

CACV000231/1995

IN THE COURT OF APPEAL

1995, No. 231
(Civil)

APEX TECH INVESTMENT LIMITED
v CHUANG'S DEVELOPMENT
(CHINA) LIMITED

Coram: Mortimer and Mayo JJA and Wong J

Date of Judgment: 15 March 1996

JUDGMENT

Mortimer JA: On 24 May 1995 the plaintiff obtained an *ex parte* order from Leonard J to enforce in Hong Kong an arbitration award in its favour in the People's Republic of China. The award was made by the *China International Economic and Trade Arbitration Commission* ('CIETAC'). On 8 September 1995 the judge dismissed the defendant's application to set aside his *ex parte* order. The defendant now appeals against that order to prevent the plaintiff from enforcing the award in Hong Kong.

The facts

For my part I am content to take the facts from the judgment.

On 1 May 1992 the plaintiff agreed to buy and the defendant to sell a block of flats in Dan Shui, Hui Yan County in the People's Republic of China for HK\$30,357,300. Payment was to be by instalments. Two were paid but the plaintiff refused to pay the third instalment with the consequence that the defendant forfeited the earlier two.

On 30 April 1993 the plaintiff applied for arbitration in accordance with an arbitration clause in the agreement for sale. On 4 September 1993 there was a hearing. The parties attended and presented their cases. That hearing was completed on 5 November and on 10 December 1994 the arbitral tribunal made an award in the plaintiff's favour.

The question in the arbitration was whether the agreement was valid. It was a condition precedent that the plaintiff should have the right to sell the flats which it had purchased on to Hong Kong purchasers. This in turn depended upon whether the defendant had acquired the right to build 'commodity real properties destined to be sold abroad'. Those words are not terms of art.

In fact the defendant had a 'Certificate for the Use of State-owned Land' issued by the Hui Yan Country State-owned Land Bureau on 1 June 1989. The use permitted was 'industrial estate by foreign investors solely'. The Certificate stated that it had been prepared under the supervision of Land Administration Bureau of the State. The question was - did the Certificate for the Use of Land confer the right to sell abroad? The tribunal answered this in the negative, adding that if change of use was required, consents had to be obtained. That was the basis of the award made in the plaintiff's favour.

The right to enforce the award in Hong Kong

The award is a convention award within the meaning of s.2 of the Arbitration Ordinance, Cap. 341 and the enforcement of such awards is dealt with in s.44, the relevant parts of which read:

"44 Refusal of enforcement

- (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
- (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-
...

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings *or was otherwise unable to present his case;*" (*emphasis added*)

This provision follows precisely the words of the New York Convention.

The decision below

The arbitral tribunal had the right under its articles to make its own inquiries and to collect its own evidence. After hearing the parties present their cases on the issue, the tribunal was minded to make its own inquiries. The relevant passage dealing with those inquiries is as follows:

"The Arbitral Tribunal was minded to conduct its own enquiries on the questions of the nature of the 'Industrial estate to be established and financed solely by foreign investment'. Such enquiries were made to the Guangdong Province State-owned Land Office which was the land administrative body established under the Implementation Methods of Administration of Land in Guangdong Province. The Guangdong Province State-owned Land Office replied that the 'Industrial estate to be established and financed solely by foreign investment' did not include land for commodity real properties destined to be sold abroad. To change the land use from 'Industrial estate to be established and financed solely by foreign investment' to commodity real properties destined to be sold abroad, it was necessary to obtain consents from the relevant Planning Administration departments above the county level and from those bodies which were authorised by the People's Government above county level to grant permit for the sale of commodity real properties destined to be sold abroad. Also, Permission for such change must be obtained from the State-owned Land Administration Department above the county level. The Guangdong Province State-owned Land Office also expressed the view that upon preliminary investigation, there were indeed some problems with the Certificate For The Use Of State-owned Land No. Hui Yang Fu Guo Yong Zi (89) 1321040018 issued by the Hui Yang Province."

The defendant contends that there was a procedural irregularity. It ought to have been given notice of the result of the inquiries made by the arbitral tribunal and then ought to have been given the opportunity to make further submissions and, if necessary, call further evidence. On that the judge agreed. So, the judge found that s.44(2)(c) applied. In other words, that in these circumstances the defendant had been unable to present its case.

However, it is clear that the judge has a discretion in s.44(2):

"(2) Enforcement of a Convention award *may* be refused..." (emphasis provided)

He exercised his discretion to order enforcement in spite of his finding of a procedural irregularity.

Having examined the material put forward by the defendant which it submitted would have been available to put before the tribunal, he came to the conclusion that the result of the arbitration could not have been different even if the opportunity to be heard had been granted.

The judge relied upon *Paklito Investment Limited v Klockner East Asia Limited* [1993] 2 HKLR 39 and the principles referred to in Professor Van den Berg's paper- 'The New York Arbitration Convention 1958 - Towards a Uniform Judicial Interpretation'. In that paper the professor - following a Court of Appeal decision in Hamburg - says:

"If it is clear that the arbitral decision could not have been different, had the irregularity in the procedure not occurred, it would seem to make no sense to refuse enforcement."

There is no challenge in this Court to either the judge's decision that there was a procedural irregularity which prevented the defendant from presenting his case before the tribunal, or of the principle upon which the judge acted in exercising his discretion to nevertheless order enforcement.

The issue on appeal

The issue on this appeal is therefore very limited. Mr Tang QC for the defendant and Mr Huggins QC for the plaintiff agree that the only issue is whether the judge was wrong when he decided that it was clear that if an opportunity to be heard further had been given to the defendant it could have had no effect upon the tribunal's award.

The approach of this Court

In considering this matter on appeal - as it was at first instance - it is important that the court should meticulously avoid any consideration of the merits of the award. This the judge made clear in his reasoning and in his finding when he said:

"I find that I cannot say that the result could have been different had the Defendant had an opportunity to make representations or call evidence on the material obtained by the tribunal of its own volition."

The word 'could', in my judgment, is of some importance. The word 'could' rather than 'would', to my mind, properly indicates the way in which the court must keep out of the merits. Of course, this is particularly so when the court is considering an award under a foreign system of law.

Was the judge's decision correct?

The judge rightly concentrated upon the matters which the defendant would have brought to the attention of the tribunal had it been given the opportunity to do so. He considered the relevant part of the award; the letter of 4 January 1995 which the defendant sent to the State-owned Land Department of Guangdong the reply of 5 January and finally the letter from the Hui Yang City Bureau of 11 February 1995. He decided that the stance taken by the State-owned Land Department of Guangdong in its reply to the tribunal and in its letters to the defendant were consistent. With this, for my part, I agree. However, this consistency also demonstrates without question that there is considerable uncertainty about the meaning of the words in the Certificate of Use. After initially giving a clear interpretation of the words in this certificate, the tribunal went on to say:

"That Guangdong Province State-owned Land Office also express the view that upon preliminary investigation there were indeed some problems with the certificate for the use of state-owned land Hui Yang Fu Guo Yong Zi (89) 1321040018 issued by the Hui Yang Province."

One adds to that, the letter of 5 January which says:

"At present, a specific legal definition has not been made on 'Industrial Estate' by the related laws and regulations of the State. According to our understanding on the spirit of Article 2 of the 'Provisional Management Guidance Relating to the Foreign Investor on Developing and Operation a Whole Plot of Land' and with reference to the actual practice on the examination and approval of use of land in Guangdong Province during recent years, the land, when specified as an 'Industrial Estate', should be used principally for industrial development (including the construction of the factories, warehouses and related facilities, etc.) purposes. However, it is also permitted to utilize a portion of land within the Industrial Estate for the construction of associated buildings for production and living services (such as shops, entertainment, residential and related facilities); and the sale or letting of such ground buildings is also permitted. Actual building works may be carried out in accordance with the master construction plan as approved by relevant Governing authority of the People's Government at the local County level or above."

This letter, it seems to me, further muddies the waters. It confirms that the result of the further inquiries made by the tribunal were far from conclusive.

On 11 February 1995, there was a further letter from the Hui Yan City Bureau which said:

"The construction of 'Chuang's Garden' properties for sale, by your company, should not be regarded as "an alteration to the use of land without approval."

Mr Tang relied upon that letter also. It tends to suggest that the defendant had the rights it contends for.

Finally, I would refer to the letter from the same authority-referred to by my brother Wong J in the course of argument-dated 28 February 1992. That letter reads:

"The project in Danshui of 'Chuang's Garden' commercial and residential zone which has been jointly built by the Danshui Real Estate Development Company, a company under the People's Government of Danshui Town, and Chuang's Development (China) Limited can now be offered for sale in Hong Kong. Buyers of the flats may proceed to obtain their real title certificates from the Real Estate Registration Office of the Bureau on production of the relevant purchasing documents."

What the exact effect of that letter was, I simply do not know, but it would appear also to show that this whole issue was far from certain.

In spite of Mr Huggins' admirably succinct and forceful submissions in support, it is with considerable reluctance that I find myself unable to agree with the judge's findings set out in his admirably clear and well-reasoned judgment.

Conclusion

Having regard to the uncertainty on the meaning of the permission granted to the defendant demonstrated by the award itself and the letters which both preceded and followed it, I am unable to say that if the defendant had been given the opportunity to make further representations to the arbitral tribunal after it had made its own inquiries, that it could not have affected the outcome of the award. As we were rightly reminded by Mr Tang in the course of his submissions this is particularly so when the applicable law is that of the People's Republic of China.

The final matter is this. The award relates not simply to the main issue canvassed, but also to the issue lying behind it, which is the validity under Chinese law of the contract between the parties.

In those circumstances, for my part, I would allow this appeal and refuse to order that the award be enforced. In reaching that decision I particularly thank counsel for their assistance.

Mayo JA: I agree entirely and have nothing to add.

Wong J: I also agree that the appeal should be allowed and have nothing to add.

(Barry Mortimer)
Justice of Appeal

(Simon Mayo)
Justice of Appeal

(Michael Wong)
Judge of the High Court

Representation:

Mr Robert Tang QC and Mr Horace Wong (M/s Deacons Graham & James) for Appellant/Defendant

Mr Adrian Huggins QC and Mr Alfred Chan (M/s Ho, Tse, Wai & Partners) for Respondent/Plaintiff