I. COURT OF FIRST INSTANCE

A. SHENZHEN NAN DA INDUSTRIAL AND TRADE UNITED CO. LTD. v. FM INTERNATIONAL LTD. [1992] HKCFI 162; HCMP1249/1991 (2 MARCH 1992)

HCMP001249/1991

HEADNOTE

Arbitration - Enforcement - New York Convention - Whether 'Convention Award' - Dispute as to whether parties agreed on Beijing arbitration or Hong Kong arbitration - Whether procedure irregular - Role of enforcing court - Need to refer to sources on Convention.

1991 No. MP 1249

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

MISCELLANEOUS PROCEEDINGS

IN THE MATTER OF Sections 2H and 42 of the Arbitration Ordinance, Chapter 341.

and

IN THE MATTER OF a Convention Award made in the People's Republic of China dated 8th January 1991

BETWEEN

SHENSHEN NAN DAS INDUSTRIAL AND TRADE UNITED COMPANY LIMITED — Plaintiff

AND

FM INTERNATIONAL LIMITED Defendant

Coram: The Honourable Mr. Justice Kaplan in Chambers

Date of Hearing: 20th January 1992

Date of Handing Down Judgment: 2nd March, 1992

J U D G M E N T

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

2. 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.

3. Part IV of the Arbitration ordinance Cap. 341 (ss41-46) provides the statutory underpinning of Hong Kong's New York Convention obligations. Section 44 provides as follows:

"44. Refusal of enforcement

(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 -

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) that the arbitration greement 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

(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 acompetent 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 to arbitration which can be separated 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."

4. Section 2 of the Arbitration ordinance, interalia, 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 territoriy, other than Hong Kong, which is a party to the New York Convention."

5. On 11th August 1988, the parties signed two contracts dated respectively the 6th and 8th August 1988. Both were in the English language. By these contracts the Defendant 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.

6. For the reasons which are set out in the evidence, on the 25th August 1988, both parties signed 2 Chinese/English contracts again dated respectively 6th and 8th 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 Commision of the China Council for the Promotion of International Trade. The English contracts contained a Hong Kong arbitration clause.

7. 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 arbritral authority .... was not in accordance with the agreement to the parties". (See Section 44 (f) of the Ordinance.)

8. Quite sensibly, Mr. Edward Chan Q.C. 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 the 1st January 1989, the name of China's international arbitration organisation was changed from the Foreign Economic Trade Arbitration Commission (FETAL) 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 Mr. Justice LIU in Tai Hing (Asia) Commercial Co. Ltd. v. Trinity (China) Supplies Limited unreported HCA No. 6585/87 Judgment deliverd on 30th May 1989. (This case is noted on page 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 FETAL 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 21st June 1988 a document was issued by The Chinas State Council which makes clear that these two organisations are legally the same entity and the name of the organisation was changed merely to reflect "the internationalisation" of China's arbitral body. This very document is exhibited and appears at page 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 Mr. Justice Barnes in Guangdong New Technology Import & Export Corporation Jiangmen Branch v. Chiu Shing t/a B.C. Property & Trading Company, [1991 M.P. 1625, Judgment delivered 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.

9. The total sum claimed by the Plaintiffs in the Arbitration was some US$2.786m. but the award was only for US$148,176.00.

10. Mr. Edward Chan, Q.C.'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.

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

12. On 1st December 1989, the defendants put in written submissions to the Arbitral Tribunal. At the bottom of page 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 apparel. We never accept the arbitration in China. But the apparel decided the Chinese contract No. : 100132 dated 8th August, 1988 was used only for customs formalities. The apparel had signed our contracts and accepted the arbitration in Hong Kong. Therefore, we regret to accept the arbitration case will be held in Beijing."

13. Then followed 8 pages of argument on the merits.

14. On the 16th July 1990, the Tribunal posed various written questions to the parties and on 14th September 1990 the Plaintiffs replied thereto.

15. 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 3 contracts numbered ..... and the 3 contracts numbered....."

16. 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.

17. The Plaintiffs answer to this question appears on pages 113 - 117 of the bundle. In essence, they stated that the 2 English contracts were only letters of intent "which lost its effect automatically when the 5 contracts were signed. Because only those 5 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 5 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 2 contracts i.e. 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.

18. 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.

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

20. In these proceedings, an affidavit of Mr. Ling Fung Tong, the defendant's 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.

21. 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.

22. The Tribunal's opinion dealt immediately with this point in the following terms:

"Having heard the statements and defence made by both parties in the course of the hearing and scrutinised the written materials and the relevant evidence submitted, the Arbitration Tribunal expressed the following opinions:

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 -TTC009-TTC-TTA-88, 011.-TTA-88 and 100132) are 6th and 8th August 1988 respectively, the actual date of signing was on or about 25th 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)

23. 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 defendant? I think not.

24. It seems to me that what the defendant is 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 authoritive book on the New York Convention states at page 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 Article 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 Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation most be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbritration. 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 an defence under the Convention."

25. 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 Section 44.

26. 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 Plaintiff's 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 Section 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.

27. 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 .

28. 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 Article VI of the Convention, which provides that the enforcing court can adjourn the application pending the determination of the application to set aside (see Section 44(5)).

29. 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.

30. 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.

31. 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 the 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.

32. 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 in World Arbitration and Mediation Revort:

"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 FETAL Provisional Rules, providing, for the first time for the appointment of foreign arbitrators and containing other provisions of benefits to foreigners."

33. 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 Section 44(2)(e). Further the specific complaints listed by Mr. Chan on page 9 of his skeleton argument seem to me to be of little substance.

34. 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.

35. There is one Hong Kong case in this area and that is Werner A Bok v. The 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 defendant to take advantage of this irregularity since no possible prejudice had been caused to the defendant. In that case waiver had not been established because it would have to be shown that the defendant knew of the irregularity and knew of his right to object. The latter condition had not been shown. In the present case the defendant knew that new rules had been made as they were sent to him. The defendant gave no evidence as to whether he knew of his right to object. I do not base my judgment upon waiver. I prefer to rest my judgment on the observations in Werner A Bock to the effect that the whole tenor of Part 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.

36. Mr. Ling of the defendants complains that no interpreter was provided. Under Article 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.

37. In conclusion, therefore, I am satisfied that this is a Convention award. I am not satisfied that the defendant has made out any of the grounds set out in Section 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 any give leave to enforce this award as if it were a judgment of this Court.

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

39. 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 8 applications for enforcement, 6 being from China. In 1990 there were 13 of which 9 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 Prof. 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 Prof. 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 2 works.

(Neil Kaplan)
Judge of the High Court

Representation:

Appearances

Mr. Denis Chang Q.C. & Mr. Eric Shum inst'd by Livasiri & Co. for Plaintiffs.

Mr. Edward Chan Q.C. & Mr. Andrew Cheung inst'd by Lian Ho & Chan for Defendants.
