Unofficial Translation

Supreme People's Court

Response to Application by Hong Kong Heung Chun Cereals, Oil and Foodstuffs Co., Ltd for the Enforcement of the Arbitration Award Rendered by Hong Kong International Arbitration Centre

November 14, 2003 [2003] Min Si Ta Zi No. 9

Anhui Higher People's Court:

In connection with the *Report on the Examination of the Non-enforcement of the Arbitration Award Rendered by Hong Kong International Arbitration Centre Regarding the Dispute Concerning the Purchase and Sale Contract between Hong Kong Heung Chun Oil and Foodstuff Co., Ltd and Anhui Cereals, Oil and Foodstuffs Import & Export (Group) Co., Ltd.* received, we hereby issue, upon examination, the following response:

According to the facts you described, Anhui Cereals, Oil and Foodstuffs Import & Export (Group) Co., Ltd. ("Anhui COFCO") is a shareholder of Hainan Gaofurui Company ("Hainan Gaofurui"). The contract out of which the dispute arose (the "Contract") was entered into with Hong Kong Heung Chun Cereal, Oil and Foodstuffs Co., Ltd. ("Heung Chun") by Genjie Chang, the general manager of Hainan Gaofurui in the name of Anhui COFCO without any express authorization from Anhui COFCO. Genjie Chang, who took advantage of the relevant documents of the employees of Anhui COFCO seconded to Hainan Gaofurui, misappropriated the corporate seal of Anhui COFCO by way of cutting, pasting, copying and faxing. Since Genjie Chang entered into the Contract by misappropriating Anhui COFCO's corporate seal without obtaining any express authorization from Anhui COFCO, and he neither notified Anhui COFCO of the Contract nor obtained any subsequent confirmation from Anhui COFCO, in accordance with the personal law of one party to the Contract, i.e., the applicable laws of Mainland China, Genjie Chang did not have the right to enter into the Contract on behalf of Anhui COFCO, i.e., Genjie Chang did not have the capacity to enter into the Contract in the name of Anhui COFCO, and accordingly, he did not have the capacity to agree to any arbitration clause in the Contract in the name of Anhui COFCO. Therefore, in accordance with Article 7(1)(a) of the *Arrangement for Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region* issued by the Supreme People's Court, we have decided to refuse the enforcement of the arbitration award in this case and agree with your opinion on how to deal with the application, provided that, you will not apply Article 7(3) of the *Arrangement for Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region* as the legal basis for your decision not to enforce the arbitration award.

Appendix:

Anhui Higher People's Court

Request for Instruction on the Non-enforcement of the Arbitration Award Rendered by Hong Kong International Arbitration Centre with Respect to the Dispute between Hong Kong Heung Chun Cereals, Oil and Foodstuffs Co., Ltd and Anhui Cereals, Oil and Foodstuffs Import & Export (Group) Co., Ltd. (Summary)

[2003] Wan Zhi Ta Zi No. 01

Supreme People's Court:

After examination by the judicial committee of Anhui Hefei Intermediate People's Court ("Hefei Intermediate Court"), the Hefei Intermediate Court proposed to refuse to enforce the arbitration award rendered by the Hong Kong International Arbitration Centre ("HKIAC") regarding the dispute concerning the sale and purchase contract between Hong Kong Heung Chun Cereal, Oil and Foodstuffs Co., Ltd. ("Heung Chun") and Anhui Cereals, Oil and Foodstuffs Import & Export (Group) Co., Ltd. ("Anhui COFCO"), on the ground that the enforcement of the arbitration award would violate the public interest of mainland China. In accordance with the *Circular on Issues Related to the Handling of Foreign-related Arbitration and Foreign Arbitration by the People's Courts* (1995) No. 18 issued by the Supreme People's Court on August 28, 1995, any decision on the non-enforcement of any arbitration award rendered by any foreign-related arbitration tribunal or any foreign arbitration tribunal shall be examined by the competent high court and the opinion of the high court shall be reported to the Supreme People's Court. No decision on non-enforcement shall be made until the Supreme People's Court issues an affirmative response. Accordingly, we hereby report our examination of this case to you as follows:

1. Facts and Arbitration

In October 1993, Hainan Gaofurui Industrial Trading Company ("Hainan Gaofurui") entered into a contract numbered HT0493 ("493 Contract") with Heung Chun in the name of Anhui COFCO without the consent of Anhui COFCO, by way of cutting, pasting, copying and faxing etc. The signatory of the 493 Contract was Genjie Chang and the corporate seal of Anhui COFCO on the 493 Contract was forged by way of copying and pasting. The 493 Contract agreed to the following:

The Seller: Anhui COFCO

The Buyer: Heung Chun

Product to be purchased: 10,000 tons of Xiaobaisha peanuts produced in Shandong in 1993,

Unit Price: US$ 595 per ton

Total price: US$ 5.95 million

Term of delivery: December 15, 1993 to February 28, 1994

The buyer shall be responsible for shipment at Qingdao, and have an irrevocable letter of credit issued to the seller or a company designated by the seller 20 days prior to the shipment. Any dispute shall be referred to final arbitration in Hong Kong. The 493 Contract was signed by way of facsimile. Because Hainan Gaofurui did not have import and export rights, it entered into an export agency agreement with China Export Base Development Company ("Base Company"), pursuant to which the Base Company shall conduct animal and plant quarantine, merchandise examination, fumigation, shipping and export declaration, etc. for Hainan Gaofurui, and Hainan Gaofurui shall make Base Company the beneficiary of the letter of credit for the settlement of foreign exchange. For the initial supply, the seller provided 1,350 tons of peanuts to Heung Chun who paid US$ 803, 309.45 by way of a letter of credit. For the second supply, the seller agreed with Heung Chun that it would supply 1,000 tons of peanuts. For this shipment, the seller had Base Company conduct the required customs declaration formalities and apply for the issuance of a letter of credit for the settlement of foreign exchange for the 1,000 tons of peanuts and shipped the 1,000 tons of products to Qingdao, the port of shipment, in March 1994. However, the load of the ship provided by Heung Chun was only about 700 tons and after Heung Chun accepted the products, Base Company was unable to conduct the settlement of exchange due to the inconsistency between quantities set forth on the bill of lading (which was 700 tons) and the letter of credit (which was 1,000 tons). Heung Chun also refused to pay after receiving the products. In response, China Marine Helicopter Enterprise Co. and Hainan Gaogurui reported the case to Shenzhen Police Bureau. Shenzhen Police Bureau placed it on file for investigation on suspicions of fraud and detained Zhengyuan Kuang, the chairman of Heung Chun and Yonglin She, an employee of Heung Chun. In order to rescue its chairman, Heung Chun instructed its attorney, Jian Xu, to send a letter to the Standing Committee of Guangdong Province People's Congress, where he provided necessary explanations by saying that, "Since the actual seller is Hainan Gaofurui, who conducted the transaction in the name of Anhui COFCO, and the personnel of Hainan Gaofurui do not have any experience in the business of foreign trade documents at all, it requested that Heung Chun provide a set of sample foreign language documents." During the investigation, Heung Chun remitted the remaining US$ 470, 488.50 due to Hainan Gaofurui, via a bank in Hong Kong, to the bank account of the beneficiary, Base Company, at the headquarters of the Bank of China; and the amount was later withdrawn by Hainan Gaofurui. As a result, Shenzhen Police Bureau lifted the mandatory measures taken against the above two persons. Afterwards, the 493 Contract was not performed. On July 5, 1994, Heung Chun filed an application for arbitration to the HKIAC on the ground that Anhui COFCO only delivered 2,084.40 tons of products which is a violation of the 493 Contract and they should thus compensate Heung Chun for the relevant losses. Anhui COFCO filed a statement of defense to HKIAC without sending an authorized representative to appear before the arbitral tribunal claiming that it was not a party to the 493 Contract and its corporate seal stamped on the 493 Contract was misappropriated. HKIAC held that the 493 Contract was stamped with the corporate seal of Anhui COFCO that Anhui COFCO failed to provide any evidence to prove that the stamp of the corporate seal on the 493 Contract was not its corporate seal or that its corporate seal was misappropriated or lent to someone else or was lost, and that it also failed to prove that the corporate seal on the 493 Contract was stamped without its authorization. It therefore failed to sufficiently prove that it was not a party to the 493 Contract. The HKIAC rendered an arbitration award on June 28, 1997, determining that (i) since Heung Chun had to purchase the products from another seller due to the violation of the 493 Contract by Anhui COFCO in order to supply products to another party, Anhui COFCO should pay Heung Chun the price difference of US$ 697,335 as a result of the increase of the market price of peanuts; (ii) the 1% commission of the above US$ 697,335 should be paid by Anhui COFCO; (iii) Anhui COFCO should compensate

Heung Chun for the indirect losses sustained by Heung Chun, i.e., the US$ 804,496.43 profit that would otherwise have been obtainable if the 493 Contract had been performed; (iv) the interest accrued to the actual repayment date at an annual interest rate of 9.5% on the total amounts set forth in (i) to (iii), which is US$ 508,804.78, should be borne by Anhui COFCO; (v) if Heung Chun does not agree to assume the arbitration fees it incurred, they shall be paid by Anhui COFCO; and (vi) Anhui COFCO shall pay the expenses in connection with the arbitration paid in advance by Heung Chun, which is HK$ 438,450.

2. Application for Enforcement

On December 1, 1997, Heung Chun filed an application for enforcement to Anhui Hefei Intermediate Court based on the arbitration award rendered by HKIAC, requesting that Anhui COFCO should pay (i) the total amounts of losses it sustained as a result of Anhui COFCO's violation of the 493 Contract, which was US$ 1,508,804.78 plus the interest accrued thereon at the annual rate of 9.5% to the date of full repayment; (ii) the arbitration fees paid in advance by Heung Chun in the amount of HK$ 461,770, and (iii) the expenses in connection with the arbitration in the amount of HK$ 438,450 payable by Anhui COFCO which was paid in advance by Heung Chun. On December 10 of the same year, Anhui COFCO filed an application for non-enforcement of the arbitration award, requesting that the court refuse enforcement of the arbitration award. During examination, Hefei Intermediate Court requested our opinion on the application of the law and we filed a report numbered (1998) Wan Gao Fa Fu Zhi Zi No. 08 for your direction. You responded to us by issuing a letter numbered Fa Jing (1998) No. 449 on October 26, 1998, in which we were instructed that since Hong Kong has become a special administrative region of China after July 1, 1997, the arbitration award rendered by HKIAC should not be recognized and enforced in accordance with the *New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards*, but since there is not any existing laws and regulations governing arbitrations in Hong Kong, the examination will be resumed after the promulgation of relevant laws or regulations. On January 24, 2000, the Supreme People's Court issued the *Arrangement for Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region*, which was put into practice on February 1, 2000. On March 10, 2000, Hefei Intermediate Court issued an enforcement notice to Anhui COFCO, requiring it to make payment to Heung Chun within the limited period. On April 18, Heung Chun submitted a supplemental enforcement application to Hefei Intermediate Court requesting (i) Anhui COFCO to pay US$ 2,088,024.84 plus the interest accrued thereon from July 28, 1997 to July 27, 2000, which is US$ 3,518,653.86; and (ii) the attorney's fees and travel expenses incurred in connection with the non-enforcement of the arbitration award by Anhui COFCO. On June 7 of the same year, Anhui COFCO submitted another application for non-enforcement to Hefei Intermediate Court.

3. Opinion of Anhui Hefei Intermediate Court

Hefei Intermediate Court held that (i) the 493 Contract, based on which the arbitration award was rendered, was signed by Genjie Chang, the general manager of Hainan Gaofurui, by misappropriating the name of Anhui COFCO; (ii) Genjie Chang was neither an employee of Anhui COFCO nor an authorized representative of Anhui COFCO; (iii) "The address of Anhui COFCO is Room 305 Anhui Building, 18 Cuizhu Road, Shenzhen City, and the legal

representative is Genjie Chang" set forth in the 493 Contract is obviously not accurate, as the actual address of Anhui COFCO at that time was 256 Financial Building, Jinzhai Road, Hefei City, Anhui Province, and the legal representative was Weigen Chang; (iv) all the foreign trade documents related to customs declarations, inspections and shipping were dealt with by Hainan Gaofurui and Anhui COFCO was never involved in any of them; (v) the 493 Contract does not have any legal binding effect on Anhui COFCO who is not a party to it, and any liability for fault determined by HKIAC shall be borne by Hainan Gaofurui and Heung Chun. If we had Anhui COFCO assume the liability for the fault, it would be contrary to the spirit of the legislation of the Chinese civil and commercial law and would violate the basic principles, such as the principles of voluntariness, fairness, equal value exchange and *bona fides*, that should be followed in any civil and commercial activities. Any enforcement would infringe on Anhui COFCO's legitimate rights and interests, disrupt social economic order, and therefore damage the public interest. Based on the foregoing grounds, Hefei Intermediate Court decided not to enforce the 493 Contract.

4. Opinion of Anhui High Court

After examination of the case, we hold that Anhui COFCO is not a party to the 493 Contract, and Genjie Chang is neither an employee of Anhui COFCO nor an authorized representative of Anhui COFCO to enter any contract on behalf of Anhui COFCO. Genjie Chang was in the capacity of the general manager of Hainan Gaofurui when he executed the 493 Contract, which is an independent legal person jointly invested and established by Anhui COFCO and China Marine Helicopter Enterprise Co. Hainan (Group) Co. ("China Helicopter Company"), but is not a branch of Anhui COFCO. The registered address and legal representative set forth in the 493 Contract is obviously not consistent with the facts. The actual registered address of Anhui COFCO is 256 Financial Building, Jinzhai Road, Hefei City, Anhui Province, and the legal representative was Weigen Chang. As the general manager of Hainan Gaofurui, Genjie Chang entered into the 493 Contract with Heung Chun in the name of Anhui COFCO, without any prior consent of Anhui COFCO, by taking advantage of the relevant documents of the employees of Anhui COFCO seconded to Hainan Gaofurui, misappropriating the corporate seal of Anhui COFCO by way of cutting, pasting, copying and faxing, and by never informing Anhui COFCO of the execution of the 493 Contract. During the performance of the 493 Contract, Hainan Gaofurui did not have the import and export operating rights so it engaged Base Company as its agent to conduct all the formalities in connection with export declaration for the exported products, to open a letter of credit, and to settle foreign exchange. When a dispute arose, it was reported to the Shenzhen Police Bureau by China Helicopter Company and Hainan Gaofurui in their own names. Anhui COFCO never participated in the performance of 493 Contract and was not the foreign trade agent to Hainan Gaofurui. From the letter to the Shenzhen Municipal People's Congress from Heung Chun, it is apparent that Heung Chun obviously knew that the execution and performance of the 493 Contract by Hainan Gaofurui did not arise out of any authorization from Anhui COFCO. Therefore, Hainan Gaofurui and Heung Chun should be responsible for their malicious collusion to harm the interest of a third party and the HKIAC had rendered an arbitration award in error by determining that Anhui COFCO should bear the liability for breach of the contract.

In accordance with Article 7(3) of the *Arrangement for Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region* issued by the Supreme People's Court, which provides that "[i]f the Mainland court determines that the enforcement of an arbitration award in the Mainland of China is in violation of the public interest, … , it can decide not to enforce such arbitration award". According to the relevant provisions in the *Contract Law of the People's Republic of China* and the *General Principles of the Civil Law of the People's Republic of China*, any liability for fault determined by the HKIAC should be borne by Hainan Gaofurui and Heung Chun, while any assumption of such liability by Anhui COFCO would contradict the spirit of the legislation of the Chinese civil and commercial law and violate the basic principles such as the principles of voluntariness, fairness, equal value exchange and *bona fides*. Any enforcement will both infringe the legal interests of Anhui COFCO and disrupt social economic order, and therefore damage the public interest. The non-enforcement applied for by Anhui COFCO is consistent with the inner spirit of Article 7(3) of the *Arrangement for Mutual Enforcement of Arbitration Awards between the Mainland and the Hong Kong Special Administrative Region* issued by the Supreme People's Court. Therefore, after examination by the judicial committee of Anhui High Court, we have decided not to enforce the arbitration award.

Please confirm whether our opinion is appropriate.