Cordells Rompotis

Case Note – August 2015

Article 34 Of The Model Law: Public Policy And Remission To An Arbitrator Where A Material Point Is Not Dealt With By The Tribunal: A vB [2015] HKCFI 1077

Executive Summary

This case concerned an application by the Plaintiff A to set aside an arbitral Award made against it in 2014 in a Hong Kong arbitration. The First Instance decision affirms that where a material point in dispute is not dealt with by an arbitrator, an award may be remitted to the tribunal if the failure to consider the point leads to substantial unfairness and injustice and reinforces the need for the points at issue in an Arbitration to be clearly agreed and for the Tribunal to consider each issue methodically in making its Award.

Facts

In 2008, B had entered into a contract with A for the development, manufacture, distribution and marketing of certain electronic products. A dispute arose as to A's performance under the contract. B argued that the products did not meet the required technical standards and specifications, that the products were not compatible with other software and components, and that A had failed to provide maintenance and support as required under the contract. Various physical deliveries of the products had in fact been made. The Defendant B commenced arbitration proceedings against A in February 2011 for a declaration of rescission of the contract, damages for repayment of development fees paid to B, the price of the goods paid to B for deliveries made and loss of profits; and a declaration that A would indemnify B under contracts with third party sub-purchasers.

The Arbitration Ordinance (Cap 341) applied as the arbitration had been commenced before the operative date of the Arbitration Ordinance (Cap 609). However, the relevant provision considered in the case is Article 34(2)(b) of the UNICTRAL Model Law, which both Ordinances incorporate. The Arbitrator had held in B's favour.

The parties' claims

A applied to set aside the award on the basis that it would be against public policy to enforce it. The basis for A's argument was that the Arbitrator had failed to take into account A's defence and had failed to give any reason for his rejection of it. A's defence had been that B's original claim was time-barred pursuant to a limitation clause in the contract (the "Limitation Defence"). Both parties accepted that the time-bar constituted part of the contract. The time-bar provided that any claim must be commenced within one year following the earlier of: the delivery of the product giving rise to the claim; or the date the cause of action arose. B contended that the Limitation Defence had been dealt with, albeit implicitly, and that the reasons for its dismissal can be inferred from the context of the award.

B argued that on the facts, even when taking the last delivery date in September 2009, B had still been out of time. B argued that as the Arbitrator had found that A had failed to deliver contract-compliant products, this meant that the Arbitrator had rejected the limitation defence as in effect, the products had never been delivered at all. As such, time had not started to run. B had also argued that the Arbitrator had rejected the limitation defence on the basis that he had accepted the contract ran for 10 years and as such, any breach would be continuing.

Conflict with public policy: the applicable principles

Mimmie Chan J considered that the starting point was Article 34 of the Model Law, which applies pursuant to the Arbitration Ordinance

(both Caps 341 and 609). Article 34(2)(b) provides that an arbitral award may be set aside if the court finds that the award is "in conflict with the public policy" of the forum of the court. Mimmie Chan J ran through the relevant authorities. The public policy ground "must not be seen as a catch-all provision to be used wherever convenient" (Qinhuangdao Tongda Enterprise Development v Million Basic Co [1993] 1 HKLRD 173, 178). In Hebei Import & Export Corp v Polytek Engineering Co Ltd (1999) 2 HKCFAR 111, the Court of Final Appeal has held that the term means "contrary to the fundamental conceptions of morality and justice" and that "the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite its being a party to the New York Convention, it cannot reasonably be expected to overlook the objection". The Court is limited to deciding on whether enforcement of the award would be contrary to public policy. There is no scope under Article 34 to consider the merits of the case: Xiamen Xinjingdi Group Ltd v Eton Properties Ltd [2009] 4 HKLRD 353 (CA). Relief under Article 34 is discretionary. The Court may, even after finding that the grounds are made out, decide to enforce the award (Hebei at page 138).

Did the Limitation Defence apply?

It was held that the Limitation Defence had not been adequately considered by the Arbitrator. In rejecting B's argument, Mimmie Chan J held that (i) when the Arbitrator had found that there had been a failure to deliver, this had been in the context of whether A had been in breach despite having made physical deliveries. In essence, B had taken the Arbitrator's words out of context of the Award; (ii) that in any event, the second limb of the time-bar clause had not been applied. The cause of action had arisen by virtue of the delivery of items that purported to be the products but which were in fact defective; and (iii) the finding of the Arbitrator that B was required to produce compliant products for 10 years under the contract (and that any breach would therefore be continuing) did not mean that he had rejected the Limitation Defence. The Judge also decided that, when taking the Award as a whole, the reasons were not sufficient to enable A to understand why the limitation defence was rejected. Moreover, it was held that the Arbitrator did not deal with the issue at all.

Would upholding the award be contrary to public policy?

Where the conduct of an arbitrator or an error in the process is so serious that they undermine due process, or are egregious, and that a real risk of prejudice can be shown as a result, the award can be set aside: Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liq) (No1) [2012] 4 HKLRD 1. It was held that it is fundamental to concepts of fairness, due process and justice that material issues raised for determination are dealt with fairly. An arbitral award should be reasoned and be sufficiently understandable by the parties. As such, if an important issue which the parties are entitled to expect to be addressed is not addressed, then this would constitute serious irregularity and denial of due process which causes substantial injustice and unfairness to the parties. In this case, the Limitation Defence was material and could have rendered the Award materially different. The failure to consider it or explain why it was not considered, resulted in unfairness to A and created a real risk of prejudice. Therefore, it was held that the Court could not overlook the injustice created by the award and that enforcement would offend the notions of justice.

The consequences under Article 34 after finding that an Award is contrary to public policy are that the Court can suspend the proceedings to allow the tribunal to: (a) resume proceedings; or (b) take such action as would eliminate the grounds for setting aside, essentially allowing the Tribunal to revisit its Award. In the circumstances, the Judge held that there would be no risk of judgment bias in remitting the Award to the Arbitrator to take such action as was appropriate since the time since the hearing was relatively short and the Award was 126 pages long and had contained full details of the issues and the evidence.

Conclusion

This decision affirms that where a material point in dispute is not dealt with by an arbitrator, an award may be remitted to the tribunal if the failure to consider the point leads to substantial unfairness and injustice. Whilst the decision concludes that the Limitation Defence had not been adequately dealt with by the Arbitrator, the effect of this is (arguably) to allow an appeal by the back door after a disguised re-

examination of the merits. The decision reinforces the need for the points at issue in an Arbitration to be clearly agreed and for the Arbitrator to consider each issue methodically in the Award.