

The Case of XX Technology Ltd. H.K. v. XX Administrative Area XX Town, XX City (the cooperator) on Dispute over Contract of Cooperation

Jurisdiction: Arbitration; CIETAC, Shenzhen

Date of Decision: Sept. 10, 1999

1. Case Brief

On Aug. 3, 1994, the claimant, XX Technology Co., Ltd. H.K., as the investor, concluded a contract of cooperation in XX City with the respondent, XX Administrative Area, XX Town, XX City, as the cooperator.

The main provisions of the contract in respect of this case are as follows:

Chapter 1: the claimant is to establish a wholly foreign-owned enterprise, XX Rubber Product Ltd. of XX City (hereinafter referred to as WFOE), in XX Administrative Area, XX Town, XX City.

Chapter 2: the respondent's obligations include: to paid transfer 60 year use right of 20,000 m² (i.e.30 Mu) land within XX Administrative Area, XX Town, XX City to the respondent. The term of using right is calculated from the day the WFOE's business license is issued. To assign personnel to assistant the claimant in labor recruiting, imports and exports customs application, approval application of building construction and water and electricity establishment installation. The claimant's obligations include: to pay for using the land the respondent provides, and to charge the duty collected by Chinese government for its direct service provided to enterprises, and the real estate tax within the term of land transferring.

Chapter 3: on the above land use, the claimant shall pay the sum of money as follows (Article 1). Charge of land use: HKD150 per m², and HKD3 million in total, which is paid off once by the claimant to the respondent within one month from the day on which the business license of WFOE is issued (Article 1, Paragraph 1). Charge of land management: HKD 0.5 per m² per month, which is calculated from the day on which the business license of WFOE is issued, and is increased 5% each year from the third year on (Article 1, Paragraph 2). Comprehensive service charge: to be calculated by HKD 110 per person per month with staff of 600, in the first two years after the enterprise is put into production; to be increased 5% per year on the basis of HKD 110 per person with staff of the exact number, from the third year on (Article 2). The claimant shall clear with the respondent the above charge of land management and comprehensive service charge via China-funded Bank in H.K. before the end of each month (Article 2). If the claimant cannot pay the shall-be-paid sum of money to the respondent on time, it shall additionally pay overdue fine to the respondent (10% of the shall-be-paid amount for each overdue month). If the payment is delayed over 6 months, the respondent gets the right to stop fulfilling this contract of cooperation (Article 4).

Chapter 4: This contract shall be effective on the date of WFOE approval is issued and till the end of the term of the WFOE. Any modification, prolonging or termination in advance shall be consulted and co-signed by the parties, and approved by the approval authority before being effective.

Chapter 5: Any dispute during the term of contract shall be settled by the parties' consultation in the principle of equality and mutual benefit. If the dispute cannot be settled by consultation, it shall be submitted to China's International Trade Promotion Committee (annotated by the tribunal: now as China's International Economic Trade Committee of Arbitration) for intercession and arbitration, the decision from which is the final one and shall be complied by both parties. Arbitration fee is all paid by the party who loses. The applicable law of this contract is the relevant Chinese laws, regulations. If content of this contract is against

the relevant governmental regulation, the Chinese governmental regulation is to be complied with.

The parties dispute during the performance of the contract, and cannot settle it by consultation, and then the claimant submits arbitration application to CIETAC, Shenzhen with claim as follows:

(1) to judge Chapter 3 of the contract of cooperation invalid, and the respondent to return the claimant the over received charge of land use RMB 2,421,918 and its interest RMB 950,000 (which is calculated till Aug. 31, 1998).

(2) to judge the respondent to pay the arbitration fee of this case.

The claimant claims based on the following reasons:

After the conclusion of this contract, the claimant, itself or its wholly funded company (including its domestic wholly funded company) successively, has paid the charge of land use, RMB 4,319,918, to the respondent, its agent, XX Property Ltd., H.K. and State-Owned Land Bureau of XX City via H.K. Bank and domestic bank. However, till Apr. 13, 1995, when the claimant concluded Contract of XX City Land Use Right Transferring with State-Owned Land Bureau of XX City, the respondent assisted the claimant to get only RMB 1,898,000 charge of land use from transferring land of 20,000 m². Therefore, the claimant repeatedly requested the respondent to return the over-accepted land use fee of RMB 2,421,918. However, the respondent returned only RMB 50,000 in Jun. 1998, and did not return the rest amount so far.

The respondent defended that:

(1) the contract of cooperation, including Chapter 3, is valid. The parties agreed in the 30 acre land use fee (including the expropriation compensation, and "water, power, and road supply; land even" fee) under the State-Owned Land Use Right Transferring Contract signed between the State-Owned Land Bureau of XX City and the claimant, and the written agreement achieved on the rights and obligations in investment and cooperation matters. Chapter 3 in the contract is not against the spirit in state-owned land legislation, and is valid. The parties of contract made clear the land use procedure, i.e. the land use right is to be get after the state expropriation of land (the state-owned land use certificate is required). Then, the land use party and the land expropriated party got agreement on the compensation, "San Tong Yi Ping (water, power, and road supply, and land even)" fee, and cooperation fee. On the other hand, the land use party and the State-Owned Land Bureau of XX City got agreement on state-owned land right transferring. In accordance with the spirit and principle of land legislation, the exact amount of expropriation fee may be conferred by the parties, coordinated by the State-Owned Land Department. The expropriation fee can be charged firstly by the Department from the land use party and turned to the land expropriated party, or alternatively by the land expropriated party itself directly. Therefore, in this case, the respondent and the claimant agreed on the expropriated fee and investment cooperation, and the claimant concluded the state-owned land use right transferring contract, which is not only valid, but also practical and feasible.

(2) the relationship between XX Property Ltd, H.K. and the respondent is not that of agent and Principal. There is no delegation and the relevant contract. The ever-existing transferring between them has terminated. The contract of cooperation and its two supplementary contracts between the respondent and the claimant were concluded with definite parties' identity, full and legal procedure. There were no delegated signatures, delegated seals, or other delegated actions. The claimant's so-called XX Property Ltd, H.K. agent lacks fact support. So the relevant return of the fee based on the claim shall not be supported.

(3) so far, the respondent did not accept any sum of money related to the land directly or indirectly from the claimant or the State-Owned Land Bureau of XX City excepted for the HKD 700,000 and RMB 600,000 from the claimant, the former with a nature of partial land use fee according to the Article 1, Paragraph 1, Chapter 3

of the contract of cooperation, the latter auto-paid by the claimant in order to derate the loss from contract termination between the claimant and XX Property Ltd, H.K.(the certificate fee has been paid for the collective land use certificate). Also, in the contract, Party B pays the certificate fee for land use right granting, and Party B only assists. Therefore, how much the State-Owned Land Bureau of XX City charges for the procedure, the reason for certificate fee, whether the charging reasonable or nor belong to the legitimacy of administrative charges, not arbitration of this case. The evidence the claimant provided fully shows that the claimant paid the certificate fee of RMB 1,113,000 on Aug. 3, 1995. The State-Owned Land Bureau of XX City charged fees including land transferring fee, land appreciating fee, management fee by the city bureau, city planning fee, land planning fee, rural construction fee, management fee by town office, fine, etc. The expropriation fee has been deducted from the transferring fee. If the claimant considers that in accordance with Provision 3 in the supplementary contract of No.X Contract, X Guo Transferring He (1995), the respondent accepted the directly payment from the claimant or the indirect payment transferred from the State-Owned Land Bureau of XX City, but required the respondent to return the "over-accepted" sum of money, it shall bear the obligation of proof.

(4) the claimant went against Provision 4, Paragraph 4 in the State-Owned Land Use Right Transferring Contract, Land Use Qualification, agreeing on the time limit of completing the investment construction, which leads a great loss to the respondent as it did not get the anticipated economic benefit. Therefore, the claimant shall be liable for its breach of contract.

Evidence found out by the tribunal:

(1) According to the evidence, State-Owned Land Bureau of XX City concluded with the wholly funded enterprise Contract of State-Owned Land Use Right Transferring (hereinafter referred to as "contract of transferring") and its supplementary contract on Apr. 13 and 15, 1995. State-Owned Land Bureau of XX City transfers the wholly funded enterprise land use right of 20,000 m² located in XXX Area XX Administrative District XX Town XX City (i.e. the same land that the respondent transfers to the claimant). In accordance with the above contract of transferring and its supplementary contract, the claimant shall pay for the land transferring charge of RMB 400,000 (RMB 20 per m²) and the land compensation fee of RMB 1,898,000 (RMB 94.9 per m²) including compensation for expropriation of land, land appreciation fee, transferred land management fee, etc, among which compensation for expropriation of land is paid directly to the unit expropriating land. Aug. 30, 1995, People's Government of XX City issued State-Owned Land Use Certificate of People's Republic of China to the wholly funded enterprise. The term of land use lasts 50 years. The use of land is for industrial use.

(2) The detail payment for buying "XXX Area XX Administrative District XX Town XX City" submitted by the claimant:

The followings are details of payment for "XXX Area XX District XX Town XX City":

50 year use fee for land along the road, 100 m long, 200m deep, with a total area of 20,000 m2

	Date to Pay	Subject to Pay	Payer	Payee	Valuta	Sum	Payment Method
1	07/05/94	Charge of land use	XX	XX Property Ltd.	HKD	700,000	HK Check # XXXXXX
2	05/10/94	Charge of land use	XX	XX Property Ltd	HKD	485,000	L/C # LC XXXXXX
3	19/10/94	Charge of land use		XX Property Ltd	HKD	512,000	L/C # LC XXXXXX
4	26/01/95	Charge of land use			HKD	700,000	HK Check # XXXXXX
					HKD	2,397,000	Zhong Yin Check # IV I XXXXXXXX
5	30/08/95	Charge of land use	XX, XX City	XX Administrative Area, XX Town	RMB	642,120	Zhong Yin Check # IV I XXXXXXXX
6	30/08/95	Fine for illegal land use	XX, XX City	XX State-owned Office	RMB	60,000	Zhong Yin Check # IV I XXXXXXXX
7	30/08/95	Management charge for land use	XX, XX City	XX State-owned Office	RMB	30,000	Zhong Yin Check # IV I XXXXXXXX
8	30/08/95	Planning & management charge	XX, XX City	XX State-owned Office	RMB	10,000	Zhong Yin Check # IV I XXXXXXXX
9	30/08/95	Agriculture transportation charge	XX, XX City	XX State-owned Office	RMB	15,000	Zhong Yin Check # IV I XXXXXXXX
10	30/08/95	City Planning & building charge	XX, XX City	XX State-owned Office	RMB	300,000	Zhong Yin Check # IV I XXXXXXXX
11	30/08/95	Land requisition management charge	XX, XX City	XX State-owned Office	RMB	48,000	Zhong Yin Check # IV I XXXXXXXX
12	30/08/95	Certificate producing charge	XX, XX City	XX State-owned Office	RMB	400,000	
13	30/08/95	Land appreciation charge	XX, XX City	XX State-owned Office	RMB	250,000	Zhong Yin Check # IV I XXXXXXXX
					RMB	1,755,120	

Remark: "XX" represents "XX Product Ltd. " in H.K.

"XX, XX City" represents "XXX Rubber Product Ltd. Of XX City"

The land use fee paid by the claimant listed in the above payment details shall be separated into three parts: (1) the payer, XX (i.e. XX Product Ltd., hereinafter referred to as "XX Company") paid three score land use fee of HKD 1,697,000 to the payee, XX Property Ltd. (hereinafter referred to as "XX Company") from Jan. 5 to May 7, 1994; (2) the payer, XX Company, paid the respondent land use fee of HKD 700,000 on Jan. 26, 1995, and the respondent produced the gathering receipt of such fee (check No. Hengsheng XXXX, receipt No. XXXXX); (3) Aug. 30, 1995, the payer, XX of XX City, paid nine scores of totally RMB 1,755,120, among which one is the land use fee of RMB 642,120 to the respondent, and

the other eight are illegally use land fine, land use management fee, planning management fee, agricultural transportation fee, city planning fee, expropriation management fee, certificate producing fee, land appreciation fee, totally of RMB 1,113,000, with XX State-Owned Land Office as the payee. As was checked, Jan. 23, 1995, the respondent signed with XX Company the Compensated Land Use Right Lease Contract, according to which the respondent shall lease use right of the above 20,000 m² land to XX Company, for HKD 700,000. The respondent in its written statement admitted that the above payment by XX Company was the partly paid land use fee by the claimant according to the contract afterwards. Aug. 30, 1995, XX Administrative Area of XX Town produced the (No. 0637262) receipt of RMB 642,120 from XXX Rubber Product Ltd. (hereinafter referred to as XX Company). The claimant did not demur the above evidence and statement submitted by the respondent.

On the relationship among the claimant, the respondent, and XX Company, according to the evidence and statement in writing, that: Aug. 18, 1992, XX Economic Association of Liaobu Town, XX City, concluded with XX Company the Land Use Right Transferring Contract (hereinafter referred to as "transferring contract") that the respondent transferred the use right of such 20,000 m² land to XX Company. The total sum of money paid for the land was RMB 2,200,000. (a) The respondent confirmed in the Supplementary Explanation for the Compensation Land Use Right Leasing Contract signed by the respondent and XX Company on Jan. 26, 1995 that: XX Company and the respondent signed in Jan. 1992 a Land Transferring Contract of 30 Mu, with a total sum of money of RMB 2,200,000. XX Company had paid the respondent RMB 1,428,400, with an arrearage of RMB 771,600. The respondent notified XX Company the termination of contract on Jan. 21 and 24, 1995, took back the 30 Mu land, and leased to XX Company. (b) May. 1994, XX Company and the claimant reached an agreement on land use right transferring in H.K., with a total sum of money of HKD 3 million. The claimant had paid XX Company HKD 1,700,000. (c) The respondent promised that as long as XX Company did not require refundment, the parties would execute the compensation land use right leasing contract. The claimant stated that it had paid the respondent's agent, XX Company, through XX Company the land use fee, on May 7, Oct. 5, Oct. 19, 1994 respectively. (4) The claimant stated that XX Company paid the respondent land use fee of HKD 700,000. Investigation shows that the claimant did not provide evidence to prove XX Company is the agent of the respondent. The above evidence of this case can only prove that the respondent transferred or leased the land use right successively with XX Company, XX Company, and the claimant on the same land, but not that there was agreement between the claimant and the respondent on the alteration or substitution of indebtedness and creditor's rights. Therefore, the tribunal holds that the sum of money XX Company paid to XX Company and the respondent the claimant claimed is the land use fee the claimant paid to the respondent under the contract disputed in this case, therefore, not being supported.

2. Award

- (1) Chapter 3 of the cooperation contract concluded by the claimant and the respondent is void.
- (2) Within thirty (30) days from the day on which the present decision is made, the respondent shall pay the claimant HKD 553,271, and 7% annually interest rate is calculated if the payment lies over.
- (3) The arbitration fee of this case shall be paid 40% by the claimant, and 60% by the respondent.
- (4) The claimant's other claims shall be overruled.

3. Comment:

The legal matters in relation to this case are mainly as follows:

(1) Applicable law

The locations of signing and performing the contract of cooperation are both in China, so settlement of dispute on such

contract shall apply China's laws and regulations.

(2) Chapter 3 of the contract of cooperation' effectiveness and its legal consequences.

In accordance with the Provision 1, Paragraph 1 of Chapter 2 in the contract of cooperation concluded by the claimant and the respondent, it is the respondent's obligation to compensated transfer the land use right of 20,000 M² (i.e.30 Mu) land within the XX Administrative Area, XX Town, XX City to the claimant, with a use term of 60 years. According to Provision 1, Paragraph 1 of Chapter 3, the claimant shall pay a lump the land use fee of total HKD 3 million (calculated by HKD 150 per M²) to the respondent within one month from the day on which the Business License of the wholly-funded enterprise is issued.

In accordance with the Land Administration Law of the People's Republic of China, Article 10, changes of owners and usages of land, shall go through the land alteration registration procedures, and change the certificate. In the Article 6 in Implement Statute of Land Administration Law of the People's Republic of China, changes of owners and usages of land, shall apply for the ownership and usages of land alteration registration to the land administrative department in town level or upwards local governments. At the same time, Article 5 of the Implement Rule of Land Administration of XX Province stipulates that the collective-owned land use right transferring is executed in accordance with the related state and provincial provisions. The respondent did not provide evidence that the transferring in the contract of cooperation had gone through the alternation registration at land administrative department. And the respondent got no right by itself of representing the state to transfer to the claimant the use right of land that will be or has been expropriated as state-owned, and gathered land use fee from the claimant.

In accordance with the relevant evidence, before Apr. 13, 1995, the above 20,000 M² land has been expropriated as state-owned by the State-Owned Land Bureau of XX City, and its land use right has been transferred to the wholly-funded enterprise based on China's laws. The claimant has paid the land use right transferring fee, land management fee, compensation for expropriation of land, etc. And the wholly-funded enterprise obtained the State-Owned Land Use Certificate. As for such 20,000M² land, the respondent as the land expropriated party shall be only paid the legitimate compensation for expropriation, and had no right to gather additional land fee from the claimant by secretly transferring land use right. In such two contracts, State-Owned Bureau of XX City represented the country to transfer the above land use right to the wholly-funded enterprise that may get such right afterwards. The Bureau's transfer shows that the former transaction between the claimant and the respondent is invalid, which actually denied the validness of the contract of cooperation. The respondent gets no right to request the claimant the relevant land use right transferring fee according to such contract. The wholly-funded enterprise's the State-Owned Land Use Right Certificate of P.R.C. is due to the land use right transferring agreed in the contract, but based on the "contract of transferring" and the payment afterwards. Therefore, the relevant content of the above contract of cooperation is against the land administrative regulation, and is invalid, for which both parties are liable. The respondent shall return to the claimant the land use fee gathered based on the invalid contract, while the claimant shall bear the relevant interest loss by itself.

(3) Confirmation on the respondent's liability for returning "charge of land use":

On the sum of money State-Owned Land Bureau received, the payment between the claimant and the Bureau belongs to another legal relation. Additionally, since the claimant cannot prove that the sum of money the Bureau received covers the land fees it shall pay to the respondent in accordance with the contract, the sum of money the Bureau received is not the evidence supporting the claimant. However, the evidence the claimant provided can prove that the respondent overly accept the claimant charge of land use HKD 600,000 besides the legitimate compensation for expropriation of land.

During the hearing, both parties admitted that the respondent had returned the claimant RMB 50,000 in Jun. 1998. So the

tribunal made judgment that such amount shall be deducted from the total sum, i.e. the return to the claimant shall be firstly deducted RMB 50,000 (i.e. HKD 46,729) from HKD 600,000.

