I. COURT OF FIRST INSTANCE

A. QINHUANGDAO TONGDA ENTERPRISE DEVELOPMENT CO. & ANOTHER V. MILLION BASIC CO. LTD. [1993] HKCFI 229; HCMP1150/1992 (5 JANUARY 1993)

HCMP001150/1992

1992, No. MP 1150

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

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BETWEEN

Qinhuangdao Tongda Enterprise Development Company & another	Plaintiff
AND	
Million Basic Company Limited	Defendant

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Coram: The Hon. Mr Justice Kaplan in Chambers

Date of hearing: 17 December 1992

Date of handing down of judgment in court: 5 January, 1993

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C O R R I G E N D U M

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The quotation referred to at the bottom of page 10 and top of page 11 derives from the U.S. Court of Appeal 2nd Circuit in *Parsons & Whittemore v RAKTA* 508 F.2d (2d cir. 1974)

(T.F.LO)
Clerk to Hon. Kaplan, J.

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H E A D N O T E

Arbitration - Chinese award - enforcement opposed under s 44 Arbitration Ordinance Cap 341 - were Defendants prevented from presenting their case - would it be contrary to the public policy of Hong Kong to enforce the award - were Defendants attempting to seek a review on the merits.

J U D G M E N T

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1. This is an application to set aside an ex parte order I made on 27th April 1992, giving leave to enforce an arbitration award made by the China International Economic and Trade Arbitration Commission (CIETAC).

2. As there is a limited amount of case law on the enforcement of foreign arbitral awards and as the number coming from China has increased I decided I should give

this judgment in open court.

3. The grounds relied upon to set aside the order are that the Defendants were not given an opportunity to present their case and that it would be contrary to the public policy of Hong Kong to enforce this award. These grounds are set out in ss. 44(2) and (3) of theArbitration Ordinance Cap. 341. This section replicates the grounds of opposition set out in the New York Convention of 1958 to which Hong Kong and China are parties. The burden of proving one of these grounds rests firmly on the Defendant, and the court retains a residual discretion to grant leave to enforce the award in any case.

4. The basic facts relating to this contractual relationship are as follows : the Plaintiffs and the Defendant entered into 2 contracts on 29th June and 30th July 1988 for, respectively, the processing and sale of latex gloves. Under these contracts, the Defendant was to supply latex raw material to the Plaintiffs, who would manufacture the gloves in accordance with certain standards. The Defendant also undertook the sale of approved gloves manufactured. The contract contained the usual arbitration clause as follows:

"9.1 Any dispute arising out of the performance or related to this contract should be resolved by both parties through friendly discussion. Should the discussion still fail to achieve any agreement, the dispute shall then be resolved by arbitration.

9.2 The arbitration shall be held at Beijing by China International Promotion Committee and China Economic and Trade Arbitration Commission in accordance with their arbitration procedures, the arbitration award shall be the final award."

5. Various disputes arose and on 5th May 1989 the Defendant terminated the processing contract and on 15th May referred the matter to arbitration in Beijing under the auspices of CIETAC, filing an application for arbitration together with supporting documents. On 20th November 1990, the Plaintiffs filed their Defence and Counterclaim. A hearing was held on 28th December, attended by representatives from all parties, following which the Plaintiffs filed a further submission. The Defendant filed a further submission on 28th January 1991, followed by two replies to the Plaintiffs' further submission on, respectively, 12th March and 29th April. On 5th July 1991, CIETAC issued a notice stating that the tribunal would hold no further hearing and fixing 31st July as the final date for the submission of evidence. The arbitration proceedings were formally closed on 2nd August 1991, and an award was, under CIETAC's rules, to be rendered within 45 days of this date.

6. In mid-July 1991, the Defendant instructed a different firm of lawyers. On 12th August, these lawyers visited the Tsing Dao Latex Factory. Tsing Dao was the Plaintiffs' technical adviser in relation to the installation and running of the latex gloves production lines. The Plaintiffs had submitted certain evidence to the tribunal as to the quantity of gloves produced at its main factory. The Defendant now obtained a written confirmation from Tsing Dao, which was said to contradict this evidence. It said that the Plaintiffs' production lines were not completed until 23rd December 1988, that assembly and test running was not completed until April 1989, and that the pass rate of gloves produced was in the region 32% to 76%.

7. An appointment with the Chief Arbitrator was arranged by the Defendant's lawyer through CIETAC's Registrar, attended only by this lawyer, at which this new evidence was shown to the Chief Arbitrator. The Defendant alleges that it was then instructed to prepare and file a detailed submission for the tribunal,but CIETAC appears to deny that the etailed submission for the tribunal, but CIETAC Chief Arbitrator made, had any power to make, any such direction. In or the event, the Defendant delivered its submission on 26th August. On the same day, CIETAC handed down its decision, dismissing the Defendant's claim and rendering an award in favour of the Plaintiff on the Counterclaim.

8. In the Arbitration proceedings, the Defendant argued that the contract of 30th July 1988 was a forgery. The CIETAC award makes clear that the tribunal rejected this argument. Despite this, the Defendant sought to argue this again before me on the basis it would be contrary to the public policy of Hong Kong to enforce an award based on a forged contract. There is nothing in this point. The award, the enforcement of which is currently sought, was made on the counterclaim in the arbitration proceedings and is clearly based only on the processing contract of 29th June 1988. The validity of the contract of 30th July has no bearing on this.

9. The Defendant submitted that in the light of the above facts they had no opportunity to present their case. In reality they are saying they had no opportunity to present their case for a second time. The Defendant initiated the proceedings, submitting at that point in time a full application dealing with the merits of the dispute. They were represented at the hearing and made oral representations. Following this hearing, the Defendant filed a further three written submissions, two in reply to a submission of the Plaintiffs. As Mr. Wong put it : they in effect had the last word twice.

10. In the light of all this, it can hardly be credible that the Defendant had no opportunity to present their case. The Defendant knew that the tribunal had fixed a deadline for the submission of evidence. This deadline was allowed to pass without any application for an extension being made. It was not until after the proceedings had been formally declared closed that any attempt was made to have new evidence admitted. It seems to me that public policy requires proceedings, both in the courts and in arbitral tribunals, to have a finite end. I ask myself whether the

Defendant actually expects the arbitration proceedings to go on indefinitely. Once a tribunal has set a date for the end of the proceedings, it cannot be right that any party can go to the tribunal with new evidence and demand that it have an opportunity to be heard. There may of course be very exceptional cases but this is not one of them.

11. The tribunal may, of course, decide to extend the deadline and allow the evidence. In this case, the Defendant says this is what occurred. It is argued that the Chief Arbitrator, in giving instructions for the preparation of a detailed submission, impliedly extended the deadline, which had already passed, and that this amounted to a formal extension of time. Alternatively, it is said that the Chief Arbitrator appeared to have power to give the instructions he allegedly gave and thus created a legitimate expectation the evidence would be admitted. In support of this, I am pointed to the fact that the meeting with the Chief Arbitrator was arranged through CIETAC's Registrar and that it took place in the Chief Arbitrator's office. Against this, the Plaintiffs exhibit a letter from CIETAC which denies that the Arbitrator has power to "make any decision on the procedures of arbitration nor anything of a substantive matter. Any decision made shall not be binding on the Arbitration Tribunal." The letter also states that supplementary materials submitted after the deadline imposed will not be considered by the Tribunal.

12. I find it very difficult to believe that, on the one hand, the Chief Arbitrator would have agreed to the submission of this evidence and then, on the other hand, allowed the Award to be rendered before the party had had time to make any such submission. In view of this, I find it extremely doubtful that a formal extension of time was ever granted by the Chief Arbitrator as alleged.

13. Furthermore, if a legitimate expectation arose that the evidence would be admitted, and I doubt that it did, I agree with Mr. Wong when he asks how anything that occurred as a result of the meeting between the Defendants and the Chief Arbitrator could have been to the Defendant's detriment or disadvantage. If the Chief Arbitrator had taken either of the other paths open to him, either he would have refused to look at the new evidence or he would have denied that he had authority to allow its admission at this stage or at all. If he had taken either of these paths, I cannot see how the Defendant would have been in any better a position. This is especially so in the light of the evidence from CIETAC that the Tribunal is not allowed to consider evidence submitted after the expiry of the imposed deadline. Even if the Chief Arbitrator had refused to help and the Defendant had sought the permission of the full Tribunal for the admission of its new evidence, I cannot see how the result could have been any different or more favourable.

14. The Defendant's real complaint, as it soon emerged, was that the evidence of the Plaintiff, on which the Tribunal relied, was "inaccurate". This allegation

pertained to the evidence as to the quantity of latex gloves said to have been processed on the Plaintiffs' production lines at a time when, the Defendant now says, these lines were not fully operational. The word "forged" was initially used by Mr. Chan, but it soon became apparent that he was referring merely to the alleged inaccuracy of the evidence. The Defendant contended that the Plaintiff had misled the Tribunal and that it would be contrary to the public policy of Hong Kong to enforce an award obtained in such a manner.

15. This contention raises several issues. Firstly, as the Plaintiff argued, the evidence that the Defendant was seeking to have admitted at the Arbitration did not necessarily completely contradict the evidence of the Plaintiffs that was alleged to be misleading. The Defendant therefore failed to show that the Tribunal had been misled.

16. Secondly, and more importantly, the issue raised is certainly a simple matter of conflict of factual evidence. The Plaintiffs say one thing and the Defendant says another. There is nothing unusual in this occurring in any dispute, be it in arbitration or before the court. If the Defendant thought the Plaintiff was wrong, they had ample opportunity to say so in the Arbitration proceedings, and it is by no means clear that they did not actually do so. The proceedings began in May 1990 ; the Plaintiff submitted this evidence in January 1991; and the deadline was passed at the end of July 1991. The fact that the Defendant waited until July 1991 before instructing new lawyers and looking for this evidence is his own fault and thus is surely irrelevant. In arguing now that the Plaintiff misled the Tribunal, the Defendant wants another chance to argue the merits of the case. It is too late for that. The New York Convention is clear that it is not for the enforcing court to rehear the case on the merits. It makes no difference that the Defendant couches his submissions in terms of public policy and an attempt to mislead the arbitral tribunal. He is trying to appeal the merits of the case and that is not allowed.

17. In view of the above, I cannot accept that the Defendant had no opportunity to present its case. On the contrary, the Defendant made full use of the ample opportunity given and only complained after the proceedings had finally been closed, having foregone the opportunity of asking for an extension of those proceedings. All proceedings must have a finite end. Almost fourteen months after the proceedings were formally commenced by the Defendant, CIETAC decided to fix a date for the end of those proceedings. The Defendant made no objection to this, and it was therefore up to that party to work within the deadlines given. I cannot accept that CIETAC must either hear any new evidence brought at any time before it makes its award or else run the risk of making an unenforceable award. It would be wrong for me to give a judgment that effectively recognised the right of any party to insist the arbitration proceedings be reopened at any time.

18. In dealing with the submission that enforcement would be contrary to the public policy of Hong Kong, I note the words of Professor Albert Jan van den Berg in his book, "The New York Convention of 1958". He says, at p. 364, that:

"the public policy limitation of the Convention is to be construed narrowly and to be applied only where the enforcement would violate the forum State's most basic notions of morality and justice."

19. This statement has been upheld by various courts in several jurisdictions and I agree with this approach. The public policy ground for refusal must not be seen as a catch-all provision to be used wherever convenient. It is limited in scope and is to be sparingly applied. I do not see that any aspect of this case could offend Hong Kong's "basic notions of morality and justice". The argument that the Plaintiffs misled the Tribunal is no more than an attempt to conduct a merits review of the case, and does not constitute a basis for refusing enforcement on the grounds that enforcement would be contrary to the public policy of Hong Kong.

20. In the case of **Werner A. Bock K.G. v. The N's Company** [1978] HKLR 281 it was said that the whole tenor of this part of theArbitration Ordinance is to discourage unmeritorious technical points and to uphold Convention awards except where complaints of substance can be made good. I very much agree. In the present case, no complaint of substance has been made good, and the Award should therefore be upheld without looking at its merits.

21. For the reasons given above, I dismiss the application with costs.

(Neil Kaplan)
Judge of the High Court

Representation:

Mr. Horace Wong instructed by Livasiri & Co. for Plaintiffs

Mr. Kenneth Chan instructed by William Sin & So for Defendant

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