HCCT55/2001

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS

NO.55 OF 2001

IN THE MATTER OF an arbitration award of the International Court of Arbitration, Paris, France dated 28 June 2001

AND

IN THE MATTER OF section 2GG of the Arbitration Ordinance, Cap.341

AND

IN THE MATTER OF Order 73, rule 10(1)(b) of Rules of High Court, Cap.4

BETWEEN

SOCIETE NATIONALE D'OPERATIONS PETROLIERES DE LA COTE D'IVOIRE – HOLDING (acting on behalf of Petroci Exploration Production S.A.)	Plaintiff
and	
KEEN LLOYD RESOURCES LIMITED	Defendant

Before : Hon Burrell J in Chambers

Date of Hearing : 18 December 2001

Date of Decision : 20 December 2001

D E C I S I O N

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1. On 2 August 2001, the plaintiff was granted leave, *ex parte*, to enforce an ICC arbitration award which had been made in their favour pursuant to arbitration proceedings concluded in France.

2. The agreed facts are as follows. The defendant commenced proceedings in France to "appeal against a decision granting recognition or enforcement" of the award. French law provides five specified bases upon which such an appeal can be launched. The lodging of such an appeal in France automatically stays the enforcement of the award in France. France is a party to the New York Convention therefore valid enforcement proceedings have been commenced in Hong Kong under Part IV of The Arbitration Ordinance, Cap.341. Section 44 is the applicable section. Section 44 sets out the different circumstances in which a foreign award may not be enforced in Hong Kong. The burden is on the defendant to satisfy the court that they come within one of the sub sections to section 44(2). Even if the case does fall within a particular sub-sub section, the court retains a discretion to nonetheless enforce the award. This court is not concerned with the strengths or weaknesses of the "appeal" in France. The appeal in France was commenced before the enforcement proceedings in Hong Kong.

3. The defendant relies, primarily, on section 44(2)(f) :

> "(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves—
>
> (*f*) that 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, it was made."

4. The sole point in issue on this application is whether or not the award in France "has not yet become binding on the parties" by virtue of the fact that appeal proceedings have commenced.

5. Mr Jonathan Harris, counsel for the defendant, relies on a passage from "*Law and Practice of International Commercial Arbitration*", 3rd Edn :

> " The fifth ground of refusal of recognition and enforcement under the New York Convention is as follows :
>
> > '(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 ….'.
>
> This fifth ground for refusal of recognition and enforcement of an arbitral award (which, like the others, also appears in the Model Law) has given rise to more controversy than any of the previous grounds. First, there is the reference to an award being 'not binding'. In the Geneva convention of 1927, the word 'final' was used. This was taken by many to mean that the award had to be declared as 'final' by the court of the place of arbitration; and this gave rise to the problem of the *double exequatur*, which has already been discussed. It was intended that the word "binding' would avoid this problem, particularly since many international and institutional rules of arbitration state in terms that the award of the arbitral tribunal is to be accepted by the parties as final and 'binding' upon them. However, some national courts still consider it necessary to investigate the law applicable to the award to see if it is 'binding' under that law — although the better position appears to be that an award is 'binding' if it is no longer open to an appeal on the merits, either internally (that is to say, within the relevant rules of arbitration) or by an application to the court."

6. I accept this as a correct statement of the law applicable to this case. A question to be addressed therefore is — is the award no longer open to an appeal on the merits? If so, it is binding and section 44(2)(f) does not apply. If it is still open to an appeal on the merits it is not binding, section 44(2)(f) applies and the court may not enforce the award in Hong Kong.

7. Mr T. Hield for the plaintiff contends that the French "appeal" procedure is limited to five specific grounds which do not include an appeal on the merits. Before considering this aspect however he invites the court to consider the words of the arbitration agreement between the parties and the ICC rules when deciding whether the French award is a binding award or not. This I now do.

8. Clause 8.5 of the parties agreement states that the arbitrators decision "shall be binding and final on the parties who undertake to enforce it." This is a familiar arbitration clause indicative of the fundamental principle that parties choose arbitration so as to avoid litigation and in so doing entrust all disputes and factual issues to an arbitrator. This is an underlying principle of finality.

9. Article 28(6) of the ICC rules states :

> " Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can be validly made."

10. Article 42(2) states :

> "(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made ..."

11. A commentary on Article 28(6) in the 3rd edition of "*International Chamber of Commerce Arbitration*" contains the following strong remarks :

> "There is, in other words, no appellate arbitral procedure which prevents the entering into effect of the award. The parties are thus called upon to comply immediately with the award at the date of notification. The intent of Article 28(6) is also to supply a title with legal effect, ripe for enforcement before any nation jurisdiction.....
>
> Article 28(6) assures that no further arbitral procedure is necessary to ensure that the Award is binding upon the parties, and seeks to eliminate any ordinary judicial recourse.....
>
> By operation of Article 28(6), the parties 'undertake to carry out any Award without delay …' Accordingly, an ICC award must be considered binding between the parties when rendered. It constitutes not only a moral obligation to comply with the terms of the award, but also a title from which legal rights flow. Thus, an award will ordinarily be considered to have *res judicata* effect from the date it is rendered.
>
> The fact that the ICC Rules comport an obligation on the parties to carry out the award has effect on its immediate enforceability pursuant to the terms of international conventions....."

12. All this simply enforces the fact that defendants face an uphill task. Other general principles which make the task more onerous are that the courts in Hong Kong should always have regard to the principles of finality and comity in deciding whether to refuse enforcement of a Convention award and that the purpose of Part IV of Cap.341 is "discourage unmeritorious points and to uphold Convention awards except

where complaints of substance can be made good" (*per* Kaplan J in *Shenzhen Nan Da Industrial and Trade United Co. Ltd v. FM Internation Ltd* [1992] 1 HKC at page 336).

13. To see how steep the uphill task facing the defendant in this case is, I return to the point in issue. Has the defendant proved that the award is not binding because it is still open to an appeal on the merits? I have come to the conclusion that they have not discharged that burden for the following reasons.

(1) I find that an appeal to set aside an award and an appeal on the merits are different animals. The French law plainly provides for the former but not the latter. The distinction is important because the general principles set out above and the ICC rules are such that a mere application (or appeal) to set aside (on maybe technical grounds) should have no effect on the binding nature of the award. The type of appeal which does affect the binding nature of the award is confined to an appeal on the merits.

(2) Mr Hield has referred the court to, and relies on as being persuasive, a number of foreign authorities. I find the following passages to be persuasive and supporting the plaintiff's arguments.

(a) When considering whether a French award was binding in Sweden (in very similar circumstances to the present case) their supreme court[(a)] stated :

> "The legislative history states unequivocally that the possibility of an action for setting aside the award shall not mean that the award is not to be considered as not being binding. This meaning has even been admitted by GMTC. A case in which a

[(a)] *AB Gotaverken v. GMTC* (1979) Swedish Supreme Court

foreign award is not binding is when its merits are open to appeal to a higher jurisdiction. The choice of the word binding was provided for the party relying on the award. The intent was, *inter alia*, to avoid the necessity of a double exequatur [i.e., in addition to the leave for enforcement in the country where enforcement is sought, a leave for enforcement in the country of origin-*Gen.Ed*.], or the need for the party relying on the award to prove that the award is enforceable according to the authorities of the country in which it was rendered.

According to the arbitral clause in the contracts (Art.13) the parties agreed to abide by the award as being finally binding and enforceable in regard of the matters submitted to the arbitrators. Furthermore, the ICC Arbitration Rules, according to which the arbitration has been conducted, provide in Art.24 that the arbitral award shall be final.

Having regard to the above observations, the present arbitral award must be considered to have become enforceable and binding on the parties in France within the meaning of Sect.7 para.1 No.5 of the Foreign Arbitration Agreements and Awards Act as from the moment on which, and by virtue of the very fact that, the award was rendered. The fact that GMTC has subsequently challenged the award in France by means of '*opposition*' has no effect in this respect."

(b) In another very similar situation a Netherland court[(b)] said :

"It results from both the legislative history of the Convention and the text of Arts.V, para.1 under *e*, and VI, that the mere initiation of an action for setting aside, to which the initiated *recours en annulation* must be deemed to belong, does not have as consequence that the arbitral award must be considered as not binding. An arbitral award is not binding if it is open to appeal on the merits before a judge or an appeal arbitral tribunal. If this were otherwise, the words 'has been set aside or suspended' in Art.V, para.1 under *e*, to which reference is made in Art.VI, would have no meaning. The drafters of the Convention chose the word 'binding' in order to abolish the requirement of the double exequatur which was the result of the word 'final' in the Geneva Convention of 1927. Having regard to the system of Arts.1504 and 1490 NCCP, the view expounded by respondent would result into a reintroduction of the double exequatur."

[(b)] *SPP (Middle East) Ltd (Hong Kong) v. The Arab Republic of Egypt* (1995) District Court of Amsterdam

(c) In the USA District Court[(c)] :

"......the award will be considered binding for the purposes of the [New York] Convention if no further recourse may be had to another arbitral tribunal (that is an appeals tribunal). Although there might still be recourse to a court of law to set aside the award, this fact does not prevent the award from being binding."

(d) From "*Staying Enforcement of Arbitral Awards*"[(d)] under the New York Convention :

"In using the term 'binding' instead of final the New York Conventions permits enforcement once an award is rendered even though it might potentially, or in fact, be subject to judicial recourse."

(3) Mr Harris' penultimate contention is that, in any event, the defendant's appeal in France should be regarded as a possible appeal on the merits thus making the award binding. He points to the written submissions prepared for the French appeal which contain arguments on the facts and merits of the award. I do not think this court should look beyond the French law itself. There can be no argument that an appeal on the merits is not provided for. It is neither possible nor desirable to predict how the appellant's written submission will be received in Paris.

14. Mr Harris' strongest point is that, in France, once the "appeal" procedure to set aside the award is commenced it has the automatic effect of staying any enforcement procedures, in France. It would be odd, he submits, for an award to be enforceable in Hong Kong but not in the country whence the award originated. I do not consider it to be so.

[(c)] *Fertilizer Corp. of India v. IDI Management, Inc.* (1981) Ohio District Court
[(d)] An article by Michael Tupman, July 1987

Individual countries are bound to have different rules, laws and regulations governing arbitral law and procedure. This court's concern is to apply the law applicable in Hong Kong to foreign awards. That law contains a strong pro-enforcement bias consistent with the general principle of finality and comity. If an inconsistency emerges between this and a foreign country's domestic regime then so be it. This court should be cautious before allowing the foreign regime to influence decisions in this jurisdiction.

15. I must finally deal with section 44(5) of Cap.341 which states :

> "(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

16. In the defendant's summons no reliance is placed on this sub-section. In Mr Harris written submission no reliance is placed on it either. At the commencement of the hearing it was specifically stated that the sole issue for the court's determination was whether or not the award was binding within the meaning of section 44(2)(f).

17. However, in his reply he sought to rely on section 44(5) as a fall back position and invited the court to adjourn the matter without ordering the defendant to make any security as provided for by this section. I do not blame Mr Harris for his attempt to gather in all possibilities for resisting enforcement. However, not surprizingly, Mr Hield argued

strongly that the court should not entertain it and should decide the issue one way or the other on section 44(2)(f).

18. I do not consider it appropriate to deal with this case under section 44(5) for two reasons. Firstly, it came far too late. Secondly, when considering this entirely different issue of whether to adjourn in Hong Kong because of an application to set aside in France (and if so, whether to order security) this court would have to address the issue of the validity of the award. If it were clearly invalid an adjournment would probably follow and *vice versa*. I have heard no submissions on the issue. I cannot therefore make any findings as to its validity which might result in an order under section 44(5).

19. For all these reasons, I dismiss the defendant's summons. I make as costs order *nisi* in the plaintiff's favour.

(M.P. Burrell)
Judge of the Court of First Instance
High Court

Mr Temogen Peter Hield of Messrs Coudert Brothers, for the Plaintiff

Mr Jonathan Harris, instructed by Messrs Alvan Liu & Partners, for the Defendant