ZHEJIANG PROVINCE GARMENT IMPORT AND EXPORT COMPANY v SIEMSSEN & CO (HONG KONG) TRADING LIMITED - [1992] HKCU 193

SUPREME COURT OF HONG KONG HIGH COURT
NEIL KAPLAN, J

HCMP 144/1992; 1992 NO. MP144

2 June 1992

Arbitration -- Enforcement of award -- CIETAC award -- Whether plaintiff was party to arbitration agreement -- Whether award had become binding on parties -- Whether award as it related to customs tax was contrary to public policy -- New York Convention -- Arbitration Ordinance s 44

Horace Wong instructed by Livasire & Co. for the Plaintiffs.

John Scott instructed by Baker & McKenzie for the Defendants.

HEADNOTE

Arbitration - Enforcement - Section 44 Arbitration Ordinance - New York Convention - CIETAC award - whether claimant in arbitration was party to the arbitration agreement - whether award was binding on the parties - whether award in relation to customs tax was in breach of public policy - use of ex parte procedure in Order 73 rule 10 encouraged.

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On the 12th July 1991 the China International Economic & Trade Arbitration Commission (CIETAC) rendered an arbitration award in favour of Zhejiang Province Garment Import and Export Company against the defendants.

On 14th January 1992 the Plaintiffs issued an Originating Summons pursuant to Sections 2H and 42 of the Arbitration Ordinance seeking leave to enforce this award in the same manner as a Hong Kong judgment. I considered this application ex parte and on 17th February 1992, an order of the court was made giving such leave and entering judgment for certain sums awarded by the CIETAC tribunal. As provided for by Order 73 rule 10(6), the order gave the Defendants 14 days from the service of the order to apply to set aside the order and if within that time the defendants did so apply, execution of the order would be stayed until the application had been finally disposed of.

The defendants duly availed themselves of this provision by applying by summons dated 13th March 1992 to set aside the ex parte order on the grounds therein set out.

Before turning to the issues in this case, I should comment that the procedure used by both parties in this case fully complies with Order 73 rule 10. That rule

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provides that the application for leave may be made ex parte 'but the court hearing the application may direct a summons to be issued'. In my judgment, the ex parte procedure should be used and only if the court directs should a summons be issued. I mention this because I have had two cases recently where the Originating Summons was served upon the defendants and the first hearing before me was an inter partes hearing. Unless there is no contest, the matter is bound to be adjourned to enable the defendants to file evidence as to why the award should not be enforced. That hearing serves no useful purpose and is a waste of costs and court time.

It is far preferable to leave the initiative with the defendant. If he does not contest the matter, costs are kept to a bare minimum. If he does contest the matter he can apply to set aside the ex parte order and file evidence in support. There may or may not have to be a hearing for directions depending on the issues raised.

If the ex parte procedure is not used, the court will require an explanation, and if not satisfied, will consider disallowing the costs of the first return day.

The Issues

Mr. Scott, who appears for the defendants, refined the five grounds of opposition set out in his summons to three.

Firstly, it was contended that the plaintiff was

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not a party to the arbitration agreement pursuant to which the award was made.

Secondly, the award had not become binding on the parties because an alleged condition precedent, namely the return of the defective goods by the plaintiffs to the defendants, had not been satisfied.

Thirdly, he submitted that it would be contrary to public policy to enforce that part of the award which dealt with the reimbursement of Chinese import duties.

An alternative ground was raised and that relied upon the fact that they had been a mistranslation of the award where it dealt with interest. The translation refers to 7.5% per month whereas all parties now agree that it should have been 0.75% per month. If I enforce this award, it is common ground that this correction must be made.

At the outset of his submissions, Mr. Scott conceded that it was not permissible for him to go into the merits of this dispute as he was solely concerned with attempting to bring himself within one or more of the grounds of opposition set out in section 44 of the Arbitration Ordinance which grounds reflect the grounds set out in the New York Convention. He further recognised that the defendants bore the burden of proof.

Was the Plaintiff a Party to the Arbitration Agreement pursuant to which the Arbitration was made ?

By a contract in writing dated 11th February 1989, No. 89CZJ9005, the defendants agreed to sell and China

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National Textiles Import and Export Corp. Zhejiang Garments Branch agreed to buy 242,000 yards of fabric for US$427,560.00 CIF Hangzhou. This contract contained a CIETAC arbitration clause.

A dispute concerning quality arose and this was submitted to CIETAC on 20th August 1990. An arbitral tribunal was formed on 29th October 1990. The tribunal met in Beijing on 17th December 1990. Although notice was sent to the defendants, they did not appear nor did they put in any written defence. The tribunal received the written application from the plaintiffs together with supporting materials. On 17th December, the plaintiffs made oral representations and answered questions from the tribunal.

On 4th January 1991, the plaintiffs submitted to the tribunal a supplement to their claim and the tribunal sent them to the defendants on 5th February 1991.The defendants did not react.

On 11th March 1991, a second hearing took place in Beijing where the tribunal heard further oral representations from the plaintiffs. The defendants did not appear.

The award in favour of the plaintiffs was rendered on 12th July 1991.

Mr. Schroeder, the defendants' managing director, filed an affidavit in which he admitted that the defendants did enter into the above-mentioned contract. He says that the defendants never received any formal notice that the

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party with whom it did enter into the contract ever changed its name to that of the plaintiffs. He admits that the defendants did receive various notices from CIETAC between August 1990 and February 1991. He says that none of these notices refer to the name of the party with whom the defendants originally contracted.

It is not without some significance that the notices which Mr. Schroeder exhibits all contain reference to the identical contract number, namely 89CZJ9005.

In para. 5 of his affidavit, Mr. Schroeder explains the reason why the defendants did not attend the arbitration despite, so he says, having a good defence to the claim, was that the defendants' then managing director had received legal advice from a Hong Kong solicitor to the effect that CIETAC awards were not binding in Hong Kong. This advice, said to be given in November 1990, was clearly wrong as China had acceded to the New York Convention in 1987.

In response to Mr. Schroeder's affidavit, Mr. Chui, the solicitor who had affirmed on behalf of the plaintiffs, filed a second affirmation in which he produced a certification dated 8th April 1990 issued by the Bureau of Administration of Industry & Commerce of Zhejiang Province which states:

> "The former China National Textiles Import and Export Corporation, Zhejiang Garments Branch has changed its name into Zhejiang Province Garment Import
>
> *[1992] HKCU 193 at 7*
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> and Export Company in accordance with the spirit of document Wai Jing Mao Ren Lao Zi No. 143(88) of Foreign Economic Trade Department.
>
> The above is certified."

A seal in the Chinese language is affixed to this document.

I should also point out that there appears to have been an error of translation of the award. Originally, the first five lines read as follows:

> " Pursuant to the arbitration provisions in the contract number 89CZJ9005 dated 11th February 1989 signed by the claimant, Zhiejiang Province Garment Import and Export Co. (formerly known as the branch office of Zhiejiang Province Garment Import and Export Co. of China Clothing Import and Export Co.Head Office)."

That has now been certified by the court translator as reading as follows:

> " Pursuant to the arbitration provisions in the contract number 89CZJ9005 dated 11th February 1989 signed by the claimant, Zhiejiang Province Garment Import and Export Co. (formerly known as China and National Texiles Import and Export Corporation, Zhiejiang Garments Branch)."

Mr. Chiu in his third affirmation exhibited the Provisional Rules of Administration of the Registration of Names and Industry and Commerce Enterprises (approved by the State Council on 22nd May 1985 pronounced by the

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National Bureau of Administration of Industry and Commerce on 15th June 1985). He points out that Rule 6 provides that where the name of an enterprise is prefixed with the name of a province, the registration of the name shall be approved by the Bureau of Administration of Industry & Commerce of that province. He says that the certificate above-referred to is in fact the approval of the name of the plaintiffs by the relevant Bureau in accordance with Rule 6.

Mr. Scott asks how it can be that the contract in this case, which was entered into after the rule was promulgated, referred to 'China'.

No explanation has been given which was a satisfactory answer to this question. However, I am satisfied that this question is of peripheral relevance to the issue which I have to determine.

It is a somewhat bizarre proposition that an organization not a party to the arbitration agreement should wish to become claimant in an arbitration arising out of a dispute in relation to the goods, the subject matter of the contract. There can, of course, be no doubt that the dispute which was submitted to the tribunal was a dispute about this particular contract. There can be no doubt that it was a dispute about these particular goods. There can be no doubt that the defendants knew that it was a claim made in respect of this particular contract which they had entered into because the contract number was on

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the notification documents from CIETAC. I am entitled to take into account that the tribunal must have been satisfied that all they were dealing with was a change of name or else they would have queried the matter. I

am quite satisfied that all that happened here, as is clear from the certificate above referred to, is that the party who entered into the contract sued upon changed its name to that of the plaintiffs.

Mr. Wong pointed out that Mr. Scott had conceded that the burden of proof was on the defendants and he submitted that they had got nowhere near to discharging their burden on this point. Mr. Scott countered by submitting that the defendants had discharged the onus simply by referring to the different names on the two documents. In my judgment, that is not the correct approach. The burden upon the defendants is to show that the plaintiff was not a party to the arbitration agreement, the subject matter of the award which it is now sought to be enforced. In my judgment, they have failed to get anywhere near establishing that fact. I do not think it is necessary for me to consider the different ways in which Mr. Scott attempted to articulate this particular point. His submission that this was not a convention award because there was no agreement between these parties and his submission that the arbitrators had exceeded their authority both fall away once the court is satisfied that one is dealing with a genuine change of name situation. As

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I have said, I am so satisfied and I do not consider that the claimants have to establish an assignment or novation or anything of that nature. They simply changed their name between the date of the contract and the date of the commencement of the arbitration and they are now attempting to enforce the award given in favour of them under their new name. This submission is therefore rejected.

Public Policy

Mr. Scott submitted that I should not enforce that part of the award which provided that:

> " A customs tax of RMB1,859,208.69 that was paid by the claimant shall be borne by both the claimant and the defendant. The defendant shall pay the claimant RMB677,629.44 which should have been paid by it together with the accrued interest thereon ..."

Mr. Scott submitted that a Hong Kong court will not entertain an action by a foreign state to recover foreign tax. He further submits that if a foreign court gives judgment for a defendant to pay tax to a foreign state, it is not enforcible in Hong Kong. He submits that both propositions would be contrary to public policy in Hong Kong. He submits that a Hong Kong court should not assist a foreign state to recover revenue.

He referred me to para. 4 of the award which states on page 14 thereof:

> " According to Article 22 of the 'People's Republic of China Import and
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> *[1992] HKCU 193 at 11*
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> Export Tax Regulations', any claim for tax rebate shall be made within one year of the payment of tax, it will not be considered if there is a delay. As regards this batch of goods, the claimant paid the tax to the Customs on 3rd June 1989. Now the time limit is expired. If this batch of goods is returned to the defendant, the claimant will not be able to recover the customs tax paid by it on behalf of the defendant, this was wholly because of the defendant serious breach of contract.Therefore, the claimant's loss in this aspect should be borne by the defendant."

Mr. Wong submitted, and in my judgment correctly, that this award was not an attempt by a foreign state to recover tax against a foreign defendant.He submitted, and again in my judgment correctly, that all that the tribunal was doing was to order the defendants to pay damages in the amount of the customs tax by way of damages for the defendants' breach of contract as determined by the tribunal. There is absolutely nothing in this point and I think this must account for the somewhat diffident way in which it was presented.

Was the return of the goods a condition precedent to the payment of the sums awarded against the defendant ?

Para. 1 of the arbitration tribunal's decision was as follows:

> "1. The claimant shall return all the quantity, according to the invoices and actual delivery of the printing materials of the six designs, 01, 02, 011, 017, 058 and 061, to the defendant.
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> *[1992] HKCU 193 at 12*
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> The defendant shall refund the payment of these six designs, a total of US$103,890.00, to the claimant and paid to the claimant the interest thereon for the period from 3rd June 1989 until the date of actual payment and a monthly interest of 0.75%; when it returns the goods, the claimant shall provide the necessary assistance, any expenses incurred for returning the goods shall be borne by the defendant;"

Mr. Scott relies on section 44(2)(f) of the Arbitration Ordinance which provides:

> " Enforcement of a convention award may be refused if the person against whom it is invoked proves -
>
> ....
>
> (f) that the award has not yet become binding on the parties ..."

Mr. Scott submits that the payment obligation imposed upon the defendants was conditional upon the claimant first returning the quantities referred to in the award.

Mr. Wong submits that this is not a condition precedent situation. He points out that para. 9 of the award provides that it shall be complied with before 15th August 1991. He says that it was always open to the defendants to take steps to enforce that part of the award which they contend to be in their favour. He submits that on the true construction of the award, it is not a condition precedent to payment that the goods must first be

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returned rather the two obligations are concurrent. When the matter came before me on the ex parte basis, I was invited to make an order in the following terms:

> " Judgment be entered against the defendant for an order that the defendant do take back at the defendant's costs the goods namely ...; and judgment be also entered against the defendant in the sum of US$103,890 ..."

I declined to make that order ex parte because I was not prepared to order the defendants to take back the goods because that was not the way in which the award had been expressed and further because I was not prepared on an ex parte basis to order a defendant to do anything other than pay money without his first being heard.

We have reached a Mexican stand-off. Mr. Scott made it clear that if I were to be against him on his three points of opposition and his clients were going to have to pay under the judgment then they most certainly wanted the goods back. There was some discussion about the mechanics of achieving this, but as I had not indicated my views on the main issues, it was difficult to take the matter very far.

I am quite satisfied that the award became binding on the parties when it was published. I reject the argument that the obligation to pay the sums awarded against the defendants was in any way conditional upon the defendants receiving back the goods. The obligation to pay

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and the obligation to return the goods were concurrent obligations.

It is quite clear that the use of the word "binding" in s. 44 of the Ordinance and in The New York Convention was substituted for the word "final" which appeared in The Geneva Convention. The word "binding" was substituted in order to make the system of enforcement less cumbersome than it had been under the Geneva Convention. The award in the present case was not subject to any appeal process and was clearly intended by the tribunal to be binding on the parties[see the commentary in Vol. X Yearbook on Commercial Arbitration p. 394 and p. 337 et seq of Van den Berg's work on The New York Convention.] In my judgment Mr. Scott's attempt to castigate this award as not being binding because the goods have not yet been returned fails to give effect to the narrow interpretation of the word binding which has been applied consistently by many courts in different jurisdictions.

Having decided that there is nothing in any of the grounds of opposition to enforcement, I propose to give the parties a little time to see if they can agree upon the mechanism of returning the goods at the defendants' expense. If they cannot, I will make an appropriate amendment to the judgment dated the 17th February 1992 so as to reflect the terms of the award. The parties, however, might care to consider the following suggestions. The defendants could pay into an interest bearing account,

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in court or otherwise, the total amount of the award together with all interest to the date of payment in. That sum could then be paid out to the plaintiffs when the goods have been returned. The defendants will have to specify to where they wish the goods delivered and will either have to give an indemnity to the plaintiffs in respect of all reasonable expenses in connection therewith or having estimated the costs thereof pay such

sum into the said account. Alternatively, the defendants might elect to collect the goods at their own expense.

If the parties cannot reach a sensible agreement on these matters, I will vary my ex parte order so as to carry into effect the terms of the award.

I propose to stay the ex-parte order I made on the 17th February 1992 until further order to enable the parties to attempt to sort out this matter. If they cannot, then this matter must be brought back before me.

Interest

It is conceded that the interest provided for by the award was 0.75% per month and not 7.5%per month. The plaintiffs have sought leave to amend the judgment to reflect this error and clearly this must follow. It is not a ground for refusing to enforce the award because it was clearly a translation error and is being corrected on the application of the plaintiffs.

[1992] HKCU 193 at 16

For the present, the only orders that I make are that the defendants' summons dated 13th March 1992 to set aside the judgment is dismissed, and that there be a stay of the judgment dated 17th February 1992 until further order.

Mr. Scott indicated that he wished to be heard on the question of costs, and I will therefore hear the parties on costs if this cannot be agreed.