

TS Haimalu Co. Ltd. v Daqing PoPeyes Food Co. Ltd.

Reply of the Supreme People's Court to the Request for Instructions on Whether or Not to Recognize and Enforce the Arbitral Award made by Korean Commercial Arbitration Board

(3 March 2006, [2005] Min Si Ta Zi No. 46)

The Heilongjiang Higher People's Court:

Your Court's Request for Instructions regarding case [2005] Hei Gao Shang Wai Ta Zi No. 1 in which TS Haimalu Co., Ltd. ("**Haimalu**") applied for recognition and enforcement of the arbitral award made by the Korean Commercial Arbitration Board ("**KCAB**") has been received by this court. Upon review of the case, this court replies as follows:

The KCAB rendered an arbitral award (No. 04113-0004) for the dispute concerning the development contract and chain agreement between Haimalu and Daqing PoPeyes Food Co., Ltd. ("**PoPeyes**") on 22 October 2004. After Haimalu applied to the Harbin Intermediate People's Court for recognition and enforcement of said arbitral award, PoPeyes applied to the court for the refusal of recognition and enforcement of the award on the ground that the arbitral tribunal failed to serve notice of the hearing and the arbitral award according to articles 4 and 8 of the Treaty between the People's Republic of China and the Republic of Korea on the Judicial Assistance in Civil and Commercial Affairs ("**Treaty on Judicial Assistance**"). Both parties clearly agreed that the arbitration shall be governed by the Arbitration Rules of the KCAB ("**KCAB rules**") in the development agreement and the chain agreement, and the arbitral tribunal in this case had already served notice of the arbitration hearing and the arbitral award to PoPeyes via mail pursuant to the KCAB rules, and there was also evidence that proved that PoPeyes had received the said notice and arbitral award.

Although the arbitral tribunal did not attach Chinese translations when serving notice of the hearing and the arbitral award, delivery of the above documents by mail without Chinese translations does not violate the Arbitration Law of Korea and the KCAB rules. The provisions requiring "contact channels for judicial assistance" and "language" as prescribed by the Treaty on Judicial Assistance shall only be applied to the judicial assistance between the judicial organs of two countries and not the service by arbitral institutions or tribunals in arbitral proceedings. Since PoPeyes has failed to present any evidence to prove that the arbitral award in this case was under any circumstance prescribed in Article V(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**") to which China has acceded, the arbitral award in this case shall be recognized and enforced.

Annex

Request of the Heilongjiang Higher People's Court for Instructions regarding the Case in which Haimalu Applied for Recognizing and Enforcing the KCAB-Rendered Arbitral Award

(14 October 2005 [2005] Hei Gao Shang Wai Ta Zi No. 1)

Supreme People's Court:

As to the case in which Haimalu applied for recognition and enforcement of the arbitral award made by KCAB, the Harbin Intermediate People's Court would rule that arbitral award No. 04113-0004 made by KCAB shall not be recognized within the territory of China. Harbin Intermediate People's Court reported its opinion to this court for review. This court formed two different opinions in the case: the majority considered that the arbitral award should be recognized and enforced; and the minority considered that there were circumstances for the court to refuse to recognize and enforce the arbitral award in this case and thus the application of Haimalu should be dismissed. Upon study, the Judicial Committee of this court decided to submit both opinions to your court for instruction. This court hereby reports the case as follows:

I. Basic Information about the Applicant and the Respondent

Applicant: TS Haimalu Co., Ltd., situated at 7-23, Sincheon-dong, Songpa-gu, Seoul-T'ukPyolSi, Republic of Korea.

Legal Representative: Cui XiangyunChoi Sangwen, representative director of the company.

Respondent: Daqing PoPeyes Food Co., Ltd., situated at (the First Floor of Daqing Plaza) No. 7, Xibin Road, Ranghulu District, Daqing City, Heilongjiang Province.

Legal Representative: Wang Jianglong, general manger of this company.

II. Cause of Action and Process of Trial

Haimalu applied to the Harbin Intermediate People's Court for the recognition and enforcement of arbitral award No. 04113-0004 made by KCAB in April 2005, and the Harbin Intermediate People's Court held upon review that this case may contain grounds according to which the arbitral award ought not to be recognized and enforced. Thus, Harbin Intermediate People's Court reported to this court for instructions 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. This court formed a collegial panel to review the case after accepting it on 21 June 2005. The Judicial Committee of this court has already completed its deliberation on this case.

III. Requests of the Applicant and the Defences of the Respondent

Haimalu initiated the arbitration with the KCAB claiming that PoPeyes did not pay the relevant expenses under the agreement.. The KCAB rendered arbitral award No. 04113-0004 on 22 October 2004, which took effect within the Republic of Korea and has not been submitted for

revocation. The Republic of Korea acceded to the New York Convention on 9 May 1973. Thus, Haimalu applied to the People's Court for the recognition and enforcement of arbitral award No. 04113-0004 made by KCAB and requested the court to rule that PoPeyes should bear the court fees, enforcement costs and counsel fees relating to this case.

PoPeyes replied as follows: (1) the arbitral award violates the arbitration procedure and thus is not legally binding on PoPeyes. According to Article 4 of the Treaty on Judicial Assistance, in the case of judicial assistance, the central organs designated by either country, the Ministry of Justice for the People's Republic of China and the Administrative Office of the Court for the Republic of Korea, shall have direct contact with each other. However, when the KCAB arbitrated this case, it did not send any notice of the hearing or the arbitral award to PoPeyes by any of the methods stipulated in the Treaty, but instead sent them by mail directly to PoPeyes. Furthermore, the Tribunal violated the provisions on the use of language as prescribed in Article 8 of the Treaty and did not provide a Chinese translation. Since PoPeyes did not know Korean and could not read the notices from the arbitral tribunal, it disregarded the notices and failed to attend the hearing in time, thereby losing the opportunity to present its case. (2) Since the KCAB violated the provisions of the service procedure, the use of language and failure to notify PoPeyes through a proper method, the recognition and enforcement of the award should be refused according to Article V of the New York Convention.

IV. Factual Background

It is found that: On 16 August 2001, Haimalu and PoPeyes concluded the "PoPeyes" development agreement and chain agreement, in which they agreed as follows: Haimalu shall give the franchising right of their chain operations to PoPeyes, while PoPeyes shall pay the franchising fees and the costs for setting up shops to Haimalu. The agreement shall be interpreted according to Korean law and the disputes over the issues relating to the agreement shall be submitted to arbitration under the KCAB. The arbitrators shall be selected from the KCAB, and the presiding arbitrator shall be selected by the KCAB. PoPeyes provided the following address for notification in the agreement: "Wang Jianglong, Daqing PoPeyes Food Co., Ltd., No. 11-3, North City of Building Materials, Ranghulu District, Daqing City, Heilongjiang Province, P.R. China".

During the performance of the agreement, Haimalu applied to the KCAB for arbitration on the ground that PoPeyes had not paid the franchising fees and costs as agreed. The KCAB rendered arbitral award No. 04113-0004 on 22 October 2004, and held: "After KCAB served the arbitration application letter to PoPeyes, PoPeyes neither took part in the hearings nor made any defence". The arbitral tribunal ruled that: (1) PoPeyes shall pay RMB 375,342.14 and U.S. \$30,000 to Haimalu together with interest of the said amounts from 16 April 2004 to 22 October 2004 at the annual interest rate of 6% and in the case of default, from 23 October 2004 to the day when the debts are paid off at the annual interest rate of 20%; (2) PoPeyes shall not enjoy any right in the development contract and chain contract concluded between PoPeyes and Haimalu on 16 August 2001; and (3) The arbitration fees shall be borne by PoPeyes. The arbitral award shall take effect in the Republic of Korea and has not been submitted for revocation.

It is also held that the KCAB served the arbitration notice and the arbitral award to PoPeyes through DHL Express respectively on 19 July and 27 October 2004, and the express delivery

bills were written in English, and sent by the KCAB to PoPeyes to their contact person Wang Jianglong. The contact phone number was 459-582-5666, and the address was No. 12, Friendship Street, Shaertu District, Daqing City, Heilongjiang Province, P. R. China. However, the address was not the business address of PoPeyes and Wang Jianglong recognized in the objection application form that he had received the express mails, but there was no Chinese translation attached. As he does not understand Korean, he did not know that the notices were served by the arbitral tribunal and thus did not attend the hearing.

Additionally, both China and the Republic of Korea have acceded to the New York Convention, and both countries concluded the Treaty on Judicial Assistance on 7 July 2003, which was been adopted by the Standing Committee of the National People's Congress of China on 29 February 2004. The Arbitration Law of the Republic of Korea recognizes service by way of mailing and prescribes that any written communication shall be deemed to have been received on the day when it is delivered to the addressee personally, and prescribes that the party to the arbitration shall file an application for revoking an arbitral award within three months upon the receipt of the effective award.

V. Reviewing Opinions and Reasons of the Harbin Intermediate People's Court

The Harbin Intermediate People's Court held that the dispute between Haimalu and PoPeyes arose from the commercial legal relationship from the contract, which could be settled by arbitration according to Chinese law. Since PoPeyes was situated within the jurisdiction of the Harbin Intermediate People's Court, according to the Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to Which China Has Acceded ("**Notice on Implementing the New York Convention**") as well as the factual background, Haimalu's application for recognition and enforcement of the arbitral award made by KCAB met the requirements for court's acceptance. PoPeyes claimed that circumstances may exist for the refusal to recognize and enforce the arbitral award.

Upon review of the case, the Harbin Intermediate People's Court found that the arbitral body has not been chosen by the parties in their agreement and the arbitration notification has not been delivered to the agreed address. Accordingly, there were circumstances to refuse the recognition and enforcement of the arbitral award as argued by PoPeyes. Thus, the Harbin Intermediate People's Court intended not to recognize and enforce arbitral award No. 04113-0004 made by KCAB according to article 268 of the Civil Procedure Law of the People's Republic of China.

VI. Reviewing Opinions and Reasons of This Court

Upon review, this court holds that:

1. Both China and the Republic of Korea have acceded to the New York Convention. Therefore, the application for recognition and enforcement of arbitral awards of the Republic of Korea shall be governed by the Convention. According to the New York Convention and the relevant provisions of the Supreme People's Court, the Harbin Intermediate People's Court has jurisdiction over this case.

2. The statement that "the arbitral body has not been chosen by the parties in the agreement" as made by the Harbin Intermediate People's Court is not a sufficient reason for the refusal to

recognize and enforce the arbitral award in this case. (1) According to Article V(1) of the New York Convention and the meaning prescribed to Article 4 of the Notice on Implementing the New York Convention, this issue shall not be reviewed unless requested by one of the parties. However, in this case, PoPeyes did not refer to this issue in its argument, so the court shall not review it upon its discretion. (2) In the development agreement and chain agreement at issue in this case, both parties have agreed that any dispute between them “shall be submitted to arbitration, the arbitrators shall be selected from the KCAB and the presiding arbitrator shall be selected by the KCAB”. Accordingly, it can be inferred from the arbitration clause that the choice of arbitral body has been clearly agreed upon by both parties and the statement “the arbitral body has not been chosen by the parties in the agreement” is not properly founded.

3. The statement “the arbitration notification has not been served to the agreed address” as made by the Harbin Intermediate People’s Court is also not a sufficient reason for the refusal to recognize and enforce the arbitral award in this case. (1) PoPeyes did not request that the court refuse the recognition and enforcement of the arbitral award on the ground that the KCAB “did not serve the arbitration notification to the agreed address”. Accordingly, the court shall not review it upon its own discretion. (2) The matters of arbitration involved in this case shall be governed by the arbitration law of the Republic of Korea, which recognize the effectiveness of the service by delivering mails. Thus, although the address to which the KCAB served the arbitration notification and the award to PoPeyes by DHL Express was different from that specified in the development agreement and chain agreement, the said notifications had not been returned. Moreover, Wang Jianglong also recognized that he had received the express mails but did not pay attention to them because he did not understand Korean. Therefore, this court considers that the KCAB served the arbitration notification to PoPeyes.

4. On the issue of whether any grounds exist according to which the recognition and enforcement of the arbitral award might be refused.

As to the defence of PoPeyes that the KCAB did not provide the service according to the means prescribed in the Treaty on Judicial Assistance between China and Korea, thereby rendering the arbitral award unenforceable, this court holds that the Treaty on Judicial Assistance only regulates matters of assistance required by both countries in the judicial field, and shall not be applied to matters of arbitration. Therefore, PoPeyes’ defence lacks legal basis and shall be refused.

PoPeyes also claimed that the KCAB did not notify it by any of the proper means prescribed in the New York Convention, and thus the recognition and enforcement of the award should be refused. As to this issue, the Judicial Committee of this court formed two different opinions upon discussion:

The majority held that since Haimalu and PoPeyes had agreed that their contractual agreements shall be interpreted in accordance with the law of the Republic of Korea and that any disputes shall be submitted to the KCAB for arbitration, the arbitration procedures shall comply with the laws of the Republic of Korea. Article 23 of the Arbitration Law of Korea prescribes that: (1) the parties are free to agree on the language or languages to be used in the arbitral proceedings. If there is no such agreement, the arbitral tribunal shall determine such language or languages, otherwise Korean shall be used. (2) The agreement or determination referred to in Paragraph (1)

shall, unless it is otherwise stipulated, apply to any written document by a party, any hearing and any award, decision or other communication by the arbitral tribunal. (3) the arbitral tribunal may, if it considers necessary, order a party to submit any documentary evidence, accompanied by a translation into the language or languages referred to in Paragraph (1).” Thus, it does not violate the Arbitration Law of Korea for the KCAB to notify PoPeyes to take part in the arbitration in the language of Korean since the agreement between both parties does not stipulate a language for the arbitration. PoPeyes did not take part in the arbitration due to its failure to pay due attention to the relevant documents and the materials served while trading with Korean enterprises. Therefore, no ground listed in Article V of the New York Convention shall be applied to this award and arbitral award No. 04113-0004 made by KCAB shall be recognized and enforced.

The minority considered that, although the method of service in question complies with the law of the Republic of Korea, which is the seat of arbitration chosen by both parties, if the domestic law is contrary with an international treaty, the international treaty shall prevail. The Republic of Korea has acceded to the New York Convention, and Article V of the New York Convention prescribes that the arbitral body shall notify the designated arbitrators or arbitration proceedings to the parties in a proper way.

Though the New York Convention does not explicitly mention the specific requirements of “proper notice”, according to the general understanding of the meanings of words “proper” and “notice” and their uses and purposes, the “proper notice” shall at least mean that the party to be notified could or should know the “notice” and its contents including the identification of the party that made the notification and sent out the notice, as well as the contents of the notice so that the party to be notified could judge or choose whether or not to exercise its rights. In this case, PoPeyes, the party to be notified, is a legal person within the territory of the People’s Republic of China, so the KCAB shall respect the language customs of China and attach the Chinese translation when it serves relevant notices, awards and other documents to the citizens or legal persons within the territory of China. When PoPeyes, as a Chinese legal person, receives express delivery sheet bills written in English or the documents without a Chinese translation, it might not be able to understand and also has no reason that it should understand where and why the expresses were sent out, or what they contain, having no legal obligation to know the contents of said documents. Thus, the notification made by the KCAB when it rendered the arbitral award in this case was improper and there were grounds upon which the recognition and enforcement of the arbitral award should be refused. The arguments of PoPeyes are founded, and according to Article V(1)(b) of the New York Convention, the application of Haimalu shall be dismissed, and the recognition and enforcement of arbitral award No. 04113-0004 made by the KCAB shall not be granted.

Considering the great discrepancy between the aforesaid opinions, this court reports the case to your court for instructions.