HCMP001748/1993

1993 No. MP 1748

IN THE SUPREME COURT OF HONG KONG

HIGH COURT

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BETWEEN

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| ANHUI PROVINCIAL CHEMICALS IMPORT & EXPORT CORPORATION | Plaintiffs |
| AND | |
| HUA QING (HONG KONG) DEVELOPMENT LIMITED | Defendants |

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Coram: The Hon. Mr. Justice Kaplan in Chambers

Date of hearing: 19 October 1993

Date of delivery of judgment: 19 October 1993

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J U D G M E N T

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1. I have before me yet another attempt, upon the flimsiest of grounds, to seek to avoid the enforcement of an arbitral award made in China against the defendants.

2. There has been produced to me a copy of 2 contracts dated 14th September 1990. Each is on the defendant's printed form and each is signed by and on behalf of both parties. It is common ground that a Madam Xu signed on behalf of the defendants and, as at 14th September 1990, she was employed by them.

3. On the reverse of each contract are certain terms including a CIETAC arbitration clause.

4. When disputes arose the plaintiffs, on 8th August 1991, commenced arbitration under the CIETAC Rules in Beijing.

5. The defendants sent a letter to the Arbitration Commission appointing the same Madam Xu as its representative in the arbitration.

6. On 8th April 1992, the defendants filed a formal defence. However, Madam Xu did not appear at the hearing which took place on 25th April 1992 and the award, in the plaintiffs' favour, was rendered on 5th October 1992.

7. The award was placed before me under the ex parte procedure and I gave leave to enforce it. The defendants had now exercised their right of applying to set aside that leave.

8. The defendants do not assert that Madam Xu did not have authority to sign the agreement. The Arbitration Tribunal was satisfied that the agreements were signed in Shenzhen and that China was the applicable law. Under Chinese law, they held the defendants responsible for its obligations under the two contracts.

9. Mr. Kenneth Chan, who appeared valiantly for the defendants, put forward the argument based upon an affidavit from Mr. Yu Heping of the defendants to the effect that the defendants had ceased using contracts which contained an arbitration clause some months prior to 14th September 1990. Mr. Yu maintains in his affidavit that "I verily believe that the 3410 and 3411 contracts which were purportedly entered into by Madam Xu on behalf of the defendants in about September 1990 did not and could not possibly contain any arbitration clause as alleged."

10. None of this was said to the Arbitration Tribunal. The defendants do not deny that Madam Xu's signature appears on the contracts and I am at a loss to understand what point the defendants are really making. The Arbitration Tribunal had the original contracts before them. A fax from the defendants to the Arbitration Tribunal dated 28th November 1991 is completely inconsistent with the argument now raised that there never was an arbitration clause at all. The argument is absolutely hopeless. It is not suggested, as far as I understand the argument, that Madam Xu's signature is a forgery, and it seems to me even if Mr. Yu is right that it is perfectly possible for Madam Xu to have used a form of contract no longer in general use by the defendants.

11. This is yet another attempt to have a second bite at the merits of the case. In this case, it is not really accurate at call it a second bite because the defendants failed to take the opportunity to have a first bite by not appearing at the tribunal at all.

12. The defendants have got nowhere near to establishing any of the grounds of opposition contained in section 44 of the Arbitration Ordinance which replicates the grounds of opposition to enforcement contained in the New York Convention.

13. For these reasons, I dismissed the defendants' application to set aside the ex parte leave with costs to the plaintiff.

(Neil Kaplan)

Judge of the High Court

Representation:

Mr. Horace Wong inst'd by Livasiri & Co. for Plaintiffs

Mr. Kenneth Chan inst'd by Kevin L.H. Kwong & Co. for Defendants