

Unofficial Translation

Mitsui Corporation (Japan) v. Hainan Textile Industry General Corporation

Reply of the Supreme People's Court to the Hainan Higher People's Court's Request for Instructions regarding Recognition and Enforcement of an Arbitral Award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce

(13 July 2005, [2001] Min Si Ta Zi No. 12)

Hainan Higher People's Court,

Your Court's request for instructions about whether or not to recognize and enforce arbitral award No. 060/1999 rendered by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") with the reference number [2001] Qiong Jing Fu Zi No. 1 has been received by this court. After deliberating the case, we reply as follows:

Hainan Textile Industry General Corporation ("**Hainan Textile**") is a State-owned enterprise. Hainan Textile became liable for the debt owned by Mitsui Corporation (Japan) ("**Mitsui**") without any foreign debt registration or the approval of the State Administration of Foreign Exchange. This violated Chinese law on the approval and registration of foreign debt as well as the Chinese policy on foreign debt administration. However, the violation of a compulsory regulation in administrative law does not necessarily constitute a violation of Chinese public policy. The grounds of refusal to recognize and enforce the arbitral award in this case are not properly founded. Therefore, the recognition and enforcement of the arbitral award in this case shall not be refused on the ground of violation of public policy.

Above is our reply.

Annex

Request of Hainan Higher People's Court for Instructions regarding Recognition and Enforcement of the No. 060/1999 arbitral award rendered by the Arbitration Institute of the Stockholm Chamber of Commerce

The Supreme People's Court,

As to the case in which Mitsui applied for the recognition and enforcement of No. 060/1999 arbitral award rendered by the SCC. Our court reviewed the Haikou Intermediate Court's report according to the Notice of the Supreme People's Court on the Disposal of the Relevant Issues about the Foreign-related Arbitration and Foreign Arbitral Matters by the People's Court. After discussion within the judicial committee in our court, we consider unanimously as follows:

We agree with the Haikou Intermediate People's Court's opinion that No. 060/1999 arbitral award rendered by the SCC shall not be recognized and enforced.

Beside the report from Haikou Intermediate People's Court with its reference number [2001] Hai Zhong Fa Ren Zi No. 1, we have the following emphasis and supplements:

1. The applicable law in this case concerning the Japanese Yuan (“JPY”) repayment agreement is Chinese law. According to Chinese law, entering into the above agreement must be approved by the State Administration of Foreign Exchange. An agreement which has not been approved shall be null and void. Therefore, the debt agreed in an agreement which is invalid under its applicable law shall not be the subject of recognition and enforcement under the above law.

2. The arbitration procedure. The two parties had disputes concerning the content and interpretation of Chinese foreign exchange law. On 8 December 1999, the presiding arbitrator Lars Rahmn served a letter on the agent of Hainan Textile stating that the arbitral tribunal would decide whether or not to appoint an expert in accordance with the SCC arbitration rules based on, first, the parties' disputes concerning the content and interpretation of the law or any other issues, and second, the tribunal would consider the expert's capability in assisting the arbitral tribunal with these issues. (Article 27 of the SCC arbitration rules states, unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues set out by the arbitral tribunal.)

It was obvious that the two parties had major disputes concerning the content and interpretation of the relevant Chinese law and that these disputes would probably have a substantial impact on the outcome of the arbitration. The appointment of an expert would help the arbitral tribunal to understand the applicable Chinese law comprehensively and correctly. The expert could also help the tribunal with settling such problems. In this case, the arbitral tribunal shall appoint an expert to report to it on the specific issues regarding the content and interpretation of the Chinese law because the conditions and requirements to appoint an expert were well founded. The arbitral tribunal shall follow the arrangement and promise made in the letter which Lars Rahmn sent to Hainan Textile and Article 27 of the SCC arbitration rules.

Unfortunately, on 23 March 2000, Lars Rahmn served a letter on Hainan Textile again saying that the arbitral tribunal would not appoint an expert on Chinese law. As to the relevant content and interpretation of the Chinese law, the parties could provide the evidence or opinions in writing issued by the experts they had appointed themselves.

The arbitral tribunal's decision not to appoint an expert went against the arrangement and promise made in the letter which Lars Rahmn served on Hainan Textile on 8 December 1999, and Article 27 of the SCC arbitration rules. The tribunal also did not give any explanation or instruction on its decision. Due to the tribunal's failure to appoint an expert, the opinion from an expert on Chinese law appointed by Mitsui was accepted by the arbitral tribunal, but the opinion was not objective, comprehensive and precise enough. The arbitral tribunal (or Lars Rahmn) did not follow its letter to Hainan Textile or Article 27 of the SCC arbitration rules to appoint an expert on specific issues of the Chinese law. This was a severe violation to the due process and constituted a ground for refusal to recognize and enforce foreign arbitral award under article V(1)(d) of the New York Convention.

3. The expert on Chinese law appointed by Mitsui took part in the hearing and listened to the arguments and disputes from both parties. Although the expert provided opinions on the legal issues, not the facts, his role in the arbitration procedure was similar to that of a witness. A witness is not allowed to take part in the entire hearing. This is a basic rule and requirement of due process. The expert witness providing an opinion while at the same time attending the entire hearing could lead to the partiality of the opinion provided. Due process shall be the basic legal principal under the New York Convention and the law of every State. The violation of due process was the violation of the basic legal principle and public policy in China. Furthermore, the expert providing a legal opinion on Chinese law was on behalf of Mitsui, not a neutral expert/witness. The expert actually represented Mitsui and its interest. Therefore, we concluded from the above facts that the arbitral tribunal in this case was not impartial while obtaining the opinion or testimony from the expert appointed by one party and it was therefore a violation of due process.

4. On 9 March 2001, our court had already made a civil decision [2000] Qiong Jing Chu Zi No. 7 concerning a general contract dispute between Hainan Textile and Hainan Qionghai Terylene Factory (“**Hainan Qionghai**”). In the decision, the court ruled that Article 9 of the contract between Hainan Textile and Hainan Qionghai was invalid. Article 9 of the contract states, “[t]he total amount of the general contract includes both JPY 2,436,974,970 plus its interest and Hong Kong Dollar (“**HKD**”) 440,480 plus its interest; both of which shall be paid respectively to Mitsui and Hong Kong Lixin Foreign Banking Ltd by Hainan Textile on behalf of Hainan Qionghai in accordance with the respective repayment agreement.”

Although it seemed that a domestic court decision was irrelevant to a foreign arbitral award, in fact, the repayment agreement between Hainan Textile and Mitsui was one of the attachments to the general contract between Hainan Textile and Hainan Qionghai. Article 9 of the general contract was the precondition and basis for Hainan Textile to be liable for the debt owned by Mitsui. Since Article 9 was ruled invalid by the court decision, the debt in the JPY repayment agreement between Hainan Textile and Mitsui under Article 9 of the general contract lost its legal basis. Therefore, Hainan Textile shall not bear any legal obligation in the repayment agreement under article 9 of the general agreement.

We shall not refuse the recognition and enforcement of a foreign arbitral award based on a previous domestic court decision, but the debt as the subject for recognition and enforcement in the foreign arbitral award was ruled unlawful according to a previous court decision which had already taken effect. Obviously, the recognition and enforcement of the foreign arbitral award would conflict with the previous decision made by this court and be contrary to the judicial authority and *res judicata* of the court decision. It would also be contrary to the legal principal and the legal order in our country.

In conclusion, recognition and enforcement of debt which was ruled invalid in the domestic court would be contrary to the public policy of the State where the enforcement is sought. One of the grounds of refusal to recognize and enforce a foreign arbitral award in Article V(2) of the New York Convention is founded in this case.

According to the notice of your court, our court reports the above case to your court for instructions.