CHINA NATIONAL ELECTRONICS IMPORT & EXPORT SHENZHEN COMPANY FORMERLY KNOWN AS CHINA NATIONAL ELECTRONICS IMPORT & EXPORT CORPORATION SHENZHEN INDUSTRY & TRADE CENTRE v CHOI CHUK MING TRADING AS ERWO ENTERPRISE COMPANY - [1993] HKCU 80

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

1992 NO. A5964

9 March 1993

Sale of goods -- Goods sold and delivered -- Application for stay pending arbitration

Mr. S.C. Poon instructed by Livasiri & Co. for Plaintiff

Mr.Ronald Tang instructed by Chow, Griffiths & chan for Defendant

JUDGMENT

By a Writ dated 3rd November 1992, the plaintiff claimed against the defendant the sum of HK$1,307,629.08 pursuant to the terms of a Memorandum of Agreement dated 6th December 1991. Alternatively the plaintiff claimed the same sum as the price outstanding for goods sold and delivered.

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The defendant duly filed a defence and counterclaim. In paragraph 27 of that pleading the defendant asserted that the plaintiff was liable to him in respect of an agreement made on or about 24th September 1990. By paragraph 35, the defendant made a similar averment in relation to an agreement dated 15th November 1990.

By a summons dated 25th November 1992 the plaintiff sought a stay of the counterclaim which was based on these 2 agreements pursuant to Article 8 of the Model Law on the grounds that both agreements contained an arbitration clause providing for arbitration before the China International Economic Trade & Arbitration Commission (CIETAC) Shenzhen Chapter.

Article 8 is in mandatory terms and provides as follows:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

Initially, it appeared that the defendant's case was to be based upon the agreement that there was no

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compliance with Article 7(2) of the Model Law which provides that the arbitration agreement has to be in writing and signed by the parties. Although this line of defence to the stay application was faintly adverted to by Mr. Ronald Tang who appeared for the defendant, it was not at the forefront of his submissions and if I may say so, with respect, not surprisingly so in the light of the facts of this particular case.

I will first dispose of this point and then move on to deal with the point upon which Mr. Tang placed most reliance namely that the plaintiffs had submitted to the jurisdiction of this court and that this was inconsistent with their present application for a stay.

Agreement in writing

Article 7(2), the Model Law, provides that the arbitration agreement shall be in writing. It then goes on to add these words:

> "An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement...."

The two agreements relied upon by the defendant in his counterclaim are both single sheets of paper with

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printing and typing on the front side and printing on the reverse side. I have seen the originals and it is perfectly clear to me that by just looking at this piece of paper one can see that there is writing on both sides. The arbitration clause appears on the reverse side. The front side also has references to clauses which only appear on the reverse side.

Both such contracts are chopped by the defendant's chop upon which there is a signature.

It is common ground that the defendant left his chop with the plaintiff so that they could chop agreements once they had been entered into on the telephone. This was an established practice which stemmed from a build up of trust between the two parties. Further, I am satisfied that there is strong evidence that the defendant actually authorised Mr. Ma of the plaintiff to sign and chop such agreements on his behalf. All this was to make it unnecessary for the defendant to travel to Shenzhen each time a contract was entered into between the parties. Many contracts were entered into between the parties in this fashion and until the matters herein complained of not only was there a good deal of mutual trust between them but no dispute about the validity of such agreement.

Although the defendant denies that he actually authorised Mr. Ma to sign the 2 agreements, the totality of the evidence to the contrary is powerful and certainly

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meets any threshold which the court might require in relation to compliance with Article 7(2) of the Model Law. (see *Pacific International Lines v. Tsinlien Metals and Minerals* (1992) HKLD G5).

I reject Mr. Tang's submission that I should order the trial of the issue whether the defendant authorised Mr. Ma to sign these contracts on his behalf. This is a matter which the defendant can raise before the arbitration.

I am thus perfectly satisfied that Article 7(2) has been complied with and I now turn to consider Mr.Tang's second line of defence.

Submission to the jurisdiction

Mr. Tang submits that because the plaintiffs have commenced proceedings in Hong Kong and have based their claim upon the terms of a memorandum of agreement between the parties which was to deal with all outstanding matters, it would be quite absurd to stay the counterclaim which Mr. Tang submits was based upon the contract the subject matter of the memorandum of agreement relied upon by the plaintiff. From a practical point of view, he points out that it must be undesirable to have the claim litigated in Hong Kong but the counterclaim arbitrated in China with all the dangers that go with multiplicity of proceedings and the possibility of inconsistent findings of fact.

If I were satisfied that the claim made by the

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plaintiff is in some way a compromise of matters between the parties which includes the two contracts pleaded in the counterclaim, I would be very concerned and would think that there would be force in Mr. Tang's submission. However, the fact remains that despite this application having come on before me some time ago and been adjourned for further argument, there is absolutely no evidence produced by the defend-

ant to substantiate the allegation that the memorandum of agreement, or the alternative claim for goods sold and delivered, is in anyway connected with the subject matter of the counterlcaim.

It seems to me clear that in the absence of such evidence, it is impossible for me to conclude that the factual basis of Mr. Tang's submission has been made out. This is a matter which should have been raised in a fresh affidavit by the defendant and then the plaintiff would have had an opportunity to disprove it.From the bar, Mr. Poon assured me that there was no substance in this allegation and I have no reason whatsoever to doubt his instructions. However, the plain fact of the matter is that there was insufficient evidence before the court to make good Mr. Tang's submission and I am therefore not in a position to give effect to it.

Of course, it is undesirable that the dispute between these parties should have to be divided up in the way I have outlined, part in China, part in Hong Kong.

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However, this is a natural consequence of the agreement which they have entered into and the further fact that when sued in Hong Kong, the defendant took no step himself to apply for a stay if that argument was open to him. The plain fact of the matter is that the Model Law gives me no discretion once I am satisfied that the parties have entered into an arbitration agreement. Had I been satisfied that the claim made by the plaintiff encompassed matters relating to the counterclaim, the matter might have been different as the argument that the plaintiff had submitted to the jurisdiction of the Hong Kong Court in relation to these very matters would have been much stronger. However, the evidential basis for this has not been made good, and I therefore have no discretion.

In all the circumstances of this case, I grant the plaintiff the relief which is sought, namely, that all further proceedings in connection with the defendant's countercalim filed on 3rd November 1992 be stayed pursuant to the terms of Article 8 of the Model Law.

I also make a costs order nisi in favour of the plaintiff.