HCCT80/1997

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO.80 OF 1997

IN THE MATTER of Section 2H of the Arbitration Ordinance (Cap.341)

and

IN THE MATTER of the Rules of the High Court (Order 73 rule 10)

and

IN THE MATTER of an award dated 6 June 1996 and a supplementary award dated 5 July 1996 made in an arbitration

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BETWEEN

SHANDONG TEXTILES IMPORT AND EXPORT CORPORATION Plaintiff

and

DA HUA NON-FERROUS METALS COMPANY LIMITED Defendant

Before : Hon Ma J in Chambers

Dates of Hearing : 28-29 January 2002

Date of Judgment : 6 March 2002

J U D G M E N T

Background to the summonses before the court

1. There are two summonses before the court :-

(1) The defendant's summons dated 3 October 1997 by which the defendant applies to set aside the order of Yam J made on 21 August 1997 (as amended on 12 October 1997) whereby the plaintiff was given leave to enforce the arbitration award made in CIETAC Arbitration No. 0218(96) and the supplementary award made in CIETAC Arbitration No. 3501(96) ("the 1st summons").

(2) The plaintiff's summons dated 29 January 2002 whereby the plaintiff applies under section 2GG and Part IIIA of the Arbitration Ordinance, Cap.341 ("the Ordinance") for leave to enforce the said Awards and for an order that judgment be entered in terms of the Awards ("the 2nd summons").

2. As will presently be shown, the 2nd summons becomes relevant only if the defendant succeeds in setting aside the said order of Yam J under the 1st summons. Further, in the event that I should find in favour of the plaintiff under the 2nd summons, counsel for both parties were kind enough to hand up to me at the conclusion of the hearing an agreed statement of the amount of indebtedness due from the defendant to the plaintiff under the said Awards.

3. Interesting questions arise under the present summonses. I first deal with the background germane to them.

4. By a contract contained in or evidenced by a Purchase Confirmation numbered 94R-20 and dated 23 November 1994 from the plaintiff to the defendant ("the 1st Contract"), the plaintiff purchased from the defendant a quantity of 4,000 metric tons (+/- 3%) of US raw cotton at the price of US$7,125,276.20 and on the terms and conditions set out therein. The Purchase Confirmation was signed by both the plaintiff and the defendant.

5. Special clause 6 of the 1st Contract stated, "OTHER TERMS AND CONDITIONS AS PER SUPPLEMENT CONTRACT NO. DH/MK 140/94HH". Further, under the heading "GENERAL TERMS AND CONDITIONS", it was stated, "PLEASE SEE SUPPLEMENT CONTRACT NO. DH/MK 140/49HH" (the reference to the supplementary contract no. DH/MK 140/49HH is a mistake and reference should instead be to contract no. DH/MK 140/94HH).

6. Supplementary Contract no. DH/MK 140/94HH ("the 2nd Contract") was also dated 23 November 1994 but, unlike the 1st Contract, it was in Chinese and also came under the defendant's letterhead. This contract was signed by the defendant and a company called Shandong Tong Hua Company Limited ("Tong Hua"). The 2nd Contract contained a number of terms which supplement the 1st Contract. Specific reference was made in the 2nd Contract to the 1st Contract (as indeed, as I have pointed out, the 1st Contract correspondingly refers to the 2nd Contract).

7. Among the terms and conditions of the 2nd Contract is an arbitration agreement :-

> "8 Arbitration
>
> (1) All disputes arising from the Contract (including the main contract) shall be settled through friendly negotiation. In case no settlement can be reached, the disputes shall then be submitted for arbitration.
>
> (2) The arbitration shall be conducted in accordance with Terms of I.C.C. and submitted to China International Economic and Trade Arbitration Commission in Beijing or an arbitration institution of a third country agreed to by both parties.
>
> (3) The award rendered by the arbitration institution shall be final and both parties must comply with it. The arbitration fee shall be borne by both parties."

The China International Economic and Trade Arbitration Commission ("CIETAC") is a well-known and established arbitral body in China and is commonly referred to simply as CIETAC.

8. Disputes arose between the parties in relation to the quantity of cotton sold and delivered under the 1st and 2nd Contracts. The plaintiff claimed against the defendant on the basis of short shipment and poor quality and accordingly claimed damages, interest and costs. Some of the goods were rejected.

9. The disputes between the plaintiff and the defendant were referred to CIETAC for resolution by arbitration. The plaintiff referred the dispute to arbitration on 6 June 1995. The plaintiff (who was the claimant in the arbitration) appointed an arbitrator, the defendant (who was the respondent) also appointed an arbitrator and the chairman of CIETAC

appointed a third arbitrator. Together, these three arbitrators formed the arbitral tribunal which adjudicated on the dispute between the parties.

10. The substantive hearing before the arbitral tribunal took place over two sessions in September 1995 and March 1996. After the March 1996 hearing, both parties continued to provide further written materials to the tribunal.

11. On 6 June 1996, the tribunal published its Award and found in favour of the plaintiff. By this and a Supplementary Award dated 5 July 1996, the tribunal ordered various sums to be paid by the defendant to the plaintiff.

12. In August 1997, the plaintiff sought leave *ex parte* from this court to enforce the two Awards on the basis that they were Convention Awards, i.e. awards made in a state (the PRC) which was a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards made in New York on 10 June 1958. This Convention is commonly referred to as the New York Convention.

13. By an order dated 21 August 1997 as amended on 12 September 1997, Yam J gave leave to enforce the two Awards.

14. As already mentioned above, by the 1st summons, the defendant applies to set aside Yam J's order.

15. The hearing of that application, however, has only taken place on 28 January 2002, nearly four and a half years after the summons was

first issued. Part of the explanation for this was that on 7 November 1997, a petition for the winding-up of the defendant was presented. As a result, all further proceedings in the present action were stayed, including the said summons. It was not until 11 June 2001 when Burrell J lifted the stay that the present action was able to be proceeded with. The winding-up petition had apparently been withdrawn or dismissed on 9 November 1998.

16. The defendant was thus able to proceed with its summons.

17. A number of grounds are relied on by the defendant to support its application. I shall in the next section identify the grounds.

18. Before the present hearing took place, both counsel served their skeleton submissions. It appeared from the plaintiff's skeleton submissions (prepared by Mr Joseph Lam who appeared for the plaintiff) that the plaintiff was conceding that Yam J's order may perhaps have been wrongly given since he may not have had jurisdiction to give leave to enforce the two Awards. Mr Lam contended in his skeleton submissions that if this was so (namely that Yam J had no jurisdiction at the time he made his order in August 1997), there was certainly jurisdiction now for me to make the necessary order giving leave to enforce the said Awards. At the commencement of the hearing, I suggested to Mr Lam that if he was now seeking a fresh order for the enforcement of the two Awards, he should formally take out a summons to this effect. This therefore accounts for the 2nd summons before me. As will presently become apparent, the 2nd summons assumes considerable importance.

The issues

19. Under the 1st summons, the defendant applies to set aside the order of Yam J as amended on the following grounds (which follow section 44 of the Ordinance) :-

(1) The arbitration agreement between the parties was not valid under the law where the Awards were made, i.e. under PRC Mainland law (section 44(2)(b)). (Issue 1)

(2) The defendant, as the respondent in the arbitration proceedings, was not able to present its case (section 44(2)(c)). (Issue 2)

(3) It was contrary to public policy to enforce the Awards (section 44(3)). (Issue 3)

20. As I have remarked, only if the defendant succeeds in setting aside Yam J's order does the 2nd summons become relevant. The issues that arise under the 2nd summons are as follows :

(1) Were the two Awards "Mainland Awards" for the purposes of Part IIIA of the Ordinance? (Issue 4)

(2) Even if they were Mainland Awards, is there any objection to their being enforced under section 40A of the Ordinance? (Issue 5)

21. I now deal with these issues in turn.

Issue 1 : Was the arbitration agreement between the parties valid under Mainland law?

22. The 1st and 2nd Contracts do not contain a choice of law clause. Both parties have proceeded on the basis that the applicable law to the Contracts is therefore PRC Mainland Law, being the law of the place where the Awards were made. I am content to proceed on this basis but wish to make it clear that I do not necessarily accept this since the proper law of the contracts might well not have been PRC Mainland Law. I notice that the arbitral tribunal itself applied Hong Kong Law. Nevertheless, as I have said, I am content to proceed on the basis of Mainland law.

23. The defendant relies on the following aspects of Mainland Law :-

(1) The capacity of a Mainland company to carry on types of trade is governed by the terms of its business certificate. Article 42 of the PRC General Principles of Civil Law states that a company shall only be permitted to carry on the trade or business for which approval and authorisation have been given. If it carries on any business outside its permitted or authorised scope, all such business including contracts it has entered into, are invalid and void. This will include any arbitration agreement entered into between the parties : see below.

(2) The Mainland has always had a policy of keeping firm control over the foreign trade business carried on by Mainland companies. Any PRC company wishing to engage in foreign trade or business must have the requisite permission to do so.

(3) Where a company does not have the requisite permission or authorisation to carry on foreign or international business or trade (a domestic company) but wishes nevertheless to engage in such trade or business, it must engage or commission the services of a company which does have such permission or authorisation (a foreign trade company) : see Part 1 Article 2 of the PRC Foreign Trade Agency System Tentative Provisions ("the Provisions"). In other words, a domestic company can trade in international business as long as it uses a foreign trade company. This situation applies where a domestic company wishes to contract with a Hong Kong company.

(4) Where any dispute arises in connection with the foreign trade or business and claims are made, it is the foreign trade company that must be the party raising or resisting any claims : see Part 4 Articles 23-25 of the Provisions.

(5) Where a domestic company commissions the services of a foreign trade company, it may, with the consent of the foreign trade company, participate in discussions with a foreign party, but cannot do so on its own : see Article 8 of the Provisions. This includes in particular the modification or amendment of agreements. Article 9 of the Provisions states, "a commissioning party may not modify or amend an import or export contract on its own with a foreign business entity. Agreements reached by a commissioning party and a foreign business entity concerning supplements or amendments to import or export contracts shall be invalid" (*emphasis added*). Thus, just as a domestic company cannot "on its own" enter into a contract involving international business with a foreign party, so it cannot modify or amend any such agreement "on

its own" either.

(6) I should finally add that where a contract is invalid having been made by a domestic company "on its own", so will any arbitration agreement made thereunder : see article 17 of the PRC Arbitration Law.

24. The above propositions of PRC law were articulated in the affirmation of Professor Nanping Liu, an associate professor at the Hong Kong University who specialises in PRC commercial law. I have no hesitation in accepting these propositions. Indeed, the plaintiff filed no evidence to contradict these principles of PRC Law.

25. Where I disagree with Professor Liu, however, is the application of those principles to the facts of the present case, in particular his analysis of the 1st and 2nd Contracts.

26. The defendant contends, based on Professor Liu's opinion, that while the 1st Contract was valid, the 2nd Contract (which contains the arbitration agreement) was not. The reason for this was that while the 1st Contract was entered into between the plaintiff (which was a foreign trade company authorised to enter into international business trade transactions) and the defendant (a Hong Kong company), by contrast, the 2nd Contract was entered into between Tong Hua and the defendant. Tong Hua was at all times a domestic company which did not have the requisite permission or authorisation to enter into international business trade contracts. Accordingly, so it is contended, the 2nd Contract and all its provisions are invalid. This includes the arbitration agreement, by reason of article 17 of the PRC Arbitration Law. Tong Hua's licence from

the Mainland authorities did not permit it to carry on trade or business with foreign entities like the defendant (which was a Hong Kong company).

27. In my judgment, I am not bound to follow Professor Liu's views on the application of PRC Law to the two Contracts. The true effect and application of foreign law to the facts of any case, especially when the construction or analysis of contracts is concerned, is a matter ultimately for the court itself to resolve : see *Dicey & Morris : The Conflict of Laws* (13th Edition) Vol.1 at paragraph 9-019.

28. In the present case, it is clear that while Tong Hua was a domestic company in the sense I have referred to under PRC Law, it engaged the services of the plaintiff (the relevant foreign trade company) for the purposes of entering into the foreign trade contract with the defendant. Professor Liu states in paragraph 23 of his affirmation, "the above statement in the Arbitration Award confirms in a way that [Tong Hua] is the principal which entrusted ... [the plaintiff] as agent to conclude Purchase Confirmation on its behalf with ... [the defendant]. Therefore, ... [the Provisions] should be applicable".

29. As I have said, the defendant does not argue that the 1st Contract is in anyway invalid. As regards the 2nd Contract, it is clear upon analysis that this Contract was really a part of the 1st Contract and both Contracts are effectively to be seen as one. The 2nd Contract was not an independent contract. I take note of the following matters :-

(1) The 2nd Contract is expressly referred to in the 1st Contract as a supplementary contract. Moreover, the terms of the 1st Contract are expressly said to include the terms of the

2nd Contract.

(2) The 2nd Contract itself refers to the 1st Contract and also expressly states that it is a supplemental to that contract.

(3) Both contracts were dated the same day.

30. It is a clear inference in the circumstances that even though the 2nd Contract was signed by Tong Hua (and not the plaintiff), this must have been done with the consent of the plaintiff : c.f. Article 8 of the Provisions. With both Contracts referring to each other, it is inconceivable that Tong Hua could be said to have entered into and signed the 2nd Contract "on its own".

31. I am fortified in this conclusion by the fact that the defendant has also all along regarded both Contracts as being valid. In the arbitration proceedings, the defendant raised a counter-claim on the basis of both Contracts.

32. The plaintiff also argues waiver and estoppel since this point on illegality was not raised at the arbitration. I express no view on this point one way or the other. In particular, I leave open the question whether waiver and estoppel are possible arguments when illegality under foreign law is involved.

33. For the above reasons, I am of the view that the arbitration agreement was and is valid under PRC Law and the defendant fails on this issue.

Issue 2 : Inability to present case

34. The defendant contends that at the arbitration hearing, the arbitral tribunal made reference to an expert's report which was not provided to the defendant's lawyers at the hearing despite a request having been made for its production. This report dealt with an issue that was relevant to the question of damages. It will be recalled that one of the claims of the plaintiff in the arbitration was over the defective quality of the goods sold. As I understand it, this "expert's report" dealt with the question whether or not the tribunal should have regarded the alleged defects individually or cumulatively when assessing damages.

35. There was before me an affirmation of Xing Xiu Song, the lawyer who acted for the defendant in the arbitration proceedings. He says this in paragraphs 5 to 16 of his affirmation :

> "5. (a) However, during the hearing on March 18, 1996, in the morning session the Arbitration Tribunal mentioned another expert report which, according to the Arbitration Tribunal, was about the calculation of damages as a result of non-conformity of the goods ('the 2nd Expert Report').
>
> (b) The Arbitration Tribunal said they had consulted with experts experienced in the import and export of American cottons, and the experts compiled a report for calculation of damages as a result of non-conformity of the cottons delivered by the Defendant. The Arbitration Tribunal further said that according to such expert report the calculated damages were different from the ones calculated and presented by the Plaintiff and the Defendant.
>
> 6. As counsel for the Defendant in the arbitration proceedings, I requested the arbitration tribunal to provide the parties with a copy of the 2nd Expert Report for calculation of damages. I asked for a copy of the 2nd Expert Report during the morning session of the arbitration hearing on March 18, 1996 immediately after the 2nd Expert Report was mentioned by the Arbitration Tribunal.

7. My request for a copy of the second expert report was not acceded to by the Arbitration Tribunal. They said that the 2nd Expert Report was for the Tribunal's reference only and would not be provided to the parties.

8. Under such circumstances, while continuing to protest for a copy of the 2nd Expert Report, I pleaded to the Tribunal that the Tribunal should make their decision independently on the basis of submissions of the parties and should not have regard to the expert report, because the expert(s) were not properly informed of the facts on the disputes between the parties, they were not aware of the circumstances surrounding the negotiation and conclusion of the contract between the parties, therefore his or their calculation would be based on misapprehension of the relevant facts to the disputes between the parties.

9. During the lunch break of the hearing on March 18, 1996, I submitted to the Arbitration Tribunal (with presence of representatives from the Plaintiff) the Hong Kong court decision in the *Paklito Investment Limited v. Klockner East Asia Limited* case in which enforcement of a CIETAC arbitration award was rejected on the ground that the report of a tribunal appointed expert was not disclosed to the parties.

10. The arbitration hearing was resumed in the afternoon of March 18 and in the morning of March 19, 1996.

11. In the morning session on March 19, 1996, after the parties had presented their respective closing statements, the Arbitration Tribunal presented and provide to the parties a copy of a piece of paper containing a calculation formula (copy attached to the Law Affirmation marked LSL-2), saying that that was the 2nd Expert Report.

12. The content of the so-called 2nd Expert Report was only a simple formula for calculation of damages for non-conformity of cotton. The difference between the Plaintiff and the Defendant was about the way of determining the applicable rates of price difference due to lowered class of cotton. The so-called 2nd Expert Report did not deal with this issue.

13. The Arbitration Tribunal did not disclose the identity of the experts who compiled the 2nd Expert Report, but they said they were not the same experts who issued the first expert report — quality inspection report.

14. (a) As counsel for the Defendant, I commented on the issue

of the way of determining the applicable rates of price difference due to lowered class of cotton in my post hearing submissions (copy attached to the Li Affirmation marked LJL-4).

(b) The question in issue was that while the Defendant argued that a subjective standard for determining the applicable rates should be adopted, i.e. both parties had reached a meeting of mind that the applicable rates should be determined on a non-cumulative basis when concluding the contract, the Plaintiff argued that an objective standard for determining the applicable rates should be adopted, i.e. the applicable rates should be determined on a cumulative basis which represented the practice prevailing in the PRC markets.

(c) However, this issue was not covered in the so-called 2nd Expert Report. I commented on this issue in my post hearing submission, arguing that the parties to this particular contract had reached an agreement of mind that the applicable rates should be determined on a non-cumulative basis, and the parties' agreement can amend the practice prevailing in the trade.

15. It appears from the Tribunal's award that the expert had opined on the way for determining the applicable rates (see Original Award p.64 and translation p.103), and the Arbitration Tribunal accepted the expert's opinion in rendering their award. However, this issue was not covered in the so-called 2nd Expert Report.

16. If a non-cumulative calculation was adopted, the price difference as a result of non-conformity of quality for the 3 lots of cottons would be around USD400,000. But if a cumulative calculation is adopted, as is the case awarded in the Arbitration Award, the price difference as a result of non-conformity of quality amounts to USD1,022,773.19 (see Original Award p.68 and translation p.109).

36. There are two matters of note arising from this extract from Mr Xing's affirmation :-

(1) First, the so-called "2nd Expert Report" was in fact provided by the parties in the form of a piece of paper containing calculations, in the morning session of 19 March 1996 : see

paragraph 11 of Mr Xing's affirmation. This is confirmed by a letter from the tribunal itself dated 3 December 1997.

(2) Secondly, in any event, it does not appear from Mr Xing's affirmation that he was eventually put to any disadvantage as regards this expert's report. I accept that he regarded the arbitral tribunal's approach as being erroneous but that is a different matter. It did not appear from his final submissions either that he regarded the defendant as having been put to any disadvantage, much less any injustice, as a result of not having been provided with this expert's report (if indeed this was not provided in the first place). All this is again consistent with what the tribunal itself says. In the said letter dated 3 December 1997, it is said that after the piece of paper containing the calculations was given to the parties, neither party thereafter raised any further questions regarding this issue.

37. In these circumstances, it cannot fairly be said that the defendant was unable to present its case. In order to make good a submission under section 44(2)(c) of the Ordinance, a party must show that it has been prejudiced to a significant degree in not being allowed to present its case such that the proceedings or an important part of them, have been conducted unfairly. The lack of fairness and equality is the key here : see *Paklito Investment Limited v. Klockner East Asia Limited* [1993] 2 HKLR 39, at 47.

38. Whether one analyses the facts as it not having been demonstrated that the defendant was unable to present its case or there has

been a waiver of any irregularity, does not in the end matter : what is important is that, ultimately, there was no unfairness or inequality.

39. For the above reasons, I also reject the defendant's submissions on this issue.

Issue 3 : Contrary to public policy to enforce the award

40. The defendant submits that Yam J had no jurisdiction to give leave enforcing the Awards because, quite simply, these were not Convention Awards.

41. The application for leave to enforce was, it will be recalled, in August 1997. At that time, the Ordinance defined Convention Awards as follows :

> "Convention award ... means an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or Territory, other than Hong Kong, which is a party to the New York Convention".

42. The type of award intended to be covered by the definition, was an award made in a state or territory other than the state or territory where the enforcement was sought. In other words, as far as Hong Kong was concerned, a Convention Award meant an award made in a state or territory, outside of Hong Kong, that was a party to the New York Convention. This reflected article I(1) of the New York Convention itself.

43. Prior to the resumption of sovereignty over Hong Kong on 1 July 1997, the enforcement of awards from the Mainland was possible on the basis of such awards being Convention Awards (the PRC being of course a party to the New York Convention). The problem was that after 1 July 1997, Hong Kong became an inalienable part of the PRC : see Article 1 of the Basic Law. The consequence of this was that the said definition of Convention Awards did not fit in with this new state of affairs. Hong Kong, which prior to 1 July 1997 was a territory of the United Kingdom (also a party to the New York Convention), became after that date a part of the PRC. Any enforcement, therefore, of a PRC award after 1 July 1997, was not the enforcement of an award made in a state or territory other than the state or territory whether recognition and enforcement was sought. In short, Mainland awards were not after 1 July 1997, Convention Awards.

44. Accordingly, from a legal point of view, the said definition of Convention Awards could not survive the resumption of sovereignty, as this would not have accorded with the changed constitutional status of Hong Kong. It is to be noted that Article 8 of the Basic Law states :

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of Hong Kong Special Administrative Region." (emphasis added).

Accordingly, it would have been contrary to Article 1of the Basic Law for Hong Kong to be regarded after the 1 July 1997 as a separate territory from the PRC.

45. The change in the law in this regard after 1 July 1997, was recognised by many practitioners and academics alike. In *Ng Fung Hong v. ABC* [1998] 1 HKC 213, the court was asked to give leave to enforce a Mainland award that had been made prior to 1 July 1997, but the enforcement of which was sought only after that date. It was conceded in that case that the award was not a Convention award. What was argued was that despite this, section 2GG allowed a Mainland award to be enforced. Findlay J held that section 2GG could only apply where the award sought to be enforced, whether pursuant to an international arbitration agreement or a domestic arbitration agreement, came from an arbitration that took place in Hong Kong. A Mainland award, therefore, did not come under section 2GG and it was not a Convention award.

46. Some support for the proposition that such awards were not Convention awards is also to be found in the obiter remarks of Mr Justice Chan CJHC in *Hebei Import & Export Corporation v. Polytek Engineering Company Limited* (No. 2) [1998] 1 HKC 192, at 196I-197D. The learned Chief Judge went on, however, to raise the question whether the second sentence in Article I(1) of the New York Convention could be used to apply to Mainland awards so that such awards, even after 1 July 1997, would still be regarded as Convention awards : see *Hebei Import & Export Corporation* at 197D-H. He was of the view that the matter was not free from doubt but said that it would be desirable that the relevant authorities should consider appropriate amendments to the Ordinance.

47. After a period of some two and a half years, in February 2000, amendments were made to the Ordinance which allowed Mainland awards to be enforced in Hong Kong. This is now reflected in Part IIIA of the

Ordinance. The amendments followed a lengthy series of negotiations between the relevant authorities in Hong Kong and in the Mainland, culminating in an agreement called the "Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region" ("the Arrangement"). The Arrangement is reproduced in *Hong Kong Civil Procedure 2002 Vol. 2* at section H2.

48. In my view, the legislative changes introduced in February 2000 provide the strongest indication that for the period between 1 July 1997 and February 2000, Mainland Awards could not be enforced in Hong Kong as Convention Awards. As I have pointed out, Hong Kong's change of status after that date make this result inevitable.

49. As for the *obiter dicta* of Mr Justice Chan CJHC regarding the second sentence of Article I(1) of the New York Convention, I have considerable doubts whether this could justify a conclusion that Mainland Awards after 1 July 1997 could still be regarded as Convention Awards. I say this for two reasons. First, the second sentence does not form part of the statutory definition of Convention Awards in the Ordinance. Its application must therefore be in some doubt anyway. Secondly, in any event, there was no material before the court in *Hebei Import & Export Corporation* (and none before us) to suggest that a Mainland award could not be considered as a domestic award (in the State of "the PRC") where its enforcement was sought. It is to be noted that Hong Kong is not an independent state, but a territory within the PRC.

50. In my judgment, therefore, Yam J had no jurisdiction to give leave to enforce the Awards on the basis of their being Convention Awards. It follows that the Order dated 21 August 1997 as amended must be set aside. It is to be noted that the plaintiff did not commence an action on the Awards; it only sought to enforce them on the basis of their being Convention Awards.

51. Lastly, I would add this. Even though I am of the view that the said order of Yam J should be set aside, I do so on the basis that he had no jurisdiction to make the order. This is <u>not</u> in my judgment because it would be contrary to public policy to enforce the Awards within the meaning of section 44(3) of the Ordinance. The significance of this will become apparent when I come to consider Issue 5 below.

Issue 4 : Were the two awards "Mainland Awards" under Part IIIA of the Ordinance?

52. The order of Yam J as amended having been set aside, the 2nd summons taken out by the plaintiff becomes relevant. By this summons, it will be recalled, the plaintiff seeks leave to enforce the two Awards under Part IIIA of the Ordinance on the basis of their being Mainland Awards within the meaning of that part.

53. Section 40B(1) states as follows :-

> "a Mainland award shall, subject to this Part, be enforceable in Hong Kong either by action in the Court or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG".

54. The first question therefore is, are the awards Mainland awards? Here, one starts with the definition of Mainland awards in section 2(1) of the Ordinance, namely, "Mainland award ... means an arbitral award made on the Mainland by a recognized Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China". The term "recognized Mainland arbitral authority" is also defined in section 2(1) as "an arbitral authority which is specified in the list of Mainland arbitral authorities provided from time to time for the purposes of this definition to the Government by the Legislative Affairs Office of the State Council of the People's Republic of China via the Hong Kong and Macau Affairs Office". In section 40F, it is stated :-

> "(1) The Secretary for Justice shall from time to time publish in its Gazette a list of the recognized Mainland arbitral authorities.
>
> (2) A list published under subsection (1) is not subsidiary legislation."

55. In the present case, no dispute arises over the status of CIETAC. It is without doubt a recognised Mainland arbitral authority.

56. The two Awards are accordingly Mainland awards within the meaning of Part IIIA of the Ordinance.

Issue 5 : Is there any objection to the Awards being enforced under section 40A of the Ordinance?

57. Section 40A(2) of the Ordinance states as follows :

> "(2) Where -
>
> (a) a Mainland award was at any time before 1 July 1997 a

> Convention award within the meaning of Part IV as then in force; and
>
> (b) the enforcement of that award had been refused at any time before the commencement of section 5 of the Arbitration (Amendment) Ordinance 2000 (2 of 2000) under section 44 as then in force,
>
> then sections 40B to 40E shall have no effect with respect to the enforcement of that award."

58. Mr Leung Hing Fung for the defendant, in an attractive argument, submitted as follows :

(1) The two Awards were Convention Awards prior to 1 July 1997.

(2) Yam J should have refused leave to enforce the awards by reason of one or more of the grounds in section 44 of the Ordinance as it then stood.

(3) Accordingly, under section 40A(2), the plaintiff should not be given leave to enforce these Awards, although they are admittedly Mainland awards for the purposes of Part IIIA of the Ordinance.

59. The first question that arises is whether the defendant can even rely on section 40A(2) since Yam J did not refuse to enforce the awards; on the contrary, he gave leave to enforce them. That, says Mr Lam, is the end of the matter; section 40A(2) therefore has no application. Mr Leung submits that the words "the enforcement of that award had been refused" in section 40A(2)(b) must be sensibly construed so as to apply to a situation, such as the present, where the enforcement should have been refused. I agree. The thinking behind section 40A(2) is to prevent Mainland awards being enforced where, prior to

February 2000 (when section 5 of the Arbitration (Amendment) Ordinance 2000 came into effect), the court was of the view that such awards could not be enforced by reason of one or more of the grounds stated in section 44. It could not have been intended that where a court had wrongly given leave to enforce, a party then escapes the prohibition in section 40A(2) even though if the Court had acted correctly, leave to enforce would have been refused under section 44.

60. The crucial question which then arises is whether Yam J should have refused leave to enforce based on one or more of the grounds stated in section 44.

61. I have already found that Yam J should have refused leave to enforce the two Awards, but was this based on a section 44 ground?

62. Sections 44(1)-(3) of the Ordinance as it was in force at the time Yam J made his order, stated as follows :-

> "**44. Refusal of enforcement**
>
> (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) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
>
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
>
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
>
> (f) that 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, it was made.
>
> (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 the award."

It is in the same terms as the present sections 44(1)-(3) of the Ordinance.

63. The grounds relied on by the defendant based on sections 44(2)(b) and (c) do not in any event apply in view of my earlier findings.

64. However, Mr Leung submits in relation to the ground based on the two Awards not being Convention Awards, that this is a public policy ground. He submitted that Yam J should have refused leave to enforce the Awards on the ground that it was contrary to public policy to do so.

65. I have found in favour of the defendant on the basis that the Awards were not Convention Awards, but, properly analysed, is this on the basis that it would be contrary to public policy to enforce them?

66. The term "public policy" is a somewhat nebulous term far from easy (or even desirable) to define precisely. It of course covers basic notions of morality and justice : see *Qinhuangdao Tongda Enterprise Development Co. v. Million Basic Co. Ltd* [1993] 1 HKLR 173, at 178; *Paklito Investment Ltd* at 50. It also covers those situations in which an award has been obtained by behaviour which is criminal, fraudulent, corrupt, oppressive or otherwise immoral or unconscionable. I have found extremely helpful a commentary on this topic in Mr Robert Morgan's book "*The Arbitration Ordinance of Hong Kong : A Commentary*" at pages 412-417.

67. I hope I will be forgiven for not dealing at length with the limits of the public policy ground because in the present case, in my judgment, it simply does not arise.

68. The defendant argues the public policy ground in this way. Since sovereignty over Hong Kong was resumed by the Mainland on 1 July 1997, thereafter, Hong Kong became a part of the PRC. There was therefore no question of Hong Kong being treated as a state or territory different to the PRC as from 1 July 1997. This did not accord with constitutional or political reality. To suggest otherwise, it was argued in effect, would be contrary to the Basic Law and to public policy. In this way, as a matter of public policy, the two Awards could not be enforced as Convention Awards.

69. It was then submitted that since it would be contrary to public policy for Yam J to have given leave to enforce the Awards (this being a ground of refusal under section 44 as it then stood), so it must follow that

the plaintiff now falls foul of section 40(A)(2) of the Ordinance and leave to enforce the Awards, even though they are clearly Mainland Awards, must be refused.

70. Attractive though these submissions at first appear, I am unable to accede to them. While I entirely accept that constitutional or political reasons may be sufficient to found an argument on public policy, the basis on which the defendant has succeeded in setting aside Yam J's order in the present case, does not on analysis, fall under this head at all.

71. First, the grounds on which the enforcement of a Convention award may be refused under section 44, all pre-suppose that the relevant award is a Convention award in the first place. Note here the words in section 44(2) "Enforcement of a Convention award may be refused if the person against whom is invoked proves ..." (my emphasis). The ground on which the defendant has succeeded in setting aside Yam J's order was on the basis that the learned judge had no jurisdiction to make the order since the two arbitration Awards were not Convention awards. Accordingly, section 44 is not relevant at all.

72. Secondly, even if section 44 was somehow relevant as being the basis for the setting aside of Yam J's order, I cannot see how section 40A(2) could render the awards unenforceable when the whole point of Part IIIA of the Ordinance was to deal with the problem or "mischief" of Mainland awards not being enforceable by reason of the resumption of sovereignty over Hong Kong. Thus, as a matter of construction, it could not have been intended that section 40B would render unenforceable those types of awards in respect of which Part IIIA

came into existence in the first place. To decide otherwise would itself be contrary to public policy and indeed a reading of the preamble to the Arrangement will confirm this.

73. For the above reasons, the answer to the question raised under this issue is No. There is no objection to the awards being enforced under section 40A (or any other section under Part IIIA) of the Ordinance.

Order

74. It will therefore be apparent from the foregoing that while I set aside Yam J's order under the 1st summons, the plaintiff succeeds under the 2nd summons.

75. Accordingly, I order as follows, namely that :-

(1) The plaintiff do have leave to enforce the arbitration award made in CIETAC Arbitration No. 0218 (96) and the Supplementary Award made in CIETAC Arbitration No. 3501 (96) in the sums of US$522,143.10 and RMB18,679,151.31 (these are the amounts due from the defendant to the plaintiff as at 29 January 2002 taking into account amounts due from the plaintiff to the defendant or amounts already paid by the defendant to the plaintiff), less the sum of HK$1,238,286.15. There will be interest in the said sums from 29 January 2002 to the date of this judgment at the rate of 8% (for US dollars) and 10% (for RMB), thereafter at the judgment rate. The relevant interest rate for the HK dollar amount will be 10%.

(2) Judgment be entered in terms of the Awards in the said sums.

(3) Insofar as necessary, that the time for service of the 2nd summons be abridged.

76. As for costs, I make an order *nisi* that the costs of and occasioned by the 1st summons be to the defendant, such costs to be taxed if not agreed and that the costs of and occasioned by the 2nd summons be to the plaintiff, such costs to be taxed if not agreed.

77. It only remains for me to thank counsel for their assistance and industry.

(Geoffrey Ma)
Judge of the Court of First Instance,
High Court

Mr Joseph Lam Siu Wah, instructed by Messrs Nie & Company,
for the Plaintiff

Mr Leung Hing Fung, instructed by Messrs Yip, Tse & Tang,
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