THE JUDGE HAS PERMITTED PUBLICATION OF THIS JUDGMENT

1991 No. MP 2219

IN THE SUPREME COURT OF HONG KONG
HIGH COURT

BETWEEN

Paklito Investment Limited	Plaintiff
and	
Klockner East Asia Limited	Defendant

Coram: The Hon Mr. Justice Kaplan in Chambers

Date of Hearings: 4th January, 1993

Date of Handing Down Judgment: 15th January, 1993

HEADNOTE

Arbitration - opposition to enforcement of New York Convention award - s.44 Arbitration Ordinance Cap.341 - nature of proceedings before CIETAC - whether right to cross-examine tribunal appointed experts and adduce contrary evidence - whether Defendants were unable to present their case - whether Defendants should have been given an opportunity to comment upon evidence of tribunal appointed experts - Discretion - limited scope of public policy ground.

J U D G M E N T

On 15th November 1990 the China International Economic and Trade Arbitration Commission (CIETAC) rendered an arbitral award in favour of the Plaintiffs in the sum of approximately US$800,000.

On 12th August 1991 Master Cannon granted the Plaintiffs ex parte leave to enforce this award as a judgment of this court. This was done under the provisions of s.44 of the Arbitation Ordinance Cap 341 which is the means by which the New York Convention of 1958, to which Hong Kong and China are both parties, is given statutory effect in Hong Kong. The application was also made under Order 73 of The Rules of The Supreme Court.

On 11th February 1992 Master Cannon, after an inter partes hearing, set aside her order dated 12th August 1991 and I have before me an appeal from that decision. I should add that the appeal was listed before me on 1st April 1992 but was adjourned at the request of both parties in order to obtain from CIETAC a recording or a transcript of the hearing before them held on 25th April 1990.

Procedure

The application for ex parte leave should not have

been made to the Master. The terms of the Practice Direction for the Construction List dated 2nd August 1986 make clear that all applications under Order 73 of The Rules of the Supreme Court shall be made to the judge in charge of the Construction List. Practitioners who ignore this Practice Direction do so at their own peril on costs. The hearing before the Master in this case was quite unnecessary and has only added to the delay and cost of these proceedings.

Facts

The point at issue in this appeal goes to the very heart of the arbitral process and in order for it to be fully appreciated a recitation of the basic facts of this matter is essential.

By a contract in writing made between the parties on the 17th August 1988 the Defendants agreed to sell to the Plaintiffs and the Defendants agreed to buy 2500 MT of hot dip galvanised steel in coil at a total price of US$1,944,000 C & F to be delivered in November 1988. The port of loading was Istanbul, Turkey and the port of destination was Huangpu, China.

Between 10th October and 19th November 1988 the goods were inspected at the manufacturer's plant by Vitsan S.A. The inspection confirmed that the goods were in good order.

On 20th December 1988, the steel coils were loaded on board m.v. "Kornat" at Istanbul. They arrived in Huangpu, China on 19th January 1989. The goods were then transhipped to Haikou, China, leaving Huangpu on 25th January and were unloaded in Haikou on 2nd February 1989.

On arrival at Haikou, the goods were examined by the Hainan Import and Export Inspection Bureau and on 14th February 1989 they were moved to storage outside a warehouse in Haikou.

When the examination certificates were published, they revealed certain defects in the steel. The Weight Inspection Certificate was issued on 20th March, showing the steel to be 9.190 tons under weight. On 14th April the Quality Inspection Certificate was issued, concluding that the goods did not comply with the quality requirements. Some white rust had formed and certain parts of the steel coils had not been galvanized.

On 19th April 1989, claims were made by a series of sub-purchasers and by the Plaintiff against the Defendant for defective goods. The contract contained an arbitration clause providing for arbitration in China. Pursuant to this the Plaintiffs submitted to CIETAC their written application for arbitration on 10th August 1989.

The Hearing

On the morning of 25th April 1990 an oral hearing

was held by the arbitration tribunal. The Plaintiff maintains that this was a full hearing with detailed submissions on the evidence and issues, whereas the Defendant says the hearing was merely a preliminary hearing.

The Defendant also says that at the hearing they made a request for a further oral hearing to consider the causes of the formation of white rust. It appears that the Defendant has since requested a copy of the recording of or transcript of the hearing but CIETAC has refused to release a transcript or to allow the Defendant to listen to the original tape.

CIETAC gave a direction at the hearing allowing the submission of further evidence within one month from that date. The Defendant submitted their Defence on 10th May 1990 and the Plaintiff submitted certain exhibits on 19th May.

On 31st July 1990 CIETAC notified the Defendant of its decision to appoint its own experts to carry out investigations. The Rules of Arbitration of CIETAC allow an arbitral tribunal to take this course of action. The relevant articles of the Rules state:

> "26. The parties shall give evidences for the facts on which the claims or defences are based. The arbitration tribunal, in case of deeming necessities, may make investigations and collect evidences on its own." (sic)

> "28. The arbitration tribunal may consult specialists for special problems arising from the cases or appoint appraisers for appraisals, Specialists or appraisers may be the institutes or citizens of the PRC or foreign countries." (sic)

On 11th August the Defendant wrote to the Commission objecting to this appointment on the ground that such an investigation would be useless having regard to the almost one and a half years that had elapsed since the goods were delivered in Haikou. The Defendant also stated that they would not accept the results of any such investigation.

On 12th September 1990 the experts employed by the arbitral tribunal made their inspection and took away samples of the five specifications of steel coils. The report, issued on 31st October, concluded that there were deficiencies in the galvanized layer on the samples, including ungalvanised patches, and that the rate of corrosion of the galvanised layers was twice that expected "except for industrial areas in the tropics". That the Report was intended to conclude whether the defects were of manufacture or storage is made clear at the commencement of the Report where it was stated the purpose of the inspection was:

> "...in order to rule out the responsibility for the quality of the galvanized layer of the galvanized sheet being attributed to the time <u>after</u> the

goods had left the factory..."
(emphasis added)

The report was received by the Defendant's lawyer on 8th November. It is common ground that the Tribunal were informed orally that the Defendant wished to comment after considering the report. On 12th November the Defendant wrote to CIETAC stating their intention to submit a further defence in answer to the report and questions arising from it.

On 15th November 1990 the Arbitration Tribunal rendered its award in favour of the Plaintiff. The letter from the Defendant was received by CIETAC on 20th November. On 8th January the Defendant wrote to the Commission outlining their expectation of having an opportunity to adduce further evidence at an oral hearing. No reply was ever received from CIETAC.

Procedure before CIETAC

There is some question both as to exactly what occurred at the CIETAC hearing in the present case and as to the procedure normally followed at a CIETAC arbitration tribunal. As regards the latter question, the Plaintiffs contend that there is no right to cross-examination either under Chinese law or under CIETAC's Arbitration Rules.

In support of this the Plaintiffs filed an affidavit from Mr. Xi Xiao Tam, the PRC lawyer who

represented them at the hearing of 25th April 1990, and a letter from the Secretariat of CIETAC. The Defendants answer this with an opinion from Professor An Chen, Professor of International Economic Law and Dean of the School of Law and Politics at Xiamen University, who is also a member and arbitrator of CIETAC, and an affirmation from Mr. Anthony Neoh QC, who is a member of CIETAC's panel of arbitrators and has been an active arbitrator for the past three years.

As I feel this issue is both very relevant to the present case and of general importance, I propose to consider this evidence in some detail.

Mr. Xi states that the Chinese system is an inquisitorial one and that the common law notion of cross-examination of witnesses is "totally absent". He says that in Chinese arbitration proceedings the Tribunal may conduct its own enquiries to verify evidence submitted by the parties, deciding the extent of its enquiries and whether to accept the evidence so obtained, and may engage experts if it thinks fit. The parties are not allowed to challenge evidence obtained in such a manner unless the Tribunal invites them to make submissions on it. There is thus, he states, no right to cross-examine the Tribunal's own witnesses and no right of cross-examination at all in China.

In a letter of 15th February 1992 the Secretariat

of the Arbitration Commission affirms this view. The Secretariat states "any party in the proceedings cannot raise any objection to the expert report prepared by the independent expert employed by the Arbitration Tribunal. This is because the expert report is compiled by an independent and impartial third person. It is a practical and scientific report and is authoritative."

Professor An Chen was asked by the Defendant to give his opinion on whether these two views were in accordance with the true position in China. The following is a summary of his evidence.

Professor An Chen says that the most important purpose of the PRC Civil Procedure Law is "to protect the exercise by the parties of their procedural rights". The proper ascertaining of the facts is regarded as the basis for the correct application of the law. Further provisions of the Civil Procedure Law state, inter alia, that all evidence, including expert conclusions, must be collected and examined "comprehensively and objectively". Such provisions aim to ascertain the true facts, verify the annexures and help ensure the court does not listen only to one party.

The Professor affirms that there is in the trial procedures in China the right to comment, raise objection and refute the evidence of witnesses, including producing new evidence. The Civil Procedure Law allows the

questioning of witnesses with the approval of the court. In fact, the court will always approve a proper request and even encourages such requests because, as the Professor says, "these greatly assist the clarification of facts and the ascertainment of the truth".

The litigant may present new evidence in court, including evidence that refutes that of the appraisers. A new provision makes this even clearer by stating that "evidence shall be presented in court and examined by the parties.". Examination means cross-examination. It is thus wrong to say that there is no system of cross-examination in China.

The Professor confirms that the same principles should be observed by CIETAC in arbitration proceedings. Under the 1988 Rules of Arbitration of CIETAC there are no specific provisions allowing the parties to raise objections or refute reports of experts engaged by the tribunal but neither are there specific provisions denying any such right, as the Plaintiff asserts.

Three reasons are given for the absence of such provisions. Firstly, the rules are very brief. Secondly, it is well known that the Civil Procedure Law provides the basic principles, in particular "to guarantee parties to a law suit equal exercise of their litigation rights". Thirdly, the principles relevant to hearing arbitrations involving foreign interests can be found in other

legislation and in international conventions.

A June 1988 State Council document clearly directed that the new CIETAC rules cannot be read to breach either China's laws regarding fundamental legal principles, including standards of conduct during trial, or international treaties to which the PRC has acceded.

Under Article 142 of the 1986 General Principles of Civil Law, the provisions of international treaties to which China has acceded apply in preference to the provisions of Chinese law where the two differ.

Article 238 of the 1991 Civil Procedure Law, repeating Article 189 of the earlier, 1982 version, provides for the application of the stipulations found in international treaties where they differ from those of Chinese law.

In the light of the above, the CIETAC rules must not be in breach of international treaties, including the New York Convention. In recognition of this, the Civil Procedure Law as amended in 1991 contained provisions allowing the People's Court to deny execution of the award of CIETAC "if the person against whom the application was made was not requested to appoint an arbitrator or to take part in the arbitration proceedings or was unable to state his opinions due to reasons for which he was not responsible.".

The conclusion drawn from all this is that if the

CIETAC award was based on the appraisals of experts and the party against whom the application was made did not have any opportunity to plead its own case, raise objection, refute the evidence or provide new evidence, this will amount to a situation where he was unable to state his opinions. This would be contrary to the Civil Procedure Law and the New York Convention and the party can therefore apply to the People's Court for the award not to be enforced temporarily, until the tribunal listens to the evidence or objection and a new, enforceable award is made.

In this case the Professor concluded that the expert. reports "were delivered too late, and the award was issued too soon".

The Defendants also engaged Mr. Anthony Neoh QC to give an opinion on the same matter. His view is summarised as follows.

The 1988 ammendments to the CIETAC Arbitration Rules were adopted pursuant to an approval of the State Council given in June 1988, which stated that the Rules shall be "in accordance with China's laws and international treaties concluded or acceded to by China and with reference to international practice". By this stage, China had already acceded to the New York Convention.

In April 1987, the Supreme People's Court issued a circular on enforcement under the New York Convention, instructing the People's Courts to study the Convention and

to handle matters in accordance with it. Furthermore, the circular instructed the courts to make orders refusing the recognition and enforcement of an award where the conditions under article 5 of the Convention are present. Article 5, para. 1(b) provides for such refusal where "the Party against whom the award was made...was...unable to present his case".

CIETAC arbitrators therefore regard the procedural standards of the New York Convention as fundamentally governing their actions. The Rules are to be seen against this background. In particular, arbitrators are conscious of the need to give the parties every opportunity to present their case "including affording an opportunity to both parties to comment or present further evidence if necessary on any expert report produced by experts appointed by the tribunal".

The Arbitration Rules do not specifically allow or disallow cross-examination or give the parties the right to challenge the evidence of experts appointed by the Tribunal. The general practice adopted by CIETAC is more instructive.

Mr. Neoh states that at the hearing, the proceedings are generally divided into two stages, an initial, fact-finding stage and a second stage involving debate on the merits of the case and on the law applicable. Article 22 requires the tribunal to hold a

hearing unless the parties agree otherwise.

Thus the tribunal will, during the first stage, generally allow the parties to ask questions of witnesses, who are not bound to answer but adverse inferences may be drawn if they refuse. Expert evidence, usually provided in reports, is also commented on, both as to the qualification of the expert and as to the detail of the reports. A party may also dispute a report by bringing their own expert report either at the hearing or at an adjourned hearing if needed. If the tribunal feels that further investigation is needed, it may adjourn the hearing for investigations or for the submission of further evidence.

At the second stage, an offer to conciliate will be made by CIETAC. If the hearing proceeds, submissions are made on the merits of the case. If further evidence is needed, the parties may choose to reserve their positions until after they have seen this evidence, and may later request a further hearing. Finally, hearings are adjourned pending publication of the award.

This procedure is similar to that used in the People's Courts, as provided for in articles 103 to 111 of the Civil Procedure Law. Mr. Neoh went on, "The underlying principle in the Law is that each party will have the opportunity to challenge evidence collected by the Tribunal (including expert evidence) before a judgment is rendered."

Thus whereas there is indeed no right to

cross-examination in a Common law sense, both CIETAC Arbitration Rules and the PRC Civil Law give the parties opportunity to challenge expert evidence collected by the Tribunal.

Mr. Neoh concluded as follows:

> "I cannot agree with the opinion expressed by the Secretariat that no-one has the right to disagree with the findings of the tribunal's experts. As I have already stated hereinabove, the Rules are to be interpreted against the background of the New York Convention in the light of the State Council's direction that the CCPIT shall enact rules in accordance with international treaties and practice. To comply with the new York Convention, it is necessary in my view that any finding that is adverse to any party must be given to that party to allow that party to answer the case against him/her/it. Perhaps that accounts for the fact that the expert reports were sent to and received by the Defendant's legal representatives in the PRC, otherwise, if the Defendant had no right to comment on the expert reports, there would have been no point in sending them at all."

Having carefully considered all the opinions expressed above, I am particularly impressed by those of Professor An Chen and Mr. Neoh. I do not accept the Plaintiff's submissions that Chinese law and arbitral practice does not allow cross-examination either in general or in relation to experts engaged by the Tribunal. In the light of the above, I think the Defendants did have the right to expect they would be able to comment on the

reports of the Tribunal appointed experts. This is such a basic right that I cannot conceive that the position would be otherwise. The conclusion at which I have arrived certainly accords with what I have seen during the course of enforcing over forty CIETAC awards.

Issues

There are in effect two issues, either of which is sufficient to have the appeal dismissed. The first issue is whether the hearing of 25th April 1990 was a substantive hearing on the merits of the case or a preliminary one, dealing only with procedural matters and entitling the Defendant to expect a further hearing.

The second issue is whether the Defendants were unable to present their case because they were given no opportunity to deal with the expert's reports.

As the second of these issues in itself is sufficient to dispose of this case, I propose to deal with this matter first.

No opportunity to deal with expert's reports

Sections 44(1), (2) & (3) of the Arbitration Ordinance provide:

> "(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
>
> (2) Enforcement of a Convention award

> may be refused if the person against whom it is invoked proves -
>
> (a) ...
>
> (b) ...
>
> (c) that he was not given proper not ice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce this award."

I have little doubt that if these facts arose in the context of a domestic arbitration in Hong Kong either a successful application would have been made for the removal of the arbitrators on the ground of misconduct or else enforcement under s.2H of the Arbitration Ordinance would have been refused in the exercise of the court's discretion.

I hasten to add that the term "misconduct" implies no impropriety on the part of the arbitrators but refers to situations where there has been a serious procedural irregularity.

I must of course take into account that these parties agreed on a CIETAC arbitration and that therefore they must be deemed to take Chinese arbitral practices and procedures as they find them.

I must also take into account that when applying the terms of s.44 which give rise to Hong Kong's New York Convention obligations I am also to have regard to the principles of due process in Hong Kong.

I have no doubt whatsoever that a serious procedural irregularity occurred and that on reflection the arbitral tribunal would recognise it as such. The Defendants had taken the stand throughout that inspection reports made many months after delivery were of no assistance in ascertaining whether at the time of delivery the goods were defective. They took a policy decision to
confess and avoid the inspection reports. I can therefore well understand their concern when, contrary to their submissions, the Tribunal decided to instruct experts who then went further by preparing a report which indicated that the white rust seen was not caused by post-delivery storage but was more likely than not present at the time of delivery. This was a very different case which confronted them and I can well understand their desire to challenge this view and to adduce evidence to the contrary. (I have seen the evidence which the Defendants would like to adduce and it raises serious questions as to the methodology of the Tribunal appointed experts).

It is clear that the Tribunal relied on these reports and that the Defendants were given no chance to

deal with this very different case which suddenly presented itself. The Defendants should have been given an opportunity to deal with this new evidence. They asked for such an opportunity but the award came too soon and they never received an answer to their request.

Taking all the matters canvassed by both sides into account I have come to the very clear conclusion that the Defendants were prevented from presenting their case and they have thus made out the grounds set out in s.44(2)(c) of the Arbitration Ordinance. The Defendants were denied a fair and equal opportunity of being heard.

Mr. Chan QC attempted to argue that both sides had in fact been given an equal opportunity of presenting their cases because both had been prevented from commenting upon or adducing evidence to contradict the evidence of the tribunal's experts. I reject this argument. The Plaintiffs were perfectly happy for the tribunal to rule on the basis of this unseen evidence. What is required is equal and fair treatment and this most unfortunately did not happen (see Hong Kong Arbitration Cases and Materials, Butterworths p.201).

I go further. On the basis of Professor An Chen's report and the affidavit of Mr. Anthony Neoh QC, both of which I accept, I am satisfied that the procedural irregularity which I have found to have occurred would also have been found by a Chinese court had they been invited to

consider the matter. I am satisfied on the evidence placed before me that questions are permitted of court or tribunal appointed witnesses and that a party is entitled to adduce evidence to rebut the view of the court appointed expert.

Substantive or preliminary hearing

Having decided that the Defendants were prevented from presenting their case and that this constituted a serious breach of due process, I do not need to decide whether the initial hearing was a preliminary hearing or a substantive hearing on the merits. However, as I can deal with the matter fairly quickly, I propose to do so.

In deciding whether the hearing before CIETAC was a substantive hearing, I note that the burden is placed squarely on the Defendant to prove the award should not be enforced and thus to prove, in the context of this issue, that the hearing of 25th April was only preliminary.

There appears to be some confusion as to exactly what did occur at this hearing. The Plaintiff says that the Defendant, who had not yet submitted a written defence, entered into full debate on the merits of the dispute. The Defendants deny that this was the case and say the hearing only dealt with preliminary issues. The Tribunal itself, in the award, stated that "The arbitration attorney of the Claimant and the Defendant appeared before the Tribunal, answered the enquiries of the Tribunal and debated on the

issues".

On the totality of the evidence, I am satisfied that the Defendant has not discharged the burden of proving that that the Plaintiff's version is not correct. In particular, it seems to me highly unlikely that the Tribunal could have had sufficient information before it after a mere "preliminary hearing" to feel itself able to make an award without hearing further oral argument. The Defendant's contention that there was no hearing other than a preliminary hearing must therefore fail.

However, I am extremely surprised that CIETAC declined to provide a transcript or to allow the Defendant to listen to a tape of the proceedings. It seems to me that an arbitral authority should have nothing to hide by making available notes or transcripts of its proceedings where there is a dispute as to precisely what occurred. The court was unfortunately deprived of the opportunity of knowing precisely what happened. I would hope that if a similar problem arose in the future CIETAC would make such information available in order to assist the enforcing court in discharging its obligations under the New York Convention.

Discretion

Mr. Chan QC submitted that even if I was satisfied that the ground of opposition set out in s.44(2)(c) had

been made out nevertheless in the exercise of my discretion I should permit enforcement.

He relied strongly upon the fact that the Defendants had taken no steps to set aside the award in China and that this failure to so act was a factor upon which I could rely. I disagree. There is nothing in s.44 nor in the New York Convention which specifies that a Defendant is obliged to apply to set aside an award in the country where it was made as a condition of opposing enforcement elsewhere. In my judgment the Defendants were entitled to take this stance.

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

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

That such a choice exists is made clear by Redfern and Hunter in International Commercial Arbitration p.474 where they state;

> "He may decide to take the initiative and challenge the award; or he may decide to do nothing but to resist any

> attempts by his adversary to obtain recognition and enforcement of the award. The choice is a clear one - to act or not to act."

(For the English domestic position see p.546 et seq of Mustill & Boyd Commercial Arbitration 2nd edition).

I therefore conclude that the Defendant's failure to apply to set aside the award is not a factor upon which I should or could rely in relation to the exercise of my discretion. The Ordinance gives certain rights to the Defendants and these rights have been exercised by them. Those rights are not in any way cut down because of their failure to challenge the matter in the courts of China.

Mr. Tang QC submitted that discretion could come into play in relation to some only of the grounds set out in s.44. For instance, he submitted that if a court were satisfied that it would be contrary to the public policy of Hong Kong to enforce an award it would be inconceivable that the court's discretion would be exercised notwithstanding. Similarly, if a court concluded that the arbitration agreement was not valid under the law to which the parties subjected it the exercise of the discretion to enforce notwithstanding would seem inconceivable.

In relation to the ground relied upon in this case I could envisage circumstances where the court might exercise its discretion, having found the ground established, if the court were to conclude, having seen the

new material which the Defendant wished to put forward, that it would not affect the outcome of the dispute. This view is supported by Professor Albert Jan Van den Berg in his book, the New York Arbitration Convention of 1958, at p.302, where he states;

> "Thus only if it is beyond any doubt that the decision could have been the same would a court be allowed to override the serious violation."

It is not necessary for me in this judgment to decide whether this is the only circumstance where the discretion could be exercised or to lay down circumstances where it would be appropriate for the court to exercise its discretion after finding a serious due process violation. In this case Mr. Chan QC has accepted that he could not argue that the result would inevitably have been the same.

At the end of the day, the argument on discretion amounted to a plea in misericordiam on the basis that it was unfair to refuse enforcement as this would, as Mr. Chan put it, turn the Defendants into the successful party. In my judgment there is no substance in this submission. If enforcement is refused it is up to the Plaintiffs to decide what course of action to adopt. I do not know whether there is any other way for the Plaintiffs to establish what they perceive to be their legitimate rights. I have a very limited function under the Arbitration Ordinance. Having

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

Public Policy

This was referred to but it is clearly irrelevant. If the Defendants do not establish that they were prevented from presenting their case, the question of public policy does not enter the equation. If the Defendants established this ground then public policy is irrelevant. The public policy defence is construed narrowly and I deprecate the attempt to wheel it out on all occasions. As the US Court of Appeals for the 2nd Circuit said in Parsons & Whittemore v. RAKTA 508 F.2d 969 (2d Cir. 1974);

> "...the convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State's most basic notions of morality and justice."

The present case does not involve issues of public policy and it is decided solely on the breach of the requirement of an opportunity to present a case which I have held to be a serious enough irregularity to justify refusal of enforcement.

Conclusion

I therefore come to the same conclusion as the learned Master and dismiss this appeal. I will make a costs order nisi in favour of the Defendants together with a certificate for two counsel.

I cannot leave this judgment without making the following observation. In the three years 1990-1992 this court has enforced approximately 40 CIETAC awards. Some of these applications were opposed but this is the first time that enforcement has been refused. This is a creditable record and I would not like it thought that problems such as occurred in this case are commonplace in CIETAC arbitrations. Judges and arbitrators in all jurisdictions occasionally and unwittingly fall into error and it is in serious cases involving arbitral awards that the enforcing court refuses enforcement to prevent injustice. It has been my experience that in all other cases that I have considered from CIETAC the due process requirements have been fairly met.

I would like to thank both counsel for their helpful and most interesting written and oral arguments which I have found of the greatest possible assistance.

(Neil Kaplan)
Judge of the High Court

Edward Chan QC and Horace Wong instructed by Livasiri & Co for Plaintiffs.

Robert Tang QC and Albert Xavier instructed by Stevenson Wong and Co. for Defendants.