Sabah Shipyard (Pakistan) Ltd v Government of the Islamic Republic of Pakistan [2004] SGHC 109

Case Number : OM 31/2003

Decision Date : 28 May 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Michael Hwang SC (Michael Hwang), Nicholas Narayanan and Jeffrey Ong (Ang and Partners) for applicant; Davinder Singh SC (Drew and Napier LLC) for respondent

Parties : Sabah Shipyard (Pakistan) Ltd — Government of the Islamic Republic of Pakistan

Arbitration – Arbitral tribunal – Jurisdiction – Whether tribunal has jurisdiction over costs arising out of prior related arbitration proceedings – Article 16(3) First Schedule International Arbitration Act (Cap 143A, 2002 Rev Ed)

Words and Phrases – "Arising out of" – "In connection with" – Whether "arising out of" has narrower ambit than "in connection with"

28 May 2004 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This is an application under Art 16(3) of the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Model Law") for a declaration as to the jurisdiction of an arbitral tribunal.

2 In March 1996, the applicant entered into a contract known as the Implementation Agreement ("IA") with the respondent. By the IA, the applicant agreed to design, finance, construct and operate a barge-mounted electric power plant for the respondent. The IA contained an arbitration clause providing for arbitration in Singapore under the Rules of Arbitration ("ICC Rules") of the International Chamber of Commerce ("ICC"). Following the purported termination of the IA by the respondent on two occasions, on 7 December 1998, the applicant commenced arbitration proceedings against the respondent under the auspices of the ICC. These proceedings were known as "ICC Arbitration Reference No 10255/OL/ESR/MS" and for reasons that will become apparent, I will refer to them as "the First Arbitration". The ICC appointed one Mr Derek S Firth as the arbitral tribunal in the First Arbitration.

3 The First Arbitration went on for about three years. It did not come to a conclusion because of a default by the respondent in the payment of costs. On 15 November 2001, the ICC increased the advance on costs by a sum of US$80,000 as a result of an increase in the amount claimed by the applicant. The additional advance was payable by the respondent, but the applicant could have chosen to pay it as well. On 25 February 2002, the ICC informed the parties that they were given a final time limit of 30 days to pay the sum failing which the claims in the arbitration would be considered withdrawn, without prejudice to their reintroduction at a later date in another Request for Arbitration. Neither party paid the amount. On 4 April 2002, the ICC informed the parties that, as a result, the claims were considered as having been withdrawn as of 2 April 2002 pursuant to Art 30(4) of the ICC Rules without prejudice to their being introduced in a new Request for Arbitration.

4 On 10 April and 4 May 2002, the respondent wrote to the arbitrator to request that an order be made for its costs in the First Arbitration. On 19 April and 10 May 2002, the ICC itself responded to these letters. It stated that the arbitrator did not have the power to act after a matter was considered withdrawn pursuant to Art 30(4) of the ICC Rules, whether with regard to costs or otherwise.

5 On 12 August 2002, the respondent commenced another international arbitration against the applicant under the ICC Rules. These proceedings have been referred to as "the Second Arbitration" but are formally known to the ICC as "Reference No 12286/MS". In the Second Arbitration, the respondent sought an order for its costs of US$292,090 incurred in respect of the First Arbitration and for which no order could be made by the tribunal in the First Arbitration. Mr Firth was jointly nominated and appointed as the arbitral tribunal in the Second Arbitration. Whilst the applicant agreed to this appointment, that agreement was without prejudice to its position that the second arbitral tribunal had no jurisdiction to deal with the costs of the First Arbitration.

6 In October 2002, the applicant formally challenged the jurisdiction of the arbitral tribunal in the Second Arbitration. The challenge was first considered by the ICC Court. In December 2002, the ICC Court stated that it was *prima facie* satisfied that "an arbitration agreement under the [ICC] Rules may exist" and therefore the Second Arbitration could proceed and the arbitrator decide whether he had jurisdiction or not. Further submissions were exchanged. On 5 November 2003, the arbitral tribunal delivered its award on the preliminary issue of jurisdiction. The arbitrator held that he had jurisdiction in the Second Arbitration for the reason that:

> [T]he claim for costs arising out of the first arbitration comes within the meaning of "… any dispute or difference between the parties arising out of or in connection with this Agreement …" in the Implementation Agreement. Those words are entitled to their plain meaning. They are clearly wide enough to include expenses of the kind incurred by the [respondent] when defending a claim against it under the Implementation Agreement by the [applicant] and where, for whatever reasons, they remain undetermined.

These proceedings

7 The applicant was not satisfied with the tribunal's decision on its jurisdiction. As permitted by Art 16(3), within 30 days of receiving notice of that ruling, the applicant lodged the present originating motion to ask this court to decide the matter of the jurisdiction of the arbitral tribunal.

8 The originating motion asks for the following reliefs:

(a) That a declaration be made that:

(i) the arbitral tribunal constituted by the sole arbitrator, Mr Firth, in the Second Arbitration has no jurisdiction over the dispute in the Second Arbitration; and

(ii) the arbitral tribunal in the Second Arbitration has no jurisdiction over the disposal of, or to deal with the bank guarantee furnished by the applicant in the First Arbitration; and

(b) That specified portions of the arbitral tribunal's award dated 5 November 2003 in the Second Arbitration dealing with the jurisdiction of the tribunal be set aside.

9 Before me, it was common ground that the main relief sought by the applicant was a declaration in terms of prayer (a)(i) of [8] above and that my decision on that prayer would determine

prayers (a)(ii) and (b) as well. The arguments before me therefore focused entirely on the issue of the jurisdiction of the arbitral tribunal in the Second Arbitration to make an order relating to the costs of the First Arbitration. I therefore do not have to deal with or mention the circumstances in which the guarantee referred to in prayer (a)(ii) was furnished or any arguments relating to the same.

The issue: how should the arbitration clause be construed?

10 It was also common ground that my determination of the main issue would depend on how I construed the arbitration clause in the IA, Art XXI entitled "Resolution of Disputes". Both parties accepted that the jurisdiction of the arbitral tribunal could only be derived from this clause. The material part of this Article, sub-art 21.2(a), provides:

> The Parties expressly consent that any dispute or difference between the Parties arising out of or in connection with this Agreement (each a "Dispute") shall be settled by arbitration …

11 The applicant submitted that the issue of costs of the First Arbitration did not fall within the meaning of the words "arising out of or in connection with this Agreement". The arbitrator in making his award in the Second Arbitration had come to the contrary conclusion without a detailed analysis of the principles and case law governing the interpretation of those words.

12 The principles applicable to the construction of words contained in an arbitration clause are discussed in *The Law and Practice of Commercial Practice in England* (2nd Ed, 1989) by Mustill and Boyd. At 118 of the book the authors state that courts will make the *prima facie* assumption that the parties intended all disputes relating to a particular transaction to be resolved by the same tribunal. Secondly, words of broad import such as "in connection with this contract" are to be given their natural meaning in the context in which they are found, and are not to be cut down by reference to earlier decisions giving a narrower meaning to the same or similar expressions in other contexts. Therefore, said the applicant, the court must bear in mind that although earlier decisions may give some guidance as to the ambit of the phrases "in connection with" and "arising out of", these words must still be construed and given their proper and natural meaning in the circumstances of each case. The applicant went on to submit that the court is not bound by the doctrine of *stare decisis* in interpreting specific words in an arbitration clause. In support, it quoted the following observation of May LJ in *Ashville Investments Ltd v Elmer Contractors Ltd* [1989] 1 QB 488 at 495:

> However, I do not think that there is any principle of law to the effect that the meaning of certain specific words in one arbitration clause in one contract is immutable and that those same specific words in another arbitration clause in other circumstances in another contract must be construed in the same way. This is not to say that the earlier decision on a given form of words will not be persuasive, to a degree dependent on the extent of the similarity between the contracts and surrounding circumstances in the two cases. In the interests of certainty and clarity a court may well think it right to construe words in an arbitration agreement, or indeed in a particular type of contract, in the same way as those same words have earlier been construed in another case involving an arbitration clause by another court. But in my opinion the subsequent court is not bound by the doctrine of stare decisis to do so.

Considering the applicant's reliance on this passage, I was surprised that it criticised the arbitrator for failing to consider prior case law in coming to his decision on the proper construction of the arbitration clause.

13 Turning to the construction of this particular phrase, the applicant submitted that a claim "arising out of" a contract would be a claim that concerned matters and questions referred to in that

contract. This proposition was based on *Union of India v E B Aaby's Rederi A/S* [1975] AC 797. Within this context, the applicant accepted that, as cited by Mustill and Boyd (at 120), cases had given a wide meaning to the phrase. It had been held to include issues of frustration, construction, non-disclosure, existence of a custom and a claim for damages for breach of the arbitration agreement. However, the applicant submitted, there had been no case that held that costs of a previous arbitration could fall within the ambit of "arising out of". Further, in *Getreide-Import-Gesellschaft mbH v Contimar SA Compania Industrial Comercial y Maritima* [1953] 1 WLR 793, the English Court of Appeal held that arbitrators do not have the jurisdiction to decide whether a notice of an appeal from the award of other arbitrators has been given in the proper form, since the dispute arises from the award, and not from the original contract. Morris LJ said at 808–809:

> So the question arises, are the plaintiffs suing in respect of a claim arising out of a contract? In my judgment, they are not. The plaintiffs did have a claim arising out of a contract. They said that there was non-fulfilment of the contract. They had an award. Now, the defendants are seeking to upset that award by an appeal without complying with the conditions for an appeal. In my judgment, the matters now raised are not matters properly to be described as a claim arising out of the contract, nor as a dispute arising out of the contract. The dispute would never have arisen but for the contract, but the real dispute between the parties was determined and an award was made. The present dispute is once removed from the contract. It is a dispute in respect of facts arising subsequent to an award.

The applicant laid emphasis on the *Getreide-Import* case as it involved a claim which was one that arose out of the arbitration itself and not from the original contract. In the applicant's submission, *Getreide-Import* was authority for the proposition that a claim which arises out of an arbitration, such as a claim for the costs of that arbitration, is not a claim which arises out of the underlying contract and therefore the arbitrator would not have the jurisdiction to decide on such a claim.

14 Dealing with the phrase "in connection with", the applicant quoted Davies J sitting in the Federal Court of Australia in *Hatfield v Health Insurance Commission* (1987) 77 ALR 103 at 107 to the effect that terms such as "relating to", "in relation to" and "in connection with" may have a very wide operation but do not usually carry the widest possible ambit because such terms "are subject to the context in which they are used, to the words to which they are associated and to the object or purpose of the statutory provision in which they appear". Thus, the applicant submitted, that phrase does not have an unlimited meaning. Additionally, the claim concerned must be directly connected with the words with which the phrase "in connection with" is associated and cannot be simply an indirect connection. This second proposition was based on an observation in *Melluish v London County Council* [1914] 3 KB 325 at 327–328 where Avory J in construing whether a kitchen maid was employed "in connection with the serving of customers" stated that it was not possible to hold that every person employed in any capacity on premises where a retail business was carried on would be employed in connection with the serving of customers. He thought there must be a direct connection and not a remote and indirect connection. But that was only a general observation, as the judge went on to hold that the words "in connection with the serving of customers" were wide enough to include the case of an assistant who was employed in operations which formed part of the operations of serving customers. Applying that observation, rather than the result, the applicant submitted that a claim for the costs of an arbitration was not a claim directly connected with the contract itself but was a claim that was connected with the arbitration. In my view, however, the *Melluish* case is not really of much assistance to the applicant as the decision itself made it clear that the observation was a general one and in each case it is the facts that have to be looked at to determine whether the requisite degree of connection exists. Further, the construction of an arbitration clause is undertaken in the context where the courts assume an inclusive interpretation is to be given to the relevant phrase in that the intention behind the choice of words in the arbitration clause is to ensure

that all disputes are adjudicated by the same tribunal.

15 In response to the foregoing submissions, the respondent, naturally, was at pains to emphasise the width of the words "arising out of or in connection with". It submitted that the phrase "arising out of" had been held to cover every dispute except a dispute as to whether there was ever a contract at all. It also cited Mustill and Boyd to show the width of the issues covered by the phrase. Further examples were the cases of *Empresa Exportadora de Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171 and *Government of Gibraltar v Kenney* [1956] 2 QB 410. The first case showed that a claim in tort could fall within the ambit of an arbitration clause if the contractual and tortious disputes were so closely knitted together on the facts, that the agreement to arbitrate on one could properly be construed as covering the other. In the second, the English High Court held that when the frustration of a contract gave rise to a claim in *quantum meruit* or to a claim under the UK Law Reform (Frustrated Contracts) Act 1943, such claim was a claim "arising out of" the underlying contract.

16 Turning to the phrase "in connection with", the respondent cited numerous cases to establish that those words had also been held to be wide in nature and to cover all disputes other than those entirely unrelated to the transaction covered by the contract in question. In *Woolf v Collis Removal Service* [1948] 1 KB 11, for example, the English Court of Appeal had held that an alternative claim in negligence fell within the ambit of the words "in connection with". *Russell on Arbitration* (22nd Ed, 2003) (at para 2-075) also cited cases showing that "in connection with" and "in relation to" had been held to include claims for rectification of a contract, as well as mistake and misrepresentation. The authors of *Russell* also considered those phrases sufficient to catch disputes arising under another contract relating to the contract containing the arbitration clause.

17 The respondent's concluding submission was that given the very wide interpretation that the authorities had given to the two phrases, the combination of the two could only serve to expand the intended ambit of the arbitration clause in the IA. Any dispute, so long as it was not one that was entirely unrelated to the IA or to the performance of the parties to the IA, would be a dispute falling within the arbitration clause.

18 Having considered the authorities, I note that the phrase "arising out of" is generally held to have a more limited ambit than "in connection with". There is, however, high authority for the proposition that "arising out of" may in certain contexts, on the ordinary and natural meaning of the words used, be the equivalent of the expression "connected with": see *The Antonis P Lemos* [1985] AC 711 *per* Lord Brandon of Oakbrook at 727. Our Court of Appeal adopted that approach in *The Indriani* [1996] 1 SLR 305 and held that the phrase "arising out of" in s 3(1)(h) of the High Court (Admiralty Jurisdiction) Act (Cap 123, 1985 Rev Ed) should be interpreted widely to mean "connected with". Hirst J in *Ethiopian Oilseeds & Pulses Export Corporation v Rio del Mar Foods Inc* [1990] 1 Lloyd's Rep 86 at 97 observed that he found it very difficult to make any distinction between the words "arising out of" and "arising in connection with", the two phrases to him appearing to be practically synonymous. To me, however, "arising out of" does seem to be the more restrictive phrase in that it would usually seem to require a more direct connection between the dispute and the contract than the phrase "arising in connection with". An example of this approach is demonstrated by the decision in *Getreide-Import* ([13] *supra*). The arbitration clause there was one limited to disputes "arising out of" the relevant contract.

19 In this particular case, it is clear that the parties wanted any and all disputes that might arise in relation to the IA, a very complicated contractual document involving large sums and heavy responsibilities, to be adjudicated upon by an arbitrator under the auspices of the ICC. They would have known that this form of adjudication would have resulted in two broad categories of costs being

incurred: the costs of arbitration and the costs of the parties. The costs of the arbitration would include the fees and expenses of the arbitrator, the fees of the ICC and the costs involved in holding the hearings. The costs of the parties would include the fees and expenses of their lawyers and the costs incurred in preparing and presenting the case, including the costs of witnesses. They would also have known that each party to the arbitration would have the right to ask the arbitrator to make an award as to which party was to pay the costs of arbitration or whether the same should be shared and as to whether one party should pay the costs of the other. The parties in agreeing to dispute resolution by an ICC arbitration would therefore have contemplated that the costs of such resolution would also have been settled in this manner. In this context, it appears to me that a dispute over the costs of the arbitration held to resolve a dispute over an issue such as whether the IA has been properly terminated is also a dispute arising in connection with the IA. The dispute over the costs cannot be described as entirely unrelated to the IA. It has arisen because there was a dispute under the IA, that dispute went to arbitration and costs were incurred but not dealt with. It was intimately connected with the adjudication of the dispute and not something that arose at one remove after the award, as was the case of the appeal considered in *Getreide-Import*.

20 Accordingly, I hold that the arbitral tribunal in the Second Arbitration had jurisdiction to adjudicate on the dispute over the costs of the First Arbitration. The originating motion is, therefore, dismissed with costs.