CASE UPDATE
CDI v CDJ [2020] SGHC 118

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I. INTRODUCTION

1. In ***CDI v CDJ* [2020] SGHC 118**, the Singapore High Court had to consider the issue of whether on the facts of the case, there was a breach of natural justice in the making of the arbitral award, and if so, whether allowing the award to be enforced would be contrary to the public policy of Singapore.

2. This case reaffirms the Singapore court's stance that the threshold for setting aside or resisting enforcement of an international arbitral award is very high, and that exceptional circumstances would be necessary to persuade the court to set aside or refuse the enforcement of an award. The case also provides further guidance on the approach of the Singapore courts to applications to resist the enforcement of an international arbitral award on the grounds of a breach of natural justice.

II. SUMMARY

3. In essence, in this decision, the Singapore High Court ("**Court**"):-

   (a) Confirms that the same grounds for resisting enforcement of a foreign arbitration award under Article 36(1) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") are equally applicable to a party seeking to resist the enforcement of a domestic international arbitral award under the Singapore International Arbitration Act (Cap 143A) ("**IAA**");

   (b) Reiterates that the Singapore court's approach is "*undergirded by the overarching principles of limited curial intervention and recognition of the autonomy of the arbitration process*";

   (c) Summarises the Singapore court's overall approach when a challenge is mounted on an alleged breach of natural justice and reiterates the heavy burden and high threshold the applicant must cross;

   (d) Adopts the approach in ***Glaziers Engineering Pte Ltd v WCS Engineering Construction Pte Ltd* [2018] 2 SLR 1311** ("***Glaziers Engineering***") in analysing whether an issue or finding was foreseeable to the parties; and

   (e) Reiterates that a party cannot seek to challenge an award on its merits "*in the guise of a complaint dressed up as a breach of natural justice*".

III. BACKGROUND FACTS

4. The dispute arose out of a purported sale and purchase of three (3) vessels between the Plaintiff (as the buyer) and the Defendant (as the seller) under a Memorandum of Agreement dated 3 August 2016 ("**MOA**"). Under the MOA, the Plaintiff was obliged to pay to the Defendant a deposit representing 10% of the purchase price of the vessels in the sum of US$335,000 ("**Deposit**"). Further, the parties had the right to cancel the MOA and to retain the Deposit or to receive a full refund respectively upon the occurrence of various events as set out at Clause 11 of the MOA, amongst which, the

Plaintiff was entitled to receive a full refund of the Deposit if the Defendant's agent ("**CF**") rejected or did not approve the grant of the loan facilities to complete the sale and purchase of the vessels.

5. Subsequently, CF informed the Plaintiff that it was no longer able to fund the purchase of the vessels. The Plaintiff then took the position that it was entitled to cancel the MOA and obtain a full refund of the Deposit on the basis that the grant of the loan facilities had been rejected or had not been approved, whilst the Defendant took the position that it was entitled to cancel the MOA and retain the Deposit as the Plaintiff had failed to take delivery of the vessels due to a reason attributable to the Plaintiff under Clause 11 of the MOA.

6. The parties thereafter referred the dispute to arbitration under the auspices of the Singapore Chambers of Maritime Arbitration pursuant to Clause 13 of the MOA. The sole arbitrator ("**Arbitrator**") ruled in all material aspects in favour of the Plaintiff and awarded the Plaintiff the sum of US$335,000.

7. The Defendant then applied to resist the enforcement the arbitral award on the basis that a breach of natural justice had arisen as a result of, *inter alia*: (1) the Arbitrator's decision to exclude evidence of pre-contractual negotiations; and (2) the Arbitrator's failure to consider the Defendant's arguments on the interplay of the sub-clauses of Clause 11 of the MOA.

8. The Defendant also asserted that the Arbitrator did not adhere to the scope of reference in the award, as the Arbitrator's decision to exclude evidence of pre-contractual negotiations fell outside the scope of the terms of reference. According to the Defendant, the Arbitrator exceeded his jurisdiction in finding that evidence of pre-contractual negotiations was inadmissible.

IV. DECISION OF THE HIGH COURT

9. At the outset, the Court confirmed that the same grounds available to a party seeking to resist the enforcement of a foreign award under Article 36(1) of the Model Law are equally applicable to a party seeking to resist the enforcement of a domestic international arbitral award under section 19 of the IAA.

10. In the context of the challenge to an award on the grounds that there has been an alleged breach of natural justice, the Court, with reference to existing jurisprudence, held that the following elements must be established by the party mounting such a challenge:-

    (a) Which rule of natural justice has been breached;
    (b) How it was breached;
    (c) In what way the breach was connected to the making of the award; and
    (d) How the breach prejudiced the rights of the challenging party.

11. The Court further summarised a number of specific principles regarding the overall approach adopted by the Singapore courts when dealing with a challenge to an award based on allegations of a breach of natural justice:-

    (a) The burden on the party seeking to persuade the court to intervene, whether to set aside or refuse enforcement of an arbitral award, is a high one and it is only in exceptional cases that a court will find that threshold crossed;
    (b) The standard of proof for such a challenge is on the balance of probabilities;

(c) An arbitral award is to be read generously and in a reasonable and commercial way, in the sense that the general approach of the courts is to strive to uphold the award;
(d) An arbitral award should be read supportively, meaning it should be given a reading which is likely to uphold it rather than to destroy it;
(e) The court's function is not to assiduously comb an award microscopically to determine if there was any blame or fault in the arbitral process; and
(f) The overarching inquiry is whether the arbitral process was conducted in a fair manner, and whether what was done by the arbitral Arbitrator culminating in that the award fell within the range of what a reasonable and fair-minded Arbitrator in these circumstances might have done.

12. On the first objection that there was a breach of natural justice as the Arbitrator had excluded evidence of pre-contractual negotiations in interpreting Clause 11 of the MOA, the Court held that the Defendant had not crossed the threshold to make out a case of a breach of natural justice. The Court found that contrary to the Defendant's submissions, there were in fact submissions made on the admissibility of extrinsic evidence to aid the Arbitrator in the interpretation of Clause 11 and in any event, there was no breach of natural justice even though parties were not invited to submit on the impact of an entire agreement clause in Clause 15 of the MOA as:-

(a) The Arbitrator's decision was not surprising or unforeseeable – the Court found that the Arbitrator's analysis and conclusions were "*in pith and substance*" in agreement with the Plaintiff's primary position and did not involve any significant departure from the parties' submissions. As such, it could not be said to be unforeseeable or surprising that the Arbitrator would agree or align himself with the Plaintiff's primary position and in doing so, find it unnecessary to consider pre-contractual extrinsic evidence in construing Clause 11 of the MOA;

(b) The Arbitrator was entitled to decide on the admissibility of pre-contractual evidence without calling for submissions – the Court held that the logically antecedent question of whether pre-contractual evidence was even admissible in the first place and ought to be considered by the Arbitrator was one that reasonably flowed from, or at least related to, the parties' submissions regarding such evidence. As such, the Arbitrator was entitled to explore and make a finding on the point even if the parties did not specifically submit on it and were asked not to;

(c) The potential impact of Clause 15 was foreseeable to the parties – the Court applied the *dicta* of the Court of Appeal in Glaziers Engineering, and found that the present case "*bears a closer resemblance to a Type Three scenario*" and that the potential issue of admissibility or exclusion of pre-contractual evidence was a reasonably foreseeable issue or question that the parties could or should have anticipated or foreseen. Therefore, where a party fails to apply its mind to and address a reasonably foreseeable issue, it cannot subsequently complain that it has been deprived of the right to a fair hearing or denied a reasonable opportunity to be heard; and

(d) No actual or real prejudice – the Court reiterated that "*it is not the court's role to assume the function of the Arbitrator*" and to do so would be "*antithetical to the overarching objectives of limited curial intervention and autonomy of the arbitral process*". Nonetheless, the Court found that in substance, the Arbitrator appeared to have given primacy to the text of the words of Clause 11 and found that the wording was clear enough. Therefore, even if the Arbitrator had invited

submissions on this issue, it could not have reasonably made any difference to the conclusions on the material issues.

13. On the second objection that the Arbitrator did not consider the Defendant's submissions on the interplay between the sub-clauses in Clause 11 of the MOA, the Court dismissed this objection entirely as it was of the view that the Arbitrator had addressed this issue. The Court was of the view that the Defendant's objection was "*an unabashed attempt to re-litigate before [the Court] the merits of its arguments on the interplay between the sub-clauses of Clause 11*" which was impermissible under the IAA.

14. The Court also wholly dismissed the Defendant's objection that the Arbitrator did not adhere to the scope of reference in the award.

15. Accordingly, the Court dismissed the Defendant's application.

V. CONCLUSION

16. The case makes clear that before mounting a challenge to resist the enforcement of an international arbitral award in Singapore on the grounds of a breach of natural justice, the party making such a challenge must make sure that all four (4) limbs of the test set out in ***Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*** **[2007] 2 SLR(R) 86** are satisfied. In other words, not only must it be shown that there was a breach of a rule of natural justice, but also that the breach was connected to the making of the award and had caused prejudice to the rights of the challenging party.

17. The party seeking a challenge to the enforcement of an international arbitral award on the grounds of a breach of natural justice ought to also pay heed to whether the failure to address an issue would result in a "*surprising outcome*" or something that should have been reasonably foreseen or anticipated by the parties. In this regard, practitioners may also wish to consider whether the facts of their particular case align with any of the three (3) types of scenarios set out by the Singapore Court of Appeal in ***Glaziers Engineering*** (bearing in mind that only a Type 1 or Type 2 scenario would be considered a "*surprising outcome*" and potentially a breach of natural justice).

18. For completeness, it was also observed that a whilst a breach of natural justice may be encapsulated within the public policy ground as a basis on which enforcement of an arbitral award may be refused, it does not, in the Court's view, stand for the wider proposition that recognising or enforcing an award made in breach of natural justice would, ipso facto, necessarily be contrary to the public policy of Singapore in every case. The Court did not however have to come to a firm conclusion on this point.