NANJING CEREALS, OILS AND FOODSTUFFS IMPORT & EXPORT CORP v LUCKMATE COMMODITIES TRADING LTD - [1994] 3 HKC 552

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 1167 OF 1994

16 September 1994

Arbitration -- Award -- Order for enforcement -- Application to set aside -- Failure of defendants to present own case -- Whether court obliged to set aside order to enforce in circumstances -- Arbitration Ordinance (Cap 341) s 44(2)(e)

The plaintiffs agreed to buy from the defendants fishmeal under a contract for the sale of goods. The defendants failed to deliver the fishmeal and the matter was referred to the China International Economic and Trade Arbitration Commission (CIETAC) pursuant to an arbitration clause in the contract.

The arbitration tribunal decided in favour of the plaintiff. The defendants were represented in these proceedings. However, a lesser quantum of damages than that sought by the plaintiffs was awarded because the arbitration tribunal, through independent investigation, found that the plaintiffs' calculation for the quantum of damages was wrong.

The defendants failed to pay the plaintiffs before the deadline and the plaintiffs applied to the court for leave to enforce the award. The application was opposed by the defendants under s 44 of the Arbitration Ordinance (Cap 341). Leave was, however, granted to enforce the award and the defendants took out this summons to set aside the order.

The defendants contended that they were unable to present their case as regards the quantum of damages to the tribunal because the award was reached by independent investigation and the defendants were not even told about the evidence which the tribunal had gathered for itself nor given a chance to question it.

Held, dismissing the summons:

(1) Section 44 of Arbitration Ordinance (Cap 341) was discretionary. Even if there were grounds to set aside the award, there remained discretion to refuse to do so.

(2) The principle to be applied under the old CIETAC rules was that even when one took into account that the parties had chosen an arbitral law and practice which differed from that practised in Hong Kong, there was still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, could not be expected to approve. *Paklito Investment v Klockner East Asia* 1993 2 HKLR 39 applied.

(3) The court was not satisfied that the defendants had made out sufficient grounds to refuse leave to enforce the award under s 44 of the Arbitration Ordinance. Even if they had made out sufficient grounds, this was a classic case where a court should exercise its discretion to refuse to set aside an award due to the failure of the defendants to prosecute their own case properly by submitting their own evidence to the tribunal. The fact that the award was lower than that

sought by the claimants was also a powerful factor against exercising discretion not to enforce.

Cases referred to

Paklito Investment v Klockner East Asia [1993] 2 HKLR 39

Qinghuangdao Tongda Enterprise Development Co v Million Basic Co [1993] 1 HKLR 173

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) s 44

Application

This was an application to set aside an order for enforcement of an arbitral award by the China International Economic and Trade Arbitration Commission in relation to an international sale of goods. The facts appear sufficiently in the following judgment.

HY Wong (Vincent TK Cheung, Yap & Co) for the plaintiffs.

Kenneth CL Chan (Livasiri & Co) for the defendants.

KAPLAN J

This hearing concerned an application by the defendant to set aside my order dated 16 June 1994 granting leave to the plaintiff to enforce an arbitration award dated 25 October 1993 of China International Economic and Trade Arbitration Commission (CIETAC). The said award was a Convention award, made under the 'old' rules of CIETAC dated 1 January 1989.

The grounds for the opposition of enforcement is contained in s 44 of the Arbitration Ordinance (Cap 341), which provides, inter alia:

> (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves --
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding or was otherwise unable to present his case ...

Thus, s 44 can be seen to be discretionary; even if there are grounds to set aside the award, there remains discretion to refuse to do so.

Under a contract dated 19 December 1991, the plaintiffs agreed to buy, and the defendants agreed to sell, 1,500 metric tonnes of Peruvian fishmeal at US$530 per tonne. The defendants failed to deliver the fishmeal, and the matter was referred to CIETAC pursuant to an arbitration clause in the contract.

The plaintiffs asked the arbitration tribunal for damages of 573 yuan/ton calculated as follows:

> 530 x 5.9 (exchange rate) = 3,127 yuan/ton
>
> 3127 yuan/ton + 100 yuan/ton (expenditure) = 3,227 yuan/ton
>
> The profit was:
>
> 3800 yuan/ton (the price of the sub-sale)
>
> less 3227 yuan/ton = 573 yuan/ton

The arbitration proceedings took place in Peking on 22 March 1993, at which the defendants were legally represented. On 25 October 1993, the arbitration tribunal decided in favour of the plaintiffs on liability, but awarded the plaintiffs a quantum of damages somewhat less than had been sought. They said:

> Through independent investigation, the arbitration tribunal holds that the resale price of 3800 yuan/ton by the claimants was too high; 3,700 yuan/ton was more reasonable. The expenditure claimed by the claimants was too low, 150 yuan/ton was more reasonable. Therefore the profit loss of the claimants shall be calculated out as 3,700 yuan/ton less 3,277 yuan/ton = 423 yuan/ton.

The tribunal therefore handed down its decision that the defendants should pay the plaintiffs RMB919,500 before 10 December 1993, together with the arbitration fee of RMB31,850. The defendants failed to pay, so the plaintiffs applied to this court on 30 May 1994 for leave to enforce the said award, which leave was granted by my order dated 16 June 1994.

The defendants now argue before this court that they were unable to present their case as regards quantum to the tribunal, basing their argument on the passage in the award quoted above beginning, 'Through independent investigation ...'. Since the award was made under the old CIETAC rules, the defendants sought to apply the principle established in *Paklito Investment Ltd v Klockner East Asia Ltd* 1993 2 HKLR 39, where I held that:

> even when one takes into account that the parties have chosen an arbitral law and practice which differs to that practised in Hong Kong, there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve.

Mr Kenneth CL Chan, for the defendants, argued very persuasively that in this case, the defendants were in an even worse situation than the defendants in the *Paklito* case, since they were not even told about the evidence which the tribunal had gathered for itself, let alone given the chance to question it.

However, it appeared that the defendants had had ample opportunity to present their own evidence as to quantum to the tribunal, but by their own admission, they had failed to do so. In addition, regarding the issue of whether I should exercise my discretion in refusing in any case to set aside the award, Mr Chan conceded that the fact that the final award was lower than that claimed by the plaintiffs was against his clients.

For the plaintiffs, Mr HY Wong submitted that this court was not a Court of Appeal. The defendants had been present in person along with their legal representative at the hearing. The tribunal did not prevent the defendants from submitting supplementary evidence. Mr Wong pointed out that the defendants by affidavit have also accepted the plaintiffs' submission that the price of fishmeal was 3,800 yuan/ton, and therefore can have nothing to complain about in the tribunal's decision to use a price of 3,700 yuan/ton, since this served to reduce the amount awarded against them. I accept this argument.

Regarding the expenditure aspect of the award, I am satisfied that the defendants had ample opportunity to present their arguments to the tribunal. According to their affidavit, the defendants were able to address the tribunal, albeit briefly, on the expenditure matters which had been given in a handwritten note to their legal representative at the hearing. At the conclusion of the hearing, the tribunal requested both parties to submit supplementary materials within the following two weeks. The certified translation is not clear about whether the tribunal conducted its own investigation into the expenditure as well as into the resale price. At all events, the defendants maintain that they did not submit their own figures to the tribunal, though this was clearly going to be an issue before the tribunal, nor, it appears, did they avail themselves of the opportunity to submit them later. That decision was up to them. They must now live with its consequences.

Their omission was similar to that of the defendants in another case, namely, *Qinghuangdao Tongda Enterprise Development Co v Million Basic Co Ltd* 1993 1 HKLR 173, where I held:

> It is not accepted that the defendant had no opportunity to present its case. On the contrary, the defendant made full use of the ample opportunity given and only complained after the proceedings had finally been closed, having foregone the opportunity of asking for an extension of those proceedings. All proceedings must have a finite end.

In conclusion, I am not satisfied that the defendants have made out sufficient grounds for me to refuse leave to enforce the award under s 44 of the Arbitration Ordinance. Even if they had made out sufficient grounds, in my opinion, this is a classic case where a court should exercise its discretion to refuse to set aside an award due to the failure of the defendants to prosecute their own case properly by submitting their own evi-

dence to the tribunal. The fact that the award was lower than that sought by the claimants is also a powerful factor against exercising discretion not to enforce.

I therefore dismiss this summons to set aside the ex parte order granting leave to enforce the arbitration award.The amount paid into court will be

released to the plaintiffs and the defendants will pay the costs of this summons.