Bovis Lend Lease Pte Ltd v Jay-Tech Marine & Projects Pte Ltd and Another Application [2005] SGHC 91

Case Number : OS 77/2005, 166/2005

Decision Date : 06 May 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Melvin See (Wong Partnership) for the plaintiff in OS 77 and the defendant in OS 166; Raymond Lye and Cheryl Ann Yeo (Tay Lye and Ngaw Partnership) for the defendant in OS 77 and the plaintiff in OS 166

Parties : Bovis Lend Lease Pte Ltd — Jay-Tech Marine & Projects Pte Ltd

Arbitration – Arbitral tribunal – Administration of arbitration – Whether contract provided for institutional arbitration or ad hoc arbitration

Arbitration – Singapore international arbitration centre – Appointing authority – Whether Singapore International Arbitration Centre or another party the appointing party – Whether Notice of Arbitration issued by defendant in breach of subcontract between parties

Arbitration – Singapore international arbitration centre – Rules 1997 – Domestic Rules 2002 – Which set of rules to be applied to arbitration

6 May 2005

Judith Prakash J:

Introduction

1 In this Originating Summons ("OS 77"), the plaintiff is Bovis Lend Lease Pte Ltd ("Bovis") and the defendant is Jay-Tech Marine & Projects Pte Ltd ("Jay-Tech Marine"). In Originating Summons No 166 of 2005 ("OS 166"), Jay-Tech Marine is the plaintiff and Bovis is the defendant. Both proceedings raised the same issues and this judgment explains my decision on those issues.

2 In OS 77, Bovis sought the following declarations:

(a) that on a proper construction of the arbitration agreement set out in cl 13 of Subcontract No 2057 between Bovis and Jay-Tech Marine dated 16 May 2003 ("the Subcontract"), the arbitrator, in the absence of agreement between the parties, should be appointed by the Institute of Architects in Singapore; and

(b) that the Notice of Arbitration dated 28 December 2004 to the Singapore International Arbitration Centre ("SIAC") issued by Jay-Tech Marine was in breach of the Subcontract.

3 In OS 166, Jay-Tech Marine sought the following orders:

(a) that the court determine and grant a declaration, on a proper construction of the Subcontract, whether the arbitration is to be administered by the SIAC or is to be an *ad hoc* arbitration;

(b) in the event that the court should find that the arbitration is to be administered by the SIAC, that the court declare that the SIAC shall administer the arbitration after the arbitrator has been appointed by the Institute of Architects;

(c) in the alternative, in the event that the court should find that the arbitration is to be administered by the SIAC, that the court declare that the Notice of Arbitration issued by Jay-Tech Marine to the SIAC is valid and that, under the SIAC Domestic Arbitration Rules ("the Domestic Rules"), the SIAC shall appoint the arbitrator;

(d) in the alternative, in the event that the court should find that the arbitration is to be an *ad hoc* arbitration, that the court declare that the arbitrator appointed by the Institute of Architects shall conduct the *ad hoc* arbitration according to the SIAC rules wherever applicable; and

(e) in the alternative, in the event that the court should find that the arbitration is to be an *ad hoc* arbitration, that the court determine the rules according to which the appointed arbitrator should conduct the arbitration and make a declaration to that effect.

Background

4 The two sets of proceedings arose in the following circumstances. By the Subcontract, Bovis had appointed Jay-Tech Marine as a subcontractor to supply and install certain structural steel works at the Biopolis building project in Singapore. In August 2004, a dispute arose over a claim by Jay-Tech Marine for the payment of the sum of $755,729.98 for alleged additional and/or varied works that it had carried out.

5 The dispute resolution provisions of the Subcontract are contained in cl 13. The relevant portions of this clause are as follows:

13.1 Dispute Resolution

13.1.1 If a dispute arises out of or in connection with the Subcontract at any time then either party may give the other a written notice identifying the particulars of the dispute. Within 5 days of receipt of the notice the parties must meet and attempt to resolve the dispute. If the dispute is not resolved within 10 days of receipt of the notice, the dispute will be dealt with in the manner provided in this Part 13.

…

13.3 Arbitration

All other disputes (including disputes referred to in Clause 13.2.1 which are not required by [Bovis] to be determined in accordance with Clause 13.2) will be dealt with in the following manner:

13.3.1 After the expiration of 10 days from the issue of the written notice identifying the particulars of the dispute, the issuer may notify the other party by written notice that it requires the dispute to be referred to arbitration and the dispute, upon the issue of that notice, will be referred to arbitration.

13.3.2 Unless otherwise agreed by the parties, the arbitrator will be appointed by the President of the Institute of Architects in Singapore (or such other body as carries on the functions of the Institute) or his nominee.

13.3.3 The arbitrator must conduct the proceedings in accordance with Rules of the

Singapore International Arbitration Centre

…

13.4 Security Deposit

When a notice of dispute is served under Clause 13.1 the party serving the notice must provide evidence that it has deposited with the Institute of Architects in Singapore, the sum of SDG2,000 by way of security for costs of the Expert Determination or the arbitration, as the case may be.

6 On 5 October 2004, Jay-Tech Marine's solicitors, M/s Tay Lye & Ngaw Partnership ("TLN"), wrote to Bovis' solicitors, M/s Wong Partnership ("WP"), stating that pursuant to cl 13.3.1 read with cl 13.1 of the Subcontract, they were giving notice of a dispute between the parties, being Jay-Tech Marine's claim for the sum of $755,729.98. TLN enclosed a copy of their letter to the Singapore Institute of Architects as evidence that a sum of $2,000 had been paid to the latter by way of security for costs of an expert determination or arbitration. WP did not accept this letter as evidence that the deposit had been paid and there was some subsequent correspondence between the parties on this issue until early November when WP were furnished with a copy of a letter from the Singapore Institute of Architects acknowledging receipt of $2,000.

7 The parties then endeavoured to agree on an arbitrator. Unfortunately, however, for one reason or another, the candidates nominated by each party were not acceptable to the other. The question then arose as to whom the appointing authority should be in the event of the parties' failure to agree. Clause 13.3.2 provided for the appointing body to be the "Institute of Architects in Singapore". This term was taken by both parties to mean the "Singapore Institute of Architects" and nothing turned on this slight difference in terminology. TLN, however, noting that cl 13.3.3 provided for the arbitrator to conduct the arbitration in accordance with the "Rules of the SIAC", examined the Domestic Rules (2nd Ed, 1 September 2002). The Domestic Rules indicated that, in respect of arbitrations that they regulated, the arbitrator was to be appointed by the chairman of the SIAC irrespective of any contrary indication in the underlying contract. Additionally, parties were not to deal directly with the arbitrator on fees; these would be settled between the arbitrator and the SIAC.

8 TLN then checked with one Mr Ganesh Chandru of the SIAC. He asked for a copy of cl 13 of the Subcontract. Subsequently he informed TLN that, in view of the Subcontract provisions, he was of the view that the Domestic Rules took precedence over the Subcontract provisions and the SIAC ought to appoint the arbitrator. On 28 December 2004, TLN gave notice of arbitration pursuant to the Domestic Rules. WP objected to this notice. They took the view that the arbitration was an *ad hoc* arbitration and that the appointing authority should be the Singapore Institute of Architects.

9 On 7 January 2005, TLN invited Bovis to confirm whether it agreed to have the matter referred to arbitration under the Singapore Institute of Architects. This was because Jay-Tech Marine desired an expeditious resolution of the matter and was prepared to follow whichever arbitral path Bovis preferred. On 19 January 2005, WP sent TLN a letter at about 1.00pm requiring them to confirm by 4.00pm that Jay-Tech Marine would withdraw the SIAC notice failing which Bovis would apply to court. At 6.00pm that day, WP informed TLN that since no reply had been received, an application to court would be taken out.

10 TLN replied on the same day stating that in view of WP's position that the arbitration ought to be commenced with the Singapore Institute of Architects, they would withdraw the SIAC notice immediately. The next day, WP replied to state that OS 77 had been e-filed the previous day. They further asserted that Bovis had not reached any agreement with Jay-Tech Marine in the previous

correspondence. It had merely set out its position on the proper approach required under the arbitration agreement in the Subcontract.

11 On 27 January 2005, the Singapore Institute of Architects sent the parties a letter stating the amount of arbitrator's fees payable for an arbitrator appointed by the Singapore Institute of Architects. TLN then took the view that the court's assistance was required for the interpretation of the Subcontract because this letter showed them that there might be practical problems when an arbitrator appointed by the Singapore Institute of Architects conducted the arbitration according to the Domestic Rules, since the Singapore Institute of Architects stated that the fees were determined by its conditions of appointment whereas under the Domestic Rules, the SIAC fixed the arbitrator's fees. Accordingly, TLN filed OS 166.

The submissions and the decision

12 The issue that I had to decide was one of contractual interpretation. The difficulty was to reconcile the provisions of cll 13.3.2 and 13.3.3. Clause 13.3.2 appeared straightforward in language and intent. It plainly provided that the Institute of Architects in Singapore was the authority nominated to appoint an arbitrator in the event that the parties failed to agree on one. The role of the Institute of Architects was further emphasised by the provision in cl 13.4 that a deposit had to be paid to it before the notice of arbitration was served by the party seeking to submit the dispute to arbitration.

13 The complication arose in connection with cl 13.3.3. By specifying that the arbitrator "must" conduct the arbitration in accordance with "Rules of the [SIAC]" were the parties agreeing that their dispute was to be submitted to the SIAC for arbitration or were they merely directing the arbitrator that, when conducting the arbitration, he must procedurally, as far as possible, follow the procedural rules implemented by the SIAC? A secondary difficulty here was what was meant by "Rules of the [SIAC]" as the SIAC has two sets of rules. These are the SIAC Rules (2nd Ed, 22 October 1997) generally intended for international arbitrations and the Domestic Rules, which govern cases regarded as "domestic".

14 Under the Domestic Rules, a case is a domestic case if all the parties have their places of business in Singapore at the conclusion of the arbitration agreement and the substantial part of the obligations of the commercial relationship is to be performed in Singapore. Since both parties to the dispute here are incorporated in Singapore and the Subcontract involves a construction project in Singapore, TLN took the view that the reference in the Subcontract to the "Rules of the [SIAC]" meant a reference to the Domestic Rules. The Domestic Rules provide that the parties, by agreeing to submit or refer their dispute to the SIAC for arbitration, also agree that the arbitration is to be administered by the SIAC, that it is to be conducted in accordance with the Domestic Rules and that the Domestic Rules are to take precedence over any and all provisions in the underlying contract relating to dispute resolution by arbitration (see r 1 of the Domestic Rules).

15 The submission made on behalf of Bovis was that the plain terms of cl 13.3.2 had to be given effect to and the designation, by that clause, of the Singapore Institute of Architects as the appointing authority was not in any way altered by the provisions of cl 13.3.3. WP argued that Bovis and Jay-Tech Marine did not agree to refer disputes between them to the SIAC for arbitration since cl 13.3.1 stated that the dispute was "to be referred to arbitration" by an arbitrator appointed according to cl 13.3.2. The SIAC was not mentioned in cl 13.3.2 but only in the next sub-clause which stated that the "arbitrator appointed according to clause 13.3.2" was to conduct the proceedings in accordance with "Rules of the [SIAC]". Secondly, the parties had agreed that the president of the Singapore Institute of Architects would appoint the sole arbitrator failing parties'

agreement. Thirdly, the reference to the Singapore Institute of Architects was consistent with the fact that the parties had agreed that that body would hold the sum of $2,000 by way of security for costs of the arbitration between the parties. Indeed, Jay-Tech Marine had paid that security deposit pursuant to cl 13.4.

16 Bovis accepted that the dispute between itself and Jay-Tech Marine was a domestic dispute within the meaning of the Domestic Rules. It disagreed, however, that the fact that the dispute was a domestic dispute *ipso facto* meant that the reference to "Rules of the [SIAC]" in cl 13.4 was to the Domestic Rules. It was a matter for the arbitrator to decide which rules he had to follow once he had been appointed by the proper appointing authority. Bovis pointed out that ss 23(1) and 23(2) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") made it clear that the parties were free to agree on the procedure to be followed by the arbitral tribunal in conducting the procedure and if no such agreement was made, then it was for the tribunal to conduct the arbitration in such manner as it considered appropriate. Once the arbitrator was appointed, parties could make submissions to him on what was meant by the phrase "Rules of the [SIAC]" and then it would be for the arbitrator to decide its meaning. In seeking a declaration from the court, Jay-Tech Marine was undermining the arbitrator's right to decide the procedure to be adopted in the arbitral proceedings by pre-empting his decision.

17 As a matter of construction of the provisions of the Subcontract, I agreed with the submission that nowhere in cl 13.3 did the parties submit or refer their disputes to arbitration by the SIAC. The parties provided for the appointing authority to be the Institute of Architects in Singapore which, in context, is the Singapore Institute of Architects. They did not refer the dispute to be arbitrated by the Singapore Institute of Architects. The role of that body was precisely defined. The clause then went on to state that once the arbitrator had been so appointed, he was to conduct the arbitration according to the rules of the SIAC. This was, perhaps, not a very wise piece of drafting as both sets of rules promulgated by the SIAC contemplate a situation where the whole arbitration is conducted under the auspices of the SIAC and its Registry plays a central role in the administration of the arbitration. It is difficult to fit an *ad hoc* arbitration into the format of an SIAC arbitration and if the parties do not intend the SIAC to carry out such functions, they will find that many of the SIAC procedural rules cannot apply to their arbitration. Difficulties of adaptation aside, however, there is no rule of law that prevents the parties from doing exactly what they did.

18 One of the most important principles in arbitration law is that of party autonomy. This is not only reflected in s 23 of the Act but has also been recognised by this court in *Jurong Engineering Ltd v Black & Veatch Singapore Pte Ltd* [2004] 1 SLR 333. Party autonomy means that the parties are free to decide how their arbitral tribunal is to be constituted and how the arbitration proper is to be conducted. In this case Bovis and Jay-Tech Marine were free to select and agree to the role to be played by the SIAC – whether as appointing authority, account holder, administrator or rule provider. These are all roles that are played by an arbitral institution from time to time as pointed out in the following passage from *Russell on Arbitration* (Sweet & Maxwell, 22nd Ed, 2003) at para 3-046:

> **Role of institutions in arbitration agreements.** Arbitration institutions can play an important role in arbitration agreements. They and their rules are often specified in the arbitration agreement, although the parties may agree to take advantage of the services offered by an institution after a dispute has arisen. An arbitral institution may adopt a number of different roles in relation to the arbitration proceedings depending upon what the parties have agreed that their role should be. In particular the institution may:
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> (a) act as the appointing authority which, in the absence of agreement between the parties, appoints the tribunal to hear the dispute;

(b) act as an account holder for fees and deposits and administer the funds necessary to pay for the tribunal's fees and expenses;

(c) supervise the conduct of the arbitration by acting as an administrator for the proceedings;

(d) provide arbitration rules pursuant to which the arbitration will be conducted.

These functions are not mutually exclusive and an institution will frequently act in a combination of some or all of these roles.

19 In this case, the parties chose the SIAC as their rule provider since they specified that the arbitrator was to apply the rules promulgated by the SIAC. In this connection, it is pertinent that what cl 13.3.3 states is that "the arbitrator must" apply the SIAC rules. It does not state that the arbitration as such is to be administered by the SIAC nor does it make any reference to the role of the SIAC prior to the appointment of the arbitrator. As I read cl 13.3.3, it is not a clause by which the parties have agreed to submit their dispute for arbitration under the Domestic Rules or to the SIAC for arbitration under their rules generally. It is only once the arbitrator has been appointed either by agreement between the parties or by the president of the Singapore Institute of Architects that the SIAC rules come into the picture. They then come into the picture as a set of rules for the arbitrator to use, not as a set of rules to run the arbitration as a whole. In this case I also agree that it would be the prerogative of the arbitrator, once appointed, to decide which set of SIAC rules are to apply and the extent to which they can be followed in the context of an arbitration that is not administered by the SIAC. It is in accordance with the principle of party autonomy that the parties were free to choose one body as their appointing authority and another body as their rules provider.

20 As an aside, I observe that the provision in the Domestic Rules which states that the parties by agreeing to submit or to refer their dispute to the SIAC for arbitration agree that the Domestic Rules will take precedence over any and all provisions in the underlying contract between the parties relating to dispute resolution by arbitration may in some situations be an unwarranted limitation on party autonomy. This is because, when read with other rules, it prevents the parties from selecting anyone other than the chairman of the SIAC as the authority to appoint an arbitrator when the parties themselves cannot agree.

21 There are two types of arbitration: the *ad hoc* arbitration and the institutional arbitration. The language of cl 13.3 indicates that in this case, the parties selected an *ad hoc* arbitration since they did not submit it to the administration of any particular institution but designated one institution to be default appointer of the arbitrator and another institution to provide the procedural rules to govern the proceedings. The authors of *Law and Practice of International Commercial Arbitration* (Sweet & Maxwell, 4th Ed, 2004) observe at para 1-97 that in such an *ad hoc* arbitration, there is often a reference to rules which are to be applicable for the running of the arbitration such as the UNCITRAL Arbitration Rules. The other type of arbitration, an institutional arbitration, is one that is administered by a specialist arbitral institution under its own rules of arbitration (*id* at para 1-99). Had the parties chosen this latter route, the arbitration clause would have been quite differently worded. As an example, one could use the model clause recommended by SIAC itself for parties who wish to choose it as their arbitral institution for a domestic arbitration. This reads:

Any dispute as to any matter arising under, out of, or in connection with this contract shall be referred to and finally determined by arbitration at the Singapore International Arbitration Centre ("SIAC") and in accordance with its Domestic Arbitration Rules.

This wording is very different from the wording of cll 13.3.2 and 13.3.3.

Conclusion

22 For the reasons given above, at the conclusion of the hearing, I made the following orders:

(a) I declared that on a proper construction of the arbitration agreement set out in cl 13 of the Subcontract between Bovis and Jay-Tech Marine dated 16 May 2003 ("the arbitration agreement"), the arbitrator, in the absence of agreement between the parties, should be appointed by the Singapore Institute of Architects;

(b) with reference to prayer 1 of OS 166, I declared that the arbitration to be conducted pursuant to the arbitration agreement is an *ad hoc* arbitration and shall be conducted by the arbitrator in accordance with such rules of the SIAC as the arbitrator determines are applicable;

(c) I declared that the notice given by Jay-Tech Marine dated 28 December 2004 to the SIAC was not a valid invocation of the arbitration agreement; and

(d) that Jay-Tech Marine should pay Bovis' costs fixed at $4,000 inclusive of disbursements.

I ordered costs against Jay-Tech Marine because it was its misinterpretation of the Subcontract that caused it to give the notice of arbitration to SIAC and that notice led to these proceedings.

23 One final point: I observed to the parties during the hearing that if either of them had picked up the telephone and talked to the other, both sets of proceedings might have been avoided and expense saved. It was clear from the outset that Jay-Tech Marine was keen to proceed to arbitration in order to resolve the dispute. Whilst Jay-Tech Marine might have gone wrong in its interpretation of cl 13.3.2, Bovis did not help matters in the way that it reacted to the steps taken by Jay-Tech Marine. Its solicitors gave Jay-Tech Marine only a very short time in which to decide whether to withdraw the notice to the SIAC. If at the same time it had confirmed unequivocally that it was prepared to proceed with an arbitration conducted by an arbitrator appointed by the Singapore Institute of Architects, I think that would have led to a speedy withdrawal of the notice. Unfortunately, though it appeared to me that Bovis was prepared to participate in such an arbitration, it did not convey that message clearly to Jay-Tech Marine. I can only recommend that as far as possible solicitors try and talk to each other to sort out problems in the best interests of their respective clients and use litigation only as a last resort.