1997, No. 65
(Civil)

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT
(MISCELLANEOUS PROCEEDINGS NO. 2900 OF 1995)

IN THE MATTER of Section 2H and 42 of the Arbitration Ordinance, Chapter 341

and

IN THE MATTER of a Convention Award made in the People's Republic of China dated 24th March, 1995

BETWEEN

LOGY ENTERPRISES LIMITED Appellant

and

HAIKOU CITY BONDED AREA WANSEN PRODUCTS TRADING COMPANY
also known as
HAIKOU BONDED AREA WANSEN PRODUCTS TRADING COMPANY Respondent

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Coram: Hon Nazareth VP, Bokhary & Liu JJA in Court

Date of Hearing: 22 May, 1997

Date of Judgment: 22 May, 1997

Date of Handing Down of Reasons:6 June 1997

J U D G M E N T

Liu JA:

On 24 March 1995, an arbitration tribunal appointed by the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing made an arbitral award in favour of the respondent as claimant against the appellant as respondent in an arbitration, R94368. The respondent's claim submitted to arbitration was for, inter alia, damages for short shipment of steel wire rods.

For the composition of the arbitration tribunal, the respondent nominated one Mr Kang who was unable to assume his post as arbitrator, and the Chairman of CIETAC nominated one Mr Zhai Bao Shan (Zhai) as a substitute arbitrator on the respondent's instructions. The appellant nominated one Mr Cao Jia Rui. The Chairman's preference for the presiding arbitrator was Mr Xie. They were all selected from the panel of arbitrators of CIETAC and were duly appointed pursuant to Article 24 of the CIETAC Arbitration Rules. The arbitration tribunal sat in Beijing, the People's Republic of China (PRC) on 5 December 1994 and an award was made in favour of the respondent. After the arbitral award, the appellant was unable to find Zhai amongst the names published in the panel of CIETAC arbitrators. The appellant also discovered that Zhai was a high-ranking official of the Import and Export Commodity Inspection Bureau (CCIB). In the said arbitration, the respondent relied on, inter alia, an Inspection Certificate issued by the Haikou branch of CCIB. It is common ground that Zhai was at the material time a Director of the Inspection Technology Section of CCIB. On 17 November 1995, Leonard, J granted leave to the respondent for enforcing the arbitral award in Hong Kong. On

19 March 1997, Sears, J, refused to set aside the order of Leonard, J but the judge stayed the order for payment-out of $1,370,083.21 the appellant lodged in court until the hearing of this appeal. From the order of Sears, J, the appellant appealed.

After leave was granted on 17 November 1995 by Leonard, J for enforcing the respondent's arbitral award, on 13 March 1996 CIETAC provided the respondent with an opinion on the propriety of Zhai serving as an arbitrator in the said arbitration. The opinion confirmed Zhai as a member on the CIETAC panel of arbitrators. It also gave his position and scope of his responsibility, which were not associated with trading activities or steel wire rods. The opinion of CIETAC noted that panel members were part-time and that once a nomination was accepted an arbitrator should not be regarded as a representative of the unit to which he or she was attached. CIETAC concluded that "Mr Zhai Boa Shan acting as an arbitrator in the R94368 case was in compliance with the law and Arbitration Rules." To the opinion of CIETAC obtained by the respondent, no input had been made by or on behalf of the appellant. In addition, on 22 April 1996 a former chief secretary of CIETAC, a PRC lawyer, Mr Cui Bing Quan gave a affirmative opinion. Article 81 of the CIETAC Arbitration Rules empowered CIETAC to interpret the rules. Under Article 29, a time limit was set for challenging an arbitrator, latest by the end of the last hearing. Under Article 30, the CIETAC Chairman was to decide himself a challenge of this nature. On the views so firmly expressed by CIETAC and its former chief secretary after the arbitral award, it would seem that any attempt on the part of the appellant to question the capacity of Zhai would not likely have been successful even if a complaint had been made to the Chairman in time.

The appellant obtained legal opinions from a former Justice of the People's Supreme Court, Mr Shi Tong Wen compiled between 25 - 28 February 1996, from Professor Chen Wen Hou, a professor of civil law at the Chinese Senior Judges Training Centre, on 23 September 1996 and from Professor Wang Gui Guo of our City University on 5 March 1997. On 15 March 1997, the respondent caused to be procured from Mr Cui Bing Quan a further opinion in rebuttal. Suffice it to say that the legal opinions given to the appellant were in stark contrast with those given to the respondent.

The issues were reasonably clear. First, whether there was any bias or conflict of interest arising from Zhai's high-ranking position with CCIB, a sub-branch of which issued the material Inspection Certificate. The aribtral award was based on, inter alia, this certificate. Secondly, whether the arbitral award was vitiated by bias. Thirdly, whether such conflict of interest was contrary to the public policy of PRC so as to annul the arbitral award. Fourthly, whether it would be contrary to natural justice and the public policy of Hong Kong to assist in the enforcement of the arbitral award made by a panel not wholly independent or impartial. Central to these issues was the possibility of real danger of bias.

Counsel for the appellant, Mr Xavier relied on Article 2 of the CIETAC Arbitration Rules which provided that CIETAC should "independently and impartially resolve in arbitration disputes .... in order to protect the legitimate rights and interests of the parties". See also Article 53. Article 28 enjoined an appointed arbitrator, having a personal interest in the case, to make a full disclosure and request for a withdrawal. Article 29 empowered any party to request AEITAC to remove an

appointed arbitrator if he had "justified reasons to suspect [his] impartiality and independence".

Section 44(2)(e) of the Arbitration Ordinance provides that the court may refuse leave to enforce an arbitral award if it is proved that "the composition of the arbitral authority ..... was not in accordance with the law of the country where the arbitration took place."

On behalf of the appellant, criticism was levelled at Zhai that he had a built-in tendency to support the Inspection Certificate issued by a sub-branch of CCIB at Haikou. No one would wish to, so counsel argued, tarnish the image of his own outfit. In all his critical analysis, Mr Xavier leaned heavily on the observation of Lord Goff in **R v. Gough** [1993] 2 WLR 883 at p. 904 D.

> "Whether a fair minded person sitting in court and knowing all the relevant facts would have had a reasonable suspicion that a fair hearing was not possible".
>
> "For the avoidance of doubt a test should be stated in terms of real danger rather than likelihood, to ensure that the court was thinking in terms of possibility rather than probability of bias."

Diverse views expressed on the neutrality or otherwise of Zhai emanated from credible personalities in the legal fraternity, on one hand, by CIETAC and its former chief secretary for the respondent and on the other by the Chinese legal advisers for the appellant. It is impossible to find fact on PRC laws and regulations or reach any conclusion thereon on the written information placed before us. The conflicting views could not be resolved on paper. It is a grave charge of dereliction of duty against a responsible officer in the Head Office for covering up a mistake or oversight of a branch office, particularly in the course of his acting as an

independent arbitrator appointed by a national institution which is known to strive for international credence. A serious charge of this nature should be supported by cogent evidence. But the core issue in the appellant's case was risk of bias, and in that regard we could also derive no assistance from the unresolved competing legal opinions. We must turn then to the circumstances known to us for ascertaining whether or not a case of real danger of bias was made out by the appellant.

On behalf of the appellant, Mr Xavier sought to make much of the absence of the Tally Report for recording the unloaded quantify at destination, the tribunal's failure or omission to seek an explanation from CCIB, Haikou for not specifying the number of bundles weighed in the Inspection Certificate or for the non-production of the Tally Report, the tribunal's failure to deal with the SGS survey report and the clean bill of lading, both of which were in favour of the appellant on the shipped quantity, and the failure of the respondent itself to account for the non-production of the Tally Report. It was also complained that the arbitration tribunal failed to address the appellant's defence on the "CNF FO" terms in the price clause for passing risks to the respondent over the rail of the vessel. But reference to the 'CNF FO" defence was made in the award. Although the arbitration tribunal did not specifically dispose of this defence, the making of the award in favour of the respondent must have, by necessary implication, rejected it.

At an interview given to the respondent, one of the arbitrators, Mr Cao described the compromise he made for arriving at a joint view on the Inspection Certificate in these terms:

> "..... the arbitration award did not confirm the inspection certificate of CCIB. Therefore, the compromise I mentioned meant that Mr Zhai Bao Shan adopted a cooperative compromising attitude, he agreed not to confirm; and the paragraph in the arbitration award about not confirming the inspection certificate of CCIB was written in a very mild and implicit manner ....."

Whatever that connoted, Mr Cao was simply recounting deliberation in action. It could not be material.

Counsel submitted that the alleged shortfalls of the arbitrators his client complained of could not be readily explained except by bias.

The resolution of this trade dispute was delegated to the arbitration tribunal. It would not be open to us to investigate any error of law or fact here on appeal from the judge's decision not to set aside leave for enforcing a PRC award, and this court could not properly form any concluded view as to whether the tribunal should have been more rational or what telling mistakes, if any, the arbitrators could have but had not avoided. Faced with this obstacle to a true evaluation of the tribunal's performance, this court was unqualified to determine how, if at all, the deliberation of the arbitration tribunal was affected by the alleged bias of one member. After all, the conduct of the other two members was not sought to be impugned. It would be incredibly onerous to ascertain whether or not the arbitration tribunal had been improperly swayed and, if so, what the degree of unsavoury influence was. We were not, as the judge was not, sufficiently assisted to make any crucial evaluations without which no one could even begin to invite us, with any sense of justification, to draw adverse inferences. Mr Xavier pressed upon us to infer bias from the flagrant disregard of what was, in his view, the more credible evidence. But it would be ludicrous for anyone to try to draw any conclusion from disputed consequences emerging from PRC law, which this court was

unable to resolve or from the alleged improprieties of Zhai or the tribunal in which he served, which this court could not investigate. Instances where bias may be inferred from alleged blatant errors or irrational conduct which a court could not investigate must be rare. Mr Xavier's vigorous attack at the various aspects set out earlier in this judgment would give us no license to inquire into the alleged failures or omissions of the tribunal. We are unable to infer bias or risk of bias from circumstances which we are not free to unravel.

Nothing which Mr Xavier directed our attention to was sufficient to discharge the appellant's burden of having to establish either that the composition of the arbitration tribunal was not in accordance with the law of PRC or that there was any real danger of bias in the discharge of Zhai's duty as an appointed arbitrator. Even assuming that Article 23 of the Criminal Procedure Law of China and Article 48 of the Code of Civil Procedure applicable to PRC would recognise the principle of conflict of interest as part of the public policy of China, no case of conflict of interest was shown to found counsel's contentions that there was real danger of bias on account of the position Zhai held in CCIB and consequently that PRC's public policy had been breached.

It was also not demonstrated that Zhai had at any time acted partially, contrary to natural justice as an appointed arbitrator or that the tribunal had laid itself open to suspicion by a fair minded person knowing all the relevant facts of a possible unfair hearing. There is no substance in counsel's submission that our public policy had been breached.

Sears, J was not persuaded that the appellant established any breach of s. 44(2)(e) of our Arbitration Ordinance. I agree with the judge

and with his refusal to set aside leave granted by Leonard, J for enforcing the PRC arbitral award. At the conclusion of the hearing, this court dismissed the appeal with costs with an intimation that reasons were to be given later. These are the reasons I now hand down.

Bokhary JA:

Article 28 of the CIETAC Arbitration Rules, which in effect disqualifies any arbitrator who has a personal interest in the case, is in harmony with the Common Law rule (declared in *Reg. v. Gough* [1993] AC 646 at p. 670 C- G) that any real danger of bias on the part of an arbitrator disqualifies him.

On the facts of the present case, the judge was not persuaded that the arbitrator under attack had any personal interest in the case or, which comes to the same thing here, that there was any real danger of bias on his part.

Of the arbitrator in question, the judge said:

> "He is the Chief Official of the Inspection Technology Section at the Import and Export Commodity Inspection Bureau of the PRC, the CCIB, a national entity, so his is a national appointment and his duties are set out at page 739 of the Bundle. He was responsible for inspection relating to the import and export of commodities involving safety hygiene and environmental protection. Inspection of steel does not lie within the ambit of that group."

Then the judge said this about the issue in which it is suggested that the arbitrator had an interest and in regard to which it is contended that there was a real danger of bias on his part:

> "The important matter which was raised here was a certificate that was issued by the Haikou CCIB which is a subsidiary, of course, of the Hainan area CCIB and the pleadings that were placed before the arbitration panel raised the issue as to the authenticity of the certificate."

And finally the judge said this about the arbitrator's fitness to decide that issue:

> "Although he clearly was a high official, he was a professional man, I cannot see why he would in anyway have any problem over finding that a sub-region might have forged a certificate."

What I would say is this. It is for the appellant to make out its case on the question of a personal interest or, which comes to the same thing here, on that of a real danger of bias. And on the whole of the evidence filed in the present case, I am not persuaded that it has done so. It is no part of our courts' function to pronounce generally on: the CCIB; its constituent parts; the inter-relationship of those constituent parts; or whether any official of one such part may be prone to shield officials of any other such part. Naturally, our courts can only decide specific issues and do so on the evidence adduced thereon.

The evidence here does not dictate a decision in favour of the appellant. Accordingly, I am not persuaded that the judge erred when he decided against the appellant. Those are my reasons for dismissing this appeal with costs.

Nazareth V-P:

The central issue in this appeal, as Mr Xavier for the appellant himself put it in his written submission, is whether or not there has been any risk of bias or conflict of interest by virtue of the fact that one of the arbitrators was a high official of CCIB who had to determine the authenticity and reliability of an inspection certificate issued by the CCIB.

Mr Xavier did not deny, indeed he contended that the principle to act independently, impartially and fairly is well recognised in the People's Republic of China as a necessary and fundamental principle for the administration of justice in that Republic. He pointed out that these requirements as the main aims and objectives of CIETAC are clearly stated in its rules for example in Article 2:

> "… the Arbitration Commission independently and impartially resolves, by means of arbitration disputes … in order to protect the legitimate rights and interests of the parties …";

in Article 53:

> "The arbitration tribunal shall independently and impartially make its arbitral award in accordance with … the principle of fairness and reasonableness";

and in Article 28:

> "any appointed arbitrator having a personal interest in the case shall himself disclose such circumstances to the Arbitration Commission and request withdrawal from his office."

The necessity for independence, impartiality and fairness would therefore have been unlikely to have been overlooked by CIETAC arbitrators and by CIETAC itself.

CIETAC and the respondent's PRC law expert confirmed the absence of any conflict of interest. The judge must have accepted that expert evidence, as he was entitled to, in coming to his conclusion. I am bound to say that I cannot see in the tenuous interest of itself that Mr Zhai might have had in respect of the issue of the inspection certificate by the

Haikou branch of CCIB, anything like a personal interest. Stripped of all the references to authorities, statutory and other provisions, which have very little to do with it, there is nothing of substance in the point taken. There was no real danger of bias.

The judge was not shown to be wrong; it followed that the appeal had to be dismissed.

(G P Nazareth)	(K Bokhary)	(B Liu)
Vice President	Justice of Appeal	Justice of Appeal

Mr Albert Xavier inst'd by M/s Desmond Wong, Angus Tse & Co. for appellant

Mr Rimsky K K Yuen inst'd by M/s Livasiri & Co. for respondent