

Unofficial Translation

*Bunge Agribusiness Singapore Pte. Ltd. v. Guangdong Fengyuan
Food & Oil Group Company Ltd.*

**Reply of the Supreme People's Court regarding the Guangdong Higher People's Court's
Request for Instruction on the Recognition and Enforcement of a U.K. Arbitral Award by
the Applicant Bunge Agribusiness Singapore Pte. Ltd.**

(25 June 2007, [2006] Min Si Ta Zi No. 41)

Guangdong Higher People's Court,

Your Court's Request for Instruction on the Recognition and Enforcement of a U.K. Arbitral Award by the Applicant Bunge Agribusiness Singapore Pte. Ltd. with Case Number "[2006] Yue Gao Fa Min Si Ta Zi No. 10" has been received by this court. Upon deliberation, we reply as follows:

The Applicant applied for the recognition and enforcement of an arbitral award made by the Federation of Oils, Seeds and Fats Associations ("**FOSFA**" or "**Association**"). This arbitral award was a foreign arbitral award. China and the U.K. are both Contracting States of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). According to Article 269 of the Civil Procedure Law of the People's Republic of China, the court shall review this case in accordance with the New York Convention and then decide that whether or not the arbitral award in this case should be recognized and enforced. The review of the arbitration agreement and the arbitration procedure shall be in accordance with the Rules of Arbitration and Appeal of FOSFA which was amended on 1 January 2001, and the English Arbitration Act 1996, as agreed by both parties.

Article 1(f) of the Rules of Arbitration and Appeal of FOSFA states that this Association must notify a party, which has failed to nominate an arbitrator or replace an arbitrator, that the Association would appoint a replacement arbitrator on its behalf, unless this party nominates one within 14 days of the notification. In this case, after the arbitrator, Mr. S. Bigwood, questioned his impartiality as an arbitrator on his own accord, the arbitral tribunal then appointed a new arbitrator for Guangdong Fengyuan Food & Oil Group Company Ltd ("**Fengyuan**" or "**Respondent**") without sending any prior notification. The arbitral tribunal failed to comply with the arbitration rules agreed by the parties. This constitutes a ground for refusal of recognition and enforcement under Article V(1)(d) of the New York Convention, *i.e.* the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties. Therefore, the People's Court shall refuse to recognize and enforce the arbitral award in this case.

Above is the reply to your Court's Request.

Annex

Request of Guangzhou Higher People's Court for the Recognition and Enforcement of a U.K. Arbitral Award by the Applicant Bunge Agribusiness Singapore Pte. Ltd.

(17 November 2006, [2006] Yue Gao Fa Min Si Ta Zi No. 10)

Supreme People's Court,

Yangjiang Intermediate People's Court accepted the case concerning the request for recognition and enforcement of arbitral award No. 3920 made by arbitrators R. W. Rookes and W. Plug of FOSFA by the Applicant Bunge Agribusiness Singapore Pte. Ltd ("**Bunge**" or "**Applicant**"). The Yangjiang court intended to dismiss the application of Bunge and refuse to recognize and enforce the arbitral award, and thus reported the case to our court. After reviewing the case, our court also considers that we shall refuse to recognize and enforce the arbitral award. According to the Circular of the Supreme People's Court on Issues in the People's Courts' Handling of Foreign-related Arbitrations and Foreign Arbitrations, we report this case to your court as follows:

1. The Parties and Their Arguments

Applicant: Bunge Agribusiness Singapore Pte. Ltd.

Legal Representative: Hunt Smith, Chief Financial Officer, Asia

Respondent: Guangdong Fengyuan Food & Oil Group Company Ltd

Legal Representative: Feixiong Yao, General Manager

The applicant Bunge requested the court to recognize and enforce arbitral award No. 3920 made by arbitrators R. W. Rookes and W. Plug of FOSFA concerning the dispute between Bunge and Fengyuan on the soybean sales contract. Bunge provided the following facts and reasons:

On 4 March 2004, the Applicant and Respondent signed a soybean sales contract and agreed that the Respondent shall open a letter of credit no later than 5 June 2004. The Respondent failed to open a letter of credit within the limited period. The Applicant notified the Respondent to open a letter of credit on 10 June 2004, but the Respondent still failed to open one. The Applicant claimed a breach of contract by the Respondent on 15 June 2004, and sent a debt notification to the Respondent on 23 July 2004, claiming damages based on the difference between the contract price and the market price, U.S. \$ 3,892,900 in total, due to the Respondent's failure to open a letter of credit as agreed between the parties.

The Respondent did not reply to the Applicant's request. The Applicant then submitted the dispute to FOSFA for arbitration. It nominated Mr. R. W. Rookes as an arbitrator and notified the Respondent to nominate an arbitrator at the same time, but the Respondent did not reply. Further to the Applicant's notification, FOSFA, on behalf of the Respondent, appointed Mr. Plug as the arbitrator. During the arbitration, even though the arbitrators ordered the Statement of

Defence from Respondent for several times, the Respondent did not respond. The arbitrators made the final arbitral award on 19 July 2005.

On 27 July 2005, the arbitrators confirmed that the tribunal had received the arbitration fees from the Applicant. The tribunal then transmitted the original arbitral award to the Applicant and a copy of arbitral award to Respondent by post. On 26 August 2005, FOSFA transmitted another copy of the arbitral award at the request of the Applicant to the Respondent by express post.

On 7 September 2005, the arbitrator found that there was a printing mistake in the arbitral award. The arbitrators then transmitted the correction in writing through FOSFA to both parties. Since the Respondent refused to sign and receive the above arbitral award and correction in writing, Liu Wen, a lawyer from the Tongshang Law Firm, went to the domicile of the Respondent at the request of the Applicant and delivered the original documents to the Respondent on 12 October 2005.

The Respondent however, refused to perform the arbitral award. The Applicant applied to the Yangjiang Intermediate People's Court for the recognition and enforcement of the arbitral award according to the New York Convention, the Chinese Arbitration Law and Chinese Civil Procedure Law.

The Respondent argued as follows: (1) Respondent received neither the application for arbitration submitted by Applicant, nor a proper notice of the arbitration proceeding, and thus Respondent was unable to present its case. (2) The arbitration institution did not provide the arbitration rules and the list of arbitrators to the Respondent, thus Respondent was unable to nominate arbitrators. (3) Respondent was not given notice of the hearing. (4) The arbitral award has not yet become binding on the parties, because He Qian, to whom the award was delivered, was not the designated recipient for the Respondent and the delivery person was Dihuang Song, the agent of the Applicant. The arbitral award was required to be delivered to Feixiong Yao in person, but he did not receive the award, so the award has not yet become binding on the parties. (5) The recognition or enforcement of the award would be contrary to the public interest and the public policy of China. On 14 June 2004, the General Administration of Quality Supervision, Inspection and Quarantine of People's Republic of China issued Announcement No. 71 which stopped the import of Brazilian soybean from the Applicant. The Applicant was the first on the list in the Announcement, the Brazilian soybean was used as seed. Therefore, the arbitral award is invalid under Chinese law and enforcing the arbitral award would be contrary to the Chinese public interest and public policy.

2. Factual Background

On 4 March 2004, the Applicant and Respondent entered into a soybean sales contract and agreed that if the Respondent failed to open a letter of credit as agreed in the contract, the Applicant had the right to claim damages based on the difference between the contract price and market price. The two parties agreed in their contract that any dispute arising from the contract shall be settled by arbitration by FOSFA in London. The arbitral award made by the arbitration institution shall be final and binding. The party that does not prevail in the arbitration shall pay the arbitration fees.

On 10 August 2004, the Applicant submitted the dispute to FOSFA in London for arbitration on the ground that the Respondent breached the contract due to its failure to open a letter of credit. The Applicant nominated Mr. R. W. Rookes as the arbitrator according to Rules of Arbitration and Appeals of FOSFA (“**FOSFA rules**”). Then, the Applicant sent a fax to Respondent indicating that it had already submitted the dispute to arbitration and requesting the Respondent to nominate one arbitrator, but the Respondent did not reply.

On 15 September 2004, FOSFA requested the Respondent to nominate one arbitrator within the time limit.

On 1 October 2004, the FOSFA sent a fax to the Respondent indicating that the Association had appointed Mr. S. Bigwood as an arbitrator on behalf of the Respondent.

On 8 October 2004, the Respondent sent a fax to FOSFA in reply refusing the appointment of the arbitrator Mr. S. Bigwood by FOSFA on its behalf and requested an extension of the time limit for the nomination of arbitrators.

On the same day, FOSFA notified the Respondent that its request for the extension of the time limit was refused by the Association.

On 11 October 2004, the Respondent sent a fax to FOSFA again and refused the appointment of the arbitrator nominated by FOSFA on the ground that there existed a conflict of interest. The Respondent requested an extension of the time limit for the nomination of arbitrators once again in its fax to FOSFA.

On the same day, FOSFA informed the Respondent that its challenge to the arbitrator was dismissed and the Association refused to extend the time limit.

On 25 October 2004, FOSFA notified the Respondent that the arbitrator Mr. S. Bigwood appointed by FOSFA had questioned his own impartiality, and that the Association had therefore appointed another arbitrator, Mr. W. Plug on behalf of the Respondent.

On 24 February 2005, FOSFA ordered the Respondent to submit the Statement of Defence within 21 days, in its fax to the Respondent.

On 30 March 2005, FOSFA sent a fax to the Respondent and once again, ordered the Respondent to submit the Statement of Defence within 14 days.

On 11 May 2005, FOSFA ordered the Respondent to submit the Statement of Defence within 14 days for the third time.

Since the Respondent never submitted the Statement of Defence to FOSFA, the arbitral tribunal, consisting of arbitrator R. W. Rookes and arbitrator W. Plug made a final arbitral award on 19 July 2005. The award was as follows: (1) the buyer shall pay the seller U.S. \$3,892,900, the difference between the contract price and market price of the 55,000 metric tons of goods; (2) the buyer shall pay the seller the annual interest rate of 3.628% based on U.S. \$3,892,900, calculated from 15 June 2004 to the date when the damages will have been paid completely; (3) the buyer can deduct from the seller’s request RMB 1 million or an equivalent amount in U.S. dollars and

the relevant interest calculated from 15 June 2004 to the date when the payment is made; (4) the buyer shall pay the arbitration fees and expenses which includes the Association fee of £820, arbitration fee £1800, non-membership fee £750, £3370 in total – if the seller paid part of or all of the arbitration fees and expenses in advance, it had the right to obtain compensation from the buyer; (5) the seller's request on compensation of the legal cost and other remedies shall not be supported by this tribunal.

After the arbitral award is made, the arbitrators confirmed that the arbitration fees paid by the Applicant had been received. The arbitral tribunal transmitted the original arbitral award to the Applicant by post on 27 July 2005. On 7 September, the arbitrator found that there was a printing mistake in the arbitral award, so the arbitral tribunal transmitted a correction in writing to the Applicant. At the request of the Applicant, Liu Wen, a lawyer from the Tongshang Law Firm delivered the arbitral award and the correction in writing to the Respondent in person. Liu Wen confirmed that He Qian received and signed the above documents on behalf of the Respondent.

3. Opinion of the Yangjiang Intermediate Court

In the Applicant's opinion, the evidence provided proves that the Respondent had already received the arbitral award and the correction in writing posted by FOSFA. Nonetheless, the Respondent denied that it had received arbitral award No. 3920 made by arbitrator R. W. Rookes and arbitrator W. Plug from FOSFA. The Applicant could not provide any evidence to prove that He Qian, who received the above documents, was an employee of Respondent's company. The delivery person Liu Wen from Beijing Tongshang Law Firm was the agent of the Applicant, which does not comply with the relevant regulation under the Chinese Civil Procedure Law. According to Article V(1)(e) of the New York Convention, the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made, the arbitral award has not yet become binding on the parties, the court shall refuse to recognize and enforce the award.

In conclusion, according to Article 140(1)(i) and Article 269 of the Chinese Civil Procedure Law, this court intended to refuse to recognize and enforce arbitral award No. 3920 made by arbitrators R. W. Rookes and W. Plug from FOSFA in London, U.K. The court fee is RMB 500, and the other litigation fee is RMB 300. The total amount of RMB 800 shall be paid by Bunge.

4. Our court's Opinion

This case is about recognition and enforcement of a foreign arbitral award. The award was made in London, U.K. China and the U.K. are both Contracting States to the New York Convention. According to Article 269 of the Chinese Civil Procedure Law, the People's Court shall review the award in accordance with the New York Convention and then decide whether to recognize and enforce it or not. The applicable law governing the arbitration agreement and arbitration procedure is English law, which was explicitly agreed by both parties.

There were three main issues in the dispute between the parties, detailed as follows: (1) whether the composition of the arbitral authority or the arbitral procedure was in accordance with the

FOSFA rules; (2) whether the recognition or enforcement of the award would be contrary to the public policy of China; and (3) whether the award has become binding on the parties.

The first issue is whether the composition of the arbitral authority or the arbitral procedure was in accordance with the FOSFA rules. According to FOSFA rules, FOSFA has no obligation to provide arbitration rules or a list of arbitrators to the parties. Therefore, the Respondent's argument that FOSFA did not provide it with the arbitration rules or a list of arbitrators rendering it unable to nominate an arbitrator shall not be properly founded. FOSFA's appointment of an arbitrator on behalf of the Respondent, where Respondent failed to nominate one, is also in compliance with the FOSFA rules. The Respondent argued that it did not receive the Applicant's application for arbitration. The Applicant submitted a DHL bill to the court in order to prove that the application notice had been delivered to the Respondent by post. Moreover, in all of the faxes between the parties, the Respondent did not mention that it had not received the arbitration application from the Applicant. Therefore, this argument by the Respondent is not properly founded either. According to the FOSFA rules, if one of the parties does not submit any Statement of Defence, the arbitral tribunal can arbitrate the case without any hearing. FOSFA gave the Respondent plenty of time to submit the Statement of Defence, the Respondent's argument that it did not receive any notice of the arbitration proceeding shall not be supported by the court.

The second issue is whether the recognition or enforcement of the award would be contrary to the public policy of China. Although the General Administration of Quality Supervision, Inspection and Quarantine of PRC issued Announcement No. 71, which stopped the import of Brazilian soybean from the Applicant, the Announcement was not about the specific goods in this case. The People's Court shall not consider the recognition and enforcement of this arbitral award as a violation of Chinese public policy.

The third issue is whether the arbitral award has become binding on the parties. The Applicant claimed that FOSFA had transmitted the arbitral award and correction in writing to both of the parties, and FOSFA sent the above documents by post and fax to the Respondent. However, the Applicant could not provide evidence to prove that the above documents had reached the Respondent and it could neither prove that the documents had been received and signed by the Respondent. Therefore, the court deduced that FOSFA had not effectively transmitted the arbitral award or the correction in writing to the Respondent. The Applicant argued that Liu Wen, the agent of the Applicant and a lawyer from the Beijing Tongshang Law Firm delivered the original documents to the domicile of the Respondent in person on 12 October 2005. Liu Wen confirmed that He Qian received and signed the documents. The Applicant, however, did not provide evidence to prove that He Qian was an employee of the Respondent's company. The Respondent also claimed that it did not sign on the confirmation letter that it had received the arbitral award. The mere confirmation letter signed by He Qian could hardly prove that the arbitral award had been transmitted to the Respondent effectively. In conclusion, the court considered that the arbitral award had not been effectively transmitted to the Respondent and the arbitral award has not yet become binding on the parties. This constituted one of the grounds which allow the court to refuse the recognition and enforcement of an arbitral award under the New York Convention.

Our court considers that arbitral award No. 3920 made by arbitrator R. W. Rookes and W. Plug from FOSFA in London, U.K. has not yet become binding on the parties. According to Article V(1)(e) of the New York Convention, the court shall refuse to recognize and enforce the arbitral award.

According to the Circular of the Supreme People's Court on Issues in the People's Courts' Handling of Foreign-related Arbitrations and Foreign Arbitrations, we report this case to your court and seek your court's advice.