HCMP002462/1990

1990, No. MP2462

IN THE SUPREME COURT OF HONG KONG
HIGH COURT
MISCELLANEOUS PROCEEDINGS

IN THE MATTER OF the Arbitration Ordinance Chapter 341

and

IN THE MATTER OF 17 Arbitrations

BETWEEN

TIONG HUAT RUBBER FACTORY (SDN) BHD Plaintiff

and

WAH-CHANG INTERNATIONAL (CHINA) COMPANY LIMITED 1st Defendant

and

WAH-CHANG INTERNATIONAL (HONG KONG) CORPORATION LIMITED 2nd Defendant

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Coram : The Hon. Mr. Justice Kaplan in Chambers
Date of Hearing : 2nd November 1990
Date of Delivery of Judgment : 28 NOV 1990

HEADNOTE

Application to enforce 17 Malaysian Arbitration awards under sections 28 and 42 of the Arbitration Ordinance Cap. 341 - effect of transitional provisions of Arbitration (Amendment) (No.2) Ordinance 1989 - whether there was a valid submission to Arbitration - whether Arbitration clause covers dispute as to non-acceptance.

JUDGMENT

I have before me a contested application to enforce 9 Arbitration awards totalling US$1,046,602.18 against the 1st Defendants and 8 Arbitration awards against the 2nd Defendants totalling US$1,044,936.50.

These applications are made under the provisions of sections 28 and 42 of the Arbitration Ordinance, Cap. 341.

The Arbitration Ordinance was substantially amended by the Arbitration (Amendment) (No.2) Ordinance 1989 to which the Governor gave his consent on the 23rd November 1989. However, the Ordinance commenced on 6th April 1990. It is important, however, to note the transitional provisions of the 1989 Ordinance which are set out in section 26 thereof.

If an Arbitration commences within the meaning of section 31 of the Ordinance before 6th April 1990, it is governed by the Principal Ordinance as if the 1989 Ordinance had not been passed.

If an Arbitration commences within the meaning of section 31 of the Ordinance after the 6th April 1990, but under an agreement made before that date, then the Principal Ordinance applies as if the 1989 Ordinance had not been passed with 3 exceptions. These exceptions relate to conciliation (s.2B), restriction on reporting (s.2E) and the abolition of the strict rules of evidence (s.14(3H)). In relation to each of these 3 exceptions, they apply to all arbitrations commenced after 6th April 1990 under agreements entered into before that date.

The effect of these transitional provisions is to ensure that the Law prior to the 1989 (No.2) Ordinance will continue to be relevant for some time to come.

One of the amendments effected by the 1989 (No.2) Ordinance was to renumber section 28 and make it section 2H but without altering its substance.

That section reads:

> "An award on an arbitration agreement may, by leave of the court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect and; when leave is so given judgment may be entered in terms of the award."

It is conceded in this case that if I am against the Defendants, then I should grant leave to enforce these awards and that I should also order that judgment be entered against the Defendants in the terms of these awards.

Section 42 of the Arbitration Ordinance provides;

> "(1) A Convention award shall, subject to this part be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 28."

(Section 2H is the numbering if the new Law applies to the Arbitration case.)

> "(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference to this Part to enforcing a Convention award shall be construed as including references to rely on such an award."

These awards were made in Malaysia. That country has acceded to the New York Convention as one can see from the Arbitration (Parties to New York Convention) Order 1989. This order was made under section 46 of the Ordinance which provides that “If the Governor by order declares that any State or Territory specified in the order is a party to the New York Convention the order, shall while in force, be conclusive evidence that the State or Territory is a party to the Convention.”

The words “Convention award” used in section 42 of the Ordinance are defined in section 2 of the Ordinance 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."

Hong Kong is a party to the New York Convention by reason of the United Kingdom’s accession on the 24th September 1975. The United Kingdom subsequently acceded on behalf of various dependent Territories. In the case of Hong Kong, this was done on the 23rd April 1977. It is to be regretted that quite frequently Hong Kong and the other dependent Territories are omitted from a list of Convention countries. In the list of countries that has thus far acceded Hong Kong should appear between the Holy See and Hungary. The other dependent Territories are Gibraltar (24th September 1975) Isle of Man (23rd May 1979) Bermuda (12th February 1980) Cayman Islands and Belize (24th February 1981). After reaching independence, Belize has taken no step to ratify the Convention and thus its name has been omitted from the list of acceding countries kept by the United Nations. In the case of itself and its dependent Territories, the United Kingdom made the first reservation, namely that it will apply the Convention to the recognition and enforcement of awards made only in the Territory of another contracting State. (In cases to which the Uncitral Model Law applies, Chapter VIII which contains articles 35 and 36 have not been adopted in Hong Kong. Section 34C of the Arbitration (Amendment) (No.2) Ordinance 1989 states “an Arbitration Agreement and an Arbitration to which this Part applies are governed by Chapters. I to VII of the Uncitral Model Law”. The effect of the omitted article 35(1) would be to override the reciprocity reservation made by the United Kingdom on behalf of itself and Hong Kong.)

Malaysia has also made the first reservation and thus the Convention applies to this dispute. (The Peoples Republic of China also acceded to this Convention in April 1987 and thus Hong Kong will continue to be a party to this Convention after 1997).

Section 44 of the Ordinance provides that enforcement of a Convention award shall not be refused except on stated grounds. Section 44 (2) permits enforcement to be refused if the person against whom it is invoked proves one or more of 7 grounds. These grounds are the New York Convention grounds. The relevant ones for the present argument are:

"(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 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."

Although 17 arbitration awards are sought to be enforced these awards relate to 3 contracts with the 1st Defendants and 2 with the 2nd Defendants. The reason why there are more awards than contracts is because some of the contracts provided for monthly deliveries and the damages had to be worked out in respect of a failure to accept delivery of each of the months in question.

The contracts with the 1st Defendant are dated respectively 22nd April 1988. 5th May 1988 and 18th August 1988. They are each contracts by which the Plaintiffs, a Malaysian Corporation agreed to sell to the 1st Defendants, a Hong Kong Company, quantities of Full Amonia Latex 60% DRC (which stands for Dry Rubber Content). Two were on C & F terms Whampoa and one was F.O.B

Each contract was on the Plaintiff's printed form of contract for rubber. Each is headed:

"Rubber Contract No.."

Each says:

"We have this day sold to you the under-mentioned rubber."

Each says against the word "remarks".

"Subject to the terms and condition of the International contract for technically specified rubbers and the regulations of The Malaysian Rubber Exchange and Licensing Board FOB Contract."

Although the Plaintiffs have used this printed form of contract which both parties have signed, nevertheless, it is fair to point out that other matters are typed in and in some cases some headings are deleted.

In short Mr. Robert Tang, Q.C. for both Defendants, in resisting enforcement, has submitted that the parties must have intended to delete the remarks, because these are all contracts for Latex and not Rubber, and at the relevant time there was no special form of contract for Latex. If he is wrong in that then he submits the Arbitration Clause contained in the Malaysian Rubber Exchange No. 2 FOB ordinary (non-guarantee) contract is inapplicable to the present dispute. That clause reads as follows:

> "12. (a) All disputes as to quality or condition of rubber or other dispute arising under these contract regulations shall be settled by Arbitration between the seller and buyer in accordance with Bye-Law 7 Part C;
>
> (b) subject to Bye Law 7 Part C section 2 such disputes arising prior to shipment and disputes arising after shipment other than a shipment made under a further contract or unless otherwise agreed shall be arbitrated upon in Malaysia at such place as the arbitrator(s) shall decide, in accordance with Bye-Law 7 Part C."

What happened in all these cases is that the 1st and 2nd Defendants failed to open the necessary letters of credit as provided for in each contract opposite the phrase “terms of payment”.

The clam against the Defendants and each of them was thus for non-acceptance of the goods agreed to be sold and delivered.

Mr. Tang submits that the phrase "or other dispute arising under these contract regulations" is not wide enough to cover claims for non-payment by reason of a failure to open the requisite Letter of Credit, in some cases for the whole shipment, and in other cases, for part of it. In effect, what he is saying is that these regulations, if they apply at all, only apply to claims based on quality, size and weight. These claims are obviously covered by the phrase “all disputes as to quality or condition of the rubber”. But I have to assume that the draftsman intended something by adding the words "or other disputes arising under these contract regulations" Payment is a crucial element in all contracts for the sale of goods and I cannot

conceive that it was intended that quality claims should be arbitrated but that claims for non-acceptance and non-payment should be litigated with all the delay that this can entail in certain jurisdictions.

On this topic at page 118 in Mustill v. Boyd's 2nd edition, the learned authors state;

> "Each arbitration clause must be construed in the context of the contract as a whole, and the meaning of a particular formula may be broader or narrower depending on the nature of the transaction, the circumstances in which the arbitration clause came into existence, and the other provisions of the contract...
>
> Nevertheless certain broad principles of construction may be said to be emerging from the more recent decisions. First, the courts will make the prima facie assumption that the parties intended that all disputes relating to a particular transaction to be resolved by the same tribunal, and that by agreeing to arbitrate they have prima facie chosen arbitration as the appropriate tribunal."

The word "arising out of" used in clause 12(a) have been given a very wide meaning in a number of cases into which I do not consider it appropriate to delve.

In my judgment if these regulations apply then the arbitration clause contained in regulation 12 is wide enough to cover the dispute between the parties which has arisen, namely refusal to accept delivery of the subject matter of the contracts by reason of a failure to put in place the agreed letter of credit.

A Mr. Ang Thiam Chye was appointed arbitrator in respect of the 3 contracts with the 1st Defendants and the 2 contracts with the 2nd Defendants. His appointment was made on the 1st September 1989. The 1st and 2nd Defendants failed to respond to the arbitral proceedings that had been instituted although they certainly had notice of them. At no stage did they seek to take any of the points which are now being sought to be taken at the enforcement stage. It is quite clear that they received correspondence from the Malaysian Rubber Exchange inviting their participation.

All 17 awards were made, with commendable expedition, on 1st November 1989. The reason that there were 17 awards in relation to five contracts has already been stated.

On the 11th November 1989 both Defendants were notified by the Malaysian Rubber Exchange and copies of the awards were enclosed with those letters. The two letters referred the Defendants to the appeal procedure should they be minded to appeal. Although there is one letter in which the Defendants' solicitors referred to the possibility of an appeal none has been mace. There is no dispute as to the amounts due under the awards if they were made pusurant to a valid arbitration agreement.

According to the evidence placed before me, it appears that at the relevant time the Malaysian Rubber Exchange Licensing Board (MRELB) had 4 forms of contracts. These were:

(a) Contract No. 1 was for local delivery and is not relevant to this case;

(b) MRE contract No. 2 F0B ordinary (non-guarantee);

(c) MRE contract No. 3 FOB ordinary (guarantee) for RSS (RSS stands for Ribbed Smoked Sheets);

(d) MRE contract No. 4 FOB ordinary (guarantee) for SMR (SMR stands for Standard Malaysian Rubber).

Dato' Ahmad Sabki Jahidin, the chairman of MRELB has made an affirmation in which he states as a fact that the reference to "regulations" in the context of this case is a reference to the no. 2 contract which applies to contracts entered into between MRELB members and non - members. The Plaintiff is a member and the Defendants are not. He produces all 4 contracts together with a fifth one for local delivery for preserved rubber Latex which was introduced from the 1st December 1989 and was thus not in existence at the time that these contracts were entered into. His affirmation ends in the following terms:

> "Other than the foregoing regulations, there were no other regulations of the MRELB in existence at the relevant time. Therefore to summarise the reference in the said contracts to the "regulations of the Malaysian Rubber Exchange and Licensing Board FOB contract" is obviously to the regulations of the standard FOB contracts referred to above (the applicable one being the regulations of MRE contract no. 2 FOB ordinary (non-guarantee), all of which as I have said, contain identical arbitration clauses specifying the provisions of Bye-Law 7, Part C of the Bye-Law of the Malaysian Rubber Exchange."

Mr. Cecil Lam, a director of both Defendants made a second affirmation on 27th October 1990 in which he states, in relation to the no. 2 contract, that it is for contracts for sale

of rubber between members and non-members and suggests that it has no application to contracts for the sale of Latex.

"Rubber" is defined in the Bye-Laws as meaning:

"... rubber produced only from Latex of the Hevea Braziliensis Tree."

Latex is in liquid form and is the raw material for rubber. Rubber is in solid form. Mr. Lam refers to certain clauses of the no. 2 contract in an attempt to show its inapplicability to Latex. He points out there is a reference to Bales (and not drums) and there is a reference to RSS which is not Latex

Then Mr. Lam alleges and Mr. Tang submits that there was no agreement between the parties to these contracts to refer any dispute or breach arising out of them to arbitration. (I should add that no submission has been made to me on the basis that 2 of the 5 contracts are C & F Whampoa).

Mr. Geoffrey Ma for the Plaintiffs submitted that as there had been express reference to these regulations (with a small r) I should do my best to give effect to them. He invited me not to ignore the no. 2 contract merely because it related to rubber and not to Latex. He emphasized that these were commercial contracts which the court should be slow to refuse to give effect to. He submitted that the parties had expressed their intent, that any dispute should go to arbitration by incorporating regulations (no. 2 contract) which contain an arbitration clause.

I begin by reminding myself of the classic words of Lord Wright in Hillas v. Arcos (1932) 147 L.T. 503 at 514 where he says.

> "Business men often record the most important agreements in crude and summary fashion, modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defect, but, on the contrary, the court should seek to apply the old maxim of English law, Verba ita sunt intelligenda ut res magis valeat quam pereat."

He followed this by adding,

> "That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as for instance, the implication of what is Just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear but the contract is silent on some detail."

At page 815 in Chitty on contracts (26th edition) under the heading “Mercantile contracts” one finds the following:

> "Although it has been stated that there is not in law any difference of construction between mercantile contracts and other instruments, commercial documents “must be construed in a business fashion” and in accordance with “business common sense.""

Paragraph 827 of Chitty recognises that it is not for the court to revise the words used or to put on them a meaning other than that which the words ordinarily bear in order to bring them into line with what the court thinks the parties intended to mean. However,

> "If, by any reasonable construction, the intention of the parties can clearly be arrived at from the document itself, then the court will give effect to that intention even though this involves departing from or qualifying particular words used. So the court will be prepared to restrict, transpose, modify, supply or reject words or terms in the document, provided the intention of the parties is plain in spite of the words. The duty of the court in this respect is summed up by Kelly C B in Gwyn v. Neath Canal Co. (1865) L.R. 3Ex 209 215: “The result of all the authorities is: that when a court of law can clearly collect from the language within the four corners of a deed, or instrument in writing, the real intentions of the parties, they are bound to give effect to it by supplying anything necessary to be inferred from the terms used, and by rejecting as superfluous whatever is repugnant to the intention so discerned.""

It is recognised that the court can correct a misnomer or mistaken designation under the principal falsa demonstratio non nocet cum de corpore constat (a false description does not vitiate when there is no doubt which person is meant). This rule has been described as “a rule of good sense” and "a rational and useful canon of construction" (per lindley M R and Sir F.H. Jeune respectively).

Under the heading “saving the document” paragraph 835 of Chitty states this:

> "If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void ineffective or meaningless, the former sense is to be adopted. This rule is often expressed in the phrase ut res magis valeat cum pereat. Thus if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction though per se less appropriate looking to the words only would produce a different effect, the latter interpretation is to be applied, if it can possibly be supported by anything in the contract."

Mr. Ma referred me to Adamastos Shipping v. Anglo Saxon Supply Limited (1959) A.C 133 no doubt because Lord Diplock had referred to this case as “an elementary textbook example” of the application of the maxim falsa demonstratio etc. In that case, a charterparty included a clause which stated “this bill of lading shall have effect subject to the carriage of goods by Sea Act of the United States ... 1936.” The House of Lords held that the words “this bill of lading” should be read as “this charterparty” Viscount Simonds said this at page 154:

> "I can entertain no doubt that the parties, when they agreed by clause 52 of the charter that the “paramount clause ... as attached” should be incorporated in their agreement, and proceeded physically to attach the clause which I have set out, had a common meaning and intention which compels me to regard the opening words “This bill of lading,” as a conspicuous example of the maxis “falsa demonstratio non nocet cum de corpore constat.” There can be no doubt what is the corpus. It is the charterparty to which the clause is attached. Nor, pursuing this main line of attack, can I be driven to a

wholesale rejection of the clause because the Act, whose provisions are in turn deemed to be incorporated, itself enacts that its provisions shall not apply to charterparties. I cannot attribute to either party an intention to incorporate a provision which would nullify the total incorporation."

At page 169/70 Lord Reid said this:

"This case appears to me to raise in an acute form the question now far a court is entitled to go in disregarding words in a contract in order to discover the intention of the parties. It is difficult to see how anyone who had given any thought to the provisions of the United States Act could have drafted this paramount clause for inclusion in a charterparty: it must have been drafted for inclusion in a bill of lading where it would be quite appropriate. But it appears that for a considerable time a clause in substantially this form has been included in a number of charterparties. We do not know how this practice originated, and we do not know and are not entitled to guess just what the parties had in mind when they agreed to incorporate the clause in this charterparty. The intention of the parties can only be inferred from the words which they have used. Undoubtedly the charterparty must be read as a whole, and any term in it must be read in light of the general nature of the contract of the fact that the contracting parties were business men, and of all relevant facts known to the parties when it was made. But in the end we must take the words which the parties have used, and interpret them.

As the parties have chosen to incorporate in a charterparty provisions which are designed to apply, and only to apply, to bills of lading, one must, I think, infer that they intended these provisions to be incorporated mutatis mutandis, and in order to see what this involves I would begin by trying to read references to bills of lading in the Act as if they were references to charterparties. That necessarily involves the rejection as insensible of the provisions of section 5 of the Act that its provisions shall not be applicable to charterparties, and I find little difficulty in taking that step.

> Then there are a number of provisions in the Act which, from their very nature, can only apply to bills of lading, and which become meaningless if one tries to make them apply to a charterparty. It probably does not matter much whether or not one regards them as incorporated in the charterparty. Some of them might throw some light on other provisions which must be incorporated, but I am content to take the case on the footing that they are not incorporated. There are also sections of the Act which permit parties to agree to vary statutory rights and liabilities in certain cases, and permit the Government of the United States to modify the terms of the Act in certain circumstances. These, too, are meaningless if incorporated in this charterparty and I disregard them."

This is precisely the approach that Mr. Ma invites me to take. He says that this case shows the effort that the court will make to give effect to the intention of the parties to a commercial contract. By modifying or extending the language he says I can comfortably conclude that the parties clearly intended the no. 2 contract, including the arbitration clause, to apply.

Mr. Tang seeks to distinguish the Adamastos case by submitting that there the parties deliberately added a typed slip which contained the paramount clause relating to the United States Act. He says that they had clearly manifested their intention by consciously and deliberately adding to the charterparty an additional clause. In the present case, there was no such addition. He turns it the other way by submitting that the parties must have been in error in not striking out the remarks column. He says I cannot conclude that the parties' intention to keep the remarks clause has been made out. I should add that there is not a thread of evidence from the Defendants that they made any error whatsoever in relation to this contract, let alone an error in relation to not striking out the remarks column.

Although I accept Mr. Tang's attempt to draw a distinction between adding a typed clause to a charterparty and not striking out the remarks column in these contracts I do not consider that this distinction detracts in any way from the very useful statements of principle contained in this case.

Mr. Tang ended his submission by submitting that only it I could clearly come to the conclusion that the parties intended to incorporate the regulations should I hold them applicable. Was it intended, he asked rhetorically, that the court should comb through the contract

regulations to find which clauses were applicable to a contract for the sale of Latex and which were not.

I have to bear in mind throughout my consideration of this case, as indeed I have done, that I am dealing with commercial parties in an international sale of goods context. I am dealing with 5 contracts entered into between the 24th April 1988 and 24th August 1988. I know not whether these parties had done business before 24th April 1988 nor as to what prior knowledge, if any the Defendants had of Malaysian Rubber contracts.

5 contracts were entered into and each one was for Latex on a Rubber contract forms. Each contained the same wording in the "remarks" column. Other terms were either deleted or added so it is not completely right to castigate these contracts as being standard printed forms because they were in fact altered. The Defendants have not sought to argue that they did not know of the terms or conditions of the international contract nor of the regulations of the MRELB. They have not put in any evidence to support the assertion of Counsel that it was a mistake not to delete the "remarks" column. Although these were contracts for the sale of Latex and not rubber. I cannot ignore the simple fact that Latex is a liquid form of rubber. The connection between Latex and rubber makes it understandable in my judgment why the Plaintiff used this particular form of contract, bearing in mind that at the time the contract was entered into there was no special MRE form of contract for Latex.

In my judgment, the 5 contracts the subject matter of these 17 arbitration awards did incorporate the regulations of MRE contract no. 2 FOB ordinary (non guarantee) so far as the same were applicable to contracts for the sale of Latex. These regulations contained an arbitration clause which I have found to be drafted in terms which clearly covers the dispute which had arisen. I have no doubt that both parties intended to incorporate these regulations and I have no doubt that both parties fully appreciated that if disputes arose between them such disputes would fall to be dealt with by arbitration, which is, of course, a common method of resolving international commodity disputes.

In coming to this conclusion, I have been guided by the powerful expressions of principle cited above, in particular, the various speeches in the Adamastos. In arriving at my conclusion, which is one of law, I have completely disregarded the lateness of these points which were first raised on the day of the original hearing before me for leave to enforce, namely the 5th October 1990. Mr. Tang was perfectly entitled to take these points on behalf of his clients. They are either good points or bad points and their lateness is irrelevant to any consideration of the legal principles involved. For all the reasons which I have endeavoured to

set out in this Judgment, I think they are bad points. In the circumstances, there being no other points taken, I give leave to enforce the 17 Arbitration awards referred to in the originating summons, and I give judgment in the terms of the awards in favour of the Plaintiffs so that there will be judgment against the 1st Defendant for US$1 046 602 18 and against the 2nd Defendant for US$1,044.935.50. It has been agreed that costs will follow the event. I therefore, order the Defendants to pay the costs of these proceedings. If the parties cannot agree upon the interest on the awards which is claimed in the originating summons. I will hear them further thereon and I will also hear the Defendants on their application for a stay (if any) which Mr. Tang intimated might be made if I was against his submissions.

(Neil Kaplan)
Judge of the High Court

Representation:
Mr. G. Ma instructed by Stevenson Wong & Co. for Plaintiff.
Mr. Robert Tang, Q.C. and Mr. T. Chum instructed by Wilkinson & Grist for both Defendants.