CHINA JIANGSU INTERNATIONAL ECONOMIC TECHNICAL COOPERATION CORPORATION v LATERAL HOLDINGS LIMITED

2023 SCJ 287

SC/COM/JICA/000776/2021

THE SUPREME COURT OF MAURITIUS
(BEFORE THE JUDGE IN CHAMBERS)
(COMMERCIAL DIVISION)

In the matter of:-

CHINA JIANGSU INTERNATIONAL ECONOMIC TECHNICAL COOPERATION CORPORATION

Applicant

v

LATERAL HOLDINGS LIMITED

Respondent

In the presence of:-

ANWAR MOOLLAN, SENIOR COUNSEL

Third Party

JUDGMENT

The services of the applicant were retained by the respondent for the construction of a hotel resort. Following dispute arising between the parties regarding payment for payment certificate no.15, arbitration proceedings were initiated upon the consent of the applicant and the respondent with the appointment of the third party as the arbitrator. The arbitration spanned over 72 sittings across a number of years and when the third party sought an extension of time by letter dated 4 June 2021 to deliver the award after the delay had expired since 15 February 2021, the applicant agreed to such request but not the respondent. The case of the applicant is that since the dispute has remained unresolved and that the arbitration proceedings had come to an end with no award, it has entered the present application. It is an application made under Article 1005 of the Code de Procédure Civile (CPC) for the appointment of an arbitrator in the person of either –

(i) Mr Mushtaq Namdarkhan ;or
(ii) Mrs Narghis Bundhun, SC ; and
(iii) that the arbitration be carried out under the aegis of the Mediation and Arbitration Centre (MARC) or any such other person as the Honourable Judge sitting in Chambers may deem fit, to look into and settle the disputes

existing between the applicant and the respondent as set out in Recitals D and E of the Arbitration Agreement dated 8 March 2012 under the Contract for the Construction of a hotel resort at Balaclava, Mauritius subject to a letter of Award dated 11 January 2007.

In order to have a better understanding of the case, it is most relevant to set out the chronology of events which is as follows -

(i) a dispute arose between the parties on 10 June 2009;
(ii) a statutory demand was served on the respondent on 27 November 2009 and following the latter not complying to same, a winding up petition was lodged by the applicant against the respondent on 11 January 2010;
(iii) as the winding up petition was yet to be heard, the respondent made an application under Article 1005 of the CPC for the appointment of an arbitrator to resolve the dispute between the parties;
(iv) the winding up petition was withdrawn on 31 January 2011 and the parties executed an Arbitration Agreement dated 8 March 2012;
(v) the first substantive hearing started in August 2014 and the arbitration process lasted over 72 sittings and ended on 4 December 2019;
(vi) the date of the delivery of the award by the third party had been extended on 14 occasions;
(vii) when a further extension of delay up to July 2021 for delivering the award was made by the third party by letter 4 June 2021, the applicant agreed to same whereas the respondent declined the request for extension;
(viii) the arbitration lapsed on 15 February 2021;
(ix) on 19 August 2021, the applicant informed the respondent of its intention to initiate fresh arbitration proceedings as the dispute between the parties was still unresolved;
(x) in the absence of any agreement reached between the parties for the appointment of a new arbitrator, the applicant has made the present application on 9 November 2021.

The respondent raised two preliminary objections which are as follows –

(a) the dispute between the applicant and the respondent is time-barred and cannot be arbitrated upon; and
(b) the present application is an abuse of process.

As stated above, the applicant had carried out works for the respondent in relation to the construction of a hotel resort in Balaclava. Arbitration was initiated following disputes on the payment of certificate no.15. As such, it is undisputed between the parties that this is an *action personelle* subject to the limitation period under Article 2270 of the Code Civil. Such cause of action is prescribed by a delay of 10 years. The computation of time for the 10 years' period can be interrupted by *une citation en justice* as provided in Article 2244 of the Code Civil. The parties concur that the initiation of the arbitral proceedings amount to *une citation en justice*.

However, according to senior learned counsel for the respondent, the fact that the arbitrator has failed to deliver an award within the time delay, by virtue of Article 2247 of the Code Civil, there is *péremption d'instance.* Article 2247 of the Code Civil provides as follows -

> *« **2247.** Si l'assignation est nulle par défaut de forme;*
> *si le demandeur se désiste de sa demande;*
> *s'il laisse périmer l'instance;*
> *ou si sa demande est rejetée,*
> *l'interruption est regardée comme non avenue.* »

Counsel for the respondent referred to ***Note 91 of Jurisciasseur, V° Prescription - Fasc. 30: PRESCRIPTION. - Interruption de la prescription*** **:**

> « *….l'interruption provoquée par la saisine d'une juridiction arbitrale (V. n° 72) est non avenue si le compromis tombe en péremption, faute par les arbitres de statuer dans le délai imparti (CA Grenoble, 1er août 1833 : DP 1834, 2, p. 96. - CA Limoges, 29 avr. 1836. : DP 1837, 2, p. 132. - CA Limoges, 6 avr. 1848 : DP 1848, 2, p. 120). L'expiration du délai d'arbitrage, actuellement fixé à 6 mois sauf convention contraire (CPC, art. 1463), constitue expressément une circonstance mettant fin à l'instance arbitrale (CPC, art. 1477).* »

Counsel for the respondent also referred to ***Note 47 of Jurisclasseur, Art. 2059 a 2061 - Fasc. 30: ARBITRAGE. - Procedure Arbitrale:***

> *« 47. - Fin de l'instance arbitrale et effet interruptif de la demande -*

> *L'instance est donc éteinte mais non la clause compromissoire, qui subsiste (Cass. 2e civ., 18 févr. 1999: Rev. arb. 1999, p. 299. note Ph. Pinsolle) Mais qu'en est-il de l'effet interruptif de la prescription que la demande d'arbitrage avait provoquée? Subsiste-t-il ou est-il également effacé? L'article 2243 du Code civil indique que "L'interruption est non avenue si le demandeur se désiste de sa demande ou laisse périmer l'instance, ou si sa demande est définitivement rejetée". Mais en matière d'arbitrage, ce sont les arbitres qui sont responsables du respect du délai prévu; ils sont mêmes liés par une obligation de résultat (Cass.1re civ., 6 déc. 2005, n° 03-13.116: JurisData n° 2005-031141) Des cours d'appel ont cependant estimé, au XIXe siècle, que l'interruption « était non avenue quand l'absence de sentence rendue dans les délais prévus aboutit à une péremption. (CA Grenoble, 1er août 1833: DP 1834, 2, p. 96. - CA Limoges, 29 avr. 1836 : DP 1837, 2, p. 132. - CA Limoges, 6 avr. 1848: DP 1848. 2, p. 120 ». - J. Jourdan-Marques, Faut-il abroger l'article 2243 du Code civil ? : Procédures 2016, étude 7, n° 12)."*

It is the contention of counsel for the respondent that the arbitral proceedings had not interrupted the prescriptive time delay of 10 years to enter an action personelle as the arbitral proceedings came to an end in the absence of an award delivered by the arbitrator by 15 February 2021. As such, according to counsel, *l'interruption est non avenue quand l'absence de sentence rendue dans les délais prévus aboutit à une péremption*. The claim of the applicant is therefore now time barred.

Furthermore, counsel for the respondent submitted that the respondent cannot be compelled to participate anew to arbitral proceedings when the arbitrator has breached his obligations by not seeking an extension of time prior to the expiry of the time to deliver an award. However, counsel for the respondent admitted at paragraph 17 of his written submissions that there has been much criticism regarding the interpretation given to *interruption* being *non avenue* if the *délai d'arbitrage* expires without the arbitrator delivering his award. Therefore, it is a matter of interpretation for the wordings of Article 2270 of the Code Civil in relation to arbitral proceedings.

Counsel for the respondent added that there cannot be an application made under Article 1005 of the CPC as the parties had already participated in an arbitration over many years for which no award had been delivered following a breach of the duties and obligations by the arbitrator. Therefore, I find that it is neither a question of the parties being unable to agree on the appointment of an arbitrator nor is it about the applicant having other recourse against the arbitrator for not delivering the award.

The present application according to counsel for the respondent is abusive and vexatious as it is asking for the appointment of an arbitrator for arbitral proceedings to be started anew. What the applicant could have done is to bring an application under Article 1015 of the CPC asking for an extension of the delay of the arbitral proceedings. In this case, it would be the extension of delay to deliver the award. Counsel for the respondent took strong objection that it had acted in bad faith when it disagreed to the extension of time to deliver the award when this exercise for an extension of time was done in June 2021, well after 15 February 2021 when the mandate of the arbitrator had already expired. In fact, it has been submitted by counsel for the respondent that it cannot be made to pay for the laches of the arbitrator for not delivering the award and now having to participate anew in an arbitral proceeding which had initially been already lengthy and costly.

In the present case, when the arbitrator requested for an extension of time in June 2021 to deliver his award which should have been delivered since 15 February 2021, the applicant was still willing to grant an extension of time but not the respondent. This resulted into the arbitrator being unable to deliver the award and the arbitral proceedings coming to an end. Senior Counsel for the applicant submitted that the arbitration proceedings came to an end on 15 February 2021 as the delay for arbitral award had expired and this is in accordance with Article 1022 of the CPC which provides -

> *« **1022.** L'instance arbitrale prend fin, sous réserve des conventions particulières des parties—*
>
> *1° par la révocation, le décès ou l'empêchement d'un arbitre ainsi que par la perte du plein exercice de ses droits civils;*
>
> *2° par l'abstention ou la récusation d'un arbitre;*
>
> *3° par l'expiration du délai d'arbitrage. »*

Senior learned counsel for the applicant disagreed that the expiry of the *délai d'arbitrage* can trigger the application of Article 2247 of the Code on the basis of *péremption*, that is, *s'il laisse périmer l'instance* by the non-delivery of the award by the arbitrator.

According to counsel for the applicant, it would only be if *le demandeur*, (in this instance meaning both parties who agreed to arbitral proceedings) who could decide that there is '*péremption d'instance'.* According to counsel for the applicant, Article 2247 of the Code Civil is applicable to a '*demandeur'* and it cannot be said that the arbitrator is a '*demandeur'* for the purpose and purport of this article.

Besides, according to counsel for the applicant, arbitral proceedings amount to *citation en justice,* and in the present case, it has interrupted the prescriptive delay of 10 years for an *action personelle*.

After having considered the oral and written submissions of both senior learned counsel, in order to decide whether the application can be acceded to, I must be satisfied that there is a dispute which exists between the parties. As at date, I agree with the submission of the senior learned counsel for the applicant that the present action is not time barred on account of –

(i) the cause of action arose on 10 June 2009 until 8 March 2012, time started running for the 10 years, making it around 2 years and 9 months' period running;
(ii) the arbitration proceedings interrupted the prescriptive delay of 10 years, from 8 March 2012 to 15 February 2021, that is, for around 8 years 11 months; and
(iii) the present action was entered in November 2021.

In computing the time, from the start of the cause of action arising, there are still around 6 years or so running before the cause of action can be said to be prescriptive.

As regards the submission of the respondent that the arbitral proceedings had not interrupted the prescriptive period of 10 years for an *action personelle* as the third party failed to give the award, I am not convinced by this argument and instead agree with the submissions of counsel for the applicant that there had not been *péremption d'instance* in the present case. Following the respondent disagreeing to an extension of time for the arbitrator to deliver an award, the applicant had done due diligence and entered the present cause of action.

Besides, it is very relevant to quote an extract from the article of **"Prescription extinctive - Faut-il abroger l'article 2243 du Code civil ?** - Etude par Jérémy JOURDAN-

MARQUES , **maître de conférences à l'université de Lorraine, Document : Procédures n° 7, Juillet 2016, étude 7** -

> ***"12. -*** *S'agissant de la péremption d'instance, il est essentiel pour les parties d'accomplir des diligences interruptives afin de ne pas laisser périmer l'instance. En principe, la péremption de l'instance ne s'oppose pas à une nouvelle saisine du juge[Note 44]. Néanmoins, encore faut-il que la péremption n'entraîne pas une prescription.Il existe en effet un risque de sanctions en cascade. L'article 381 du Code de procédure civile offre au juge la faculté de radier l'affaire du rôle en l'absence de diligences des parties. Si cette sanction ne s'oppose pas à une réinscription au rôle, c'est, selon l'article 383, sous réserve d'une éventuelle péremption de l'instance. La péremption de l'instance n'interdit pas l'introduction d'une nouvelle demande, mais ce sera, cette fois, sous réserve de l'absence de prescription extinctive. C'est précisément ce qui s'est passé dans un arrêt récent, où la radiation a entraîné une péremption qui a elle-même conduit à une prescription[Note 45]. Dès que le délai de prescription est suffisamment bref, notamment lorsqu'il est de deux ans, la péremption conduit immédiatement à une prescription. C'est ce qui a pu être qualifié d'effet maximum de la péremption d'instance[Note 46].De plus, une difficulté spécifique existe en matière d'arbitrage. Une jurisprudence très ancienne considère que l'interruption provoquée par la saisine d'une juridiction arbitrale est non avenue si le compromis tombe en péremption, faute pour les arbitres de statuer dans le délai imparti[Note 47]. En d'autres termes, et cela vaut pour la clause compromissoire, le non-respect par les arbitres des délais fait perdre aux parties le bénéfice de l'interruption de la prescription.Il est difficile de savoir si la solution subsiste en droit positif. L'article 1477 du Code de procédure civile dispose que « l'expiration du délai d'arbitrage entraîne la fin de l'instance arbitrale ». S'il est de jurisprudence constante que la clause compromissoire subsiste à l'expiration du délai[Note 48], il en va différemment de la demande d'arbitrage. La conséquence naturelle est l'absence d'effet interruptif de prescription. La solution est pourtant inappropriée. La jurisprudence retient que les arbitres sont responsables du respect du délai de l'arbitrage et qu'ils sont tenus à cet égard par une obligation de résultat[Note 49]. L'anéantissement de l'effet interruptif serait donc une sanction disproportionnée et injuste pour la partie qui n'est pas responsable de l'expiration du délai."*
> *(emphasis mine)*

Since, the delay in delivering the award was not the result of the acts and doings of either the applicant or the respondent, it would be disproportionate, as set out above, to conclude that the interruption of the arbitral proceedings is '*non avenue'* as the arbitrator had not delivered the award within the time limit. I therefore overrule the first preliminary objection of the respondent that the cause of action is time barred as the arbitral

proceedings initiated had not interrupted the prescriptive delay of 10 years for an *action personelle* for want of delivery of an award by the arbitrator.

In relation to whether the present application constitutes an abuse of process, submissions were offered by counsel for the respondent in support of this argument as follows –

(i) the cause of action is time barred;

(ii) having already participated in an arbitral proceeding which lasted for years without any award delivered;

(iii) a failure by the arbitrator to ask for an extension of time to deliver an award prior to the expiry of his mandate;

(iv) no justifiable reason had been put forward by the arbitrator for being late in the delivery of the award; and

(v) forcing the respondent to restart arbitral proceedings which would be costly and time consuming,

all this tantamount to an abuse of process of the Court. Since the respondent cannot be held responsible for the non-delivery of the award, it would be vexatious and abusive for arbitration proceeding to be started anew. As such, the respondent has prayed that the application be set aside with costs.

As for counsel for the applicant, he submitted that the issue of abuse of process would be best left to the competent jurisdiction to decide, meaning the *instance arbitrale*. He also added that the issue of the dispute being time barred could also be best left for the competent jurisdiction.

I disagree with learned senior counsel for the applicant that the issue of time barred is best left to the competent jurisdiction. An application had been made before me under Article 1005 of the CPC. On the basis of Article 1005 of the CPC –

> ***« 1005.*** *Si le litige né, la constitution du tribunal arbitral se heurte à une difficulté du fait de l'une des parties ou dans la mise en oeuvre des modalités de désignation, le juge en Chambre désigne le ou les arbitres.*
>
> *Si la clause compromissoire est soit manifestement nulle, soit insuffisante pour permettre de constituer le tribunal arbitral, le juge en Chambre constate et déclare n'y avoir lieu à désignation* »

I need to decide if a dispute exists or not. Since the issue of the cause of action being time barred or not is directly linked to the determination of whether a dispute exists or not, I am of the view that it is within the jurisdiction of the Judge in Chambers to decide on the first preliminary objection. On what has been adduced before me, I am satisfied that there is a dispute regarding the non-payment of payment certificate no.15 in connection with the construction of a hotel resort.

As regards the objection in relation to the present application being an abuse of the process of the Court in the appointment of an arbitrator, I find that once the arbitrator is appointed, it would be best left for the parties to submit before the arbitrator and for the latter to decide whether the arbitral proceedings are vexatious and abusive. In my determination of whether Article 1005 of the CPC has been satisfied or not, I need not dwell into the issue of whether this would constitute an abuse of the process of the Court.

In the light of the above, I, therefore, allow the present application and appoint Mr Mushtaq Namdarkhan as the arbitrator to look into and settle the dispute existing between the applicant and the respondent as set out in Recitals D and E of the Arbitration Agreement dated 8 March 2012 under the contract for the construction of a hotel resort at Balaclava, Mauritius subject to a letter of Award dated 11 January 2007.

With costs and I certify as to counsel.

M J Lau Yuk Poon
Judge

19 July 2023

FOR APPLICANTS	**:**	**Mr B. Sewraj, Senior Attorney**
	:	**Mr G. Glover, Senior Counsel**
	:	**Mr I. Colimalay, of Counsel**
FOR RESPONDENTS	**:**	**Mr S. Mardemootoo, Attorney at Law**
	:	**Mr M. Sauzier, Senior Counsel**
	:	**Mr S. Dabee, of Counsel**
FOR THIRD PARTY	**:**	**Mr A. Rajah, Senior Attorney**
	:	**Mr D. Basset, Senior Counsel**
	:	**Mr J.G. Basset, of Counsel**