FLASHBIRD LIMITED v COMPAGNIE DE SECURITE PRIVEE ET INDUSTRIELLE SARL

2018 SCJ 402

Record No. SCR 5A/400/17-115983

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Flashbird Limited

Applicant

v.

Compagnie de Sécurité Privée et Industrielle SARL

Respondent

Judgment

This is an application under sections 39 and 39A of the International Arbitration Act ("the Act") for an order to set aside an arbitration award holding the applicant liable to the respondent.

The parties had entered into a contract which contains the following clause ("arbitration clause"):

> ***14. Loi applicable et règlement des litiges***
>
> *Maurice possède une Cour permanente d'arbitrage à la Chambre de commerce et d'industrie (http://www.jurisint.org/fr/ctr/75.html).*
>
> *Tous différends découlant du présent Contrat cadre ou en relation avec celui-ci, tel le cas des avenants, seront tranchés définitivement suivant le Règlement d'arbitrage de la Chambre de commerce internationale par un ou plusieurs arbitres nommés conformément à ce Règlement.*
>
> *Le droit applicable sera le droit malagasy.*
>
> *L'arbitrage se déroulera à Port Louis, Maurice.*
> (Emphasis added)

It is common ground that the "Cour permanente d'arbitrage à la Chambre de commerce et d'industrie" is the Mauritius Chamber of Commerce and Industry ("MCCI") Arbitration and Mediation Centre ("MARC") and that "le Règlement d'arbitrage de la Chambre de commerce internationale" refers to the Rules of Arbitration of the International Court of the International Chamber of Commerce ("the ICC Rules").

On 24 August 2016 the respondent referred a dispute to MARC. On 13 October 2016 the applicant wrote to MARC informing it that whilst it was not objecting to MARC being the arbitral tribunal, it was not agreeable to the appointment of a sole arbitrator.

On 28 October 2016 MARC appointed Mr. El Ahdab, a sole arbitrator, to determine the dispute pursuant to the MARC Arbitration Rules 2014. MARC maintained its decision to appoint a single arbitrator despite further protests from the applicant.

At the initial stage of the proceedings, the applicant objected to the jurisdiction of the tribunal appointed by MARC on the ground that on a true interpretation of clause 14, the arbitration should be governed by the ICC Rules and should be administered by the ICC. It is the applicant's contention that the material difference between the ICC and MARC rules pertain to the constitution of the arbitral tribunal and in particular to the number of arbitrators comprising the tribunal.

On 6 July 2017 the applicant initiated proceedings before the ICC in connection with this matter and the matter was scheduled to be heard in November 2018.

On 24 October 2017 the arbitrator declared *inter alia* that he had jurisdiction to determine the dispute in accordance with the MARC Rules and delivered his final award.

The Arbitrator was of the view that there was an inconsistency in the Arbitral Agreement which referred to an arbitration administered by MARC whilst providing for the arbitral procedure in accordance with the ICC Rules. He wrote at paragraph 154 of the award:

> *"… Les deux premiers alinéas de la Clause d'Arbitrage semblent donc bien inconciliables en l'état.»*

Consequently, the arbitrator considered that the Arbitration Clause could be interpreted to mean that the arbitration could either be administered by MARC in application of the MARC Rules or administered by ICC in application of the ICC Rules. The arbitrator then decided that the reference to the ICC Rules in the Arbitration Clause must have been a misnomer and that the clause should have referred to the MARC Rules. According to the arbitrator, *"Cette*

explication semble être la seule qui permet de donner un effet utile à la Clause d'Arbitrage en application de l'article 1157 du Code civil mauricien.»

The applicant is relying upon the provision of Section 39(1)(2)(a)(iv) of the Act, reproduced hereunder, to have the award set aside –

> ***"39. Exclusive recourse against award***
>
> *(1) Any recourse against an arbitral award under this Act may be made only by an application to the Supreme Court for setting aside in accordance with this section.*
>
> *(2) An arbitral award may be set aside by the Supreme Court only where -*
>
> *(a) the party making the application furnishes proof that –*
>
> *(i) …….*
>
> *(ii) …….*
>
> *(iii) …….*
>
> *(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with this Act; …*
>
> *…"*

According to the applicant, the sole issue that needs to be determined by this court is which Rules should be applicable to the arbitral process.

The applicant's contentions are as follows:

(i) the arbitrator erred in his interpretation of the arbitral clause as referring to the MARC Rules instead of the ICC Rules;

(ii) irrespective of whether the tribunal is to be administered by the ICC or MARC, the arbitral clause provides that the arbitration should be governed by the ICC Rules;

(iii) we are here in presence of a hybrid arbitration and the arbitral procedure including the constitution of the tribunal, should have been in accordance with the ICC Rules, not MARC rules;

(iv) the court must give effect to the parties' express agreement embodied in clause 14 to the effect that the arbitral procedure should be in accordance with ICC Rules;

(v) the arbitrator was wrong to conclude that the reference to ICC Rules in the Arbitration Clause must have been a mistake and that the clause should have referred to the MARC Rules and this, in line with the provisions of Article 1157 of our Civil Code;

(vi) irrespective of the arbitral institution that administers the arbitration, where it is clear that the parties have agreed to submit to ICC Rules, the court should give effect to such intention;

(vii) the court should set aside the Award on the ground that it is not in accordance with the arbitral procedure agreed by the parties i.e. the ICC Rules;

(viii) the court should accordingly set aside the Award on the ground provided under Section 39(2)(a)(iv) of the Act i.e. that the composition of the tribunal or the arbitral procedure was not in accordance with the agreement of the parties;

(ix) pursuant to its powers under Section 39A of the Act, the court may direct that the dispute between the parties be determined in accordance with the ICC Rules;

(x) in the alternative, if the court were to find that there is an irreconcilable inconsistency in the arbitration clause between the reference to MARC and the ICC Rules, the court should stay the present application to allow the tribunal constituted by the ICC to determine its jurisdiction upon an interpretation of the arbitration clause.

In support of the above arguments counsel for the applicant referred to the jurisprudence from other jurisdictions notably **Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd [2015] HKEC 2439** and **Insigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24**. In the latter case the Court of Appeal of Singapore upheld and gave effect to an arbitration agreement which provided that disputes should be resolved by arbitration before the Singapore International Arbitration Centre (SIAC) in accordance with the ICC Rules.

Counsel referred to the following extract from **Insigma (supra)** –

> *"… The role of SIAC in the present case is precisely that of an administrator of arbitration proceedings to be conducted under the ICC Rules. The choice of a hybrid form of arbitration is a matter of agreement between the parties and is wholly consistent with the policy considerations …"*

Counsel also referred to the case of **The Government of the Russian Federation v Badprim SRL – Case No. T 2454-14***,* in which the Svea Court of Appeal in Stockholm considered an arbitration agreement which provided that the arbitration was to be administered by the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC") under the ICC Rules.

Counsel found support from the following extract from the above case:

> *"If an arbitration agreement in some respect provides a self-contradicting or otherwise ambiguous procedure, which is not practically doable, the general principle is that the agreement should, to the extent possible, be interpreted in line with the parties' basic intentions with the arbitration agreement, i.e. that disputes between the parties should be settled by arbitration. This could entail that the court will disregard a contradicting provision if it is clear that the remainder of the arbitration agreement otherwise represents the parties' actual intentions. In some particular instances the natural order could, however, be to disregard the arbitration agreement in its entirety…"*

The Court of Appeal went on to conclude that the *"agreement between the parties must be understood so that the main purpose was that possible disputes between the parties would be resolved by arbitration and that the purpose was that the arbitration should take place in Stockholm before the SCC. It is undisputed that the SCC agreed to and also did administer the arbitration. Thus, it is clear that the arbitration agreement was enforceable."*

Referring to the provisions of Section 39(2)(a)(iv) of the Act in his reply, counsel for the respondent pointed out that there is in the section a distinction between the arbitral procedure and the constitution of the tribunal. He submitted that the constitution of the arbitral tribunal is carried out by the arbitral institution which appoints the arbitral tribunal whereas the arbitral

procedure refers to the procedure to be applied by the arbitral tribunal in the arbitral proceedings themselves.

Counsel argued that it is provided in the Interpretation and General Clauses Act (IGCA) that the word "or" has to be construed disjunctively so that the use of this word in Section 39(2)(a) (iv) of the Act means that there are two alternative possibilities to challenge an award. Consequently a party who wishes to challenge an award on the basis of both grounds must specifically rely on each of them in its pleadings.

Counsel referred to the following extract from **AQZ v ARA [2015] SGHC 49 (CLOUT Case 1535)**:

> *"This article covers **two separate possible grounds of challenge**. An applicant can seek to set aside an award pursuant to Art 34(2)(a)(iv) on the basis that the composition of the arbitral tribunal and/or the arbitral procedure was not in accordance with the agreement of the parties. (emphasis added)."*

Counsel added that in its motion dated 18 December 2017 as well as in its prayer, the applicant has relied exclusively on one ground, namely that the arbitral procedure was not in accordance with the agreement of the parties. Given that under the generally accepted rule of interpretation the grounds for setting aside an award must be construed narrowly, the arbitral procedure does not include the composition of the arbitral tribunal *vide* **Corporacion Transnacional de Inversiones, S.A. de C.V. et al. and STET International, S.p.A. et al. [1999] O.J. No. 3753, A.J. Van Den Berg, New York Convention of 1958 Consolidated Commentary**, cited in **Yearbook Comm. Arb. XXI (1996) at pp. 477-509**.

Counsel submitted that given that the applicant has, for the purposes of the present proceedings, admitted that MARC would be the appointing tribunal, the composition of the arbitral tribunal is not the subject matter of the present Arbitration claim. It is an entirely new ground and the applicant cannot be allowed to proceed with this ground.

In the alternative that the court were to allow the applicant to submit on the additional ground, counsel raised the following arguments –

(a) The applicant has provided absolutely no evidence, or insufficient and incomplete evidence, to support the contention that the appointment of the arbitral tribunal was not in accordance with the agreement of the parties. Indeed the evidence shows the contrary.

(b) During the MARC arbitration proceedings, the objection of the applicant was that the tribunal should be composed of three arbitrators on the erroneous basis that under the ICC Rules, three arbitrators would be appointed.

(c) The applicant's argument that a material difference between the ICC and MARC Rules is that the ICC provide for the appointment of three arbitrators is erroneous. Article 12.2 of the ICC Rules provides for the appointment of a sole arbitrator as a general principle. It is for the ICC Court to decide when it would be appropriate for the tribunal to be composed of three arbitrators. Therefore, ICC tribunals composed of three arbitrators are the exception to the general rule.

(d) Under Article 12.2 of the MARC Rules, it is for the MARC Secretariat to decide on the number of arbitrators. The MARC Secretariat was entitled to decide that a sole arbitrator should be appointed.

(e) The PCA dismissed the applicant's challenge of MARC's decision to appoint a sole arbitrator. The PCA rejected the applicant's contention that three arbitrators should have been appointed and confirmed that the appointment of a sole arbitrator was valid.

(f) Further, on the assumption that the administering institution had been the ICC, the ICC Court would not have necessarily considered it efficient to appoint three arbitrators, and unnecessarily impose the costs of two additional arbitrators on the parties given the lack of complexity in the matter.

(g) In order to buttress its argument that the ICC Court would have appointed three arbitrators, the applicant ought to have adduced evidence to the effect that in the proceedings which it has initiated before the ICC, the ICC has appointed three arbitrators, if such is the case.

(h) Even on the assumption that the arbitration were considered to be a "hybrid arbitration", (which is denied), the applicant still cannot contend that under the ICC Rules there would have been three arbitrators.

(i) The applicant therefore cannot prove that the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

In order to interpret the arbitral clause, we need firstly to apply the ordinary rules of interpretation as set out in Article 1156 of our Civil Code so as to give effect to the common intention of the parties –

> «*On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes.»*

The number of arbitrators is firstly a decision of the parties. If they have agreed upon the number of arbitrators, their decision will prevail. Should there be no such agreement it will then be for the ICC to decide upon the number of arbitrators in accordance with the ICC rules.

In the present case a plain reading of the arbitration clause makes it clear that the parties had contemplated the appointment of "*un ou plusieurs arbitres nommés conformément à ce Règlement*".

As such the parties had made provision in the contract itself for the number of arbitrators who may be appointed to determine any dispute arising between them and they have clearly agreed that such arbitral proceedings be carried out either by a single arbitrator or several arbitrators.

Therefore the appointment of a single arbitrator in the present case is not in conflict with, and falls within the purview of, the expressed intent of the parties and there is no evidence to displace any such contention.

Counsel for the applicant has also submitted that the ICC Rules provide for the appointment of three arbitrators and as such if the ICC Rules had been applied, three arbitrators would have been duly appointed to determine the dispute.

Counsel's argument to the effect that as a general principle the ICC Rules make provision for the appointment of three arbitrators is clearly untenable as is apparent from Article 12 of the ICC Rules, which provides:

> *"1. The disputes shall be decided by a sole arbitrator or by three arbitrators.*
>
> *2. Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court*

> *that the dispute is such as to warrant the appointment of three arbitrators…"*

It is clear from a reading of the above Rule that the ICC has the discretion to appoint the number of arbitrators ranging from one to three as appropriate in any particular case. There is no rule to the effect that three arbitrators would systematically be appointed in all cases. Indeed the presumption is that where there is no agreement between the parties as to the number of arbitrators, there will be one arbitrator appointed by the court unless the court finds the dispute is such as to warrant the appointment of three arbitrators.

The following extracts from **Handbook of ICC Arbitration – Commentary, Precedents, Materials – Third Edition – Thomas H. Webster and Michael W. Bühler** are pertinent –

Article 12-02:

> "… Both the Rules and the standard ICC arbitration clause leave open the number of arbitrators…."

Article 12-03:

> "A contract in a relatively small amount may give rise to a substantial and complex claim for damages. Large contracts may give rise to apparently intractable disputes as to smaller amounts that the parties to the contract may wish to have adjudicated, especially if they have an ongoing relationship. As a result, the amount in dispute may be relatively small although the contract itself is large. In other cases, the parties may wish to have an issue or principle decided without specifying the financial consequences of the resolution of the dispute."

Article 12-04:

> "This flexibility sometimes results in the first dispute between the parties being with respect to the arbitral procedure. One party may see an advantage in having a sole arbitrator and the other party may prefer to have three arbitrators. In case of dispute as to the number of arbitrators, the ICC Court will decide the issue in accordance with art. 12."

Article 12-17:

> "The presumption is that there will be one arbitrator "save where it appears to the court that the dispute is such as to warrant the appointment of three arbitrators". For cases submitted during the period from 2007-2011, where the ICC was called upon to fix the number of

> arbitrators, it decided on a sole arbitrator in 80 per cent of the cases. In considering whether a Tribunal should consist of three members the factors that are usually considered are the amount in dispute, the complexity of the matter, the place of arbitration and whether there is a state entity involved.

It is clear from all the above that the general rule is for the appointment of one arbitrator. Among the factors which are considered relevant in determining whether more than one arbitrator need to be appointed are the amount of the dispute and the complexity of the matter.

In the present case as per the agreement, the parties left the number of arbitrators to be appointed in any potential dispute open, the arbitral clause providing for the appointment of one or several arbitrators.

Although the appointment of a single arbitrator was decided by MARC, there is nothing to show and one cannot speculate that the ICC itself would have reached a different decision and would have proceeded to appoint three arbitrators in the present circumstances.

Article 12.2 of the MARC Rules provides that it is incumbent upon the MARC Secretariat to decide upon the number of arbitrators to be appointed. In the present case MARC decided to appoint a single arbitrator. There is nothing to suggest that this decision was unreasonable. Further it has not been shown that the case is of such complexity and the issues involved so difficult to determine as to necessitate the appointment of three arbitrators. In fact the issue here is limited essentially to a question of payment. There is no evidence to suggest that the additional costs which may result from the appointment of two additional arbitrators are warranted in the present matter.

The applicant sought to challenge the decision to appoint a sole arbitrator before the PCA. It is not in dispute that the PCA rejected the applicant's contention that three arbitrators should have been appointed and confirmed that the appointment of a sole arbitrator was valid. Furthermore there is no indication of any prejudice that could result from the appointment of a single arbitrator and that would instead call for the appointment of three arbitrators. Indeed the applicant has not challenged the reasoning or finding of the arbitrator on the merits of the dispute.

As such, we find that the applicant has failed to establish its case that the composition of the arbitral tribunal was not in accordance with the agreement of the parties, as contemplated by Section 39(1)(2)(a)(iv) of the Act.

In any case, in order to establish its case for the award to be set aside under Section 39(1)(2)(a)(iv) of the Act, it was incumbent upon the applicant to establish that it has suffered substantial prejudice as a result of any alleged breach of the ICC Rules. Upon consideration of similar provisions based on the New York Convention, the courts have clearly indicated that any breach, however minor or technical, committed by an arbitral tribunal, will not necessarily lead to the award being set aside. This is explained in the following extracts from **Truilzi Cesare SRL v Xinyi Group (Glass) Co Ltd [2014]SGHC 220**:

> ***54.*** *I now come to technical and minor breaches committed by an arbitral tribunal. It cannot be the case that any breach of an agreed arbitral procedure, even that of a technical provision or minor formality, will invariably result in an award being set aside. Most supervising courts inquire into the materiality of the procedural requirements that was not complied with and the nature of the departures from the parties' agreed arbitral procedures. The cases below (see [55]-[58] illustrate the element of prejudice (whether procedural or substantive) that eventuates as a result of a violation of an agreed procedure to support the materiality of the breach.*
>
> ***55.*** *… the United States District Court* in the case of **Compagnie des Bauxites de Guinee v Hammermills, Inc 1992 WL 122712 (DDC, 1992)** *also observed at [5] that:*
>
> > *The Court does not believe that section 1(d) of Article V [of the New York Convention] was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if any violation of ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias of the [New York] Convention and its intention to remove obstacles to confirmation of arbitral awards. Rather, the Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party.*
>
> ***56****. This passage quoted above was approved in another US District Court decision of Karaha Bodas Company, LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara 190 F Supp 2d 936 (SD Tex, 2001). It was held at 945 that for a complaining party to succeed in an application under Art V(1)(d) of the New York Convention on the ground that the arbitral tribunal departed from the agreed arbitral procedure, it "must show that there is a violation of an arbitration*

agreement between the parties and that the violation actually caused [that party] substantial prejudice in the arbitration …"

Further, there is nothing on record to suggest that if the arbitration were to be administered by the ICC, the ICC would necessarily have appointed three arbitrators in the case. Tellingly the applicant has not adduced evidence as regards the number of arbitrators which the ICC has appointed in the arbitration proceedings which it has itself lodged before the ICC in connection with the present dispute.

For the reasons given above we hold that this application is devoid of merit and we accordingly set it aside. With costs.

R. Mungly-Gulbul
Judge

A.D. Narain
Judge

N. F. Oh San-Bellepeau
Judge

30 November 2018

Judgment delivered by Hon. R. Mungly-Gulbul, Judge

…

For Applicant	:	**Mr. R. Pursem, SC, together with** **Mr. B. Nirsimulu, of Counsel** **Mrs. D. Ghose-Radhakeesoon, Attorney**
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