that the Final Award was liable to be set aside. The question before the Hong Kong Court would entail an analysis of analogous statutory provisions to those found in section 5 of the local Foreign Arbitral Awards Enforcement Law, provisions derived from the same multilateral treaty source: Article 5 of the New York Convention. This common legal derivation enabled this Court to have more of a general 'feel' of the approach the Hong Kong Court was likely to take, without having recourse to expert evidence of Hong Kong law. It also justified viewing the Hong Kong authorities on article 34 as persuasive as to the approach to be adopted under Cayman Islands law if this Court was substantively determining the due process complaints for enforcement and/or reliance purposes under the Law.

47. It was ultimately self-evident that the Article V of the New York Convention, section 5 of the Law and Article 34 of the Model Law all share a broad public policy goal of upholding the validity of arbitral awards and adopting a restrictive approach to invalidating them. After a review of international texts on the Convention and the Model Law, the Hong Kong Court of Appeal (Tang V-P) in Grand *Pacific Holdings Ltd* cited with approval the following observations of Lax J in *Corporacion Transnacional de Inversiones SA de CV-v-STET International SpA* (1999) 45 OR (3d) 183 (Ontario SC):

> "*[34] ... In my view...judicial intervention for alleged violations of the due process provisions of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state*..."

48. Dr Hu has been advised that these are the principles which will inform the approach of the Hong Kong Court to the review proceedings in respect of the Final Award, as the Opinion exhibited to Mr Lau's Affirmation makes clear.

49. The Petitioner's counsel also provided clear authority for a proposition which would otherwise have seemed self-evident. Where a complaint is made that a party has been unable to present his case is advanced, it must be grounded in the conduct of the arbitration proceedings and matters beyond the party's control. In *Cukurova Holding-v-Sonera Holding* [2014] UKPC 15, the Privy Council (Lord Clarke) opined as follows:

> "*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...

34. The general approach to enforcement of an award should be pro-enforcement. See e.g. 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 pre-disposition to favour enforcement of New York Convention awards, reflecting the underlying purpose of 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."

50. The Privy Council also held (at paragraph 33) that where the main complaint was that the party seeking to resist enforcement had been deprived of the ability to present their case, an ancillary public policy objection would only ordinarily be potentially available if the primary natural justice point was successful. I was guided by these principles.

51. In summary, I found that in approaching the question of whether or not the Final Award had been shown to be disputed on substantial grounds, this Court was required to have regard to the following guiding principles:

(a) the Court's stance should in general terms be pro-enforcement in the broad sense prescribed by section 4 of the Foreign Awards Enforcement Law;

(b) the burden was on the Companies to show that there were substantial grounds for the argument that a full inquiry into the dispute would likely

result in this Court declining to permit the Petitioner to rely upon the Award under local law and/or would result in the setting aside the Award under Hong Kong law;

(c) the local law position was relevant because, without recourse to expert evidence as to Hong Kong law, it was essentially common ground that the Hong Kong Court would apply the same principles under Article 34 of the Model Law (on an application to set aside) as this Court would apply under section 5 of the Law (on an application to enforce and/or rely upon) the Final Award;

(d) the Cayman Islands legal position (which the Court was entitled to assume was likely to be the same or similar under Hong Kong law) was that only very serious departures from the rules of natural justice beyond the Companies' control would constitute substantial grounds for setting aside the Final Award. Such serious departures necessarily connoted a fundamental breakdown in the arbitral process due to matters beyond the set aside applicant's control reflecting serious mismanagement of the process on the tribunal's part.

52. The apparently strong similarity between Hong Kong law and Cayman Islands law is based on the fact that Article 4 of the UNCITRAL Model Law (incorporated into Hong Kong law) echoes Part V of the New York Convention (incorporated into Cayman Islands law). However, I still felt it was important to clearly delineate two distinct forensic tasks:

(a) determining whether or not the Petitioner should in general terms be entitled to rely upon the Final Award as a matter of Cayman law; and

(b) whether or not the Petition Debt founded on the Final Award was disputed on substantial grounds, a question which turned on the likelihood of the Award being set aside under the curial law of the Arbitration, the law of Hong Kong.

Findings: were the Final Award and the Debt based on it disputed on substantial grounds?

53. Mr Mooney unflinchingly insisted that the Petitions were liable to be dismissed despite a merciless attack on the coherence of the Companies' disputed debt evidence which was launched by Mr Lowe QC, and despite robust questioning from the Bench. By the

end of the hearing I had little difficulty in concluding, however, that the Companies had not established that the Petition Debt was disputed on substantial grounds.

54. It was difficult to imagine a more incoherent and insubstantial evidential attack being launched against such a carefully crafted and clearly reasoned decision as the Final Award. Dr Hu's evidence lacked coherence and substance at two levels of analysis:

(a) assessing the evidence on its face assuming that all the matters deposed to both expressly and by implication which were within the knowledge of the affiant were true; and

(b) assessing the evidence more critically with a view to testing its internal consistency and inherent credibility.

55. At the first level of analysis, the key threshold question was: did the November 27, 2017 email which the Companies' attorneys Sinowing sent to the Tribunal arguably put the Tribunal on notice that the attorneys lacked (or might lack) authority to represent the Respondents when they appeared at the hearing? The central factual thesis underpinning the criticism of the Tribunal for failing to query the authority of Sinowing and failing to realise that Sinowing were acting for the personal interests against the interests and instructions of their clients was the following key assertion: they ought to have had concerns about Sinowing's authority because the November 27, 2017 email put them on notice about the alleged lack of authority.

56. The answer to this threshold question turned on a straightforward and practical reading of the short November 27, 2017 email from Dr Hu to Sinowing which Sinowing forwarded to the Tribunal (and the Petitioner's attorneys) pursuant to Dr Hu's instructions:

> "*Zou Iv,*
>
> *You should tell Kirkland that they cannot assume you and Sun Lv will be there in the hearing since you did not have our instruction yet regarding this and they should wait to hear from you and you should wait our instruction.*"

57. It is not arguable and, quite patently, not seriously arguable that this email ought to have put the Tribunal on notice that when Sinowing appeared and participated in the hearing (and in the months thereafter), they were not authorised by the Respondents to represent them. Dr Hu's email instructed Sinowing to inform Kirkland not to assume that

Sinowing would be instructed to appear at the hearing. The clear implication was that Sinowing would only appear at the hearing if they received instructions to do so.

58. It follows that, assuming in the Companies' favour at this stage that Dr Hu did not instruct Sinowing to appear at the arbitration hearing (and to communicate with the Tribunal in the subsequent months before the Final Award was delivered), this is a complaint to be laid entirely at Sinowing's door. There was no arguably serious breakdown in the arbitral process. The Tribunal was entitled to assume that Sinowing continued to possess, at all material times after the email was sent, the same authority to represent all the Arbitration Respondents which it is tacitly admitted that the attorneys enjoyed as at November 27, 2017.

59. Further and in any event, the assertion (only made implicitly, not explicitly) that Sinowing appeared at the hearing without receiving instructions from Dr Hu to do so is internally inconsistent and inherently incredible. The argument is firstly internally inconsistent in the sense that it assumes that the November 27, 2017 email said something different to what it actually says. It is illogical to criticize the Tribunal for failing to query the authority of the Respondents' attorneys based on an email which raised no questions about their authority if in fact they did appear. The position might have been different had Sinowing not appeared at the beginning of the hearing, and had only appeared having been directed by the Tribunal to do so.

60. Secondly, it is internally inconsistent for Dr Hu to complain about the Injunctions impeding his ability to fund the proceedings and to impugn the propriety of Sinowing agreeing with their opponents to vary the Injunctions so they could receive settlement of their outstanding fees. He admittedly failed to avail himself of access to further frozen funds by deciding not to comply with the Tribunal's conditions for doing so.

61. The central argument advanced by Dr Hu is inherently incredible, most broadly, because it beggars belief that parties who are applying to set aside a Final Award entered after a contested hearing in fact did not wish to contest the claim at all. If the implication is supposed to be that Dr Hu intended to instruct fresh non-conflicted lawyers to appear at the hearing instead of Sinowing, no evidence has been adduced that this occurred or would but for some intervening factors beyond the Respondents' control have occurred.

62. However, subjecting the argument to more detailed analysis, Dr Hu offers no or no coherent explanation as to what he thought was happening with the Arbitration after he told Sinowing not to appear. Dr Hu was not a salaried director having no personal interest in the arbitration proceedings. He and his wife were themselves Respondents exposed to personal liability in respect of substantial claims. His Affirmation implies that he was preoccupied with raising funds to properly prepare a defence from late November 2017 until the Final Award was handed down on June 15, 2018, seven

months later. He apparently made no enquiries about the status of the proceedings until he received the Final Award and was (presumably) shocked to discover that the proceedings had taken place as scheduled in December 2017, with Sinowing purporting to represent the Respondents. This high level view simply beggars belief.

63. However, the Companies' case is made more unbelievable still by an inconvenient point of detail highlighted by the Petitioner's counsel. Dr Hu himself actively participated in the arbitration proceedings by signing a document dated December 24, 2017 which was presumably provided to the Tribunal by Sinowing in compliance with a post-hearing Procedural Order made on December 14, 2017. The angry communications which one would expect from Dr Hu to Sinowing (when he discovered Sinowing had attended the hearing), complaining about their acting without authority, was not produced. This undermined entirely the plausibility of the suggestion that Dr Hu had no idea that Sinowing was still actively involved and that the proceedings were continuing on a contested basis.

64. In summary, no arguable or seriously arguable breakdown of the arbitration process was disclosed on the face of the Companies' evidence and the assertion that their attorneys defended the claims contrary to express instructions not to attend the hearing was inherently incapable of belief in light of all the evidence before the Court. Mr Lowe QC submitted in reply that winding-up orders should be made because the dispute raised could fairly be characterised as either "*a 'put up job'*" (per Lord Denning in *Re Claybridge Shipping Co SA* [1981] Com LR 107) or a dispute supported by evidence of "*breathtaking inadequacy*" (per Rimer LJ in the *Rochdale Drinks Company* case [2013] B.C.C. 419 at paragraph 86).

65. In my judgment the latter phrase best captures the insubstantial nature of the dispute relied upon by the Companies in the present case. For these reasons I found that the Companies had failed to demonstrate that the Petition Debt was disputed on substantial grounds and the Petitioner was *prima facie* entitled to immediate winding-up Orders in each case on the insolvency ground.

Findings: insolvency

66. I was satisfied that the Petitioner had in all the circumstances established that the Companies were insolvent on the cash flow basis. Although it was asserted by way of mere argument that the reason why the Debt was unpaid was because it was disputed, no attempt was made to demonstrate through cogent and credible evidence an ability to pay the Debt if the application to set aside the Final Award failed.

Findings: should the Petitions be adjourned pending the determination of the Companies' application to set aside the Final Award?

67. The Companies' alternative application for an adjournment to my mind fell away once I concluded that the Debt was not disputed on substantial grounds. The reliance placed on *In the Matter of the Sphinx Group of Companies*, CICA 6 of 2015, Judgment dated November 11, 2015 (unreported) was misconceived. That case concerned granting a stay so that a dispute could be determined through arbitration, not whether reliance could be placed on a final award.

68. This submission elided two distinct pro-arbitration principles and legal contexts, (1) ensuring that arbitration agreements are honoured by enforcing agreements to arbitrate, and (2) enforcing arbitration awards after arbitral disputes have been adjudicated by the contractually agreed tribunal. Before an award has been obtained, there is a strong public policy imperative requiring courts to favour honouring arbitration clauses. After an award has been obtained, there is a strong public policy imperative requiring courts to enforce arbitration awards. This second imperative does not justify a starting assumption in favour of staying court proceedings pending an application to set aside a foreign award, particularly where local law and the curial law of the arbitration are designed to narrow the scope of judicial review of arbitral awards.

69. It was rightly submitted by the Companies' counsel that the Court possessed the discretion to grant an adjournment under section 95(1) (b) of the Companies Law. However, the Petitioner was also correct to submit that the Court may exercise its discretion to wind-up where it finds no substantial dispute exists about a petition debt. The breadth of this discretion is even greater in such circumstances, bearing in mind that a winding-up order can even be made even where a substantial dispute about the petition debt exists: *Re Parmalat* [2008] UKPC 23 at paragraph 9. Some good reason for adjourning a petition rather than making an immediate winding-up order must be identified.

70. *Re Amalgamated Properties of Rhodesia* [1913] 2 Ch 115 serves as a useful illustration of the circumstances in which the discretion to decline to make a winding-up order in light of a pending an appeal against the judgment debt will be exercised where the petitioner has established a *prima facie* right to a winding-up order. In that case a winding-up order was made, with directions given for the petition to be dismissed if the respondent gave security for the petition debt. If security was not given, the winding-up order would become operative.

71. That was a case where an appeal lay as of right on the merits of a judgment obtained following an ordinary civil trial. In the present case the Companies have no right of appeal on the merits at all and are seeking to set aside the Final Award on dubious due process grounds. They offered no security for the Debt as a condition for this Court agreeing to adjourn the Petition. Nor did they adduce any tangible evidence of any material or irreversible prejudice which they would suffer if winding-up orders were made and subsequently had to be rescinded or stayed in the event the Final Award was in fact set aside.

72. On the contrary, the Petitioner was able to plausibly contend that even if the Final Award was set aside it could rely upon its standing as a shareholder of China Hospitals to seek a winding-up on the just and equitable ground against that Company. I did not find it necessary to formally decide this alternative ground for winding-up as against at least one of the two Companies. Instead I took it into account as an additional factor broadly confirmatory of my primary conclusions on the applications to wind-up in two respects. Firstly, the case for winding-up China Hospitals on either insolvency and/or or just and equitable grounds was compelling. Secondly, having found that the challenge to the Final Award lacked substance so that neither Company had any qualifying defence to the Petitions as creditor Petitions, it was impossible to identify any cogent grounds for delaying making the winding-up Orders sought.

Discharge and/or variation of the JPL Appointment Orders

73. The Companies' Skeleton opposed the continuation of the JPLs' appointments "[i]*n the event that the Petitions are dismissed or adjourned.*" These submissions clearly fell away with the making of the winding-up Orders and did not need to be fully considered. If the Petitions had been dismissed the JPLs' appointments would obviously have been discharged. Had I seen fit to adjourn the Petitions, I would have decided to keep the JPLs in office because of the strength of the Petitioner's case and the findings underpinning the Final Award. I would not have modified the terms of their appointment.

74. Brief mention may conveniently be made at this juncture of the Companies' complaint that they were prejudiced by not having sight of a Confidential Report filed by the JPLs and sealed by me following an ex parte application heard on September 10, 2018. It was submitted that:

> *"53…In so far as Classroom seeks to rely on upon any material in that report in an application to continue the provisional liquidation orders, natural justice requires that such material be disclosed to the Companies and they be given*

adequate time to consider it so that they may be in a position to respond to the application to continue the provisional liquidation orders."

75. The Confidential Report was sealed because it dealt with asset preservation steps taken and proposed to be taken by the JPLs. To the extent that its contents potentially supported the hotly contested issue of whether or not the Injunctions had been breached by the Companies and/or others under the direction of Dr Hu, there was a risk of prejudice to the Companies in my resolving that issue in partial reliance on the Confidential Report. The merits of the breach of Injunctions arguments deployed by the Petitioner were not directly in issue. The central allegation was that there was a risk of dissipation of assets, and this risk could be substantiated without establishing any breach of the Injunctions. My initial response to this point in the course of the hearing was to indicate that, in the event that I was persuaded to adjourn the Petitions, the case for keeping the JPLs in place could be supported without having to decide the breach of the Injunctions issue. It would suffice for the Court to rely upon the recorded findings of fraudulent conduct in the Final Award to justify keeping the Companies under independent management. The appointment of joint provisional liquidators is often grounded on far less compelling evidence than that which supported the appointment (and its continuance) in the present case.

76. Mr Moody also argued that the Companies ought to be permitted to contest the bills of costs which were raised against them in respect of two earlier petitions which were dismissed after the petition debts were paid in full. I was initially attracted by this argument, but Mr Lowe QC in reply satisfied me that the Official Liquidators would bring the necessary independence to bear in assessing these claims in the liquidations. I was more attracted by the oral argument that the Companies should not be permitted to join and oppose the Hong Kong review proceedings than I was by the suggestion that the Companies should through their directors be permitted to actively support the appeal. On this point, I was satisfied by Mr Lowe QC's oral concession that the Companies in liquidation would be bound by any favourable ruling the other Arbitration Respondents achieved in terms of setting aside the Final Award. This did not in any way diminish my agreement with Mr Moody (based on the information then before me) that it would be inappropriate for the Companies in liquidation to intervene and oppose the application to set aside the Final Appeal. That application appeared to me to be the Petitioner's battle to fight.

Summary

77. For the above reasons, on September 13, 2018 I ordered that the Company should be wound-up and refused the Company's application to adjourn the Petition.

HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT