I. COURT OF FIRST INSTANCE

A. J.J. AGRO INDUSTRIES (P) LTD. (A FIRM) v. TEXUNA INTERNATIONAL LTD. [1992] HKCFI 182; HCMP751/1992 (12 AUGUST 1992)

HCMP000751/1992

H E A D N O T E

Arbitration - enforcement of a Convention award - whether a single award is severable - whether Plaintiffs can obtain immediate enforcement of that part not in dispute - 0.73 r.10(6) - whether stay provided for applies to undisputed part.

The judge has authorised the publication of this judgment.

1992, No. MP 751

IN THE SUPREME COURT OF HONG KONG HIGH COURT

_____

BETWEEN

J.J. Agro INDUSTRIES (P) LTD. (a firm)	Plaintiff (Claimant)
AND	
TEXUNA INTERNATIONAL LTD.	Defendant (Respondent)

_____

Coram: The Honourable Mr. Justice Kaplan in Chambers

Date of Hearing: 3rd August 1992

Date of Delivery of Judgment: 12th August 1992

_____

J U D G M E N T

---

1. This is an application by the Plaintiffs for the immediate enforcement of the Indian rupee part of an arbitration award made on 24th May 1991 by a GAFTA Tribunal in London. Alternatively, the Plaintiffs seek an interim payment under 0.29 r.10 of the Rules of The Supreme Court of Hong Kong. On 29th May 1992, I gave a preliminary ruling in this matter to which I will have to make reference later in this judgment.

2. The dispute between these parties has spawned a number of hearings before me and I have already had to rule on certain preliminary issues. My ruling of 29th May 1992 is being challenged by the Plaintiffs in the Court of Appeal in November 1992. I regret that this judgment will not make sense unless I set out the background and explain how this application comes to be made..

3. I should make it clear that the present proceedings are but one of five sets of proceedings brought by different Plaintiffs (for whom the present Plaintiffs'. solicitors also appear) against these Defendants. However, the point is identical in each case and it has been agreed, quite sensibly, that the present proceedings should be the lead proceedings and that the other proceedings stand or fall by the result of these proceedings.

Background

4. The Plaintiffs and the Defendants are both Indian trading companies. In August 1987, the Plaintiffs agreed to buy from the Defendants 1,000 tons of Chinese green mung beans. The Plaintiffs were required to pay, and did pay, a total deposit of Indian rupees 250,000.

5. It is common ground that the buyers failed to deliver the goods and arbitration was requested. The Plaintiffs sought damages arising from the Defendants' failure to deliver the 1,000 m/t and they also claimed the return of their deposit.

6. I do not propose to go into the details of the arbitration as it is only necessary to deal with those points that impinge on the application before me.

7. One of the Defences raised by the Defendants to the claim made in the arbitration was that the Plaintiffs had failed to mitigate their loss by not accepting an offer which a Mr. Savla had made on behalf of the Defendants for the delivery of 2,000 m/t. This offer was to be spread across a number of disappointed purchasers and included these Plaintiffs and the four others that I have mentioned. It was clear from the Defendants' submission before me (and it is set out in the Defendants' skeleton argument) that if the Plaintiffs had accepted the offer it "would have substantially reduced the loss suffered by the Plaintiffs by reason of Texuna's non-delivery in breach of contract."

8. The role of Mr. Salva is pivotal to the Defendants opposition to these proceedings brought to enforce the arbitration award. The Defendants seek to oppose the enforcement of the award on the grounds that to enforce it would be contrary to the public policy of Hong Kong (see 6.44(3) of the Arbitration Ordinance replicating a ground set out in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

9. Mr. Bunting who appears for the Defendants set out succinctly the allegations relied upon in relation to Mr. Savla in his skeleton argument submitted at the earlier hearing before me. The relevant part reads as follows:

"The fraud consisted of kidnapping a witness for Texuna in the arbitration (Mr. Savla) forcing him to make a false affidavit retracting material evidence favouring Texuna in the arbitration, causing false affidavits to be sworn as to the circumstances in which Mr. Savla's false affidavit was made and relying on the false affidavit in the arbitration and causing the arbitrator to rely on them."

10. Mr. Savla, whilst alleging in an affidavit as to the truth of the matters complained of by him, was not called as a witness in the arbitration although the arbitrator recorded that he had been heralded as the Defendants' major witness. In their award, the arbitrators dismissed the Savla evidence. By that 1 mean they disregarded the evidence as to mitigation. They expressed themselves thus:

"We find Mr. Savla's evidence to be totally unreliable and we find no evidence that would constitute a breach of the Arbitration Agreement on the part of the buyers. Nor do we find any evidence of buyers having been offered at any stage any part of the consignments of beans under their Purchase Contracts from sellers."

11. Before the award was rendered, the Defendants took proceedings in the Commercial Court and argued, inter alia, that by the kidnapping of Mr. Savla, the Plaintiffs had repudiated the agreement to arbitrate. Webster J. struck out the Defendants' action and in relation to the repudiation point held that the Defendants had not accepted the alleged repudiation. The Defendants at no time have taken any proceeding in England or elsewhere to set aside the award that is the subject matter of these proceedings. The Defendants appealed the decision of Webster J. and leave to appeal was refused by Parker L.J. sitting as a single Justice of Appeal. I was told that the application for leave was being renewed to the full court but I have not yet been told of the result.

The Hong Kong Proceedings

12. The Plaintiffs applied to me ex parte under 0.73 r.10 of the Rules of the Supreme Court for leave to enforce the award as a judgment of this court. I granted the application ex parte with the proviso, as provided for by 0.73 r.10(6), that the judgment was not to be enforced if the Defendants applied to set aside the ex parte

leave and if they did it should not be enforced until the application had finally been disposed of.

13. Eventually the matter came before me on an inter partes basis and I agreed to determine two preliminary points. The first point was whether, even if the Defendants' allegation concerning Mr. Savla was true, it could be said to be contrary to the public policy of Hong Kong to enforce the award. The second point related to the doctrine of res judicata. It was contended by the Plaintiffs that the Savla kidnapping point had been raised not only in the arbitration but also in the Commercial Court and that by applying the basic principles of res judicata it was not open to the Defendants to raise the matter again at the enforcement stage in Hong Kong.

14. In a written ruling which I delivered on 29th May 1992, I held that, notwithstanding the narrow interpretation which had been given both here and abroad to the public policy ground of opposition to enforcement, nevertheless "if the facts alleged are made out, they are capable of coming within the ambit of public policy. In other word it would be contrary to the public policy of Hong Kong to enforce an award which had been obtained in the circumstances alleged." I went on to make clear that there was a discretion in Section 44 but the time had not yet arrived for me to consider the exercise of that discretion. I decided that it was necessary to hear the evidence first, and reach conclusions on the disputed facts. It is still an open question whether on the assumption that a public policy ground is established, this affects the whole US$ part of the award or only such part of it that was or might have been affected by the mitigation defence.

15. In relation to res judicata, I decided that, on the basis of the authority of the House of Lords decision in Owens Bank v. Bracco[1992] 2 WLR 621, the doctrine of res judicata did not apply in the same sense as it would to an attempt to re-litigate the same point previously determined in proceedings in Hong Kong. On the basis of my decision on these two rulings on preliminary issues, I ordered that an issue be tried on viva voce evidence as to whether the kidnapping took place as alleged and I set aside 10 days for the evidence to be heard commencing on 3rd August 1992.

16. The Plaintiffs appealed these two rulings and, as I have stated, that appeal will be heard in November 1992. When the November dates were fixed and when it became clear that there were no dates prior to the 3rd August, the parties agreed that the August dates before me should be vacated and they were refixed for February 1993. Obviously, if the Court of Appeal takes a different view of the matter, these dates may not be required.

The Present Application

17. The Plaintiffs seek in their application an order that they be permitted to enforce the Indian rupee part of the award by which they were reimbursed their deposit of Indian rupees 250,000 paid in August 1987. As at the date of the ex parte judgment on 24th March 1992, this sum had grown with interest to Indian rupees 441,135 and up to the 3rd August 1992 had further grown to Indian rupees 459,427. [The total amount of the Indian rupee awards involving all five Plaintiffs which include the present Plaintiffs was, with interest as at 3rd August 1992, Indian rupees 1,601,051 which is equivalent to approximately HK$437,887.]

18. Mr. Stevenson who has appeared throughout for the Plaintiffs submitted as follows. There has never been any Defence raised to the claim for reimbursement of the Indian rupee deposit of 250,000. No defence was raised to it in the arbitration. Save as to the general allegation of repudiation of the arbitration agreement no specific point was raised with regard to it in the Commercial Court. No point has been taken as to it in these proceedings. He submits that it must follow inexorably that the Plaintiffs will at the very least get leave to enforce that part of the award and therefore there is no reason whatsoever why they should wait until the determination of the issue whether Mr. Savla was kidnapped or not.

19. Mr. Bunting submits that this application must fail because there is a stay on the enforcement of the award, and I have no jurisdiction to remove the stay wholly. or in part, until the Defendants' application is disposed of. He submits that the terms of 0.73 r.10(6) are decisive of the issue. Further, he submits that there is only one award in this case and only one judgment. He submits that there is no warrant in the Arbitration ordinance or the Convention for enforcing the good part of an award and refusing to enforce the bad. This award, he submits, has to stand or fall as one award. However, he conceded that had the arbitrators rendered two awards, one for the Indian rupee deposit and one for the US$ damages for non-delivery, he would have no argument whatsoever to prevent enforcement of the Indian rupee award,

<u>The Ordinance</u>

S.44(1) provides that:

"Enforcement of a Convention award shall not be refused except in the cases mentioned in this section."

20. S.44(2) then sets out a number of grounds which are taken from the Convention none of which apply to this case.

21. S.44(3) provides that:

"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."

22. S.44(4) provides that:

"A Convention award which contains decision on matters not submitted to arbitration may be enforced to the extent that it contains decision on matters submitted to arbitration which can be separated from those on matters not so submitted."

23. I think I should quote sub-section 5 of section 44 because it deals with a specific instance where security can be ordered but those circumstances do not apply in the present case.

"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 sub-section 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."

24. I do not know why the court is not given power to order security to be put up by any Defendant opposing the enforcement of an award. I can see no reason why. the court should not be given a discretion in appropriate circumstances to order security to be put up, especially as there have been instances of cases before me where the application to enforce (because it was contested) had taken almost a year to come on as a result of various interlocutory skirmishes. During the period of delay there must, in some cases, be a risk that the Defendant will utilise the time to ensure that such assets as he has in Hong Kong will no longer be there. It seems to me that justice requires the court to have such a power and with the growing number of applications to enforce Convention awards, this may be a matter which could be considered by the Rules Committee or the Attorney General.

The Rules

25. The scheme of 0.73 r.10 is that an application to enforce an award under the Convention may be made ex parte but the court has power to direct a summons to be issued. In Zheiianq Province Garment Import and Export Company v. Siemssen & Co. (H.K.) 'Trading Ltd. (unreported 1992 MP144 Judgment, 2nd June 1992), I made it clear that the ex parte procedure should be used and an inter partes summons should only be used if the court so directs. If the ex parte procedure is not used, the court will require an explanation because the use of an inter partes summons immediately only increases the costs.

0.73 r.10(6) provides as follows:

"Within 14 days after service of the order or, if the order is to be served out of the jurisdiction, within such period as the court may fix, the debtor may apply to set aside the order and the settlement agreement or award shall not be enforced until after the expiration of that period or, if the debtor applies within that period to set aside the order, until after the expiration is finally disposed of."

26. My ex parte order gave the Defendant 14 days to apply to set aside the order. They availed themselves of this opportunity and the proceedings are still pending. Mr. Bunting's simple submission is that the award cannot be enforced until after the application is finally disposed of.

Is the Award Severable

27. The first issue which I have to decide is whether under Hong Kong law an award is severable. In other words, if one award contains two separate decisions and one cannot be enforced, because to do so would be contrary to Hong Kong's public policy, does it follow that the other, in respect of which no challenge is made, has to fall with it.

28. Russell on Arbitration (20th Edition) accents that "an award bad in part may be good for the rest. If, notwithstanding that some portion of the award is clearly void, the remaining part contains a final and certain determination of every question submitted. The valid portion may well be maintainable as the award, the void part being rejected." However, the void part must be clearly separable in order that the award may be held good for the remainder:

29. In Aubert v. Maze (1801) 2 Bos & Pul 370. The court was concerned with an illegal partnership. An award had been rendered and Chambre J. who sat with Lord Eldon, Heath & Rooke JJ said: "I think we cannot do otherwise in this case and decide the question submitted to us according to law, and therefore that so much of the award as is founded on the illegal partnership must be set aside." The court set aside the latter part of the award.

30. In Prestige & Co. v. Brettell (1938) 4 AER 347 Slesser L.J. said this on the question of severing the good from the bad:

"There was in addition a further sum of 1,167 awarded. As to that, it has been held by the Judge - and I agree with him - that there was no jurisdiction to make that award. I need say no more about that aspect of this case. However, it has been argued that, in so far as part of this award was bad on the face of it, therefore the whole award - namely, the 500 given under para. 2 - fell, because the amount given under para. 3 of the Statement of Claim fell. I see no reason for coming to that conclusion. As it seems to me, these two matters are entirely severable. It being contended that the certificate was improperly withheld, and the question arising how much the contractors were entitled to, there is nothing in the valid award of

500 which is in anyway prejudiced by the fact that some other money has been given which there was no authority. The two matters seem to me to stand in quite distinct and different circumstances. The one does not in any way pollute or vitiate the other, on the general principle that, where in an award you have two severable decisions - and these seem to me entirely severable - either can be supported."

31. In London & Overseas v. Timber Shipping (1972) A.C. 1, the House of Lord was concerned with the rate of interest provided for by an award. They held that the higher rate should not have been awarded and Lord Morris at p. 22 had no difficulty in holding that the part of the award providing for the higher rate "is a part that is separable and divisible."

32. I would be most surprised if Mr. Bunting's extreme submission was sound in law. The policy of the courts in modern time has been supportive of the arbitral process. Legislation has been introduced to limit court interference on the merits in domestic cases without leave. In international cases there is now the Model Law which does not permit any court interference on the merits. Arbitration is the preferred method of dispute resolution in many areas both internationally-and domestically. If an award contained an objectionable part it would be absurd if the remainder of the award was to fail as well. This would be elevating form over substance which the courts have for some time been concerned to prevent where possible.

33. Let me give an example of the absurdity of the argument that the award is not severable. In the Zhejiang Garment case referred to above, I was concerned with the argument that the enforcement of part of the award should be refused on the grounds that to do so would be contrary to the public policy of Hong Kong. In that case, a small part of the damages awarded by the CIETAC Tribunal in Beijing represented the abortive customs duties paid by the Plaintiffs. It was argued for the Defendants that this award was contrary to the public policy of Hong Kong because that part of the award amounted to the enforcement by China of her fiscal legislation extraterritorially. 1 had little difficulty in dismissing this ground. But assume that the point had been a good one, how could it sensibly be argued that I should have refused enforcement of the whole of the award and not just that small part relating to customs duty. It is not without significance to note that Counsel for the Defendants in that case limited his submissions on public policy to that part of the award involving the customs duty. I think he was correct in so doing.

34. Take an other example. Assume a joint-venture agreement between two international parties which contains an arbitration clause. The arbitration clause covers all disputes arising between them under the joint-venture agreement. Assume further that three years into the joint-venture agreement, a number of quite separate disputes had arisen. All the disputes were referred to an arbitral tribunal who considered them all. and rendered a single award. Would it not be absurd if, in relation to .just one such dispute, there was a public policy defence, and it were

argued that this rendered the whole of the award unenforceable under the Convention. Provided the court is satisfied that the good part is separable from the bad, there can be no objection in principle to enforcing the good and if necessary refusing to enforce the bad. I would go so far as to hold that to decide otherwise would be to bring the whole arbitration process into disrepute. I would not come to that conclusion unless I were constrained by clear statutory provision or by directly binding authority upon me. I can find no support for this contention in the ordinance, the Convention, the Rules or the Common Law.

35. In my judgment, it is necessary to have regard to the substance of the award to see whether it contains distinct findings that can be severed. The rupee part of the award relates to a deposit paid 5 years ago in respect of goods which, it is common ground, have never been delivered. The alleged kidnapping of Mr. Savla could have no conceivable effect on that part of the award. There is no defence to the claim for the return of the deposit and no ground of opposition has been put forward which is referrable to that claim (save that it is submitted that the award cannot be severed).

36. I am quite satisfied that the words in s.44(3) "....if it would be contrary to public policy to enforce the award" must be taken to refer to that part of the award which is challenged on those grounds. The argument that the arbitrators could have rendered two awards but did not or that the Plaintiffs could have applied to enforce each part separately is neither here nor there. These are technical points which only obscure the underlying reality of the situation, namely, that the rupee claim stands on its own and is in no way affected by the Savla allegation.

37. I do not think Mr. Bunting's attempt to distinguish between applications to set aside awards and applications to oppose enforcement take the matter any further.

38. I think it is also pertinent to note that the doctrine of severability of an award is recognised distinctly in s.44(4) which enabled the court to enforce that part of an award that was within the jurisdiction of the arbitrators whilst not enforcing that part which was outside their jurisdiction. This subsection is the statutory basis for Article VI(c) of the Convention which provides a ground for opposition if:

"The award deals with a difference not contemplated by or not falling within the terms of a submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced;"

39. I am not impressed with the argument that because there is no specific reference to separability in the sub-section on public policy, therefore this means that the whole award has to fail if part only is affected by the public policy ground.

I believe that s.44(4) indicates a statutory intention to provide for the doctrine of severability and merely because the draughtsman had not applied his mind to a situation where the public policy ground of opposition related to only part of an award, this is not sufficient to exclude the doctrine. As I have already said, it is necessary to have regard to more than the piece of paper that is the award, and one must look at its substance to see what the arbitrator has decided and ordered and then to see whether there are any free standing parts or whether it is an integral award not separable in any way. If it is necessary to do so, I would be prepared to hold that on a true construction of Part IV of theArbitration Ordinance the words "Contrary to public policy to enforce the award" should be read as "Contrary to public policy to enforce a severable part of the award".

40. I am happy to note that the conclusion at which I have arrived accords with the view of at least 2 other courts in the United States. In Laminoires-Trefileries Cableries de Lens S.A. v. Southwire company and Southwire International Corp.,484 Fed. Suppl. 1065 (see also vol. VI Yearbook of Commercial Arbitration (1981) pp 247-248) Judge Tidwell in the U.S. District Court of the Northern District of Georgia was asked to enforce an I.C.C. award against the U.S. defendants. One of the grounds of opposition was that the arbitrators adopted the French rate of interest on the sums due and that the French rate violated the enforcing forum's public policy and was usurious. Having stated that the public policy ground only applies "where enforcement would violate the forum country's most basic notions of morality and justice" the learned judge held that the French rate was penal and not compensatory and bore no reasonable relation to any damage resulting from delay in recovering the sums awarded. The judge went on to conclude that;

"Therefore that portion of the award which purports to' to assess the rates of interest at 14.5 and 15.5% will not be enforced or recognised by this Court."

41. The principle in Laminoires was followed by the U.S. District Court for the Southern District of New York in Brandeis v. Calabrian Chemicals 656 Fed. Suppl. 160 (see also vol. XIII Yearbook of Commercial Arbitration 1988 pp 543-555).

42. In Werner A. Bock K.G. v. The N's Co. Ltd. [1978] HKLR 281 the Court of Appeal made it clear 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."

43. It would in my judgment be contrary to the whole spirit of the Convention and the Ordinance if enforcement were to be refused in respect of a severable part of an award which has never been in issue. I cannot understand the contrary reasoning which would give a windfall to the Defendants in a case where, whatever might or

might not have happened to Mr. Savla, the defendants failed to deliver any beans under the contract of sale.

0.73 R.10(6)

44. Having decided that the rupee part of the award is severable for enforcement purposes, I now have to consider whether I am precluded from ordering immediate enforcement of that part of the award by the terms of 0.73 r.10(6) which I have already set out.

45. I see no reason why I should not construe the word "award" in sub-rule (6) as referring to that part of a severable award which is in fact the subject matter of attack. There is no reason whatever why the rupee part of the award should remain in limbo until the kidnapping issue has been resolved. It is not in issue and never has been in issue. The rule refers to the debtor applying to set aside the order. The order referred to is the ex parte leave I granted to enforce the award as a judgment. The Defendants are seeking to set aside the US$ part of the award on the grounds of public policy. I accept that they would like the whole order and award to be affected by the public policy ground but I am against them on that point. It follows therefore that the stay can only relate to that part of the order/award which is the subject matter of attack.

46. If I am correct that an award is severable so far as it is good then the word "award" in sub-rule (6) should only refer to that part of the award which is challenged in fact. Again, it is a question of considering the substance and not the mere form. If it is accepted, as it is by Mr. Bunting, that if the arbitrators had rendered two awards that for the rupee part could never be challenged, the result should not be different merely because the arbitrators have dealt with two distinct claims in one document.

47. Mr. Bunting submits that there is no power in the rule for me to lift the stay. The answer to that is that. the stay does not bite on that part of the order/award which is not in issue.

48. I therefore conclude that the Plaintiffs are entitled to enforce the rupee part of the award which as at 3rd August 1992 amounted to Indian rupees 459,427. (There was no dispute about the figures). Whether or not they are entitled to enforce the US$ part of the award depends firstly on the views of the Court of Appeal and if. necessary upon my view of the evidence on the issue as to whether Mr. Savla was kidnapped and whether if he was, I should exercise my discretion in favour of enforcing the award.

Interim Payment

49. Mr. Stevenson submitted as an alternative to immediate enforcement that the Plaintiffs should be granted an interim payment under 0.29 r.10.

50. On reflection it seems to me that this argument is unnecessary. I have decided that the Plaintiffs are entitled to immediate enforcement of the rupee part of the award. Had I not come to that conclusion and had found that either the award was not severable or that the terms of 0.73 r.10(6) precluded me from ordering immediate enforcement of that part of the award, it would have been somewhat strange if I could have achieved the same result by ordering an interim payment.

51. It seems to me that the Plaintiffs must stand or fall on the issue whether they can obtain immediate enforcement. If they cannot obtain immediate enforcement, it does not seem to me appropriate to even begin to consider an interim payment. However, lest this matter should go further, I should make it clear that had I had to consider the exercise of my discretion under 0.29 r.l0.and assuming the order applicable, 1 would most certainly have awarded an interim payment to the Plaintiffs in the amount of the rupee part of the award with interest up to the date of payment.

52. I am quite satisfied that the court has jurisdiction to grant an interim payment which comprises both the sum the court thinks appropriate together with interest thereon. This is supported by the decision of the English High Court in Indenendant Broadcasting Authority v. E.M.I Electronics, 13.9.1981 unreported but see Kemp on Quantum of Damages Part 1, 16022. If the matter proceeded to a full hearing, I am satisfied that the Plaintiffs would have recovered at the very least the rupee part of the award together with interest thereon up to the appropriate date. However, for the reasons which I have endeavoured to state, it is not necessary for me to go into the question of interim payments.

53. Although I am only dealing with MP751/92 in which the Plaintiffs are JJ Agro Industries (P) Ltd., it follows that the same result extends to the other four cases in respect of which the present has been treated as the lead case.

Costs

54. The Plaintiffs have succeeded in this argument before me and I see no reason why they should not have their costs. I propose to make a costs order nisi in their favour in relation to this application.

(Neil Kaplan)
Judge of the High Court

Representation:

Mr. Stevenson of Jewkes & Co. for Plaintiffs

Mr. Bunting instructed by Wilkinson & Grist for Defendants
