Tan Poh Leng Stanley v Tang Boon Jek Jeffrey
[2000] SGHC 260

Case Number : OM 14/2000

Decision Date : 30 November 2000

Tribunal/Court : High Court

Coram : G P Selvam J

Counsel Name(s) : Philip Jeyaretnam (Helen Yeo & Partners) for the applicant; Alvin Yeo, Tan Kay Kheng and Emily Yeow (Wong Partnership) for the respondent

Parties : Tan Poh Leng Stanley — Tang Boon Jek Jeffrey

Arbitration – Arbitral tribunal – Arbitrator – Powers of arbitrator – Whether arbitration has power to recall and reverse previous final award – Whether court can remit null award to arbitrator – International Arbitration Act (Cap 143A) – art 34 (4)UNCITRAL Model Law on International Commercial Arbitration

Arbitration – Award – Application to set aside – Time limit for making application – Whether application made out of time – art s 16 & 34 UNCITRAL Model Law on International Commercial Arbitration

: ***The final award***

The question for determination in this case is whether an arbitrator has the power to revisit and reverse a final award he made disallowing a claim. The chain of events that brought the parties before me are as follows.

On 10 January 2000 the arbitrator made a final award. I shall call it `the January award`. It ended with four lines of conclusion:

> *I find hold award and adjudge as follows:*
>
> *1 The claimants` claim be dismissed.*
>
> *2 The respondents` counterclaim be dismissed.*
>
> *3* ***The award is final*** *save as to costs.*
>
> *[Italics here and hereafter added by me.]*

Those lines of conclusion were at the end of a 37-page award. It contained a two-page introduction and a body of 136 paragraphs. He gave it this title: Arbitrator`s Award (Arbitration 2). There was an earlier award which does not concern me.

Seven days later, on 17 January 2000, the arbitrator added something to the award mentioned above. He gave it this title `Additional Award (Arbitration 2)`. I shall call this `the clarification award`. Paragraph 10 made this clarification:

> *For the avoidance of any doubt, with regard to the issue of the US$2.6m deposit (of which a sum of A$1,375,762.64 is an item of the respondents` counterclaim being the amount in excess over A$3,000,000 pursuant to cl*

> *2(A)2(b) of the SA), I agree with the claimants that cl 2(A)2(b) of the SA must be read literally as applying to the case where DA instructs ANZ Bank (Hong Kong) to transfer cash deposits in United States Dollars deposited by DA with ANZ Bank (Hong Kong) to Dynasty Pacific Group Pty Ltd (`DPG Pty Ltd`). Here the respondents admit in para 111 of the respondents` closing written submissions that it was STA who procured the appropriation of this deposit in partial satisfaction of DPG Pty Ltd`s liability. This approach is not inconsistent with the literal approach adopted by me in Arbitration 1 in dealing with cl 2(C) of the SA. I reiterate the general position that I have taken in my awards in Arbitration 1 and Arbitration 2, which is, that if a claim falls foul of the wording of the SA, that claim cannot be allowed. This item of counterclaim has been dismissed in my award of 10 January 2000.*

The clarification award contained the arbitrator`s decision on another matter which he had omitted. I am not concerned with it either.

The matter did not end there. On 31 January 2000 the arbitrator at the request of the respondent before me had a fresh hearing with counsel for the parties concerned. The parties before me are Stanley Tan Poh Leng, one of the seven claimants before the arbitrator and Jeffrey Tang Book Jek, one of the two respondents before the arbitrator. The other parties were not concerned with the matter at issue. At the fresh hearing Jeffrey Tang wanted the arbitrator to make a reversal of the January award which the arbitrator said was a final award. Counsel for Stanley Tan objected to the arbitrator revisiting the decision by dismissing Jeffrey Tang`s claim. Stanley Tan`s contention was that the arbitrator had completed and terminated the hearing by making a final award. He was functus officio. He had exhausted his mandate. Accordingly it was outside the arbitration agreement which conferred the arbitration power on the arbitrator. All the same the arbitrator went ahead with the hearing. On 6 March 2000 he made another award. He called it `Additional Award II`. I shall call it the `March Award`. By this award the arbitrator made a volte facie and made this award:

> *I find hold award and adjudge that the claimants pay the respondents the sum of A$1,375,762.64 together with interest at the rate of 6% per annum from the date of the award dated 10 January 2000 to the date of payment.*

The March award included matters which do not concern me. Stanley Tan on 29 April 2000 filed the notice of OM 14/2000 which is before me. By that notice of motion Stanley Tan asked for the following principal order:

> *That paras 19 to 34 of Additional Award II (Arbitration 2) delivered on 6 March 2000 by the arbitrator in an arbitration between the applicant and the respondent pursuant to an arbitration agreement contained in a settlement agreement dated 24 January 1998 and a supplemental agreement contained in or evidenced by an exchange of letters between the respective parties` solicitors dated 6 April 1999 be set aside.*

Preliminary point on procedure

Before I consider the merits of the motion there is a preliminary procedural matter to decide. This was a contention on behalf of Jeffrey Tang that the motion was filed out of time. It was contended for

Jeffrey Tang that it should have been made within 30 days.

To understand this procedural and the substantive issue it is necessary to take in the relevant provisions of the International Arbitration Act (Cap 143A). I shall call it `the Act`.

The Act provides a code for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration. The Model Law was adopted by the United Nations Commission on International Trade Law and Conciliatory Proceedings.

The Act defines `Model Law` as follows:

> *The UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21st June 1985, the text in English of which is set out in the First Schedule.:*

The Model Law deals with the constitution and powers of the arbitral tribunal and regulates the process of arbitration. It is not a complete body of law. Provisions in the Act complement the powers of the arbitration tribunal. They also empower the High Court to stay court proceedings, set aside an award made in the purported jurisdiction of the arbitration tribunal and for applications to the High Court.

The preliminary point calls for a consideration of art 16 of the Model Law. It reads as follows:

> ***Article 16: Competence of arbitral tribunal to rule on its jurisdiction.***
>
> *(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.*
>
> *(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.*
>
> *(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.`*

On a plain reading of art 16, the stipulation of 30 days for appealing to the High Court on the issue of jurisdiction applies only when the arbitral tribunal rules as a preliminary question that it has jurisdiction. Furthermore, the tribunal cannot be compelled to make a preliminary ruling on the jurisdiction issue. Additionally, the right to request the High Court for a decision on the preliminary decision is an option. This is indicated by the words `may request`. It does not bar a challenge by an application to set aside the award on the ground of lack of jurisdiction.

In this case, there was no preliminary decision by the arbitrator on the issue of jurisdiction. Additionally, art 16 applies to a challenge to the jurisdiction of the Tribunal at the commencement of the arbitral proceedings and not at or after the conclusion stage of the arbitral proceedings. This is indicated by the stipulation that the plea `shall be raised not later than the submission of the statement of defence`.

The time limit that applies to this case is stipulated in art 34 of the Model Law. It is three months from the receipt of the award. This applies when the arbitrator`s ruling on jurisdiction is included in the award.

For the reasons set out above, Jeffrey Tang`s plea that the application to set aside was incorrect and out of time, fails. I, therefore, turn to the substantive points.

The law of functus officio

The doctrine of functus officio owes its origin to a wider principle expressed in the Latin maxim: ***Nemo debet bis vexari pro eadem causa*** (No man should be twice troubled.) The purpose of the principle is finality to dispute resolution. When applied to litigation and arbitration, this principle may take the form of res judicata, issue estoppel and functus officio. Finality may also be reached by the operation of the doctrine of merger and the doctrine of extinction of a cause of action.

The meaning and effect of what has been said crystallize into the principle that: Once a matter is finally adjudicated or arbitrated no party bound by it is permitted to reopen it. The court or the arbitrator becomes functus officio. They have exhausted their jurisdiction or mandate as the case may be. A decision in favour of the claimant merges the claim into a judgment or arbitral award. If the claim is disallowed the cause of action is extinguished. There is nothing to adjudicate or arbitrate. The doctrine of functus officio is analogous to the effect of the Statute of Limitation which extinguishes the claim. Under the regime of the Act and the Model Law the original cause of action and the arbitrator have no life after the release of the final award.

The doctrine of functus officio is expressed lucidly in ***Russell On Arbitration*** (21st Ed, 1997) para 5-235:

> *Proceedings will close after the oral hearings have finished and any post-hearing submissions have been made. Thereafter the tribunal makes its award. Once a final award is made, the tribunal becomes functus officio. This means that its authority to act ceases, the reference terminates and the award cannot thereafter be amended.*

There are statutory exceptions in Arbitration Acts to the basic rule that once the tribunal has made

its final award it becomes functus officio and cannot subsequently amend the award. Section 17 of the English Arbitration Act 1950 for instance conferred the power on the arbitrator to correct in an award any clerical mistake or error arising from any accidental slip or omission.

The fact that this is an exception created by statute emphatically affirms the basic rule that the arbitrator has no power to reconsider or make a reversal of the substantive award even if it is perceived to be in error. Any attempt on the part of the arbitrator to confer upon himself such power would be utterly without authority and against the policy, purpose and scope of the Arbitration Acts. The principle and logic are stated in the eloquent words of Spencer Bower, Turner and Handley`s ***The Doctrine of Res Judicata*** (3rd Ed, 1996) at para 128:

> *Where the arbitral tribunal is shown to have acted within, or is not shown to have acted in excess of, its jurisdiction, and the other conditions of a valid res judicata are established, the award binds the parties and cannot be impeached for error of law or fact. Jurisdiction, for this purpose, does not mean jurisdiction to give a correct decision only. At common law if error in law appeared on the face of the award, or in any memorandum intended to form part of it, it might be set aside, or remitted on the motion of the party aggrieved, except where a specific question of law was submitted, or the tribunal had authority to adjudicate upon a debt of honour, or other matter not cognisable by the courts of law. This jurisdiction was abolished by section 1(1) of the Arbitration Act 1979. The award may be remitted to enable the arbitrator to rectify any mistake of fact apparent on its face, or to which the arbitrator calls attention, and an arbitrator or umpire now has statutory authority `to correct any clerical mistake, or error arising from any accidental slip or omission`. The existence of these powers shows that, unless and until they are exercised, the award, however wrong in law, or mistaken in fact, operates as a res judicata.*

In the case of **The Montan** [1984] 1 Lloyd`s Rep 389 at p 394, Hobhouse J pointed up the point of principle that the power to correct a clerical error must not be converted into a power to reconsider and reverse the substantive decision:

> *It is an exception to the rule that the award as published is final and the arbitrator having made his award is functus officio. This rule is one of fundamental importance. arbitrators cannot be allowed to have second thoughts or to change their minds after making their awards. Such a reconsideration by the arbitrator can only occur if the court has remitted the award to him under the Arbitration Acts. There are very strong reasons of policy which underly this. There must be an end to an arbitration, as to litigation. The exception which s 17 allows is very limited. It in no way allows any change of mind by the arbitrator, nor does it allow the arbitrator to correct mistakes of reasoning or of evaluation or assessment or even of expression.*

Fidelitas Shipping Co Ltd v V/O Exportchleb [1966] 1 QB 630 is authority for the proposition that once the arbitrator has made a formal award on a specific matter he has no power to reconsider that award.

The doctrine of finality and functus officio is expressed in art 32 of the Model Law:

> *The arbitral proceedings are terminated by the final award. The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of arts 33 and 34(4).*

Article 33 empowers the arbitral tribunal to correct in the award (a) any errors in computation, any clerical or typographical errors or any errors of similar nature; (b) to give an interpretation of a specific point or part of the award; and (c) to make an additional award as to claims presented in the arbitration proceedings but omitted from the award.

Article 34(4) provides as follows:

> *The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal`s opinion will eliminate the grounds for setting aside.*

Article 34 is important. It is the only article in Chapter VII of the Model Law. It provides for recourse against an award. The heading of the section is as follows:

> *Application for setting aside as exclusive recourse against arbitral award.*

Paragraph 1 of art 34 says that recourse to a court against an atrbitral award may be made only by an application for setting aside in accordance with paras (2) and (3) of this article.

There is nothing in the Model Law which authorises the arbitrator to recall or reconsider his award after he has made the final award and his mandate is thereby terminated.

The quest for justice under a hierarchical court system can be a long haul. Under it justice inclines now one side and now to another side. Sometimes she makes a full circle and returns to where she started. Model Law regime avoids such vicissitudes entirely. There is no provision for appeals or to recall, reconsider and reverse of a substantive award which the loser perceives to be in error. Furthermore, the scheme and substance of the Model Law are entirely against the court making the substantive decision or investigating the correctness of the decision.

A historical note

It is fitting moment to make a historical note. It was a time when London was the bastion of transnational arbitration. London`s role as international arbitration and commercial litigation centre was part of its paraphernalia as the foremost financial centre and commercial exchange. It was `a valuable economic asset, part of its capital, although an intangible one`. By the 1970`s, however, foreign parties became disillusioned with English arbitration jurisprudence. This was because of the procedures of stating-a-case for a ruling by the court and the procedure of error of law or fact on the face of the award. Defeated parties used these methods to delay and at times defeat arbitral justice. These interminable procedures were radically different from and unknown to Europe and America. They brought a bad name to London. In the result foreign parties began to avoid London. Paris and New York found much favour. This prompted the English Parliament to pass the Arbitration Act of 1979 to remove the pitfalls mentioned above. It prescribed judicial review in the form of appeals in extremely circumscribed circumstances. Singapore followed suit in 1980: see Act 2 of 1980. The hallmark of the Model Law is that it does not provide for appeals on the merits of an arbitral

decision even on points of law. It gives effective force to the doctrine of functus officio in respect of the substantive decision contained in an arbitral award. The powers to recall, reconsider and reverse does not fit in well with the fit of things of the Model Law. It is foreign to the jurisprudence of the Model Law. The omission of the power to recall and reconsider is deliberate. We have accepted the United Nations`s Model Law as the transcending copybook instead of the traditional English precedent. So, the only eyes with which we must view an award made under the Model Law are the eyes of the Model Law and no other law - written or unwritten. We must not go our own way in transnational arbitration.

In respect of an arbitration governed by the Act and the Model Law, art 34(4) applies only to an award made before the mandate of the arbitrator is terminated as provided in art 32 and no other. The court has no choice on the matter.

The decision

The foregoing analysis of the law and facts decrees me to conclude that the March award was made by the arbitrator outside his mandate. It was a nullity and accordingly without any force or effect.

The arbitrator, in order to get around the lack of power and the fact of functus officio wrote his own writ. He admitted that there was no provision in the Act or the Model Law which enabled him recall and reverse the award. But, he said, he had the power because `It is inconceivable that the law or public policy would permit such a situation.` He assumed the authority to add something to the Act and the Model Law. The arbitrator added this to justify his unauthorised assumption of power:

> *I am therefore of the view that an arbitrator can reconsider the award not only on the terms of art 33(1) of the Model Law but under the general powers given to him to determine the rules and procedure of the tribunal which would include the power to reconsider an award before enforcement if the arbitrator so decide. If I have good reasons to reconsider the matter, I should be allowed to do it. Otherwise, an injustice would be perpetuated.*

The propositions of the arbitrator assume that there is a shortcoming in the Model Law to provide for a possible shortcoming of an arbitrator. I repeat that the absence of the power on the Model Law to recall, reconsider and reverse the decision contained in an award is deliberate and is founded on the principle of finality and public policy to bring an early end to commercial disputes. Its purpose is to compel the arbitrator to act with extreme care and decide with competence and decisiveness. An inclusion of the powers the arbitrator argues for will encourage defeated parties to reopen the arbitration even after his mandate has been terminated. It will provide for indecisive and incompetent arbitrators a second chance. I repeat that what the arbitrator attempted to do was to write his own writ. It was utterly outside the parameters and dynamics of the Act and the Model Law. Once he became functus officio he had no power to recall and reverse the award. More importantly he had no power to create that power when it is not contained in the Act or the Model Law. The only powers he had an award after he became functus officio were those under art 33. Article 33 did not empower the arbitrator to recall and reverse a final award.

Counsel for Jeffrey Tang referred to s 12 of the Act which confers certain powers on the arbitrator relating to the conduct of an arbitration. These include the powers to make orders or give directions in relation to security for costs, discovery of documents, and securing the amount in dispute. It also enables the arbitrator to award any remedy or relief which could be ordered by the High Court if the

dispute had been subject of civil proceedings in that court. These are limited procedural powers which can only be exercised during the arbitration before the arbitrator becomes functus officio. There is nothing in s 12 of the Act which empowers the arbitrator to recall and reverse a final award. The arbitrator quite rightly did not rely on s 12 of the Act.

Finally, counsel for Jeffrey Tang asked me to invoke art 34(4) and suspend the setting aside proceedings before me and remit the award to the arbitrator. I cannot do that. Article 33(4) can be invoked only when there are irregularities in the award and not when the award is a nullity. Furthermore the power to remit does not apply to an award made after the arbitrator became functus officio. The court has no power to resuscitate a dead arbitrator.

By reason of the maters stated above I set aside the March Award and let the January award stand.

Outcome:

The respondent (Jeffrey Tang) shall pay the costs of the applicant (Stanley Tan).

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