IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 199

Originating Summons No 1057 of 2016
(Registrar's Appeal No 78 of 2017)

Between

Quanzhou Sanhong Trading Limited Liability Co Ltd

… *Plaintiff*

And

ADM Asia-Pacific Trading Pte Ltd (formerly known as Toepfer International-Asia Pte Ltd)

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [Enforcement] — [Foreign award]

Quanzhou Sanhong Trading Limited Liability Co Ltd
v
ADM Asia-Pacific Trading Pte Ltd

[2017] SGHC 199

High Court — Originating Summons No 1057 of 2016 (Registrar's Appeal No 78 of 2017)
Chua Lee Ming J
14 July 2017

14 August 2017

Chua Lee Ming J:

Introduction

1 This was an appeal by the defendant, ADM Asia-Pacific Trading Pte Ltd, against the decision of the assistant registrar ("AR") dismissing its application to set aside an order granting leave to the plaintiff, Quanzhou Sanhong Trading Limited Liability Co Ltd, to enforce a foreign arbitral award. The main issue was whether the arbitral tribunal exceeded its jurisdiction if it made an error as to the governing law of the contract. I concluded that the tribunal did not. Accordingly, I dismissed the appeal. The defendant has appealed against my decision.

Background

2 On 4 July 2013, the plaintiff and the defendant entered into a contract to purchase corn from the defendant ("the Contract"). Subsequently, a dispute arose between the parties in relation to the quality of the corn. This dispute was referred to arbitration in Beijing, People's Republic of China, under the China International Economic and Trade Arbitration Commission Arbitration Rules.

3 On 6 May 2016, the arbitral tribunal rendered its award requiring the defendant to pay to the plaintiff US$772,957.41 and RMB4,223,702.69 together with interest ("the Award").

4 On 17 October 2016, the plaintiff obtained an order of court granting it leave to enforce the Award against the defendant ("the Enforcement Order"). The Enforcement Order was served on the defendant on 24 October 2016.

5 On 7 November 2016, the defendant filed Summons No 5409 of 2016 ("SUM 5409/2016") seeking, among other things, to set aside the Enforcement Order.

6 On 5 January 2017, the Beijing Intermediate People's Court dismissed the defendant's application to set aside the Award.

7 On 7 March 2017, the AR dismissed the defendant's application to set aside the Enforcement Order. The AR also ordered a stay of execution of the Enforcement Order pending appeal on condition that the defendant provided security (by way of a banker's guarantee or payment into court) in the sum of US$772,957.41 and RMB4,223,702.69.

8 On 17 March 2017, the defendant filed a notice of appeal against the whole of the AR's decision in SUM 5409/2016. The defendant also furnished the requisite security.

Whether the Enforcement Order should be set aside

9 Before me, the defendant submitted that the Enforcement Order should be set aside on the following grounds:

(a) That the Award contained a decision on a matter beyond the scope of the submission to arbitration (s 31(2)(*d*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act")); and/or

(b) That enforcing the Award would be contrary to the public policy of Singapore (s 31(4)(*b*) of the Act).

Whether the tribunal acted in excess of its jurisdiction

10 Section 31(2)(*d*) of the Act provides that the court may refuse enforcement of a foreign award if "the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration".

11 Section 31(2)(*d*) of the Act is similar to Art 34(2)(*a*)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), which has the force of law in Singapore by virtue of s 3 of the Act. Art 34(2)(*a*)(iii) applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. Errors of law or fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(*a*)(iii) of the Model Law. See *CRW Joint*

Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] 4 SLR 305 at [31] and [33]. If an issue is firmly within the scope of submission to arbitration, it cannot be taken outside the scope of submission to arbitration simply because the arbitral tribunal came to a wrong, or even manifestly wrong, conclusion on it: *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [37]. These principles are equally applicable to s 31(2)(*d*) of the Act.

12 In the present case, it was undisputed that the governing law of the Contract was an issue that was firmly within the scope of submission to the arbitral tribunal. This was not a case where both parties had submitted the dispute to arbitration on the basis that English law was the governing law. Before the arbitral tribunal, the defendant's case was that the Contract was governed by English law. The plaintiff argued that the governing law was the law of the People's Republic of China ("PRC law") since it was the law of the state most closely connected to the Contract. The tribunal decided that only one section of the Contract was governed by English law and that the rest of the Contract was governed by PRC law.

13 The defendant did not dispute the principles set out at [11] above. However, it argued that where the issue related to the governing law, an error by an arbitral tribunal would cause it to exceed its jurisdiction because it would have disregarded the parties' express agreement as to the governing law. The defendant therefore submitted that in the present case, the court could review the arbitral tribunal's decision on the governing law of the Contract and set aside the Award if the court found the tribunal's decision to be wrong.

14 I disagreed with the defendant's submission that an arbitral tribunal's error in respect of the governing law would cause it to exceed its jurisdiction.

In my view, the defendant's submission could not be justified as a matter of principle. The law as stated at [11] above is well established. An arbitral tribunal does not exceed its jurisdiction just because it comes to a wrong conclusion on an issue that was within the scope of the submission to arbitration. There is no reason why an issue as to governing law should be treated differently from other issues submitted to arbitration.

15 The defendant's submission was also not supported by case authority. A similar submission was rejected in *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057 ("*Quarella*"). In that case, the choice of law clause provided that the agreement "shall be governed by the Uniform Law for International Sales under the United Nations Convention of April 11, 1980 (Vienna) ["CISG"] and where not applicable by Italian law." Before the arbitral tribunal, the plaintiff argued that the governing law was the CISG while the defendant argued it was Italian law. The tribunal agreed with the defendant. The plaintiff applied to set aside the arbitration award. Among others, the plaintiff relied on Article 34(2)(*a*)(iii) of the Model Law. The plaintiff argued that the tribunal's decision on the governing law was wrong and that by failing to apply the law chosen by the parties, the tribunal had gone beyond the scope of submission to arbitration. The plaintiff accepted that an error of law was not a ground for setting aside the award but submitted that the application of the wrong law was a distinct situation.

16 The court rejected the plaintiff's submissions. The court noted (at [53]) that the issue of the applicable law had been submitted to the tribunal and the award addressed this issue explicitly. The court was of the view (at [55]) that the plaintiff's application was based entirely on its disagreement with the tribunal's interpretation of the choice of law clause and concluded that the

dispute was not one that engaged Art 34(2)(*a*)(iii) of the Model Law. I respectfully agree with the decision in *Quarella*.

17 The defendant sought to distinguish *Quarella* on the ground that the choice of law clause in that case specifically mentioned both the CISG and Italian law. The defendant said that this conferred authority upon the tribunal to decide which law applied. However, in the present case, the Contract only referred to the GAFTA 88 (*ie*, Contract No 88, a standard form contract produced by the Grain and Feed Trade Association) under which the governing law was English law. Nowhere in the Contract was PRC law mentioned.

18 That distinction did not take the defendant very far. The fact that the choice of law clause in *Quarella* mentioned both the CISG and Italian law was not critical to the court's decision. Clearly, *Quarella* decided that where an issue has been submitted to arbitration, the tribunal cannot be said to have exceeded its jurisdiction just because its decision on that issue was wrong, even if the issue was in respect of the governing law.

19 In substance, the defendant was arguing an appeal against the tribunal's decision on the governing law of the Contract. Such a dispute did not engage s 31(2)(*d)* of the Act. I therefore concluded that the defendant was not entitled to rely on s 31(2)(*d*) of the Act.

Whether enforcement of the Award would be contrary to the public policy of Singapore

20 Section 31(4)(*b*) of the Act provides that the court may refuse to enforce a foreign award if "enforcement of the award would be contrary to the public policy of Singapore".

21 The defendant's case was that enforcement of the Award would be contrary to the public policy of Singapore because the arbitral tribunal had exceeded its jurisdiction when it decided that the Contract was governed by PRC law (save for one section of the Contract). As I had decided that the tribunal had not exceeded its jurisdiction, it followed that the defendant's case based on s 31(4)(*b*) of the Act also failed.

Conclusion

22 I dismissed the appeal and ordered the defendant to pay costs of the appeal fixed at $6,000 inclusive of disbursements.

Stay of execution pending appeal

23 The defendant made an oral application for a stay of execution pending appeal, alternatively a temporary stay pending its application to the Court of Appeal for a stay pending appeal. The defendant argued that otherwise, if it succeeded on appeal, it would be impossible to recover its money from the plaintiff because the plaintiff was a China-based entity and the Beijing Intermediate People's Court had refused to set aside the Award.

24 The mere fact that the plaintiff is a foreign entity, making it inconvenient or expensive to seek recovery, does not constitute special circumstances warranting a stay. There was no evidence that the plaintiff would not be able to repay the relevant sums to the defendant if the defendant succeeded in its appeal. Neither was there any evidence that a PRC court would not enforce an order made by a Singapore court requiring the plaintiff to repay the relevant sums to the defendant if the latter succeeded in its appeal. I therefore dismissed the

defendant's application for a stay pending appeal as well as its alternative application for a temporary stay pending its application to the Court of Appeal for a stay pending appeal.

Chua Lee Ming
Judge

Kirpalani Rakesh Gopal and Tan Yi Yin Amy (Drew & Napier LLC) for the plaintiff;
Gurbani Prem Kumar (Gurbani & Co LLC) for the defendant.
