Tang Boon Jek Jeffrey v Tan Poh Leng Stanley
[2001] SGCA 46

Case Number	: CA 107/2000
Decision Date	: 22 June 2001
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; L P Thean JA; Yong Pung How CJ
Counsel Name(s)	: Alvin Yeo Khirn Hai SC and Tan Kay Kheng (Wong Partnership) for the appellant; Philip Jeyaretnam and Yip Wai Lin Jamie (Helen Yeo & Partners) for the respondent
Parties	: Tang Boon Jek Jeffrey — Tan Poh Leng Stanley

Arbitration – Arbitral tribunal – Powers – Power to revisit and reverse previous award – Meaning of "final award" – When arbitrator functus officio – International Arbitration Act (Cap 143A) – UNCITRAL Model Law on International Commercial Arbitration

JUDGMENT:

Curia Advisari Vult

1. This appeal raises a general question of law as to the power or jurisdiction of an arbitrator under the International Arbitration Act (Cap 143A) (IAA) and the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) to revisit or reverse an award he has made. UNCITRAL is the acronym for United Nations Commission on International Trade Law. The Model Law is set out in the First Schedule to the IAA. At the hearing below, the judge set aside the further award rendered by the arbitrator on the ground that, when he made that further award, he was *functus officio*.

The facts

2. We shall first briefly set out the background facts giving rise to the application to set aside the further award. In 1994, the appellant, Mr Jeffrey Tang (Tang) and the respondent, Mr Stanley Tan (Tan), together with their respective group of investors, formed a joint venture corporation called Dynasty Pacific Group (DPG). Dispute arose between them which led to litigation in Australia. Pursuant to mediation, a Settlement Agreement dated 24 January 1998, was reached. In the Settlement Agreement there was an arbitration clause for the settlement of disputes arising thereunder. The DPG had basically two main lines of business property development and hotels. Under the Settlement Agreement, the businesses were duly divided between Tang and Tan and their respective associates. It also set out the details on how the division should be carried out.

3. However, disputes arose between the parties as to the obligations each party should fulfil under the Settlement Agreement. The disputes were referred to Mr Giam Chin Toon SC as arbitrator (the Arbitrator). There were two sets of disputes giving rise to two separate arbitration proceedings. We are here concerned with only the second arbitration. Before the Arbitrator, Tang was the respondent and Tan, the claimant. There were claims and counterclaims between the parties. One of the counterclaims brought by Tang was for a sum of A$1,375,762.64 (hereinafter referred to as the "A$1.3 million counterclaim"). On 10 January 2000 the Arbitrator made a reasoned award, with the following concluding results:-

> "1. The claimants (Tans) claim be dismissed
>
> 2. The respondents (Tangs) counterclaim be dismissed.
>
> 3. This award is final save as to costs."

4. Two days later, on 12 January 2000, the solicitors for Tang wrote to the Arbitrator, pointing out that, although he had dismissed Tangs counterclaim, it would appear that an aspect of the counterclaim of Tang relating to cash deposits were left out by the Arbitrator and that the award in dismissing Tangs counterclaim did not refer to these cash deposits. Tangs solicitors accordingly asked the Arbitrator to make an additional award, pursuant to Article 33 of the Model Law.

5. On 17 January 2000, the Arbitrator issued an additional award wherein he acknowledged that he had omitted to address Tangs counterclaim relating to the seven cash deposits and duly made the award in respect thereof. However, as regards Tangs A$1.3 million counterclaim, the Arbitrator re-affirmed the 10 January 2000 award and refused to make any award in respect of that counterclaim because he did not think that Tang was entitled to it. The Arbitrator gave his reasons.

6. Following the delivery of this additional award, on 21 January 2000, Tangs solicitors wrote again to the Arbitrator raising two points. First, they sought further arguments before the Arbitrator relating to the A$1.3 million counterclaim on the ground that the Arbitrator appeared to have decided the matter on the basis of a point which was not argued before him. Second, they sought clarification as to whether Tang would be entitled to interest on the cash deposits which were to be refunded to him under the additional award of 17 January 2000.

7. The Arbitrator acceded to the request of Tang for further arguments and heard the parties on 31 January 2000. On 6 March 2000, the Arbitrator rendered "Additional Award II" wherein he dealt with not only the counterclaim for A$1.3 but also the question of interest on the cash deposits and the question of costs, which question was reserved under the award of 10 January 2000. On the A$1.3 million counterclaim, the Arbitrator stated that his previous interpretation of the relevant provision of the Settlement Agreement as set out in his Additional Award of 17 January 2000 was erroneous. He thus changed his mind and gave an award in respect of the A$1.3 million counterclaim with interest. This award will hereinafter be referred to as the "March award".

8. Accordingly, Tan applied by way of a motion to have the March 2000 award set aside.

Reasons given by Arbitrator

9. In the March award, the Arbitrator expressly addressed the question whether he had the jurisdiction or power to recall an award and alter it. We will now quote the relevant paragraphs of the award where he gave his reasons why he could do that:-

> It is not in dispute that in the case of judgments pronounced by the courts, the Judge has the power to re-consider his verdict so long as the judgment has not been entered or perfected. There is no such procedure in an arbitration award. So, a judge can, like in the case of *Lim Yam Teck v Lim Swee Cheng* (1979) 1 MLJ 162 change his mind after giving further consideration to the matter. There is, therefore, a period in which a judge is permitted to re-consider the matter. Thereafter, if a decision is wrong, it would have to be rectified by a Court of Appeal.
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> Unfortunately, the position is less clear in an international arbitration award where the arbitrator desires to re-consider the matter. There are no direct authorities on the point. If an error is made, there are no express provisions whereby the decision could be rectified in a court of law. Great injustice would be caused in such a case. It is inconceivable that the law or public policy would permit such a situation.
>
> In addition, it has been submitted by Counsel for the Respondent that since there is no procedure of registration or perfection of the Award, the equivalent

> period for an arbitrator could be when enforcement proceedings are applied for. I agree with this.
>
> I am therefore of the view that an arbitrator can re-consider the award not only on the terms of Article 33(1) of the Model Law but under the general powers given to him to determine the rules and procedure of the tribunal which would include the power to re-consider an award before enforcement if the arbitrator so decide. If I have good reasons to re-consider the matter, I should be allowed to do it. Otherwise, an injustice would be perpetuated.

10. It will be seen that essentially the basis upon which the Arbitrator felt he had the jurisdiction or power to reconsider an award already delivered is the overriding consideration of justice so long as the award had not yet been enforced.

Court below

11. The judge below was of the view that the March award was a nullity because the Arbitrator was *functus officio* when he made that award. Having rendered an award, the powers which an arbitrator still possesses would only be those which were reserved under Article 33 of the Model Law. That article does not empower an arbitrator to recall an award with a view to reversing it.

12. As regards Tangs alternative argument, that the court should exercise the discretion conferred upon it under article 34(4) of the Model Law and afford the Arbitrator an opportunity to resume the hearing so that the ground to set aside the award could be eliminated, the judge said:-

> Article 34(4) can be invoked only when there are irregularities in the award and not when the award is a nullity. Furthermore, the power to remit does not apply to an award made after the Arbitrator became *functus officio.*

Appeal

13. Counsel for Tang, Mr Alvin Yeo, put the issues which we are required to consider in this appeal under the following four heads:-

> a. Whether the judge erred when he decided that the Arbitrator was *functus officio* when he made the Arbitration 2 Award;
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> b. If so, whether the Arbitrator had the jurisdiction to reconsider the Arbitration 2 Award as regards the claim for A$1,375,762.64 and to make the March Award;
>
> c. whether the Respondent had successfully made out a case for setting aside under Article 34 of the Model Law;
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> d. In the alternative, whether the judge erred when he refused to remit the March Award to the Arbitrator pursuant to Article 34(4) of the Model Law.

14. As we see it, there is really only one main issue: was the Arbitrator *functus officio* vis--vis the A$1.3 million counterclaim when he made the March award. If he was, then the March award is a nullity and we do not think Article 34(4), which gives the court the discretion to remit a case back to the Arbitrator either to give the Arbitrator an opportunity to resume the arbitral

proceedings or to take such other actions as will eliminate the grounds for setting aside, can be applied to a case such as this. Here, remitting the case back to the Arbitrator will not eliminate the problem.

Relevant Provisions

15. It is common ground that the proceeding before the Arbitrator was an international arbitration, governed by the IAA. By s 3 of the IAA, the Model Law (except Chapter VIII) is to have the force of law. The relevant provisions are Articles 32-34 of the Model Law which provide:-

> Article 32

(1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this Article.

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

> (a) --- Not relevant
>
> (b) --- Not relevant
>
> (c) --- Not relevant

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of Articles 33 and 34(4). (Emphasis added).

Article 33

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

> (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
>
> (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this Article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this Article.

Article 34

(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:
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> > .
> > .
> >
> > (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;
>
> .
> .

(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 tribunals opinion will eliminate the grounds for setting aside.

Appellants contentions

16. Mr Yeo relied upon a number of works to say that in this instance there was, as yet, no final award. First, is *A guide to the UNCITRAL Model Law on International Commercial Arbitration Legislative History and Commentary by Holtzmann and Neuhaus* (hereinafter referred to as "The Guide"), where the authors referred briefly to the history behind Article 32(1) and said:-

> Common to the various definitions is the commonsense notion that a final award is simply one that decides, or completes the decision of, all claims presented. At the same time, the Secretariat also suggested as an alternative a definition of the term final award; this draft provided that the making or delivery of the final award, which constitutes or completes the disposition of all claims submitted to arbitration, would terminate the mandate of the arbitral tribunal.
>
> The Working Group favoured this last approach, although it was noted that it

> would be desirable to express in some provision of the Model Law that the arbitral tribunal had the power to render awards such as interim, interlocutory, or partial awards. This affirmative definition of the term final award without a mention of the other types of awards that might be issued was incorporated into the draft of what became Article 32, dealing generally with the termination of the arbitral proceedings. Later, however, for the sake of simplicity, the Working Group deleted the defining clause the words which constitutes or completes the disposition of all claims submitted to arbitration leaving just the term the final award that appears in Article 32(1).
>
> We may add that Mr Holtzmann was the Secretary-General to UNCITRAL during the period when the latter was deliberating on the Model Law.

17. Next is the Report of the Secretary-General of the United Nations (Document A/CN 9/260), which incorporated an Analaytical Commentry on Draft Text of a Model Law on International Commercial Arbitration. In the commentary, the following observation was made on Article 32 (at page 68):-

> A good example is that the arbitrator would become *functus officio* by making an award only if that is the final award, i.e., the one which constitutes or completed the disposition of all claims submitted to arbitration.

18. In *Law and Practice of International Commercial Arbitration by Redfern and Hunter (3rd Edition*) the authors stated the following in relation to the expression final award (8-33):-

> However, the term "final award" is customarily reserved for an award that completes the mission of the arbitral tribunal. Subject to certain exceptions, the delivery of a final award renders the arbitral tribunal functus officio. It ceases to have any further jurisdiction over the dispute, and the special relationship that exists between the arbitral tribunal and the parties during the currency of the arbitration ends. This has significant consequences. An arbitral tribunal should not issue a final award until it is satisfied that its mission has actually been completed. If there are outstanding matters to be determined, such as questions relating to costs (including the arbitral tribunals own costs) or interest, or further directions to be given relating to the disposal of property, the arbitral tribunal should issue an award that is expressly designated as a partial or interim award.

19. *Redfern and Hunter* also say that when the arbitrator does not deal with the question of costs in the award, he effectively reduces "what was intended to be a final award on the merits of the case to the status of a partial award."

20. Counsel submitted that as the Arbitrator did not deal with the question of costs, as well as the claim on the cash deposits in the 10 January award, the latter award could not constitute a final award within the meaning of Article 32(1). While the cash deposits question was dealt with in the 17 January award, the question of costs remained undetermined until the March award. Until then the Arbitrator had not completed his mission.

21. Reference was also made by Mr Yeo to *Russell on Arbitration (21st Edition)*, which is a work concerned with domestic arbitration rather than international arbitration under the Model law. There the author recognises there are three senses in which an award may be said to be final:-

> There are three senses in which an award may be said to be final. First, an award may be final in that it determines all the issues in the arbitration, or

> determines all the issues which remain outstanding following earlier awards dealing with only some of the issues in the arbitration. Secondly, an award is final under section 58(1) of the Arbitration Act 1996 in that it is final and binding on the parties. Thirdly, an award must be final in the sense of being a complete decision without leaving matters to be dealt with subsequently or by a third party.

22. But in relation to the term "final award", the author said:-

> A final award is descriptive of the kind of award rather than its effect; it describes an award which determines all the outstanding issues in the arbitration. A tribunal can only make one final award .. and once its final award is made, the tribunal is *functus officio*.

23. Counsel also emphasised the fact that care must be exercised in considering English authorities because England decided not to adopt the Model Law following the Mustill Report 1988 which Report came to the conclusion that the Model Law "does not offer a regime which is superior to that which currently exists in England."

24. Section 16 of the English Arbitration Act 1950 provided as follows:-

> 16. Awards to be final

Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the award to be made by the arbitrator or umpire shall be final and binding on the parties and the persons claiming under them respectively.

25. The 1950 Act was replaced by the Arbitration Act 1996, and s 58(1) is the equivalent of the previous s 16 and it provides:-

Effect of award

58(1) Unless otherwise agreed by the parties, an award made by the tribunal pursuant to an arbitration agreement is final and binding both on the parties and on any persons claiming through or under them.

26. Counsel argued that the concept of an award being final and binding is different from final award, referred to in Article 32 of the Model Law. The concept of final and binding means that an award once given, whether partial or otherwise, cannot be re-opened and the arbitrator would be *functus officio* in relation to the matters dealt with in that award. Counsel also pointed out that in comparison with the English Arbitration Acts, there is no appeal to the Court under IAA and the Model Law and the parties rights to challenge an award under the Model Law are severely curtailed.

27. Counsel submitted that to give an arbitrator the jurisdiction to revise or vary his earlier award, so long as it is not the final award, will not be inconsistent with the scheme contemplated under the Model Law and the need for finality. There is no reason in logic why an arbitrator may not revise or vary his earlier award if he is, on hearing further arguments, satisfied that his earlier award is wrong, all the more so bearing in mind that even a High Court Judge has the inherent jurisdiction to reconsider his decision so long as the order has not yet been perfected.

Respondents arguments

28. The respondents argument is that while s 32 of the Act provides that an arbitrators mandate only terminates upon the final award, all that means is that the arbitrator has not finished his mission until all issues have been dealt with. But that in no way means that in respect of a claim which has been decided in an award, the arbitrator is empowered to re-open it, so long as there are other claims or issues yet to be determined, such as costs.

29. Mr Jeyaratnam, for Tan, submitted that once an award is given, it is final on all matters dealt with in the award though the arbitration may still not be completed as there are other issues to be determined or it had inadvertently omitted to deal with other claims (s 33[3]). But s 33(3) would not empower an arbitrator to revise or reverse an award already made, even if that award is only a partial award. Section 33(1)(b) which gives the arbitrator the power to interpret specific points of an award given reinforces that viewpoint.

30. The 17 January award was an additional award which the Arbitrator was empowered to make pursuant to s 33(3). It is of significance to note that the Arbitrator had called the 10 January award his final award reserving only the question of costs. He did it again in the 17 January award. He did not reserve any right to revisit the issues already dealt with. This is effectively a final award in so far as the issues dealt with are concerned.

31. As for Article 19 of the Model Law (which allows the arbitrator to conduct proceedings as he deems appropriate) and section 12 of the IAA (which accords to the arbitrator specific powers in relation to the arbitration including the power to grant any remedy or relief which would have been ordered by the High Court), counsel submitted that they do not in any way have any relevance to the question whether the arbitral tribunal may, after having given an award on a specific matter, have the power to reconsider and vary it. There must be finality to an award, unless the IAA or the Model Law otherwise provides, e.g., Articles 33 and 34 of the Model Law.

Our decision

32. The judge below had set aside the March award on the ground that when it was made the Arbitrator was *functus officio*. We have in 15 above set out the relevant provisions of the Model Law. In this regard, it is relevant to point out that under s 4(1) of the IAA, it is expressly provided that in interpreting the Model Law it is permissible to have reference to the documents of UNCITRAL and its Working Group relating to the preparation of the Model Law.

33. The first limb of article 32(1) provides that arbitral proceedings are terminated by the final award. In 17 above, we have referred to an UN doc A/CN 9/260, where it was stated that:-

> A good example is that the arbitrator would become *functus officio* by making an award only if that is the final award, i.e., the one which constitutes or completed the disposition of all claims submitted to arbitration.

34. It will further be recalled from the Guide by Holtzmann & Neuhaus, that while in the UNCITRAL and the Working Group there were different views as to the types of award, it was generally understood that final award was simply one that decides or completes the decision of all claims

presented. Apparently, it was for the sake of simplicity that the term "final award" was not defined in the Model Law. We would add that Article 32(1) is the only place in the Model Law where the term "final award" appears.

35. We do not think there could be any doubt that the final award must be the one that completes everything that the arbitral tribunal is expected to decide, including the question of costs. Costs are invariably an item of claim both in civil litigation in the courts as well as in arbitral proceedings. It was such an item in the present arbitration.

36. Following from the above, it is clear that until such a final award is given, the arbitral tribunals mandate still continues; it is not *functus officio*. In this connection, Article 32(2) is very pertinent as it provides that even after an arbitral tribunals mandate is terminated, with the issue of the final award, it still has certain residual powers as the Articles states that the termination of the tribunals mandate is subject to Articles 33 and 34(4). Article 33 sets out the scope and the time frames within which the arbitral tribunal may, after its mandate is terminated, exercise the additional powers to make corrections, to give interpretation to an award and to make an additional award. As regards Article 34(4), the tribunal is empowered to resume hearing the case if the court, on the grounds set out in article 34(2), remits the case back to the tribunal.

37. The scheme of things under the Model Law is, therefore, quite different from the English Arbitration Acts of 1950/1996, where it is provided that an award made by an arbitral tribunal is final and binding on the parties, and every such award, whether interim/partial or final, could be challenged by way of an appeal or review in accordance with the provisions of those Acts. Therefore, the English authorities, including a Singapore High Court decision of 1934, *Chung & Wong v CM Lee* [1934] 3 MLJ 153, which decided that an arbitrator is *functus officio* on a particular claim, once he has given his award, are of no relevance to the interpretation of the Model Law. As we have referred to earlier, England did not adopt the Model Law because, in the words of the Mustill Report, 1988, it "does not offer a regime which is superior to that which currently exists in England." Implicit in this statement is the recognition that there are differences between the two regimes. We would reiterate that under the Model Law, there is extremely limited scope (essentially on jurisdictional grounds) to challenge an award.

38. It is true that in the 10 January award, as well as the 17 January award, the Arbitrator had described the award as final. But the label which the Arbitrator gave to the award could not be conclusive if the facts were that there was still the claim on costs which have yet to be adjudicated upon. Accordingly, as the mandate of the Arbitrator had not yet been terminated, he was entitled to reconsider his decision and if he thought fit, as he did here, to reverse himself.

39. We recognise that the High Court has the inherent jurisdiction to recall its decision which have not yet been perfected. However, we are here concerned with a model law, discussed and adopted at an international forum. We do not think it would be correct to inject any domestic law practices or consideration into the construction of such a model law. Neither could that have been intended by the participants at the forum who adopted the Model Law. Nevertheless, until the issue of the final award, the arbitral tribunal is not *functus officio*. What are the remaining powers of the arbitral tribunal after it has given the final award are set out in Article 33. The concept of partial *functus officio* on the basis of issues/claims decided by the arbitrator is adopted by the English Courts because of the provisions in their Arbitration Acts 1950/1996. Singapore has also adopted a similar approach as far as domestic arbitration is concerned see Arbitration Act (Cap 10). But there is nothing in the Model Law which indicates that there should be another sense to the meaning of *functus officio* other than that set out in article 32.

40. In the result, we would allow the appeal with costs here and below. The order of the court below is set aside. The security for costs (with any accrued interest) shall be refunded to the appellant or his solicitors.

Sgd:	Sgd:	Sgd:
Yong Pung How	L P Thean	Chao Hick Tin
Chief Justice	Judge of Appeal	Judge of Appeal

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