Unofficial Translation

Singapore Yideman Asian Co. (Asia) Pte Ltd. v. Wuxi Huaxin Cocoa Food Corp

Reply of the Supreme People's Court regarding Jiangsu Higher People's Court's Request for Instruction on the Recognition and Enforcement of a Foreign Arbitral Award by the Applicant Singapore Yideman Asian Co. Ltd.

(12 June 2003, [2001] Min Si Ta Zi No. 43)

Jiangsu Higher People's Court,

Your Court's Request for Instruction on the Recognition and Enforcement of a Foreign Arbitral Award, dated on 9 November 2001, has been received by this court. After discussion of the Judicial Committee of this court, we reply as follows:

The pre-condition of an arbitration agreement is the parties' mutual consent to have the dispute settled by arbitration. In this case, according to the faxes between Singapore Yideman Asian Co ("**Yideman**") and Wuxi Huaxin Cocoa Food Co. Ltd ("**Huaxin**"), there was no mutual consent by the parties to have their dispute, arising from sale of cocoa, settled by arbitration. The arbitration by the Cocoa Association of London ("**CAL**") therefore lacked legal basis as the arbitration agreement was drafted by Yideman alone, without the consent of Huaxin. According to Article 269 of the Civil Procedure Law of People's Republic of China ("**Chinese Civil Procedure Law**") and the relevant provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), the People's Court shall refuse the recognition and enforcement of the arbitral award in this case.

Above is the reply to your Court's Request.

Annex:

Jiangsu Higher People's Court's Request for Instruction on the Recognition and Enforcement of a Foreign Arbitral Award

(2001) Su Li Min Er Ta Zi No. 008

Supreme People's Court,

The Wuxi Intermediate People's Court accepted the case of Recognition and Enforcement of a Foreign Arbitral Award by the Applicant Singapore Yideman Asian Co. Ltd. After reviewing the case and upon discussion of the Judicial Committee, the Wuxi Intermediate People's Court decided to refuse recognition and enforcement of the arbitral award. According to the Circular of the Supreme People's Court on Issues in the People's Courts' Handling of Foreign-related Arbitrations and Foreign Arbitrations, the Wuxi Intermediate People's Court reported the case to our court. After reviewing the case, our court has ruled to refuse the recognition and

enforcement of the arbitral award and reports the case to your court according to the above circular.

1. The basic information of the parties and their agents

Applicant: Singapore Yideman Asian Co ("**Yideman**")
Domicile: Singapore
Agent: Zhizhong Wen, Nanjing Zhongxiang Law Firm

Respondent: Wuxi Huaxin Cocoa Food Co. Ltd ("**Huaxin**")
Domicile: Wuxi, PRC
Legal Representative: Hongliang Wu, Chairman of Board
Agent: Kaizhou Fan, Wuxi Hengjiada Law Firm

2. Case brief

On 12 January 1999, Yideman sent a fax to Huaxin on "confirmation of business (business offer)" by its agent, Malaysia Borneo Local Products Ltd ("**Borneo**"). The fax was as follows:

"This fax confirms that Yideman is going to sell Huaxin the following goods: SMC1A Cocoa 500 metric tons and SMC1B Cocoa 500 metric tons; the quality standard of the goods: SABAH SMC1A Standard and SABAH SMC1B Standard; the price: U.S. $ 1450 per metric ton CFR Shanghai. The goods shall be loaded during January or February 1999. The contracts shall follow the CAL rules. Payment: irrevocable letter of credit within 30 days opened by Singapore First Commercial Bank. Remark: the full contract will be delivered afterwards."

On 13 January 1999, Yideman sent another fax to Huaxin with the following content:

"For further instruction to the 'confirmation of business' we sent to you yesterday, please notice the two contract numbers as follows, (1) Contract S50502 – 500 metric tons of SMC1A Cocoa; (2) Contract S50503 – 500 metric tons of SMC1B Cocoa."

In addition to the above information, the fax included the following provisions: "for the detail of contracts, we would send them to you afterwards"; "we would arrange sampling to analyze FFA index at your order", etc. The fax also requested Huaxin to open a letter of credit and give orders for loading the ship.

On 14 January 1999, Yaoqing Wang of the Huaxin signed on the faxes sent by Yideman on 12 January and 13 January 1999. He did not make any change to the former, which was dated 12 January but he did change Yideman's offer in the fax dated 13 January from "we would arrange sampling to analyze FFA index at your order" to "the sampling and analysis before the loading shall be operated by Singapore SGS, and the FFA index shall be below 1.75%". Huaxin sent the fax including the clause on the sampling amendment to Yideman's agent, Borneo and Borneo then forwarded the fax to Yideman on the same day. Yideman replied to Huaxin concerning the FFA index, "we would assure the sampling of FFA index is below 1.75% before loading, but only before the loading." Yideman also notified Huaxin that Yideman was able to load the ship and deliver the goods to Zhangjiagang and requested Huaxin to open a letter of credit and notify Yideman about the loading.

On 15 January 1999, Yideman sent Huaxin two formal contracts with Yideman's signatures. Huaxin received the contracts on 18 January but returned them to Yideman without signing the contracts.

On 22 January 1999, Huaxin replied to Yideman by fax: "we require that the FFA index shall be below 1.75% in the sampling both before the loading and after the arrival of goods. The inspection shall be operated by the Department of commodity inspection of China. Yideman could only guarantee the FFA index before the loading. Huaxin does not accept this contract."

On 26 January 1999, Yideman sent the contracts to Huaxin again saying that it could only assure the sampling of FFA index being below 1.75% before loading, and that the other requirements raised by Huaxin could be accepted.

Yideman and Huaxin negotiated several times afterwards on the FFA index, the inspection organization of SGS, the method of payment and the price but did not reach an agreement. Yideman then requested Huaxin to pay the losses allegedly caused by Huaxin's failure to perform the business offer which Huaxin had already accepted and signed, otherwise, Yideman would have the dispute settled by arbitration. Huaxin argued that there was no contract between the two parties, there was no compensation and there was even no arbitration agreement.

Yideman submitted the dispute to the CAL for arbitration. On 30 April 1999, Huaxin received the notice for arbitration. It replied to the CAL on 12 May 1999 indicating that they had received the relevant arbitration documents but that there was no contract between Huaxin and Yideman.

On 13 July 1999, CAL made an arbitral award as follows: it held that there was a contract between the buyer (Huaxin) and the seller (Yideman) and the contract had binding force on both parties. It further held Huaxin liable to Yideman for damages of U.S. $ 106,645 plus interest. Huaxin did not perform the arbitral award and Yideman applied to the Wuxi Intermediate People's Court for recognition and enforcement of the CAL-rendered arbitral award. During the review of the case by Wuxi Intermediate People's Court, the Respondent applied to the Court for refusing the recognition and enforcement of the arbitral award.

3. The reviewing opinion of Wuxi Intermediate People's Court

Wuxi Intermediate People's Court arrived at the following opinion after reviewing the case by the Judicial Committee:

(1) The arbitration procedure in this case

After reviewing the case materials and the arguments of the two parties, the court found that CAL had already transmitted all the relevant arbitration materials to Huaxin. Although Yideman or CAL was unable to submit a full list of documents which were transmitted, the court deduced that all materials were supposed to be delivered to Huaxin in accordance with the reply Huaxin sent to CAL. Huaxin, however, was unable to provide any evidence to establish the irregularity in the arbitration procedure. Therefore the arbitration procedure adhered to the international arbitration rules. Neither of Huaxin's arguments were properly founded; namely that CAL did not transmit arbitration documents according to international arbitration rules, nor that the arbitration procedure was otherwise irregular.

(2) The merits of the dispute in arbitration

(a) Although Huaxin had signed and replied to the "business offer" on 14 January 1999, according to the faxes between the Huaxin and Yideman, the replies of Huaxin could only show the intentions of the parties to enter into an agreement, but no actual agreement was reached between the parties. The fact that Huaxin signed the business confirmation letter dated 12 January 1999 only showed Huaxin's intention to reach an agreement with Yideman. Huaxin made changes to the fax on 13 January 1999, and there were several offers and counteroffers concerning the quality and price afterwards. Huaxin did not sign either of the final formal contracts which Yideman sent to it on 15 January and 22 January 1999.

(b) The several negotiations on the FFA index and inspection organization shall generally be understood as offers and new offers. In the case at hand, the FFA index and the inspection organization were the two necessary elements. If the two parties did not reach an agreement on these two issues, the contract cannot be regarded as having been reached by the parties. Furthermore, the two parties had also disputed the price of goods.

(c) Since there was no agreement, CAL arbitrated the case without legal basis. However, in the business confirmation letter dated 14 January 1999, it was not clear that any dispute shall be settled by CAL.

(3) Summary of Wuxi Intermediate People's Court's court decisions

According to the international custom and Chinese Civil Procedure Law, while reviewing a case concerning the recognition and enforcement of a foreign arbitral award, the court shall only review the validity of the arbitral procedure and not the merits of the case. Some of the courts in China reviewed the merits of the cases and made decision refusing recognition and enforcement of the award accordingly. The Wuxi Intermediate People's Court held if the foreign arbitration was wrong on the merits of the case and if we do not review the merits, we would enforce a wrong arbitral award in China. It dose not comply with Chinese legal principles. In the legal practice in China, courts sometimes overrule arbitral awards that are wrong. The arbitration was not impartial in this case since the review of evidence was incomplete. In conclusion, the Judicial Committee agreed unanimously that since there was no agreement between the two parties, the arbitral award concerning the dispute arising from the "agreement" should not be recognized or enforced.

4. Supplemental hearing during the review of the case by this court

During the review of the case by this court, a supplemental hearing took place. The hearing focused on the arbitration procedure, specifically whether any ground listed in Article V of the New York Convention could be applied in this case.

The agent of the Respondent raised the following issues concerning the arbitration procedure:

(1) There was no arbitration agreement between Huaxin and Yideman. According to the United Nations Convention on Contracts for the International Sale of Goods ("**CISG**"), international custom and domestic laws (Chinese Arbitration Law etc.), the faxes Huaxin sent to Yideman on 14 January 1999 were not the acceptances of the business confirmation letters dated 12 January and 13 January and there was no arbitration agreement in said letters.

(2) CAL seriously violated its arbitration rules according to the CAL rules, the English Arbitration Act 1996 and the UNCITRAL Model Law on International Commercial Arbitration ("**UNCITRAL Model Law**"):

(a) There was no "Article 23.3 (d)" which was referred to in the arbitral award in the CAL rules; the appointment of 3 arbitrators by CAL did not comply with the CAL rules.

(b) CAL did not transmit the arbitration documents in accordance with the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matter ("**Hague Service Convention**"), though CAL transmitted the arbitral award in accordance with the Hague Service Convention.

(c) Huaxin replied to CAL after receiving the arbitration documents from CAL saying that Yideman did not have the right to submit the dispute to arbitration since there was no arbitration agreement between the parties. By not responding to Huaxin's argument, CAL violated the English Arbitration Act 1996.

(d) 5 of the 33 arbitrators in CAL were employees of Yideman; therefore Huaxin considered that the CAL could not arbitrate the dispute impartially.

The agent of Yideman answered to the above issues as follows:

(1) That whether there is a contract between the parties is a question of the merits of the case, not a question on the procedure of arbitration. This issue is not within the scope of review by the court. The arbitral award made by CAL confirmed that there was a contract between Yideman and Huaxin. According to the contract, the two parties agreed to have their dispute settled under CAL rules. This complies with the Article 7 (2) of UNCITRAL Model Law, "……The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract."

(2) There is no ground stated in the Articles V(1) and V(2) of New York Convention for the court to refuse the enforcement of the CAL-rendered arbitral award. The award also complied with CAL rules.

(a) The CAL rules Yideman submitted to the court were different from the rules Huaxin downloaded from the internet. The rules include Article 23.3 (d). The Article 23.3 (a) states that CAL has the right to appoint 3 arbitrators; and 23.3 (d) states that any party shall, if it need to, challenge the appointment of arbitrators appointed by CAL within 2 working days.

(b) As to Huaxin's argument that the documents were not delivered in accordance with the Hague Service Convention, arbitration documents are not judicial documents. Article 17 of the Hague Service Convention states that extrajudicial documents emanating from authorities and judicial officers of a Contracting State may be transmitted for the purpose of service in another Contracting State by the methods and under the provisions of the present Convention. Delivery by post is an accepted method of delivery.

(c) The CAL did not answer Huaxin's argument on the existence of contract between the parties. This is not a ground listed under Article V of the New York Convention in which the People's Court shall apply when refusing the recognition and enforcement.

5. The reviewing opinion of our Court

Considering the above facts and arguments, our court's reviewing opinions are as follows:

According to Article 269 of the Chinese Civil Procedure Law, the New York Convention shall apply where the court reviews the case on recognition and enforcement of a foreign arbitral award. The arbitral award in this case was made by an English arbitration institution in the territory of England. China and the UK are both contracting States to the New York Convention and the Applicant, the court of jurisdiction and time period for the application all comply with the Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China ("**Circular**").

Article 4 of the Circular states "after the people's court of China with jurisdiction receives the application of one party, it shall examine the arbitration award whose recognition and enforcement has been applied for. If the court believes that the grounds listed in Article V (1) (2) of the 1958 New York Convention do not exist, it shall recognize and enforce the arbitral award according to the Chinese Civil Procedure Law. If the court holds that any of the grounds listed in Article V (2) exist, or the evidence provided by the party subject to enforcement proves that any of the grounds listed in Article V (1) exist, the court shall dismiss the application and refuse to recognize and enforce the arbitral award." According to the above Article in the Circular, the court's scope of review shall only extend to the arbitration procedure, not the merits of the case.

(1) There is no ground listed in Articles V(1) and V(2) of the New York Convention that would be applicable to this case.

The Article V of the New York Convention states as follows,

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (e) The award has not yet become

binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) The recognition or enforcement of the award would be contrary to the public policy of that country."

According to the case materials and evidence provided in the supplementary hearing, the arguments on arbitration procedure raised by Respondent did not constitute any ground listed above.

The Respondent raised an argument under (2) (a) that CAL violated its rules, there was no Article 23.3 (d) in CAL rules and according to CAL rules the CAL has no right to appoint 3 arbitrators by itself. In answering to Respondent's argument, the Applicant submitted a version of the CAL rules which it claimed to have obtained from CAL to prove that there was an Article 23.3 (d) in the rules and that CAL was able to appoint 3 arbitrators accordingly. The court found that Respondent downloaded the CAL rules from the internet and could not prove the authenticity or correctness of the rules. The Applicant submitted the CAL rules which it claimed to have obtained from CAL, but without a notarization by a relevant organization, so the evidence was only for reference. The court was unable to rely on the evidence provided by both parties. Therefore, the court deduced that the Respondent did not have sufficient evidence to prove the violation of CAL rules in arbitration procedure.

The Respondent raised its argument (2) (b) that CAL did not deliver the relevant arbitration materials in accordance with the Hague Service Convention. Applicant argued that the arbitration documents were not judicial documents under the Convention. The court considered that whether or not the arbitration documents were judicial documents is a controversial theoretical question. Since the Respondent was unable to prove that the relevant arbitration documents were judicial documents under the convention, the court deduced that the Respondent did not have sufficient evidence to prove that the delivery by post of arbitration documents by CAL violated the due process.

The arguments (2) (c) and (2) (d) provided by Respondent did not fall within the scope of the review of the court. Even the Respondent considered that they only amounted to minor flaws in the procedure.

(2) Whether or not there was an explicit arbitration clause in the contract

According to Article 7 (2) of the UNCITRAL Model Law, "……The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." The fax which Yideman sent to Huaxin on 12 January stated that the contracts shall follow the CAL rules. It shall be seen as an arbitration clause.

(3) Whether or not there was an arbitration agreement between the parties

This problem is not a ground listed in Articles V(1) and V(2) of the New York Convention, but it is the focus of the disputes between the parties. If there was no arbitration agreement, the CAL has no jurisdiction over the case. The arbitration agreement was one of the clauses in the contract between the parties. If the contract was not reached by the two parties, there was no arbitration agreement. (Respondent agreed)

We agreed with the Wuxi Intermediate People's Court's opinion that there was no contract between the two parties. The two faxes which Yideman sent to Wuxi on 12 and 13 January 1999 constituted an offer as a whole. The fax dated on 13 January was the supplement for the fax dated on 12 January, because the contents in the former fax concerning contract numbers and inspection organization were not included in the latter one. In a sales contract, usually the buyer has requirements for the price and quality of the goods, therefore the clauses on quality and inspection organization are mandatory clauses. Huaxin replied and signed the two faxes on 14 January 1999 after making amendments to the fax dated on 13 January. The changes were about the goods quality standard, which constituted substantive amendments to the offer according to CISG. The amendments made by Huaxin to the faxes dated on 12 and 13 January from Yideman were a counteroffer. The two parties had negotiated on the quality (FFA index) and inspection organization from time to time afterwards, but never reached an agreement. Huaxin did not sign the formal contracts which Yideman sent to Huaxin on 15 January and 22 January. Therefore a contract was not formed between Huaxin and Yideman.

Huaxin signed the fax dated on 12 January but made changes to the fax on 13 January. It shall therefore not be seen as the acceptance of the whole contract which includes both faxes on 12 and 13 January, otherwise Huaxin would have to accept the goods provided by Yideman even if the quality of the goods did not reach the requirement. Without both parties' consent on the FFA index requirement in the fax dated 13 January, the parties did not actually reach an agreement.

There are now two different opinions in our court after reviewing the case. The first is, if we strictly follow the Article 4 of the Circular in reviewing the case, no ground listed in Article V (1) (2) of the New York Convention shall be applied to the CAL-rendered arbitral award and there was negligence of Huaxin when it signed the fax sent by Yideman on 12 January 1999. The court shall recognize and enforce the CAL-rendered arbitral award.

The other opinion is that the court shall review whether or not there was an arbitration agreement between the parties, in other words, whether or not the contract was established. We are inclined to decide that there was no contract and there was no arbitration agreement (clause) between the parties. CAL did not have the jurisdiction to arbitrate the case. The CAL-rendered arbitral award shall not be recognized and enforced.

Our court is inclined to take the second opinion and refuse the enforcement. We now report the above case to you and seek your advice on it.

Jiangsu Higher People's Court

9 November 2001