BERMUDA

COURT OF APPEAL

Sampoerna Strategic Holdings Ltd -v- (1) Huawei Tech Investments Co Ltd and (2) Huawei International Pte Ltd [2014] Bda LR 108 (19 November 2014)

LEAVE TO ENTER JUDGMENT IN ARBITRATION - INDONESIAN LAW - EXCESS OF JURISDICTION - PLEADINGS - OPPORTUNITY TO PRESENT CASE - PUBLIC POLICY

The issue in this Appeal was whether the Supreme Court correctly gave leave to the Respondents to the Appeal to enter judgment against the Appellant in the terms of a Consolidated Final Award dated 27 June 2013 (the "Award") issued by the Singapore International Arbitration Centre ("SIAC"). The Appellant was a Bermudian company named Sampoerna Strategic Holdings Ltd. The Respondents (the Claimants in two arbitrations against the Appellant) were Huawei Tech Investments Co Ltd (a Hong Kong company) and Huawei International Pte Ltd (a Singapore company).

In short, the Arbitral Tribunal had awarded the sums claimed by the Respondents, not on the grounds advanced in the Statements of Claim, which were rejected, but under the provisions of Article 1316 of the *Singapore Civil Code*, which was not expressly pleaded. The Appellant now contended that: 1. the Award dealt with disputes not contemplated by and not falling within the terms of the submission to arbitration; 2. the Award contained decisions on matters beyond the scope of the submissions to arbitration; 3. the Respondent was unable to present its case; and 4. the enforcement of the Award would be contrary to public policy.

On 9 October 2013 Hellman J gave leave to enter judgment in the terms of the Award. By Summons dated 14 November 2014, the arbitration Respondent applied to set aside the Order of Hellman J, on the grounds stated above. The application was refused by the Chief Justice following a hearing in Chambers. The Court of Appeal dismissed the appeal on each on the grounds:

Ground 1 – Excess of Jurisdiction

Section 42(2) of the *Bermuda International Conciliation and Arbitration Act, 1993* (the "Act") provides, *inter alia*, that enforcement of an Award may be refused where the defendant proves –"*(d) ...that the award deals with a difference 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; …*". The Court of Appeal held that it was clear beyond doubt that the jurisdictional challenge must fail on the basis that the arbitration agreement was broadly defined to incorporate "*All disputes arising out of or in connection with this letter shall be finally settled under the administrative and procedural rules of [SIAC]...*".

Ground 2 – The Pleading Point

The Appellant submitted that the Respondents did not, in their Notices to Arbitration, their Consolidated Statement of Claim, or their Consolidated Statement of Reply, plead or even mention Article 1316.

Counsel for the Appellant submitted that under Singapore law "*a party is bound by his pleadings and an action is confined to the issues raised therein*" and therefore, the Arbitral Tribunal was precluded from granting any relief under Article 1316. However, it was also accepted by the Appellant's Counsel that the Singaporean authorities do not go so far as to hold that an arbitrator's finding can be set aside merely because it was a finding based on a ground not expressly included in the pleadings before him. The Court of Appeal held that in every

case where there is no express reference in the pleadings it is necessary to consider about the factual background leading to the failure to plead a particular issue. There is no general rule that, because the matter was not pleaded, the finding must be disregarded or set aside, or that an award cannot be enforced. The Court of Appeal determined it necessary to consider how it came about that the Arbitral Tribunal made its Award under Article 1316 of the Civil Code, a ground which was not expressly pleaded by the Claimants.

3 and 4 – No Opportunity to Present Case, and Public Policy

The Act provides that enforcement of an award may be refused when the defendant proves "*that he was not given proper notice of the…proceedings or that he was otherwise unable to present his case*" (Section 42(2))(c), or "*if it would be contrary to public policy to enforce the award*" (Section 42(3)).

The Court of Appeal held, in agreement with the Chief Justice, that it was abundantly clear that the Tribunal rejected the submission. It was reiterated that the Claim raised no new issues of fact, and the Chairman of the Tribunal had considered that no amendment was necessary for the Claim to be based on Article 1316. The issue was first raised by the Respondent's own expert witness and it cannot be said, therefore, that either he or counsel for the arbitration Respondent was unprepared to deal with it. In fact, both parties dealt with it in detail, both at the hearing and in the arbitration Respondent's closing submissions. The Tribunal treated it as an issue in the proceedings that had been fully argued by both parties. If an amendment was necessary and had been applied for, there was no ground on which it could properly be refused.

On the public policy argument the Court of Appeal again agreed with the Chief Justice who had cited judgments from in the Singapore Court of Appeal (*PT Asuransi Jasa Indonesia (Persero) -v- Dexia Bank SA* [2006] SGCA 41) and the Federal Court of Australia (*Castel Electronics Pty Ltd -v- TCL Air Conditioner (Zhongsam) Co Ltd (No 2)* [2012] FCA 1214) which demonstrate the heavy burden that lies upon a party seeking to set aside or to prevent enforcement of an arbitral award on the ground of a breach of natural justice. In the former case, Chan Sek Keong CJ citing English as well as Singaporean authority, referred to cases where upholding an award would "*shock the conscience*" or be "*clearly injurious to the public good*" or "*violate the forum's most basic notion of morality and justice*". The Court of Appeal found that the Appellant did not come within a measurable distance of establishing that the present Award satisfied that test and the requirements of public policy demand no less.

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