In the Matter of Section 19 and Section 29 of the International Arbitration Act (Cap 143A Revised Edition 1995) and O 69A r 6 of the Rules of Court 1996

And

In the Matter of An Arbitration between Newspeed International Limited (Buyers) and Citus Trading Pte Ltd (Sellers) and An Arbitral Award dated 16 August 2000 ensuing therefrom

Between

Newspeed International Limited ...plaintiffs

And

Citus Trading Pte Ltd ...defendants

Citation: **OS No 600044 of 2001**

Jurisdiction: **Singapore**

Date: **2001:06:04**

2001:04:24, 2001:04:05

Court: **High Court**

Coram: **Woo Bih Li JC**

Counsel: **Yang Lih Shyng *(Khattar Wong & Partners)* for the plaintiffs**

Sushil Nair and Tan Choon Leng *(Drew & Napier)* for the defendants

JUDGMENT:

Grounds of Decision

Background to my decision

1. In Originating Summons No 600044 of 2001, Newspeed International Limited ('Newspeed') had sought leave to enforce an arbitration award dated 16 August 2000 against Citus Trading Pte Ltd ('Citus').

2. By an Order of Court dated 19 February 2001, such leave was granted.

3. Citus then applied in Summons-in-Chambers No 600563 of 2001 to set aside the Order granting leave to enforce.

4. After hearing arguments, including arguments on interlocutory matters, I dismissed Citus' application with costs. Citus have appealed against this decision.

Background to Citus' application

5. Newspeed had entered into a contract No CT/NS/001 dated 2 November 1998 ('the Citus Agreement') with Citus for Newspeed to buy from Citus 7,000 cubic metres (allowing 10% increase and decrease) of Indonesian Merbau Round Logs ('the Logs').

6. Newspeed in turn re-sold the Logs to China Timber Import/Export Company under contract number NSL/35 ('the China Timber Agreement').

7. Newspeed made a claim against Citus for short-delivery and defective quality. They relied on a survey report prepared by Guangdong Import and Export Commodity Inspection Bureau of the People's Republic of China ('GIEC').

8. Citus' position was that a log list had been provided with the Citus Agreement which described the Logs and explained defects in the Logs. After taking into account those that were defective, the price was adjusted accordingly.

9. Citus said that after they received the GIEC report, they sent their graders accompanied by graders from their Indonesian suppliers to Huangpu port where the Logs had been delivered.

10. Their graders, the Indonesian graders and graders from the port spent a week and came up with their own log list i.e a second log list.

11. Also the GIEC report referred to the China Timber Agreement instead of the Citus Agreement.

12. The dispute was referred to arbitration under the China International Economic and Trade Arbitration Commission ('CIETAC') in accordance with the terms of the Citus Agreement. Three arbitrators were appointed.

13. According to Citus they had asked for the China Timber Agreement to be produced and various information from the start of the arbitral hearing. One of the documents they had also sought was the log sheet of the GIEC which should be attached to their report.

14. The hearing of the arbitration tribunal took place on 11 January 2000 and lasted no more than 90 minutes.

15. According to the allegations of Citus or documents exhibited:

(a) Subsequent to the hearing:

(i) Citus had filed an Opinion dated 28 January 2000, and

(ii) Newspeed had filed an Opinion, received by CIETAC on 2 February 2000.

(b) CIETAC had issued a letter dated 18 February 2000 that all opinions and evidence are to be submitted by the final deadline of 10 March 2000.

(c) Both Citus and Newspeed filed further opinions:

(i) Opinion filed by Citus dated 29 February 2000

(ii) Opinion filed by Newspeed and received by CIETAC on 8 March 2000

(iii) Opinion filed by Citus dated 24 March 2000.

(d) CIETAC replied on 30 March 2000 that since the last Opinion filed by Citus was after the deadline of 10 March 2000, CIETAC may not accept it. I note that the translated version states that the arbitration tribunal will decide whether to accept the evidence submitted by Citus. Citus' position was that the last Opinion filed by it did not forward any new document or evidence.

(e) On or around 28 April 2000, Newspeed wrote to the arbitral tribunal to explain the GIEC report and to forward for the first time, inter alia, the China Timber Agreement. Citus alleged that the authenticity of the China Timber Agreement was open to question for various reasons but it is not necessary for me to state them. Also the China Timber Agreement did not have the log list that should have accompanied this agreement.

(f) Citus alleged that despite the deadline of 10 March 2000 and CIETAC's letter of 30 March 2000, CIETAC was prepared to accept Newspeed's new evidence without question as CIETAC simply forwarded Newspeed's explanation to Citus and asked them to check it.

(g) Citus alleged that Citus wrote to CIETAC on 17 May 2000 stating that the China Timber Agreement and related documents submitted constituted new evidence and sought leave for a sitting for cross-examination to be conducted. I noted that the translated version only states that Citus hoped that the arbitral tribunal will first examine and verify the new evidence (from Newspeed) before the tribunal decides whether to accept it.

(h) On 16 August 2000 Citus wrote to request an extension of the arbitration term and a second sitting because Citus had important evidence to submit and had questions about the evidence last submitted by Newspeed.

(i) From the documentary evidence, it seems that this letter dated 16 August 2000 was received by CIETAC on 23 August 2000.

(j) On 24 August 2000, Citus sought again for the arbitration to be extended for another hearing. In this letter, the intention to cross-examine was mentioned for the first time.

(k) Very soon 'thereafter', CIETAC forwarded an arbitration award dated 16 August 2000.

(l) Citus then appealed to a court in Beijing on 21 September 2000. Mr Yang Lih Shyng, for Newspeed, said this was the Intermediate People's Court. The appeal was dismissed on 30 October 2000.

The correspondence with CIETAC was usually done by lawyers.

16. In summary, Citus' position was that:

> (a) They had not been given the opportunity to challenge the China Timber Agreement.
>
> (b) The China Timber Agreement did not attach the log list that accompanied the agreement.
>
> (c) Furthermore, even if the China Timber Agreement was bona fide, it showed that Newspeed made no loss and there was no evidence of any claim against Newspeed.

17. Citus then applied to set aside the (Singapore) Order granting leave to enforce the award. Its application did not identify the specific provision of the International Arbitration Act (Cap 143A) ('IAA') that they were relying on. Neither did the supporting affidavits.

18. However Mr Sushil Nair, for Citus, said that Citus were relying only on that part of s 31(2)(c) of IAA which states:

> '31(2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that –
>
> > (c) he … was otherwise unable to present his case in the arbitration proceedings; '

19. It was not in dispute that the reasons for the application before me were the same reasons Citus had relied on in their appeal to the Intermediate People's Court.

20. Mr Nair relied primarily on *Paklito Investment Ltd v Klockner East Asia Ltd* [1993] 2 HKLR 39.

21. In that case, the arbitration was also under CIETAC. Kaplan J held, inter alia, that the defendants there did have the right to comment on the reports of experts appointed by the arbitral tribunal and accordingly the defendants there had been prevented from presenting their case.

22. At p 49 to 50, Kaplan J said:

> 'I have a very limited function under the Arbitration Ordinance. Having concluded that a serious breach of due process has occurred I cannot see that it would be right or proper to exercise my discretion in favour of enforcement. I am quite satisfied that even when one takes into account that the parties have chosen an arbitral law and practice which differs to that practised in Hong Kong there is still a minimum requirement below which an enforcing court, taking heed of its own principles of fairness and due process, cannot be expected to approve. Regrettably, this case is a classic example of such a situation.'

23. Accordingly, Kaplan J upheld the order of Master Cannon who had set aside her own order granting leave to enforce the arbitral award.

24. In that case, the plaintiffs had argued that the defendants should have appealed to a Chinese court rather than apply to set aside the order granting leave to enforce the award. However Kaplan J decided this was not necessary.

25. Mr Yang argued that the facts before me were different. Citus had appealed to the Intermediate People's Court and had failed. That decision was binding on Citus.

26. I agreed. Although Kaplan J had decided that it was not necessary for the defendants there to appeal to the Chinese court before seeking an order from the Hong Kong court to set aside the order granting leave to enforce an award, he did not say that the defendants there could have two bites at the cherry, i.e by proceeding to a Chinese court and, if unsuccessful, then by applying to the Hong Kong court.

27. At p 48 and 49, he said:

> 'It is clear to me that a party faced with a Convention award against him has two options. Firstly, he can apply to the courts 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 can 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* 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."
>
> (For the English domestic position see p.546 *et seq* of *Mustill & Boyd Commercial Arbitration* 2nd ed.).'

28. I take this to mean that the options are alternatives and are not cumulative.

29. Indeed, at p 47, Kaplan J said that based on the evidence before him he was satisfied that the procedural irregularity which he found to have occurred 'would also have been found by a Chinese court had they been invited to consider the matter'.

30. The facts before me were quite different. The Intermediate People's Court had been invited to consider the matter and Citus were unsuccessful.

31. I would add that the expert opinion of Citus' lawyer in China had criticised the proceedings before the arbitral tribunal but had not criticised the proceedings before the Intermediate People's Court.

32. In my view, *Paklito* did not support Mr Nair's arguments but Mr Yang's.

33. Accordingly, Citus' application was dismissed with costs.

Woo Bih Li
Judicial Commissioner
Singapore