The Case of XXX Co., Ltd. v. XX Company, Weihai on Dispute over the Payment of the Goods of Sales Contract

Jurisdiction: Arbitration; CIETAC

Date of Decision: November16, 2001

1.Case Brief

In September 1998, the claimant, as the seller, and the respondent, as the buyer, concluded the contract in this case which stipulated that the respondent would purchase 190 tons of 3# crude rubber at a unit price of $630/ton and the total sum was $119,700, the port of shipment was the port in Thailand and the port of destination was Dalian in China, the importer should, within 10 days as of the date the customs procedures were finished, transfer the price of the goods by telegraph to the bank as appointed by the exporter, such pre-picking up fees as the storage fee should be assumed by the claimant while the after-picking up fees should be assumed by the respondent after the goods arrived at Dalian.

Because the respondent did not pay the price when performing the contract, the claimant applied for arbitration according to the arbitration term as agreed in the contract. The claimant ultimately confirmed the claims for this case as follows:

(1) The respondent should pay the claimant the owed price of RMB 818,353Yuan;

(2) The respondent should compensate such losses as a result of the delayed payment as

(a) the loss of interest RMB 118,272Yuan and the interest from the claimant applying for arbitration to that the final decision was made; and

(b) the loss of attorney fee RMB 20,000 Yuan;

(3) The arbitration fee should be assumed by the respondent.

As regards the facts and reasons of this case, the claimant claimed that:

The claimant performed the liabilities as agreed in the contract. The respondent applied to customs and picked up the goods in accordance with the contract, but did not perform the payment liability agreed in the contract for a long time. Although the claimant frequently hastened, the respondent did not pay off until now by varied excuses.

The respondent's conducts had violated the liability as stipulated by Article 14 of the contract, which constituted a breach of contract because of rendering large loss to the claimant. As a result, the respondent should pay the claimant immediately and undertake the liability of breach of contract to compensate the claimant for loss suffered from such breach.

Against the statements and claims above, the respondent presented its main defenses as follows:

(1) Both parties did not agree on the application of law for the disputes in either of the several contracts signed in different periods. As the contract in this case was both signed and performed in China and according to the principle of close contact, the case should apply laws of China, i.e. the General Principles of the Civil Law of the People's Republic of China and the Contract Law of the People's Republic of China.

(2) Aiming at the identical batch of goods, the two parties had signed 3 contracts of different contents on July 30, 1998 as well as in September and October of 1998. The 3 contracts did not definite the validity of each contract, but whereas the contract signed in October of 1998 was the last one and both parties did not have any other relationships on business except for the 3# crude rubber, the last contract had replaced the former two and the both parties had performed liabilities on the basis of this contract during the actual performance.

Therefore, the 98HC01 contract signed in October of 1998 (hereinafter referred to as the October Contract) should be the radical basis for handling this case.

(3) As regards whether the respondent should undertake responsibility

The October Contract stipulated clearly that the price of goods should be paid to the seller by Weihai XX Industry Co., Ltd as the entrustor of import. The contract on sales of goods was based on the entrustment relationship between Weihai XX Industry Co., Ltd. (hereinafter referred to as XX Co.) and the respondent. Because XX Co. did not have the right of import-export operation, the respondent, as one party to the contract, had this right and signed and sealed on the contract according to the regulations on management of foreign trade. It is provisioned in Article 402 of the Contract Law of the People's Republic of China that where the agent, acting within the scope of authority granted by the principal, entered into a contract in its own name with a third party who is aware of the agency relationship between the principal and agent, the contract is directly binding upon the principal and such third party, based on which, although the contract in this case was signed by the respondent and the claimant, it directly bounded the claimant and XX Co., as a result, the claimant should claim his contractual rights against the entrusting party XX Co.. Moreover, during the whole course of performance, the claimant demanded the payment from and issued receipt to XX Co. all the time and requested XX Co. to perform the obligation of payment in the subsequent multiple exchange faxes. Meanwhile, XX Co. iterated to the claimant that it was entrustment relationship between it and the respondent and the obligation of payment should not be assumed by the respondent.

Based on all mentioned above, the respondent requested the arbitral tribunal to overrule the claims of the claimant.

The Detailed Statements for Calculation of Interests for Delayed Payment as submitted by the claimant were as follows:

According to the foreign exchange quote price publicized by the Bank of China, the US dollar's medial price was 827.78 on October 22, 1998 (e.g. the payment date as stipulated by the contract after 10 days as of the finishing of the customs), so the price owed by the respondent was $119,700, which equaled RMB 990,853 Yuan when converted.

(a) When passing the customs, the respondent advanced the storage fee RMB 52,500 Yuan, with deduction of which, the sum owed by the respondent was RMB 938,353 Yuan.

The lending rate with corresponding period of the People's Bank of China was annual 6.93% before December 6, 1998. There were 46 days as from October 22, 1998 to December 6, 1998, within which the interest was: [(938353×6.93%)/860 days]×46 days=RMB 8309 Yuan

(b) The lending rate with corresponding period of the People's Bank of China was annual 6.39% after December 7, 1998 and before June 9, 1999. The respondent had paid RMB 131,700 Yuan on January 25, 1999. Taking this payment date as a boundary, the interest during this period was calculated as two parts:

There were 50 days between December 7, 1998 and January 25, 1999, within which the interest was: [(938353×6.39%)/360 days]×50 days=RMB 8327Yuan.

There were 134 days between January 26, 1999 and June 9, 1999, within which the interest was: [(80653×6.39%)/360 days]×134 days=RMB 19,186 Yuan.

(c) The lending rate with corresponding period of the People's Bank of China adjusted to annual 5.85% after June 7, 1999. There were 629 days between June 10, 1999 and February 28, 2001 on which the arbitration was filed, within which the interest was: [(806653×5.85%)/360 days]×629 days=RMB 82,450 Yuan.

Above all, the total amount of the interest engendered by the respondent's delaying to pay was RMB 118,272

Yuan by the end of February 28, 2001 on which day the arbitration was filed.

Subsequently, the claimant represented the claims concerning the relevant matters as follows:

(1) The claimant and XXX, the manager of the second import-export department of the respondent's corporation, had begun to attach and negotiate about the purchase of 3# crude rubber since June or July of 1998. In the beginning of September of the same year, they reached an agreement on the terms of the contract and signed the contract in this case. Because crude rubber was the state import-export merchandise of the first grade, it was necessary to transact the import-export license. Thus, after the contract was concluded, the respondent transacted the import-export license as provisioned and applied to Dalian Customs on October 12 of that year. After finishing the customs, the goods were picked up by the respondent. As provisioned in the contract, the storage fee should be assumed by the claimant before passing customs. But the charge only accepted RMB and the transactor of the claimant did not bring enough RMB, so the respondent XXX advanced the storage fee of RMB 52,500 Yuan for the claimant and illuminated that this money was borrowed from XXX, the manager of XX Company that was the respondent's cooperator. In October 1999, XXX, the manager of XX Company as the respondent's cooperator, advanced RMB 131,700 for the respondent again under the situation that the claimant hastened the payment continuously. XX, the personnel of the claimant company gave a receipt of these two sums of money. From then on, the respondent did not pay any more. Although he alleged that XXX, the manager of his cooperator XX Company would advance, XXX did not pay any more, either.

(2) After passing the customs on October 14, 1998, the personnel of the respondent found the claimant presenting that the manuscript September contract could not be used to handle the transaction of foreign exchange in the Administration of Foreign Exchange, they ought to submit the print contract and he had printed some with the same content as the original on which the claimant was asked to sign. The claimant signed as required without scrutiny. The contracts were handed to the respondent at that time. Regarding to these, the claimant had recognized the truth of his seal on the October Contract.

(3) The claimant had hastened the respondent to pay after passing customs. The respondent purported that the foreign exchanges had been prepared but they needed customs declaration pasted with a fake proof label to pay out. However, the respondent did not pay after such label was received. Afterward, the respondent purposed XX Co would pay for it. But the two parties had paid the amount mentioned above only. Within the period, the claimant's faxes were all sent to the respondent.

(4) After the merchandise had passed the customs, the claimant requested the respondent to remit the $119,700 to his account in a Hongkong Bank as agreed. But the respondent presented that he was unable to remit US dollars according to the contract for various reasons so he had to pay RMB. By considering this situation and that the claimant had many invested enterprises in the mainland, the RMB could be received as circulating fund for those enterprises, the claimant agreed with the respondent and the claimant had accepted the RMB advanced by XXX for the respondent. So the respondent was required to pay RMB when the claimant presented the claims as agreed by the two parties.

(5) During the course of negotiation and conclusion of this contract between the claimant and the respondent, the respondent never told the claimant about the import agent relationship between him and XX Co. nor showed any relevant documents. On the other side, he purposed that he imported the crude rubber to produce for himself. The import-export license handled by the respondent and the documents for customs all indicated that the goods under this contract were free of tax and imported for processing, which could only be used for given purpose according to law and was irrelevant to import agency.

(6) According to the Interpretation (1) on Some Matters concerning Application of the Contract Law of the People's Republic of China made by the Supreme People's Court, the respondent insisted that Article 402 of the Contract Law should apply to this case, i.e. it was not tenable that the contract was directly binding on the claimant and XX Co. and the respondent had no duty to pay. The contract on dispute of this case was concluded in 1998, and at that time there were Interim Regulations on the Agent in Foreign Trade for the matters concerning foreign trade and agent. So these Interim Regulations should apply to matters concerning responsibilities for the agent in foreign trade in this case.

As provisioned in these Interim Regulations, the price of the foreign trade contract should be paid by the entrusting party to the entrusted party only, and the latter should conduct outwards payment. The entrusting party neither had rights nor obligations in the import-export contract and should assumed the contractual obligations and enjoy the contractual rights to foreign traders. Therefore, the respondent did have the duty to pay, even though it had an illegal import agent relationship with XX Co..

The claimant persisted that the respondent should pay to the claimant according to law, but the respondent did not pay in time, so the respondent should assume the corresponding liability.

The respondent stated in his supplementary materials that:

(1) XX, the personnel of the claimant's company, participated in the conclusion and performance of the contract from the beginning to the end and was quite clear about the entrust agent relationship between the respondent and XX Co.. Based on which, it was confirmed in the last contract that the XX Co. should pay to the claimant directly and during the course of performance the claimant always deemed XX Co. as the party who should perform the obligation of payment. It was against the basic facts that the content of the contract was not scrutinized as alleged by the claimant.

(2) Articles 402 and 403 of the Contract Law of the People's Republic of China should apply to the disputes in this case.

(3) The agreement upon the rights and obligations in the contract, especially upon the obligation of payment, did not violate the provisions of relevant laws and should be fully respected. In the course of performance, the facts, that XX frequently accepted the payment of RMB because he knew that XX Co. was unable to pay the foreign exchange, just manifested the respect upon the agreement. Therefore, the claimant should keep on claiming the right upon the payment to XX Co. as agreed.

2.Awards

(1) All claims of the claimant shall be overruled;

(2) The arbitration fee shall be assumed by the claimant.

3.Comments

The main legal issues concerned in this case are as follows:

(1) Law application

The two parties did not stipulate the law applicable to solve disputes in the contract of this case. Whereas both parties had invoked Chinese law as their allegations' foundation, the arbitral tribunal held that the Chinese law should apply to this case according to the principle of free will.

The arbitral tribunal noticed that the claimant claimed to apply the Interim Regulations on the Agent of Foreign Trade as promulgated by the Ministry of Foreign Trade and Economic Cooperation of China which was effective when the contract was concluded while the respondent claimed to apply the General Rules of the Civil Law of the People's Republic of China and the Contract Law of the People's Republic of China and Articles 402 403 of the Contract Law in detail.

According to Article 1 of the Interpretations (1) on the Matters concerning Application of the Contract Law of

China as made by the Supreme People's Court, disputes on the contracts concluded before the Contract Law was implemented should apply laws existing at that time. In case the law existing at that time did not provision the problem, they may apply the relevant provisions of the Contract Law. As the contract in this case was a foreign trade agent contract and the effective foreign trade agent law and regulations, existing at the time of the conclusion of this contract, was the Interim Regulations on the Agent of Foreign Trade, the arbitral tribunal supported the claimant's allegation that these Interim Regulations should apply to this case. Meanwhile, in case these Interim Regulations made no provisions related to this case, the relevant provisions of the Law of Economic Contracts involving Foreign Interest and the General Rules of Civil Law which were effective at that time should apply, and if they did not provision either, the relevant provisions of the Contract Law could apply.

(2) The trial scale of this case

Article 7 as the delivering term of the contract in this case stipulated that both parties should negotiate friendly to solve any dispute relevant to this contract when implementing this contract. In case the negotiation could not solve the dispute, it shall be submitted to CIATAC for arbitration according to its procedures, the address should be Beijing and the award should be final and binding to both parties. The arbitration fee should be assumed by the failing party except that the arbitral commission decided otherwise. The arbitral commission heard this case in accordance with this term. Therefore, the arbitral tribunal held that the trial scale of this case should be limited to the performance of this contract and disputes relevant to the performance. Other contracts handed by both parties as evidences such as the import agent contract etc. were out of the scale of the arbitration commission's jurisdiction and also out of the trial scale of the arbitral tribunal. The arbitral tribunal would refer to them as relevant facts and evidences.

(3) The respondent's obligation and responsibility of payment under this case

The arbitral tribunal scrutinized the evidences and materials as presented by both parties and the present evidences indicated that:

(a) The contract in this case was concluded in September 1998. The two parties had stipulated in the contract that the respondent should buy 190 tons of 3# crude rubber at a price of $630/ton from the claimant, the total amount of contract should be $119,700. And the supplementary terms of the contract stipulated that the importer should transfer the payment by T/T to the bank appointed by the exporter within 10 days after the importer finished the customs.

(b) The respondent had signed the No. WH98802 import agent contract (hereinafter referred to the import agent contract) with Weihai XX Industry Co., Ltd. (hereinafter referred to XX Co.) in September 28, 1998, which stipulated that the respondent should agent to import 190 tons of 3# crude rubber at a price of $630/ton whose total amount was $119,700 for XX Co.. The main contents of the agent import contract were as follows:

The rights and obligations of the respondent should be

(i) to sign contracts with foreign traders according to XX Co.'s opinions;

(ii) to take charge of the import customs and give notice to XX Co. to take the goods after signing the contract; and

(iii) to take responsibility in case the goods were failed to deliver to XX Co. successfully for the reasons of the respondent.

The rights and obligations of XX Co. should be:

(i) to take charge of attaching and negotiating with foreign traders and concluding contracts in the name of the

respondent with other parties; and

(ii) to take responsibility unilaterally in case the contract terms were violated for the reasons of XX Co. and assume all fees charged in the process of import and pay to the claimant.

(c) In September 1998, the claimant and the respondent had signed a sale contract with the identical number, the basically identical name and specifications etc. to that of the contract in this case. But such contract (i.e. October Contract) had supplementary terms stipulating that the payment should be made by the entrusting importer XX Co. to the seller (i.e. the claimant in this case) after the buyer (i.e. the respondent in this case) finished the procedures for customs and the ultimate user examined and confirmed qualified.

(d) The respondent obtained the import license on October 7, 1998 and handled the import customs procedures on October 12 and then picked up the goods.

(e) On January 25, 1999, XXX of XX Co. paid RMB 184,200 to XX of the claimant's company and XX gave a receipt to XXX.

(f) On October 12, 2000, XXX of XX Co. sent a letter to the claimant which read:

As regards the issue of paying back the money for the 3# crude rubber imported by the agency of Weihai XX Company (the respondent) for us (XX Co.), in our opinion:

(i) We could make an agreement on payment. We would guarantee to pay within the period we agreed.

(ii) We begged your considering the close relationship of cooperation we once had, especially our endeavors on your this stock of goods when accidents happened in Dalian China. As regarding this, you had better not resolve it through arbitration.

(iii) Weihai XX Company (the respondent) was an agent company in this transaction and did not participate actually. So we begged you not resolve this problem against Weihai XX Company directly. And

(iv) The problems of payment happened in this transaction should be solved by negotiation between you and us.

It would be better that Mr. XX give me a reply.

On November 9, 2000, XX, the personnel of the claimant company, sent a letter to XXX of XX Co. stating that it needed RMB 300,000 Yuan in urgency, please did transfer RMB 300,000 Yuan that would be deducted from the payment of rubber.

The claimant sent a notice to the respondent and XX Co. stating that the payment under the contract was USD630×1900×Rate 8.30=RMB 993,510 Yuan subtracting the storage fee in Dalian bonded area and the loading fee of RMB 52,500 Yuan, subtracting the price of purchasing plane ticket of RMB 15,200 Yuan, subtracting the money of RMB 120, 000 Yuan as paid by Mr. XXX in 1999 and there was still RMB 805,810 Yuan remained and demanding a reply concerning this issue from the respondent and XX Co.

Based on the facts mentioned above and according to Article 7 of the Law of Economic Contracts involving Foreign Interest, the arbitral tribunal held that the contract in this case came into effect as of both parties signing in September of 1998 and both party should seriously perform as stipulated in the contract. The claimant as the seller had delivered the goods under the contract while the respondent as the buyer had not paid money to the claimant. In order to decide weather such conduct of the respondent constituted a breach of the contract, it was necessary to make sure weather the respondent was the party who should pay the money for the goods under the contract.

It was clearly stipulated in the contract that the money should be transferred by T/T to the bank appointed by the exporter within 10 days as of the importer finishing the customs. This term did not define the party who should pay. As regarding that the contract was a foreign trade contract and the respondent signed on the

contract as the buyer, the respondent should pay for the goods according to the Interim Regulations on the Agent of Foreign Trade. The respondent handled the customs on October 12, 1998 within which the both parties had signed October Contract stipulating that the payment should be made by the entrusting importer XX Co. to the seller after the buyer finished to pass the customs and the ultimate user examined and confirmed qualified. So the two parties had ascertained further concerning the payment, namely, the XX Co. should pay the money. The claimant presented that XX, the signer on behalf of the claimant, did not scrutinize the terms of the contract before he signed on the contract. But it could not render the conclusion that the contract was void and null. This term constituted legal modification to the terms on payment by the both parties.

The arbitral tribunal held that the goods appointed in the agent import contract signed by the respondent and XX Co. was the same as that under the contract in this case if no contrary evidence existed. According to the facts of this case, it was unbelievable that the claimant was unaware of the agent import relationship between the respondent and XX Co.. In addition, whether the claimant knew about the relationship between the respondent and XX Co. did not influence the cognizance of the party who should pay. By considering that the both parties had stipulated clearly in October Contract that XX Co. should pay the money for the contractual goods and that the agent import contract between the respondent and XX Co. had stipulated that the respondent might sign contracts with other parties on behalf of XX Co., take charge of handling the customs and notice XX Co. to receive the goods, the XX Co. should assume all the fees during the import process and the money should be paid to the claimant by XX Co.. As a matter of fact, the relevant fees during the import process and the partial payment the claimant had already received were paid by XX Co.. And because XXX on behalf of XX Co. sent faxes to the claimant indicating that the party who owed the money and should pay back the money under this contract were XX Co., the claimant demanded XX Co. to pay. The arbitral tribunal held that the money for the goods under this contract paid to the claimant by XX Co. was the true will of the 3 parties i.e. the obligation of payment had been transferred to XX Co. from the respondent under this contract which did not violate the mandatory rules of the law. Therefore, the respondent should not assume the obligation of payment and should not take the responsibility for the claimant not receiving the rest money of the contract.