OVERSEAS COSMOS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DEC 8 1997

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In the Matter of the Arbitration	
- between -	
OVERSEAS COSMOS, INC.,	MEMORANDUM DECISION
Petitioner,	97 Civ. 5898 (DC)
- and -	
NR VESSEL CORP.,	
Respondant.	

APPEARANCES:

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CHIN, D.J.

Petitioner, Overseas Cosmos, Inc., seeks an order confirming an arbitration award rendered by a three-member London Maritime Arbitrators' Association panel on February 19, 1997, amended March 31, 1997, in London, England. Respondent, NR Vessel Corp., moves to dismiss the petition on the ground that the arbitral award on which the petition is based is not entitled to recognition and enforcement under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"), as implemented by 9 U.S.C. §§ 201-208 (Supp. 1997). For the following reasons, respondent's motion to dismiss is denied, and the arbitration award is confirmed.

BACKGROUND

By a Memorandum of Agreement dated August 9, 1996 (the "MOA"), petitioner agreed to sell the vessel "MURANO" to respondent, upon the terms and conditions set forth therein. Respondent, in turn, intended to resell the vessel to another purchaser for a profit. Ultimately, the vessel was to be demolished for scrap. Respondent signed the MOA on August 16, 1996. Petitioner's broker, J.C. O'Keefe Shipbroking Ltd., signed the MOA on behalf of petitioner on August 19, 1996.

Pursuant to paragraph 2 of the MOA, respondent was obligated to pay a 10% deposit by the close of business in London on August 22, 1996. Due to the declining market price of vessels for scrap, the ultimate buyer backed out of its deal with respondent. Respondent attempted to locate another buyer, but in the meantime failed to pay the 10% deposit to petitioner as agreed. Eventually, petitioner sold the vessel to a third party, but for a substantially lower price than provided for in the MOA entered into with respondent.

Paragraph 11 of the MOA states that any dispute under the agreement was to be referred to arbitration in London. The arbitration clause provides as follows:

> If any dispute should arise in connection with the interpretation and fulfilment [sic] of this Agreement, same shall be decided by arbitration in the city of London in accordance with the London Maritime Arbitrators' Association Terms 1994 and shall

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be referred to a single Arbitrator to be appointed by the parties hereto. If the parties cannot agree upon the appointment of a single Arbitrator, the dispute shall be settled by 3 (three) Arbitrators, each party appointing one Arbitrator, the third being appointed by the London Maritime Arbitrators' Association.

. . .

The award rendered by the Arbitration Tribunal shall be final and binding upon the parties and may if necessary be enforced by a Court or any other competent authority in the same manner as a judgement in the High Court of Justice, London.

(Pet'n, Exh. B, ¶ 11). Believing respondent to be in breach of the MOA, petitioner commenced an arbitration proceeding in London, consistent with the terms of the MOA, seeking damages. As respondent neglected to appoint an arbitrator, one was appointed on its behalf by the London Maritime Arbitrators' Association. A panel of three arbitrators held that respondent indeed breached the MOA and rendered an award in favor of petitioner, directing respondent to pay petitioner $604,936.83, plus interest.

Petitioner petitions this Court to confirm the London arbitration award pursuant to Article III of the Convention and 9 U.S.C. § 207. Respondent moves to dismiss the petition, arguing that this Court lacks subject matter jurisdiction to confirm the arbitration award because (1) the MOA is invalid and therefore the arbitration provision is unenforceable; (2) an arbitration award entered on default cannot be confirmed; and (3) petitioner has failed to comply with certain requirements of the Convention

and therefore is barred from commencing an action under 9 U.S.C. § 207 to confirm the arbitration award.

DISCUSSION

A. Motion to Dismiss

1. Legal Standards

United States district courts have original jurisdiction over actions or proceedings arising under the Convention. See 9 U.S.C. § 203. Any party to an arbitration may apply to a district court for an order confirming an arbitral award within three years of the arbitral decision. Id. § 207; see also Ukrynashprom State Foreign Econ. Enter. v. Tradeway, Inc., No. 95 Civ. 10278, 1996 WL 107285, at *2 (S.D.N.Y. Mar. 12, 1996). "[T]he district court's role in reviewing a foreign arbitral award is strictly limited: 'The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.'" Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., No. 96-9692, 1997 WL 560044, at *4 (2d Cir. Sept. 10, 1997) (quoting 9 U.S.C. § 207).

Article V of the Convention enumerates seven circumstances in which a district court is justified in refusing to recognize or enforce a foreign arbitration award. See Convention, Art. V, reprinted in the text following 9 U.S.C. § 201.[1] The Convention clearly manifests a "general pro-

[1] The seven grounds for refusal to confirm an arbitration award are as follows: (a) a party to the arbitration agreement lacked capacity or the agreement is otherwise invalid; (b) the

enforcement bias," however. Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974); accord American Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan Ltd., 659 F. Supp. 426, 428 (S.D.N.Y.), aff'd, 828 F.2d 117 (2d Cir. 1987), cert. denied, 484 U.S. 1064 (1988). Accordingly, the party opposing confirmation bears the burden of proving that one of the seven grounds enumerated in Article V applies and provides a basis for the court to refuse to confirm the arbitration award. Parsons & Whittemore Overseas Co., 508 F.2d at 973. Respondent relies on Articles II, IV, and V(1)(a) and (b) in support of its motion to dismiss, but fails to meet its burden on any of these grounds for dismissal.

2. Validity of the Agreement to Arbitrate

Respondent first contends that this Court may refuse to recognize and enforce the London arbitration award because "the [MOA] is not valid under the law to which the parties subjected it," Convention, Art. V(1)(a), and because the arbitration clause is not an "'agreement in writing' . . . signed by the parties," id. Art. II(2). Respondent argues that because the MOA was never

party against whom the award is invoked had insufficient notice of the arbitration proceeding; (c) the dispute is beyond the scope of the arbitration agreement; (d) the composition of the arbitral authority or the arbitration procedures were not in accordance with the arbitration agreement or with the law of the country where the arbitration took place; (e) the award is not yet final or binding on the parties; (f) the dispute is not capable of settlement by arbitration under the law of the country where confirmation of the award is sought; and (g) confirmation of the award would violate the public policy of the country where confirmation of the award is sought. See Convention, Art. V.

signed by petitioner, but rather by J.C. O'Keefe Shipbroking Ltd, "as brokers only," neither the underlying agreement between the parties for the purchase and sale of M/V MURANO, nor the agreement to arbitrate contained therein, is enforceable. Respondent advances two theories to support its argument that the MOA is unenforceable. First, the agreement fails to satisfy the Statute of Frauds. Second, a disposition of property made by an agent without the authority of the principal is not binding on the principal.

As an initial matter, the Court notes that respondent had ample opportunity to raise its objection to arbitration on the ground that the agreement to arbitrate is unenforceable prior to and during the London arbitration proceeding. It chose not to do so, however. Thus, the Court finds that this ground for dismissal of the petition to confirm "is not properly raised at this time and therefore has been waived." La Societa Nationale Pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Shaheen Natural Resources Co., 585 F. Supp. 57, 62 (S.D.N.Y. 1983) (holding that respondent waived objection to confirmation of award on ground that it was not bound by the arbitration provision because such objection was not raised before the arbitration panel), aff'd, 733 F.2d 260 (2d Cir.), cert. denied, 469 U.S. 883 (1984).

Even assuming respondent has not waived this objection to confirmation of the award, it should be rejected because respondent has not demonstrated that the MOA is unenforceable.

Paragraph 11 of the MOA clearly provides that English law governs. (See Pet'n, Exh. B, ¶ 11). Respondent has utterly failed, however, to cite any persuasive authority to support its position that the underlying agreement between the parties is unenforceable under English law.[3] Thus, respondent has not established that "the . . . agreement is not valid under the law to which the parties have subjected it." Convention, Art. V(1)(a).

Moreover, the arbitration agreement contained in the MOA is clearly enforceable under U.S. law. "[I]t is well-established that a party may be bound by an agreement to arbitrate even absent a signature." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 846 (2d Cir. 1987). While Article II of the Convention indeed requires that an agreement to arbitrate be in writing to be enforceable, "it does not require that the writing be signed by the parties," id., and "ordinary contract principles dictate when the parties are bound by a written arbitration provision absent their signatures." Sarhoun

[3] Indeed, a cursory review of English authority suggests that both of respondent's theories are unavailing. First, the U.K. Sale of Goods Act of 1979 provides that "a contract of sale may be made in writing, either with or without seal, or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties." Halsbury's Laws of England, vol. 41, ¶ 643 (4th ed. 1983) (footnotes omitted). In England, therefore, contracts for the sale of goods no longer need to be in writing to be enforceable, regardless of their value, as the Statute of Frauds relating to sale of goods contracts has been repealed by statute. Id. ¶ 645. As for respondent's agency argument, under U.K. law, "[a] broker employed to buy or sell has implied authority to make and sign on behalf of his principal a written contract or memorandum where necessary to make the contract enforceable in law." Id. ¶ 649.

Aktiengesellschaft v. Societa Industriale Agricola "Tresse" di Dr. Domenico e Dr. Antonio Dal Ferro, 471 F. Supp. 1163, 1170 (S.D.N.Y. 1979). Even if this Court assumes that Mr. O'Keefe's signature on the MOA was not an adequate substitute for that of petitioner, the relevant inquiry is whether the agreement to arbitrate nevertheless satisfies the Statute of Frauds, binding both parties to the agreement.

Pursuant to the Uniform Commercial Code, a contract for the sale of goods for $500 or more is binding if it is in writing and signed by the party against whom enforcement is sought. See U.C.C. § 2-201(1). Here, respondent claims that the arbitration provision is unenforceable because petitioner, as seller, never signed the underlying agreement. There is no dispute that respondent, the party against whom enforcement is sought, signed it. Whether petitioner signed the agreement is irrelevant for Statute of Frauds purposes, and therefore both the underlying agreement and the arbitration clause are enforceable against respondent. Accordingly, for all of the above reasons, respondent's Article V(1)(a) defense to confirmation of the award is hereby rejected.[3]

[3] Respondent's reliance on San Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991) is misplaced. There, Judge Edelstein held that the agreement to arbitrate was unenforceable because it was contained only in petitioner's telex. Respondent's responsive telexes were "not only devoid of arbitration language, they also disavow[ed] the entire contents of [petitioner's] . . . telexes." Id. at 883. Thus, Article II's writing requirement was not satisfied because the arbitration clause was not signed by respondent, the party to be charged, and was, in fact, objected to by respondent. Id.

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3. Arbitration Award Entered On Default

As an additional basis for dismissal, respondent contends that this Court cannot confirm the London arbitration award because it was rendered on default. The Court construes this ground for dismissal as one based on Article V(1)(b) of the Convention. It, too, is entirely without merit.

To invoke the Article V(1)(b) defense, respondent "must establish that it was denied the opportunity to be heard at a meaningful time or in a meaningful manner." Ukrvneshprom State Foreign Econ. Enter. v. Tradeway, Inc., 1996 WL 107285, at *5. The only evidence respondent offers in support of its position that it did not "appear" in the London arbitration consists of a statement in the affidavit of its CEO, Andrew A. Levy, that it "did not appoint an arbitrator in that proceeding" (Levy Aff. ¶ 25), and its attorney's statements in its reply brief that it "did not hire counsel in England, did not answer the arbitration petition, (and) did not deliver any Points of Defense and Authorities." (Resp.'s Reply Brief at 2).

The documents submitted by petitioner tell a different story, however. Respondent corresponded with A.S. Christofides, the arbitrator appointed on its behalf, on December 9, 1996, raising two issues that respondent wished the arbitrators to consider in their deliberations. (See Oxton Aff., Exh. A). Hence, respondent did assert, in writing, defenses to petitioner's claims. Furthermore, the arbitration was conducted on the written submissions of the parties; therefore, no personal appearance was required or made by either party. In fact, a second arbitrator on the panel, Christopher Moss, advised the parties by fax dated January 15, 1997 that the panel had received no objection from either party to conducting the arbitration in this manner, and that if either party did so object, to make a demand for an oral hearing within a set time period. (See id., Exh. B). No such demand was made by respondent, nor did it lodge an objection to the arbitration going forward at all, despite having had ample opportunity to do so.

In light of the above facts, respondent cannot seriously contend that it lacked notice of the London arbitration so as to justify this Court's refusal to confirm the award pursuant to Article V(1)(b) of the Convention. Respondent's alleged lack of participation in the arbitration proceeding, even if true, could only be interpreted as intentional. The proper course, however, would have been for respondent to object to the proceeding entirely, see La Societa Nationale, 585 F. Supp. at

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Here, the MOA contained a written arbitration clause that was indeed signed by respondent, the party to be charged. Furthermore, there is no indication that respondent objected to the terms of the MOA or the arbitration provision contained therein at the time of signing. Respondent's claim that it did not believe that petitioner's broker's signature on the MOA could create a binding contract is dubious in light of the fact that respondent signed the MOA itself only three days later. (See Pet'n, Exh. B at 10). Moreover, respondent's cover letter enclosing the MOA containing its signature does not take the position that the parties did not have a binding agreement. (See Levy Aff., Exh. E). Finally, in a December 9, 1996 letter to its appointed arbitrator, respondent conceded that it had breached the MOA. (See Oxton Aff., Exh. A). These facts demonstrate respondent's acknowledgement that the MOA was an enforceable contract.

62, which it clearly did not do, rather than simply refuse to participate. In any event, the record indicates that respondent did participate. Accordingly, because the Court finds that respondent was given "ample notice of the arbitration and an adequate opportunity to present its defenses" and objections, Geotech Lizenz AG v. Evergreen Sys., Inc., 697 F. Supp. 1248, 1253 (S.D.N.Y. 1988), respondent's second ground for dismissal is also rejected.

4. Failure to Comply with Convention Requirements

Finally, respondent argues that this Court should dismiss the petition to confirm because petitioner has failed to comply with Convention requirements, specifically the requirements that a petitioner seeking confirmation of an award under the Convention submit a "duly authenticated original award or a duly certified copy thereof and the original of the agreement to arbitrate or a duly certified copy of the agreement to arbitrate." (Resp.'s Brief at 7). This argument for dismissal, too, is meritless.

Article IV of the Convention provides that to obtain recognition and enforcement of a foreign arbitration award, "the party applying for recognition and enforcement shall, at the time of the application, supply: (a) The duly authenticated original award or a duly certified copy thereof; (b) The original [arbitration] agreement . . . or a duly certified copy thereof." Convention, Art. IV(1). Petitioner has appended to its petition a copy of the MOA, containing the arbitration provision, and a

copy of the Final Award, both of which are certified by petitioner's solicitor in the London arbitration. (Gen Pet'n, Exhs. A-D).

"The purpose for requiring submission of the original agreement or a certified copy is to prove the existence of an agreement to arbitrate." Al Haddad Bros. Enters., Inc. v. M/S Agapi, 635 F. Supp. 205, 209 (D. Del. 1986), aff'd, 813 F.2d 396 (3d Cir. 1987). Here, respondent does not challenge the existence of the arbitration provision, but rather only its enforceability. Similarly, the genuineness of the arbitration award is not in dispute. Respondent is merely grasping at straws, attempting to persuade the Court to refuse to confirm the award on the basis of a mere technicality. In these circumstances, the certification of petitioner's solicitor, who participated in the London arbitration and has personal knowledge that the agreement and the award are genuine, is sufficient to satisfy the requirements of Article IV. Cf. Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983) (holding that certification by a member of the arbitration panel provided sufficient basis upon which to enforce arbitration award); Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, 1130 n.11 (D. Mass. 1994) (overlooking failure to submit original or certified copy of agreement to arbitrate and award because neither party contested their validity), vacated on other grounds, 61 F.3d 101 (1st Cir. 1995); Al Haddad Bros., 813 F. Supp. at 209-10 (holding that court's prior rulings that agreement to arbitrate existed

were sufficient to meet requirements of Article IV(1). Accordingly, the Court rejects respondent's final argument for dismissal.

B. Motion to Confirm

"Confirmation of a foreign arbitration award is proper under 9 U.S.C. § 207 if (1) the party moving for confirmation of the arbitration award has complied with the requirements of the Convention; and (2) the party opposing the motion has failed to show the existence of any of the grounds stated in Article V of the Convention that would bar confirmation of the arbitration award." Montauk Oil Transp. Corp. v. Steamship Mut. Underwriting Ass'n (Bermuda) Ltd., No. 90 Civ. 3792, 1995 WL 361303, at *1 (S.D.N.Y. June 16, 1995), aff'd, 79 F.3d 295 (2d Cir. 1996). Both prerequisites are satisfied in this case for the reasons set forth above. Accordingly, the arbitration award rendered February 19, 1997, amended March 31, 1997, is hereby confirmed.

CONCLUSION

For the foregoing reasons, petitioner's motion to confirm the arbitration award is granted, and respondent's cross-motion to dismiss the petition is denied. Costs and post-award, pre-judgment interest will be awarded. Petitioner shall submit a proposed judgment, on notice, within seven days hereof.

SO ORDERED.

Dated: New York, New York
December 8, 1997

DENNY CHIN
United States District Judge

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3. That the Defendant's Motion for Summary Judgment on Count III of the Plaintiff's Complaint [Docket No. 14] is GRANTED in part, and DENIED in part.

4. That the Defendant's Motion for Summary Judgment on Count IV of the Plaintiff's Complaint [Docket No. 14] is GRANTED.

5. That the Defendant's Motion for Summary Judgment on Count V. of the Plaintiff's Complaint [Docket No. 14] is GRANTED in part, and DENIED in part.

POLYTEK ENGINEERING CO., LTD.

v.

JACOBSON COMPANIES and Jacobson, Inc.

No. 97-CV-1767 (JMR/FLN).

United States District Court, D. Minnesota.

Dec. 12, 1997.

Hong Kong corporation brought action against Minnesota manufacturer of rubber recycling equipment to confirm Chinese arbitral award. The District Court, Rosenbaum, J., held that manufacturer entered into valid "agreement in writing" to submit to arbitration in China.

Judgment for plaintiff.

1. Arbitration ⇐72.4
Treaties ⇐8

Convention on the Recognition and Enforcement of Foreign Arbitral Awards compels court to conduct the following limited, four-part inquiry when deciding whether to confirm award: (1) whether there is an agreement in writing to arbitrate subject of dispute; (2) whether agreement provides for arbitration in territory of signatory of Convention; (3) whether agreement arises out of legal relationship whether contractual or not, which is considered as commercial; and (4) whether party to agreement is not an American citizen or whether commercial relationship has some reasonable relation with one or more foreign states. 9 U.S.C.A. § 201 et seq.

2. Arbitration ⇐6.2
Treaties ⇐8

Under Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Minnesota manufacturer of rubber recycling equipment entered into binding "agreement in writing" to submit to arbitration in China in dispute with Hong Kong seller, based on purchase contract between seller and Chinese importer, which contained arbitration clause; contract between seller and importer was attached to purchase order sent by seller to manufacturer, purchase order incorporated terms of contract, and parties' behavior indicated that they were aware of and were influenced by existence of contract. 9 U.S.C.A. § 201.

See publication Words and Phrases for other judicial constructions and definitions.

Lawrence Jeffrey Field, Leonard Street & Deinard, Minneapolis, MN, for Polytek Engineering Co., Ltd., plaintiff.

Peter A. Koller, Thomas A Keller, III, Kevin Mark Busch, Moss & Barnett, Minneapolis, MN, for Jacobson Companies, Jacobson Inc., defendant.

ORDER

ROSENBAUM, District Judge.

Plaintiff, Polytek Engineering Co., Ltd. ("Polytek"), asks this Court to confirm a $1,700,367.41 foreign arbitral award granted in its favor, pursuant to Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. §§ 201–208. The award was issued on May 26, 1997, by an arbitration panel of the Chinese International Economic and Trade Arbitration Commission ("CIETAC"). The arbitral award was rendered against defendant Jacobson, Inc. ("Jacobson"),[1] on a finding that Jacobson breached a contract

1. Jacobson, Inc., uses "Jacobson Companies" to identify some of its products. The Court, however, has been unable to ascertain the "Jacobson Companies" entity. (Sorensen Aff., p. 1).

with Polytek. The Court heard oral argument on October 3, 1997.

I. *Background*

Polytek Engineering Co., Ltd., is a Hong Kong organized corporation with its principal place of business in Hong Kong. Defendant Jacobson, Inc., is a Minnesota corporation with its principal place of business in this state. Jurisdiction is premised on 9 U.S.C. § 203, and venue is proper under 9 U.S.C. § 204 and 28 U.S.C. § 1391. For the purposes of this motion, the parties agree that Jacobson has never had staff, property, assets, or personnel outside of the United States.

In 1992, Polytek began negotiating with Hebei Import & Export Corp. ("Hebei"), based in the People's Republic of China, to sell rubber recycling equipment for a factory in China's Hebei Province. In November, 1992, Polytek contacted Jacobson, a manufacturer of this type of equipment. After this initial contact, however, Polytek and Jacobson forestalled entry into a formal purchase agreement until Polytek concluded its contract with Hebei. In April, 1993, Polytek entered into a contract with Hebei to sell the equipment (the "Hebei Contract"). Polytek then turned to Jacobson to obtain the equipment needed to satisfy the Hebei Contract.

To begin its purchase of the rubber recycling equipment, Polytek sent a one page U.S. $865,000 equipment Purchase Order to Jacobson, dated May 10, 1993. (Polytek Pet., Exh. A). The Purchase Order requested:

> One Set—Rubber Recycling Equipment including spare parts for two years; special tools; commissioning and training charges. For detail specification and terms, please refer to the attached contract.

The Purchase Order contained a section titled "Remarks," which provided that: "All the terms and conditions should conform with the main contract attached." Attached to the Purchase Order was a copy of the Hebei Contract. (Polytek Pet., Exh. A).

The Hebei Contract included a number of terms, in addition to technical equipment specifications. Section 10 of the Hebei Contract required the seller to provide either an irrevocable letter of guarantee or a standby letter of credit. Section 19 of the Hebei Contract contained the following arbitration clause:

> All disputes in connection with this contract or the execution thereof shall be settled through friendly negotiations. In case no settlement can be reached through negotiations, the case should then be submitted for arbitration to the Arbitration Commission of the China Council of the Promotion of International Trade [2] in accordance with the rules and procedures promulgated by the said Arbitration Commission. The arbitration shall take place in Beijing, China and the decision of the Arbitration Commission 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. The arbitration fee shall be borne by the losing party.

(Polytek Pet., Exh. A).

Subsequent to Polytek's submission of the May 10, 1993, Purchase Order, Polytek and Jacobson discussed the irrevocable letter of guarantee or standby letter of credit, as required by the Hebei Contract. The parties agreed Jacobson would provide a standby letter of credit to Polytek, and Polytek would send Jacobson a deposit. Based upon its agreement with Polytek, Jacobson manufactured and shipped the recycling equipment to China and received payment from Polytek as specified in the Purchase Order.

In May, 1995, Hebei claimed the Jacobson equipment failed to conform to contract specifications, and began a CIETAC arbitration proceeding against Polytek, its seller. On March 29, 1996, the arbitration tribunal awarded Hebei a total of U.S. $1,266,933.85 and 4,762,132.56 RMB, and ordered Polytek to collect the equipment at its cost. (Polytek Pet., p. 4).

Thereafter, on April 3, 1996, Polytek began its own CIETAC arbitration against Jacobson in Beijing, China, claiming Jacobson breached the Hebei Contract attached to the May 10, 1993, Purchase Order. Polytek

2. Now known as the Chinese International Economic and Trade Arbitration Commission.

claimed Jacobson supplied equipment which did not conform to contract specifications. Jacobson initially ignored the notice given by CIETAC, but ultimately replied to the Chinese arbitral forum in November, 1996. (Polytek's Pet., pp. 4–6). Jacobson's reply denied CIETAC's jurisdiction over the matter and the existence of any arbitration agreement between Polytek and Jacobson. (Lau Decl., Exh. 33). CIETAC considered the issue of jurisdiction prior to examining the case on the merits, and, on December 23, 1996, CIETAC issued a decision finding jurisdiction was proper. (Polytek Pet., Exh. B).

Upon rendering its decision, CIETAC wrote to both parties advising them it would hear the trade dispute on March 17, 1997. Jacobson did not appear at the hearing. CIETAC then notified Jacobson that the hearing had taken place and requested objections or further responses by April 20, 1997. CIETAC received nothing from Jacobson. (Polytek Pet., pp. 7–8).

CIETAC issued its decision on May 26, 1997, awarding Polytek U.S. $1,700,367.41, and ordering Jacobson to dismantle and collect the recycling equipment at its own expense. (Polytek Pet., Exh. C).

II. *Discussion*

A. *The Convention*

Chapter 2 of the Federal Arbitration Act grants federal courts the power to affirm foreign arbitral awards. This Chapter enables the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"), to which the United States is a signatory. *See* 9 U.S.C. § 201. The Convention governs foreign arbitration disputes resulting from international commercial transactions. *See Filanto, S.p.A. v. Chilewich Int'l Corp.*, 789 F.Supp. 1229, 1234 (S.D.N.Y.1992); 9 U.S.C. § 202. "The goal of the Convention is to facilitate and stabilize international business transactions by promoting the enforcement of arbitral agreements in contracts involving international commerce." *Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 620 (8th Cir.1997). Under the Convention, a party to an arbitration has three years to seek an order confirming an award. *See* 9 U.S.C. § 207. The Convention directs that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them ...." Convention, Art. III, 9 U.S.C. § 201. A court must "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the ... Convention." 9 U.S.C. § 207.

[1] The Convention compels a court to conduct the following limited, four-part inquiry when deciding whether to confirm an award:

1. Is there an agreement in writing to arbitrate the subject of the dispute?
2. Does the agreement provide for arbitration in the territory of the signatory of the Convention?
3. Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?
4. Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

Ledee v. Ceramiche Ragno, 684 F.2d 184, 186–87 (1st Cir.1982) (citations omitted); *see also Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 959 (10th Cir.1992); *Filanto*, 789 F.Supp. at 1236.

The Court does not consider the last of these three questions to be in serious dispute. The answer to the second question is simple: If the Hebei Contract is part of the Polytek/Jacobson agreement, there is a contract to arbitrate. And if the Hebei Contract is part of the agreement, it provides for arbitration in China, a signatory to the Convention. *See* 9 U.S.C. § 201.

The third question asks whether some form of contract or legal contractual relationship existed between Polytek and Jacobson. Both Polytek and Jacobson stipulated in their pleadings that theirs was a legal and contractual relationship. While the parties differ as to the date the contract actually took effect, there is no question that the recycling equipment was delivered, and Polytek paid, pursuant to Jacobson's Purchase Order contract. The parties do not

deny the commercial nature of the transaction.

As to the fourth question, Polytek is certainly one of the parties to the agreement. It is not an American corporation, and its commercial relationship with Jacobson relates to China, a foreign country. The fourth question is satisfied.

It is the first question—"Is there an agreement in writing to arbitrate the subject of the dispute?"—to which the Court now turns.

B. *An Agreement in Writing to Arbitrate*

The Convention defines an agreement in writing as an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention, Art. II, para. 2, 9 U.S.C. § 201. Jacobson claims it never agreed to Chinese arbitration, nor did it manifest an intent to do so.

The Chinese arbitration clause lies within Section 19 of the Hebei Contract attached to Polytek's May 10, 1993, Purchase Order. The Purchase Order twice refers to the attached Hebei Contract, and includes the statement: "All the terms and conditions should conform with the main contract." For the reasons set forth below, the Court finds Section 19 of the Hebei Contract, attached as it was to the Purchase Order, satisfies Article II's definition of an "agreement in writing."

[2] The parties' behavior relative to this Purchase Order and attachment lends credence and support to this determination. Polytek and Jacobson had conducted preliminary negotiations in November, 1992, but waited until April, 1993—until the Hebei Contract was completed—before entering into their own purchase and manufacture agreement. Jacobson's president, Ivar W. Sorensen, sent a facsimile message to Polytek, dated February 24, 1993, stating: "We hope that you will be able to finish up the contract work this week [with Hebei], as planned. From our discussion, my understanding is that you will then issue us a Polytek Purchase Order, with the official contract attached." (Lau's Decl., Exh. 15). The manager responsible for the negotiation on behalf of Polytek, Lau Yiu Chung Reddy, faxed a reply to Mr. Sorensen's message on March 2, 1993, stating: "We'll issue a purchasing order with the contract as attachment to you within this week." (Lau's Decl., Exh. 20).

While the exact date the Purchase Order was delivered is in dispute, the date of its arrival is irrelevant. There is no question it arrived and was the document which governed the Polytek/Jacobson relationship. The parties' subsequent conduct decisively illustrates the Hebei Contract's direct influence on each party's transactional behavior.

On May 18, 1993, Mr. Lau asked Jacobson to provide an irrevocable letter of guarantee or a standby letter of credit, as required by Section 10 of the Hebei Contract. (Lau's Decl., Exh. 23). Mr. Sorensen declined to provide a standby letter of credit on behalf of Jacobson. (Lau's Decl., Exh. 24). After further correspondence, Polytek and Jacobson agreed to a deposit and a standby letter of credit arrangement satisfactory to both sides. (Lau's Decl., Exh. 26). This behavior shows that the parties were directly aware of, and were influenced in their contract performance by, the Hebei Contract far beyond the confines of specifications for the manufacture and delivery of rubber recycling equipment.

While Mr. Sorensen indicated initial disagreement with the letter of credit requirement, neither he nor anyone on Jacobson's behalf indicated any problem with the arbitration provision in Section 19 of the Hebei Contract. (Lau's Decl., p. 12). Mr. Sorensen wrote Polytek on July 21, 1993, indicating "the contract date, ... will be the date we confirm receipt of the [Polytek] deposit." (Lau's Decl., Exh. 27). Mr. Sorensen then sent a facsimile, dated July 23, 1993, confirming Jacobson's receipt of Polytek's deposit and the commencement of the contract. (Lau's Decl., Exh. 28).

All terms of the agreement, with the exception of the compromised change concerning the letter of credit, were thereby adopted, confirming Jacobson's compliance with the Polytek Purchase Order and attached Hebei Contract. Thus, this Court finds that an "agreement in writing," as contemplated by the Convention, existed between Polytek and Jacobson.

C. *Challenging Enforcement of an Arbitration Award*

Article V of the Convention governs a party's challenge to enforcement of an arbitration award. The challenging party must prove: 1) it was under an incapacity at the time the agreement was made; 2) the arbitration agreement was not valid under the law which the parties have subjected it, or under the law of the country where the award was made; 3) the party was not given proper notice of the proceeding; 4) the award concerned an issue which did not fall within the arbitration agreement; 5) the arbitration panel was invalid; or 6) the award has not yet become final. See Convention, Art. V, para. 1, 9 U.S.C. § 201.

Jacobson does not argue that it falls under these criteria. Its attack on the arbitral award is restricted to its challenge to the claimed contract to arbitrate. An arbitration award may also be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of [this] country; or the recognition or enforcement of the award would be contrary to the public policy of [this] country." Convention, Art. V, para. 2, 9 U.S.C. § 201. Neither of these elements has been demonstrated to the Court. And again, this is not the thrust of Jacobson's argument.

In the absence of any defect under Article V of the Convention, and having found the written agreement to arbitrate encompassed in the May 10, 1993, Purchase Order, with the Hebei Contract attached, this Court must confirm the foreign arbitration award.

III. *Conclusion*

For the reasons set forth above, IT IS ORDERED that:

1. The May 26, 1997, arbitration award issued by the China International Economic and Trade Arbitration Commission is recognized as binding and enforceable, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. §§ 201–208.

2. Defendant Jacobson shall pay plaintiff Polytek the sum of U.S. $1,700,367.41, plus interest at the rate of nine percent (9%), as specified in the arbitration award.

3. Defendant Jacobson shall dismantle and collect the rubber recycling equipment at its own expense.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BENSMAN, et al., Plaintiffs,

v.

UNITED STATES FOREST SERVICE, et al., Defendants.

No. 97–3479–CV–S–RGC.

United States District Court, W.D. Missouri, Southern Division.

Oct. 23, 1997.

Pro se individuals sued United States Forest Service (Forest Service) and United States Fish and Wildlife Service (Fish and Wildlife Service) for violating Endangered Species Act (ESA), National Environmental Policy Act (NEPA) and Administrative Procedure Act (APA) by proposed timber harvest sales of timber blown down and damaged by wind storm, and sought preliminary injunction halting removal. Logging companies that had purchased salvage contracts and associations representing timber interests intervened. The District Court, Russel G. Clark, Senior District Judge, held that: (1) Forest Service violated ESA and acted arbitrarily and capriciously in approving timber sales where possible harm or harassment to Indiana bat from salvage operations could arise from removal of dead or dying trees; (2) Forest Service's claim that no known habitat of bat would be involved in current sale was unavailing as Forest Service had affirmative duty to identify habitat of bat and conduct further research if necessary; (3) Forest Service should have initiated formal consultations with Fish and Wildlife Service as

POLYTEK

97-CV-1767(JMR/FLN)

USDC District of Minnesota 97-CV-1767 (JMR/FLN)

Polytek Engineering Co., Ltd.)
)
v.) ORDER
)
Jacobson Companies and)
Jacobson, Inc.)

Plaintiff, Polytek Engineering Co., Ltd. ("Polytek"), asks this Court to confirm a $1,708,367.41 foreign arbitral award granted in its favor, pursuant to Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. §§ 201-208. The award was issued on May 26, 1997, by an arbitration panel of the Chinese International Economic and Trade Arbitration Commission ("CIETAC"). The arbitral award was rendered against defendant Jacobson, Inc. ("Jacobson"),[1] on a finding that Jacobson breached its contract with Polytek. The Court heard oral argument on October 3, 1997.

I. Background

Polytek Engineering Co., Ltd., is a Hong Kong organized corporation with its principal place of business in Hong Kong.

[1]Jacobson, Inc., uses "Jacobson Companies" to identify some of its products. The Court, however, has been unable to identify a separate "Jacobson Companies" entity. (Sorensen Aff. ¶ 1).

DEC 12 1997

Defendant Jacobson, Inc., is a Minnesota corporation with its principal place of business in this state. Jurisdiction is premised on 9 U.S.C. § 203, and venue is proper under 9 U.S.C. § 204 and 28 U.S.C. § 1391. For the purposes of this motion, the parties agree that Jacobson has never had staff, property, assets, or personnel outside of the United States.

In 1992, Polytek began negotiating with Hebei Import & Export Corp. ("Hebei"), based in the People's Republic of China, to sell rubber recycling equipment for a factory in China's Hebei Province. In November, 1992, Polytek contacted Jacobson, a manufacturer of this type of equipment. After this initial contact, however, Polytek and Jacobson forestalled entry into a formal purchase agreement until Polytek concluded its contract with Hebei. In April, 1993, Polytek entered into a contract with Hebei to sell the equipment (the "Hebei Contract"). Polytek then turned to Jacobson to obtain the equipment needed to satisfy the Hebei Contract.

To begin its purchase of the rubber recycling equipment, Polytek sent a one page US $865,000 equipment Purchase Order to Jacobson, dated May 10, 1993. (Polytek Pet., Exh. A). The Purchase Order requested:

> one set - Rubber Recycling Equipment including spare parts for two years; special tools; commissioning and training charges. For detail specification and terms, please refer to the attached contract.

The Purchase Order contained a section titled "Remarks," which provided that: "All the terms and conditions should conform with the main contract attached." Attached to the Purchase Order was a copy of the Hebei Contract. (Polytek Pet., Exh. A).

The Hebei Contract included a number of terms, in addition to technical equipment specifications. Section 10 of the Hebei Contract required the seller to provide either an irrevocable letter of guarantee or a standby letter of credit. Section 19 of the Hebei Contract contained the following arbitration clause:

> All disputes in connection with this contract or the execution thereof shall be settled through friendly negotiations. In case no settlement can be reached through negotiations, the case should then be submitted for arbitration to the Arbitration Commission of the China Council of the Promotion of International Trade[2] in accordance with the rules and procedures promulgated by the said Arbitration Commission. The arbitration shall take place in Beijing, China and the decision of the Arbitration Commission 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. The arbitration fee shall be borne by the losing party.

(Polytek Pet., Exh. A).

[2]Now known as the Chinese International Economic and Trade Arbitration Commission.

Subsequent to Polytek's submission of the May 10, 1993, Purchase Order, Polytek and Jacobson discussed the irrevocable letter of guarantee or standby letter of credit, as required by the Hebei Contract. The parties agreed Jacobson would provide a standby letter of credit to Polytek, and Polytek would send Jacobson a deposit. Based upon its agreement with Polytek, Jacobson manufactured and shipped the recycling equipment to China and received payment from Polytek as specified in the Purchase Order.

In May, 1995, Hebei claimed the Jacobson equipment failed to conform to contract specifications, and began a CIETAC arbitration proceeding against Polytek, its seller. On March 29, 1996, the arbitration tribunal awarded Hebei a total of US $1,266,933.85 and 4,762,112.56 RMB, and ordered Polytek to collect the equipment at its cost. (Polytek Pet., p. 4).

Thereafter, on April 3, 1996, Polytek began its own CIETAC arbitration against Jacobson in Beijing, China, claiming Jacobson breached the Hebei Contract attached to the May 10, 1993, Purchase Order. Polytek claimed Jacobson supplied equipment which did not conform to contract specifications. Jacobson initially ignored the notice given by CIETAC, but ultimately replied to the Chinese

arbitral forum in November, 1996. (Polytek's Pet., pp. 4-6). Jacobson's reply denied CIETAC's jurisdiction over the matter and the existence of any arbitration agreement between Polytek and Jacobson. (Lau Decl., Exh. 33). CIETAC considered the issue of jurisdiction prior to examining the case on the merits, and, on December 23, 1996, CIETAC issued a decision finding jurisdiction was proper. (Polytek Pet., Exh. B).

Upon rendering its decision, CIETAC wrote to both parties advising them it would hear the trade dispute on March 17, 1997. Jacobson did not appear at the hearing. CIETAC then notified Jacobson that the hearing had taken place and requested objections or further responses by April 20, 1996. CIETAC received nothing from Jacobson. (Polytek Pet., pp. 7-8).

CIETAC issued its decision on May 26, 1997, awarding Polytek US $1,710,169.41, and ordering Jacobson to dismantle and collect the recycling equipment at its own expense. (Polytek Pet., Exh. C).

IV. Discussion

A. The Convention

Chapter 2 of the Federal Arbitration Act grants federal courts the power to affirm foreign arbitral awards. This Chapter enables the Convention on the Recognition and Enforcement of Foreign

Arbitral Awards ("Convention"), to which the United States is a signatory. See 9 U.S.C. § 201. The Convention governs foreign arbitration disputes resulting from international commercial transactions. See Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238 (S.D.N.Y. 1992); 9 U.S.C. § 202. "The goal of the Convention is to facilitate and stabilize international business transactions by promoting the enforcement of arbitral agreements in contracts involving international commerce." Transit Cas. Co. v. Certain Underwriters at Lloyd's of London, 119 F.3d 619, 620 (8th Cir. 1997). Under the Convention, a party to an arbitration has three years to seek an order confirming an award. See 9 U.S.C. § 207. The Convention directs that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them . . . ." Convention, Art. III, 9 U.S.C. § 201. A court must "confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the . . . Convention." 9 U.S.C. § 207.

The Convention compels a court to conduct the following limited, four-part inquiry when deciding whether to confirm an award:

1. Is there an agreement in writing to arbitrate the subject of the dispute?

2. Does the agreement provide for arbitration in the territory of the signatory of the Convention?

3. Does the agreement arise out of a legal relationship whether contractual or not, which is considered as commercial?

4. Is a party to the agreement not an American citizen, or does the commercial relationship have some reasonable relation with one or more foreign states?

Ledee v. Ceramiche Ragno, 684 F.2d 184, 186-87 (1st Cir. 1982) (citations omitted); see also Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959 (10th Cir. 1992); Filanto, 789 F. Supp. at 1236.

The Court does not consider the last of these three questions to be in serious dispute. The answer to the second question is simple: If the Hebei Contract is part of the Polytek/Jacobson agreement, there is a contract to arbitrate. And if the Hebei Contract is part of the agreement, it provides for arbitration in China, a signatory to the Convention. See 9 U.S.C. § 201.

The third question asks whether some form of contract or legal contractual relationship existed between Polytek and Jacobson. Both Polytek and Jacobson stipulated in their pleadings that there was a legal and contractual relationship. While the parties differ as to the date the contract actually took effect, there is no

question that the recycling equipment was transferred, and Polytek paid, pursuant to the parties' Purchase Order contract. The parties do not deny the commercial nature of the transaction.

As to the fourth question, Polytek is certainly one of the parties to the agreement. It is not an American corporation, and its commercial relationship with Jacobson relates to China, a foreign country. The fourth question is satisfied.

It is the first question -- "Is there an agreement in writing to arbitrate the subject of the dispute?" -- to which the Court now turns.

B. An Agreement in Writing to Arbitrate

The Convention defines an agreement in writing as an "arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." Convention, Art. II, para. 2, 9 U.S.C. § 201. Jacobson claims it never agreed to Chinese arbitration, nor did it manifest an intent to do so.

The Chinese arbitration clause lies within Section 19 of the Hebei Contract attached to Polytek's May 10, 1993, Purchase Order. The Purchase Order twice refers to the attached Hebei Contract, and includes the statement: "All the terms and conditions should

conform with the main contract." For the reasons set forth below, the Court finds Section 19 of the Hebei Contract, attached as it was to the Purchase Order, satisfies Article II's definition of an "agreement in writing."

The parties' behavior relative to this Purchase Order and attachment lends credence and support to this determination. Polytek and Jacobson had conducted preliminary negotiations in November, 1992, but waited until April, 1993 -- until the Hebei Contract was completed -- before entering into their own purchase and manufacture agreement. Jacobson's president, Ivar W. Sorensen, sent a facsimile message to Polytek, dated February 24, 1993, stating: "We hope that you will be able to finish up the contract work this week [with Hebei], as planned. From our discussion, my understanding is that you will then issue us a Polytek Purchase Order, with the official contract attached." (Lau's Decl., Exh. 15). The manager responsible for the negotiation on behalf of Polytek, Lau Yiu Chung Reddy, faxed a reply to Mr. Sorensen's message on March 2, 1993, stating: "We'll issue a purchasing order with the contract as attachment to you within this week." (Lau's Decl., Exh. 20).

While the exact date the Purchase Order was delivered is in dispute, the date of its arrival is irrelevant. There is no question it arrived and was the document which governed the Polytek/Jacobson relationship. The parties' subsequent conduct decisively illustrates the Hebei Contract's direct influence on each party's transactional behavior.

On May 10, 1993, Mr. Lau asked Jacobson to provide an irrevocable letter of guarantee or a standby letter of credit, as required by Section 10 of the Hebei Contract. (Lau's Decl., Exh. 23). Mr. Sorensen declined to provide a standby letter of credit on behalf of Jacobson. (Lau's Decl., Exh. 24). After further correspondence, Polytek and Jacobson agreed to a deposit and a standby letter of credit arrangement satisfactory to both sides. (Lau's Decl., Exh. 26). This behavior shows that the parties were directly aware of, and were influenced in their contract performance by, the Hebei Contract far beyond the confines of specifications for the manufacture and delivery of rubber recycling equipment.

While Mr. Sorensen indicated initial disagreement with the letter of credit requirement, neither he nor anyone on Jacobson's behalf indicated any problem with the arbitration provision in Section 19 of the Hebei Contract. (Lau's Decl., p. 12). Mr. Sorensen wrote Polytek on July 21, 1993, indicating "the contract date, . . . will be the date we confirm receipt of the [Polytek] deposit." (Lau's Decl., Exh. 27). Mr. Sorensen then sent a facsimile, dated July 23, 1993, confirming Jacobson's receipt of Polytek's deposit and the commencement of the contract. (Lau's Decl., Exh. 28).

All terms of the agreement, with the exception of the compromised change concerning the letter of credit, were thereby adopted, confirming Jacobson's compliance with the Polytek Purchase Order and attached Hebei Contract. Thus, this Court finds that an "agreement in writing," as contemplated by the Convention, existed between Polytek and Jacobson.

C. Challenging Enforcement of an Arbitration Award

Article V of the Convention governs a party's challenge to enforcement of an arbitration award. The challenging party must prove: 1) it was under an incapacity at the time the agreement was made; 2) the arbitration agreement was not valid under the law which the parties have subjected it, or under the law of the country where the award was made; 3) the party was not given proper notice of the proceeding; 4) the award concerned an issue which did not fall within the arbitration agreement; 5) the arbitration panel was invalid; or 6) the award has not yet become final. See Convention, Art. V, para. 1, 9 U.S.C. § 201.

Jacobson does not argue that it falls under these criteria. Its attack on the arbitral award is restricted to its challenge to the claimed contract to arbitrate. An arbitration award may also be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of [this] country; or the recognition or enforcement of the award would be contrary to the public policy of [this] country." Convention, Art. V, para. 2, 9 U.S.C. § 201. Neither of these elements has been demonstrated to the Court. And again, this is not the thrust of Jacobson's argument.

In the absence of any defect under Article V of the Convention, and having found the written agreement to arbitrate encompassed in the May 10, 1993, Purchase Order, with the Hebei Contract attached, this Court must confirm the foreign arbitration award.

III. Conclusion

For the reasons set forth above, IT IS ORDERED that:

1. The May 26, 1997, arbitration award issued by the China International Economic and Trade Arbitration Commission is

recognized as binding and enforceable, pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and 9 U.S.C. §§ 201-208.

2. Defendant Jacobson shall pay plaintiff Polytek the sum of US $1,700,367.47, plus interest at the rate of nine percent (9%), as specified in the arbitration award.

3. Defendant Jacobson shall dismantle and collect the rubber recycling equipment at its own expense.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: December 12, 1997

JAMES M. ROSENBAUM
United States District Judge

[TRANSLATION]

CHINA INTERNATIONAL ECONOMIC

AND TRADE ARBITRATION COMMISSION

ARBITRATION AWARD

Claimant : Polytek Engineering Co. Ltd.

Address : Flat C, 7th Floor, Sea View Estate, 2-8 Watson Road, North Point, Hong Kong

1st Respondent : Jacobson Companies

Address : 2445 Nevada Avenue, North Minneapolis, MN55427 U.S.A.

2nd Respondent : Jacobson Inc.

Address : 2445 Nevada Avenue, North Minneapolis, MN55427 U.S.A.

Beijing

26 May 1997

Arbitration Award

(97) Mao Zhong Cai Zi No.0241

In accordance with the arbitration clause in the 'Purchase Order Agreement on Rubber Powder Equipment for Recycling Rubber Tyres' (Contract No. J-2134 (J93900)) entered into in 1993 between the Claimant, Polytek Engineering Co. Ltd. and the Respondent, Jacobson Companies and Jacobson Inc. and based on the arbitration application in writing submitted to the China International Economic and Trade Arbitration Commission (formerly known as the Foreign Trade Arbitration Commission of China Council for the Promotion of International Trade, hereinafter referred to as the 'Arbitration Commission') on 3rd April 1996 by the Claimant, the Arbitration Commission has taken up the arbitration case regarding the dispute over the quality of equipment under the aforementioned contract. The case number is M96170.

On 10 May 1996, the Secretariat of the Arbitration Commission served on the Respondents by express courier the Notice of Arbitration ((96) Mao Zhong Cai Zi No. 3711), the Arbitration Application made by the Claimant and other evidence and material, the Arbitration Rules of the Arbitration Commission and the list of the Arbitrators. The 1st Respondent, Jacobson Companies, submitted to the Arbitration Commission the Power of Attorney dated 13 June 1996 in favour of JIANG Ba and CO Da Bi with restricted authority. But the two Respondents had all along failed to comply with the rules under the aforesaid Notice of Arbitration by failing to appoint an arbitrator and submit their defences. As a result thereof, the Secretariat of the Arbitration Commission had issued the Notice ((96) Mao Zhong Cai Zi No. 8215) urging the same to handle the aforesaid matters, but the two Respondents still

failed to comply with the request under the said notice

On 24 September 1996, SHI Wei Hao , the Chief Arbitrator appointed by the Chairman of the Arbitration Commission pursuant to the Arbitration Rules, GAO Fei , the Arbitrator appointed by the Claimant, and ZHOU Rei Lin , the Arbitrator appointed by the Chairman of the Arbitration Commission for the two Respondents in pursuance of Rule 27 of the Arbitration Rules, formed an Arbitration Tribunal to try this case. The Secretariat of the Arbitration Commission sent by fax and by registered airmail to the Claimant and the two Respondents the Notice of Formation of Tribunal ((96) Mao Zhong Cai Zi No. 9037)

The Arbitration Tribunal decided to hold a hearing in Beijing on 29 November 1996 to try the case, and served on both parties a Notice of Hearing ((96) Mao Zhong Cai Zi No. 9621) Later on, on 13 November 1996, (the Arbitration Tribunal) by Notice ((96) Mao Zhong Cai Zi No. 10598) adjourned the aforesaid hearing to 16 December 1996

In the course of the arbitration proceedings, the 1st Respondent, Jacobson Companies, had raised objection to the jurisdiction of the Arbitration Commission on this case by sending a letter to the Arbitration Commission on 26th November 1996. In view of the above, the Arbitration Tribunal notified the two parties in writing through the Secretariat of the Arbitration Commission that the hearing originally returnable on 16 December 1996 was allowed to be adjourned.

After the Secretariat of the Arbitration Commission forwarded to the Claimant the objection raised by the 1st Respondent to the jurisdiction of the Arbitration Commission, the Claimant

on 2nd December 1996 and 5th December 1996 submitted to the Arbitration Commission its Opinion and Supplemental Opinion on the jurisdiction issue with supporting materials.

On 23 December 1996, the Arbitration Commission made a decision on the issue of jurisdiction ((96) Mao Zhong Cai Zi No. 11561) : 1. there exists a valid arbitration clause between the Claimant and the 1st Respondent of this case, Jacobson Companies, such clause is binding on both parties; 2. the Arbitration Commission has arbitration jurisdiction over this case; 3. the arbitration proceedings of this case shall proceed in accordance with the rules of the Arbitration Rules. The Secretariat of the Arbitration Commission then served on both parties of this case the aforesaid decision on the issue of jurisdiction by registered mail and by express courier.

On 29 January 1997, the Secretariat of the Arbitration Commission issued a Notice of Change of Arbitrator ((97) Mao Zhong Cai Zi No. 0801) to both parties of this case by registered mail and by express courier : due to the fact that ZHOU Rei Lin , the Arbitrator appointed by the Chairman of the Arbitration Commission for the two Respondents was physically unfit, the Chairman of the Arbitration Commission had reappointed GU Dan Qiang in replace of ZHOU Rei Lin continue to try this case.

After perusing the Claimant's Arbitration Application and its Appendix, the Arbitration Tribunal decided to hold a hearing in Beijing on 17 March 1997 to try the case and issued Notice of Hearing ((97) Mao Zhong Cai Zi No. 0910) to both parties by fax, registered mail and express courier through the Secretariat of the Arbitration Commission.

The hearing of the Arbitration Tribunal took place on 17 March 1997 as scheduled. The Claimant sent its representatives and its attorney to attend the hearing, who gave oral representation in respect of the facts of the case and answered questions raised by the Arbitration Tribunal. Both Respondents did not send the representatives to attend the hearing and did not give any explanation. In the course of trial, the Claimant submitted a Supplemental Opinion and evidence in support.

On 21st April 1997, the Arbitration Tribunal served on the two Respondents through the Secretariat of the Arbitration Commission by express courier a letter ((97) Mao Zhong Cai Zi No. 2809) with appendix. The said letter informed the two Respondents the details of the hearing in Beijing and informed the two Respondents that should they have any objection or opinion in respect of this case or request for re-hearing, (the application) should be made in writing to the Secretariat of the Arbitration Commission before 20 April 1997, failing which, the Arbitration Tribunal would proceed with the Arbitration procedures. However, the two Respondents had failed to give any answer within the aforesaid prescribed time limit.

The hearing of this case is now complete. The Arbitration Tribunal has made this Award based on the present materials together with the circumstances in the hearing and after discussion. The facts of this case, the opinion of the Arbitration Tribunal and the Arbitration Award are set out as follows -

I. The Facts of the Case

In 1993, the Claimant and the Respondents entered into an Purchase Order Agreement on

Rubber Powder Equipment for Recycling Rubber Tyres, J-2134 (B929001), (hereinafter referred to as "the Contract") wherein the Claimant purchased and the Respondents sold a set of rubber recycling equipment, including accessories for 2 years, special tools, commissioning and costs for training, for a total sum of US$865,100; payment schedule being as follows : the buyer shall first pay 10% as deposit, 80% shall be paid by means of Letters of Credit, another 10% (the balance) to be paid on the presentation of the inspection certificate and bills of exchange or within 180 days after delivery of the equipment should the buyer fail to finish the commissioning (whichever is earlier)

Clause 12 of the Contract, the clause on technological information, provides that : the seller(the Respondents) shall provide 4 sets of technological information specified in the Contract free of charge within 4 weeks after receipt of the deposit.

Clause 13 of the Contract, the clause on quality guarantee, provides that : the seller shall guarantee that the equipment provided was manufactured by raw materials of high quality and with the use of advanced craftsmanship. The equipment shall not be used before and shall be of brand new and in accordance with the quality, standard and function as stipulated in the Contract. The seller also guaranteed that upon proper installation, normal use and maintenance, the equipment shall operate properly within 18 months after the delivery of the goods to its port of destination or 12 months after the issuance of the certificate of inspection, whichever is earlier.

Clause 18 of the Contract, the clause on commissioning and technological training, provides the following on commissioning: the seller shall send engineers to the buyer's plant to conduct

commissioning for 3 weeks: 1) conduct inspection on the installed equipment; 2) conduct commissioning; 3) provides training for the buyer's operating staff.

Clause 14 of the Contract, the clause on inspection and damages, SubClause (3) provides that during the guarantee period provided for in Clause 13 of the Contract, if the quality and specifications of the goods were found not be in conformity with those specified in the Contract, or if defects were found in the goods irrespective of how they were caused, including latent defects or defective materials being used, the buyer shall apply to the Commodities Inspection Bureau for an inspection and make a claim for compensation against the seller based on the commodities inspection certificate issued by the Commodities Inspection Bureau. SubClause (4) of that clause provides that : after the seller had received Notice of Claim from the buyer, should the seller fail to give any reply within 30 days, the seller shall be regarded as accepting all claims made by the buyer.

Regarding the resolution on claims for compensation, SubClause (1) of Clause 15 provides that : during the inspection and quality guarantee period as stipulated in Clauses 13 and 14, any objection raised and damages claimed by the buyer and for which the seller shall be responsible, the seller shall, after obtaining consent from the buyer, pay compensation in accordance with one or several ways as follows: 1) agreeing to return the goods and refund the price of the goods sold in the original trading currency to the buyer, and undertaking to be responsible to all direct loss and expense incurred from returning the goods, including interest, bank charges, freight costs, insurance fees, commodities inspection fee and all other charges to be incurred in taking care of the returned goods.....

At the same time, the Contract has also provided for quality standard etc.

In the course of performance of this Contract, the Claimant claimed that the Respondents had failed to procure the equipment to operate properly and to manufacture products in conformity with the specifications provided for in the Contract, and therefore applied for arbitration to the Arbitration Commission on 1 April 1996.

The Claimant made arbitration claims in its application for arbitration on 1 April 1996 and submitted to the Arbitration Commission "Supplemental Opinion and Opinion on Variation of Arbitration Claims" on 30 January 1997 as very its arbitration claims. Subsequently, on 31 March 1997, the Claimant submitted to the Arbitration Commission the "Supplemental Composite Opinion of the Claimant (2)", wherein the Claimant varied part of its arbitration claims. The final arbitration claims of the Claimant are as follows :

1. Rescinding the Contract, [such that] the equipment for recycling rubber tyres shall be returned to the Respondents, all the expenses incurred in relation to dismantling of the equipment and freight costs shall be borne by the Respondents. The Respondents shall refund to the Claimant US$86,550 being the deposits for equipment paid by the Claimant, US$714,437 being the price of the goods, and US$63,369.71 being compensation for the loss of interest.

2.1) The Respondents shall compensate the Claimant US$191,492 being loss of gross profit and together with interest in the sum of US$35,414

2) The Respondents shall compensate the Claimant US$62,927.44 being the extra expenses incurred, in relation to staff's trip allowance and loss of wages, by the Claimant in performing the Contract.

3. The Respondents shall compensate the Claimant the following economic loss suffered by the Claimant in relation to the Arbitration Case No. M95294:

1) The Arbitration Award No. 0092 made by the Arbitration Commission provided for the Claimant to pay Hebei Import and Export Corporation compensation in the sum of US$612,232, arbitration fees in the sum of US$43,911, expert examination fees in the sum of US$17,000, case handling fees for foreign arbitrator in the sum of US$962;

2) Legal costs incurred by the Claimant in that case in the sum of US$28,683, the travelling expenses incurred by the lawyers in that case for attending hearing in Beijing in the sum of US$2,897;

3) The wages and trip allowance of staff incurred by the Claimant in handling that case in the sum of US$140,371.

4. The Respondents shall bear the staff's trip allowance and travelling expenses and other actual expenses etc. incurred by the Claimant for handling this case in the sum of US$6,101.96; legal costs in the sum of US$95,620 and arbitration fees of this case.

The Claimant alleges:

1. The Claimant had through its arbitration attorney C&M Law Office in Beijing notified the Respondents the related information concerning the arbitration matter.

2. The negotiation, formation and performance of this Contract are as follows:

As early as in the beginning of 1993, the Respondents already knew of the terms, including the arbitration clause, of the contract (hereinafter referred to as the Hebei Contract) (to be entered into between the Claimant and Hebei Import and Export Corporation (hereinafter referred to as Hebei Company). That contract was entered into between the Claimant and Hebei Company in April 1993, providing for the sale of the equipment for recycling rubber tyres by the Claimant to Hebei Company. The relationship between the Claimant, the Respondents and Hebei Company is: the Respondents sold the equipment for recycling rubber tyres to the Claimant, the Claimant then sold the equipment to the Hebei Company). The Respondents also knew that the Claimant would attach the Hebei Contract to the Purchase Order.

On 10 May 1993, the Claimant informed the Respondents that it would send them (by fax and by post) the purchase order and the attached main contract. On 11 May, the Claimant faxed to the Respondents the Contract entered between the two parties - the Purchase Order of the Claimant and the English version of the attached Hebei Contract (except the clauses on price). It was clearly marked on the top right hand side of the Purchase Order that the order number was to be "J-2134 (B619001)", (B939001) denotes the contract entered into between the Claimant and Hebei Company. The last line of that Purchase Order states that: all the terms and conditions shall comply with the attached main contract, that main contract being the contract with number B939001 as specified in the Purchase Order. According to the Purchase Order, the contract attached is part and partial of the Purchase Order. Clause 19 of that contract is the arbitration clause. On 18 May, the Claimant notified the Respondents that it would send the aforesaid contract to the Respondents on the same day and that it had already faxed to the Respondents the Purchase Order No. J-2134. The Respondents replied by fax on the same day acknowledging receipt of the contract and the letter of the 18th day faxed to it and raising objection to the request on them to arrange for stand-by letters of credit for a sum of 15% of the contract price. This indicated that upon receipt of the contract by the Respondents, (the Respondents only raised objection to the payment clause and did not raise objection to other clauses, that is to say, the Respondents accepted all the other clauses of the contract. The two parties had negotiated with each other for 2 months on matters relating to the stand-by letters of credit and the deposit payment and finally came to a mutual agreement that the Claimant should pay the 10% of the deposit. The two parties varied the payment terms in the Purchase Order: the Claimant shall first pay 10% as deposit, then open letters of credit for 80% of the Purchase Order, and then pay the 10% outstanding balance. On 21 July, the Claimant informed the Respondents by fax that it would remit to them the 10% deposit, ie. US$86,550. On the same day, the Respondents returned by fax indicating that the date which it received the deposit shall be the date of the Contract. On 23 July 1993, the Respondents acknowledged receipt of the deposit by fax. Therefore, according to the faxes of both parties, the Contract of this case was concluded on 23 July 1993.

After the Contract was concluded, the Claimant paid the price of the goods in accordance with the Contract, the Respondents delivered the equipment. Details of the course of performance of the Contract are as follows: on 23 July 1993, the Respondents acknowledged receipt of 10% deposit of the Contract price, US$86,550; on 10 November 1993, the Respondents issued the Quality Guarantee of the equipment for recycling rubber tyres of this case; on 14 December 1993, the Claimant issued the letters of credit to the Respondents for an amount of 80% of the Contract price, i.e. US$692,400; on 4 January 1994, the Claimant agreed to change the pricing terms of the Contract from that of FOB into CFR, and the Contract price was to be increased by US$22,037. On 1 February 1994, the Claimant

amended the letters of credit accordingly, the total amount of the amended letters of credit was (US$)692,480 + 22,037 = US$714,437, on 8 March 1994, the Respondents notified (the Claimant) that it had received the payment, on 28 January and 21 February, the Respondents loaded the equipment of the Contract in two trenches on ship for dispatch.

3 There is an arbitration agreement between the Claimant and the Respondents, the Arbitration Commission has made the decision that this case is within its jurisdiction.

4 The breaches of contract committed by the Respondents are as follow:

(1) Delay in providing technological information and sketches

The Respondents should have within 4 weeks from its' receipt of deposit, provided the related technological information, but the Respondents was in breach by failing to provide the same within the prescribed time limit, thereby causing the domestic supporting equipment design and infrastructure construction of the factory user of that equipment, Hebei Province Qinhuangdao Benjuya Rubber Powder Factory (hereinafter referred to as Hebei Factory), be delayed for 3 months. After the delivery of the equipment to the factory, the Respondents still delayed in providing the information of installation sketches and thereby causing further delay in equipment installation in the Hebei Factory.

(2) Failure to complete the commissioning of equipment

On 18 August 1994, the installation of the equipment in the Hebei Factory was basically completed. According to the Contract, the Respondents should come to the factory to conduct the commissioning. The Claimant had repeatedly requested and urged the Respondents to come to the factory to conduct the commissioning, but the Respondents only

came to the factory after 26 September to conduct the commissioning for 3 weeks. However, the Respondents failed to complete the commissioning within the 3 weeks as provided for by that clause. Later, the Claimant again requested the Respondents several times to send staff (to the factory) to complete the commissioning. Only until the period between 6 and 10 December 1994, did the Respondents send staff to the factory to re-conduct the commission, but had still failed to procure the continuous proper operation of the equipment and the manufacturing of end products which complied with the specifications under the Contract.

As the Respondents had failed to complete the commissioning of the equipment, the Claimant, the Respondents, Hebei Company and Hebei Factory had discussed on the proposal for modification of the equipment and the means of compensation, and prepared the minutes of the meeting, and the representatives from the Respondents had signed on the minutes of that meeting. The minutes of that meeting stated that: "1. Hong Kong Polytek Engineering Co. Ltd. and the American Jacobson Companies, aiming at the situation that the existing equipment had failed to manufacture products in conformity with those specifications under the Contract, had submitted a proposal for modification, after consideration (taken) by the buyer (Hebei Company) and the buyer's factory (Hebei Factory), they took the view that the proposal was too big a difference from those terms under the Contract and could not be accepted in any event. 2. the buyer and the buyer's plant had preliminarily proposed the scope of compensation for rejecting of goods with preliminary audited figures, the seller (the Claimant) and the selling plant (the Respondents) took the view that the amount claimed was too excessive and the same had to be decided by the board of directors after consideration. Therefore, all parties agreed to continue the negotiation on 3 April 1995 in Beijing. If the seller (the Claimant) and the selling plant (the Respondents) were unable to submit any

proposal for modification which was acceptable to the buyer(Hebei Company), discussion on the compensation items and actual figures was to be carried out and (they) indicated that they would spreden up to resolve (the matter) expediently in order to mitigate loss." Apparently, the Respondents had unequivocally admitted that the equipment had failed to manufacture products in conformity with those specifications under the Contract.

Nevertheless, the Respondents had given up the said opportunity of the scheduled Beijing discussion and thereby the discussion could not be held. Thereafter, all the parties concerned were unable to come to an agreement on resolving the matter.

On 8 May 1995, pursuant to the application made by Hebei Company, Hebei Province Import and Export Commodities Inspection Bureau had conducted commodities inspection on the equipment and issued the Commodities Inspection Certificate No. (103)95J062. The conclusion of that Certificate is: "Regarding the equipment for recycling rubber tyres, within the commissioning period as agreed between the buying and selling parties, despite repeated commissioning conducted by the seller (that equipment) had all along failed to operate properly and failed to manufacture products in conformity with those specifications under the Contract. The quality and the function of that equipment were found not in conformity with those specified by the Contract and were caused by the sellers's defective design and manufacturing."

To sum up the above, the Respondents were in breach of the clause on Quality Guarantee, and amounted to a breach of the Contract. That breach has entirely deprived the Claimant of the economic gains which it was entitled to expect under the Contract, and this is regarded as a

fundamental breach

As the Respondents had failed to procure the continuous proper operation of the equipment and the manufacturing of end products to be in conformity with specifications under the Contract, in June 1995, Hebei Company made an arbitration application to the Arbitration Commission, and the case no of which is 5695294. On 29th March 1996, the Arbitration Tribunal made an Arbitration Award (96) Mao Zhong Cai Zi No. 0092, the major contents of the arbitration award are:

1) returning of goods, the freight costs incurred in relation to returning goods etc shall be borne by Polytek; Polytek shall refund US$1,186,910.09 being the price of goods; pay damages in the sum of US$83,083.76 being the interest on that price of goods; 2) Polytek shall compensate Hebei Company RMB 2,826328.07 being related direct loss and expenses; compensate RMB 310896.09 being interest on that loss and expenses; 3) Polytek shall compensate Hebei Company RMB 1,365,000 being other economic loss (Note: that sum included part of the expected loss of profit); 4) Polytek shall bear RMB 364,908.40 being the arbitration fee, US$17,000 being the expert examination fees, RMB 8,000 being foreign arbitrator case handling fees.

The Respondents of this case shall be wholly liable for the compensation of the economic loss in the above arbitration decision.

5) The economic loss suffered by the Claimant as a result of the Respondents' breaches are as follows:

(1) the paid deposit in the sum of US$86,550, the price of goods in the sum of US$714,7437 and loss of interest in the sum US$113,519.77. Loss of interest was based on an interest rate of 9% p.a.

(2) A) the loss of gross profit of the Claimant in the sum of US$393,492 (the difference between the contract price of the contract entered into between the Claimant and Hebei Company and the contract price of this Contract) and interest thereon in the sum of US$35,414.

B) US$63,927.43 being extra payment of wages and staff's trip allowance and travelling expenses incurred in relation to re-commission conducted by the Claimant and resolving of problems as a result of the Respondent's breaches.

(3) The Respondent shall be liable to compensate for any economic loss suffered by the Claimant as a result of the Arbitration case No. 5695294. As this loss was entirely within the reasonable foresight of the Respondents and (the Respondents) shall be wholly responsible.

Save that the written objection to the jurisdiction submitted to the Arbitration Commission on 26th November 1996, the first Respondent had not submitted any written defence, the second Respondent had not submitted any written defence.

II Opinion of the Arbitration Tribunal

1 The question regarding the jurisdiction of this case

Regarding the jurisdiction of this case, the Arbitration Commission had made the decision on jurisdiction (96) Mao Zhong Cai Zi No.11545 on 23rd December 1996, (wherein it) clearly held that the Arbitration Commission had arbitration jurisdiction over this case. By virtue of the above, the Arbitration Tribunal tried this case and made the award.

2 The question regarding the quality of the equipment and the liability of breach of contract of this case.

The Arbitration Tribunal had fully noted the provisions for price of equipment, payment method, technological information, quality guarantee, commissioning and technological training, inspection and compensation, means of resolving claims for compensation, quality specifications etc in the Contract and the negotiation, signing and performance of this Contract, and (the Arbitration Commission) was also fully aware of the Memorandum relating to this Contract signed by the Claimant, the Respondents and Hebei Factory dated 18 March 1995 and the Inspection Certificate No. 130395P062 issued by the Hebei Import and Export Commodities Inspection Bureau dated 8 May 1995. The Arbitration Tribunal takes the view that according to the aforesaid Memorandum and the Inspection Certificate, the equipment delivered by the Respondents was not in conformity with those specifications under the Contract, this act amounts to a breach of contract. The Respondents shall be liable for the breach and pay compensation for any economic loss suffered by the Claimant.

3. The question regarding the arbitration claims of the Claimant

(1) According to SubClause (1) of Clause 15 of the Contract which provides for resolving claims for compensation, the Arbitration Tribunal supports the first item of arbitration claims of the Claimant, that is, rescission of the Contract, the equipment for recycling rubber tyres be returned to the Respondents, any expenses incurred in relation to the dismantling of the equipment and freight costs of the returned goods etc. are to be borne by the Respondents, the Respondents shall refund to the Claimant US$86,550 being the paid deposit for the equipment, refund to the Claimant US$714,437 being the paid price on the goods and together with interest thereon. The Arbitration Tribunal takes the view that the calculation method adopted by the Claimant in arriving the loss of interest is reasonable but the interest rate of 9% p.a. is too high, the Arbitration Tribunal takes the view that the loss of interest should be calculated at an interest rate of 7% p.a. Therefore according to the calculation method proposed by the Claimant, the Respondents shall pay to the Claimant US$90,242.44 being loss of interest.

(2) The Claimant claimed its loss of gross profit from the Respondents, ie US$193,492 being the difference in contract price between that of the Contract between the Claimant and Hebei Company and that of this Contract and US$15,414 being the loss of interest on that sum for one year. The Arbitration Tribunal takes the view that, from the course of the negotiation, formation and performance of the Contract, the Respondents was perfectly aware of the deal between the Claimant and Hebei Company and knew that Hebei Company was the buyer of the equipment. Therefore, the Respondents are able to foresee the expected loss of profit suffered by the Claimant as a result of the Respondents' breach. Accordingly, the Arbitration Tribunal supports the claims made by the Claimant in relation to the loss of profit. However, the Arbitration Tribunal is of the view that the level of profit is too high, as high as 44%, the Arbitration Tribunal after discussion takes the view that the Respondents shall compensate the

Claimant for 20% of the contract price as loss of profit, i.e. US$177,507.40 is reasonable. As that loss of profit is only to become adjudged debt by virtue of this arbitration award, the Arbitration Tribunal does not support the Claimant's interest claim for interest on loss of profit.

Regarding the claim for the sum of US$62,927.41 being the extra expenses incurred in relation to the staff's trip allowance and loss of wages by the Claimant in the course of performance of the Contract, the Arbitration Tribunal takes the view that there are insufficient grounds and evidence and therefore does not support the same.

(3) Regarding the Claimant's claim against the Respondents for the economic loss suffered by the Claimant as a result of the Arbitration case No.M95294, the Arbitration Tribunal takes the view that as the Respondents have breached the Contract, the equipment delivered was not in conformity with those specifications under the Contract, and thereby leading to the Arbitration case No. M95294 between the Claimant and Hebei Company and the liability for damages to Hebei Company (being) borne by the Claimant. That compensation for damage is the economic loss suffered by the Claimant as a result of the Respondents' breach, the Respondents should be liable for compensation. The Arbitration Tribunal after consideration takes the view that the related direct economic loss and expenses (including the direct loss of the equipment, part of the domestic supplemental equipment, installation, commissioning and wages and management charges for preparation for manufacturing) in the sum of RMB2,836,328.07 and other economic loss in the sum of RMB1,250,000, totalling RMB4,086,328.07, converted into US$492,328.67 awarded to be paid by the Claimant of this case to Hebei Company under the Arbitration Award of the Arbitration case No. M95294 shall be compensated by the Respondents to the Claimant. The economic loss suffered by the

Claimant being the Arbitration fees in the sum of US$43,811, the expert examination fees in the sum of 17,000, foreign arbitrators' case handling fees in the sum of US$963 incurred in relation to the Arbitration case No.M95294, shall also be compensated by the Respondents to the Claimant. As regards the claims of the Claimant against the Respondents for the legal costs, travelling expenses of lawyers for attending hearing in Beijing, wages and staff's trip allowance incurred by the Claimant in relation to the arbitration case No.M95294, the Arbitration Tribunal does not support the same.

(4) As for the actual expenses being legal costs and staff's trip allowance and travelling expenses etc. incurred by the Claimant in handling this case, the Arbitration Tribunal takes the view that the Respondents shall pay the Claimant US$40,000 being the actual expenses incurred by the Claimant in handling this case.

4. Regarding the arbitration fees of this case

As a result of the aforesaid, the Claimant shall bear 15%, and the Respondents shall bear 85% of the arbitration fees of this case.

III. The Award

The Arbitration Tribunal has made the following award:

1. The purchase order No.J-2134 (B91900C) between the Claimant and the Respondents shall be rescinded; the Respondents shall forthwith on the date of this arbitration award collect the equipment for recycling rubber tyres, all the expenses for dismantling of the equipment, freight costs etc. incurred in relation to the returning of the good shall be borne by the Respondents; the Respondents shall refund the deposit for equipment paid by the Claimant in the sum of US$86,550 and the price of the equipment in the sum of US$714,457 and shall compensate

the Claimant for the loss of interest in the sum of US$90,242.44.

2. The Respondents shall compensate the Claimant for loss of profit in the sum of US$177,507.40.

3. The Respondents shall compensate the Claimant for economic loss arising from the arbitration case No.M95294 in the sum of US$514,201.67.

4. The Respondents shall compensate the Claimant for the legal costs and the staff's travelling expenses etc. being the actual expenses incurred by the claimant in handling this case in the sum of US$40,000.

5. Dismiss the other claims made by the Claimant.

6. The arbitration fee of this case is in the sum of US$44,034. The Claimant shall bear 15% thereof i.e. US$6,605.10, and the Respondents shall bear 85% thereof i.e. US$37,428.90. The Claimant had already paid US$44,034 to the Arbitration Tribunal in advance and this shall be wholly set-off against the arbitration fee of this case. Therefore, the Respondents shall pay the Claimant the arbitration fees paid by the Claimant on behalf of the Respondents in the sum of US$37,428.90.

All the above-mentioned awards to be paid by the Respondents to the Claimant amount to US$1,700,367.41, the Respondents shall pay the Claimant within 45 days from the date of this arbitration award. In the event of late payment, an annual interest of 9% shall be charged.

This arbitration award shall be final.

Chief Arbitrator: (signed)

Arbitrator: (signed)

Arbitrator: (signed)

Beijing, 26 May 1997