Construction Law Focus

CHAN TAN & PARTNERS ISSUE 1 OF 1996 NO.1 COLOMBO COURT #09-26/27 SINGAPORE 179742

Arbitration - enforcement of foreign award - International Arbitration Act 1994

Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & Mcarthy Pte Ltd [1996] 1 SLR 34

The Plaintiffs are an organisation constituted under the laws of China. In October 1992, the Plaintiffs and the Defendants entered into a contract for the sale of goods by the Defendants to the Plaintiffs. A dispute subsequently arose which dispute the Plaintiffs submitted to arbitration in China in accordance with the contract. The arbitral tribunal issued its award in favour of the Plaintiffs in April 1994. The Defendants did not satisfy the award and, as the Defendant company is incorporated in Singapore, the Plaintiffs in October 1994 applied in these proceedings for an order that they be at liberty to enforce the award in the same manner as a judgment or order of this court. An order to that effect was duly made. The Defendants applied for the order to be set aside and for the further order that the arbitration award should not be enforced against them. Their application was heard by the Assistant Registrar and dismissed. The Defendants appealed.

The Defendants objected on several grounds. First, they argued that the order of court dated 27 October 1994, as drawn, failed to comply with certain procedural requirements of RSC O 69 r 7(7). Second, they argued that the award dealt with a difference not contemplated by,or not falling within the terms of the submission to arbitration or contained a decision on a matter beyond the scope of the submission to arbitration in that the Plaintiffs had by their conduct waived their right to arbitration and did not raise the issue to the arbitrators. Third, they claimed that the arbitral procedure was not in accordance with the agreement between the Plaintiffs and the Defendants.

3. The Defendants' contention as to how the arbitrators should act based on English legal principles was not applicable because in this instance, the proper procedure was governed by the Chinese law. Under art 29 of the Arbitration Rules, the arbitral tribunal had the power, in the event of one party failing to appear at the hearing, to proceed with the hearing and make an award by default. The Defendants did not adduce any evidence that the procedure followed by the Commission in conducting the arbitration had not been in accordance with the Arbitration Rules. The Defendants were given every opportunity by the Commission to present their case in reply to the claim. Further, the arbitrators were well aware of the facts of

or was not in accordance with the law of the country where the arbitration took place, in that the arbitrators were not prompted to and did not in any event adhere to the proper procedure when making the award in favour of the Plaintiffs. Fourth, they alleged that the subject matter of the difference between the Plaintiffs and the Defendants with respect to the award was not capable of settlement by arbitration under the law of Singapore in that the jurisdiction conferred upon the arbitrators did not specify the law governing the contract nor the curial law of the arbitration proceedings, and such an issue would under the law of Singapore have to be either agreed between the parties or decided by the arbitrators. Lastly, they argued that the enforcement of the award would be contrary to the public policy of Singapore in that the courts will not allow an award to be enforced where a Defendant has raised facts which would give rise to the possibility that the award already procured did not decide on the real matter in dispute between the parties and injustice would be done to the Defendants if the award were to be enforced.

In dismissing the appeal, the court held as follows:

1. The Plaintiffs' omission should be regarded as an irregularity curable under O 2 r 1. On the facts, the omission had clearly not prejudiced the Defendants. Further, the omission could not nullify the order since the notice did not affect the fundamental points of whether the court had the jurisdiction to hear the Plaintiffs' application or whether the grounds required for registration of the award had been satisfied.
2. None of the documents relied upon by the Defendants suggested that the Plaintiffs were giving up their right to arbitration. There was no evidence, apart from a bare assertion, that the Defendants sincerely believed that by stating in their letters that they would resort to legal channels, the Plaintiffs meant that they would institute a law suit here and abandon their rights to arbitration. There was no evidence either that the Defendants relied on the statement of the Plaintiffs and acted to their detriment by reason of such reliance.

the case.

4. In the absence of any express choice of law, the nominated place of arbitration is the best evidence of an implied choice of law. Whilst it was correct that the arbitrators did not specifically identify the law which they applied to the contract or the proceedings, it was not correct that they had made the award only in accordance with trade practice. Presumably, the arbitrators must have applied Chinese law as it would not have been familiar with other laws.
5. Public policy did not require that this court refuse to enforce the award obtained by the Plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public good. The principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist.

EDITORIAL COMMENT

There is hardly any reported decisions since the passing of the International Arbitration Act 1994. This decision is therefore welcomed for the light it throws on the enforcement of foreign arbitration awards. What is particularly interesting is that the award in this case resulted from an arbitration conducted in China, which has a system of law quite different from that administered in Singapore. The defendants raised a number of grounds, a number of which are fairly technical and procedural. It is clear from this decision that a Singapore court would not give much weight to arguments based on English principles for a non-English (or common law) arbitration. What is also interesting is the rejection of the public policy argument in the manner framed by the defendants. This argument, made under s. 31(4)(a) of the International Arbitration Act, is not an unfamiliar one. It is regularly used in many jurisdictions by the party seeking into avoid enforcement. What is significant is the observation by the court of the lack of any allegation of illegality or fraud and that therefore enforcement would "not be injurious to the public good."

This case is also a good illustration of the perils of a refusal or failure to participate in arbitration proceedings properly convened.

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We are pleased to announce that our home page on the World Wide Web is now ready at ***http://www.singnet.com.sg/~chantan***. It provides what we think should be useful information on some general principles of Singapore law. There is also a section on construction law and practice and another relating to the latest development in arbitration and dispute resolution in Singapore. A page also contain useful links to other legal and construction related web sites, both local and international. Please do not hesitate to send us an e-mail at the address given below if you have any comments or suggestions relating to our home page.

STATE, TRENDS AND PERSPECTIVES OF NATIONAL SPECIFICATION SYSTEMS IN EUROPEAN CONSTRUCTION

Readers may be interested in a recent study conducted of the national specification systems of a number of European countries. The research study presents the most recent data on the European construction industry and focuses on the following:

- comparison of national construction industries and specification systems
- comparison of national tendering procedures
- analysis of the most common national project forms
- presentation of the most important contractual forms and legal frameworks
- detailed study of the European construction sector, analysing activities and market position of contractors, product manufacturers and consultants at national and international level
- conclusions on future trends and perspectives.

Anyone interested in the report may contact Ms. Egli, CRB, Postfach, CH-8040 Zurich, Fax: ++41 1 456 45 66.

Readers with any questions or comments on the contents of this issue are welcomed to write to us or send us an e-mail to our internet address at **chantan@singnet.com.sg**