IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 269

Originating Summons No 359 of 2017

In the matter of Section 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed)

And

In the Matter of International Chamber of Commerce Arbitration Case No. 21674/CYK/PTA

Between

(1) BNP
(2) BNQ

… *Plaintiffs*

And

BNR

… *Defendant*

JUDGMENT

[Arbitration] — [Agreement] — [Incorporation]
[Arbitration] — [Agreement] — [Interpretation]
[Arbitration] — [Arbitral tribunal] — [Jurisdiction]

BNP and another
v
BNR

[2017] SGHC 269

High Court — Originating Summons No 359 of 2017
Belinda Ang Saw Ean J
6 & 15 September 2017; 6 & 26 October 2017

31October 2017 Judgment reserved.

Belinda Ang Saw Ean J:

1 This application is made under s 10(3) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The plaintiffs seek a determination by this court that the Tribunal does not have jurisdiction over the arbitration, which is administered under the Rules of Arbitration of the International Chamber of Commerce ("the ICC Rules"). The plaintiffs contend that the Tribunal is not properly composed, as the third member of the Tribunal was appointed as the president of the tribunal and not an umpire, contrary to the arbitration agreement.

2 The issue here concerns how the arbitral tribunal is to be constituted. The relevant arbitration clause is in a shareholders' agreement entered into between the plaintiffs and the defendant on 7 August 2008 ("the shareholders' agreement"). Clause 24 of the shareholders' agreement reads as follows:

> 24.2 Such Dispute shall be referred to and finally resolved by arbitration under the [ICC Rules] which Rules are deemed to be incorporated by reference into this Clause 24. …
>
> 24.3 The number of arbitrators shall be one (1) provided that, if the parties to the dispute are not able to agree upon the sole arbitrator within 30 (Thirty) days of the date on which a Party initiates arbitration proceedings, the number of arbitrators shall be 3 (Three). In such event, one arbitrator shall be nominated by [the defendant] on the one hand and one arbitrator, by [the plaintiff] on the other hand as the case may be. The third arbitrator, who shall act as an umpire, shall be nominated by the 2 (two) arbitrators appointed ('Umpire'), provided that if these two arbitrators are unable to agree on the nomination of the Umpire within 20 (Twenty) days of their appointment, the Umpire shall be appointed in accordance with the Rules.

3 In this case, the two party-appointed arbitrators jointly nominated the third member of the panel to act as the third arbitrator and president of the Tribunal and this was confirmed by the ICC Court. The plaintiffs filed a preliminary objection challenging the role of the third member of the panel as arbitrator and president. The Tribunal (including the third member) issued a partial award ("the Partial Award") finding that the third member was validly confirmed as president. The plaintiffs now challenge the Tribunal's jurisdiction before this court.

4 I begin with some general principles that are relevant to this application.

(a) The principle of party autonomy enables the parties to decide on how the arbitral tribunal is to be constituted and how the arbitration is to be conducted: see *Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and another application* [2005] SGHC 91 at [18].

(b) Where clauses are incorporated by reference into a written agreement, and the incorporated clauses conflict with terms in the

written agreement, the latter will ordinarily prevail: see *Chitty on Contracts* vol 1 (Sweet & Maxwell, 31st Ed, 2012) ("*Chitty on Contracts*") at [13-082]. However, the court will endeavour to give effect to both cls 24.2 and 24.3, if it is reasonably and sensibly possible to construe the two clauses so that they can sit together, *ie*, the court will endeavour to construe the sub-clauses harmoniously to give effect to the whole of cl 24.

(c) The indisputable fact is that the parties have agreed to incorporate the ICC Rules into their arbitration agreement and effect should be given to the ICC Rules in a manner that is consistent with the incorporation. It would not be respecting party autonomy to construe cl 24.3 by ignoring the relevant ICC Rules. If necessary, where there is express incorporation of the ICC Rules into cl 24, case law allows for some degree of verbal modification or adjustment to fit the incorporated ICC Rules into the wording of cl 24.3.

(d) A clause that is completely inconsistent with the parties' objectively ascertained intention will not be enforced (see *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] 4 SLR(R) 257 at [20]).

5 It is clear from cl 24.2 that the ICC Rules are expressly incorporated by reference into cl 24. Clause 24.2 further provides that disputes between the parties shall be referred to and finally resolved by arbitration under the ICC Rules. There is no dispute that the ICC Court of Arbitration ("the ICC Court") is the only body authorised to administer arbitrations under the ICC Rules.

6 The parties have agreed on three arbitrators if the parties are unable to agree on a sole arbitrator in cl 24.3. Article 12(5) of the ICC Rules states that

that where the parties agree that there are to be three arbitrators, the third arbitrator shall be appointed by the court and "will act as president of the arbitral tribunal". The immediate question is whether the parties, by setting out a procedure for the appointment of the third arbitrator, including the selection of the "umpire" in cl 24.3, have agreed to an arbitral panel that is composed of three arbitrators or an arbitral panel of two arbitrators and one umpire (*ie*, the umpire is not a member of the panel). I will come to the knotty question of what "umpire" in clause 24.3 means later on in this judgment.

7 Counsel for the plaintiffs, Mr Andre Yeap, SC ("Mr Yeap"), argues that cl 24.3 of the shareholders' agreement overrides the standard ICC rule for the appointment of a president in Art 12(5) of the ICC Rules. Art 12(5) states that the procedure for the third arbitrator's appointment (as president of the tribunal) applies "unless the parties have agreed upon another procedure for such appointment". He also cites Art 11(6) of the ICC Rules in support of his contention that Arts 12 and 13 of the ICC Rules do not apply because the parties have "provided otherwise" in cl 24.3 on how the arbitral tribunal is to be constituted. Article 11(6) of the ICC Rules reads:

> Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

Mr Yeap says that cl 24.3 expressly states that the "third arbitrator… shall act as an umpire" and in doing so the parties have made their own arrangements by agreement on the procedure to apply for the constitution of the arbitral tribunal. He therefore argues that it is impermissible for this court to read "umpire" as meaning "president" as per Art 12(5) of the ICC Rules.

8 Counsel for the defendant, Mr Thio Shen Yi, SC ("Mr Thio"), rejects Mr Yeap's reading of cl 24.3 as it does not give effect to the parties' agreement

to have the disputes between them resolved by a three-member arbitral tribunal in accordance with the ICC Rules. To Mr Thio, the plaintiff's construction of cl 24.3 ignores the parties' express stipulation that "the number of arbitrators shall be 3 (Three)". The word "shall" is mandatory.

9 The next question is how to construe the role of an "umpire", both during the arbitral proceedings itself and the decision-making process. The plaintiffs in their written submissions dated 30 August 2017 ("August submissions") argue that the word "umpire" is a settled and well-defined term and cannot simply be a third arbitrator. The defining characteristic of an umpire is that he remains passive until and unless the two party-appointed arbitrators disagree on a joint award. If the two arbitrators disagree, the umpire becomes the sole member of the tribunal deciding the arbitration and the powers of the other two arbitrators come to an end. At the hearing on 6 September 2017, Mr Yeap submitted on the "role" of an umpire during the arbitral proceedings. He said that the umpire can be given the papers filed in the arbitration and sit with the other two arbitrators to hear the evidence and arguments even though he is not allowed to ask questions. Repeating the same contention, the plaintiffs in their second supplementary submissions dated 6 October 2017 stated that an umpire's role is to attend hearings and participate so long as he does not usurp the authority of the co-arbitrators. On 26 October 2017, Mr Thio pointed out that the plaintiffs' inconsistent submissions "belies" their earlier submission on 30 August 2017 that an umpire's functions are settled and well defined.

10 Mr Yeap's description of the role and function of the umpire in his August submissions is based on the English Arbitration Act 1996 (c 23) (UK), which is not applicable here. I find that the Tribunal's view (at [37] of the Partial Award) that the actual role and function of the third arbitrator/umpire was unclear is not misplaced. Plainly, cl 24.3 is silent as to the role and function of

the umpire; and this is a significant feature to note. There is, therefore, a "gap" in cl 24.3 and this will have a bearing on the meaning of "umpire". In England and Hong Kong, if the parties have not agreed on the role and function of the umpire in the arbitration agreement, the default position is found in the relevant statutes. In England there is s 21 of the English Arbitration Act 1996, and in Hong Kong, there is s 31 of the Hong Kong Arbitration Ordinance (Cap 609) (HK). There is no similar default provision in the IAA. Indeed, the IAA has no provision covering the role and function of an umpire.

11 Mr Yeap's further submissions dated 6 October 2017 on the ostensible role of an umpire under common law prior to the English Arbitration Act 1996 is not helpful. Even if the concept of the umpire was present then, the umpire's role still evaded precise definition. As stated, unlike in England and Hong Kong, the IAA does not specify an umpire's role and function. Even in domestic arbitrations, Singapore law has moved away from the umpire system. This is evident from the transitional provision in s 65(3) of the Arbitration Act (Cap 10, 2002 Rev Ed) which makes clear that the law that governs the appointment, role and function of an umpire will apply to arbitration agreements made or entered into before 1 March 2002 providing for the appointment of an umpire or an arbitral tribunal comprising two arbitrators. This implies that the current Arbitration Act does not provide for an umpire's role and function. As the Court of Appeal observed in *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd* and another [2014] 1 SLR 130 at [31], our legislative scheme today obliges our courts to put the English authorities aside. Further, the IAA has undergone a number of changes to keep it consistent with best international practices and the Arbitration Act follows the IAA to a significant degree.

12 The upshot of the analysis above coupled with the stipulation in cl 24.3 for three arbitrators, and the express incorporation of the ICC Rules (which provides only for a one or three-member arbitral tribunal) is that a three-member arbitral tribunal was intended as objectively ascertained. Had the parties intended for an umpire in the style described by Mr Yeap, the description of a third arbitrator to act as umpire is unclear especially in the absence of the parties' agreement on the role and function of the umpire during the arbitral proceedings. Thus, I find that the parties intended for a three-member arbitral tribunal. This militates against Mr Yeap's contention that the parties have made their own arrangements by agreement on the procedure for the constitution of the arbitral tribunal in cl 24.3. Therefore, by default (*ie*, according to Art 11(6) of the ICC Rules), the arbitral tribunal is to be constituted in accordance with Arts 12 and 13 of the ICC Rules.

13 With this finding, the question that arises is how to reasonably and sensibly construe cl 24.3 with Art 12(5) of the ICC Rules so that they can sit together harmoniously to give effect to the whole of cl 24. The problem with construction is self-evident in the situation where the party-appointed arbitrators are unable to nominate "the third arbitrator, who shall act as an umpire". Clause 24.3 of the shareholders' agreement provides that if these two arbitrators are unable to agree on the nomination of "the Umpire within 20 (Twenty) days of their appointment, the Umpire shall be appointed in accordance with the Rules". Here, the rule in question is Art 12(5). Under Art 12(5), the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the ICC Court. Immediately, the inconsistency in the language in clause 24.3 ("umpire") and Article 12(5) ("president") would appear, and is this difference in terminology cosmetic or fundamental? In his written submissions dated 15 September 2017, Mr Thio says that the defined term "Umpire" (alphabet "U" in uppercase) in cl

24.3 does not carry any additional legal meaning. The only issue is how to interpret the word "umpire" (alphabet "u" in lowercase).

14 In this case, the matters to take into consideration are as follows: (a) the parties have agreed to a three-member arbitral tribunal; (b) the constitution of the arbitral tribunal is to be appointed in accordance with Arts 12 and 13 of the ICC Rules; (c) the nomination of the third arbitrator who is to act as umpire to be appointed in accordance with the ICC Rules in cl 24.3 is unintelligible since the ICC Court is required to nominate the third arbitrator who is to act as the president of the arbitral tribunal; and (d) the parties' agreement to have the dispute and conduct of the arbitration resolved in accordance with the ICC Rules. It is against this context that the meaning of the term "umpire" in cl 24.3 or the objectively ascertained intention of the parties has to be understood and interpreted. This approach is similar to the approach to contractual interpretation that was laid down in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029.

15 Mr Thio contends that Mr Yeap's interpretation of the "umpire's" role necessarily advocates for a two-member arbitral tribunal, which is inconsistent with the ICC Rules. The umpire appointed by the party-appointed arbitrators is not a member of the two-member arbitral tribunal. The umpire steps in only in the event of a deadlock (*ie,* when the two party-appointed arbitrators cannot agree) and renders an umpire's award which becomes the eventual award.

16 I agree with Mr Thio's submissions. First, the ICC Rules do not support a two-tier decision-making process where the umpire only renders his award when the two party-appointed arbitrators do not agree. Second, the ICC Rules as well as the IAA and UNCITRAL Model Law on International Commercial Arbitration ("Model Law") envisage decision-making by majority, which is

incompatible with Mr Yeap's umpire system. Article 30(1) of the ICC Rules and Art 29 of the Model Law state that if the composition of the arbitral tribunal is more than one, the award is made by a majority decision. In a three-member panel, a majority-making decision implies that all three arbitrators participate in the decision-making process even though one arbitrator may be outvoted by the remaining two. Where no majority decision is formed, the relevant ICC Rule states that the presiding arbitrator may rule alone. His authority to rule on his own arises only when neither of the other two arbitrators can agree with him.

17 The construction advanced by the plaintiff, *ie*, that cl 24.3 calls for two arbitrators plus one umpire, would mean two arbitrators in the panel (the umpire is not a member and does not participate in the arbitration). The implication is that the parties desire a unanimous decision or no decision at all if consensus cannot be reached. The umpire steps in if there is a deadlock to render an umpire's award, and it stands as the award of the umpire alone. The implication that the parties desire a unanimous decision in a two-member tribunal does not sit well with a majority decision in a three-member panel. Further, Art 31 of the Model Law also requires that an arbitral award be signed by all members of the arbitral tribunal, or a majority of all members of the arbitral tribunal provided that the reason for any omitted signature is stated. This is again inconsistent with a two-member arbitral panel rendering an award. An umpire structure thus sits uncomfortably in the context of the ICC Rules and the Model Law.

18 In the light of the unclear definition of an umpire's role both during the arbitral proceedings itself and the decision-making process coupled with the parties' intention to have a three-member arbitral tribunal and to have arbitration conducted (and the arbitral tribunal constituted) in accordance with the ICC Rules, I thus agree with the Tribunal's interpretation at [74] of the Partial Award that to be effective, cl 24.3 of the shareholders' agreement must be interpreted

"so that the third arbitrator acts not as an umpire, only to be involved if there is disagreement between the two nominated arbitrators, but as a chairman or president, taking… full part in the arbitral process". The Tribunal said that when read in its proper context, whether or not the third arbitrator is named as "umpire", when taking part in the arbitral process conducted by ICC Rules, the third arbitrator shall act as presiding arbitrator with authority to rule on his own only when neither of the other two arbitrators can agree with him. Put simply, the word "umpire" in cl 24.3 of the shareholders' agreement is given no legal effect.

19 Finally, as a separate point, and without having the benefit of the parties' arguments on the matter, my view is that the court would have been permitted in this case to go further to engage in some degree of verbal modification or adjustment where the ICC Rules are expressly incorporated into cl 24 of the shareholders' agreement to resolve the effect of the gap in the agreement (see [10] above). The court will give effect to the meaning of the parties' agreement reasonably discerned from the written agreement itself and the background even though it involves departing from or qualifying particular words used, especially if the words in the written agreement would lead to inconsistency with the rest of the instrument: see *Chitty on Contracts* at [13-074] and [13-077] and *Hanwha Non-Life Insurance Co Ltd v Alba Pte Ltd* [2012] 1 SLR 941 at [81] and [84], citing *Miramar Maritime Corp v Holborn Oil Trading Ltd* [1984] AC 676.

20 I have already explained that the arbitral tribunal is to be constituted in accordance with Arts 12 and 13 of the ICC Rules. Even though the express written terms of the agreement usually supersede terms incorporated by reference in the event of a conflict, I find that the parties' intentions were clearly to carry out arbitration under the auspices of the ICC Rules and ICC Court, and effect should be given to this as far as possible to make such an arbitration

workable and feasible. It thus makes little sense to deny effect to Art 12(5) of the ICC Rules in cl 24.3 of the shareholders' agreement, especially given the lack of clarity in the definition of "umpire". Therefore to what extent is it reasonable to modify or adjust cl 24.3 to give meaning to Article 12.5? In my view, the court is permitted to substitute the word "umpire" which, in this shareholders' agreement, is not expressly associated with a two-tier umpire system, for the word "president".

21 For the reasons stated, the plaintiffs' application is dismissed with costs.

Belinda Ang Saw Ean
Judge

Andre Yeap S.C., Yap Wern-Jhien and Zhuang WenXiong (Rajah & Tann Singapore LLP) for the plaintiffs;
Thio Shen Yi S.C., Evans Ng and Niklas Wong (TSMP Law Corporation) (Instructed) and Boey Swee Siang and Jonathan Choo (Bird & Bird ATMD LLP) for the defendants;