PT Pukuafu Indah and others v Newmont Indonesia Ltd and another [2012] SGHC 187

Suit No	:Originating Summons No 351 of 2011
Decision Date	:11 September 2012
Court	:High Court
Coram	:Lee Seiu Kin J
Counsel	:Teh Ee-Von and Ashton Tan (Infinitus Law Corporation) for the first to third and fifth to seventh plaintiffs; The fourth plaintiff in person; Disa Sim Jek Sok and Kelvin Koh Li Qun (Rajah & Tann LLP) for the defendants.

Arbitration – Award

11 September 2012

Lee Seiu Kin J:

1 This was the plaintiffs' application to set aside an order ("the Order") of the arbitral tribunal ("the Tribunal") pursuant to s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Art 34 of the Model Law as set out in the First Schedule to the IAA.

2 The Order was an interim order made on 15 October 2010. A partial award ("Partial Award") was subsequently given by the Tribunal on 7 April 2011.

3 The plaintiffs applied to set aside the Order on the following grounds:

(a) The agreement to arbitrate was found in a contract dated 26 November 2009 made by the first, second and third plaintiffs with the first defendant ("the Release Agreement"). As the fourth, fifth, sixth and seventh plaintiffs were not parties to the Release Agreement, it would be a breach of natural justice for them to be bound by the arbitration proceedings.

(b) The arbitration proceedings arose as a result of the alleged breach of the Release Agreement but the Release Agreement was unenforceable as it stifled the prosecution of criminal offences being heard by the Indonesian Courts and would hence conflict with the public policy of Singapore.

(c) The Release Agreement was invalid under Indonesian law as it had expired on 26 June 2010.

4 The defendants made the following submissions in response:

(a) The court's jurisdiction to annul arbitral awards did not extend to the Order as it was an interim measure.

(b) The application to set aside the Order had been filed out of time.

(c) The application should fail because the plaintiffs had waived their objections to the Order by declining to participate in the arbitration proceedings or court proceedings for leave to enforce the Order, and there was no basis to set aside the Order on grounds of public policy.

I dismissed the application on the basis of grounds (a) and (b) and now set out the grounds of my decision.

Background facts

5 The first plaintiff, PT Pukuafu Indah ("PTPI"), is a company incorporated in Indonesia. The six members of the Merukh family – the second, third, fourth, fifth, sixth and seventh plaintiffs ("the Merukh Parties") – are 100% shareholders of PTPI. The first defendant, Newmont Indonesia Limited ("NIL"), and PTPI are shareholders of an Indonesian company PT Newmont Nusa Tenggara, which operates a copper and gold mine under mining rights issued by the Indonesian Government. The second defendant NVL (USA) Limited ("NVL") is a company related to NIL and a creditor of PTPI.

6 The full course of events leading up to Arbitration No 102 of 2010/MXM (the "Arbitration Proceedings") before the Singapore International Arbitration Centre ("SIAC") is complex and, for the purpose of this application, it suffices to set out the procedural history of the challenged Order. NIL and NVL had commenced the abovementioned Arbitration Proceedings on 10 August 2010 seeking declaratory and other relief for alleged breaches of contract by PTPI and the Merukh Parties. The contracts in issue were the Release Agreement of 26 November 2009, a loan agreement dated 25 November 2009 between NVL and PTPI, and a co-ordination agreement dated 25 November 2009, as amended.

7 Under the Release Agreement, PTPI and the Merukh Parties were allegedly bound to discontinue two suits that had been commenced in the Indonesian courts on 9 October 2009 and 24 October 2009. PTPI and the Merukh Parties subsequently took no steps to discontinue the proceedings, and began proceedings for three more suits before the South Jakarta District Court on 5 January 2010, 11 March 2010 and 17 July 2010.

8 By an application dated 1 October 2010, NIL and NVL requested the Tribunal to issue an interim order pursuant to r 26.1 of the SIAC Rules (4th Edn, 1 July 2010) ("SIAC Rules 2010") restraining PTPI and the Merukh Parties from continuing with all court proceedings that were pending in the Indonesian courts (hereafter collectively referred to as the "Indonesian Suits") or from commencing fresh proceedings relating to the disputes between them. PTPI and the Merukh Parties were not present or represented at the hearing for the application, which took place on 12 October 2010.

9 The Order was issued on 15 October 2010. The High Court granted leave to enforce the Order on 28 March 2011 pursuant to originating summons no 1192 of 2010. The plaintiffs were served with notice of the enforcement proceedings but did not appear at the hearing. The plaintiffs then filed this application on 6 May 2011 to set aside the Order.

Analysis and decision

The meaning of "award" under the IAA

10 Section 24 of the IAA and Art 34 of the Model Law set out the grounds upon which the High Court may set aside an *award* of an arbitral tribunal. This application was brought under the two provisions, and the court's jurisdiction to annul the Order was thus only triggered if the Order was an "award" under the IAA.

11 Section 2 of the IAA defines "award" in the following manner:

> "award" means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but *excludes any orders or directions made under section 12.* [emphasis added]

12 Section 12(1) provides as follows:

> 12(1) Without prejudice to the powers set out in any other provision of this Act and in the Model Law, an arbitral tribunal shall have powers to make orders or give directions to any party for —

(*a*) security for costs;

(*b*) discovery of documents and interrogatories;

(*c*) giving of evidence by affidavit;

(*d*) the preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute;

(*e*) samples to be taken from, or any observation to be made of or experiment conducted upon, any property which is or forms part of the subject-matter of the dispute;

(*f*) the preservation and interim custody of any evidence for the purposes of the proceedings;

(*g*) securing the amount in dispute;

(*h*) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(*i*) an interim injunction or any other interim measure.

An analysis of the nature of the orders and directions listed in s 12 indicates that they are concerned with procedural matters or protective measures and do not determine the substantive merits of the claim. The substance-procedure distinction was underscored by the Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 ("*PT Asuransi*"), where the court held (at [66]) that a determination of an arbitral tribunal must be a decision on the substance of the dispute to be an "award" for the purposes of Art 34 of the Model Law.

13 Certain legal consequences flow from the categorisation of an order or direction of an arbitral tribunal as an "award". An award is "final and binding on the parties" under s 19B(1) of the IAA. The court may also set aside an award under s 24 of the IAA and Art 34 of the Model Law, and enforce an award under s 19 and the Second Schedule to the IAA. The present application was solely concerned with the setting aside of a decision rendered by the Tribunal.

Is the Order an "award" under the IAA?

14 I now turn to the question of whether the Order which the plaintiffs sought to challenge was an "award" under the IAA. It is the substance of the ruling that is decisive, not the label given by the tribunal: *Re Arbitration Between Mohamed Ibrahim and Koshi Mohamed* [1963] MLJ 32 , approved by the Court of Appeal in *PT Asuransi* at [70].

15 The Order was made in the following terms:

IT IS ORDERED THAT UNTIL FURTHER ORDER BY THIS TRIBUNAL:

1. The Respondents, whether by themselves, their servants or agents or otherwise howsoever, shall forthwith each be and are hereby restrained from proceeding with or continuing with or assisting or participating in the prosecution of the Indonesian Suits, including but not limited to the taking of any further steps in relation to any order or judgment of the Indonesian Courts in the Indonesian Suits (other than to abandon or discontinue the Indonesian Suits).

2. The Respondents whether by themselves, their servants or agents or otherwise howsoever, shall forthwith each be and are hereby restrained from commencing any further or other proceedings in the courts of the Republic of Indonesia or elsewhere against the Claimants and/or

any of the Released Parties (as defined in Article 8 of the Release Agreement, pertaining to the same subject matter as in any of the Indonesian Suits or as covered under the Release Agreement.

3. The costs of the application for interim relief be reserved to the Final Award.

16 The Order was in effect an interim anti-suit injunction restraining the plaintiffs from continuing proceedings in the Indonesian Suits and from commencing new court proceedings in Indonesia pending arbitration. Although the Order, which restrained the plaintiffs from continuing with the prosecution of the Indonesian Court proceedings, was the substantive relief sought by the defendants in the arbitration, it had only interim effect. It was intended to maintain the status quo until the Tribunal could hold a full hearing on the merits. In the event, the defendants subsequently obtained the Partial Award in which the Tribunal made a substantive finding in their favour *viz* that the plaintiffs had breached the Release Agreement by continuing with the Indonesian Suits. The Partial Award certainly fell within the definition of "award" in s 2 of the IAA. But that definition excludes from its ambit any order made under s 12. The issue is whether the Order was one made under s 12.

17 Ms Teh, acting for the first, second, third, fifth, sixth and seventh plaintiffs, submitted that it was not clear on the face of the Order that it had been made under s 12 of the IAA. To this, I would state, first, that there is no requirement for an order made under s 12 to state that it is made under that provision. What is important is the substance of the Order, which granted the injunction "until further order by this Tribunal" and provided that "costs of the application for interim relief be reserved to the Final Award". This clearly signified that the intent of the Order was to preserve the status quo until the Tribunal could hear the parties on the merits of the claim. Secondly, the defendants had applied to the Tribunal for interim relief under r 26.1 of the SIAC Rules 2010 in which r 26 provides as follows:

Rule 26: Interim and Emergency Relief

26.1 The Tribunal may, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.

26.2 A party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.

26.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.

18 It was therefore clear that there was no ambiguity as to whether the Order was an interim injunction made under s 12(1)(*i*) of the IAA. The absence of a reference in the Order to s 12(1) merely provided a pretext for the plaintiffs to make the present application. This could have been precluded by making a reference in the Order to s 12(1) of the IAA and an arbitral tribunal would do a great service to the parties before them if they simply state this fact in making such an order.

19 Following from my conclusion that the Order was an order or direction made under s 12(1) of the IAA, the Order is specifically excluded from the definition of "award" under s 2. This court therefore did not have the jurisdiction to consider an application for the setting aside of the Order under s 24 of the IAA and Art 34 of the Model Law, as those powers only extend to an "award".

Policy behind the exclusion of interlocutory orders from the court's jurisdiction to set aside arbitral awards

20 I pause at this juncture to make some observations about the position of the IAA in respect of the judicial enforcement and challenge of interlocutory orders. There is no consensus on how the terms "interlocutory" and "interim" are to be defined, and for the purposes of clarity and precision, I will use

the phrase "interlocutory order" to refer to an order that does not decide the substance of the dispute or an order under s 12 of the IAA during the pendency of arbitration proceedings, and "interim order" to refer to an order which seeks to preserve the legal rights and obligations of parties before the dispute is completely disposed of. An "interim order" falls within the category of an "interlocutory order".

21 Concerns over the exclusion of interlocutory orders from the definition of "award" usually stem from the perceived lack of enforceability in courts if these orders are not given the binding nature of an award. During the drafting stages of the International Arbitration Bill, the Law Reform Committee's sub-committee ("the sub-committee") on the Review of Arbitration Laws proposed that assistance should be available from the courts when interim orders are made by an arbitral tribunal so as to ensure that such orders are not mere paper awards. Article 17 of the Model Law gives an arbitral tribunal powers to make orders on interim measures of protection but is silent on the status and enforceability of such orders. The sub-committee considered that the Model Law had left a lacuna in this aspect and that "such orders may also need to be given the status of awards in order to be enforceable" (at [34] of the sub-committee's report on the Review of Arbitration Laws). Parliament responded by providing in s 12(6) of the IAA that "[all] orders or directions made or given by an arbitral tribunal in the course of an arbitration shall, by leave of the High Court or a Judge thereof, be enforceable in the same manner as if they were orders made by a court", thus filling in the lacuna with a *sui generis* enforcement mechanism without broadening the definition of "award" to allow the court to set aside these orders.

22 In my view, while the same policy consideration may underpin the scope of the court's powers in relation to the enforceability and challenge of an interlocutory order, the method of giving effect to this policy differs in each case. Parliament has chosen the approach of minimal curial intervention by insulating these orders from judicial challenge while simultaneously lending the coercive powers of the court to the enforceability of the orders – the pendulum swings between independence and interventionism, but the overarching aim is always to facilitate the efficiency of arbitration. The issue of whether interlocutory orders may be subject to judicial challenge is simply another manifestation of the perennial debate over the role that courts should play in arbitration; and under the IAA, the scales have come down firmly in favour of independence in the ongoing conduct of arbitral proceedings.

23 The rationale for limiting the court's powers to set aside interlocutory orders dealing with procedural and administrative issues – for example, orders that direct the methods in which evidence may be given or require the production of documents – is fairly uncontroversial. Both the IAA and the Model Law only provide a basic procedural framework, allowing the parties to flesh out this skeleton with rules of their choice. Procedural issues thus fall directly within the province of the Tribunal and should be decided solely by the Tribunal. One of the primary advantages of arbitration as a private dispute settlement mechanism is that it permits parties to tailor a more informal system of procedure that is suited to the specific situation and judicial review of orders deciding on procedural issues would frustrate the parties' objectives and run counter to the principle of party autonomy. Arbitration, particularly international arbitration, is conceptualised as a form of dispute settlement that is not bound by the parochial application of the procedural rules of the arbitral seat, albeit subject to a minimal level of procedural integrity. This limited control is only exercised at the stage where a party seeks to set aside a final award, and not with respect to each and every order made by the Tribunal.

24 Interim orders may require a more nuanced balance to be struck between the efficacy of arbitration and safeguards to ensure due process. This is because orders granting interim relief such as injunctions may have the effect of prejudging the substantive rights of one party and are often dependent on the national court for coercive effect; the *quid pro quo* should be some measure of judicial scrutiny. This was the historical rationale for the hostility towards granting arbitral tribunals the power to order interim measures (see generally, Gary B Born, *International Commercial Arbitration* vol *2* (Wolters Kluwer, 2009) at pp 1949-1958).

25 National courts and arbitration statutes have drawn the boundaries differently (see Julian D M Lew et al, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at paras 23-88 to 23-94, where the authors consider the approaches in different jurisdictions towards characterising an interim order as an "award", affecting the question of whether the order may be enforced or set aside). Our Parliament has chosen the line of minimal curial intervention as the means of balancing fairness and efficiency: while the courts may also grant interim relief under s 12A of the IAA in narrowly limited circumstances to assist arbitration, the court has no jurisdiction under the IAA to set aside or review interim measures made by an arbitral tribunal. Limiting challenges only to awards that decide the substantive merits of the case would reduce the risk of delay and prevent tactical attempts to obstruct the arbitration process by bringing challenges on interim orders.

26 The temporary character of interim orders, as distinct from the finality of awards, also necessitates a separate approach towards these orders. It is possible that interim orders may be modified or terminated during the course of the arbitral proceedings. While the courts are willing to enforce these orders to ensure that the arbitration progresses smoothly, allowing parties to challenge an interim order would have the undesirable effect of staying the arbitration while judicial determination of the issue is pending. The better remedy, and one which could be determined with proper consideration of the substantive context of the dispute and which focuses on the actual merits of the grounds for ordering such relief, would be to have recourse to the arbitral tribunal and not the courts.

27 Finally I note that while an order made under s 12 of the IAA cannot be set aside because it is not an award, the enforcement mechanism under s 12(6) requires the leave of the High Court or of a Judge thereof for the Tribunal's order to be enforced as an order of court. I express no concluded view as to the grounds for refusing leave for enforcement but venture to suggest that the possibility of refusing leave could provide some measure of residual protection for the rights of both parties. Under O 69A r 5(2) of the Rules of Court (Cap 322, R5, 2006 Rev Ed), where the order made is in the nature of an interim injunction and an applicant seeks judicial enforcement, "leave shall be granted only if the applicant undertakes to abide by any order the Court or the arbitral tribunal may make as to damages". The chips are not totally stacked in favour of the party seeking interim relief.

Time limit for bringing an application to set aside an arbitration award

28 Even if I had found that the Order was an award and accepted that I had the power to set aside the Order, I would still have been bound to dismiss the plaintiffs' application on the ground that it was filed out of time. Article 34 of the Model Law governs the time limits within which an application must be made:

> ARTICLE 34. — APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARD
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> (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:
>
> ...
>
> (3) *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.
>
> [emphasis added]

29 The interpretation of Art 34(3) of the Model Law was considered by Judith Prakash J in *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 at [9]:

> ... On the aspect of time, art 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 art 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.

30 I respectfully agree with those observations. While the word "may" often conveys some measure of discretion in contradistinction to the mandatory "shall", "may not" is clearly mandatory and in the context of Art 34 of the Model Law, imposes a time bar. This interpretation is consistent with O 69A r 2 (4) of the Rules of Court, which provides that an application to set aside an award under s 24 of the IAA and Art 34 of the Model Law "*shall* be made within 3 months from the date of receipt by the plaintiff of the award" [emphasis added]. The court's powers in relation to international arbitration proceedings are limited to those conferred by the IAA and the jurisdiction to set aside an award must therefore be construed narrowly. In the absence of an express provision, the phrase "may not" cannot be read as implicitly enlarging the scope of the court's powers by giving a discretion to extend the time limit. I add that finality is one of the fundamental principles of arbitration, and a definitive time limit for challenging an arbitral award is necessary to ensure the expeditious and effective resolution of parties' disputes.

31 This application was taken out on 6 May 2011, more than three months after the Order had been made on 15 October 2010 and conveyed to the plaintiffs by courier mail and email by 18 October 2010 at the latest. The plaintiffs did not dispute that they had received notice of the Order and the time limit for this application expired sometime in late January 2011. This application was out of time by more than three months.

32 I note that the Partial Award was made on 7 April 2011, and had this application been made to set aside the Partial Award instead of the Order, this court would have had jurisdiction to hear the application on its merits. For some reason, the plaintiffs chose to challenge the Order. If that had been a tactical litigation decision made by the plaintiffs, it was on hindsight an unfortunate decision.

Conclusion

33 For the above reasons, I dismissed the plaintiffs' application with costs. The defendants' costs were fixed at $6000 plus reasonable disbursements, for which the plaintiffs were jointly and severally liable.