CITATION: Depo Traffic v. Vikeda International, 2015 ONSC 999
COURT FILE NO.: CV-13-483322
DATE: 20150218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: DEPO TRAFFIC FACILITIES (KUNSHAN) CO., Applicant

AND:

VIKEDA INTERNATIONAL LOGISTICS AND AUTOMOTIVE SUPPLY LTD., Respondent

BEFORE: CHIAPPETTA J.

COUNSEL: *Robert Wisner*, for the Applicant

Chris Reed, for the Respondent

HEARD: January 26, 2015

ENDORSEMENT

Overview

[1] The Applicant, Depo Traffic Facilities (Kunshan) Co. ("Depo") is a Chinese company. It succeeded in an international arbitration against the Respondent, Vikeda International Logistics and Automotive Supply Ltd. ("Vikeda") heard before the Shanghai International Arbitration Commission ("the Commission").

[2] Depo seeks to have the award recognized in Ontario because Vikeda is an Ontario company. The application is brought pursuant to the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The *International Commercial Arbitration Act*, R.S.O. 1990, c. I. 9 provides that the Model Law is in force in Ontario (article 2(1)).

[3] Vikeda defends the application arguing that the Court should refuse to recognize and enforce the award as Vikeda was unable to present its defence with respect to double recovery (Model Law, article 36 (1)(a)(ii)), and further, that the recognition or enforcement of the award would be contrary to the public policy of Ontario (Model Law, article 36 (1)(b)(ii)). Insofar as the award concerns the dispute with respect to moulds, it is argued that this part of the award should not be recognized in Ontario as there was no agreement to submit the dispute concerning moulds to arbitration.

[4] For reasons set our below I have concluded that there is no reason not to recognize and enforce the award.

The Parties

[5] Depo is a Chinese corporation carrying on business in Kunshan City, Jiangsu Province, China.

[6] Vikeda is an Ontario corporation with its registered head office in Toronto.

[7] A number of non-parties are as well referred to by the Commission in its award. Changzhou Tianning Foreign Trade Co. Ltd. ("Changzhou") acted as an intermediary in business dealings between Depo and Vikeda. Kunshan Fuyi Traffic Facilities Co. Ltd. ("Kunshan Fuyi") merged with Depo in July 2010, but had business dealings with Vikeda before the merger referred to in the award.

[8] Between February 2008 and January 2012, Kunshan Fuyi and Depo constructed moulds and delivered parts for Chrysler to Vikeda in accordance with various agreements described below. Vikeda failed or refused to pay for the moulds and parts as contracted. Depo commenced an arbitration to recover unpaid amounts from Vikeda by filing its application for arbitration with the Commission on March 22, 2012.

[9] In its application, Depo sought, among other things, an order requiring Vikeda to pay Depo CNY 53,403,578.56 with respect to parts that Vikeda received but did not pay for and CNY 3,407,909.25 with respect to moulds Depo constructed at Vikeda's request but for which Vikeda did not pay.

[10] The Commission delivered its award on May 16, 2013.

The Award

Background Facts

[11] The relevant facts giving rise to the parties' dispute are summarized in the Arbitral Award of the Shanghai International Arbitration Centre, dated May 16, 2013.

[12] On February 10, 2008, Kunshan Fuyi, a company that later merged with Depo, entered into a "Tripartite Agreement for Export of Components and Parts and Payments" with Vikeda and Changzhou. Pursuant to the Tripartite Agreement, Kunshan Fuyi exported parts and components to Vikeda, which Vikeda then supplied to Chrysler. Changzhou acted as Vikeda's agent with respect to customs declaration, settlement of foreign exchange, shipment, and production of shipping documents (page 87 of the award). On April 1, 2011, the parties entered into a new Tripartite Agreement with Depo as the exporter. The terms of the new Tripartite Agreement are consistent with the 2008 Tripartite Agreement (page 86 of the award).

[13] According to the Tripartite Agreement, Vikeda and Changzhou would negotiate all expenses relating to customs declaration. Vikeda would make payments in US dollars to

Changzhou, which Changzhou would convert and pay to Depo in Chinese CNY. Vikeda and Changzhou would each bear responsibility for any liability arising from their respective failure to make payments to Depo (page 87 of the award).

[14] As agreed upon in the Tripartite Agreement, Depo and Vikeda entered into separate sale and purchase agreements that contained specific provisions regarding the quantity and prices of the parts that were to be exported by Depo to Vikeda (page 86 of the award). Those separate agreements consisted of the May 21, 2007 "Purchase Agreement for Parts, Components and Special Equipment", the May 15, 2009 "Purchasing Agreement for DS LID Parts, Components and Special Equipment", the May 15, 2009 "Purchasing Agreement for DS LATCH Parts, Components and Special Equipment", and the July 23, 2009 "JS Spectacle Case Parts, Components and Special Equipment". Each agreement stipulated that Depo would provide specific goods at a specific price to Vikeda. The specific quantities of those goods were to be determined based on Vikeda's orders.

[15] From May 2007 to January 2012, Depo and Vikeda entered into 32 transactions based on orders placed by Vikeda. Vikeda paid a total sum of CNY 92,888,644.99 to Depo, but failed or refused to pay the outstanding CNY 53,403,578.56.

[16] The Commission found that, in addition to the aforementioned agreements, Depo and Vikeda entered into three other agreements for the development and production of moulds: the July 20, 2009 "Purchase Agreement for WK Load, Floor Components, Parts and Specialized Equipment", the July 20, 2009 "Purchase Agreement for WD-7 Load Floor Components, Parts and Specialized Equipment", and the December 20, 2010 "Purchase Agreement for WD-5 Load Floor Components, Parts and Specialized Equipment". Vikeda's payment obligation was governed by the payment method agreed upon in the Tripartite Agreement (page 100 of the award). By the commencement of the arbitration, Vikeda had yet to pay CNY 3, 407, 909.25 for four moulds produced and shipped by Depo.

Submissions to the Commission

[17] Depo commenced an arbitration to recover these unpaid amounts from Vikeda. It also sought an award against Changzhou for the payments that, according to Depo, Vikeda paid but Changzhou withheld.

[18] In its written submissions prior to the hearing of the case, Vikeda maintained that Depo supplied its goods at unacceptably high prices in order to replace Vikeda as Chrysler's chief supplier. Vikeda submitted that the prices were unconfirmed and that Depo had already recovered the amounts it sought in arbitration through direct profits from its deals with Chrysler.

[19] In its submissions to the Commission, Changzhou maintained that it had transferred all payments received by Vikeda to Depo. It submitted that as the payment intermediary and customs clearance entity, it should not be jointly and severally responsible for any payments that Vikeda failed to make to Depo for the delivered goods (page 81 of the award).

[20] Following the hearing, Vikeda made further written submissions. It claimed that it numerously asked Depo to improve its efficiency and reduce its costs. It further submitted that Depo was aware that Vikeda existed in name only and another supplier had successfully obtained full compensation from Chrysler directly. Vikeda maintained that, by pursuing arbitration, Depo had relinquished the opportunity to obtain full compensation immediately (page 82 of the award).

[21] In response, Depo filed a written statement arguing that Vikeda's argument regarding Depo's delivery of goods at unconfirmed prices was a complete fabrication. Depo maintained that Vikeda confirmed the prices and never made any requests for reductions. It also rejected Vikeda's allegation that it strategically attempted to replace Vikeda as Chrysler's chief supplier. It argued that Vikeda's argument based on full compensation from Chrysler was groundless, and that Depo could not unreasonably transfer Vikeda's debts to Chrysler (pages 83-94 of the award).

[22] In response, Vikeda referred to the 36 to 47 percent reductions in the prices of certain items as proof that Vikeda in fact complained about the excessive prices and Depo made certain reductions in response.

The Commission's Award

[23] Having considered submissions from the parties, the Commission made its award in favour of Depo on May 16, 2013. The Commission found that Vikeda had breached its agreements with Depo by failing to make timely payments for the goods and moulds that Depo produced and delivered. Specifically, the Commission found that all agreements were valid and lawful, and therefore binding on the parties. It further found that Depo had performed its obligations in accordance with the orders placed by Vikeda, and that the quality of the moulds delivered conformed to relevant quality standards recognized by Chrysler. With regards to price adjustments, the Commission found that while the parties may by agreement vary the prices of the goods, no such agreement had been reached, and consequently, Vikeda was liable for the outstanding amounts. The Commission dismissed Depo's claim against Changzhou, noting that there was no evidence in support of the argument that the latter had withheld monies paid by Vikeda (pages 103-107 of the award).

[24] The Commission ordered Vikeda to pay to Depo by May 31, 2013, the sum of CNY 53,403,56 on account of parts that Vikeda received but for which it did not pay. It also awarded Depo CNY 3,404,909.25 on account of the moulds that Depo constructed at Vikeda's request, but for which Video never paid. The Commission further ordered Vikeda to pay Depo CNY 704,057 for the costs of the arbitration.

[25] To date, Vikeda has failed or refused to pay the amounts due to Depo in accordance with the award.

Model Law

[26] The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law on June 21, 1985. The Model Law covers all stages of the arbitral process, from the arbitration agreement to the recognition and enforcement of the arbitral awards: "Introduction to the UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration".

[27] The Model Law represents "a collaborative effort among nations to facilitate the resolution of international commercial disputes through the arbitral process": *Corp Transnacional de Inversiones v. STET International*, [1999] O.J. No. 3573, at p. 190 (S.C.J.), aff'd [2000] O.J. No 3408 (CA), leave to appeal refused, [2000] S.C.C.A. No. 581. It was developed and adopted for the purpose of establishing a uniform and universally consistent method of recognizing and enforcing commercial arbitration agreements between contracting parties to the United Nations Convention on Foreign Arbitral Awards adopted by the United Nations Conference on the Recognition and Enforcement of International Commercial Arbitration in New York on June 10, 1958 (the "New York Convention"). In *Automatic Systems Inc. v. Bracknell Corp.*, [1994] O.J. No. 828, the Court of Appeal for Ontario underscored the Model Law's objectives of party autonomy and predictability at p. 456:

> The purpose of the United Nations Conventions and the legislation adopting them is to ensure that that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: *Kaverit Steel and Crane Ltd. v. Kone Corp*. (1992), 87 D.L.R. (4th) 129 at p.139, 40 C.P.R. (3d) 161, 4 C.P.C. (3d) 99 (Alta. C.A.).

[28] Furthermore, the Court canvassed the widespread acceptance of the Model Law, including its adoption in Ontario through the enactment of the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, noting at para. 21:

> Legislation similar to the ICAA, adopting the Model Law, was enacted by the other provinces, providing for a uniform and universally consistent method of recognizing and enforcing commercial arbitration agreements between contracting parties in Canada and other countries adhering to the Convention.

[29] In *BWV Investments Ltd. v. Saskferco Products Inc.*, [1995] 2 W.W.R. 1, at para. 34, the Saskatchewan Court of Appeal summarized the four overarching objectives of the ICCA and comparative legislation as: 1) giving effect to the intentions of the parties in choosing to submit to arbitration; 2) facilitating predictability in the resolution of international commercial disputes; 3) fostering consistency between jurisdictions in the resolution of international commercial

disputes; and 4) encouraging the use of international commercial arbitration as a dispute resolution alternative, to encourage international commercial activity.

Application of the Model Law to Arbitral Awards

[30] Under the Model Law, a party applying for the recognition and enforcement of an arbitral award has the obligation to supply the Court with a certified copy of the arbitral award, the relevant arbitration agreement, as well as a certified English translation of those documents. This obligation is codified in article 35(2) of the Model Law, which states:

> The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

[31] Where an applicant has complied with article 35(2), the Court shall recognize and enforce an award. However, notwithstanding this obligation, further to article 36(1)(a)(i-v), the Court retains the discretion to refuse to recognize or enforce an arbitral award if the party against whom the award is invoked furnishes the court with proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced, or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place, or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

[32] The Respondent bears the onus of proving the existence of a ground under article 36 (1)(a). The Court may then exercise its discretion to refuse to recognize or enforce the arbitral award. However, as the Court noted in *Schreter v. Gasmac Inc.*, [1992] O.J. No. 257, at para. 15, such discretion does not give rise to an obligation by the Court to refuse to enforce or put aside the arbitral award. Rather, the Court may enforce the arbitral award even if the Respondent proves the existence of one or more of the grounds enumerated under s. 36(1)(a). In *Schreter v. Gasmac Inc.*, the Respondent sought to have the arbitral award set aside. Among other grounds, the Respondent argued that the arbitrator acted beyond his jurisdiction and beyond the terms of agreement by including attorneys' fees in the award and by accelerating the royalty payments when the contract provided that they were payable over five years. In rejecting those submissions, the Court explained that the Respondent had failed to discharge its burden of proof under article 36(1)(a) and provide the Court with evidence of Georgia Law, the governing law of the agreement, on which the Respondent relied. Consequently, the Court found that the Respondent had failed to demonstrate that the award dealt with matters not within the arbitrator's jurisdiction.

[33] In addition to article 36(a) grounds for refusing to enforce arbitral awards, the Court retains discretion to refuse to recognize or enforce an arbitral award on the ground of public policy. Article 36(1)(b)(ii) of the Model Law provides that "recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused… if the court finds that the recognition or enforcement of the award would be contrary to the public policy of this State". As explained in *Schreter v. Gasmac Inc.*, at para. 15, there is no onus on the Respondent to convince the Court that the award is contrary to the public policy of Ontario. Rather, such determination would be made by the Court itself which, under article 36(1)(b)(ii), retains discretion to enforce an award that is contrary to public policy.

Analysis

[34] As the party applying for recognition and enforcement of the award, Depo has filed a certified copy of the award and a certified copy of the arbitration agreements pursuant to which the Commission heard the arbitration and granted the award. As the award and arbitration agreements are in Chinese, Depo has also filed certified translations of each. Depo has therefore complied with its obligations as set out at article 35(2) of the Model Law.

[35] As noted above, Vikeda defends the application arguing that the Court should refuse to recognize and enforce the award as Vikeda was unable to present its defence with respect to double recovery (Model Law, s. 36(1)(a)(ii)), and further, that the recognition or enforcement of the award would be contrary to the public policy of Ontario (Model Law, s. 36(1)(b)(ii)). Insofar as the award concerns the dispute with respect to moulds, it is argued that this part of the award should not be recognized in Ontario as there was no agreement to submit this part of the dispute to arbitration.

A) Vikeda's Defence of Double Recovery

[36] Vikeda relies on s. 36(1)(a)(ii) of the Model Law, as set out above. It maintains that the Commission failed to render legal or factual findings on a submission fundamental to its defence.

Vikeda does not dispute that goods were delivered to it and that it failed to pay the price invoiced by Depo. Vikeda's position is that Depo deliberately forced it out of business and made direct arrangements with Chrysler and, in doing so, made full recovery of the amounts it claims against Vikeda ("double recovery").

[37] The Commission's award acknowledges that Vikeda advanced a double recovery defence. It summarizes Vikeda's submission that Depo had already recovered the disputed amounts from its deals with Chrysler. It also refers to Vikeda's post-hearing written submissions to the Commission, maintaining that Depo was aware that Vikeda existed in name only and that another supplier had obtained full compensation directly from Chrysler. Vikeda maintained that Depo could – but chose not to — obtain full compensation from Chrysler, deciding instead to pursue its claim against Vikeda in arbitration. While the Commission did not make any factual findings with respect to double recovery, it arguably addressed Vikeda's submission in its Decision from a general legal perspective. At page 35 of the Arbitral Award, the Commission stated:

> Finally, according to Article 107 of the "Contract Law", [Depo] shall be entitled to demand continuance of performance of the agreement by [Vikeda] since the latter is unable to completely fulfill its obligations of payment under the agreements.

[38] Vikeda submits however that the award makes no legal or factual findings with respect to this critical issue. Consequently, according to Vikeda, there has yet to be a finding as to whether Depo is seeking double recovery and, if so, why it should succeed. In effect, it is argued, in accordance with s. 36(1)(a)(ii), Vikeda has been denied the opportunity to present its defence to Depo's claims because the Commission failed to consider, in a meaningful and substantive way, the defence put forward by Vikeda. It is submitted that this amounts to denying Vikeda the ability to present its case.

[39] I disagree. It cannot be said that Vikeda was unable to present its case, as contemplated by article 36(1)(a)(ii) of the Model Law. Its case was presented effectively as summarized in the award as set out above. Vikeda would have the Court read in words to the clear language of article 36(1)(a)(ii) that are simply not there. The Model Law provides for detailed instruction wherein enforcement may be refused, by exception, upon specific grounds as enumerated therein. To accept the Respondent's submission would effectively expand the restrictive list of reasons to refuse enforcement. This would prove both improper and unwise.

[40] In *Schreter v. Gasmac Inc.*, above, the Court explained that the ground of natural justice, codified under article 36(1)(a)(ii), is comprised of the right to notice and the ability of the Respondent to present its case: see para. 39. In that case, the Respondent argued that the arbitrator's failure to provide reasons precluded it from initiating judicial review proceedings. The Respondent had provided submissions on the arbitrator's lack of jurisdiction to deal with a claim for indemnity for product liability insurance. In the absence of reasons, it was unclear whether the arbitrator took jurisdiction over that issue and whether any portion of the award included indemnity for insurance. While the Court acknowledged that reasons are important for determining whether the parties' evidence and submission were understood and considered, it

found that the absence of reasons did not amount to a ground upon which the Court could exercise its discretion to refuse to enforce the arbitral award: see paras. 41-43.

[41] The principle of non-judicial intervention in arbitral awards has been recognized by Canadian courts. In *Corp Transnacional de Inversiones v. STET International*, [1999] O.J. No. 3573, at p. 190 (S.C.J.), aff'd [2000] O.J. No 3408 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 581, the Court emphasized the limited scope of judicial interference in arbitral awards, and explained at paras. 21 and 22:

> Article 5 of the Model Law expressly limits the scope for judicial intervention except by application to set aside the award or to resist enforcement of an award under one or more of the limited grounds specified in Articles 34 or 36. Under Article 34 of the Model Law, the applicants bear the onus of proving that the awards should be set aside. If the applicants fail to satisfy this onus, Articles 35 and 36 of the Model Law expressly require this court to recognize and enforce the awards.
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> The broad deference and respect to be accorded to decisions made by arbitral tribunals pursuant to the Model Law has been recognized in this jurisdiction by the Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456.

[42] Other Canadian jurisdictions have adopted the same deferential approach to arbitral decisions. In *Quintette Coal Ltd. v. Nippon Steel Corp*., [1991] 1 W.W.R. 219, leave to appeal to S.C.C. refused, [1990] S.C.C.A. 431, the British Columbia Court of Appeal refused to set aside an international commercial arbitration award under legislation comparable to the ICAA. In doing so, the Court reasoned, at p. 229:

> It is important … that the court express its views on the degree of deference to be accorded the decision of the arbitrators. … The "concerns of international comity, respect for the capacities of foreign and transnational Tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet, therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia.

[43] In my view Vikeda has not met its onus to establish that it has been denied natural justice, as codified under article 36(1)(a)(ii). It enjoyed both the right to notice and the ability to present its case. It had full opportunity to present its case on double recovery and respond to Depo's response to is position. While the reasons from the Commission could have been more robust on

this specific issue, read as whole, it can be said that the Commission both understood and considered Vikeda's position as presented in the absence of detailed reasons. Further, a failure to provide detailed reasons does not amount to a ground upon which the Court could exercise its discretion to refuse to enforce the arbitral award.

[44] Vikeda further submits that the Court should refuse to recognize the award as to do so would be contrary to public policy, per article 36(1)(b)(ii). It is submitted that it is clear from the arbitral award that the Commission failed to consider, explore, or evaluate the case of double recovery presented by Vikeda. That failure amounts to a denial of natural justice. Public policy therefore demands that recognition and enforcement of the award should be refused until such time as the tribunal has considered the case presented by Vikeda.

[45] I disagree. Vikeda wishes to rely on a public policy defence to the recognition and enforcement of arbitral awards. Public policy is truly an exceptional defence. Courts have recognized that the defence of public policy must be construed narrowly in light of the overriding purpose of the Convention "to encourage recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries". In *Schreter v. Gasmac Inc.*, Feldman J. made the following remarks about the defence of public policy at paras. 47 and 48:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.
>
> It is true that arbitral awards have been viewed with less confidence than judgments of a court because the procedures of the courts are more regulated and standardized, and judges are sworn to uphold those procedures and to apply the law, while the qualifications and training of arbitrators may diverge greatly. And it is of concern to a court in this jurisdiction that a party to a foreign arbitration may feel that justice was not done or that the award is perverse in law.

[46] In particular, Feldman J. cautioned against the re-determination of the merits of the claims under the guise of public policy and stated, at para. 49:

> [I]f this court were to endorse the view that it should re-open the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction and where there has been no misconduct, under the guise of ensuring conformity with the public policy of this

> province, the enforcement procedure of the Model Law could be brought into disrepute.

[47] This interpretation reflects the prevailing view on the scope of the defence of public policy. Professor McLeod notes that the public policy prohibition ought to be invoked only if the judgment involves an act that is illegal in the forum or if the action involves acts repugnant to the orderly functioning of the social or commercial life of the forum. An obvious example would be the enforcement of a gambling debt which would be illegal in Ontario: J.G. McLeod, The Conflict of Laws (Calgary: Carswell, 1983), at p. 61. Similarly, the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session, June 3-21, 1985 provides guidance on the intended scope of the public policy ground for a court's refusal to recognize or enforce an arbitral award. The Report states, at p. 63:

> 296. In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice . . .
>
> 297. . . . It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

[48] The public policy defence has no application to the facts of this case. The procedure followed by the Commission did not offend our principles of justice and fairness in a fundamental way. The Commission was alive to Vikeda's double recovery defence. The award references the issue when rejecting Vikeda's argument that the circumstances were such that it should no longer be bound by the agreed terms of the contracts (page 35 of the award). The Commission dismissed the defence, however, without detailed analysis of how Chinese law addresses the common law concept of mitigation. There may be many reasons for this. It may be that the Commission found the argument irrelevant or without merit. It may be that it thought a broad comment "demanding continuance of performance" was enough. Whatever the reason, it does not follow that a further hearing should be directed on the merits of the double recovery defence, nor does it follow that the award is somehow unfair. The Commission held that the contracts before it were binding on Vikeda and that Vikeda had to pay. This finding was made in the context of Vikeda's argument that Depo should look to Chrysler to recover what Vikeda owed. While specific factual findings on this issue would have been preferable, there is no evidence of misconduct. I see no reason to reopen the merits of the double recovery defence by relying on the public policy concerns in these circumstances.

B) The Mould Claim

[49] Vikeda submits that 5 percent of the award concerns a dispute that was not properly submitted to arbitration as there was no written agreement to submit the mould claim to arbitration.

[50] The award includes CNY 3,407,909.25 as compensation for the unpaid price of moulds. Vikeda argues that there was no written agreement concerning moulds and no agreement that any dispute regarding moulds would be submitted to arbitration.

[51] As set out in the opening paragraph of the award, the Commission appears to have taken jurisdiction on the basis of the Tripartite Agreements and three other agreements for the development and productions of moulds. The paragraph of the award provides:

> [2013] Hu-Mao-Zhong-Cai-No.162
>
> On March 30, 2012, China International Economic and Trade Arbitration Commission, Shanghai Commission (renamed as Shanghai International Economic and Trade Arbitration Commission (Shanghai International Arbitration Center), hereinafter referred to as the "Commission"), in accordance with arbitration clauses under four agreements by and between the claimant, Depo Traffic Facilities (Kunshan) Co., Ltd. (the "Claimant") and the first respondent, Vikeda International Logistics & Automotive Supply Ltd. (hereinafter referred to as the "First Respondent") and the second respondent, Changzhou Tianning Foreign Trade Co., Ltd. (hereinafter referred to as the "Second Respondent", both respondents hereinafter jointly referred to as the "Respondents"), (I.e. "Tripartite Agreement for Export of Components and Parts and Payment", "Purchase Agreement for WD-7 Load Floor Components, Parts and Specialized Equipment" and "Purchase Agreement for WD-5 Load Floor Components, Parts and Specialized Equipment"), upon the written application for arbitration filed with the Commission by the Claimant on March 22, 2010, accepted the arbitration case with respect to disputes arising out of such four agreements after the Complainant completed the relevant formalities. The case number is SG2012033.

[52] As set out at page 17 of the award, there were two relevant Tripartite Agreements: the 2008 agreement between Kunshan Fuyi, Vikeda and Changzhou and the 2011 agreement between Depo, Vikeda and Changzhou, (collectively "the Tripartite Agreements"). The Tripartite Agreements set out how the parties would execute and make payment on a series of other agreements for each of the moulds that Depo developed and all of the parts that Depo supplied to Vikeda. The relevant portions of the Tripartite Agreements are as follows:

> WHEREAS Party A and Party B have signed the agreement for pricing and purchasing of components and parts and special

> equipment and that Party A has entrusted Party C as its agent to export Party B's products to Party A. In order to ensure the fulfillment of the purchasing agreement between Party A and Party B and guarantee the rights and interests of Party A, Party B and Party C, through equal negotiation, such three parties hereby agree upon as follows:
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> …
>
> II. Rights and Obligations:
>
> …
>
> (5) Party A shall make the payment for goods or payment for molds or any other payments to Party C, and Party C shall timely transfer such payments to Party B. In case of Party B's failure to receive such payments as scheduled due to Party C's reasons, Party C shall bear the consequences caused thereof and Party A shall assume the guarantee liability. In case of Party B's failure to receive such payments as scheduled due to Party A's reasons, Party A shall bear the consequences thereof.
>
> …
>
> IV. Any dispute arising from the performance of the agreement shall be settled by the three parties through friendly negotiation. In case no settlement can be reached, the dispute shall be submitted to China International Economic and Trade Arbitration Commission Shanghai Branch for arbitration. The arbitration award shall be final and binding upon such three parties.
>
> V. The relevant provisions of this Agreement shall be governed by the laws of the People's Republic of China.

[53] As set out at page 31 of the award, Depo and Vikeda entered into 3 agreements for the development and production of moulds ("the Mould Agreements"). Vikeda was responsible for payments of such moulds based on the payment method stipulated in the Tripartite Agreements. The reference to Tripartite Agreements was in Article 5 of the Mould Agreements:

> Payment term: The specific payment shall be effected in accordance with "Tripartite Agreement for Components & Parts Export and Payment" signed by Party A and Party B.

[54] The Mould Agreements had their own arbitration clause. Article 9 provides:

> Any disputes arising from the fulfillment of this Agreement shall be settled by both parties through friendly negotiations. In case no settlement can be reached, the disputes shall be submitted to China International Economic and Trade Arbitration Commission Shanghai

> Branch for arbitration. The arbitration shall be conducted pursuant to the existing valid rules for this Commission. The arbitration award shall be final and binding upon both parties.

[55] Vikeda submits that the Mould Agreements were never presented to, approved of or authorized by Vikeda and its Board of Directors. The signatory thereto, Mr. Wang, was not authorized to sign the Mould Agreements on behalf of Vikeda. While Mr. Wang executed a power of attorney allegedly given to him by Vikeda, the evidence is that the power of attorney was not executed until after the creation of the Mould Agreements upon which Depo relies. Vikeda therefore submits, in accordance with s. 36(1)(a)(i) of the Model Law, that as the Mould Agreements are not valid, the portion of the dispute pertaining to the Mould Agreements was not properly submitted to arbitration and should not be enforced.

[56] The issues of Mr. Wang's authority to sign the Mould Agreements and the effective date of the power of attorney are interesting but not necessary to be analyzed by this Court in these circumstances. I have concluded that the dispute with respect to the payment of moulds was properly within the jurisdiction of the Commission and ought to be enforced. I make this conclusion for the following reasons, taken together:

1. The Commission assumed jurisdiction on the basis of the Tripartite Agreements and the Mould Agreements;
2. The Commission found that all agreements in the case were voluntarily executed between Depo and Vikeda; all agreements were lawful and valid and binding on both parties;
3. Having regard to the arbitration clauses in each of the Tripartite Agreements and the Mould Agreements, the Commission took jurisdiction over the dispute between Depo and Vikeda;
4. Vikeda raised no issue of jurisdiction with the Commission, including no issue of validity with respect to the Mould Agreements. It is not proper and not permissible for Vikeda to split its case and raise this issue for the first time as a defence to enforcement (Model Law, s.18);
5. Vikeda relies on Model Law, article 36(1)(a)(i). Vikeda has the onus of establishing the Commission was without jurisdiction. Vikeda submitted no evidence demonstrating how Chinese law would address the retroactivity of a power of attorney, and no evidence to establish that the arbitration agreement as set out in the Mould Agreements is not valid under Chinese law;
6. The dispute over the payment of moulds is a dispute arising from the Tripartite Agreements and subject to the arbitration agreement therein.

Disposition

[57] For these reasons, I see no reason why the Court should exercise its discretion to refuse to enforce the arbitral award.

[58] The application is granted. The following Orders are to follow:

1. A declaration recognizing the award of the Shanghai International Economic & Trade Arbitration Commission dated May 16, 2013 ("the award") as binding in Ontario;
2. A declaration that the award is enforceable in Ontario in accordance with s. 11 of the *International Commercial Arbitration Act*, R.S.O. 1990, c.19;
3. Costs as agreed by the parties and accepted by the Court, fixed in the amount of $40,000, paid by the Respondent to the Applicant.

CHIAPPETTA J.

Date: February 18, 2015