CACV 235/2013

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO 235 OF 2013
(ON APPEAL FROM HCCT 54/2011)

IN THE MATTER of article 34 of the Fifth Schedule of the Arbitration Ordinance, Cap 341

and

IN THE MATTER of International Chamber of Commerce Arbitration No 15438/JEM/CYK

BETWEEN

TRONIC INTERNATIONAL PTE LTD (Singapore)	Plaintiff
and	
TOPCO SCIENTIFIC CO LTD (Taiwan)	1st Defendant
BEST TEC CO LTD (Hong Kong)	2nd Defendant
JEFFREY CL PAN, also known as PAN CHUNG-LIANG (Taiwan)	3rd Defendant

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Before : Hon Lam VP, Kwan JA and Barma JA in Court
Date of Hearing : 26 September 2014
Date of Judgment : 26 September 2014
Date of Handing Down Reasons for Judgment : 15 August 2016

REASONS FOR JUDGMENT

Hon Barma JA (giving the Reasons for Judgment of the Court):

1. This was an appeal by the plaintiff against the order of Au J dated 17 October 2013 refusing to set aside a final award in favour of the defendants in an ICC arbitration between the plaintiff and the defendants. At the end of the hearing, we dismissed the appeal and ordered that the plaintiff should pay the defendants their costs of the appeal on an indemnity basis. These are our reasons for doing so.

2. The background to the appeal can be summarised as follows:

(1) The arbitration concerned disputes arising out of four agreements (two between the plaintiff and the 1st defendant, and one each between the plaintiff and the 2nd and 3rd defendants respectively). The plaintiff claimed damages against the defendants, alleging that the defendants had breached the agreements. In turn, the defendants counterclaimed damages against the plaintiff alleging that the plaintiff had wrongfully terminated the agreements between itself and the 1st defendant.

(2) The arbitral tribunal initially delivered a Partial Award dealing with the issue of liability, by which it dismissed the plaintiff's claims and found that the plaintiff had breached and wrongfully terminated the agreements it had entered into with the 1st defendant.

(3) After further hearings, the tribunal delivered its Final Award, upholding part of the counterclaims and awarding the

> 1st defendant damages of US$1,715,868 plus interest, the 2nd defendant US$400,000 plus interest, and further ordering the plaintiff to pay the fees and expenses of the tribunal and of the ICC in the total amount of US$780,000 and to reimburse the defendants their legal fees and costs of the arbitration in the amount of HK$5,160,226.

3. Dissatisfied, the plaintiff applied to have the Final Award set aside, relying for this purpose on Articles 34(2)(a)(ii) and (iii) of the UNCITRAL Model Law on Commercial Arbitration, which applied to the arbitration.

4. Under Article 34(2)(a)(ii), 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".

5. Under Article 34(2)(a)(iii), 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".

6. The plaintiff contended that it could bring itself within Article 34(2)(a)(ii) in two respects, each relating to an alleged inability to present its case. The first related to a decision by the tribunal to refuse the plaintiff's application to inspect the originals of the documents and equipment and material on which the defendants relied for their

counterclaims. The second related to a decision by the tribunal refusing 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. It was said, in respect of each of these decisions, that they had the result that the plaintiff was unable to properly present its case as it wished to, and that in consequence, Article 34(2)(a)(ii) was engaged.

7. The judge rejected these submissions. He held that when considering an application to set aside an award under Article 34, the court was not hearing an appeal against the outcome of the arbitration, and thus was not concerned with the substantive merits of the dispute or the correctness of the award, but rather with the fairness of the arbitral process. He was of the view that this approach applied to all decisions by the arbitral tribunal, whether procedural or substantive in nature, so that the court should not be concerned with the correctness of those decisions, but rather by the fairness of the process by which they were reached. Having reviewed the circumstances in which the decisions relating to production of documents and stay of proceedings were reached, the judge concluded that both decisions were reached fairly, in that the plaintiff was afforded the opportunity to make such submissions as it wished to before the decisions were made. He therefore declined to set aside the Final Award on these grounds.

8. So far as Article 34(2)(a)(iii) was concerned, the plaintiff's complaint was that although neither of the parties had raised any issue in the terms of reference for the arbitration (which provide an outline of the parties' respective positions in the arbitration and, under Article 18 of the ICC Rules of Arbitration 1998, define the scope of the submission to

arbitration) as to the potential applicability of the Sale of Goods Ordinance (Cap 26) ("SOGO") for the purposes of assessing the quantum of any award to be made in the arbitration, the tribunal had, of its own motion, raised the question whether or not the SOGO was applicable. The plaintiff argued that by doing this, and ultimately assessing the defendants' damages in accordance with the SOGO, the tribunal had decided on matters beyond the scope of the submission to arbitration.

9. The judge also rejected this complaint. He held that Article 19 of the ICC Rules permitted a party to raise new issues beyond the limits of the terms of reference if authorised to do so by the tribunal, having regard to the nature of the new claims, the stage of the proceedings and other relevant circumstances. He held that even if an issue that had not been raised by the parties were raised by the tribunal, it was open to the tribunal to permit such an issue to be argued, provided that the parties were given an opportunity to make submissions on such issue, including whether or not the issue should be canvassed. The judge held that in this case, the plaintiff had had the opportunity to make submissions on these matters, and that there was thus no infringement of Article 34(2)(a)(iii).

10. Before us, Mr Cooney SC (who appeared for the plaintiff, as he had in the court below) renewed each of these arguments. As in the hearing below, the first and second grounds of appeal relied on Article 34(2)(a)(ii) in the context of the refusal of the inspection and stay applications respectively, while the third ground of appeal relied on Article 34(2)(a)(iii) in respect of the determination of the quantum issues on the basis of the SOGO.

11. Dealing first with the first ground of appeal, in relation to the refusal of the application for inspection, Mr Cooney submitted that the judge had erred in declining to look into the correctness of the tribunal's decision as to the outcome of the application. Although he accepted that, when dealing with an application to set aside an arbitral award, the court was not hearing an appeal from the arbitrators, but was concerned with whether or not the parties had been afforded a fair hearing, or due process, he contended that in the context of a procedural decision, it was open to the court to look into the correctness of the decision itself, and, provided that the decision was both wrong and related to a "serious" matter (or would have "serious" consequences), the court would be justified in setting aside the award under Article 34(2)(a)(ii).

12. We are unable to accept this submission. It is well established, as Mr Cooney accepted, that the court hearing an application to set aside an arbitral award is not concerned with the substantive merits of the dispute between the parties, or the correctness of the award, but with the fairness of the process. See *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd (in liquidation) (No. 1)* [2012] 4 HKLRD 1, per Tang VP (as he then was) at paragraph 7. In our view, the correct approach is as set out by Recorder Chow SC (as he then was) at paragraph 29 of his judgment in *Pang Wai Hak v Hua Yunjian* [2012] 4 HKLRD 113 (quoted in paragraph 15 of the judgment below). For present purposes, we would emphasise the following aspects of that summary:

(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 (see principles (2) and (3) stated by Recorder Chow).

(2) The nature of the deprivation that is required is well illustrated by the examples given by Recorder Chow – 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 (see principle (5) stated by Recorder Chow).

(3) The ultimate question is one of the fairness of the arbitral process (see principle (7) stated by Recorder Chow).

13. While it might be argued that the limitation on consideration of the merits of a decision by the arbitral tribunal should be restricted to decisions relating to the substantive dispute, we do not think it should be so restricted. Given that the court's concern, when considering Article 34(2)(a)(ii), is to ensure the fairness of the overall process of the arbitration, it seems to us that so long as the parties are able to make representations in respect of any decision that might affect the arbitration, whether procedurally or substantively, they will have been afforded due process and will have been given a fair hearing. In such a case, the actual merits of any particular decision (whatever its nature) made as a result of such submissions is not a matter with which the court should be concerned on an application to set aside under Article 34(2)(a)(ii). In relation to procedural decisions, it should also be noted that the requirements of fairness will necessarily be a factor to be taken into account. But there will be other factors to be considered, such as the need for a sense of proportion and procedural economy, and the need to progress with the arbitration with due speed. The decision reached will necessarily involve a weighing of the various factors, which is 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.

14. We therefore reject the submission that it is open to the plaintiff to seek to challenge the correctness of the procedural decision reached by the tribunal in relation to the inspection application. That being so, given that the parties had the opportunity to make submissions to the tribunal as to the inspection application before the tribunal ruled on it, the judge was right to conclude that there had been no such failure of due process as to justify the court in setting aside the Final Award on the basis of Article 34(2)(a)(ii) in respect of the inspection application.

15. We would also note, as the judge did, that the tribunal in fact afforded the plaintiff a further opportunity to make submissions as to the nature of the "serious issues" it claimed to have with the documentary evidence put forward by the defendants in support of their claims, in the email by which the tribunal notified the plaintiff of its rejection of the inspection application. This invitation was declined. This is, we think, significant in two respects. First, it shows clearly that the plaintiff was given ample opportunity to make out its case in relation to the inspection application. Second, the failure to pursue the matter casts doubt (to put it no higher) on the importance which the plaintiff attached to the need to inspect the documents in question.

16. Even if we were to have accepted Mr Cooney's submission as to the ability of the court to examine the merits of the tribunal's decision on procedural applications such as the inspection application, we would not have been minded to set aside the Final Award on this ground. First, we do not consider that it has been demonstrated that the tribunal's decision in

relation to the inspection application was clearly wrong. Bearing in mind the nature of the application, and the stage of the proceedings at which it was made, it seems to us that it was open to the tribunal to come to the conclusion that it did. Second, we do not think that it could be said that the refusal of the application could be said to have amounted to a serious or egregious breach of due process.

17. Turning to the second ground of appeal, this is also based on Article 34(2)(a)(ii), but this time in the context of the application for a stay of proceedings pending the outcome of Taiwanese criminal proceedings for forgery against certain employees of the 1st and 2nd defendants.

18. Mr Cooney acknowledged that the legal principles applicable to this ground of appeal were necessarily the same as those to be applied to the first ground. So far as the procedural fairness of the way in which that application is concerned, there is no suggestion that the plaintiff was not given a fair opportunity to present its arguments in support of the application. Again, the submission is that the decision to refuse the stay was wrong, and rendered the proceedings as a whole unfair because it severely hampered the plaintiff in its ability to present its case as it wished to. For the reasons we have already given, we are satisfied that we should not enter upon a consideration of the merits of the tribunal's decision to refuse the stay applied for. That being so, this ground of appeal necessarily fails.

19. Further, as with the first ground of appeal, we do not consider that the tribunal's decision was in fact wrong, or that it had as significant an impact on the plaintiff's ability to make out its case as the plaintiff suggests. It therefore did not have the effect of rendering the proceedings

procedurally unfair, and provides no basis for the court to interfere under Article 34(2)(a)(ii).

20. We turn finally to deal with the third ground of appeal, based upon Article 34(2)(a)(iii). As we have noted, Mr Cooney's argument was that because the defendants had not raised the SOGO in their pleadings, issues based on the SOGO did not fall within the scope of the arbitration. Mr Manzoni SC, for the defendants, did not dispute that the SOGO issue was not raised in the pleadings, and that no application to amend to plead it was made. He submitted, however, that it was open to the tribunal to raise the issue of its own motion, and provided that the parties were given the opportunity to deal with the issue, as they in fact were, it was in order for the tribunal to rule upon it (see *Brunswick Bowling & Billiards Corp v Shanghai Zhonglu Industrial Co Ltd* [2011] HKLRD 707 at paragraph [28]), and that the failure of a party to amend its pleading to incorporate the point would not be fatal to any award made (see *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [49]).

21. In our view, Mr Manzoni is correct. 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 authorises the new claim to be made. In our view, 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. That being so, we are satisfied that

even if the SOGO issue was not within the original terms of reference, it was an issue that was raised with the authority of the tribunal so as to expand the scope of the arbitration to cover it.

22. Mr Cooney also sought to argue that the tribunal had predetermined the question of whether or not the SOGO issue should be considered. However, as was pointed out to Mr Cooney in the course of the hearing, this was a different complaint from that embodied in the third ground of appeal – it was in fact a complaint of procedural unfairness which would give rise to a challenge under Article 34(2)(a)(ii) rather than (iii). No such challenge having been made in the plaintiff's notice of appeal, we refused to permit it to be made before us at the hearing.

23. For the foregoing reasons, we were satisfied that none of the grounds of appeal relied on by the plaintiff were meritorious, and accordingly dismissed the appeal.

(M H Lam)	(Susan Kwan)	(Aarif Barma)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Nicholas Cooney SC and Mr Tony Ko, instructed by Chiu, Szeto & Cheng, for the plaintiff / appellant

Mr Charles Manzoni SC, instructed by Stephenson Harwood, for the defendants / respondents