CHINA RESOURCES METALS & MINERALS CO LTD v ANANDA NON-FERROUS METALS LTD - [1994] 3 HKC 526

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 520 OF 1994 AND CONSTRUCTION LIST NO 7 OF 1994

7 July 1994

Arbitration -- International arbitration -- Sole arbitrator appointed -- Whether mutual mistake in equity in relation to appointment of arbitrator -- Whether both parties sharing mistaken belief that arbitrator was being appointed for domestic and not international arbitration -- Res judicata/issue estoppel -- Relief refused -- Arbitration Ordinance (Cap 341) ss 2H, 23(3) -- Uncitral Model Law

By a contract of sale constituted by a sales confirmation dated 24 July 1991, the plaintiff, CRM, agreed to purchase 40 tonnes of Chinese cadmium ingots from the defendant, Ananda. The goods were to be delivered in Rotterdam at the end of August or early September 1991. The contract contained an arbitration clause providing for arbitration in Hong Kong under Hong Kong law. A dispute arose as to the quality of the goods delivered and CRM sought Ananda's concurrence in the appointment of a sole arbitrator, failing which CRM would seek the appointment of a sole arbitrator under s 12 of the Arbitration Ordinance (Cap 341) (the Ordinance). On 25 May 1992, the parties agreed to the appointment of a sole arbitrator. During the course of the arbitration, the parties issued summonses for leave to serve interrogatories and discovery, which summonses purported to be issued under s 14 of the Ordinance. The arbitrator gave an award, without reasons, in CRM's favour on 26 April 1993 and subsequently, declined to give reasons on the ground that he had not been asked to do so before making his award. Ananda sought leave to appeal against the award and on 22 June 1993, Kaplan J refused leave on the ground that the arbitration was an international arbitration which was covered by the Uncitral Model Law, under which there was no right of appeal against arbitration awards: see [1993] 2 HKLR 331. The Court of Appeal refused Ananda's appeal against Kaplan J's decision on 22 February 1994: see [1994] 1 HKC 204 .

On 5 March 1994, CRM applied ex parte under s 2H of the Ordinance for leave to enforce the award as a judgment of the High Court. Kaplan J granted leave subject to a temporary stay to enable Ananda to oppose enforcement. Ananda applied for Kaplan J's order to be set aside and issued an originating notice of motion for a declaration that the arbitrator's award was a nullity on the ground that his appointment was void or, alternatively, that the award should be set aside on the ground of mutual mistake, in that both parties believed the arbitration was domestic whereas it was an international arbitration to which the Uncitral Model Law applied.

Held, dismissing the application:

(1) Despite the parties having proceeded with the appointment process and with the interlocutory stages of the arbitration as if it were a domestic arbitration,

there was a valid, subsisting and binding agreement to which the provisions of the Uncitral Model Law applied.

(2) There was no evidence of mutual mistake because it was clear that neither party had, at the time of making the arbitration agreement, considered the nature of the agreement. In any event, the alleged mutual mistake relied upon by Ananda was not one of fact but of law, and it did not go to the root of the contract. The question which had to be asked was whether the parties did agree to arbitrate, not whether they ever properly analysed the legal nature of their ar-

bitration agreement, nor whether if they did analyse the nature of the agreement, they did so correctly.

(3) Ananda was barred by res judicata/issue estoppel from re-opening points which had previously been determined by Kaplan J and by the Court of Appeal, viz that there was a valid, subsisting and binding arbitration agreement and that neither party had applied its mind as to whether the arbitration agreement was domestic or international. It was also too late and an abuse of process for Ananda to seek to raise new arguments now.

Cases referred to

Antaios, The; Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191

Associated Japanese Bank (International) v Credit du Nord SA [1988] 3 All ER 902

Bell v Lever Brothers [1932] AC 161

Greenhalgh v Mallard [1947] 2 All ER 255

Grist v Bailey [1967] Ch 532

Henderson v Henderson [1843] 3 Hare 100

Lee Chang Yung Chemical Industry Corp v PT Dover Chemical Co [1990] 1 HKC 132

Solle v Butcher [1950] 1 KB 671

Torrance v Bolton (1872) 8 Ch 118 ER 902 ER 255 App 118

Westminster Chemicals & Produce v Eichholz and Loeser [1954] 1 Lloyd'S Rep 99

Yat Tung Investment Co v Dao Beng Bank [1975] AC 581

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 2H, 12, 14(1), 23(3)

(HK) Arbitration (Amendment) Ordinance 1991 (Ordinance No 56 of 1991)

Other legislation referred to

Anson Law of Contract (26th Ed) p 289

Uncitral Model Law arts 1, 11, 31(2)

Application

This was an application by the defendant pursuant to s 2H of the Arbitration Ordinance (Cap 341) to set aside an order granting leave to enforce an arbitration award as a judgment of the High Court. The defendant also issued an originating notice of motion seeking a declaration that the award of the arbitrator was void or should be set aside. The facts appear sufficiently in the following judgment.

Adrian Huggins QC and P Ng (Slaughter & May) for the plaintiff.

John Swaine QC and A Leong (Pang Wan & Choi) for the defendant.

KAPLAN J

The plaintiff (CRM) was a successful claimant in an arbitration heard before Mr Anthony Dicks QC (as he now is). He rendered an award in CRM's favour on 26 April 1993.

The defendant (Ananda) sought my leave to appeal against the award pursuant to s 23(3) of the Arbitration Ordinance (Cap 341) (the Ordinance). On 22 June 1993, I refused leave on the grounds that the arbitration was an international arbitration which was covered by the Uncitral Model Law and, under that law, there is no right of appeal either with or without leave of the court. Ananda appealed my decision to the Court of Appeal, and the appeal was dismissed.

CRM applied to me ex parte on 5 March 1994 under s 2H of the Ordinance for leave to enforce the award as a judgment of this court and I granted leave subject to the usual stay in order to give Ananda an opportunity to oppose if they so wished.

Ananda duly applied for the ex parte order to be set aside and in addition, they issued an originating notice of motion seeking a declaration that the award of Mr Dicks is a nullity on the grounds that the appointment of Mr Dicks was void or, alternatively, should be set aside for mutual mistake on the part of both parties, namely, that they believed that the arbitration was one within the domestic regime of the Ordinance whereas, in fact, it was one to which the Model Law applied.

My decision refusing the application for leave to appeal is reported in [1993] 2 HKLR 331. The Court of Appeal's judgment in CA 139/93 was handed down on 22 February 1994: see *Ananda Non-Ferrous Metals Ltd v China Resources Metal and Minerals Co Ltd* [1994] 1 HKC 204 . In order to understand the way in which Mr John Swaine QC puts Ananda's case now, it is necessary to have regard to some of the matters canvassed in the earlier judgments.

CRM was the buyer from Ananda of 40 tonnes of Chinese cadmium ingots under a contract of sale. Delivery was agreed at end August/early September 1991. A dispute arose as to the quality of the goods delivered. CRM instituted arbitration proceedings against Ananda in April 1992. The arbitration clause provided for arbitration in Hong Kong under Hong Kong law.

As I said in my earlier judgment, I do not think that either side properly focused on the issue as to whether this was an international arbitration to which the Model Law applied. Had they done so, they would surely have realized that because the delivery of the goods was to take place in Rotterdam, a substantial part of the obligations of the commercial relationship was to be performed outside of Hong Kong and, thus, this was an arbitration agreement which came within the Model Law (see art 1).

Be all that as it may, the matter did proceed differently. On 14 April 1992, Slaughter & May for CRM wrote to Ananda's solicitors requesting them to concur in the appointment of an arbitrator pursuant to cl 11 of the sales confirmation dated 24 July 1991, failing which they threatened to apply to the court for the appointment of an arbitrator under s 12 of the Ordinance. This is, of course, a domestic section. If the Model Law applied, then, art 11 is relevant. By letter of like date, Slaughter & May proposed the name of three barristers whom were acceptable to their clients.

Further correspondence ensued but eventually, by letter dated 25 May 1992, Ananda's solicitors agreed to the appointment of Mr Dicks.

Mr Swaine QC has correctly pointed out that under the domestic regime there is to be one arbitrator unless the parties agree on more, whereas under the Model Law there are to be three unless the parties agree on one. He submits that the appointment of Mr Dicks as sole arbitrator was a very strong indication that both sides were considering this to be a domestic arbitration.

Mr Swaine QC, then, relies upon various other matters to which I made reference in my earlier judgment. On 17 November 1992, Ananda issued a summons seeking the arbitrator's leave to serve interrogatories and they headed this summons as being pursuant to s 14(1) of the Ordinance which is a domestic section (subject, of course, to the terms of the Arbitration (Amendment) Ordinance 1991).

Slaughter & May, then, followed suit by issuing on 24 November 1992, a summons for discovery which they headed as being pursuant to s 14(1) of the Ordinance.

Ananda also relied on certain correspondence relating to whether Mr Dicks was obliged to give reasons for his refusal to permit interrogatories, whereas under art 31(2) of the Model Law, an arbitrator is obliged to give reasons for his award. This, Mr Swaine QC submits, is yet another indication that the parties thought they

were dealing with a domestic as opposed to an international arbitration. This point continues because after the final award, Mr Dicks declined to give reasons on the grounds, permitted under the domestic regime, that he had not been asked to give reasons before rendering his award.

Mr Swaine QC submits that it is clear that all along the parties and the arbitrator thought they were dealing with a domestic dispute. The first time that the Model Law was mentioned was when Mr Joseph Fok, who then appeared for CRM, put in a skeleton argument shortly before the application for leave to appeal was heard before me. Ananda's deponent, Diana Shang, states the following in para 11 of her affirmation:

> To the plaintiff (Ananda), it has all along been both parties' intention that the arbitration would be a domestic one under the Ordinance of the laws of Hong Kong. The sudden change of stance by the defendant and its legal advisers was,
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> *[1994] 3 HKC 526 at 530*
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> I respectfully submit, a forensic exercise. The correctness of such an argument has been upheld by the Court of Appeal but at the same time, it means that both the plaintiff and the defendant had been acting under a common mistake and belief that the arbitration was a domestic arbitration to which the Uncitral Model Law has no application when in fact it was an international arbitration.

Mr Swaine QC places his case fairly and squarely on the following passage from the judgment of Denning LJ (as he then was) in *Solle v Butcher* default [1950] 1 KB 671, 692, where he said:

> Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court, it was said, had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained: *Torrance v Bolton* default per James LJ.

The court had, of course, to define what it considered to be unconscientious but, in this respect, equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental; or if one party, knowing that the other is mistaken about the terms of an offer of the identity of the person by whom it is made, lets him remain under his delusion and concludes a contract on the mistaken terms instead of pointing out the mistake ... .

A contract is also liable in equity to be set aside if the parties were under a common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party seeking to set it aside was not himself at fault.

Mr Swaine QC also relies upon the decision of Goff J in *Grist v Bailey* default [1967] Ch 532. In that case, the defendant agreed to sell to the plaintiff a house for £850, subject to the existing tenancy thereof. The value of the house was in fact £2,250 with vacant possession. At the time of sale, both parties believed that the house was occupied by a tenant who was entitled to remain in the house as a protected tenant under the Rent Acts. This was in fact an erroneous belief. The alleged tenant was only doubtfully entitled to claim protection but, in any event, he left the house without making any such claim. The judge held that there was a common mistake which was not such as would avoid the contract but, in equity, the mistake was fundamental. There being no fault on the part of the defendant, relief in equity was given in that the sale at £850 was set aside on terms that the defendant would enter into a fresh contract at a price of £2,250.

Mr Swaine QC extracts the following principles from these two cases:

> (1) Firstly, one or both of the parties must have contracted under a mistake. If the mistake is mutual, then, in some sense, it must be
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> *[1994] 3 HKC 526 at 531*
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> 'fundamental' or 'material' before the court will intervene. If it is unilateral, then, it must either have been induced by a misrepresentation or have been known to the other party when he concluded the contract.
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> (2) Secondly, the circumstances of the case must be such that it would be inequitable for the party seeking to uphold the contract to rely on his strict rights at common law.
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> (3) Thirdly, the party seeking to set the contract aside must not himself have been at fault.

Mr Swaine also relies on certain passages at p 289 in *Anson's Law of Contract*(26th Ed).

Applying these principles to the facts of this case, Mr Swaine submits that there was a mutual mistake as to the nature of the arbitration over which the arbitrator would be appointed to preside, in that both parties believed this was going to be a domestic arbitration. Mr Swaine contends that this mutual mistake was fundamental and material given the differences between the domestic and international regimes to which I have referred above.

Mr Swaine submits that in the circumstances of the case, it would be inequitable for CRM to rely on its strict rights to contend that the arbitration is an international one because had Ananda known about the arbitration being one under the international regime, Ananda could and would have appointed three arbitrators instead of one and opted out of the Uncitral Model Law if there was only to be one arbitrator. Finally, he submits that Ananda has not been at fault and that in all the circumstances, Ananda has satisfied the requirements for the court to grant relief in equity in cases of mistakes committed by parties to a contract. He invites me to set aside the appointment of the arbitrator for mutual mistake on the part of the parties and he further submits that the just and equitable order I should make is for the parties to arbitrate afresh pursuant to the arbitration agreement when each of them knows that it will be an arbitration to which the Uncitral Model Law will apply.

Mr Adrian Huggins QC, who appears for CRM, began by taking objection to various parts of Diana Shang's affirmation where she says such things as 'the plaintiff was advised by its solicitor that solicitors acting for both parties treated the arbitration as a domestic arbitration'. She does not give the name of the solicitor who is alleged to have given that advice and the source of information is missing. I agree with Mr Huggins that it is entirely a matter for me to draw such inferences as I consider proper from the documents referred to but whatever Diana Shang was advised by her solicitors was an inference to be drawn from those documents as to 'the thinking and intentions of defendant's solicitors' is inadmissible.

Mr Huggins' first point was that the point now sought to be raised is res judicata /issue estoppel in the narrow sense. He points out that in the

hearing before me and, thereafter in the Court of Appeal, the following issues were determined:

> (1) That there was a valid, subsisting and binding arbitration agreement between the parties contained in cl 11 of the sales confirmation, the legal nature of which was an 'international' one and not a domestic one. That is what I held and in the Court of Appeal, Ananda did not challenge my finding on this point. Mr Huggins, therefore, submits that it is not open to Ananda to relitigate the self-same issue and to argue now that the appointment of Mr Dicks should be set aside.
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> (2) I also held that neither part had applied their minds at the time of the arbitration as to whether the agreement was for an international or domestic arbitration. In the Court of Appeal, Mortimer JA said:

> It is more likely that the judge was right in thinking that no adequate attention had been given to the point by the parties or their advisers.

Mr Huggins, therefore, submits that it is not open to Ananda now to argue that these findings were wrong and submit that the parties did apply their minds to this point at the time and that they proceeded under a mutual mistake that the arbitration agreement was for a domestic arbitration and not an international one.

I think that Mr Huggins is correct in this submission. I have decided that there was a valid, subsisting and binding agreement to which the provisions of the Uncitral Model Law apply. That point was not challenged in the Court of Appeal. It does seem to me that Ananda is now trying to have a second bite at the self-same cherry. Further, it seems to me that the present argument based on mutual mistake is quite inconsistent with my finding, supported by the Court of Appeal, that there was no meeting of the minds on this issue and, therefore, no mutual mistake.

Mr Huggins also relies upon res judicata /estoppel in the wider sense of abuse of process. He submits that it is an abuse of the process of this court for Ananda now to seek to introduce new arguments or evidence as to why they say that the agreement to appoint Mr Dicks should be set aside. Mr Huggins relies upon the well-known case of *Yat Tung Investment Co Ltd v Dao Heng Bank* [1975] AC 581 , which reaffirms a classic

passage in the judgment of Wigram VC in *Henderson v Henderson* 1843 3 Hare 100, 115, where the judge stated:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea on res judicata applies, except in special cases, not only to points upon
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> which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.

In *Greenhalgh v Mallard* default [1947] 2 All ER 255, 257, Somervell LJ said:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide but it covers issues of facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be in abuse of the process of the court to allow a new proceeding to be started in respect of them.

In my judgment, the point now taken could and should have been taken (and that evidence produced) before me and the Court of Appeal. It is now too late to raise this matter. The present argument is inconsistent with Ananda's position before me. On that occasion, Mr Sarony QC, who then appeared for Ananda, submitted that I should draw the only possible inference that both parties were agreeing in writing to treat the agreement as a domestic one. Now it is being said but there was no meeting of minds as to that but in fact both parties were labouring under the same mistake of fact.

In so far as Ananda puts its case on the basis that it thought that it was agreeing to a domestic arbitration two consequences follow. Firstly, one has to consider whether there were any reasonable grounds for that belief. I do not think that there were any such grounds because it is plain and obvious that delivery was to be performed outside the place where both parties carried on their business. Secondly, I have to be satisfied that there was a mutual as opposed to a unilateral mistake. I find it impossible so to conclude. Ananda's case has changed so much that it is hard to be sure what they thought at the relevant time. Mr Sarony was submitting that they opted into the domestic regime which is quite inconsistent with the argument now that at the time they thought they were agreeing to a domestic arbitration. In any event, I am not satisfied that there is sufficient evidence to show that CRM and/or their solicitors were also labouring under the same mistake as it is alleged were Ananda. I do not resile from my conclusion that the parties did not apply their mind to this problem and that until the issue became relevant, they both had no position on it. If I am wrong about that in relation to Ananda but I am correct with regard to CRM and Slaughter & May, then, no mutual mistake has been made out. I am not satisfied that Ananda can rely on any misrepresentation on the part of CRM or its solicitors.

In my judgment, there is a further bar to Ananda's claim and that it is that they are estopped from taking the point they now wish to take by reason of the following matters:

[1994] 3 HKC 526 at 534

(1) They expressly agreed to the appointment of a sole arbitrator. In this regard, the comments of Devlin J in *Westminster Chemicals & Produce Ltd v Eichhloz and Loeser* default [1954] 1 Lloyd's Rep 99, particularly the observations that appear between pp 104 and 105 are helpful. There, the learned judge makes the point that if you have appointed an arbitrator, as indeed Ananda had, 'the first logical question does not then become 'what did I do?' but 'what authority did I give to the arbitrator?'.

(2) Ananda participated in the arbitration before the arbitrator and accepted the fact that he had jurisdiction to arbitrate. In fact, Ananda formerly abandoned a point it had intended to take to the effect that the arbitrator lacked jurisdiction. [See p 2 of the interim award.]

(3) Ananda participated in asking the arbitrator to reserve other questions for a final award. [See p 43 of the interim award.]

(4) Ananda sought leave to appeal against the interim award both before me and the Court of Appeal on the basis that there was a valid and subsisting arbitration agreement. Their present stance is now quite inconsistent with their application for leave to appeal.

> (5) On 18 February 1994, after the argument in the Court of Appeal but before delivery of judgment, Ananda issued a further notice of motion for leave to appeal against the final award of Mr Dicks again on the basis that the final award was valid and subsisting. This application made no reference to the appointment of Mr Dicks being void in law or equity.

In my judgment, it would be quite intolerable and contrary to principle and common sense to permit Ananda now to change course directly and attack the very appointment of Mr Dicks in the way suggested whether in law or equity. It would be quite intolerable in the exercise of the court's equitable jurisdiction to enable Ananda to set aside the appointment and, thus, the award and force CRM and other arbitrator/arbitrators to start all over again. There has to be an end to litigation and arbitration, and I am not prepared to permit Ananda to start all over again on the basis which they have now put forward or on any basis at all.

Mr Huggins further submits that if Ananda accepted that there was a valid subsisting and binding international arbitration agreement between the parties but because their solicitor thought, wrongly, that it was a domestic one at the time that the arbitrator was appointed and that therefore the appointment of the arbitrator was invalid, he wished to argue as follows:

> (1) The factual premise upon which the argument is based, namely, that there was a mutual mistake and that both parties were acting under a common mistaken belief that the arbitration was a domestic arbitration to which the Uncitral Model Law had no application, is not accepted.
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> *[1994] 3 HKC 526 at 535*
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> He relies upon an affirmation by the deputy general manager of CRM, Mr Ding, sworn on 7 June 1993, para 4 of which states as follows:

> Prior to signing the sales confirmation, I had not applied my mind to whether any arbitration which might result from a breach of the contract would be 'international' or 'domestic'; I am not a lawyer and the phrase meant nothing to me from a legal point of view. When I read the terms and conditions of the sales confirmation, however, I noticed cl 11 of that document stated (the clause is then set out) ... .

He continues in para 5 in the following terms:

> My understanding from the terms and conditions of the sales confirmation was that there would be no right of appeal to any court once an arbitration award had been made as the parties had agreed, by signing the sales confirmation, that an arbitration award would be final and binding on them. I was unaware of the Uncitral Model Law until the plaintiff sought to appeal from the interim award of Mr Dicks dated 26 April 1993 which appeal was heard on 22 June 1993. Prior to that appeal being made, I had not discussed with Slaughter & May, China Resources' solicitors, the question of whether this arbitration was 'international' or 'domestic'. This matter was only discussed with them after the plaintiff sought to appeal from the interim award of Mr Dicks.

No further evidence was put in after Mr Ding's affirmation and no application was made to cross-examine him. It seems to me that on this evidence, Mr Huggins must be right when he submits that Ananda has failed to establish the factual premise for its argument based on mutual mistake.

> (2) Mr Huggins also makes the point that it is immaterial whether the parties' solicitors analysed the arbitration agreement as either domestic or international at the time of the arbitration because in determining whether there was any mutual mistake between the parties, the time of contract is the relevant point to consider.
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> I did not intend to go into the other points raised by Mr Huggins but it seems to me that there is force in his submission that the 'mutual mistake' argument is simply an attempt to rehash the earlier unsuccessful argument based on 'estoppel by representation'. I also think it is right that these two arguments amount to the same thing in essence, namely, that there was a mutual assumption or understanding as to a particular state of affairs, which assumption was incorrect, and it would now be unfair to allow CRM to rely on the correct position.
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> One of the problems facing Mr Swaine is that the alleged mutual mistake upon which he relies is one of law and not of fact and in my judgment, it is not one which goes to the root to the contract. The question which has to be asked is whether the parties did agree to arbitrate, not whether they ever properly analysed the legal nature of
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> *[1994] 3 HKC 526 at 536*

> their arbitration agreement nor, as Mr Huggins puts it, whether if they did, they did it correctly. The whole application before me on a previous occasion and before the Court of Appeal was predicated on the basis that both parties accepted the appointment of the arbitrator as valid and it is too late now to go back on that.

Finally, I think it is important to make reference to a decision of Steyn J in *Associated Japanese Bank (International) Ltd v Credit Du Nord SA* default [1988] 3 All ER 902. This case concerned mutual or common mistake and the learned judge set out the law quite clearly between pp 264 and 269. Having referred to cases such as *Solle v Butcher* default and the well-known case of *Bell v Lever Brothers* default [1932] AC 161, he said this at p 268:

> The first imperative must be that the law ought to uphold rather than destroy apparent contracts. Secondly, the common law rules as to a mistake regarding the quality of the subject matter, like the common law rules regarding commercial frustration, are designed to cope with the impact of unexpected and wholly exceptional circumstances on apparent contracts. Thirdly, such a mistake in order to attract legal consequences must substantially be shared by both parties and must relate to facts as they existed at the time the contract was made. Fourthly, and this is the point established by *Bell v Lever Brothers Ltd* default ... , the mistake must render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist. While the civilian distinction between the substance and attributes of the subject matter of a contract has played a role in the development of our law (and was cited in speech of *Bell v Lever Brothers Ltd* default), the principle enunciated in *Bell v Lever Brothers Ltd* default is markedly narrower in scope than the civilian doctrine. It is therefore no longer useful to invoke the civilian distinction. The principles enunciated by Lord Atkin and Lord Thankerton represent the ratio decidendi of *Bell v Lever Brothers Ltd.* default Fifthly, there is a requirement which was not specifically discussed in *Bell v Lever Brothers Ltd.* default What happens if the party, who is seeking to rely on the mistake, had no reasonable grounds for his belief? An extreme example is that of the man who makes a contract with minimal knowledge of the facts to which the mistake relates but is content that it is a good speculative risk. In my judgment, a party cannot be allowed to rely on a common mistake where the mistake consists of a belief which is entertained by him without any reasonable grounds for such belief ... . That is not because principles such as estoppel or negligence require it, but simply because policy and good sense dictate that the positive rules regarding common mistake should be so qualified. Curiously enough, this qualification is similar to the civilian concept where the doctrine of error in substantial is tempered by the principles governing culpa in contrahendo. More importantly, a recognition of this qualification is consistent with the approach in equity where fault on the part of the party adversely affected by the mistake will generally preclude the granting of equitable relief: *Solle v Butcher* default .

I have found this a useful passage. I fail to see how it can be said that Ananda, through the minds of its directors, had any reasonable belief that

this arbitration agreement which they entered into through cl 11 of the sales confirmation was anything but an international arbitration to which the Uncitral Model Law applied. As I have said, I do not think, despite what is said on affidavit now, that Ananda ever did properly apply their mind to this particular point. However, one has to have regard to the sanctity of the arbitration agreement and if Ananda failed to apply their mind to the consequences which resulted from the fact that the goods were to be delivered in Rotterdam, they can only have themselves to blame. The law is, of course, concerned with being fair and minimising as far as possible the effect of a party acting under a mistake. However, there has to be a limit to this paternalism and a court can only intervene on the settled principles which have been established over the years. I am not convinced that Ananda has entered into a contract, the subject matter of which is essentially and radically different from the subject matter which the parties believed to exist. They agreed to arbitrate their dispute as opposed to litigate it. They had the good fortune of having a skilled and experienced arbitrator to resolve their dispute. Naturally, they are upset they lost. However, it has to be said that even under the domestic regime, there have only been two known instances of leave to appeal being granted in the 12 years that this provision has been in force. If one applies the principles laid down by the Hong Kong Court of Appeal in *Lee Chang Yung Chemical Industry Corp v* default *PT Dover Chemical Co* default [1990] 1 HKC 132 , it is obvious that any application to appeal the award of Mr Dicks is at the top of the scale or spectrum of cases, where the presumption of finality is strongest because leave can only be granted in this situation, to use the words of Lord Diplock in the *The Antaios* default [1985] AC 191, 206, where he said that leave should only be granted if the arbitrator is:

> So obviously wrong as to preclude the possibility that he might be right.

It follows therefore that I am not satisfied that the contract entered into was essentially and radically different from that which the parties believed to exist and I am further satisfied that Ananda had no reasonable grounds, in all the circumstances of this case, to come to a conclusion that at the time they were entering into the contract or at the time they were appointing Mr Dicks that this was a domestic arbitration agreement.

For all these reasons, therefore, I do not consider that this is an appropriate case to declare that the appointment of Mr Dicks should be set aside on the grounds of mutual mistake. I do not think that such an argument has been made out in law and insofar as the argument is based upon the equitable jurisdiction of this court, then, for the reasons which I have set out above, I do not think that this is an appropriate case in which it would be right to exercise the court's equitable jurisdiction to grant relief to Ananda. In all the circumstances, therefore, this application is dismissed.

[1994] 3 HKC 526 at 538

I should have made clear at the outset of this judgment that there was an application for leave to amend the originating notice of motion so as to bring in the point that the appointment should be set aside for mutual mistake. Mr Huggins initially put into his skeleton argument the submission that leave should not be granted because if I was with him at the end of the day, it would be an immaterial amendment. However, I think that for the sake of completeness and bearing in mind that this matter might proceed further, it is probably safer to give leave to amend as sought by Mr Swaine but to refuse the relief at the end of the day. That will prevent the need for there being more than one appeal if this matter is to be taken further.

I also propose to make a costs order nisi in favour of CRM.