

Cordells Rompotis

Case Note - December 2016

Court of Appeal Revisits Model Law Setting Aside Provisions: TRONIC INTERNATIONAL PTE LTD (SINGAPORE) v. TOPCO SCIENTIFIC CO LTD (TAIWAN) AND OTHERS [2016] HKCA 371

In a judgment delivered by the Hong Kong Court of Appeal in mid-August 2016, the Court dealt with Article 34(2)(a)(ii) of the UNCITRAL Model Law (the “unable to present his case” ground) and Article 34(2)(a)(iii) (the “decided matters beyond the scope of the submission to arbitration” ground) of the UNCITRAL Model Law.

Background

The appeal was brought by the plaintiff against the first instance order of Au J refusing to set aside a final ICC arbitral award rendered in favor of the Defendants. The dispute giving rise to the arbitration arose out of 4 agreements, in which the plaintiff claimed damages against all three defendants for breach of the respective agreements and the first defendant counterclaimed against the plaintiff for damages and the defendants counterclaimed for wrongful termination.

The claims against the first defendant failed. The arbitral tribunal rendered a partial award on liability in favour of the first defendant’s counterclaim for wrongful termination. In the final award, arbitral tribunal found in favour of the defendants and awarded damages, interests, costs of arbitration, and the defendant’s own costs.

The plaintiff applied to have the final award set aside, relying on Article 34(2)(a)(ii) and (iii) of the UNCITRAL Model Law. The application failed and the appeal dismissed.

Article 34(2) (a) (ii) of the Model Law

Article 34(2) (a) (ii) of the Model Law provides that an arbitral award may be set aside if the applicant furnishes proof that the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present his case.

The plaintiff argued that the appeal fell within the ambit of Art 34(2)(a)(ii) because it was unable to properly present its case as it wished to, having regard to the following facts:

1. That the arbitral tribunal refused to allow the plaintiff to inspect the originals of certain evidence which the defendants relied for their counterclaims (the “First Ground”); and
2. That the arbitral tribunal refused to stay the arbitration pending the outcome of criminal proceedings in Taiwan against certain employees of the 1st and 2nd defendants for forgery and the use of forged documents (the “Second Ground”).

The plaintiff asserted that the judge had erred in declining to look into the correctness of the tribunal’s decision as to the outcome of both applications. While it was accepted that the purpose of an annulment proceeding is not a re-hearing or appeal on the merits, it was argued that where it is a *procedural decision* of the arbitrator that is in question, it was nevertheless permissible for the court to look into the merits of that decision itself.

The argument failed. The Court of Appeal summarized the position where applications to set aside arbitral awards are made under Article 34(2)(a)(ii):

“(1) To justify setting aside an arbitral award on this ground, a party must have been denied due process in a respect that is *serious, or even egregious*...

(2) The nature of the deprivation that is required [includes] ... situations where the tribunal carries out its own investigations or inquiries as to primary facts, or decides a case on the basis of a new point (whether or law or fact) without giving the parties an opportunity to consider and respond to it. Both of these are situations in which a party is, in effect, not

given a hearing on matters that are critical to the tribunal's decision...

(3) The ultimate question is one of the fairness of the arbitral process..."

The Court noted that the principle of no review on merits in an application to set aside an arbitral award applies equally to *both* substantive and procedural decisions, even as regards to the *actual merits* of any submissions made in a procedural decision. The requirement as to due process and fair hearing is therefore *prima facie* satisfied if "the parties are able to make representations in respect of any decision that might affect the arbitration, whether procedurally or substantively".

Specifically in the context of a procedural decision, the Court noted that it would conduct a balancing exercise between the following considerations: (i) fairness; (ii) the need for a sense of proportion and procedural economy; and (iii) the need to progress with the arbitration with due speed. Ultimately, it was "an exercise which the tribunal, which is much more intimately involved with the arbitral proceedings than a court could ever be, will be far better placed to carry out."

Accordingly, the Court of Appeal rejected the plaintiff's First Ground of appeal highlighting the following:

1. the plaintiff was given ample opportunity to make out its case in relation to the inspection application;
2. the failure to pursue the matter casts doubt on the importance which the plaintiff attached to the need to inspect the documentary evidence;
3. the plaintiff failed to prove that the arbitral tribunal's decision was clearly wrong; and
4. it is not appropriate to reopen such issues having regard to the nature of the application, and the stage of the proceedings.

Similarly, the Court rejected the Second Ground of appeal on the basis that there was no suggestion that the plaintiff was deprived of a fair opportunity to present its arguments and that the refusal to order a stay was not in itself wrong nor did it severely hamper the plaintiff's ability to present its case as it wished to, thereby rendered the proceedings as a whole unfair.

Article 34(2)(a)(iii) of the Model Law

Article 34(2)(a)(iii) of the Model Law provides that an arbitral award may be set aside if the applicant furnishes proof that the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The Plaintiff argued that the arbitral tribunal had erred in raising, of its own motion, the applicability of the Sale of Goods Ordinance (Cap 26) ("SOGO") in determining the quantum of damages (the "Third Ground"), given that neither party had raised any issue in their terms of reference for the arbitration (which defines the *scope* of arbitration under Article 18 of the ICC Rules of Arbitration 1998). According to the plaintiff, the tribunal had therefore decided matters beyond the scope of the submission to arbitration.

On the facts, it was conceded that the SOGO issue had not in fact been raised in the Terms of Reference. However, the argument nonetheless failed, with the Court noting that Article 19 of the ICC Rules *clearly* enables the scope of an arbitration to be expanded beyond the original Terms of Reference where the tribunal authorizes the new claim to be made.

In addition, for the purposes of Article 19 of the ICC Rules, where the tribunal raises a matter or issue of its own motion, and makes it clear to the parties that it will deal with it after having heard submissions in relation to the matter or issue, and the parties make such submissions (as they did here), the party relying on the issue raised by the tribunal can properly be said to be making a claim based on that issue, and (if allowed by the tribunal to do so) to have been authorised by the tribunal to make it.

Commentary

Applications to set aside arbitration awards based on either the "unable to present his case" ground (Article 34(2)(a)(ii)) or the "decided matters beyond the scope of the submission to arbitration" ground (Article 34(2)(a)(iii)) are not uncommon.

As has been referred to in other cases, these provisions are often engaged by the unsuccessful party in an effort to re-open the merits for consideration. The decision highlights the courts' rejection of any attempt to have the merits re-considered and the high threshold required to obtain relief under these provisions.

Consistent with previous decisions of the Hong Kong courts, the unsuccessful appellant was ordered to pay costs on an indemnity basis.

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