

Unofficial Translation

DMT S.A. v. Chaozhou City Huaye Packing Materials Co., Ltd. & Chaoan County Huaye Packing Materials Co., Ltd.

Reply of the Supreme People's Court regarding the Request for Instruction on the Recognition and Enforcement of a Foreign Arbitral Award between the Applicant DMT S.A. (France) and the Defendants Chaozhou City Huaye Packing Materials Co., Ltd. and Chaoan County Huaye Packing Materials Co., Ltd.

(12 October 2010, [2010] Min Si Ta Zi No. 51)

Guangdong Higher People's Court,

Your Court's Request for Instruction on the Recognition and Enforcement of a Foreign Arbitral Award between the Applicant DMT S.A. (France) and the Respondent Chaozhou City Huaye Packing Materials Co., Ltd. and Chaoan County Huaye Packing Materials Co., Ltd., No. [2010] Yue Gao Fa Min Si Ta Zi No. 2, has been received. Upon deliberation, we reply as follows:

The present case concerns the request for recognition and enforcement of arbitral award No. 13450/EC rendered by the ICC (Singapore) International Court of Arbitration. China and Singapore are both Contracting States of the "Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (hereinafter, the "**New York Convention**"). Therefore, whether the arbitral award in question can be recognized and enforced shall be reviewed according to the provisions of the New York Convention.

Concerning the question of whether Chaozhou City Huaye Packing Materials Co., Ltd. is the competent Respondent in the case, where the arbitral award initially listed "Chaozhou City Huaye Packing Materials Co., Ltd." as the Respondent before the Applicant submitted its application for the recognition and enforcement of the arbitral award; however, the arbitral tribunal issued an addendum to the award, changing the Respondent to "Chaoan County Huaye Packing Materials Co., Ltd.". Therefore, Chaozhou City Huaye Packing Materials Co., Ltd. is not a party to the arbitration and has no contractual disputes with the Applicant. There exists no foreign arbitral award to be recognized and enforced. The request of DMT S.A. (France) against Chaozhou City Huaye Packing Materials Co., Ltd. shall be rejected.

Concerning the question of whether the presiding arbitrator appointed by the tribunal conforms to the agreement of the parties, Chaoan County Huaye Packing Materials Co., Ltd. did not raise any objections concerning whether the presiding arbitrator is a Singapore resident during the arbitration proceedings, and failed to produce sufficient evidence to prove that the presiding arbitrator is not familiar with Chinese law and lacks independence. Therefore, the ground raised by Chaoan County Huaye Packing Materials Co., Ltd. on the conformity of the arbitrator appointed by the tribunal to the agreement of the parties is not established. The other grounds raised by Chaoan County Huaye Packing Materials Co., Ltd., supporting the refusal to recognize and enforce the award fall within the scope of substantive review, and not within the scope of review concerning the recognition and enforcement of foreign-related arbitral awards as set out

in the New York Convention. Consequently, the grounds raised by Chaoan County Huaye Packing Materials Co., Ltd. in support of the refusal to recognize and enforce the award have not been established.

In view of the above, we agree with your court's opinion concerning the recognition and enforcement of the award concerned.

We reply as above.

Annex

Guangdong High People's Court's Request for Instruction concerning the Request for Recognition and Enforcement of a Foreign Arbitral Award between the Applicant DMT S.A. (France) and the Defendants Chaozhou City Huaye Packing Materials Co., Ltd. and Chaoan County Huaye Packing Materials Co., Ltd.

(21 June 2010, [2010] Yue Gao Fa Min Si Ta Zi No. 2)

Supreme People's Court,

Chaozhou Intermediate People's Court (hereinafter, "**Chaozhou IPC**") of our province received the request from the Applicant, DMT S.A. (France), for the recognition and enforcement of award No. 13450/EC rendered by the ICC Court of Arbitration (Singapore) (hereinafter, "**ICC Singapore**") against the Respondents, Chaozhou City Huaye Packing Materials Co., Ltd. and Chaoan County Huaye Packing Materials Co., Ltd. Chaozhou IPC intended to refuse recognition and enforcement of the arbitral award and reported to our court for instruction. Upon review, our court intends to partially refuse to recognize and enforce the award, and hereby requests instruction from your court.

I. Information Concerning the Parties

Applicant: DMT Limited Company (DMT S.A., hereinafter "**DMT company**"). Address: BP270 Savoie Technolac, 73375, Le Bourge t-du-LacCedex, France.

Defendant: Chaozhou City Huaye Packing Materials Co., Ltd. Address: Guangdong Chaoan City Chaoan County Yanbu Town Yanqian Village.

Defendant: Chaoan County Huaye Packing Materials Co., Ltd. Address: Guangdong Chaoan City Chaoan County Yanbu Town Yanqian Village, besides the ChaoShan Road.

II. Claims of the Parties and Their Positions

The Applicant, DMT company, claimed as follows: on 20 September 2003, the Applicant, DMT company, as the seller, and the first respondent, Chaozhou City Huaye Packing Materials Co., Ltd., as the buyer, entered into a sales contract concerning a whole set of multifunctional production lines for thin films. Disputes arose during the execution of the contract and the

Applicant filed an arbitration request to the International Chamber of Commerce on 19 August 2004, in reliance of the arbitration clause stipulated in the sales contract. Following the arbitration, the ICC Singapore International Court of Arbitration issued a final award on 27 July 2007. The award was already effective, but neither the first respondent nor the second respondent executed any of the payment obligations until now. To protect the legitimate rights of the Applicant, and according to the Civil Procedure Law of the People's Republic of China, the Resolution of the Standing Committee of the People's Congress on the Revision of the Civil Procedure Law, and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (namely the New York Convention), we hereby request the court to: 1. recognize award No. 13450/EC made by the ICC Singapore Court of Arbitration; 2. enforce the aforementioned award No. 13450/EC made by the Singapore International Court of Arbitration, and to order the Respondents to pay the 2,000,000 Euro determined by the award and its interest (interest shall be calculated according to the annual rate of 2.434% from 25 March 2004 to the date of actual payment), the attorney fees of 183, 943.84 Euro and the arbitration fees of 150,000 USD; and 3. order the Respondents to bear the fees of the enforcement of the award.

The first respondent, Chaozhou City Huaye Packing Materials Co., Ltd., raised the following objection: Chaozhou City Huaye Packing Materials Co., Ltd. is an enterprise created in 2001, business license number 445100400003757. It is not a party to arbitral award No. 13450/EC rendered by the ICC Singapore, has no disputes with DMT company, and has not received the arbitral award in the present case. The fact that it is listed by the Applicant as the Respondent to the request for the recognition and enforcement of the arbitral award is an error on the qualification of the party. It is hereby requested that the court should refuse to recognize and enforce the award, considering that the Applicant has wrongly listed Chaozhou City Huaye Packing Materials Co., Ltd. as the Respondent.

The second Respondent, Chaoan County Huaye Packing Materials Co., Ltd., raised objections and requested the Court to refuse the recognition and enforcement of arbitral award No. 13450/EC rendered by the ICC Singapore and to reject the request of the Applicant. The reasons are as follows:

1. Descriptions concerning the contractual dispute and its nature: the production line sold by the Applicant cannot produce the BOPS heat-shrinkable thin film of the quality required. The Applicant lacks the capacity to execute its contractual obligations. Therefore, the Applicant should be responsible for the termination of the contract concerned between the Applicant and Respondents.
2. The appointment of the presiding arbitrator did not conform to the agreement of the parties and contradicted the arbitration rules. (1) The parties in the present case reached the following agreement concerning the qualification of the presiding arbitrator: a. the presiding arbitrator should be a resident of Singapore; b. the presiding arbitrator should be very familiar with Chinese laws and regulations, as well as the United Nations Convention on the International Sale of Goods; c. the presiding arbitrator should be familiar with European law, especially French law. However, the presiding arbitrator appointed by the Court of Arbitration, Mr. John Savage, is not a resident of Singapore and is not familiar with Chinese law. Such appointment did not conform to the agreement of the parties. (2) The presiding arbitrator lacked independence. Mr. Johan Savage is of British nationality. The U.K. and France are two important member states of NATO and the European Union. Citizens from one country do not need a visa to go to the other country. The two countries have close connections historically and

in various domains such as a modern economy, politics, diplomacy and military. Between 1988 and 2002, John Savage studied and lived in France for 12 years. He had close connections with France (Country of the Applicant). John Savage did not have the degree of independence required to be the presiding arbitrator in the present case. (3) The Court of Arbitration did not consult the Singaporean National Committee of the ICC, but appointed the presiding arbitrator following the suggestion of the British National Committee, which did not conform to the normal rules. According to the ICC Rules of Arbitration and the terms of the contract, parties agreed to have Singapore as the place of arbitration. The Singaporean National Committee of the ICC should have knowledge of possible qualified arbitrators who were Singaporean citizens. The principle of fairness and efficiency requires that the Court of Arbitration should have resorted to the Singaporean National Committee of ICC for advice, but the Court of Arbitration appointed the presiding arbitrator following the suggestion of the British National Committee. Such practice broke with the normal rule, and was tainted in preference of the Applicant. (4) The second Respondent had raised objections to the appointment of Mr. John Savage as the presiding arbitrator many times and had requested the replacement of the presiding arbitrator. The Court of Arbitration did not reply to its requests. 3. The arbitration proceedings did not conform to the arbitration rules. (1) The arbitral tribunal did not reply to the request of the second Respondent to have an important witnesses cross-examined and have the recordings submitted as evidence. (2) The arbitral tribunal did not examine and review the capacity of the Applicant to perform the contract. (3) The arbitral tribunal did not examine and review the authenticity of the loss claimed by the Applicant.

III. Factual Background

On 20 September 2003, the Applicant and the former legal representative of the second Respondent, Yang Yang, entered into a sales contract concerning a whole set of multifunctional production lines for thin films. The buyer to the contract is Chaozhou Huaye Packing Materials Co., Ltd. The company, however, did not put its stamp on the contract. Only the former representative of the second Respondent, Yang Yang, signed the contract. The following arbitration clause was stipulated in Article 16 of the contract as a method of dispute resolution: “[a]ny disputes arising out of the execution of the present contract shall be resolved through friendly consultation between the two parties. Should the consultation fail, the disputes shall be submitted to the International Chamber of Commerce and be arbitrated pursuant to the applicable rules and laws in Singapore. The arbitral award shall be the final decision, which is binding on both parties. The arbitration fees shall be borne by the losing party.”

On 25 March 2004, after the second Respondent had terminated the contract, disputes arose between the Applicant and the second Respondent. On 19 August, the Applicant filed an arbitration request to the ICC Court of Arbitration in Singapore. Subsequently, the second Respondent took part in all arbitration activities, including the submission of defence, counterclaims, objections, the exchange and cross-examination of exhibits, the hearings and the pleadings.

On 8 February 2005, the Secretariat of the Court of Arbitration approved the request of the Applicant and appointed Hans-Jurgen Schroth as the arbitrator pursuant to Article 9(2) of the ICC Rules of Arbitration. In the meantime, the Court of Arbitration approved the request of the second Respondent, appointing Wang Hai (Hai Wang) as an arbitrator. Between 27 April and 29

April 2005, the Applicant and the second Respondent reached the following agreement concerning the qualification of the presiding arbitrator: a. since both parties agreed on Singapore as the place of arbitration, the presiding arbitrator should be a resident of Singapore; b. since the contract was negotiated, concluded and performed in China, the presiding arbitrator should be very familiar with Chinese law and other relevant laws such as the United Nations Convention on the International Sale of Goods; c. if possible, the presiding arbitrator should be familiar with European law, especially French law. On 1 July 2005, the Court of Arbitration, following the suggestion of the ICC British National Committee, appointed Mr. John Savage as the presiding arbitrator of the tribunal. The CV of the Mr. John Savage shows the following information: John Savage is a British national; LL.B, King's College in London, 1998; Master of laws, University of Paris, 1990; Final exam of the Bar Association of the London City Hall, 1991; Clifford Chance Law Firm (London and Paris), trainee, 1991-1993; Associate, Shearman & Sterling (Paris), 1993-1999; Partner, Shearman & Sterling (Paris), 2000-2002; Partner, Shearman & Sterling (Singapore), 2002-present; John Savage is specialized in arbitration concerning international trade, construction and investment; his working languages are English and French (to be able to conduct the arbitral proceedings and draft the award without the assistance of a translator). The major achievements of John Savage in his field of practice include: Member of the Consulting Committee, Member of the Forum of BITs, Vice president of the British International and Comparative Law Association, Member of the Commission of Dispute Resolution and Arbitration, Member of the Trans-pacific Bar Association, Member of the Australia International Trade Arbitration Centre.

Within the period fixed by the Court of Arbitration, the second Respondent raised objections to the appointment of Mr. John Savage as the presiding arbitrator by the Court of Arbitration, on 6 July 2005 and 13 July 2005. The second Respondent requested the Court of Arbitration to reconsider its appointment of the presiding arbitrator. The reasons were as follows: (1) John Savage does not conform to the qualification of the presiding arbitrator as agreed by the parties. The CV of John Savage demonstrates that he is not very familiar with Chinese law and does not have enough experience in the Chinese law. Though he has represented Fujian Pacific Electronic Co., Ltd. in arbitration before the London Court of International Arbitration, the company he represented was a wholly foreign owned enterprise, and none of the shareholders of the company were Chinese. More importantly, the case was totally irrelevant to Chinese law. Though John Savage is a member of the CIETAC, the official website of CIETAC shows that his specialized areas of specialty are "international trade, construction and investment arbitration", and does not suggest that he has experience relevant to Chinese law. (2) The lack of independence: according to Article 9(1) of the Rules of Arbitration, whether an arbitrator has the degree of independence required, whether his nationality has close connections with the country where the parties in the case are situated is to be taken into account. From his birth until present, John Savage has passed one third of his life in France. He received education in France, and lived and worked in France for more than 12 years. Though he was transferred to Singapore at the end of 2002, this was simply an internal transfer within the law firm where he has been working. Before that, he had already been working for the Paris office of the firm for more than 11 years. It is unconvincing that Johan Savage has no close connections with France, i.e., the place where the Applicant is situated and registered. Consequently, we express concerns over the independence of John Savage. (3) Given that a resident in Singapore was to be chosen as the arbitrator, it is questionable why the Court of Arbitration chose to rely on the suggestion of British National Committee. We believe that the Singaporean National Committee could offer

better suggestions as to a resident in Singapore who would be a competent presiding arbitrator. Therefore, we requested the Court of Arbitration to have the Singaporean National Committee to suggest a presiding arbitrator and to appoint the presiding arbitrator upon the suggestions of the Singaporean National Committee. On 12 July, the co-arbitrator, Wang Hai, also commented on the appointment of Mr. John Savage as the presiding arbitrator, stating the following: (1) among the three conditions agreed by the parties as to the appointment of the presiding arbitrator, the most essential is that he is specialized in the United Nations Convention on the International Sale of Goods and the law of the People's Republic of China. Since the place of execution of the contract and the place of the enforcement of the arbitral award are both in China, it is crucial to have familiarity with Chinese law. I believe that Mr. John Savage has full knowledge and experience in the domains he is specialized in. However, from his profile, I do not think that he is specialized in Chinese law, or has enough experience concerning Chinese law. The fact that he has been involved in only one case related to a Chinese party is not enough. (2) Mr. John Savage has studied and practiced in France for many years, so it is certain that he is specialized in French and European law. However, as far as the present case is concerned, the presiding arbitrator should have sufficient professional experience in Chinese law. I understand that it is quite difficult to find such a qualified, competent arbitrator. But even if the presiding arbitrator is not specialized in Chinese law, he should at least understand Chinese or have working experience in China. I understand that the Respondent challenged the independence of Mr. John Savage because it was concerned that the close connections between John Savage and France and the fact that he was unfamiliar with China and Chinese law (as seen from his background) would affect his fairness during the arbitration. I suggest the Court of Arbitration take into account the objection raised by the second Respondent against the presiding arbitrator and reappoint a presiding arbitrator. In response to the objection of the second Respondent and the comment of Mr. Wang Hai, the Court of Arbitration made a decision on 29 July 2005, rejecting the challenge made by the second Respondent against the appointment of John Savage as the presiding arbitrator.

On 27 July 2007, the ICC tribunal rendered the final award No. 13450/EC between the Applicant DMT Company (France) and the Respondent Chaozhou Huaye Packing Materials Co., Ltd., ruling: (1) to accept the claims of the Applicant, ordering the Respondent to pay 2,000,000 Euro in total, the interest of which shall be calculated at the annual rate of 2.434% from 25 March 2004 to the actual date of payment; (2) to reject the counterclaims of the Respondent; (3) that the Respondent shall pay the applicant 75% of the costs claimed, which amounts to 183,943.84 Euro in total; (4) that of the arbitration fees fixed by the ICC Court of Arbitration, 300,000 USD, 25% shall be borne by the Applicant and 75% by the Respondent, according to which the Respondent shall pay the Applicant 150,000 USD; and (5) to reject all other arbitration claims.

After the final award was made, the second Respondent requested the tribunal to correct the final award, pointing out an error of name. The tribunal then issued award No. 13450/EC again on 19 November 2007, making an addendum to the award concerning the name of the second Respondent. Article 8 of the addendum holds as follows: since the Respondent objected to the use of "Chaozhou Huaye Packing Materials Co., Ltd." as its name, and the Applicant had no objection to the change of name, the tribunal hereby issues this addendum, changing the name of the Respondent "Chaozhou Huaye Packing Materials Co., Ltd." to "Chaoan County Huaye Packing Materials Co., Ltd.", as per its official business registration (registration number: 4451211003725).

It is also found that Chaozhou City Huaye Packing Materials Co., Ltd. was registered with the Bureau of Industry and Commerce of Chaozhou City on 5 April 2001. The investors are Guangdong Huaye Packing Materials Co., Ltd. (Chinese party) and Teleisipapuhan (U.K.) Co., Ltd. (foreign party). The address of the company is Guangdong Province, Chaozhou City, Chaozhou County, YanBuAn Town, YanQian Village. The legal representative of the company is Chen YouBiao, and later Yang Man. ChaoAn County Huaye Packing Materials Co., Ltd. was registered with the Bureau of Industry and Commerce of Chaozhou County on 5 August 2004, with the investors Yang Yang, Chen XiangRong and Guangdong Huaye Packing Materials Co., Ltd. On 29 December 2007, the investors were replaced by Yang Xiang and Chen XiangRong. The address of the company is Guangdong Chaozhou City ChaoAn County YanBu Town YanQian Village beside the ChaoShan Road. The legal representative was Yang Yang, subsequently replaced by Yang Xiang.

IV. Opinion of the Chaozhou Intermediate People's Court

Upon review, the Chaozhou Intermediate People's Court reached the following observation: the present case concerns the request for recognition and enforcement of a foreign arbitral award. Therefore, the relevant provisions under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (namely the "**1958 New York Convention**") and Civil Procedure Law of the People's Republic of China are applicable.

The party subject to the recognition and enforcement of the foreign arbitral award shall be determined according to the party identified by the award. ICC award No. 13450/EC and its addendum did not list "Chaozhou City Huaye Packing Materials Co., Ltd." as a party, so it is therefore not a concerned party to the arbitration. Article V(1)(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards stipulates that "the award has not yet become binding on the parties [...]". Therefore, in the present case, "Chaozhou City Huaye Packing Materials Co., Ltd." is not bound by the award and the addendum. It is therefore unfounded for the Applicant to list "Chaozhou City Huaye Packing Materials Co., Ltd." as the first Respondent. The request shall be rejected.

As concerns the arguments of the Respondent, Chaoan County Huaye Packing Materials Co., Ltd., on the lack of conformity of the appointment of the presiding arbitrator, John Savage, to the agreement of the parties and on the lack of independence of John Savage: first, Johan Savage is a British national, and there is no proof that he is a resident in Singapore; second, when answering the question "working languages under which you can conduct the arbitral proceedings and draft the award" on the "Declaration of Availability and Independence", John Savage mentioned English and French, but not Chinese. This demonstrates that he is not familiar with Chinese. Though John Savage is a member of the CIETAC, there is no proof that he is specialized in Chinese law. In addition, John Savage does not have enough experience on Chinese law and has worked on only one case concerning a Chinese party. Therefore, it should be held that John Savage is not familiar with Chinese law; third, as seen from his educational background and professional experience, John Savage has studied and practiced in France for many years. He has been working for the Paris office of Shearman & Sterling since 1990. Though he was transferred to Singapore at the end of 2002, this was simply a transfer within the law firm where he has been working. The place of registration of Shearman & Sterling is in Paris, and the applicant is also situated and registered in Paris. Consequently, it should be held that John

Savage has close connections with France. According to Article 9(1) of the Rules of Arbitration, in examining whether an arbitrator has the degree of independence required, whether his nationality has close connections with the country where the parties in the case are situated is to be taken into account. The Court of Arbitration did not take into account the close connections that John Savage has with France when appointing him as the presiding arbitrator. The Court of Arbitration therefore breached the arbitration rules. The Respondent Chaoan County Huaye Packing Materials Co., Ltd. argues that the appointment of the presiding arbitrator made by the Court of Arbitration does not conform to the agreement of the parties or to the Arbitration Rules. Such argument falls within the grounds listed under Article V of the New York Convention. Consequently, the objection of the respondent Chaoan County Huaye Packing Materials Co., Ltd. shall be accepted.

In light of the above, the aforementioned award made by ICC (Singapore) Court of Arbitration falls within the circumstances listed under Article V(1)(d) of the New York Convention, based on which a court may refuse to recognize and enforce an arbitral award. Therefore, the award shall be refused recognition and enforcement. According to Article 267 of the Civil Procedure Law of the People's Republic of China, Article V of the New York Convention, and Articles 2 and 3 of the Supreme People's Court Provisions on the Fees and Time Limits for the Recognition and Enforcement of Foreign Arbitral Awards, the court intends to reject the request of the DMT Company (DMT S.A.), refusing to recognize and enforce award No. 13450/EC made by the ICC Court of Arbitration and its addendum.

V. Opinion of Our Court

This case concerns whether award No. 13450/EC made by ICC (Singapore) Court of Arbitration shall be recognized and enforced. China and Singapore are both parties to the New York Convention. According to Article 267 of the Civil Procedure Law of the People's Republic of China, the award shall be reviewed according to the relevant provisions of the New York Convention.

Since award No. 13450/EC lists DMT Company and Chaoan County Huaye Packing Materials Co., Ltd. as the parties, and there is no arbitration clause between Chaozhou City Huaye Packing Materials Co., Ltd. and DMT Company, Chaozhou City Huaye Packing Materials Co., Ltd. is not a qualified respondent to the request for recognition and enforcement of the foreign-related arbitral award.

Based on the correspondence between the Court of Arbitration and the two parties, it is found that DMT Company and Chaoan County Huaye Packing Materials Co., Ltd. reached an agreement concerning the appointment of the presiding arbitrator. It was agreed that the presiding arbitrator should be a resident of Singapore, but not necessarily a permanent resident of Singapore. As the presiding arbitrator, John Savage, has lived and worked in Singapore for two years, and Chaoan County Huaye Packing Materials Co., Ltd. did not object to his status as a resident of Singapore during the arbitration. It can be concluded that John Savage conforms to the requirement that the presiding arbitrator should be a resident of Singapore, as agreed by the parties. As concerns the question whether John Savage is familiar with Chinese law or whether he lacks independence, there is no sufficient proof to show that he is not familiar with Chinese law, lacks independence, and that the two other requirements agreed by the parties for the

presiding arbitrator are not fulfilled. Other grounds put forward by Chaoan County Huaye Packing Materials Co., Ltd. fall within the scope of substantive review, and therefore not within the scope of review for the recognition and enforcement of foreign-related arbitral awards set out by the law. Consequently, the grounds raised by Chaoan County Huaye Packing Materials Co., Ltd. concerning the non-recognition and non-enforcement of award No. 13450/EC are not established.

In light of the above, our court intends to refuse the request for non-recognition and non-enforcement of foreign-related arbitral awards of the applicant DMT Company against the Respondent Chaozhou City Huaye Packing Materials Co., Ltd., and intends to recognize and enforce the request for recognition and enforcement of foreign-related arbitral awards of the applicant DMT Company against the Respondent Chaoan County Huaye Packing Materials Co., Ltd.

We seek your instructions on whether the above opinions are correct.