I. COURT OF FIRST INSTANCE

A. CHINA NANHAI OIL JOINT SERVICE CORPORATION SHENZHEN BRANCH v. GEE TAI HOLDINGS CO. LTD. [1994] HKCFI 215; [1995] 2 HKLR 215; HCMP2411/1992 (13 JULY 1994)

HCMP002411/1992

1992 No. MP 2411

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

BETWEEN

CHINA NANHAI OIL JOINT SERVICE CORPORATION SHENZHEN BRANCH	Plaintiff
and	
GEE TAI HOLDINGS CO. LTD.	Defendant

Coram: The Hon. Mr. Justice Kaplan in Chambers

Date of hearing: 20 June, 1994

Date of handing down judgment: 13 July, 1994

H E A D N O T E

Arbitration Chinese award - Enforcement under New York Convention - whether arbitral tribunal properly constituted - whether party opposing enforcement is estopped from relying on ground in S.44 of Arbitration Ordinance - whether court

should exercise discretion notwithstanding ground made out - Result : award enforced.

J U D G M E N T

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1. I have before me an application to enforce an arbitration award dated 10th February 1990 rendered by the Shenzhen Sub-Commission of the China International Economic and Trade Arbitration Commission (CIETAC). The Defendants oppose the enforcement of the award on the ground set out in section 44(2)(e) of the Arbitration Ordinance Cap. 341.

Section 44(1) provides that:

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

Section 44(2) provides that:

"Enforcement of a convention award may be refused if the person against whom it is invoked proves -

(a) ...

(b) ...

(c) ...

(d) ...

(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; ..."

2. It is clear therefore that the only grounds upon which enforcement can be refused are those specified in this section and that the burden of proving a ground is upon the Defendant. Further, it is clear that even though a ground has been proved, the court retains a residual discretion.

3. The parties entered into a contract dated 12th February 1988 which provided as follows in relation to arbitration :-

"12. Arbitration : Any dispute arising from the execution of, or in connection with this contract should be settled through negotiation. In case no settlement can be reached, the case shall then be submitted to the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade, Peking, for settlement by arbitration in accordance with the Commission's Provisional Rules of Procedure. The award rendered by the Commission shall be final and binding on both Parties."

4. On 2nd March 1989, the Plaintiff applied to CIETAC, Shenzben for arbitration of the dispute which had by then arisen. The Defendant received this notice on the 24th March 1989.

5. On 15th April 1989, in default of appointment by the Defendant, CIETAC, Shenzhen appointed an arbitrator for the Defendant. The Plaintiff had also appointed its arbitrator and the Shenzhen Sub-Commission appointed a presiding arbitrator.

6. In mid May 1989, Chen Jian, the Defendant's Shenzhen lawyer was instructed. Shortly thereafter, she pointed out to CIETAC, Shenzhen that the arbitration should be held in Beijing but CIETAC, Shenzhen, claimed to have jurisdiction.

7. On 17th June 1989, CIETAC, Shenzhen stated that they accepted jurisdiction over this dispute and gave notice of the hearing which was to be held on 3rd July 1989. The Defendant received such notice on the 19th June 1989.

8. On 26th June 1989, Chen Ning was instructed as an additional Shenzhen lawyer by the Defendant.

9. It appears that a hearing was held on the following dates namely, 12th July 1989, 3rd August 1989 and 18th December 1989. The award was rendered on 10th February 1990. No complaint is now made relating to the adequacy of the notice given to the Defendant of the hearing.

10. Mr. Reyes, who appears for the Defendant, bases his opposition to enforcement fairly and squarely on section 44(2)(e), that is the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties given that the award was rendered by CIETAC, Shenzhen and not CIETAC, Beijing.

11. It is common ground that the Plaintiff never approached to CIETAC, Beijing.

12. Chen Jian signed an affirmation dated 25th September 1992 in which she stated that after accepting instruction on behalf of the Defendant on 15th May 1989, she visited the Shenzhen Commission and pointed out that the arbitration should be held in Beijing. One of the appointed arbitrators quoted the arbitration rules and

stated that the Shenzhen Commission had authority to accept jurisdiction. She then goes on as follows :-

"Since when I was instructed, Defendant had already exceeded the time limit to submit a Defence, therefore according to arbitration rules, both I and Defendant cannot apply to court to oppose the acceptance of the matter for arbitration nor can we raise our opposition or ask for review with the Beijing Arbitration Committee or the Committee Chairman.

Subsequently, Shenzhen Branch Committee issued hearing notices .... Since if the Defendant and I do not appear in the hearing, we would lose the chance to state and defend our case before the Arbitration Court which may only have the evidence from the Plaintiff side alone and hence to allow the full claim of US$218,453.52. I therefore have no choice but to attend the hearing at the place and time notified by the court."

13. It is clear therefore that the Defendant did raise its objection with the Shenzhen Sub-Commission. The objection was overruled. No other steps were taken to make the point such as an urgent fax to the Chairman or Vice Chairman of CIETAC, Beijing complaining that the Shenzhen Conunission had accepted a case not within its jurisdiction. Instead, the Defendant took part in the arbitration and was fully represented throughout. I have seen no document or statement to the effect that the Defendant took part in the arbitration without prejudice to its contention that the Shenzhen Commission and the arbitrator appointed thereby had no jurisdiction over this dispute. I will, in due course, have to consider the effect of this admission. Further there is no evidence that this jurisdictional issue was raised with the arbitral tribunal itself nor were they were invited to consider it as a tribunal. All that was done was to raise the issue with one of the three members of the tribunal.

14. As the case centres around the constitution of CIETAC, it may be helpful to deal with this point at this stage. Much of the information I am about to recite comes from the affirmation of Mr. Chan Siu Wah, a qualified and practising lawyer in China. The remainder is in the public domain and is referred to in "Hong Kong and China Arbitration - Cases and Materials" published by Butterworths in May 1994.

15. The Arbitration Committee of the China Council for the Promotion of International Trade (CCPIT) was first established by the Government Administrative Council of the People's Republic of China by a resolution dated 6th May 1954 at the 215th meeting of CCPIT. Its full official name was then "Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade".

16. On 26th February 1980, by order of the State Council of the People's Republic of China, the Commission changed its name to the Foreign Economic and Trade Arbitration Commission (FETAC) of CCPIT.

17. On 21st June 1988, the State Council of the People's Republic of China changed the Commission's name to the China International Economic and Trade Arbitration Commission. It may be useful to point out that challenges to enforcement based on the change of name have met with a singular lack of success (see Guangdong New Technology etc v. Chiu Shing, MP 1625 of 1991, Barnes J., reported on p.237 Hong Kong and China Arbitration and Shanghai Nan Da Industrial v. FM International Ltd [1992] HKLD C6).

18. CIETAC has its headquarters in Beijing. It now has two sub-commissions, one in Shenzhen and one in Shanghai. The same rules of arbitration apply to arbitrations conducted in Beijing, Shanghai or Shenzhen.

19. Provisional Rules of Procedure of the Foreign Trade Arbitration Commission of CCPIT were adopted on 31st March 1956 at the 4th session of CCPIT.

20. CIETAC adopted new rules on 12th September 1989 at the 3rd session of the First National Congress of CCPIT. These rules became effective on 1st January 1989.

21. On 17th March 1994 at the First Session of the Standing Committee of the 2nd National Congress of CCPIT, new arbitration rules were promulgated, effective as of 1st June 1994.

22. Also on 1st June 1994, CIETAC published a list of CIETAC Arbitrators. This is a composite list and applies to all arbitrations conducted under CIETAC rules regardless of whether the arbitration is being held in Beijing, Shenzhen or Shanghai.

23. These new rules and the new list (which contained over 70 foreign nationals) were rendered necessary, inter alia, by the huge increase in CIETAC arbitrations over the years. In 1985, CIETAC handled 37 cases. In 1993, it received 504 new cases split as to 389 in Beijing, 75 in Shenzhen and 40 in Shanghai. This compares with 337 new cases submitted to the ICC in Paris in 1992.

24. One of the main issues in this case turns on whether in 1989, there were separate panels of arbitrators kept by Beijing and Shenzhen. At p.308 in "Hong Kong and China Arbitration" one finds a statement :-

"The CIETAC head office is located in Beijing. However, sub-commissions have been established in Shenzhen and in Shanghai. At present, each sub-commission maintains its own Panel of Arbitrators. No foreign national has been appointed to

the Panel of Arbitrators of either the Shanghai or Shenzhen sub-commissions, although the Shenzhen Panel includes a number of Chinese citizens from Hong Kong. Plans are now on the way to issue a unified Panel of Arbitrators which would be used for all CIETAC arbitration proceedings in Beijing, Shanghai and Shenzhen."

25. [This part of the text was written prior to the promulgation of the unified CIETAC list of arbitrations which appears as appendix 37 on p.811]

26. Mr. Reyes also referred to passages at pp.312 and 313 which indicate that the arbitration clause must clearly state that the arbitration shall be conducted by CIETAC so that reference to "Arbitration in China" or "arbitration in Peking" is not sufficient. It is suggested that :-

"... a clause providing for "CIETAC Arbitration in Dalian" would fail because CIETAC has no seat in that city."

27. This view is supported by a decision of Intermediate Leve] People's Court in Shatou City who held that a claim providing for arbitration by "the Guangdong Branch of FETAC of CCPIT" failed because FETAC did not have a branch in Guangdong although it did have one in Shenzhen. This decision was appealed to the Guangdong Provincial Higher Level People's Court but the decision was affirmed. [For a different approach to a similar problem in Hong Kong, see Lucky Goldstar Ltd. v. Ng Moo Kee Engineering reported at p.221 in "Hong Kong and China Arbitration"]

28. On the question of situs of arbitrations, one finds the following passage at p.323 in the same book :-

"CIETAC arbitration proceedings are held at either the Commission's headquarters in Beijing or at the premises of one of two sub-commissions in Shanghai and Shenzhen. Sub-commissions will assume jurisdiction over a case only if they are specifically designated to do so in the arbitration agreement. Otherwise, the case will always be referred to CIETAC headquarters in Beijing. Notwithstanding the foregoing, art. 24 of the rules allows tribunals to convene proceedings anywhere in China if required and with the approval of the Chairman. This, however, rarely occurs in practice."

29. I was referred to CIETAC's 1988 Rules, no doubt on the basis that they appear to govern this arbitration which was commenced by the Plaintiff's application dated 2nd March 1989. I was referred to 3 specific rules namely, Article 5, Article 24 and Article 42. Article 5 provides as follows :-

"The Arbitration Commission is located in Beijing. The Arbitration Commission may, according to the requirement of development of arbitration business, establish sub-commissions in other places within the territory of Chaina."

Article 24 states :

"The cases taken cognisance of by the Arbitration Commission shall be heard in the place where the Arbitration Commission is located and may, with the approval of the Chairman of the Commission, be heard in other places."

Article 42 states :

"These rules shall also apply to the cases of dispute taken cognisance of by the Sub-Commissions of the Arbitration Commission. In the arb BETWEEN itration proceedings conducted by the Sub-Commissions of the Arbitration Commission, the functions and duties of the Chairman and the Secretariat of the Arbitration Commission under these rules shall be performed by the Chairman and Secretariat of the Sub-Commissions."

30. As I pointed out above the arbitration clause in this particular contract refers to arbitration in accordance with CIETAC's Provisional Rules of Procedure. Under Article 19 of the Provisional Rules, one finds that :-

"Hearing shall be held at the seat of the Arbitration Commission. When necessary, hearings may, upon the approval of the Chairman of the Arbitration Commission, be held in other places within the Chinese territory."

31. By the time, these parties had entered into their contract, the Arbitration Commission had not only changed its name but it had also promulgated new rules. I do not think that it is possible for parties opting for CIETAC arbitrations to opt to have their arbitration governed under rules which are no longer in force. In those circumstances, I think it is necessary to have regard to the 1989 Rules and not the Provisional Rules. If and insofar as the Defendants base their claim on the fact that the arbitration was not conducted under the Provisional Rules, but was conducted under the 1989 Rules (as indeed it must because the Provisional Rules make no provision for Sub-Commissions), I would reject that submission on the basis that the parties opted for arbitration in Beijing in relation to a foreign trade contract and they must arbitrate under the rules in force at the time when an arbitration commences. I am not aware of any transitional provisions as between the 2 rules.

32. I did not think much turns upon the terms of the 1989 Rules. I think that they do apply to this arbitration but there is really nothing in them which addresses the point at issue.

33. At the hearing before me, the Plaintiff called their Chinese lawyer, Mr. Chan Siu Wah. He was asked about whether there was a unified list of arbitrators or whether each Sub-Commission kept their list. I think he was somewhat confused by the questioning because he was right when he said that there is now a unified list but I was not sure that he was properly directing his minds to the position as it existed in 1989. It is not without significance that none of the 3 arbitrators in this case were on the 1990 list of Beijing arbitrators. 2 of them are on the 1994 unified list. The arbitrator appointed by the Commission for the Defendant does not appear on the 1994 list. [These 2 lists were placed before me by consent as exhibits P1 and P2]

The Issues

34. The issues, as I see them, are as follows :-

(1) Did the Shenzhen Sub-Commission have jurisdiction over this arbitration given that the parties had agreed on arbitration in .....?

(2) Did the Defendant waive any irregularity in the composition of the Tribunal by participating in the arbitration without making clear that its participation was without prejudice to its jurisdictional objection which it had voiced before the hearing began?

(3) If the Defendant has establisbed the grounds set out in section 44(2)(e) of the Arbitration Ordinance should I exercise my discretion in favour of or against enforcement, it being clear that I have a discretion notwithstanding the proof of one of the grounds specified in the section?

Issue 1

35. In the light of the materials presented to me, I am satisfied that in 1989 the Shenzhen Sub-Commission kept its own list of arbitrators. If an arbitrator was on the Shenzhen list but not on the Beijing list, then he/she was not qualified to arbitrate in Beijing and vice versa. I believe that one of the reasons for having a unified list was to get over this very problem. I agree that the conclusion is a little strange, given that we are dealing with a single Arbitration Commission but I have to have regard to the way in which these problems are considered in China and must not impose my own method of solving this dilemma. If a Chinese Court is not prepared to hold that a clause providing for arbitration at CIETAC, Guangdong, is a sufficient reference to include CIETAC Shenzhen, then I am quite satisfied that a Chinese Court would not be impressed with a Shen zhen arbitrator dealing with a dispute in which the parties had agreed on CIETAC in Beijing and where one of the appointed arbitrators was not even on the Beijing list.

36. I conclude, therefore, somewhat reluctantly, that technically the arbitrators did not have jurisdiction to decide this dispute and that in all the circumstances of this case, the ground specified in the section has been made out. I say technically because the parties did agree to have a CIETAC Arbitration and that is what they got even though it was held at a place within China not specified in the contract and by arbitrators who apparently were not on the Beijing list. The promulgation of a unified list as from 1st June 1994 will ensure that this problem does not arise again, save perhaps in respect of arbitrations commenced before the new rules and new list.

2nd Issue

37. As to the 2nd issue, Mr. Reyes submitted that the Defendants were able to participate in the arbitration and, if they lost, they could challenge the composition of the tribunal at the enforcement stage. He seeks to rely upon certain passages in my judgment in Paklito Investment Ltd. v. Klockner (East Asia) Ltd. [1993] 2 HKLR 39.

38. In that case, I was dealing with an argument made, that even if I was satisfied that the ground of opposition had been established, nevertheless, I should exercise my discretion in favour of enforcement. Counsel making that submission relied strongly upon the fact that the Defendant in that case had taken no steps to set aside the award in China and that I should take that fact into account. That was a case where the Defendant voluntarily appeared before a properly constituted tribunal but as a result of the way in which the arbitration was conducted they were, most unfortunately, unable to present their case. They did not apply to a Chinese court to have the award set aside but they waited until the award was brought to Hong Kong for enforcement under the New York Convention and then they raised at the appropriate ground. All I said in that case was :

"There is nothing in s.44 nor in the New York Convention which specifies that a Defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere. In my judgment, the Defendants were entitled to take this stance.

It is clear to me that a party faced with a Convention award against him has two options. First, he can apply to the court of the country where the award was made to seek the setting aside of the award. If the award is set aside, then this becomes a ground in itself for opposing enforcement under the Convention.

Secondly, the unsuccessful party could decide to take no steps to set aside the award but wait until enforcement is sought and attempt to establish a Convention ground of opposition.

That such a choice exists, is made clear by Redfern and Hunter in International Commercial Arbitration, Sweet and Maxwell 2nd ed. p.474 where they state :-

'He may decide to take the initiative and challenge the award; or he may decide to do nothing but to resist any attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one - to act or not to act.' "

39. The present case is somewhat different. The Defendant's lawyer was alerted at the earliest possible opportunity to the point that this arbitration should have been heard in Beijing. She raised it somewhat informally, so it appears to me, before one of the appointed arbitrators. He opined that there was jurisdiction. She appears have done nothing else. She did not raise it with the tribunal and make it part of her submissions. She did not apply to a Chinese court for an order declaring that the tribunal had no authority. Perhaps what is more important, she did not take the basic precaution of writing, phoning or faxing CIETAC, Beijing and pointing out to them that the Shenzhen Sub-Commission was taking on a case which should have been heard in Beijing. She did none of these things and took part in the arbitration and I am sure did her very best to succeed on behalf of her clients. The award went against her clients and now at this stage, it is being suggested that there was no jurisdiction and that the composition of the arbitral authority was different to that specified in the contract. This is not an attractive proposition. Under most systems of law, parties are obliged to put forward their argruments at an early stage and not wait and see how the case turns out and then, and only then, if they lose, take jurisdictional points. Nevertheless, this is a serious point and I have to consider whether in the context of an enforcement action under the New York Convention, there is any scope whatsoever for the doctrine of estoppel.

40. Estoppel has certainly been considered in relation to Article II of the New York Convention. The first part of Article II obliges each contracting state to recognise an agreement in writing under which parties have agreed to submit to arbitration their differences concerning a subject matter capable of settlement by arbitration. The second part of Article II attempts to define the term "agreement in writing" and the third part of Article II obliges a court of a contracting state to refer cases submitted to it when there is an arbitration clause to arbitration unless it finds that the agreement is null and void inoperative or incapable of being performed.

41. The question has arisen in cases where there has been an arbitration and an award rendered and enforcement steps taken. At that stage a respondent takes a point on the absence of sufficient written form to comply with Article II. Is their scope in those circumstances from the doctrine of estoppel? This specific point is raised by Dr. Albert Jan van den Berg in his book, the New York Arbitration Convention of 1958, Kluwer, 1981. At p.182 he poses the following question :-

"There is, however, one case in which this may be questioned : if a party has acted specifically in respect of the arbitration agreement without objection, thereby

implying that he considers it valid, is he then subsequently estopped from invoking the lack of compliance of the agreement with the written form as required by Article II(2)? This case may, for instance, come up where a party has cooperated in the appointment of the arbitrator(s), has participated in the arbitration, or has invoked the arbitration agreement for objecting to the competence of a court to try the merits of the dispute.

The question form was part of a more general question whether a party can be estopped from invoking any of the provisions of the convention."

42. Dr. van den Berg then goes on to point out that courts appear to be somewhat divided on the question of estoppel an Article II(2). He refers to decisions in Germany and Italy which he concludes are not wholly is satisfactory. At p.184, he makes reference to an observation of the President of a Dutch court of first instance, which rejected the invocation of the formal invalidity of the arbitration agreement.

"The judge observed that from the minutes of the hearing before the arbitrators, at which the respondent was assisted by a lawyer, it appeared that neither the respondent nor his lawyer, had objected to the formal contents of the arbitration agreement. The judge held that '... at present ... more than 2 years after the hearing ... the respondent is estopped from the right to question the validity of the arbitration agreement ...' "

43. I should point out in passing that the award in this case was made by the CIETAC arbitrators on the 10th February 1990 and as far as I am aware the first time at which this point was taken was in the affidavit of Chen Jian dated 25th September 1992.

44. Dr. van den Berg then discusses 3 possible solutions to the question of estoppel from invoking the non-compliance with the written form of the arbitration agreement as required by Article II(2) but I believe his observations are equally apposite in relation to other parts of the Convention.

45. His first solution is to follow the views of the Italian and German court and conclude that the written form prescribed by Article II(2) was a condition for the enforcement of the agreement and award which must be complied with under all circumstances. On this basis, there could be no scope for the doctrine of estoppel.

46. The second solution is to approach the matter on the basis of municipal law and not as one being regulated by the Convention. He suggests that the municipal law relevant will be the law of the forum. He goes on :-

"Under this solution, the Convention remains applicable to the enforcement, whilst the estoppel from invoking the non-compliance with Article II(2) is to be decided

according to municipal law. Thus, under this solution, it may happen that the enforcement can be pursued on the basis of the Convention although the written form of Article II(2) is not met, because under law of the forum, a party is deemed to be estopped from invoking the non-compliance."

47. Under this second solution, he points out that more modern arbitration statutes tend towards an acceptance of estoppel and he points to the European Uniform Law of 1966 as an example. A similar view is discernable from the Model Law. Article 16 requires parties to raise a plea that the arbitral tribunal does not have jurisdiction not later than the submission of a statement to defence. The tribunal may admit a later plea if it considers the delay justified but, if not, then clearly the party is estopped from raising the point. Similarly, under Article 16(3) if the tribunal rules that it has jurisdiction any party may request within 30 days, the court to decide the matter. It seems to follow from this that if you do not seek the view of the court, then you cannot raise the matter subsequently at enforcement stage.

48. Dr. van den Berg's third solution is set out on p.185, where he says :-

"The third solution is to regard the question of estoppel as a fundamental principle of good faith, which principle overrides the formalities required by Article II(2). Under this solution the Convention would also remain applicable, differing from the second solution in that it does not depend on the diverse municipal laws. The principle of good faith may be deemed enshrined in the Convention's provisions. The legal basis would be that Article V(1) provides that a court may refuse enforcement if the respondent proves one of the grounds for refusal of enforcement listed in that Article. The permissive language can be taken as a basis for those cases where a party asserts a ground for refusal contrary to good faith.

"It is submitted that the third solution is, in principle, to be preferred. It would, for example, exclude the unsatisfactory result of the afore-mentioned decision of Italian Supreme Court. It would also correspond with the trend in the more modern arbitration laws. And, finally, it has the advantage that the question does not depend on municipal law as will be the case if the second solution was adopted. Although the Court of Appeal of Hamberg and the Dutch court of first instance had not expressly held so, it can be said that they implicitly favour the third solution."

49. I am quite satisfied that Dr. van den Berg's third solution is the correct one for me to apply. If the doctrine of estoppel can apply to arguments over the written form of the arbitration agreement under Article II(2), then I fail to see why it cannot also apply to the grounds of opposition set out in Article V. It strikes me as quite unfair for a party to appreciate that there might be something wrong with the composition of the tribunal yet not make any formal submission whatsoever to the tribunal about its own jurisdiction, or to the arbitration commission which constituted the tribunal and then to proceed to fight the case on the merits and then

2 years after the award attempt to nullify the whole proceedings on the grounds that the arbitrators were chosen from the wrong CIETAC list. I think there is much force in Dr. van den Berg's point that even if a ground of opposition is proved, there is still a residual discretion left in the enforcing court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances although I accept that in many cases where a ground of opposition is established, the discretion is unlikely to be exercised in favour of enforcement. If the enforcing court was obliged to refuse enforcement in the event of the establishing of a ground of opposition, I believe that it would be far harder to import the doctrine of estoppel. But a discretion there is, and I for myself are prepared to hold that on a true construction of the Convention there is indeed a duty of good faith which in the circumstances of this case required the Defendant to bring to the notice of the full tribunal or the CIETAC Commission in Beijing its objections to the formation of this particular arbitral tribunal. Its failure to do so and its obvious policy of keeping this point up its sleeve to be pulled out only if the arbitration was lost, is not one that I find consistent with the obligation of good faith nor with any notions of justice and fair play.

50. I am encouraged to note that other enforcing courts have taken a similar attitude. The Swiss Federal Supreme Court had a case where enforcement was opposed on the grounds that the tribunal consulted an expert in the absence of the parties. The Court declined to get involved in arguments about Article V(1)(b) because the respondent had failed to object when it was informed by the president of the tribunal shortly after the consultation had taken place. According to the Court the raising of this objection at the enforcement stage only manifested bad faith and constituted an abuse of rights. (Yearbook XI p 439, Switzerland 10).

51. Similarly The Spanish Supreme Court held that a respondent was barred from objecting to the competence of arbitrators at the enforcement stage because they should have done so during the arbitral proceedings (Yearbook ibid, Spain 6). The Court of Appeal of Athens took the view that arguments about the lack of written form of the agreement to arbitrate and the authorisation to conclude the agreement cannot be raised at the enforcement stage if that party participated in the arbitration proceedings without reservation. The Court arrived at this conclusion both on the basis of German law (law of situs) and Greek arbitration law (Yearbook XIII & XIV p 575, Greece 10).

52. It is for these reasons, therefore, that I am quite satisfied that I am entitled to apply the doctrine of estoppel to the conduct of the Defendants in this case and to find that, even though technically, the arbitration tribunal was wrongly constituted, nevertheless, this is not in all the circumstances of this case a point which they are now entitled to take.

<u>Discretion</u>

53. As I have decided that the Defendants are estopped from relying upon the wrongly constituted arbitral tribunal, it is not strictly necessary for me now to consider the question of discretion although I have discussed it briefly in the context of the doctrine of estoppel. However, just in case this matter goes further, and lest another court should disagree with my view as to estoppel, it is necessary for me to state how I would have exercised my discretion.

54. In Paklito (supra), I briefly described that sort of situation where a court was satisfied that a ground had been made out but, nonetheless, proceeded to enforce the award. The example I gave is where the Defendant was prevented from submitting some evidence as part of its case but where the enforcing court looked at that evidence and could see that it would not have made any difference at all to the result. However, I was not required in that case to decide whether this was the only circumstance where such a view might be taken [note that at p.277, line 27 in Hong Kong and China Arbitration, the word "not" has been omitted after the words "It is".]

55. How should I exercise my discretion in this case?

56. The parties agreed on a CIETAC Arbitration under CIETAC Rules. They got it.

57. CIETAC, Shenzhen, is a sub-commission of CIETAC in Beijing. The Defendants participated in the arbitration and have raised no other grounds whatsoever which go to the procedure of the arbitration or the substance of the award. Had they won, they would not have complained.

58. Further, I am quite satisfied on the material placed before me that no one would be placed on the arbitration panel of the Shenzhen Sub-Commission without the approval of the Commission in Beijing. It was, after all, CIETAC which is headquartered in Beijing that set up the Shenzhen Sub-Commission at about this very time and later set up another one in Shanghai. The original reason for separate panels may well have had something to do with the vastness of China and the cost of travel.

59. I am quite satisfied that the Defendants got what they agreed in their contract in the sense that they got an arbitration conducted by 3 Chinese arbitrators under CIETAC Rules. To exercise my discretion against enforcement on the facts of this case would be a travesty of justice. Had I thought that the Defendants' rights had been violated in any material way, I would, of course, have taken a different view. However, this is an obvious case where the court can exercise its discretion to enforce the award notwithstanding a ground of opposition in the New York Convention being made out. This conclusion is, in my judgment, quite consistent with the pro enforcement bias of the Convention and the pro enforcement attitude of most enforcing courts around the world.

60. Let it not be thought that I am being critical in any way of the Defendant for taking this point which was a perfectly respectable and proper point to take. It has enabled me to consider the constitution of CIETAC and hopefully give some guidance in relation to any other similar case which might come for enforcement under the 1989 Rules and based on the separate listing.

61. Finally, I must comment on the procedure adopted by the Plaintiff in this case. Order 73 of the Hong Kong Rules of the Supreme Court provides a very simple method for dealing with applications under the New York Convention. The Plaintiff takes out an Originating Summons for leave to enforce the award as a judgment of the court. If the papers are in order and comply with theArbitration Ordinance and rules, the judge grants the order but stays enforcement for 14 days to enable the Defendant, if so advised, to apply to set aside the ex parte order. If an application is made to set aside the order then the stay continues until the matter has been disposed of. This procedure prevents unnecessary applications to the court and keeps the cost down. When all the evidence has been filed on both sides the parties can fix a date and the matter can be disposed of in one hearing.

62. In this case, the Plaintiff applied inter partes. This resulted in 3 applications before a High Court Judge, basically for directions.

63. Neither of the previous 3 hearings was, in my judgment, necessary. The judge had not directed an inter partes summons should be issued. I referred to this very point in Zhejian Province Garment Import and Export Co. v. Siemssen and Co. (Hong Kong) Trading Ltd.[see p.248 "Hong Kong and China Arbitration"]. I indicated that if the ex parte procedure was not used, then save in exceptional circumstances (which this is clearly not), then there might be a costs consequence. [I accept that this decision which I handed down on 2nd June 1992 may not have been noticed before the inter partes summons was taken out in this case but the terms of Order 73 are clear enough].

64. I am quite satisfied that the 3 previous hearings before the judge were unnecessary and would not have been necessary if the ex parte procedure had been used. However the Plaintiff has already been awarded the costs of two of those appearances so I cannot interfere. I propose to make a costs order nisi in favour of the Plaintiffs excluding the costs of the hearing on 30th September 1992 in respect of which there will be no order as to costs.

(Neil Kaplan)
Judge of the High Court

Representation:

Mr. Erik Shum instructed by W.K. To & Co. for Plaintiff

Mr. Anselmo Reyes instructed by Ince & Co. for Defendant
