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CASE COMMENTS

ENFORCEMENT OF FOREIGN ARBITRAL AWARD

Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd[1]

THE United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was concluded in New York in 1958,[2] is widely perceived as a "great success story of international commercial arbitration."[3] It was enacted in Singapore in 1986 under the Arbitrations (Foreign Awards) Act.[4] In 1994, that Act was repealed by (and substantially "re-enacted" in Part III of) the International Arbitration Act.[5] The recent case of *Re An Arbitration between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd*[6] appears to be the first reported judgment in Singapore[7] concerning enforcement under the New York Convention.

The plaintiffs were "an organisation constituted under the laws of China". The defendants were a company incorporated in Singapore. The parties had entered into a contract for the sale of 15,000 metric tons of steel wire rods. The goods were to be delivered by the defendants from a port in the Black

1 [1996] 1 SLR 34.

2 Hereafter, it shall be referred to simply as the New York Convention.

3 *Per* Steyn J in *Rosseel NV* v *Oriental* [1991] 2 Ll LR 625 at 629. It is reported in the July 1995 issue of *Singapore Arbitrator* that as at 22 February 1995, the New York Convention "received 102 ratifications and/or accessions from member states, making it one of the most well-received conventions."

4 Formerly, cap 10A, 1985 Rev Ed.

5 Cap 143A, 1995 Ed; hereafter, "IAA". This was done for the sake of neatness. The result is that all the provisions on international commercial arbitrations are now contained in a single piece of legislation, namely, the IAA. See the explanatory statement to the International Arbitration Bill (No 14 of 1994) and Hsu Locknie, "The Adoption of the UNCITRAL Model Law on International Commercial Arbitration in Singapore" [1994] SJLS 387 at 407.

6 *Supra*, note 1.

7 There could well be earlier unreported judgments. One unreported case is mentioned in [1995] 1 SINARB 1 at 1. *Cf Harris Adacom Corporation* v *Perkom Sdn Bhd* [1994] 3 MLJ 504 (Malaysian High Court).

Sea to two ports in China. It was a term of the contract that, failing settlement by friendly negotiation, disputes may be submitted for arbitration by a named arbitration body in China.[8] It was further agreed that the arbitration was to be conducted in accordance with the rules of procedure promulgated by that body.

The defendants failed to ship the goods by the agreed date. This was due, so they alleged, to fierce storm and earthquake affecting the port of shipment. The plaintiffs rescinded the contract. They claimed a "sum of US$217,500 being the non-performance penalty payable by the defendants under the contract."[9] The defendants, relying on a *force majeure* clause, refused payment. Some correspondence passed between the parties but no settlement resulted. The plaintiffs referred the matter to arbitration by the agreed Chinese arbitration body (hereafter "the Commission"). The Commission wrote to the defendants on several occasions, in essence, informing them of the arbitration proceedings and inviting their participation. The defendants refused to participate. They insisted that they had not agreed to the institution of the arbitration proceedings. The Commission nevertheless proceeded to hear the case and ultimately issued an award in favour of the plaintiffs.

The plaintiffs applied for leave to enforce the award in Singapore against the defendants under Arbitration (Foreign Awards) Act.[10] The application was made and heard before that Act was repealed by the IAA.[11] The application succeeded. The order of the Court granting leave to enforce the award was served on the defendants. The defendants applied to have it set aside. The application failed at first instance. The appeal was heard by Judith Prakash J after the IAA had come into force. As required under section 36 of the IAA, her Honour treated the proceedings as if it had been commenced under the IAA. The arbitral award was a "foreign award" as the term is defined in both Acts.[12] The defendants raised various grounds in support of the appeal, each of which will be examined in turn.

8 Namely, the "Arbitration Committee of the China Council for the Promotion of International Trade": *supra*, note 1, at 38. The name of that entity has gone through several changes. It is now known as "China International Economic and Trade Arbitration Commission". It still operates under the umbrella of the China Council for the Promotion of International Trade. See Cheng, Moser & Wang, *International Arbitration in the People's Republic of China* (1995), at 7, 13.

9 *Supra*, note 1, at 38. The significance of the possibility that the sum claimed may be a contractual penalty is discussed below.

10 *Supra*, note 4.

11 *Supra*, note 5.

12 S 27(1) of the IAA; s 2(1), Arbitration (Foreign Awards) Act. China is a Contracting State: she acceded to the New York Convention on 22 April 1987. (Kaplan *et al, Hong Kong and China Arbitration – Cases and Materials* (1994), at 332.) She is listed as a Convention

That the Application to Enforce the Award was Defective

The first point taken by the defendants was that the order granting leave to enforce[13] the award that was served on them was not indorsed, as the (then) Rules of the Supreme Court require,[14] with a statement stating, *inter alia*, that the defendants may, within 14 days after service, apply to the Court to have the order set aside. This was an entirely technical point. The defendants were not prejudiced by the omission. Their application to set aside the order was made within the time allowed. Prakash J ruled that the omission was a mere "irregularity curable under O 2, r 1" RSC. That the defect should not render the proceedings a nullity is clearly defensible.[15] However, it is difficult to see how the defect in issue could be cured and indeed it would appear that neither an application nor an order for amendment was made.

That the Arbitration was not Conducted in Accordance with Proper Procedure

The defendants argued that the award should not be enforced as the arbitration was not conducted "in accordance with proper procedure". As to what the proper procedure was, the Court was referred to a well-known text on English commercial arbitration.[16] The defendants argued: "Before the arbitrators could make an *ex parte* award adjudicating on the claim they had to first be satisfied that the plaintiffs had brought forth sufficient evidence to make out a good arguable case for the amount claimed and secondly, they had to take into consideration any evidence or submissions

Country in the Schedule to the International Arbitration (New York Convention Countries) Order 1995 (GN S 30/95), published under s 32(1) of the IAA.

13 The judgment refers, on a number of occasions, to *registration* of the award. That terminology is wrong. Under the Scheme of the New York Convention, there is no need to register the foreign award. The party seeking enforcement need only to apply for leave to enforce the award: s 19 of the IAA.

14 The relevant rule, formerly applicable, was O 69, r 7(7) of the Rules of the Supreme Court (GN S 274/70). For the current position, see: O 69A, r 6(5) Rules of Court 1996 (GN S 71/96). The rules in O 69A were made by the Rules Committee under the powers conferred by, *inter alia*, s 35 of the IAA. They came into operation on 27 January 1995 (GN S 39/95).

15 In *Agromet* v *Maulden Engineering Ltd* [1985] 1 WLR 762 at 774-5, the application to enforce the arbitral award was not in compliance with the procedure prescribed in O 73, r 10(3)(b) of the English RSC (equivalent to O 69A, r 6(1)(b) of the Rules of Court 1996). The non-compliance was similarly treated by the English High Court as a mere irregularity. *Cf Velautham Chettiar* v *Sayampanathan* [1929] SSLR 98.

16 Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, 1989).

which the defendants had put before the arbitrators on any previous occasion or in correspondence."[17]

The argument was misconceived on a number of counts. It is beyond doubt that the grounds for refusing enforcement of foreign awards are exhaustively set out in sections 31(2) and (4) of the IAA. No other grounds may be relied upon to resist the enforcement.[18] The defendants were in fact seeking to rely on the ground as contained in section 31(2)(e). To succeed, the defendants had to prove to the satisfaction of the court that "the arbitral procedure was not in accordance with the agreement of the parties". It was in accordance with the agreement of the parties that the Commission should follow the "Arbitration Rules of the China International Economic and Trade Arbitration Commission 1988."[19] As Prakash J pointed out, the defendants' "contention as to how the arbitrators should act was based on English legal principles. These principles were not applicable because this was not an English arbitration."[20]

There appeared a lack of appreciation, on the defendants' part, of the point that the burden of proving the facts constituting the ground for not enforcing the award was on them.[21] They argued that "whilst art 30 of the Arbitration Rules governing the conduct of the Commission provided that during hearings record should be taken of the proceedings, such records had not been supplied to the defendants. Accordingly, [the Singapore High Court] did not have sufficient information to decide what transpired at the arbitration hearing."[22] This was a fatal concession. The defendants, it would appear, were claiming inability to prove that the proper arbitral procedure had been complied with, and, as noted by Prakash J, no evidence on that point was in fact adduced by them.[23] The plaintiffs, on the other hand, were able to produce an affidavit by a Chinese lawyer who deposed to due compliance by the Commission with the relevant arbitral procedure.

Waiver/Estoppel

The defendants' next objection was in essence that the plaintiffs had, by statements and conduct, "waived and/or repudiated their right to ar-

[17] *Supra*, note 1, at 41.

[18] See *Rosseel NV* v *Oriental, supra*, note 3, at 628; *DST* v *Rakoil* [1987] 2 Ll LR 246 at 249 (point not discussed on appeal: [1988] 3 WLR 230).

[19] *Supra*, note 1, at 41.

[20] *Ibid*. Arguably, her Honour lost sight of this point when, in the next page, she sought guidance on the arbitrator's role in the same English text.

[21] This is clear from s 31(2) of the IAA. The burden has to be discharged on a balance of probabilities: *Rosseel N V* v *Oriental*, *supra*, note 3, at 628.

[22] *Supra*, note 1, at 41.

[23] *Ibid*.

bitration".[24] This objection was dismissed by the Court on the basis that the defendants had not represented that they were giving up their right to arbitration and that, in any event, there was no detrimental reliance by the defendants.[25] Although the conclusion is right, the reasoning by which it was reached left unresolved many legal issues.

As noted above, sections 31(2) and (4) of the IAA spell out *exhaustively* the grounds for refusing enforcement of foreign awards. Waiver of the right to arbitration is not explicitly provided for under any of those subsections. The defendants however sought to fit their waiver (or more accurately, estoppel) objection under section 31(2)(d). This is puzzling for how could the waiver/estoppel argument possibly be turned into an argument that "the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration"? There is nothing in the judgment to suggest that the dispute fell outside the scope of the arbitration agreement.[26] Ironically, to allege, as the defendants did, that the plaintiffs have waived their right to arbitration is to concede that the plaintiffs had a right, under the arbitration agreement, to have the dispute resolved by arbitration. The crux of the defendants' objection was that they should no longer be bound by the arbitration agreement. This is not an explicit ground for refusing enforcement which is provided for in section 31(2) and (4): the closest provision is section 31(2)(b) which allows the Court to refuse enforcement where it is proved that the arbitration agreement is not valid.[27] Had the defendants sought to rely on that provision, the validity would have had to be decided by Chinese law, either because it had been (impliedly) chosen by the parties to govern the arbitration agreement[28] or as the law of the country in which the award was made.

Chinese contract law is substantially different from the common law. It is unclear how Chinese law would conceptualise an "invalid agreement".[29]

[24] *Supra*, note 1, at 42.

[25] *Supra*, note 1, at 44.

[26] See discussion below on arbitrability.

[27] That the arbitration agreement is invalid was not a ground for refusal to enforce an award in the original draft of the convention contained in the Report of the Committee on the Enforcement of International Arbitral Awards dated 28 March 1955. (G Gaja, *International Commercial Arbitration, New York Convention* (1978), vol 1, at III.A.1.1). It apparently made its first appearance as Art IV, 1(a) in the draft Convention proposed by the Working Party No 3 (*Ibid*, at III.B.5.1).

[28] This conclusion is likely to follow from the Court's finding that Chinese law was the law governing the contract over which the substantive dispute arose and in which the arbitration clause was contained.

[29] On some commonly contested issues concerning the validity of an arbitration agreement under Chinese law, see Kaplan *et al, Hong Kong and China Arbitration – Cases and*

At common law, that term has no clear meaning. It may be worthwhile to consider, for the sake of discussion, how the common law would have approached the issue. It is submitted that the facts do not disclose an arbitration agreement that is "invalid" at common law. The agreement was certainly not void. Neither was there any allegation that it was voidable (in the sense of having been tainted by a vitiating factor, such as duress). An invalid agreement would, as the term is understood at common law, no doubt include a void agreement and perhaps also an avoided agreement.[30] However, it is distinguishable from a perfectly valid agreement which is neither void nor voidable but which has merely ceased to be binding (for example, by mutual revocation) or which one party is estopped from enforcing. The last is the case alleged by the defendants. Their objection was not, as such, directed at the validity of the arbitration agreement. Even if we assume that estoppel goes to validity, there is yet another problem to the argument. Since, as section 31(2) makes explicit, the burden is on the *defendant* to prove an *invalid* agreement, there is little significance in estopping the plaintiff from proving otherwise. Given that the plaintiffs do not have to prove validity, how would estopping them from doing so further the defendants' case?

It can perhaps be argued that the use of the present tense in section 31(2)(b) fixes the time of arbitration as the point of reference and that a valid agreement may technically still fall within the ambit of that clause if at that point in time, it is no longer binding. This is unpersuasive. First, the use of the present tense in itself does not point inevitably to any conclusion.[31] Secondly, the argument loses force in the light of the more explicit terms used elsewhere in the same Act. Section 6(2) of the IAA, to put it very simply, provides that the Court shall stay court proceedings brought in contravention of an arbitration agreement unless the agreement is, *inter alia*, "null and void' or "*inoperative*".[32] Hence, the distinction

Materials, *supra*, note 12, at 312-3. Chinese law, it would appear, lacks the concepts of "voidable contract" and "unenforceable contract": Wang Gui Guo, *Business Law of China* (1993), at 88. See also Henry Zheng, *China's Civil and Commercial Law* (1988), at 65, 72-3. For this reason, it is exceedingly difficult to predict how Chinese law would respond to the common law-based arguments presented in the text.

30 On the categorisation of contracts, see Atiyah, *An Introduction to the Law of Contract* (1995, 5th ed), at 46-8.

31 The use of the present tense does not foreclose an interpretation of that provision to cover only arbitration agreements that are void or (perhaps also) agreements that are voidable and have been avoided before the commencement of arbitration.

32 Albert Jan van den Berg, commenting on the meaning of "inoperative" in Art II.3 of the New York Convention, which like s 6 of the IAA, deals with the enforcement of arbitration agreements, says: "The word "inoperative" can be deemed to cover those cases where the arbitration agreement has ceased to have effect. The ceasing to have effect...may occur for

between an invalid agreement and a valid agreement which has ceased to be binding is manifested within the IAA itself. If this is accepted, it would mean that any argument that a valid arbitration agreement is no longer operative should be raised at the forum in which the arbitration is brought. The matter may not be raised (or re-raised) before the court in the jurisdiction in which enforcement of the award is subsequently sought.

Non-arbitrability

The defendants also attempted to rely on section 31(4)(a) of the IAA. Under that provision, the Court would have to be satisfied that the award ought not to be enforced because "the subject-matter of the difference between the parties...is not capable of settlement by arbitration under the law of Singapore". It is yet another puzzle how the defendants' argument fit this ground. Their contention was that there was "no express choice of substantive and/or curial law" and that the Commission "did not choose a governing law apart from an indication that the award had been made according to 'general international trade practice'."[33]

Section 31(4)(a) is based on the concept of public interest.[34] As the provision itself makes clear, it is concerned with the arbitrability of the *subject-matter* of the dispute.[35] Where public interests are involved, the disputes should be resolved, not by the private arrangement of the parties, but by an institution that is better placed to enforce and protect those public interests, namely the Court.[36] The defendants' argument was not directed at the subject matter of the dispute; and it could not have been so directed for the dispute was over the failure to deliver goods under a contract of sale and this was eminently amendable to arbitration.

a variety of reasons. One reason may be that the parties have implicitly or explicitly revoked the agreement to arbitrate." (*The New York Arbitration Convention of 1958* (1981), at 158.) There is an error in the reproduction of Art II.3 in the second schedule to the IAA: the word "shall" is missing after the first comma in the third line. A similar error appears in the text of the New York Convention published in 330 *United Nations Treaty Series* (1959) 38 at 39: van den Berg, *ibid*, at 398.

33 *Supra*, note 1, at 45.

34 It is arguably superfluous since the general ground of public policy is already provided for under s 31(4)(b) of the IAA: van den Berg, *supra*, note 32, at 368.

35 Under s 11(1) of the IAA, all disputes which the parties have agreed to submit to arbitration are arbitrable except where public policy dictates otherwise. In the present case, the parties had agreed, under clause 22 of the contract, to settle by arbitration "all disputes in connection with the execution of the contract".

36 See M Sornarajah, "Refusal of Enforcement by Courts of Secondary Jurisdiction" [1995] 3 SINARB 2, at 3 and "The Enforcement of Foreign Arbitral Awards in Singapore" [1988] 1 MLJ lxxxvi at lxxxix-xc.

The argument would have been better placed under the general ground of public policy provided for in section 31(4)(b) of the IAA. It could then be argued, adopting a line similar to the arguments presented on behalf of the defendants in the English case of *DST* v *Rakoil*,[37] that it is contrary to our public policy to enforce an award determined, "not on the basis of any particular national law, but upon some unspecified, and possibly ill defined, internationally accepted principles of law." This argument would not have succeeded since Prakash J found that the Commission had applied Chinese law. How would her Honour have resolved the issue had the allegations that the Commission had applied some principles gleaned from "general international trade practice" – arguably, a form of *lex mercatoria* – been substantiated?[38] Perhaps the Court might be prepared to sanction such a practice, at least in the international context. There is some indication of acceptance in England; in *DST* v *Rakoil*,[39] Sir John Donaldson MR did not think that such a practice was contrary to public policy.[40]

Public Policy

The last ground relied upon by the defendants was the public policy ground provided for in section 31(4)(b) of the IAA. They alleged, ambiguously, that there was a "possibility that the award did not decide on the real matter in dispute between the parties." Presumably, by "real matter in dispute", the defendants meant the applicability of the *force majeure* clause. This objection was dismissed by Prakash J. According to her Honour, the Commission was aware of the defendants' position on *force majeure*. The defendants had only themselves to blame for not bringing evidence before the Commission to support their defence. To raise this defence before the court in the country of enforcement, albeit under the guise of public policy, comes dangerously close to inviting that court to review the merits of the case. Such an invitation must be firmly declined for one of the main aims

[37] *Supra*, note 18, at 252. Point not pursued on appeal to the House of Lords: [1988] 3 WLR 230.

[38] It should be noted that there was no express agreement by the parties to apply *lex mercatoria.* Had it been expressly chosen, justifying its application would be easier: see Lord Justice Mustill, "The New Lex Mercatoria: The First Twenty-five Years" (1988) 4 Arbitration International 86 at 98. See also D Rivkin, "Enforceability of Arbitral Awards Based on *Lex Meratoria*" (1993) 9 Arbitration International 67.

[39] *Supra*, note 18.

[40] His view on this point has been well received by writers. See, *eg*, D Thomas, "Reflections on Recent Judicial Development of the Concept of a Convention Award" [1992] Civil J Q 352, at 357. In the local context, see Vincent Powell-Smith, Opening Address, *Arbitration Conference Proceedings, Arbitration and the Changing World of the Nineties* (1994) at 5.

of the New York Convention was to prevent double exequatur.[41] In the present case, it was not against public policy to enforce the award as there "was no allegation of illegality or fraud and enforcement would therefore not be injurious to public good."[42] This strictness in interpreting public policy accords with the judicial approach taken in most other contracting States.[43] The opportunity to demarcate between international and domestic public policies was unfortunately missed. Had the plaintiffs' claim been for a sum which our law would treat as a penalty,[44] a nice point would have arisen as to whether our court should enforce a foreign award given on a claim which, had it been brought in Singapore, would have been dismissed for arguably (domestic) public policy reasons.[45] This raises the issue of how

41 This was recognised as a basic feature of the New York Convention by Steyn J in *Rosseel N V* v *Oriental, supra*, note 3, at 628.

42 *Supra*, note 1, at 46. *Cf DST* v *Rakoil*, *supra*, note 18, at 254 where Sir John Donaldson MR noted that to invoke the public policy ground, it "has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised." See also the *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (1985), at para 297 (which Report can be found in *UNCITRAL – Model Law of International Commercial Arbitration – Legislative History, Documents* (K Kavass and A Liivak eds), vol 2, at 66.0-1) where it is said: "...the term 'public policy', which was used in the 1958 New York Convention ... covered fundamental principles of law and justice in substantive as well as procedural respects." For example, it would be against public policy to enforce awards tainted by corruption, bribery or fraud. *Cf* s 24 of the IAA.

43 At para 46 of the 1979 *Report of the Secretary-General on International Commercial Arbitration: Study on the Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958* contained in Vol 1 of *UNCITRAL – Model Law of International Commercial Arbitration – Legislative History, Documents, supra,* note 42, at 2.0-1, it is reported that there is a tendency of restraint in decisions considering the public policy ground for refusing enforcement of foreign awards under the New York Convention; courts tend to restrict this ground to "extreme, intolerable cases". A similar observation was made in the report filed by Professor KD Kerameus at the Eighth World Conference on Procedural Law: *Justice and Efficiency* (W Wedekind ed, 1988), at 254, para 62. On the justifications for a narrow approach, see the judgment of the United States Court of Appeal, 2nd Circuit, in *Parsons & Whittemore Overseas Co Inc* v *Societe Generale de L'industrie du Papier* (1974) 508 F.2d 969 at 973-4.

44 This point was not argued. However, in relation to grounds set out in s 31(4) IAA, a court may act on its own motion. The sum was described in the contract as a penalty but the description is not conclusive: *Dunlop Pneumatic Tyre Co Ltd* v *New Garage and Motor Co Ltd* [1915] AC 79 at 86.

45 On the rationalia behind the law of contractual penalty, see HL Ho, "The Privy Council on Liquidated Damages" (1995) 8 JCL 280. This issue does not appear to have arisen in any New York Convention case. But *cf Renusagar Power Co Ltd* v *General Electric Co* (1995) XX *Yearbook Comm Arb'n* 681, especially paras 55-61 (on compounded interest), 62-63 (on damages upon damages).

far we should 'liberalise' international public policy beyond what we can accept domestically.[46]

Prakash J defended a pro-enforcement approach in the following terms:[47] "...the principle of comity of nations requires that the awards of foreign tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad."[48] This approach is entirely sensible. Parochialism will, in the long run, be counterproductive: it will damage our international legal and commercial reputation.[49]

HO HOCK LAI*

[46] That there should be more tolerance in the international arena than at home is well accepted: van den Berg, *supra*, note 32, at 359-368; consolidated commentary to vols XVII-XIX, (1994) XIX *Yearbook Comm Arb'n* 475 at 594-7.

[47] *Supra*, note 1, at 46. This passage is certainly in tandem with the spirit of the speech made by the Minister for Law during the second reading of the Arbitration (Foreign Awards) Bill: *Singapore Parliamentary Debates, Official Report*, 25 August 1986, col 616.

[48] Both Singapore and China subscribe, as Art I(3) of the New York Convention permits, to the principle of reciprocity. China's agreement to adopt the New York Convention was motivated in large measure by the "basis of mutual interests". See Xu Guojian, "International Civil Procedural Law in the People's Republic of China" (1991) 17 Review of Socialist Law 319 at 323-3.

[49] Sir Michael Kerr had warned us as much at a 1994 conference held in Singapore. He observed: "Without the intervention and assistance of national courts, international arbitration would be wholly ineffective. It is therefore at this point, unfortunately, that the idealism of the concept of international arbitration is liable to come up against barriers of nationalism enshrined in domestic legislation and in the attitudes of national courts." (*Arbitration Conference Proceedings, supra*, note 36, at 24.) Singapore judges appear to be well aware of the dangers of setting up unwarranted "barriers of nationalism". This is reflected not only in the tone of Prakash J's judgment but in the fact that up to January 1995, no foreign award has been refused enforcement under the New York Convention by Singapore courts: [1995] 1 SINARB 1 at 1.

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