IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

No. 4278 of 2001

CTA INTERNATIONAL PTY LTD (ACN 081 007 918) — Plaintiff

v

SICHUAN CHANGHONG ELECTRIC CO LTD — Defendant

JUDGE:	Byrne J
WHERE HELD:	Melbourne
DATE OF HEARING:	29 August 2002
DATE OF JUDGMENT:	6 September 2002
CASE MAY BE CITED AS:	CTA International Pty Ltd v Sichuan Changhong Electric Co Ltd
MEDIUM NEUTRAL CITATION:	[2002] VSC 374

ARBITRATION – foreign arbitration – whether proceeding in this Court should be stayed – comity – estoppel - forum non conveniens – whether justice requires temporary stay – stay pursuant to *International Arbitration Act* 1974, s. 7.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr T.V. Hurley	J. Lei & Co
For the Defendant	Mr A. Serong	KPMG Legal

HIS HONOUR:

1 By writ filed on 31 January 2001 the plaintiff, CTA International Pty Ltd ("CTA"), sues the defendant, Sichuan Changhong Electric Co Ltd ("SCHEC"), seeking damages for breach of a distribution agreement made on 21 April 1998. By the distribution agreement, SCHEC granted to CTA the exclusive sales rights to SCHEC's TV and VCD units in Australia and New Zealand from 1 June 1998 to 31 May 2001.

2 The distribution agreement is fairly brief; it appears to contemplate that SCHEC will sell units to CTA on an FOB or CIF basis upon letter of credit terms[1]; CTA is to be responsible for pre-sales service, sales service and after sales service[2] including technical personnel for after sales service[3]. SCHEC is to bear the costs of sending technical personnel to train local repair personnel in the first year of the agreement[4]. There are provisions for minimum quantities to be purchased by CTA[5] and for the supply by SCHEC of an extra 2% of ordered quantities to cover replacement claims[6]. The distribution agreement further requires that the products to be sold to CTA "should meet the technical terms and conditions that have been mutually agreed on and it should be based on Certificates of Quality issued by the China Import and Export Commodity Inspection Bureau"[7].

3 The distribution agreement also contains a dispute resolution clause in these terms:

> "14. Dispute and Arbitration
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> All dispute arising in connection with this agreement or execution thereof shall be settled amicably through negotiation. In case no settlement can be reached, the case under dispute shall then be submitted for arbitration to an arbitration body where the dispute arises in accordance with this body's rules

1 Clause 3.
2 Clause 8.1.
3 Attachment 2, cl. 1.
4 Attachment 2, cl. 2.
5 Clause 9.
6 Attachment 2, cl. 4.
7 Clause 13.2.1.

and procedure for arbitration. The decision of the arbitration shall be accepted as final and binding upon both parties."

4 The distribution agreement contains no provision stipulating the proper law of the contract and no jurisdiction clause. It provides only that the place of signing is Mianyang City, Sichuan Province, China[8].

5 According to the statement of claim endorsed on the writ, SCHEC provided an estimated total of 2,000 faulty units. It seems that these faults were discovered in September 2000 so that the consignments in question must have been delivered sometime previously[9]. Second, SCHEC had failed from July 1999 to supply the additional two percent of TV units to cover warranty claims[10]. Third, SCHEC has refused to reimburse CTA the sum of A$55,560.31 being the cost of sending a technical service team to Australia to service units. The agreement to reimburse this expense which is not covered by the distribution agreement is said to have been entered into in March 2000[11]. Finally, SCHEC failed to supply 536 units to CTA in October 2000 as agreed. As a consequence, CTA seeks substantial damages in the sum of A$7M.

6 On 16 March 2001, SCHEC entered an unconditional appearance in this proceeding.

7 On 22 April 2001, SCHEC lodged with the Mianyang Arbitration Commission in Sichuan Province an application for arbitration against CTA seeking US$954,801.85 for the unpaid price of goods delivered and interest, US$3,240,000 for consequential losses, US$993,286 for the failure of CTA to purchase the minimum number of units stipulated by the distribution agreement and US$84,400 being the cost of sending technical personnel to Australia in July and December 1999.

8 Following the acceptance on 18 September 2001 of the arbitration application by the Mianyang Arbitration Commission, CTA on 15 October 2001 applied to the Mianyang City Intermediate People's Court seeking an order that the arbitration

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8 Clause 16.4.
9 Statement of claim, para. 4(a), (b).
10 Statement of claim, para. 4(c).
11 Statement of claim, para. 5.

agreement contained in cl. 14 of the distribution agreement was invalid. On 18 December 2001, Mianyang Court published its decision rejecting this application. Meantime in November 2001, CTA had appointed an arbitrator for the purposes of the Mianyang arbitration, which was fixed to commence on 28 March 2002.

9 In this proceeding, SCHEC on 11 May 2001 had filed a defence raising no set-off or counterclaim based on the matters before the Mianyang Arbitration Commission. On 21 March 2002, CTA applied to this Court for an interlocutory order restraining SCHEC from taking a further step in the Chinese arbitration. On 26 March 2002, Beach J refused the application[12] because of delay in bringing the application, because the Mianyang Court had determined the arbitration agreement to be valid and because of his Honour's doubts about the enforceability of the order sought.

10 On 20 March 2002, CTA filed a counterclaim in the arbitration seeking A$7,346,391.31 damages for faulty products and for the action of SCHEC unilaterally terminating the distribution agreement. It seeks also reimbursement of A$138,491 advertising costs advanced by it and reimbursement of A$60,900.31 living expenses for the technical personnel sent by SCHEC to Australia. These claims are brought under the distribution agreement.

11 The hearing of the arbitration is presently fixed to commence on 4 September 2002.

12 The application presently before the court is brought on behalf of SCHEC by summons filed on 5 June 2002. It seeks an order that this proceeding be permanently stayed. The grounds relied on were comity between this legal system and that of the People's Republic of China and an estoppel arising out of the findings of the Mianyang Court as to the validity of the arbitration agreement, as well as upon the principles of forum non conveniens. In addition, during the course of oral argument, attention was directed to s. 7 of the *International Arbitration Act* 1974 and I granted leave to the parties to file written submissions on this point.

13 To my mind, comity and issue estoppel do not provide an adequate basis for the

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12 [2002] VSC 103.

orders sought. It is, of course, correct that this Court will pay the greatest respect to the decision of a properly constituted court of another sovereign nation. I do not, however, have any evidence as to the status of the Chinese court and, in any event, the determination of that court does nothing more than bind the parties to the conclusion that cl. 14 is a valid arbitration agreement under Chinese law.

14 Argument before me then moved to forum non conveniens. My task here is to determine whether this Court is a clearly inappropriate forum for the determination of the disputes between the parties. The existence of an arbitration proceeding in China does not provide a basis for such a conclusion[13], nor does the suggestion that CTA is unlikely to obtain a fair hearing before the Chinese arbitrators. I make no finding about this, nor is it desirable that I should enter upon this matter for the reasons set out in *Voth v Manildra Flour Mills Pty Ltd*[14]. It is true that the agreement was entered into in Sichuan Province in China and that all of SCHEC's witnesses and documents are located in that country. Insofar as the issue as to the quality of the goods will depend upon the contractual assumption by SCHEC of the obligation to comply with Australian Standards, it does not appear that the factual basis for this necessarily lies outside Australia or that the evidence of non-compliance is to be given by witnesses resident in China. On the other hand, it cannot be denied that part of the damages cross-claim of SCHEC will depend upon Chinese revenue legislation. For these reasons, I am not satisfied that this Court is a clearly inappropriate forum, so that the permanent stay will be refused.

15 Then, it was put that a less stringent test is to be applied where a merely temporary stay is sought. Counsel for SCHEC asked in the alternative that such a stay be granted only until the arbitral award is given in China. Reliance was placed in this regard upon the observations of Professor Nygh in his respected *Conflict of Laws in Australia*[15] and upon the decision of Lockhart J in *Sterling Pharmaceuticals Pty Ltd v The Boots Company (Australia) Pty Ltd*[16]. In the case of such a limited stay, the court

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13 *Rocklea Spinning Mills Pty Ltd v Consolidated Trading Corporation* [1995] 2 VR 181.
14 (1990) 171 CLR 538 at [39].
15 6th Ed, page 109.
16 (1992) 34 FCR 287 at 290-1.

will act where the justice of the case demands that the foreign proceeding go first. In the present case, it was pointed out that the Chinese arbitration was well advanced in terms of readiness for hearing, that CTA had submitted to that process including bringing a counterclaim in which it makes much the same claims as it makes in this Court, that the determination of the issues in the arbitration will be likely to have a material effect on this proceeding, that the award of the arbitral tribunal is likely to be enforceable in Australia under the New York Convention, as well as the factors relied upon in the forum non conveniens argument. Add to this the decision of Beach J in March of this year and the conclusion is overwhelming that I should grant the temporary stay which SCHEC seeks.

16 I turn now to the stay application under s. 7(2) of the *International Arbitration Act* 1974. I am satisfied, notwithstanding the contrary submission of counsel for CTA, that cl. 14 of the distribution agreement is an arbitration agreement to which the section applies. It is an agreement in writing to submit to arbitration differences which may arise in connection with the distribution agreement or "execution thereof". I construe this later expression as meaning the implementation of the distribution agreement. My summary of the claims made in this proceeding shows that, with the possible exception of the claim for $55,560.31 for the technical service team, all claims are predicated upon breaches of the terms of the distribution agreement or upon breaches of supply contracts made under the distribution agreement. It seems to me very likely that as a matter of construction even this claim for the technical service team is a matter capable of settlement in the arbitration. All of these claims therefore are matters capable of settlement by arbitration within the meaning of s. 7(2)(b).

17 It follows from this that, subject to s. 7(5), the court shall stay the proceeding. I have been referred to authority to the effect that the court has a discretion in this matter notwithstanding the use of the word "shall"[17]. My own impression is that no such

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17 *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 159 ALR 142 at 153; *Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH* [2001] 1 Qd R 461 at 467.

discretion exists[18]. In deference to the authorities to the contrary, and bearing in mind that no detailed argument was presented on the point, I express no concluded view on this matter. I would exercise my discretion in the present case in favour of the stay for the reasons mentioned in my consideration of the forum non conveniens and associated matters.

18 Section 7(5) requires a court not to make a stay order if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed. The conclusion of the Mianyang court means that the parties are bound by the finding that the arbitration agreement is valid. No other basis for the application of s. 7(5) was suggested.

19 I should finally make mention in passing to the UNCITRAL Model Law. It was put on behalf of CTA that by Division 2 of the *International Arbitration Act*, the Model Law Rules apply to this arbitration including Article 8(1) which prevents a party from referring a court proceeding to arbitration after it has submitted its "first statement on the substance of the dispute". To my mind, these rules have no application to the present matter. The arbitration is being conducted in China. Local rules will therefore apply. There is no evidence that the Model Law Rules are those under which the Mianyang Arbitration Commission is conducting the proceeding before it.

20 I conclude from this that I should stay the proceeding in this Court pursuant to s. 7 of the *International Arbitration Act*. I will hear counsel further on the precise terms of the orders required to give effect to this conclusion.

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18 See Jacobs, *International Commercial Arbitration in Australia* at [8.70] and the cases there referred to.