ABC Co v XYZ Co Ltd
[2003] SGHC 107

Case Number : OM 600027/2001, SIC 601646/2002

Decision Date : 08 May 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : VK Rajah, SC, with Allen Choong and Priya Selvam (Rajan & Tann) for the Applicants; Alvin Yeo, SC, with Tay Peng Cheng (Wong Partnership) for the Respondents

Parties : ABC Co — XYZ Co Ltd

Arbitration – Award – Interim award – Party seeking to set aside interim award – Article 34 of the UNCITRAL Model Law on International Commercial Arbitration – Whether new grounds may be added to originating motion after expiry of prescribed three-month period

Civil Procedure – Originating processes – Application to amend originating motion seeking to set aside arbitration award after relevant limitation period – Rules of Court (Cap 322, R 5, 1997 Rev Ed) O 20 r 5

1 This summons in chambers raises an interesting point on the application of Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ('the Model Law') which is part of our law by reason of the International Arbitration Act (Cap 143A) ('the Act').

2 In respect of an arbitration in Singapore which is an international arbitration within the meaning of s 5 of the Act, the governing legislation is the Model Law as implemented by the Act. As a result, the courts of Singapore have only such jurisdiction over the proceedings as is specifically conferred on them by the Act and the Model Law. The principle of party autonomy is one that is central to the Model Law. It is a principle that must be respected by the courts whenever they have cause to deal with any issues arising in relation to an international arbitration. Thus, the attitude to be adopted when a court is faced with such an issue is to look first to the Model Law for an indication as to how such issue is to be treated and, in the absence of such indication, to apply the applicable principles of the general law in the manner best suited to uphold the parties' choice of arbitration as the appropriate method of dispute resolution.

3 Article 34 of the Model Law deals with the recourse that a party to an arbitration has when he is not satisfied with an arbitral award. The title of this article is 'Application for setting aside as exclusive recourse against arbitral reward' and the Article by ¶ (1) makes it clear that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with ¶ (2) and ¶ (3) of the Article. Paragraph (2) amplifies ¶ (1) by enumerating the grounds which the applicant has to prove in order to succeed in his application to set aside an award. The Model Law provides six such grounds and s 24 of the Act provides two extra grounds for parties to an international arbitration in Singapore. Paragraph (3) of Article 34 sets out the time limit for the making of an application to set aside. It states:

> An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

4 Article 34 does not provide the procedure by which recourse to the courts is to be had. The

drafters left this to the domestic law of the various states implementing the Model Law. In our case, the procedure has been provided by O 69A of the Rules of Court 1996. Rule 2(1) of that order provides that every application to the court to set aside an award under s 24 of the Act or Article 34(2) of the Model Law must be made by originating motion to a single judge. By r 2(4), such application has to be made within three months from the date of receipt by the applicant of the award or corrected award. This rule echoes the time limit set by Article 34(3). The references to O 69A are references to that Order as it existed in October 2001. In April 2002, it was amended. These amendments specify that the notice of motion must state the grounds on which the application is made and must be accompanied by an affidavit that exhibits the relevant documents and sets out the evidence the applicant relies on.

The parties and the application

5 The applicants and the respondents here, both foreign companies, were respectively, the claimants and respondents in an international arbitration conducted according to the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The arbitration started in 1998 and took place in Singapore. Both parties put in claims. On 10 September 2001, an interim award ('the Award') was issued by the arbitral tribunal. Basically, the claims of the applicants were dismissed and the counterclaims of the respondents were allowed. The Award dealt with issues of liability only leaving issues of causation and quantum to be decided later.

6 On 10 October 2001, well within the time limit specified by the Model Law, the applicants applied by way of originating motion for the award to be set aside 'insofar as it purports to make the determinations or findings pertaining to the causes of action set out in the schedule attached [thereto], all of which arose prior to 15 November 1994'. The motion stated that the grounds of the application were that:

> 1 The Arbitral Tribunal had, by their determination that clause 2.1(a) of the Assignment dated 15 November 1994, entered into by the Respondents, assigned absolutely to a consortium of banks all claims that had arisen as at the date of the Assignment, thereby excluded from the scope of the arbitration all the Respondents' counterclaims set out in the schedule attached hereto, all of which had arisen or accrued prior to 15 November 1994.
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> 2 Notwithstanding such determination, the Arbitral Tribunal had, in excess of their jurisdiction, purported to make determinations and findings in respect of the said causes of action set out in the schedule attached hereto, all of which had arisen or accrued prior to 15 November 1994.

The above description of their grounds made it clear that the applicants were seeking to bring their case within Article 34(2)(a)(iii) which provides that an award may be set aside if the applicant proves 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 …

7 The time period within which an application to set aside the Award could be made ended on 20 December 2001. Eleven months later, on 7 November 2002, after spending time in effecting service of these proceedings out of the jurisdiction on the respondents and after changing their lawyers, the applicants filed this summons in chambers. By it, they have asked for leave to amend the originating motion. The amendments asked for are quite substantial. They wish to add six new grounds as bases for the setting aside of the Award. The proposed additional grounds are as follows:

3 a breach of the rules of natural justice had occurred in connection with the making of the Award by which the rights of the applicants have been prejudiced;

4 the applicants were not treated equally and/or were not given a full opportunity to present their case and/or were otherwise unable to present their case;

5 the Award deals with disputes not contemplated by or, alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters beyond the scope of the submission to arbitration;

6 the composition of the Arbitral Tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties;

7 the Award is in conflict with the public policy of Singapore; and

8 the Award was induced or affected by fraud.

It can be seen that the applicants have not been particularly selective in relation to the new grounds. The new ground 5 is to a large extent a repetition of the original grounds 1 and 2. In addition, they have invoked three of the five other grounds under Article 34 of the Model Law and both of the grounds under s 24 of the Act. Further, when the summons in chambers was filed, it appeared that the applicants wished to set aside the whole of the Award, which would include the decision in relation to their claim as well as the decision in relation to the counterclaim, when their original request had been only for the setting aside of the decision on the counterclaim. In oral arguments before me, however, their counsel confirmed that the applicants were not asking for the decision on their claim to be set aside. The new grounds were intended only as additional ammunition for the setting aside of the decision on the counterclaim. Naturally, the respondents totally oppose any amendment being made to the originating motion.

The proper approach

8 The main battle ground is over how the court should treat such an application to amend. The respondents point to the intentions of the drafters of the Model Law which were that they would provide a fairly short period of time during which an application for setting aside could be made in order to minimise the risk of dilatory tactics. The respondents argue that the time limit of three months is a strict statutory time limit. Therefore when it is sought, outside this period of three months, to amend a setting aside application for the purpose of introducing new grounds, such application must be treated in the same way as an application to amend a writ to introduce new causes of action which are time barred at the time of the application. The applicants, on the other hand, say that the approach to be adopted is that used when an appellant who has filed his notice of appeal within time seeks the court's leave to amend the notice so as to challenge additional points in the decision against which he is appealing.

9 The starting point of this discussion must be the Model Law itself. On the aspect of time, Article 34(3) is brief. All it says is that the application may not be made after the lapse of three months from a specified date. Although the words used are 'may not' these must be interpreted as 'cannot' as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three month period as Article 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and,

as the court derives its jurisdiction to hear the application from the Article alone, the absence of such a provision means the court has not been conferred with the power to extend time.

10 Secondly, the Article does not say that the ground on which the award is being challenged has to be stated in the application. I think, however, that this requirement must be inferred since it is plain from Article 34(2) that only proof of one or more of the grounds enumerated in that paragraph will entitle a court to set aside an award. The proper interpretation of Article 34(3) must be, therefore, that a party seeking to set aside an award must, within the three month period, file an application which states the ground or grounds he intends to rely on. Having done so, if that party discovers a further ground more than three months later, what can he do? He cannot file another application - that would not be permitted either under Article 34 or under the general law since the court would regard a second action for the same relief as being vexatious. Could he then apply to amend the application to add the additional ground ?

11 This further question is not answered by ¶ (3) or any other paragraph of Article 34. The question of amendment of court proceedings, once started, is a question of procedure and the Model Law says nothing about procedure within judicial systems. This is not surprising given that the Model Law, while intended to establish 'a unified legal framework for the affair and efficient settlement of disputes arising in international commercial relations' (see Resolution passed by United Nations General Assembly on 11 December 1985 endorsing the adoption of the Model Law), was only meant to govern the conduct of arbitration proceedings. It was not intended to interfere in domestic judicial systems. Thus, while prescribing the situations in which parties can have access to a domestic judicial system and also prescribing the relief which can be granted by that system in relation to the arbitration, the Model Law does not attempt to prescribe the procedure to be used but leaves this to the rules of the relevant domestic judicial system.

12 As stated, O 69A r 2(1) prescribes that applications to set aside awards under the Model Law are to be made by originating motion. Order 20 is the rule dealing with amendment of court documents. By O 20 r 7, O 20 r 5 applies in relation to an originating notice of motion in the same way as it does to a writ. The parties recognise this but their dispute is over which sub-rule of r 5 governs this particular application. The applicants say that the relevant rule is sub-rule (1) whilst the respondents argue the relevant rules are sub-rules (2) and (5). These three sub-rules provide as follows:

> (1) Subject to Order 15, Rules 6, 6A, 7 and 8, and this Rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.
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> (2) Where an application to the Court for leave to make the amendment mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph if it thinks it just to do so.
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> …
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> (5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment.

13 The respondents' argument is that sub-rules (2) and (5) apply because the three month period

from the date on which the applicants received the Award was 'the relevant limitation period' and it expired on 20 December 2001 long before the application to amend was made. Secondly, each of the proposed new grounds for the setting aside the Award is in fact a 'new cause of action' within the meaning of that term in sub-rule (5).

14 The applicants do not accept this view. They say that O 20 r 5(5) only applies when a party seeks to introduce a new cause of action and that what they are seeking to introduce are new grounds, not new causes of action. They point out that the phrase 'the grounds' is consistently used in both the principal and subsidiary legislation to refer to the objections to the award enumerated in Article 34(2) and s 24 of the Act. Section 24 itself states that 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 …'. Although Article 34(2) itself does not use the phrase 'the grounds' in reference to the list of objections to an award that it contains, Article 34(4) does. It confers on the court power to suspend setting aside proceedings in order to give the arbitral tribunal an opportunity to take such steps as 'will eliminate the grounds for setting aside'. Further, in the amended O 69A, there are references to 'the grounds' of the application and 'the grounds' on which a respondent may oppose it. In sum, the applicants contend that 'causes of action' and 'grounds' are two different things. 'Grounds' are reasons for the relief that an applicant seeks. The applicants say that here they are not seeking new reliefs by making this application. They seek exactly the same relief as they did originally but simply seek to give additional reasons as to why it should be granted. The applicants also tendered an annotated copy of the Rules of Court to show that the phrase 'cause of action' had been used in a very precise fashion in various parts of the Rules and that the word 'grounds' had been used in a different fashion throughout the Rules. Thus, they say 'grounds' and 'cause of action' are distinct and one cannot apply the limitation on adding new causes of action imposed by r 5(5) to the addition of new grounds in this case.

15 *Black's Law Dictionary* (7th Ed) defines 'cause of action' as:

> A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person

This definition echoes that in ¶ 18 of volume 37 of *Halsbury's Laws of England* (4th Ed Reissue), which reads:

> 'Cause of action' has been defined as meaning simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from the earliest time to include every fact which is material to be proved to entitle the claimant to succeed, and every fact which the defendant would have a right to traverse. 'Cause of action' has also been taken to mean that particular act on the part of the defendant which gives the claimant his cause of complaint, or the subject matter or grievance founding the claim, not merely the technical cause of action.

16 The matters enumerated in Article 34(2) sub-paragraphs (a)(i) to (iv) and (b)(i) to (ii) and in s 24(a) and (b) are descriptions of factual situations or situations of mixed fact and law which, if established, would entitle a party to an arbitration to have the award issued in that arbitration set aside by the court. As an example, one can look at Article 34(2)(a)(i) and (ii) which read:

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

In my judgment, although the matters in the provisions quoted above and in the other sub-paragraphs of Article 34(2) and s 24 have been described or referred to as 'grounds' that in itself cannot stop them from also constituting 'causes of action' since they display all the characteristics of causes of action. They relate to facts or grievances which entitle a party to claim a remedy from the court. To my mind, the said matters are statutorily created causes of action. They were created by the drafters of the legislation in order to confer on parties to international arbitrations specific (although strictly delimited) rights to challenge arbitral awards in the domestic court system because it was recognised that in the situations described it would not be just to enforce the arbitration award against the parties.

17 The applicants argue that an application to amend a motion to set aside an arbitral award by adding additional grounds should be treated in the same way as an application to amend a notice of appeal. They point out that the court does not apply the same stringent standard to an application to amend a notice of appeal that it does when faced with an application by a prospective appellant for leave to file a notice of appeal out of time. See *Leong Mei Chuan v Chan Teck Hock, David* [2001] 2 SLR 17. Rather the court will lean in favour of allowing the amendment unless it is shown that the amendment will cause grave prejudice or hardship to the opposing party that cannot be addressed by an order as to costs. This is because the appellant had filed his application to appeal within time and allowing an amendment to the notice of appeal would not run counter to the principle that recourse to the appellate tribunal should not be open ended.

18 I do not accept that an application to amend a notice of appeal is analogous to an application to amend an originating motion to set aside an arbitration award. The two processes are entirely distinct. When an appeal is lodged, what is being demonstrated is a dissatisfaction with the way that the facts and the law have been analysed in the first instance court. The appellant to succeed on his appeal does not have to prove any new facts. What he has to do is to show that the evidence already before the court has not been considered adequately and that a proper consideration of that evidence and the applicable law must lead to a decision that is different from that arrived at by the trial judge. An appeal is not an originating process.

19 It is not an accident that O 69A specifies that an application to set aside an award should be made by an originating motion. That is one of the originating processes provided for by the Rules when a party with a cause of action wishes to initiate proceedings to obtain a remedy against another party. Unlike an appeal, it is not a process designed to impugn a pre-existing judicial decision. The fact that in this case the remedy required is the setting aside of an arbitral award does not make the application the equivalent of an appeal. To succeed in the application, new facts which were not (and generally would not have had to be) considered by the arbitral tribunal in coming to its decision will have to be established by the applicant. This is recognised by the amended O 69A r 2(4B) which requires the motion to be accompanied by an affidavit disclosing the supporting evidence. The application is a process whereby relevant facts are established. It is not a process whereby facts which already have already been established in the arbitration are reassessed. It is not appropriate therefore to apply to an application to amend an originating motion the same principles that are applied to an application to amend an appeal. In any case, O 20 r 5 is quite clear as to the principles that apply to the amendment of originating motions.

20 Accordingly, I agree with the submission of the respondents that in considering this application to amend the originating motion I am governed by O 20 r 5(2) and O 20 r 5(5). As far as r 5(2) is concerned, the relevant period of limitation current at the date of issue of the originating motion was the period of three months that commenced when the applicants received the award. That period expired on 20 December 2001, well before the filing of this summons. The effect of allowing the amendments asked for will be to add new causes of action because each ground on which an award may be set aside constitutes, as I have said, a separate cause of action. Accordingly, in accordance with r 5(5) I am only able to allow such amendment if the new grounds proposed to be added arise out of the same facts or substantially the same facts as the grounds specified originally.

21 Having looked at the new grounds which the applicants propose to add, it is clear that the only ground that arises out of the same facts or substantially the same facts as the original grounds is the proposed ground 5. All the other grounds rely on facts that would not be involved, even incidentally, in a determination of grounds 1 and 2. For example, the proposed ground 6 is that the composition of the arbitral tribunal and/or its procedure is not in accordance with the agreement of the parties. The facts needed to establish that ground are completely distinct from the facts that would be needed to establish the original grounds 1 and 2 and the new ground 5 which assert that the Award deals with disputes that were not or could not be part of the submission to arbitration.

22 In the result, the applicants are given leave to amend the originating motion by adding the proposed new ground 5 as a third ground. In respect of all of the other proposed amendments, the application is dismissed. Since the applicants have, by and large, failed in their application, they shall bear the costs of the respondents as taxed or agreed.