

Unofficial Translation

North American Foreign Trading Corporation v. Shenzhen Laiyingda Co., Ltd., Shenzhen Laiyingda Technology Co., Ltd., Shenzhen Cangping Import & Export Co., Ltd., Shenzhen Light Industry Import & Export Co., Ltd.

Reply of the Supreme People's Court in the matter of the Request for Instruction on the Judgment of the Case Regarding the Application for Recognition and Enforcement of the Arbitral Award Granted by the Commercial Arbitration Tribunal at the International Centre for Dispute Resolution Submitted by North American Foreign Trading Corporation

(2 September 2009, [2009] Min Si Ta Zi No. 30)

The Guangdong Higher People's Court,

Your decision, No. 11 [2008] No. 4 Civil Tribunal of the Guangdong Higher People's Court: the Request for Instruction on the Judgment of the Case Regarding the Application for Recognition and Enforcement of the Arbitral Award granted by the Commercial Arbitration Tribunal at the International Centre for Dispute Resolution Submitted by North American Foreign Trading Corporation, was received. After our deliberation we reply as follows:

The present case concerns an application for recognition and enforcement of foreign arbitral award. Because the arbitral award in this case was granted by the Commercial Arbitration Tribunal at the International Centre for Dispute Resolution (the United States) and both China and the United States are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**New York Convention**"), in accordance with both Section 267 of the Civil Procedure Law of the People's Republic of China and Article 1 of the New York Convention, the relevant provisions in the New York Convention should be applied to the review of the recognition and enforcement of the arbitral award in question.

The following are found based on the facts recognized in your court's request for instruction: in the light of the arbitration plaintiff's request, the arbitral tribunal postponed the hearing date that was initially confirmed by all relevant parties and notified all relevant parties by fax. The respondents raised an objection to the extension and requested the case to be heard on the date that had been initially decided. The respondents did not have any evidence to prove that they had no knowledge about this hearing date. The arbitration procedure was in compliance with the applicable arbitration rules to which all parties agreed.

After the arbitral tribunal rendered an award in this case, the tribunal then sent the arbitral award by international registered mail to the address provided by the respondents; however, the mail was returned. Subsequently, the arbitral tribunal sent the arbitral

award by mail again to the address provided by the applicant, which was also the registered address of one of the respondent—Shenzhen Laiyingda Technology Co., Ltd. The delivery method was also in compliance with the provisions of the applicable arbitration rules.

None of the situations under Article V of the New York Convention are applicable to this arbitral award. The People’s Court should recognize and enforce this arbitral award. We agree with your review comments.

The above is our reply.

Annex

The High People’s Court of Guangdong Province

The Request for Instruction on the Judgment of the Case Regarding the Application for Recognition and Enforcement of the arbitral award granted by the Commercial Arbitration Tribunal at the International Centre for Dispute Resolution submitted by North American Foreign Trading Corporation

(13 July 2009, [2008] Yue Gao Fa Min Si Ta Zi No. 11)

The Supreme People’s Court,

On 4 October 2005, the Commercial Arbitration Tribunal at the International Centre for Dispute Resolution (ICDR) made arbitral award No. 50181T0025104 regarding a dispute arising from the cooperation contract between the applicant, North American Foreign Trading Corporation, and the respondents—Shenzhen Laiyingda Co., Ltd., Shenzhen Laiyingda Technology Co., Ltd., Shenzhen Cangping Import & Export Co., Ltd., and Shenzhen Light Industry Import & Export Co., Ltd. On 26 January 2006, the applicant, North American Foreign Trading Corporation, submitted an application for recognition and enforcement of the abovementioned arbitral award to the Shenzhen Intermediate People's Court. The Shenzhen Intermediate People's Court held that this arbitral award should be recognized and enforced. After our review, we are inclined to agree with the Intermediate Court’s opinion; however, because of the considerably large number of parties and the substantial high value of the award involved in this case, we would like to consult your Court.

I. Brief Background

Applicant	North American Foreign Trading Corporation Address: 105 Madison Avenue, New York, NT 10016, USA
Respondents	Shenzhen Laiyingda Co., Ltd. Address: JiaHua Edifice, North Huaqiang Road, Shenzhen

Shenzhen Laiyingda Technology Co., Ltd.

Address: Second Building, No. 2 Township Labour Industrial Area, West of Bao'an District, Shenzhen

Shenzhen Cangping Import & Export Co., Ltd.

Address: Guoshang Edifice North Town, suite 303-307, Jiabin Road, Luohu District, Shenzhen

Shenzhen Light Industry Import & Export Co., Ltd.

Address: Guoshang Edifice North Town, suite 204-205, Jiabin Road, Luohu District, Shenzhen

II. Facts

On 18 May 2000, the applicant and the respondents entered into a cooperation agreement, which provided the following: the respondents shall provide at least six final assembly lines and ensure that the assembly lines would be delivered on time and the applicant shall place orders that contain at least 1.1 billion U.S. Dollars in 2000. On 16 October 2001, the applicant and two of the respondents— Shenzhen Laiyingda Co., Ltd. And, Shenzhen Laiyingda Technology Co., Ltd.—entered into the 2002 Cooperation Agreement. In the Agreement, the parties agreed that the respondents shall provide at least six assembly lines; the applicant shall place at least 80 million U.S. Dollars worth of orders in 2002. It was also agreed that the respondents must repair any and all parts of goods returned by customers within 60 days of receiving customers' returned goods and return them to the applicant according to the provisions in the Agreement. A Letter Agreement was attached to the 16 October 2001 Agreement. The following was set out in the Letter Agreement: This Letter Agreement is under the jurisdiction of the State of New York and shall be interpreted under the laws of New York without making reference to the conflict of law principles. The parties shall resolve any conflict arising from the main provisions of this Agreement by arbitration conducted by the American Arbitration Association in accordance with the law of New York in New York.

On October 2004, the applicant filed an application for arbitration with ICDR. The applicant held that the respondents violated the arrangement under the Cooperation Agreement and claimed the following damages: (1) USD \$7,245,344.67, which was the value of the customer returned goods that the respondents had accepted but had not yet returned; (2) USD \$2,111,750.60, which was the cost of the warehouse in the United States storing unrepaired customer returns that was produced by the respondents; (3) USD \$6,471,918.71, which was the relevant cost incurred while handling the returned goods from American Electronic Co., Ltd.; (4) USD \$301,978.36, which was the 3% difference paid to American Electronic Co., Ltd.; (5) USD \$1,130,091.90, which was the value of the goods returned by the customers of GD Company; (6) USD \$175,045.20, which was all other storage costs; (7) USD \$466,024,737, which was the compensation for the incomplete outstanding orders. In total, the respondents shall pay damages in the amount of USD \$22,096,376.81 to the applicant. The respondents pled that the respondents had no obligation to repair the customer returned goods; the respondents had already performed their obligations in compliance with the Agreement, but the applicant

substantially violated its obligation, which, in turn, resulted in the bankruptcy of the respondents and cessation of operations. Therefore, the applicant's petition should be rejected. In addition, the respondents raised counterclaims that: North American Foreign Trading Corporation's continuous violation or threat and abuse of its power to request concessions under duress caused the bankruptcy of the respondent, Shenzhen Laiyingda Technology Co., Ltd. As such, North American Foreign Trading Corporation was liable for paying damages in the amount of \$5,092,005.96 US Dollars. After the hearing, ICDR issued an award on 4 October 2005: (1) the damage requested by the applicant was affirmed; the respondents must immediately pay \$22,096,376.81 US Dollars to the applicant, and interest shall be calculated on any outstanding part of this amount based on simple annual interest rate of 9% from August 15, 2003. (2) All of the respondents' counterclaims are rejected. (3) The four respondents must pay \$32,420.50 US Dollars, which was the amount that had already been paid to ICDR by North American Foreign Trading Corporation. (4) This award is the final resolution of all claims and counterclaims from this arbitration proceeding. Any other claims or counterclaims that are not particularly mentioned in this award are rejected.

Regarding the arbitration procedure in this case: after accepting this case on 15 November 2004, ICDR established an arbitral tribunal consisting of a sole arbitrator. The four respondents submitted pleadings and counterclaims to the tribunal. On 4 January 2005, the applicant and four respondents discussed and agreed on the arbitration proceeding timetable, and decided that the hearing dates of this case were going to be from 25 to 27 May 2005. The applicant, North American Foreign Trading Corporation requested to postpone the hearing date on 21 March 2005. The arbitral tribunal granted the extension on 22 March 2005 and cancelled the hearing dates that were from 25 to 27 May 2005. The four respondents objected to the extension and requested the hearing proceeding to be held on the initially agreed dates. The tribunal sent a fax to all parties on July 2005, requesting the hearing to be held on 16 August 2005. However, the four respondents did not appear in court. After the tribunal heard the case, a default award was made on 4 October 2005. The applicant, North American Foreign Trading Corporation, submitted an applicant for recognition and enforcement of this arbitral award to the Shenzhen Intermediate People's Court.

The applicant, North American Foreign Trading Corporation, claimed that: the ICDR had already made a final award on the dispute between the applicant and the respondents on 4 October 2005. Because each of the respondents, against whom the award shall be executed, had not yet performed their obligations as required by the award, in accordance with the rules in the Supreme People's Court of People's Republic of China's Circular on Implementing the Participation of China in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the applicant specifically requested the following: (1) recognition of the arbitral award made by ICDR bearing the case number 50181T0025104; (2) enforcement of the two following parts which had been confirmed in the arbitral award: (i) the principal, USD \$22,128,797.31 and (ii) the principal, USD \$22,096,376.81, and any part of the interest, which is calculated at a simple annual

interest rate of 9% starting from 15 August 2003 (and ending on the day when the enforcement is completed).

The four respondents pled that: (1) they did not receive ICDR's arbitral award, nor did they receive the hearing notice or the final arbitral award. (2) The ICDR violated the arbitration rules, which caused the Chinese parties to be unaware of the time and location of the hearing, which, in turn, meant they were unable to present their case. Therefore, in accordance with the Circular of Implementing the Participation of China in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and Article V(2)(a) of New York Convention, the respondents submitted a petition for non-recognition and non-enforcement of this arbitral award. The reasons were: the arbitrator violated the arbitration rules, by making unauthorized changes to the Timetable Arrangement, which was signed by three parties and contained contractual features. During the arbitration proceeding, the parties discussed the arbitration timetable on 4 January 2005, including time to submit evidence and expert witness opinions, and eventually confirmed that the time of the hearing would be from 25 to 27 May 2005. After the timetable was reached, the Chinese parties submitted evidence and expert witness opinions according to the timetable, but the American party did not submit any evidence or expert witness opinions after the above agreed timeline. The attorney for the American party submitted an excuse to the tribunal on 21 March 2005 that because the spouse of the attorney was expecting a child, he requested the hearing time to be postponed for seven months. The Chinese party argued that due to the attorney of the American's party's negligence in his work, the American party was unable to submit evidence and expert witness opinions before the deadline that had been agreed on 4 January 2005. As such, the American party had lost its right. At that time, the Chinese parties raised objections as to the extension, but the arbitrator of ICDR cancelled the hearing on 25 May 2005 regardless of the Chinese parties' strong objections. At that same time, the arbitrator extended the deadline for submitting evidence and expert witness opinions that was agreed in the timetable. The Chinese parties argued that this severely violated the arbitration rules; therefore, the four respondents objected to the American attorney's granted extension of time, and did not receive any hearing notice from ICDR or the arbitral award from that point onwards.

III. Opinion of the Shenzhen Intermediate People's Court

After the review, the Shenzhen Intermediate People's Court opined that this case involves the recognition and enforcement of an American arbitral award; because both China and the United States are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, this convention applies to this case. In this case, the Cooperation Agreement between the applicant and the respondents contains an arbitration clause. The applicant, North American Foreign Trading Corporation, submitted an arbitration application to ICDR according to the agreement, and the four respondents made pled and raised counterclaims, where they adequately expressed their own views. The four respondents claimed that they did not receive the notice of the arbitration hearing date, but the tribunal only cancelled the initially agreed hearing date from 25 to 27 May 2005, and postponed the hearing date to 16 August 2005; the four respondents

raised an objection and opposed to the extension of the hearing date. The Shenzhen Intermediate People's Court held that the tribunal's extension of the hearing date was in compliance with the arbitration rules. In particular, the tribunal's transmission of the hearing notice by fax to the parties on both sides is also in compliance with the arbitration rules, and does not satisfy any situations under Articles V(1) or V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. We also held that this award does not violate China's public policy and, thus, should be recognized and enforced.

IV. Opinion of our Court

After the review, our court planned to agree with the opinion adopted by the Shenzhen Intermediate People's Court.

Both China and the United States are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This Convention and the relevant provisions under the Civil Procures Law of China should apply to the review of whether to recognize and enforce the arbitral award made by ICDR on 4 October 2005 which bears the case number 50181T0025104.

Regarding the issue of whether the tribunal's change of the hearing time violated the arbitration rules: the respondents refused to attend the hearing based on the grounds that the tribunal granted an extension to postpone the initially agreed hearing date from 25 to 27 May 2005 to 16 August 2005 in light of the application submitted by the attorney of the applicant, North American Foreign Trading Corporation. Our court opines that although the tribunal set the hearing date to 25 May 2005 based on the discussion of parties from both sides, the parties had not agreed that the arbitrator could not change this hearing date. In accordance with Article 1(1) of the arbitration rule which applies to this case, a party has the right to change the arbitration rules by written agreement, but the parties in this case had not reached an agreement to make any changes to the arbitration rules. The applicant and the respondents reached the arbitration timeline agreement on 4 January 2005, including the agreement on the hearing time, which did not constitute an agreement of changing the provisions under the arbitration rules, and did not exclude the arbitrator's right of managing the hearing date. Thus, we opine that the tribunal's change of the hearing date according to the request submitted by North American Foreign Trading Corporation's attorney did not violate the arbitration rules.

Regarding the issue whether the four respondents received the arbitral award: the tribunal stated that the arbitral award had been sent to the address provided by the four respondents by international registered mail on 6 October 2005; however, the registered mail was returned to ICDR. Subsequently, the tribunal re-sent the arbitral award to the four respondents to their address provided by the applicant on 16 May 2006. This delivery method is in compliance with Article 18 of the arbitration rules, and now the four respondents have been aware of the subject matter of the arbitral award in this case; hence, the reasoning of this pleading does not constitute a legal ground for non-recognition and non-enforcement of this arbitral award.

Based on the reasons above, our court holds that this case does not meet the situations listed under Article V(1) and V(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, we are inclined to agree with the opinion adopted by the Shenzhen Intermediate People's Court, and recognize and enforce the arbitral award in this case.

Please confirm whether this opinion above is proper.