Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush and Another [2004] SGHC 26

Case Number : OS 108/2004, SIC 456/2004

Decision Date : 16 February 2004

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Wong Meng Meng SC, Andre Maniam and Melvin See (Wong Partnership) for plaintiff; Quentin Loh SC and Sim Kwan Kiat (Rajah and Tann) for second defendant

Parties : Mitsui Engineering & Shipbuilding Co Ltd — Easton Graham Rush; Keppel Engineering Pte Ltd

Arbitration – Interlocutory order or direction – Court's power – Whether court had power to grant injunction restraining arbitrator from taking further step in arbitration pending application to remove arbitrator and set aside award – Articles 5, 13, 34 UNCITRAL Model Law on International Commercial Arbitration, s 24 International Arbitration Act (Cap 143A, 2002 Rev Ed)

16 February 2004

Woo Bih Li J:

Introduction

1 This originating summons was filed by the plaintiff, Mitsui Engineering & Shipbuilding Co Ltd ("Mitsui"), for an injunction to restrain the first defendant, Mr Graham Rush Easton, from "continuing or assisting in the prosecution or further prosecuting or taking any further step" in the arbitration between Mitsui and the second defendant, Keppel Engineering Pte Ltd ("Keppel"), and to restrain Keppel likewise, until Mitsui's challenge of Mr Easton as arbitrator and its application to set aside the first interim award ("FIA") from Mr Easton are determined. Mitsui also filed an *ex parte* summons-in-chambers application ("the Application") for an interim injunction seeking similar relief pending the hearing of the originating summons.

2 Although the Application was filed on an *ex parte* basis, counsel for Keppel also appeared before me, presumably after notice of the same had been given by Mitsui's solicitors. In the light of the nature of the application before me, I allowed counsel for Keppel to present arguments as well. As various Counsel presented arguments, I will refer to such arguments as Mitsui's and Keppel's arguments respectively.

Background

3 Mitsui and Keppel were joint venture partners in a consortium which was awarded certain contracts by the Port of Singapore Authority. Disputes arose among various parties and the disputes between Mitsui and Keppel were referred to arbitration pursuant to an arbitration provision in the agreements between them. Mr Easton was appointed by Mitsui and Keppel as the arbitrator.

4 It was agreed that Mr Easton was to decide on various preliminary issues which were in the form of 11 questions. After hearing evidence and receiving submissions, Mr Easton issued the FIA in relation to these questions on 26 December 2003.

5 Mitsui was dissatisfied with the FIA. For present purposes, it is sufficient for me to say that it was dissatisfied because the FIA had allegedly dealt with matters outside the scope of what had

been submitted for decision and Mr Easton had pre-judged some of the issues which were to be dealt with at subsequent hearings.[1]

6 Keppel then made five applications on 5 January 2004 as a result of the FIA. Mitsui contended that at least one of these applications would not have been made if Mr Easton had not exceeded his mandate. Mitsui then informed Mr Easton of its concerns and challenged his position as arbitrator on 9 January 2004 and invited him to withdraw accordingly.

7 In a letter dated 12 January 2004, Mr Easton gave his views on the FIA in response to the letter dated 9 January 2004 challenging his position as arbitrator. Mitsui says this letter is revealing but it is not necessary for me to set it out.

8 Subsequent to that letter but also on 12 January 2004, counsel for Mitsui said at a telephone conference that the next hearing, which was fixed for three weeks from 26 January 2004, should be vacated in view of the challenge on Mr Easton. Counsel for Keppel agreed to only the first week's hearing being vacated to accommodate Mitsui, and Mr Easton asked the parties to make their contentions whether the entire three weeks should be vacated.

9 On 13 January 2004, Mr Easton vacated the first week's hearing since counsel for Keppel was agreeable to this.

10 On 15 January 2004, Mr Easton gave some directions on the conduct of the hearing for the remaining weeks.

11 Mitsui took the position that pending an intended application to remove Mr Easton and to set aside the FIA, there should be no further hearing before Mr Easton, otherwise Mitsui "will be irrevocably prejudiced to an extent that damages cannot compensate" and, on the other hand, Keppel would suffer little prejudice in respect of the vacating of the remaining two weeks of this hearing tranche.[2]

12 Mitsui also made a further attempt to have the remaining two weeks' hearing vacated but as its attempt was unsuccessful, the originating summons and the Application were filed on 28 January 2004. As the hearing before Mr Easton was to continue from Tuesday, 3 February 2004, 2 February 2004 being a public holiday, the Application was heard on an urgent basis.

13 Eventually, the primary issue before me was whether the High Court of Singapore has the jurisdiction to grant the injunction in the terms sought under the originating summons ("the Interlocutory Injunction"). If not, then I should not, and indeed could not, grant an interim injunction pending the hearing of the originating summons. I also add that in the course of arguments, the court's jurisdiction and the court's power to grant the Interlocutory Injunction were used interchangeably. After hearing arguments, I was of the view that the court had no jurisdiction, or power, to grant the Interlocutory Injunction and I dismissed the Application with costs. After hearing further arguments on an application subsequently made by Mitsui, I maintained my decision.

The arguments and my reasons

14 Section 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) states that an injunction may be granted either unconditionally or upon such terms and conditions as the court thinks just, in all cases in which it appears to the court to be just or convenient to do so. However, it was not in dispute that the arbitration between the parties is an international arbitration and is governed by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") which incorporates the UNCITRAL Model

Law on International Commercial Arbitration ("the Model Law"). It was also not in dispute that the scheme and intention behind such arbitrations is minimal court involvement, but, that is not to say that court involvement is excluded entirely.

15 Accordingly, cases before the advent of the Model Law and the IAA and cases which do not involve international arbitrations provided me with limited assistance, if any, in deciding the primary issue.

16 As I have said, under Singapore law, the Model Law applies to an international arbitration. This is by virtue of s 3 IAA. The English text of the Model Law is set out in the First Schedule of the IAA. Both sides referred to Art 5 of the Model Law. It states:

Article 5. Extent of court intervention

In matters governed by this Law, no court shall intervene except where so provided in this Law.

17 Mitsui argued that it was not relying on a general supervisory power of the court but a residual power of the court when an arbitrator is being challenged and when an application is being made to set aside an award. It referred to Arts 13 and 34 of the Model Law as well as s 24 IAA. As Art 13 provides the challenge procedure and Art 12(2) provides the grounds for challenge, I set out below the terms of Arts 12(2) and 13:

Article 12. Grounds for challenge

(1) …

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this Article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in Article 12(2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this Article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in Article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings, and make an award.

18 I also set out below the terms of Arts 34(1), (2)(a) and (4):

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in Article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) 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; or

(iii) 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; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) ….

(3) ….

(4) 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.

19 Section 24 IAA states:

Court may set aside award

24. Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

20 Under s 4(1) IAA, reference may be made to the documents of the following, where these documents relate to the Model Law, for the purpose of interpreting the Model Law:

(a) the United Nations Commission on International Trade Law *ie* UNCITRAL, and

(b) its working group for the preparation of the Model Law.

However, both Mitsui and Keppel referred to *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) ("the Guide") for assistance. The Guide includes not only commentaries of the authors but also the legislative history and reports of the Commission and its working groups in respect of the Model Law.

21 As regards Art 5 of the Model Law, the Guide states at 216:

COMMENTARY

> Article 5 states a simple, but very important, principle. Its purpose is to oblige the draftsmen of the Law to state any instances in which court control is envisioned, in order to increase certainty for parties and arbitrators and further the cause of uniformity. As noted by the Secretariat the effect of the provision is to "exclude any general or residual powers" given to the court of the enacting State in statutes other than the Model Law. The Commission made clear that the term "intervene" in Article 5 included court action that might be categorized as "assistance" to the arbitration rather than intervention in it. Article 5 should not be taken to express hostility to court intervention or assistance in appropriate circumstances, but only to satisfy the need for certainty as to when court action is permissible. The Model Law provides for or envisages court involvement in the following Articles: 8 (arbitration agreement and substantive claim before court), 9 (interim measures), 11 (appointment of arbitrators), 13 (challenge procedure), 14 (failure or impossibility to act), 16 (competence of arbitral tribunal to rule on its jurisdiction), 27 (court assistance in taking evidence), 34 (setting aside an award) and 35 and 36 (recognition and enforcement of awards).

22 Mitsui's argument was that the Model Law does provide for the instances of challenging the arbitrator and the setting aside of an award. Accordingly, the court must surely have the residual power to grant the Interlocutory Injunction. To reinforce this argument, Mitsui submitted that if a decision was made to remove an arbitrator but he insisted on carrying on with the arbitration notwithstanding his removal, then, surely the court must have the power to grant an injunction to restrain him from doing so. However, I bore in mind that this illustration was in relation to a perpetual injunction after a decision had been made to remove the arbitrator and not an interlocutory injunction pending such a decision. Besides, one does not really need an injunction if an arbitrator who has been removed continues with the arbitration. All the proceedings before him thereafter will be invalid. Also, I could not imagine any *bona fide* arbitrant wanting to continue with an arbitrator after he is removed.

23 It seemed to me that Mitsui's argument went against the terms of Art 5 which states that in matters governed by the Model Law, no court shall intervene "except where so provided" in the Model Law. Since the Model Law does not provide for the Interlocutory Injunction in respect of an application under Arts 13 and 34, the court does not have the power to do so. In any event, I did not rely on this view alone.

24 It will be recalled that the last clause of Art 13(3) allows an arbitrator to continue the arbitral proceedings and even make an award pending the outcome of the court's ruling on the challenge. In

my view, this clause hints that it is for the arbitrator, and not the court, to decide whether the arbitral proceedings should be stayed in the meantime.

25 Moreover, the Guide has the following commentary at 406-408:

> Article 13, like Articles 5, 8, and 16 and, to a lesser extent, Article 14, raises the critical question of the extent of court interference in or assistance to an arbitration that is to be permitted during the arbitral proceedings. It was on this question that the Commission displayed the greatest difference of views. Other features of this article were settled early. … The only provision that occasioned continued debate throughout both the Working Group's and the Commission's consideration of the Article was paragraph 3, which governs the scope of court intervention in deciding challenges.
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> A wide variety of alternatives were considered on this question. At one extreme was a proposal to permit a party challenging an arbitrator to resort to the court immediately after denial of the challenge by the arbitral tribunal or other body, with the arbitral proceedings held in abeyance pending the court's decision. The proponents of this view argued that settling the question immediately in this way would help avoid delays and controversy occasioned by proceedings being conducted by a challenged arbitrator, and would reduce the risk of an award being set aside. At the other extreme were those who argued that resort to a court to settle a challenge should not be allowed during the arbitral proceedings but only by way of an application to set aside the award. The argument in favor of this view was that allowing for immediate court intervention provided an opportunity for dilatory tactics that would effectively enable a party to obtain a postponement of the proceedings at any time. The Working Group adopted "a compromise solution" that is essentially the provision contained in the final text. It provides for immediate court review of unsuccessful challenges, but with three features designed to reduce the risk of delay: a short time period for seeking court review, no appeal of the court's decision, and, most important, discretion in the arbitral tribunal to continue the arbitration during the court proceedings. The court is to review all unsuccessful challenges, whether decided initially by the arbitral tribunal under paragraph 2 of Article 13 or by another body under an agreed-on challenge procedure.
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> During the Commission's deliberations, a number of modifications to this scheme were proposed. On the one hand, it was suggested that the court, and not only the arbitral tribunal, should have the power to order a stay of the arbitral proceedings.[7]

26 At this point, there is a reference to footnote 7 which states:

> Commission Report, A/40/17, para 123, p 436 *infra*. The Commission rejected this view. *A court thus is barred by Article 5 of the Model Law from issuing such a stay order*. In this respect, the Model Law, as *lex specialis*, supersedes any domestic laws authorizing such stay orders. [emphasis added]

27 The Guide then continues to state at 408:

> On the other hand, a number of suggestions were made to limit court intervention, including (1) allowing the arbitral tribunal to decide whether court review would occur immediately or only after an award; (2) restricting the operation of paragraph 3 to those cases where the sole arbitrator or a majority of the arbitrators were challenged; and (3) restricting the operation of paragraph 3 to those cases in which the parties had not agreed on another procedure for resolving challenges, such as one that entrusted final decision of challenges to a third person or

an institution. In favor of this last proposal it was argued that parties preferred arbitration to court proceedings in part because it was quick and confidential. Because arbitrators might well stay proceedings pending a court's decision, it was said, and because court proceedings are public, allowing court review of challenges nullified these advantages. It was noted in reply that it was impossible to predict what challenge procedures the parties might choose, so that court review was necessary to ensure fair procedures. Further, it was said that an arbitral tribunal would probably not stay its proceedings and a court would be less likely to uphold a challenge in cases where that challenge had already been rejected by an arbitral institution. In the end, the Commission retained the balance struck by the Working Group between preventing obstruction or delay and avoiding unnecessary arbitral proceedings.

28 Mitsui submitted that the statement in footnote 7 that a court is barred by Art 5 from issuing a stay order is merely the view of the authors of the Guide and that that view is not expressly stated in the Commission's report. I set out paras 122 to 125 of the Commission's report of 21 August 1985 in respect of Art 13(3):

General discussion on appropriateness of court control during arbitral proceedings

121. The Commission, before considering the provisions of article 13 in detail, embarked on a general discussion on the appropriateness of court control during arbitral proceedings. Divergent views were expressed on that matter.

122. Under one view, the court control envisaged under article 13(3) was inappropriate and should at least be limited, in order the reduce the risk of dilatory tactics. One suggestion was to delete the provision, thus excluding court control during the arbitral proceedings, or to restrict its application considerably, for example, to those rare cases where the sole arbitrator or a majority of the arbitrators were challenged. Another suggestion was to replace in paragraph (1) the words "subject to the provisions of paragraph (3) of this article" by the words "and the decision reached pursuant to that procedure shall be final." The thrust of the suggestion was to allow the court control envisaged in paragraph (3) only if the parties had not agreed on a procedure for challenges and, in particular, not entrusted an institution or third person with deciding on the challenge. Yet another suggestion was to let the arbitral tribunal decide whether court control should be allowed immediately or only after the award was made. The suggestion was advanced as a possible solution to the problem that under article 13 a challenged arbitrator appeared to have full freedom to withdraw and that as a result of such withdrawal the party who appointed the arbitrator might be adversely affected by additional costs and delay.

123. Under another view, the weight accorded to court intervention in article 13(3) was not sufficient in that the provision empowered the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings irrespective of the fact that the challenge was pending with the Court. It was stated in support of the view that such continuation would cause unnecessary waste of time and costs if the court later sustained the challenge. At least, it should be expressed in article 13 that the arbitral tribunal was precluded from continuing the proceedings *if the Court ordered a stay of the arbitral proceedings*.

124. The prevailing view, however, was to retain the system adopted in article 13 since it struck an appropriate balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding unnecessary waste of time and money.

125. The Commission, after deliberation, adopted the prevailing view.

[emphasis added]

29 In my view, footnote 7 did accurately reflect the outcome as stated in the Commission's report. The question of the court's intervention by way of a stay was specifically mentioned in one of the views which advocated a more active role for the court under Art 13(3). That view was not adopted and a balance was struck. If the court is still to have the power to stay the arbitral proceedings, pending the outcome of the challenge in the court, then this would not have been considered a balance. That view would have prevailed. I would add that it was not disputed that the granting of the Interlocutory Injunction would have effected a stay of the arbitration.

30 However, as I have mentioned, Mitsui did not rely on its intended application to challenge Mr Easton under Art 13 alone to support the Application. It also relied on its intended application to set aside the FIA under Art 34 and s 24 IAA. In particular, Mitsui relied on Art 34(2)(a)(ii) to (iv) and s 24(b) IAA.

31 Mitsui submitted that these provisions do not have the last clause of Art 13(3) which states that while the request to the court to decide on the challenge is pending, the arbitrator may continue the arbitral proceedings. Accordingly, even if this clause gave rise to the comment in footnote 7 which I have mentioned above, the omission of the clause in Art 34 and s 24 IAA means that the court does have power to stay arbitral proceedings when these provisions are invoked.

32 Mitsui also submitted that the court's power to set aside an award is on grounds no less serious than the power to remove an arbitrator. It went further to argue that the court's power to set aside is the ultimate power and hence the court should have the residual power to grant the Interlocutory Injunction under Art 34 and s 24 IAA, if not under Art 13. Furthermore, the fact that Parliament enacted s 24 IAA means that the setting aside of an award is a different situation from that of challenging an arbitrator. If the court does not have such a power it will render the court's eventual decision on the application to set aside an award nugatory.

33 Mitsui had another illustration. It submitted that if the court has no power to grant the Interlocutory Injunction pending the determination of the challenge or a setting aside application, then even in the most extreme of cases, for example, where the court is satisfied that an arbitrator is corrupt or biased or insane, the court is powerless to act until the challenge procedure is worked through or the setting aside application is heard. The argument was that the court should not be so powerless.

34 I did not accept Mitsui's arguments.

35 First, as Keppel submitted, and I accepted, Art 34 and s 24 IAA are aimed at challenging the result of an arbitrator's decision (by way of an award) and not the arbitrator himself. Accordingly, there was no need for a similar clause as in Art 13(3) to be included in the Model Law. In Art 16 which deals with a challenge on an arbitrator's jurisdiction, there is a similar clause.

36 Secondly, Art 34 does in fact have a provision which seems to hint that it is for the arbitrator, and not the court, to decide whether to stay arbitral proceedings. This is Art 34(4) which I have set out above. It allows the court to suspend the setting aside proceedings in order to give the arbitrator an opportunity to resume arbitral proceedings. I did not agree with Mitsui's submission that "to resume" in Art 34(4) does not mean "to continue". Clearly, it refers to the continuation of arbitral proceedings.

37 Thirdly, although Mitsui suggested that its grounds for setting aside were just as serious as

those for challenging an arbitrator, an application to set aside an award can be made on less serious grounds than those for challenging an arbitrator. I was of the view that it is incongruous for the court to have the power to grant the Interlocutory Injunction under Art 34 if it does not have the power to do so under Art 13. On this point, Keppel pointed out that there was no discussion among the members of the Commission about the court's power to stay proceedings when Art 34 was discussed, unlike the situation in respect of Art 13 as well as Art 16. Keppel submitted, and I accepted, that this demonstrated that the court's power to stay proceedings under Art 34 was not even contemplated.

38 Fourthly, as Keppel pointed out, Art 34(1) states that recourse to a court against an arbitral award may be made "only" by an application for setting aside. It seemed to me that it would be contrary to Art 34(1) if the court has the power to order a stay of arbitral proceedings in respect of an award given.

39 As for Mitsui's reliance on s 24(b) IAA, I was of the view that it did not help Mitsui to argue that s 24 IAA applies to a different situation from Art 13. Of course it does. However, that does not mean that the concept of non-intervention by the court on an interlocutory basis was changed to one of intervention under s 24 IAA. What s 24 IAA did was to add additional grounds to set aside an award, leaving the concept of such non-intervention intact.

40 I did not agree that the absence of the power to grant the Interlocutory Injunction, pending the decision on the setting aside application, would render a court's eventual decision to set aside an award nugatory. If an award is set aside, anything done in reliance on that award will consequently be set aside too. That may be inconvenient or troublesome from one point of view, but that was not the prevailing view in the Commission. Furthermore, if Mitsui's nugatory argument was valid then every dissatisfied arbitrant would seek an interlocutory injunction pending the determination of the setting aside application, contrary to the overall scheme of minimum court intervention.

41 As for the illustration about a corrupt or biased arbitrator, these grounds are already covered under the grounds for challenge in Art 12(2) relating to impartiality and independence. Also, s 24(a) IAA relates to fraud or corruption and s 24(b) IAA relates to a breach of the rules of natural justice which can be the result of bias, although not necessarily so. In my view, the illustration about a corrupt or biased arbitrator did not add anything to Mitsui's arguments.

42 As for insanity, this is probably covered under Art 14 of the Model Law. As Mitsui was not making its application for the Interlocutory Injunction under that provision, it was not necessary for me to reach a view thereon.

Plaintiff's application dismissed.

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[1]See paras 31 and 35 of Melvin See's affidavit of 28 January 2004.

[2]See paras 55 and 56 of Melvin See's affidavit.