SHENZHEN NAN DA INDUSTRIAL AND TRADE UNITED CO LTD v FM INTERNATIONAL LTD - [1992] 1 HKC 328

HIGH COURT
KAPLAN J

MISCELLANEOUS PROCEEDINGS NO 1249 OF 1991

2 March 1992

Arbitration -- Enforcement -- Dispute as to whether parties agreed on Beijing arbitration or Hong Kong arbitration -- Whether award a 'Convention award' -- Whether procedure irregular -- Role of enforcing court -- Need to refer to sources on convention -- Arbitration Ordinance (Cap 341) s 44

On 11 August 1988, the parties signed two contracts for the sale and purchase of refrigerators, both in the English language and containing a Hong Kong arbitration clause. On 25 August 1988, both parties signed two Chinese/English contracts which related to the same items as specified in the English contracts but provided for arbitration in Beijing under the auspices of the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. A dispute having arisen between parties, the plaintiffs submitted their claim to the China International Economic & Trade Arbitration Commission (CIETAC) in Beijing, which delivered an award in the plaintiffs' favour.The plaintiffs sought leave to enforce the award in Hong Kong. The defendants contended, inter alia, that this was not a Convention award because the parties never agreed to arbitration in China, and that there was real prejudice to the defendants in having the arbitration carried out under the new arbitration rules

Held, granting leave to enforce the award:

(1) What the defendants sought to do was to appeal on the merits. They objected to the arbitral tribunal acting upon the basis of the English/Chinese agreements even though this very point had been argued before the tribunal.
(2) The fact that the arbitral institution chosen by the parties had improved its rules between the time of contract and arbitration is not sufficient to justify refusing enforcement. Such a complaint does not come within the grounds set out in s 44(2)(e) of the Arbitration Ordinance.
(3) The whole tenor of Pt IV of the Arbitration Ordinance is to discourage unmeritorious technical points and to uphold Convention awards except where complaints of substance can be made good.
(4) The court was satisfied that this was a Convention award and that the defendants had not made out any of the grounds set out in s 44(2) of the Arbitration Ordinance and unless they did so, enforcement of a Convention award should not be refused.

Obiter

The Foreign Economic Trade Arbitration Commission (FETAC) and CIETAC of The People's Republic of China were legally the same entity, the change of name merely reflecting the 'internationalization' of China's arbitral body.

Cases referred to

Tai Hing (Asia) Commercial Co v Trinity (China) Supplies (A6585/87, unreported) default

Guangdong New Technology Import & Export Corporation Jiangmen Branch v Chiu Shing t/a BC Property & Trading Co [1991] 2 HKC 459

Werner A Bock v N's Co [1978] HKLR 281

Legislation referred to

(HK) Arbitration Ordinance (Cap 341) ss 2, 41-46, Pt IV

(CH) China International Economic & Trade Arbitration Commission Arbitration Rules art 39 [PRC]

Other legislation referred to

Hong Kong Arbitration-- Cases and Materials (Butterworths) 1991 p 28

Moser ' New Civil Procedure Law Affects Arbitration Practice in China' 2 World Arbitration and Mediation Report pp 117-119

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

Van den Berg Albert Jan New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981)

Van den Berg Albert Jan (ed) Yearbook on Commercial Arbitration (Kluwer)

Summons

This was a summons by the plaintiffs seeking leave to enforce an arbitration award in their favour dated 8 January 1991 made by the China International Economic & Trade Arbitration Commission (CIETAC) of The People's Republic of China. The facts appear sufficiently in the following judgment.

Dennis Chang QC and Eric Shum (Livasiri & Co) for the plaintiffs.

Edward Chan QC and Andrew Cheung (Lian Ho & Chan) for the defendants.

KAPLAN J

By this originating summons, the plaintiffs seek leave to enforce an arbitration award in their favour dated 8 January 1991 made by the China International Economic & Trade Arbitration Commission (CIETAC) of The People's Republic of China.

Hong Kong is a party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards by reason of the United Kingdom's accession on its behalf in 1977. China acceded to the Convention in 1987.

Part IV of the Arbitration Ordinance (Cap 341) (ss 41-46) provides the statutory underpinning of Hong Kong's New York Convention obligations.Section 44 provides as follows:

> *Refusal of enforcement*
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> (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
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> *[1992] 1 HKC 328 at 330*
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> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves --
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> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
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> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
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> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

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

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

(3) Enforcement of a convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

Section 2 of the Arbitration Ordinance, inter alia, provides that:

> 'Convention award' means an award to which Part IV applies, namely an award made in pursuance of an arbitration agreement in a state or territory, other than Hong Kong, which is a party to the New York Convention.

On 11 August 1988, the parties signed two contracts dated respectively 6 and 8 August 1988. Both were in the English language. By these contracts the defendants agreed to sell and the plaintiffs agreed to buy a quantity of refrigerators on various terms which are not germane to the issue before me.

For the reasons which are set out in the evidence, on 25 August 1988, both parties signed two Chinese/English contracts again dated respectively 6 and 8 August 1988. These contracts related to the same items as specified

in the English contracts. However, the Chinese/English contracts contained an arbitration clause providing for arbitration in Beijing under the auspices of CIETAC's predecessor, the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade. The English contracts contained a Hong Kong arbitration clause.

In one of the affirmations filed on behalf of the defendants, the point was taken that CIETAC was not the arbitral body named in the contract and thus 'the composition of the arbitral authority ... was not in accordance with the agreement to the parties'. (See s 44(f) of the Ordinance.)

Quite sensibly, Mr Edward Chan QC, who appeared for the defendants, did not pursue this point. However, I think it may help if the point is completely laid to rest just in case there is a temptation to raise it in future cases. The simple answer to the point is that on 1 January 1989, the name of China's international arbitration organization was changed from the Foreign Economic Trade Arbitration Commission (FETAC) to CIETAC. CIETAC's revised arbitration rules also came into effect on that date, replacing the provisional arbitration rules first issued as long ago as 1956. This very point came before Liu J in *Tai Hing (Asia) Commercial Co Ltd v Trinity (China) Supplies Ltd* default (A6585/87, unreported). Judgment was delivered on 30 May 1989. (This case is noted on p 28 of *Hong Kong Arbitration -- Cases and Materials* (Butterworths) 1991.) Unfortunately, what seems to have happened in that case is that the appropriate documentation was not placed before the judge so as to be able to satisfy him that FETAC and CIETAC were legally the same entity. Had such document been placed before him, I am quite convinced that the judge would have been so satisfied. In fact, such document does exist, because on 21 June 1988, a document was issued by the China State Council which makes clear that these two organizations are legally the same entity and the name of the organization was changed merely to reflect 'the internationalization' of China's arbitral body. This very document is exhibited and appears at p 242 in the bundle. I have not the slightest doubt that this is a bad point and I am fortified in that view by a recent decision of Barnes J in *Guangdong New Technology Import & Ex-*

port Corporation Jiangmen Branch v Chiu Shing t/a BC Property & Trading Co ([1991] 2 HKC 459 . Judgment was delivered on 23 August 1991, where he came to precisely the same conclusion. I trust, therefore, that this point will not see the light of day again.

The total sum claimed by the plaintiffs in the arbitration was some US$2.786m but the award was only for US$148,176.

Mr Edward Chan QC's primary submission is that this is not a 'Convention award' because the parties never agreed to arbitration in China but in fact agreed to arbitration in Hong Kong.

It is clear that there were disputes between the parties in relation to these refrigerators. On 20 September 1989, the plaintiffs submitted their claim to CIETAC.

On 1 December 1989, the defendants put in written submissions to the arbitral tribunal. At the bottom of p 1, they said this:

> According to the stipulation no 17 of the two contracts no 009-TTD-TTA 88 and no 011-TTC-TTA 88, we already explained to the appellant. We did not accepted the arbitration in China. But the appellant decided the Chinese contract no: 100132 dated 8 August 1988 was used only for customs formalities. The appellant had signed our contracts and accepted the arbitration in Hong Kong.Therefore, we regret to accept the arbitration case will be held in Beijing.

Then followed eight pages of argument on the merits.

On 16 July 1990, the tribunal posed various written questions to the parties and on 14 September 1990, the plaintiffs replied thereto.

The first question which the tribunal 'deemed vital to the case' was as follows:

> (1) what is the sequence and the actual date ... of and the respective purpose for and the understanding pertaining to the execution of the three contracts numbered ... and the three contracts numbered ...

It is clear that this question raises the very point in issue, namely whether the parties were bound by the English contracts or the English/Chinese contracts.

The plaintiffs' answer to this question appears on pp 113-117 of the bundle. In essence, they stated that the two English contracts were only letters of intent 'which lost its effect automatically when the five contracts were signed. Because only those five contracts expressed the final intentions of both parties, and in the subsequent course of the performance of the contracts, both parties were also acting in accordance with the stipulation of these five contracts' (sic). The plaintiffs stated that they had only ever agreed to arbitrate in Beijing. They say that they had signed the English contracts in haste in order to signify their intention to do this business. They stated that it was expressly agreed between both parties that these two contracts, ie the English contracts should have no more effect than a letter of intent, with the formal document being subject to further negotiation. They contended that further negotiation did take place.

It is also pertinent to point out that the defendants put forward a counterclaim which was not adjudicated upon because they failed to pay the necessary fees.

The hearing took place in Beijing on 29 June 1990. The defendants were present. They presented evidence and argued on the merits.

In these proceedings, an affidavit of Mr Ling Fung Tong, the defendants' manager, has been placed before me. He stated that after signing the two English contracts, a Mr Li Yuan of the plaintiffs informed Mr Sun and Mr Crozzolli of the defendants that for the purpose of getting the goods through Chinese customs, it was necessary to show a Chinese/English contract. That, he says, was the sole reason why the Chinese/English

contracts were signed. He maintained that both Crozzolli and Sun made it clear when the Chinese/English agreements were signed that the English contracts were the binding ones. He said Mr Lee agreed to this.

It can thus be seen that the tribunal was faced with a conflict of evidence relating to the respective status to be given to these two different contracts.

The tribunal's opinion dealt immediately with this point in the following terms:

> Having heard the statement and defence made by both parties in the course of the hearing and scrutinized the written materials and the relevant evidence submitted, the arbitration tribunal expressed the following opinions:
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> > 1 As to the main contract on which this dispute relied on, there are seven contracts between the claimant and the respondent. The subject matters involved were overlapping, but the clauses are dissimilar. The parties did not make it clear in performing the contracts which contract would prevail. According to common statements made by both parties in the course of hearing, although the dates of the five Chinese-English contracts (numbered 009-TTC-TTA-88, 011-TTC-TTA-88 and 100132) are 6 and 8 August 1988 respectively, the actual date of signing was on or about 25 August 1988. In view of the above, completed with the fact that the respondent agreed to accept the Arbitration Commission to hear the case, the arbitration tribunal held that in order to determine the rights and the obligations of both parties, the provisions of the five English-Chinese contracts should take precedence and the clauses in the two English contracts should be regarded as supplementary provided they are not inconsistent with the clauses in the five English-Chinese contracts. [Sic.]

This passage is perhaps not as clear as it could have been. However, one is entitled to have regard to the submissions which had been put in writing. Both parties gave evidence before the tribunal, and although I have not been shown any transcript of the proceedings, it seems very clear that both sides gave their versions which I have outlined above. Indeed it has not been suggested otherwise in the evidence placed before me. It thus follows that this very point was before the tribunal and they decided it adversely to the defendants. Is this situation any different to the tribunal having decided any other disputed issue of fact or law adverse to the defendants? I think not.

It seems to me that what the defendants are seeking to do is to appeal on the merits. They objected to the tribunal acting upon the basis of the English/Chinese agreements. Are they entitled to raise this point at this stage? In my judgment, they are not. Professor Albert Jan van den Berg in his authoritative book on the New York Convention, *New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* states at p 269:

> It is a generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in art V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention, the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an opposition of a respondent on the basis of the grounds for refusal in art V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration. Accordingly, it has, for example, been held that the objection that the arbitrator wrongly applied German law to the arbitration of the dispute is not a defence under the Convention.

Mr Chan submitted that the initial onus was on the plaintiffs to establish that what was being sought to be enforced was in fact a 'Convention award'. Apart from a couple of procedural points to which I will refer shortly, Mr Chan did not base his opposition on any of the grounds set out in s 44.

I find it impossible to accept Mr Chan's submission on this point. One of the issues before the tribunal, to which they properly directed the parties' attention, was which set of contracts were binding. I think it is clear that they must have accepted the plaintiffs' version of events even though I accept that they did not express this as clearly as would have been desirable. If I be right as to this, then what Mr Chan is effectively attempting to do is to appeal on the merits. He submits that they should have found that the English contracts were binding in which case the parties would have agreed on Hong Kong arbitration. In my judgment, unless Mr Chan can establish one of the New York Convention grounds set out in s 44, his ground of opposition must fail. It is to be noted that the defendants have not sought to introduce any evidence that under Chinese law, the arbitration agreement was not valid (see s 44(2)(b)). I do not base my judgment on any waiver arising by reason of the defendants' participation in the arbitration hearing. Clearly, they were faced with a most difficult position.

It is to be noted that the defendants have not taken any steps to seek the setting aside of this award in the courts of China. Neither have they applied to this court for a declaration that they are not bound by the Chinese/English contracts nor have they sought rectification of the Chinese/English contracts so as to bring the arbitration clause into line with what they say was agreed. The latter course might be very difficult, given that they would have to prove an agreement to arbitrate in Hong Kong.

Section 44(f) of the Ordinance sets out, as a ground for not enforcing an award, the fact that it has been set aside by a competent authority of the country in which it was made. This section mirrors art VI of the Convention,

which provides that the enforcing court can adjourn the application pending the determination of the application to set aside (see s 44(5)).

It is also important to appreciate that the enforcing country and court may have no connection at all with the parties, the subject matter of dispute or the law of the contract. In this case, one party happens to be a Hong Kong company. But the defendants could have had assets in, say, the Philippines (a contracting state) in which case this application could have been made there.

Various decisions have made clear that the Convention is not applicable for setting aside awards. The court of the country of origin of the award is the only court competent to rule.

I now turn to Mr Chan's next point. He submits that even if the plaintiffs are correct and the CIETAC arbitration clause applies, it refers to the 'Provisional Rules of Procedure of the Foreign Trade Arbitration Commission' of the China Committee for the Promotion of International Trade. These rules were in fact changed and new rules promulgated. These new rules were applied to this arbitration. Mr Chan has compared the new rules which were adopted on 12 September 1988 with the provisional rules referred to in the arbitration clauses and he has made a number of points about the differences. He submits that there was real prejudice to the respondents in having the arbitration carried out under these new rules.

I am not impressed with this submission. These new rules were sent to the defendants at the commencement of the arbitration. They took no objection. If they had any objection to them, they presumably could have asked for the arbitration to be under the old rules. It has to be noted that it frequently occurs that arbitral institutions update their rules. In this instance, the new rules have been said to be more liberal than those they replaced.As Mr Michael Moser has written in an article 'New Civil Procedure Law Affects Arbitration Practice in China' (*2 World Arbitration and Mediation Report* pp 117-119):

> It is difficult to see how the parties could have found the new procedure 'objectionable'. The new CIETAC Arbitration Rules are far more liberal than the earlier FETAC Provisional Rules, providing, for the first time for the appointment of foreign arbitrators and containing other provisions of benefits to foreigners.

In my judgment, there is nothing in this point. The fact that the arbitral institution chosen by the parties has improved its rules between contract and arbitration is not sufficient to justify refusing enforcement. Such a complaint does not come within the ground set out in s 44(2)(e). Further, the specific complaints listed by Mr Chan on p 9 of his skeleton argument seem to me to be of little substance.

The use of the word 'provisional' would seem to suggest that changes would be made, but I accept that they were some time in coming.

There is one Hong Kong case in this area and that is *Werner A Bock v N's Co Ltd* [1978] HKLR 281 . This was a Convention award case where Mr Commissioner Liu (as he then was) refused enforcement on the grounds that the composition of the tribunal was not in accordance with the agreement of the parties. The Court of Appeal, while accepting that the procedure followed in the arbitration was irregular, nevertheless enforced the award because the irregularity was of such a nature that it would be unjust to refuse enforcement and permit the defendants to take advantage of this irregularity, since no possible prejudice had been caused to the defendants. In that case, waiver had not been established because it would have to be shown that the defendants knew of the irregularity and knew of his right to object. The latter condition had not been shown. In the present case, the defendants knew that new rules had been made as they were sent to them. The defendants gave no evidence as to whether they knew of their right to object. I do not base my judgment

upon waiver. I prefer to rest my judgment on the observation in *Werner A Bock* to the effect that the whole tenor of Pt IV of the Arbitration Ordinance is to discourage unmeritorious technical points and to uphold Convention awards except where complaints of substance can be made good. In my judgment, no complaints of substance have been made good in the present case.

Mr Ling of the defendants complains that no interpreter was provided. Under art 39 of the new Rules, provision is made if the parties or their witnesses or attorneys are not familiar with Chinese. The Commission may provide an interpreter. None was provided. Mr Ling did the interpreting for the defendants' non-Chinese speaking witnesses. He complains that he is not a qualified interpreter but there is no evidence that he made any complaint about this at the time nor has he demonstrated how, if at all, he was deficient in interpreting for his witnesses.

In conclusion, therefore, I am satisfied that this is a Convention award. I am not satisfied that the defendants have made out any of the grounds set out in s 44(2) of the Ordinance, and unless they do so, 'enforcement of a convention award should not be refused'. I therefore propose to grant the relief sought in the originating summons and give leave to enforce this award as if it were a judgment of this court.

I propose to make a costs order nisi in favour of the plaintiffs.

Before parting with this case, I would like to make the following observations which are not intended as any criticism of counsel or their solicitors. There are almost 90 countries who have acceded to the New York Convention. Courts in Convention countries are being asked to consider the Convention on a regular basis and there are many decisions on the Convention. It is clearly desirable, so far as is practicable, for the interpretation of the Convention to be uniform. Cases under the Convention are increasing dramatically in Hong Kong. In 1989, there were eight applications for enforcement, six being from China. In 1990, there were 13

of which nine were from China. In 1991, there were 20 of which 18 were from China. There is only one text book devoted solely to the New York Convention and that is by Professor Albert Jan van den Berg published in 1981 by Kluwer. That must be the starting point for the consideration of any problem arising under the Convention. But this excellent book is now a little out of date and thus it is essential to keep abreast of new developments by reference to the *Yearbook on Commercial Arbitration* published by the International Council for Commercial Arbitration (ICCA). This too is published by Kluwer and is now edited by Professor Albert Jan Van den Berg. This work is in the Supreme Court Library and is at the Hong Kong International Arbitration Centre and contains reference to all known decisions on the Convention. I was not referred to either of these works and I would suggest that anyone researching or arguing a New York Convention point must start with these two works.