

Unofficial translation

Application for the Recognition and Enforcement of the Arbitral Award Issued by the
ICC Court of Arbitration Regarding the Disputes among TH&T International Corp. and
Chengdu Longhua Auto Parts Co., Ltd

Civil Ruling by the Sichuan Higher People's Court of People's Republic of China

(2002) Min Cheng Chu Zi No. 531

Applicant: TH&T International Corp.
Legal Representative: Huang Shuwu, director
Attorney: Zhao Xiaoping, lawyer of Sichuan Chuanda Law Firm
Attorney: Huang Lihua, lawyer of Sichuan Shangxin Law Firm

Respondent: Chengdu Longhua Auto Parts Co., Ltd
Legal Representative: Liao Yang, director
Attorney: Xu Jingbin, lawyer of Beijing Guantao Law Firm, Sichuan Branch
Attorney: Wang Lai, lawyer of Beijing Guantao Law Firm, Sichuan Branch

On 31 July 2002, this court accepted the case regarding the application for recognition and enforcement of an arbitral award (the "Award") issued by the ICC Court of Arbitration ("ICC") between the Applicant TH&T International Corp. ("TH&T") and the Respondent Chengdu Longhua Auto Part Co., Ltd ("Longhua"); we formed a collegial bench and held public hearings on 7 August 2003 and 31 October 2003, respectively. TH&T's attorneys Zhao Xiaoping and Huang Lihua, Longhua's legal representative Liao Yang, and Longhua's attorney Xu Jingbin appeared in court and presented their positions. This case has now been decided.

Applicant TH&T claimed that it entered into an agreement with Longhua on 3 June 1993 ("the Agreement"). Pursuant to the Agreement, TH&T authorized Longhua to produce certain auto parts and TH&T would hold exclusive distribution rights within North America. However, Longhua breached the contract; not only did they provide defective products to TH&T, but they also allowed third parties to sell such products developed by TH&T. Since Longhua seriously breached the contract and caused economic damage to TH&T, TH&T initiated an arbitration with the ICC on April 13, 1999. The ICC rendered an award in March 2003 that Longhua should compensate TH&T for damages in the amount of \$212,440.3, lawsuit fees in the amount of \$11,910.34 and arbitration fees in the amount of \$34, 350. Further to the above, TH&T applied to the People's Court for recognition and enforcement of the foregoing award.

Respondent Longhua asked the court to reject the application and refuse recognition of the award. Its reasons were as follows: 1. because the legal representative of Longhua did not receive proper notice of the appointment of the arbitrator or the arbitration proceeding, it

was unable to appear before the tribunal and thus it did not have a chance to defend itself. Liu Qingfeng is neither the legal representative nor an authorized agent of Longhua. Even though he had sent letters to the ICC, that was an individual action as opposed to a corporate action. Therefore, the award constitutes a ground for refusing recognition and enforcement under Article V(1)(d) of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (“the 1958 New York Convention”). 2. the ICC had no jurisdiction over the disputes between the Applicant and Respondent regarding the disposal of defective goods and thus the award goes beyond its mandate; meanwhile, TH&T and Longhua had agreed in the Agreement that if they could not reach a decision on the arbitral scheme and place of arbitration, then the Court of Arbitration of the Zurich Chamber of Commerce (“ZCC”) would be recommended. In addition, Liu Qingfeng had expressed disagreement with having the arbitration proceeding under the aegis of the ICC, as had been filed by TH&T. Since the ICC had recognized that Liu Qingfeng’s letter could represent the opinions of Longhua, that letter had expressed the opinion that TH&T and Longhua did not reach the agreement on the arbitral scheme and place of arbitration. Therefore, the award constitutes a ground for refusing recognition and enforcement under Article V(1)(d) of the 1958 New York Convention.

We believe that because France and China are both Contracting States of 1958 New York Convention and that the award in this case involved a dispute arising from a contractual and commercial legal relationship in China, thus, the 1958 New York Convention should be applied to this case. According to Article 5 of Circular on Implementation of Recognition and Enforcement of Foreign Arbitral Awards issued by the Supreme People’s Court, the application period for the recognition and enforcement of a foreign award is six (6) months and TH&T filed its application to our court within the valid period. Pursuant to Article V(1)(b) of the 1958 New York Convention, if “ the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case, then the recognition and enforcement of the award may be refused”. Longhua is a qualified party of the arbitral procedure, as the ICC had served the proper notice on Longhua regarding the appointment of the arbitrator and arbitration proceedings, thus this case does not fit the circumstance in which recognition and enforcement should be refused under in Article V(1)(b). Given the above, this court does not find support for Longhua’s claims that its legal representative did not receive the proper notice, which led to its failure to appear before the court to defend itself. With respect to the issue as to whether the ICC had jurisdiction over Longhua’s liability for the sale of defective products, Longhua claimed that the defective products were production problems and thus such dispute should be arbitrated as a production dispute under the auspices of the China International Economic and Trade Arbitration Commission (“CIETAC”) in Beijing according to Article 32 of the Agreement. However, TH&T claimed that such dispute was a sale and payment dispute and thus it should be arbitrated as a sale and payment dispute under the ICC in Los Angeles, United States according to Article 32 of the Agreement. We find that the meaning of “production” should first be determined pursuant to the Agreement between two parties. Section 2 of the Agreement concerns problems as to production and sale and according to this section “production” is defined as “Capacities that Longhua exclusively manufactures products under the products’ scope listed in the Agreement and have the ability to expand such listed

products.” Therefore, we could infer that “production”, as agreed upon by both parties, relates to exclusive production rights. In any event, production literally means manufacture. Longhua had sold the defective products to TH&T so the products have entered sales field. Meanwhile, the ICC arbitrated matters with respect to whether Longhua sold defective products to TH&T and return or refund related issues. Thus, the disputes among two parties are not in relation to production problems but the commercial disputes caused by marketing activities. Third, both parties had agreed in the Agreement that any commercial disputes caused by marketing activities or payments would be arbitrated or conciliated by the ICC in Los Angeles, United States and so the ICC has jurisdiction over this case. In response, Longhua claimed that the ICC does not have jurisdiction over this case because both parties did not reach an agreement over arbitral scheme and place of arbitration. However, TH&T claimed that both parties have no disputes on jurisdiction. Although Liu Qingfeng expressed in his letter that he would not attend the arbitral proceedings, he did not challenge the jurisdiction. We believe that the pre-condition for submitting the case to the ZCC is that two parties could not reach an agreement over arbitral scheme and place of arbitration, as mentioned above (i.e., arbitral agreement over production and sale). Longhua also failed to prove that the two parties disagreed on jurisdiction and that it had raised such disagreement with the ICC. With respect to the letter of Liu Qingfeng (the deputy general manager of Longhua), Longhua does not recognize that his action was performed on behalf of Longhua on the one hand; and on the other hand, however, Liu Qingfeng did not argue against the arbitral scheme and the place of arbitration in his letter. Therefore, we may not support the claims of Longhua in this regard. As suggested above, the two reasons raised by the Respondent regarding the refusal of recognition and enforcement do not constitute grounds under Article V of 1958 New York Convention. Therefore, according to Article V of 1958 New York Convention and Article 269 of Civil Procedure Law of the People’s Republic of China, we hereby rule as follows:

For the case numbered 10512/BWD/SPB and the corresponding award rendered by sole arbitrator Bing Ho of the ICC on 8 January 2002, we admit the application for recognition and enforcement of such award.

Chengdu Longhua Auto Parts Co., Ltd should bear the recognition fee and enforcement fee in the amount of 20,680RMB and other litigation fees in the amount of 1,000RMB, which totaled 21,680RMB (that had been prepaid by TH&T). These fees should be directly paid to TH&T in Longhua’s performs of such obligations.

Chief Judge: Liang Qun
Acting Judge: Zeng Ying
Acting Judge: Chen Bing
12 December 2003
Clerk: Wang Xiao