Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd

UNCITRAL !

HIGH COURT — ORIGINATING SUMMONS NO 1056 OF 1994
UDITH PRAKASH J
8 JUNE, 5, 19 JULY, 29 SEPTEMBER 1995

Arbitration — Foreign award — Application to enforce — Objections raised by defendants — Defences under ss 31(2)(b), (d), (e), 31(4)(a) and (b) of International Arbitration Act 994 — International Arbitration Act 1994 ss 31(2)(b), (d), (e), 31(4)(a) & (b)

The plaintiffs were an organisation constituted under the laws of China. The defendants were an organisation consituted under the laws of Singapore. On 15 October 1992, the parties entered into a contract for the sale of goods by the defendants to the plaintiffs. A dispute subsequently arose which dispute the plaintiffs submitted to arbitration in China in accordance with the contract. The arbitral tribunal issued its award in favour of the plaintiffs in April 1994.

The defendants did not satisfy the award. In October 1994, the plaintiffs applied in these proceedings for an order that they be at liberty to enforce the award in the same manner as a judgment or order of this court. An order to that effect was made shortly thereafter and served on the defendants. The defendants then applied for the order to be set aside and for the further order that the arbitration award should not be enforced against them. Their application was heard by the assistant registrar in February 1994 and was dismissed. The defendants appealed to the High Court.

The defendants put forth the following grounds in their objection to the award being enforced:

(i) the order of court dated 27 October 1994 as drawn, failed to to comply with RSC O 69 r 7(7) in that the order of court registering the arbitration award was not indorsed with a statement specifying the period of time within which they had to apply to court to have the order set aside and stating that during such period the plaintiffs would not be able to enforce the award;

(ii) the award dealt with a difference not contemplated by, or not falling within the terms of the submission to arbitration or contained a decision on a matter beyond the scope of the submission to arbitration in that the plaintiffs had by their conduct waived their right to arbitration and did not raise the issue to the arbitrators;

(iii) the arbitral award procedure was not in accordance with the agreement between the plaintiffs and the defendants or was not in accordance with the law of the country where the arbitration took place, in that the arbitrators were not prompted to and did not in any event adhere to the proper procedure when making the award in favour of the plaintiffs;

(iv) the subject matter of the difference between the plaintiffs and the defendants with respect to the award was not capable of settlement by arbitration under the law of Singapore in that the jurisdiction conferred upon the arbitration did not specify the law governing the contract or the curial law of the arbitration proceedings, and such an issue would under the law of Singapore have to be either agreed between the parties or decided by the arbitrators; and

(v) enforcement of the award would be contrary to the public policy of Singapore in that the courts would not allow an award to be enforced where a defendant had raised facts which would give rise to the possibility that the award already procured did not decide on the real matter in dispute between the parties and injustice would be done to the defendants if the award were to be enforced.

Held, dismissing the appeal:

(1) The omission had not prejudiced the defendants. Having received the order on 1 November 1994, the defendants had consulted their solicitors within the next five days and had made their application to set aside the order within the specified period of 14 days. In the meantime, the plaintiffs had not instituted any execution proceedings. Further, the omission of the notice could not nullify the order since the notice did not affect the fundamental points of whether the court had the jurisdiction to hear the plaintiffs' application or whether the grounds required for registration of the award had been satisfied. It was a notice drawing attention to the procedure to be followed after the order had been obtained and not a matter which had to be complied with prior to the making of the order (see p 40E–G).

(2) There was no evidence that the procedure followed by the Commission in conducting the arbitration had not been in accordance with the Arbitration Rules. English legal principles were not applicable because this was not an English arbitration. Even if there had not been any agreement between the parties as to what procedure was to be followed, the appropriate procedure would not have been English procedure but Chinese procedure since the arbitration took place in China (see p 41G–I).

(3) The defendants were given every opportunity by the Commission to present their case in reply to the claim. They however chose deliberately to reject that opportunity. It was also clear from the way in which the award was written that the arbitrators were well aware of the facts of the case, in particular, that the defendants had made a claim that a force majeure incident had occured. The defendants themselves could have forestalled such a finding by producing proof of the force majeure incident to the Commission. They had refused to participate in the arbitration at all and in that situation their complaint that the arbitrators had not considered whether there was sufficient evidence to make a finding in favour of the plaintiffs was unjustifiable. In addition, the fact that the Commission had found for the plaintiffs did not mean that they had not addressed themselves to the evidence presented as required (see pp 41I to 42F).

(4) None of the documents relied upon by the defendants suggested that the plaintiffs were giving up their right to arbitration. The documents

merely showed that the plaintiffs desired to proceed legally in the event that their attempts to get payment directly from the defendants failed. An arbitration was a legal channel of seeking redress and arbitration proceedings were also legal proceedings (see p 43G–H, post). Further, there was no evidence that the defendants relied on the statement of the plaintiffs and acted to their detriment by reason of such reliance apart from a bare assertion that the defendants believed that by stating in their letters that they would resort to legal channels, the plaintiffs meant that they would institute a law suit here and abandon their rights to arbitration (see p 44E); *Andre et Compagnie SA v Marine Transocean* [1981] QB 694 and *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] AC 854 distinguished.

(5) Article 29 of the Arbitration Rules allowed the arbitral tribunal, in the event of one party failing to appear at the hearing, to proceed with the hearing and make an award by default. The defendants' dissatisfaction with the award was a matter of substance rather than procedure and they had not subsstantiated their assertion that the arbitration procedure was not in accordance with their agreement or in accordance with Chinese law (see p 42F).

(6) While it was correct that the arbitrators did not specifically identify the law which they applied to the contract or proceedings, it was not correct that they had made the award only in accordance with trade practice. In the absence of any express choice of law, the nominated place of arbitration was the best evidence of an implied choice of law. It appeared therefore that Chinese law was the basis of the decision (see p 45C–E).

(7) Public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. The comity of nations required that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist (see p 46B–C).

[*Editorial Note*: The defendants have appealed to the Court of Appeal vide Civil Appeal No 90 of 1995.]

Cases referred to

Andre et Compagnie SA v Marine Transocean [1981] QB 694.

Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal [1983] AC 854

Legislation referred to

Arbitration (Foreign Awards) Act (Cap 10A)

International Arbitration Act 1994 ss 31(2)(b), (d), (e), 31(4)(a), (b), 36

Rules of the Supreme Court O 2 r 1, O 69 r 7(7)

S Thulasidas (*Shook Lin & Bok*) for the plaintiffs.

Lawrence Teh (*Rodyk & Davidson*) for the defendants.

Judith Prakash J: In October 1992, the plaintiffs and defendants entered into a contract for the sale of goods by the defendants to the plaintiffs. A dispute subsequently arose which dispute the plaintiffs submitted to arbitration in China in accordance with the contract. The arbitral tribunal issued its award in favour of the plaintiffs in April 1994.

The defendants did not satisfy the award and, as the defendant company is incorporated in Singapore, the plaintiffs in October 1994 applied in these proceedings for an order that they be at liberty to enforce the award in the same manner as a judgment or order of this court. An order to that effect was made shortly thereafter and served on the defendants. The defendants then applied for the order to be set aside and for the further order that the arbitration award should not be enforced against them. Their application was heard by the assistant registrar in February 1995 and was dismissed. The defendants appealed. I dismissed their appeal and they have now appealed to the Court of Appeal.

Background

The plaintiffs are an organisation constituted under the laws of China. On 15 October 1992, they agreed to buy from the defendants 15,000 metric tons of steel wire rods from a Black Sea port to be delivered to the plaintiffs at the ports of Tianjin and Haikou in China. The contract provided that the latest date of shipment was 25 October 1992 and that if the delay in shipment should exceed three weeks, the plaintiffs would have the right to cancel the contract and the defendants would pay a penalty of 5% of the value of the contract.

The contract also contained the following material articles:

> 20 Force majeure: The sellers shall not be held responsible for the delay in shipment or non-delivery of the goods due to force majeure, which might occur during the process of manufacturing or in the course of loading or transit. The sellers shall advise the buyers immediately of the occurrence mentioned above and within fourteen days thereafter, the sellers shall send by airmail to the buyers for their acceptance a certificate of the accident issued by the competent government authorities or the chamber of commerce where the accident occurs as evidence thereof. Under such circumstances the sellers, however, are still under the obligation to take all necessary measures to hasten the delivery of the goods. In case the accident lasts for more than 10 weeks, the buyers shall have the right to cancel the contract.
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> 22 Arbitration: All disputes in connection with the execution of this contract shall be settled friendly (sic) though negotiations. In case no settlement can be reached, the case may then be submitted for arbitration to the Arbitration Committee of the China Council for the Promotion of International Trade in accordance with the Provisional Rules of Procedure promulgated by the said arbitration committee. The arbitration shall take place in Beijing and the decision of the arbitration committee shall be final and binding upon both parties. Neither party shall seek recourse to a law court or other authorities to appeal for revision of the decision. Arbitration fee shall be borne by the losing party.

After the contract was concluded there were further negotiations between the parties with regard to the shipment date as the defendants were unable to ship the goods within the originally prescribed dates. Finally, the plaintiffs agreed to amend the latest shipment date to 31 January 1993 and this was provided for by

an amendment of the letter of credit which the plaintiffs had procured in favour of the defendants.

There is a dispute as to what happened next. According to the plaintiffs, shipment was not effected on or before 31 January 1993 due to the default of the defendants although the defendants had sent the plaintiffs a fax dated 30 January 1993 stating that the arrangements for loading the cargo were complete and that loading at the port of Reni in the Black Sea onto a vessel called St Nikatriov was currently underway and expected to be over shortly. The plaintiffs replied the same day to say that their information was that no such vessel was at that port on that date. On 1 February 1993, the plaintiffs formally cancelled the contract and preserved their right to claim the penalty provided for in the contract.

The defendants' position was that on 27 January they were informed by the port authorities in Reni that there was a fierce storm and earthquake in the Black Sea area and that movement of underwater soil and silt in and around Reni had rendered navigation of vessels into that port impossible. The defendants were further informed by the port authorities that shipment from Reni was unsafe and that all loading had been postponed. The defendants said that they had immediately written to the plaintiffs informing them of the situation at Reni and declaring a situation of force majeure under art 20 of the contract. They said that their letter of 30 January 1993 was sent in error due to a miscommunication. The defendants alleged that on 6 February 1993 they had written to the plaintiffs informing them again about the force majeure position and that on 8 February 1993 they had sent the plaintiffs a copy of the original force majeure certificate dated 29 January 1993 which they had received from the Chamber of Commerce and Industry of the Russian Federation.

The plaintiffs, on the other hand, contended that the defendants had not sent any letter declaring force majeure to the plaintiffs on 27 January 1993 and that the letters of 27 January 1993 and 6 February 1993 were both typed on the same day. The plaintiffs said that they only received the letter of 27 January 1993 on 18 February 1993. They denied receiving the letter of 8 February 1993 or the force majeure certificate. They did not accept that any incident of force majeure had occurred so as to excuse the defendants from their shipment obligations under the contract pursuant to art 20.

In late March 1993, the plaintiffs informed the defendants that they required payment of the sum of US$217,500 being the non-performance penalty payable by the defendants under the contract. They further notified the defendants that they had authorised a Singapore company to collect payment on their behalf and that if the defendants did not pay they would seek recourse through legal channels to recover the losses sustained by them by reason of the defendants' breach.

The defendants did not pay the plaintiffs the amount demanded. In June 1993, the plaintiffs submitted the dispute for arbitration to the China International Economic And Trade Arbitration Commission ('the Commission') which, apparently, is the same body as the China Counsel for the Promotion of International Trade, the body nominated under the contract to conduct the arbitration. The defendants then received a letter dated 24 June from the Commission informing them that the Commission had taken cognisance of the plaintiffs' case and that they had started the arbitration proceedings. The defendants were asked to do

various things, including naming an arbitrator and filing their defence. Various documents in Chinese were forwarded with the said letter.

On 1 July 1993 and 4 September 1993 the defendants wrote to the Commission asking for an English translation of the documents and stating that they did not agree to the institution of arbitration proceedings. The Commission wrote to the defendants again in November 1993 stating that if they did not appoint an arbitrator, the Commission would proceed with the arbitration. In January 1994, the defendants were informed that the hearing of the arbitration would take place on 7 April 1994. The defendants did not attend the hearing and, by a letter dated 9 April 1994, the Commission told the defendants that the plaintiffs had presented their case and asked the defendants to submit their request or supplementary materials within the next 15 days. The defendants' only response to this letter was a fax stating that they did not agree to the arbitration. The Arbitration Commission proceeded to issue its award in favour of the plaintiffs on 30 April 1994.

The grounds of the defendants' objections

The plaintiffs' original application had been made pursuant to the provisions of the Arbitration (Foreign Awards) Act (Cap 10A). This statute was repealed by the International Arbitration Act 1994 ('the Act') which came into force on 27 January 1995. Section 36 of the Act provides that any proceedings commenced by virtue of the Arbitration (Foreign Awards) Act should continue as if it had been commenced under the Act. Accordingly, the legislative provisions governing this application were those contained in s 31 of the Act. This section sets out the various grounds on which the court may refuse to enforce a foreign arbitration award.

Before me, the defendants argued that the award should not have been registered under the Act for the following reasons:

(i) the order of court dated 27 October 1994, as drawn, failed to comply with RSC O 69 r 7(7);

(ii) the award dealt with a difference not contemplated by, or not falling within the terms of the submission to arbitration or contained a decision on a matter beyond the scope of the submission to arbitration in that the plaintiffs had by their conduct waived their right to arbitration and did not raise the issue to the arbitrators;

(iii) the arbitral procedure was not in accordance with the agreement between the plaintiffs and the defendants or was not in accordance with the law of the country where the arbitration took place, in that the arbitrators were not prompted to and did not in any event adhere to the proper procedure when making the award in favour of the plaintiffs;

(iv) the subject matter of the difference between the plaintiffs and the defendants with respect to the award was not capable of settlement by arbitration under the law of Singapore in that the jurisdiction conferred upon the arbitrators did not specify the law governing the contract nor the curial law of the arbitration proceedings, and such an issue would under the law of Singapore have to be either agreed between the parties or decided by the arbitrators; and

(v) enforcement of the award would be contrary to the public policy of Singapore in that the courts will not allow an award to be enforced where a defendant

has raised facts which would give rise to the possibility that the award already procured did not decide on the real matter in dispute between the parties and injustice would be done to the defendants if the award were to be enforced.

The defendants, therefore, were in the main relying on the grounds for refusing to nforce a foreign arbitration award set out in ss 31(2)(b), (d) and (e) and ss 31(4)(a) nd (b) of the Act.

i) Non-compliance with RSC O 69 r 7(7)

The defendants' first complaint was that when the order of court registering the rbitration award was served on them it was not indorsed with a statement pecifying the period of time within which they had to apply to court to have the rder set aside and stating that during such period the plaintiffs would not be able o enforce the award. This statement was a requirement of O 69 r 7(7) and the efendants contended that the need to comply with this rule was imperative so hat the defendants would have been given sufficient notice of the plaintiffs' ntention to enforce the award.

The plaintiffs pointed out that the order of court had been served on the efendants on 1 November 1994 and the defendants' application to set it aside had een filed on 15 November 1994. They conceded that there was an omission to tate in the order that the defendants had 14 days in which to apply to set it aside ut contended that this omission was only an irregularity and did not nullify the rder. They relied on O 2 r 1 in support of this argument.

I agreed that the plaintiffs' omission should be regarded as an irregularity urable under O 2 r 1. It was clear on the facts that this omission had not rejudiced the defendants. Having received the order on 1 November, they had consulted their solicitors within the next five days and had made their application o set aside the order within the specified period of 14 days. In the meantime, the laintiffs had not instituted any execution proceedings.

Further, the omission of the notice could not nullify the order since the notice id not affect the fundamental points of whether the court had the jurisdiction to ear the plaintiffs' application or whether the grounds required for registration of he award had been satisfied. It was a notice drawing attention to the procedure to e followed after the order had been obtained and not a matter which had to be omplied with prior to the making of the order. The defendants' first point was hus devoid of merit.

ii) Was the arbitration procedure in order?

This issue arose from s 31(2)(e) of the Act under which enforcement of an award vill be refused if the composition of the arbitral authority or the arbitral procedure vas not in accordance with the agreement of the parties or, failing such agreement, vas not in accordance with the law of the country where the arbitration took lace.

The defendants did not take issue with the composition of the arbitral authority. t would be recalled that under art 22 of the contract, disputes were to be ubmitted to the Arbitration Committee of the China Council for Promotion of nternational Trade ('the China Council'). This dispute was submitted to the Commission which the plaintiffs contended was in fact the same body as the

Arbitration Commission of the China Council. As the defendants did not dispute that assertion, I accepted it.

The defendants' argument was that the making of the award was not in accordance with proper procedure. They relied on the authority of *Commercial Arbitration* by Mustill and Boyd for the procedure that should have been followed in the arbitration when the defendants failed to appear to refute the plaintiffs' claim. They submitted that their failure to appear did not mean that there should automatically be an award against them for the full amount of the claim. Before the arbitrators could make an ex parte award adjudicating on the claim they had to first be satisfied that the plaintiffs had brought forth sufficient evidence to make out a good arguable case for the amount claimed and, secondly, they had to take into consideration any evidence or submissions which the defendants had put before the arbitrators on any previous occasion or in correspondence.

The defendants asserted that the purported award did not take into consideration nor mention the contents of the letters written by the defendants to the Commission. Further, the plaintiffs did not show the Commission the force majeure certificate nor did they reveal to the Commission that they had signalled an unqualified intention of commencing legal proceedings against the defendants prior to instituting the arbitration proceedings. The defendants also contended that whilst art 30 of the Arbitration Rules governing the conduct of the Commission provided that during hearings record should be taken of the proceedings, such records had not been supplied to the defendants. Accordingly, this court did not have sufficient information to decide what transpired at the arbitration hearing.

The question here is what procedure had to be followed in the arbitration. According to art 22 of the contract, the arbitration had to be conducted in accordance with the provisional rules of procedure promulgated by the Arbitration Committee of the China Council. The plaintiffs filed an affidavit which had been deposed to by a Mr Liang Pin Ying, a lawyer in practice in China in the city of Tianjin. Mr Liang confirmed that the procedural rules applicable to the arbitration were the Arbitration Rules of the China International Economic and Trade Arbitration Commission 1988. A copy of these rules and an English translation thereof were exhibited to his affidavit. Mr Liang deposed that based on the plaintiffs' application for arbitration and on the facts pertaining to the conduct of the arbitration as stated in the arbitration award, he was satisfied that the award was made in accordance with the said procedural rules.

The defendants on the other hand did not adduce any evidence that the procedure followed by the Commission in conducting the arbitration had not been in accordance with the Arbitration Rules. Their contention as to how the arbitrators should act was based on English legal principles. These principles were not applicable because this was not an English arbitration. Further, even if there had not been any agreement between the parties as to what procedure was to be followed, the appropriate procedure would not have been English procedure but Chinese procedure since the arbitration took place in China. This is provided by s 31(2)(e) itself. In the present instance, Mr Liang also deposed that Chinese law did not contain anything which invalidated the procedure followed by the Commission.

The defendants themselves were given every opportunity by the Commission to present their case in reply to the claim. They chose deliberately to reject that

opportunity. It appeared to me that having chosen not to attend they had very little right to criticise the way in which the arbitration had been conducted. In any case, it was clear from the way in which the award was written that the arbitrators were well aware of the facts of the case. In particular, they knew that the defendants had made a claim that a force majeure incident had occurred. They held that the defendants had failed to produce proof of such an incident and therefore were liable to the plaintiffs for breach of contract. The defendants themselves could have forestalled such a finding by producing proof of the force majeure incident to the Commission. They refused to participate in the arbitration at all and in that situation I found their complaint that the arbitrators had not considered whether there was sufficient evidence to make a finding in favour of the plaintiffs, unjustifiable.

The defendants argued that there must be full and frank disclosure and that the conclusion the arbitrators came to was incorrect because the plaintiffs did not furnish them with a copy of the force majeure certificate issued by the Chamber of Commerce and Industry of the Russian Federation. The plaintiffs' position was that no such certificate had been given to them. The plaintiffs, further, did not have the onus of presenting the defendants' case to the arbitrators. The defendants should have done that themselves. In any case, as the book *Commercial Arbitration* makes clear (at p 538) whilst the arbitrator must address himself to the question whether the claimant's evidence proves his case, this requires him only to make sure that the evidence bears out the claimant's case and that it has the appearance of being true and is internally consistent. The learned authors continue: 'Further than this, [the arbitrator] need not, and indeed should not, go. It is not his function to search out the truth, but to choose between two versions presented to him; and if only one version is presented, he does not thereby become an advocate for the other side'. The fact that the Commission had found for the plaintiffs did not mean that they had not addressed themselves to the evidence presented as required.

In the present instance, under art 29 of the Arbitration Rules, the arbitral tribunal had the power, in the event of one party failing to appear at the hearing, to proceed with the hearing and make an award by default. I could see no errors in the procedure adopted by the Commission. It appeared to me that the defendants' dissatisfaction with the award was a matter of substance rather than procedure. In my view they had not substantiated their assertion that the arbitration procedure was not in accordance with their agreement or in accordance with Chinese law.

(iii) Waiver

Section 31(2)(d) states that enforcement of an award may be refused if that award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on a matter beyond the scope of the submission to arbitration. The defendants submitted that this subsection applied in the present case because the plaintiffs had by their conduct waived and/or repudiated their right to arbitration and did not raise the possibility of such waiver to the arbitrators.

The defendants' argument was that when the plaintiffs appointed a Singaporean as their agent to collect the penalty from the defendants and, further, indicated to the defendants that they intended to resort to legal process if the penalty was not paid, they thereby waived and/or repudiated their right to arbitration. This brought

the agreement to arbitrate to an end. The defendants pointed out that the circumstances which will bring an agreement to arbitrate to an end include:

(a) a verbal renunciation of the obligation to arbitrate;
(b) conduct by which a party evinces an intention no longer to be bound by the arbitration agreement;
(c) a representation by one party communicated to and relied upon by the other party that the arbitration agreement is at an end.

The defendants relied on the cases of *Andre et Compagnie SA v Marine Transocean Ltd* [1981] QB 694 and *Paal Wilson & Co A/S v Partenreederei Hannah Blumenthal* [1983] AC 854.

The documents on which the defendants relied to substantiate their argument of waiver were exhibited in an affidavit affirmed by their general manager, Mr Vinod Kumar. The first was a letter dated 10 March 1993 from the plaintiffs to the defendants. In this letter the plaintiffs stated that they were glad to hear that Mr Kumar was intending to visit Hainan and hoped that this visit would lead to a friendly settlement of the matter. They stated however that they were preserving their rights of pressing their claim for penalty through governmental channel(s). In their next letter of 23 March 1993, the plaintiffs formally demanded payment of the penalty amount and stated that they had authorised Innoswift Technology, a Singapore company, as their authorised agent in Singapore to collect payment of the penalty on their behalf. They further stated that if the defendants did not abide by their contractual obligations, they, the plaintiffs, would seek recourse through 'the legal channel' to recover their claim. The authorisation which the plaintiffs gave to Innoswift Technology stated that they were authorised to pursue the matter to a successful conclusion including seeking help from the staff of the Chinese Embassy in Singapore and through legal channels.

Innoswift Technology subsequently sent a letter to the defendants asking for payment. The defendants' response was to write directly to the plaintiffs and deny responsibility due to force majeure. On 9 April 1993, the plaintiffs responded to the defendants as follows: 'If you have further correspondences *(sic)*, please go through Messrs Rajah & Tann ... in Singapore. You may want to show whatever documents to prove your claim. Please contact directly to Messrs Rajah & Tann.'

The plaintiffs did not take any further steps to collect the penalty in Singapore. Instead they commenced the arbitration proceeding in China. No letter of demand was issued by any lawyer in Singapore on the plaintiffs' behalf nor was any writ filed by them in our courts. The plaintiffs submitted and I agreed that none of the documents mentioned above suggested that the plaintiffs were giving up their right to arbitration. The documents merely showed that the defendants desired to proceed legally in the event that their attempts to get payment directly from the defendants failed. I also accepted the plaintiffs' submission that an arbitration is a legal channel of seeking redress and arbitration proceedings are also legal proceedings.

The cases cited by the defendants did not, in my opinion, assist them. In the *Andre & Cie* case, there was a dispute arising out of a charterparty of a vessel. The dispute was submitted to arbitration, the owners appointing their arbitrator in September 1969 and the charterers appointing their arbitrator the next month. The charterers' arbitrator died in [illegible]

Between February 1970 and December 1977 there was no correspondence between the parties, no step was taken in the arbitration and in 1973 the charterers closed their file. In January 1978 the owners served points of claim in the arbitration. The charterers were granted an injunction to restrain the owners from proceeding with the arbitration, it being held that the proper inference to be drawn from the conduct of the parties, in particular the long period of total inactivity, was that the agreement to submit the dispute to arbitration had been abandoned or rescinded by the parties.

There were two elements in the *Andre & Cie* case which were not present in the case before me. First, there was the long period of inactivity. Secondly, the charterers there had closed their file in reliance on the owners' delay and had prejudiced their ability to contest the arbitration. The importance of the second element was shown by the next case, *Paal Wilson*, where the House of Lords refused to issue a declaration that an arbitration agreement between buyers and sellers had been discharged by abandonment of the arbitration because after arbitration proceedings had started no further steps were taken in the proceedings for three years. It was one of the holdings of the case that the sellers could only establish that the arbitration had been abandoned by the apparent inaction of the buyers in reliance on which the sellers acted to their detriment, if they could prove not only that the buyers' conduct was such as to induce a reasonable belief that they intended to abandon the arbitration, but also that the sellers did in fact believe that the buyers so intended and that they themselves acted accordingly.

In the present instance there was no evidence, apart from a bare assertion, that the defendants sincerely believed that by stating in their letters that they would resort to legal channels, the plaintiffs meant that they would institute a law suit here and abandon their rights to arbitration. There was no evidence either that the defendants relied on the statement of the plaintiffs and acted to their detriment by reason of such reliance. It was argued that there was an element of reliance in that the defendants did not, after receiving the plaintiffs' various letters, prepare or equip themselves for arbitration. However, I was unable to accept that contention as first, there was no affidavit evidence to that effect and secondly, as the plaintiffs argued, it was an absurd contention since there would be no material difference in preparing for an arbitration or for any other type of legal proceedings which the defendants said they anticipated the plaintiffs would commence.

Further, there was no reason at all why the defendants should not have prepared or equipped themselves to meet any case which the plaintiffs might bring. The notice of the arbitration was given to the defendants in June 1993 and the hearing of the arbitration took place in April 1994. The defendants therefore had a reasonable time in which to prepare their case. If in the course of doing so they had found the timing to be tight, they could have asked for an extension of time. There is nothing to indicate that this would have been an impossibility. I was unable to accept that the defendants had in any way changed their position in reliance on a belief that the plaintiffs would sue them rather than going for arbitration.

(iv) Law governing the arbitration

The next issue arose under s 31(4)(a) which provides that the court may refuse to enforce an award if it finds that the subject matter of the difference between the

parties to the award is not capable of settlement by arbitration under the law of Singapore. The defendants contended that this subsection applied because the jurisdiction conferred upon the arbitrators did not specify the law governing the contract nor the curial law of the arbitration proceedings. They relied on the principle that where there is no express choice of substantive and/or curial law it becomes necessary either for the parties to agree on the applicable law or for the arbitration tribunal to decide on it. They contended that on the face of the present award, the Commission did not choose a governing law apart from an indication that the award had been made according to 'general international trade practice'. They submitted that in view of the fact that there were no notes of evidence of the arbitration proceedings before the court, it could not be said with certainty which law had been applied to the Commission's analysis of the contract or to the proceedings themselves. It would, therefore, be unsafe for the court to allow enforcement of the award.

Whilst it was correct that the arbitrators did not specifically identify the law which they applied to the contract or the proceedings, it was not correct that they had made the award only in accordance with trade practice. At p 3 of the award the Commission had stated: 'With the hearing of this case now having been concluded, the arbitration court, on the basis of established facts, delivered this award in accordance with the law.' Presumably, the Commission must have meant Chinese law since it would not have been familiar with other laws.

It was not open to the defendants to contend that an application of Chinese law would have been wrong. As *Commercial Arbitration* made clear, in the absence of any express choice of law, the English courts have long regarded the nominated place of arbitration as the best evidence of an implied choice of law. This is a view supported by other academics as well.

It appeared therefore that Chinese law was the basis of the decision. The defendants themselves raised no objection to the application of Chinese law. They were concerned to show that no law had been applied but rather general trade practice and this was inappropriate. But even though the Commission did make a comment about general trade practice, this did not in my view mean that they had not acted in accordance with legal principles. The award itself was premised on the finding that the defendants had been in breach of contract and by application of the terms of the contract itself, the plaintiffs were then entitled to the penalty payment. That was a straight forward legal principle and the defendants did not contend what objection they had to such a principle or why it could not be part of Chinese law.

(v) Public policy

The defendants' final argument was that it would be contrary to public policy to allow the award to be enforced because they had raised facts which would give rise to the possibility that the award did not decide on the real matter in dispute between the parties and an injustice would be done to the defendants if the award were to be enforced.

The plaintiffs submitted that the above argument was a back door route to inviting the court to look at the merits of the case. They pointed out that the Act did not provide as a ground for setting aside an award the fact that the court hearing the application considered that the defendants had an arguable case. I

agreed. The defendants had had ample opportunity to put up before the arbitration tribunal whatever they considered to be the real matter in dispute. In fact the Commission had been aware of the defendants' position on force majeure. The defendants, however, had not given the Commission any material on which it could find that this position was substantiated and not simply a bare assertion. The defendants had agreed when they signed the contract to arbitration in China. Having done so and having themselves chosen not to participate in the arbitration proceedings, it was not open to them to complain about the possibility of an injustice having been done because their evidence had not been before the Commission.

In my view, public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad. I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the Commission.

Appeal dismissed.

Reported by Allan Tan Poh Chye