11-2011

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Darius Chan (Norton Rose Fulbright)/November 9, 2011
Published in: Kluwer Arbitration Blog
Available at: http://arbitrationblog.kluwerarbitration.com/2011/11/09/setting-aside-an-international-arbitration-award-based-on-deficient-pleadings/?doing_wp_cron=1576660478.9575119018554687500000

If it isn't pleaded, you can't consider it. That in a nutshell appears to be the holding established recently by the Singapore High Court in *Kempinski Hotels SA v PT Prima International Development* [2011] SGHC 171 ("Kempinski"). That case saw the setting aside of three related international arbitration awards on the basis that the tribunal had gone beyond the scope of matters submitted to it by making a decision based on an issue not formally pleaded.

Facts and Decision

The applicant (Kempinski Hotels) was a Swiss company which contracted to manage a hotel of the respondent (an Indonesian company called PT Prima) in Jakarta. The Indonesian Ministry of Tourism subsequently issued three decisions requiring the contract to be performed by an Indonesian company. Although certain proposed amendments to the contract were then raised between the parties, no amendments were effected nor did Kempinski Hotels change the entity operating the hotel to an Indonesian company.

After some time, following an alleged material breach by Kempinski Hotels, PT Prima purported to terminate the contract and Kempinski Hotels commenced SIAC arbitration proceedings in 2002 alleging wrongful termination. The contract was governed by Indonesian law. PT Prima defended the legality of its termination and also mounted counterclaims for alleged breaches of contract by Kempinski Hotels.

The tribunal, consisting of a sole arbitrator, released its first award relating to the effect of the Ministry's decisions, by holding, *inter alia*, that the contract remained valid but had become incapable of performance in the manner stipulated. Following cross-examination of each party's experts and written submissions, the tribunal released a second award. The second award held that there were alternative methods of performance consistent with the Ministry's decisions. Consequently, any supervening illegality did not necessarily bar Kempinski Hotels from bringing a claim for damages if Kempinski Hotels could show that the contract was wrongfully terminated.

According to PT Prima, after the release of the second award, it learned that Kempinski Hotels had, prior to the release of the second award, entered into a

new management venture, in full compliance with the Ministry's decisions, to provide hotel management services in respect of another hotel located within a one mile vicinity of PT Prima's hotel. PT Prima wrote to the tribunal to seek clarification on the first and second awards in light of this information. The tribunal held a conference to decide how the arbitration should proceed.

After the conference, the tribunal directed Kempinski Hotels to provide specific disclosure on four questions concerning the new management venture. Kempinski Hotels issued its response to those queries. The tribunal made another order directing Kempinski Hotels to disclose certain information relating to the new management venture. Kempinski Hotels stated that the new venture was irrelevant to the issue of liability in respect of PT Prima's termination of the contract and sought directions for the further conduct of the arbitration.

Thereafter, the tribunal directed written submissions on the disposition of the dispute to be tendered. The tribunal subsequently published its third award. It held that (a) the new management venture was inconsistent with the contract; (b) the methods of performance that remained open after the Ministry's decisions were no longer possible; and (c) the possibility of damages remained for the period between the date of alleged termination of the contract and the date the methods of performance ceased being possible. The tribunal requested submissions on damages.

PT Prima duly filed the relevant submissions. Kempinski Hotels took out proceedings before the Singapore High Court to set aside the third award instead. Thereafter, PT Prima requested the tribunal to make its determination on the issues of damages payable. Kempinski Hotels' submissions however did not contain any argument on damages.

The tribunal issued a fourth award holding that, because no steps were taken to make performance of the contract lawful, an award of damages to Kempinski Hotels was not possible. The arbitrator also made a costs awards after requesting for submissions on costs. Kempinski Hotels took out similar proceedings to set aside the fourth and costs awards as well.

Before the Singapore High Court, Kempinski Hotels sought to set aside the awards on five grounds and failed on all but a pleading point which forms the focus of this note.

The learned Judge's reasoning can be summarized as follows. Art 34(2)(a)(iii) of the Model Law (set out in the First Schedule of Singapore's International Arbitration Act) provides that an arbitration award can be set aside when the matters decided by the tribunal were beyond the scope of the submission to arbitration. To determine whether matters in an award were within or outside the scope of submission to arbitration, a reference to pleadings would usually have to be made. An arbitrator is bound to decide the case in accordance with the

parties' pleadings, and the arbitrator is not entitled to go beyond the pleadings and decide on points which the parties have not given evidence or submissions.

Comment

A question of prejudice

Two questions can be posed. We start with the more intuitive question: what was the prejudice to Kempinski Hotels here?

If one accepts — as alluded to by the learned Judge — that pleadings exist to permit no surprises on the relevant issues so as to allow a party proper opportunity to meet the case against it, intuitively it is difficult to see where the surprise or prejudice to Kempinski Hotels was in this case.

After the issue of the new management venture was raised by PT Prima and the Tribunal had made directions for specific disclosure on that issue, the parties tendered not one but two rounds of submissions and one round of further expert opinions before the Tribunal published its third award. That must have given Kempinski Hotels ample opportunity to ventilate its position concerning the new management venture, even if the matter had only surfaced after the first award was published.

Indeed if PT Prima's raising of the new management venture had caught Kempinski Hotels by surprise, the learned Judge would have simultaneously found a breach of natural justice by the tribunal for failing to give Kempinski Hotels a proper opportunity to meet the case against it. Yet far from contending so, one of Kempinski Hotels' complaints concerning natural justice was that the tribunal had failed to consider Kempinski Hotels' defences relating to the new management venture. Implicit in this submission is an admission that the opportunity to raise arguments concerning the new management venture was given and was taken.

The aim of having pleadings needs little introduction: pleadings define the issues to give the other party fair notice of the case which it has to meet and also enable the relevancy and admissibility of evidence to be determined. The importance of proper pleadings is undeniable. But in so far as fair notice had already been given and taken by the tendering of multiple rounds of submissions, having the result of a case turn on the precise state of pleadings may be, as other authorities have vividly noted, putting the cart before the horse. That must be so, whether in litigation or arbitration.

A question of principle and practice

The second question that can be posed is: can it be said that the new management venture falls *within* the scope of matters submitted to arbitration?

The Court of Appeal in *CRW* cited its earlier decision in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*Asuransi*") for the two-stage assessment the court has to embark upon when considering Art 34(2)(a)(iii). Specifically, the court has to determine:

(a) first, what matters were within the scope of submission to the arbitral tribunal; and

(b) second, whether the arbitral award involved such matters, or whether it involved "a new difference ... outside the scope of the submission to arbitration and accordingly ... irrelevant to the issues requiring determination".

Art 34(2)(a)(iii) — with the specific expression "submission to arbitration" used therein — traces its lineage back to Art V(1)(c) of the New York Convention and Art 2(c) of the 1927 Geneva Convention. The report of the Drafting Committee of the New York Convention explained that:

"the expression 'submission to arbitration' was used in a broad sense, and was intended to include not only an arbitration clause in a contract, but also a specific 'compromis'". (emphasis added)

This could be read to mean that a matter is properly within the scope of arbitration as long as it falls within an arbitration clause in a contract or a *compromis* (which can be defined for present purposes as a submission agreement to arbitrate after a dispute arises). A literal reading of the equally authentic French text of the New York Convention supports this reading. When literally translated, the French text catches "a difference not contemplated by the submission agreement or not falling within the terms of the arbitral clause". If one applies a literal reading of the French text of the New York Convention to the present case, there appears to be nothing to suggest that the arbitration agreement in this case precluded the tribunal from considering the new management venture.

Nonetheless, it has been suggested that if such a reading of Art V(1)(c) was intended, the Drafting Committee would have simply used the expression "arbitration agreement" which it used in Art V(1)(a) of the New York Convention, instead of the expression "submission to arbitration". Most authors agree that this means that if tribunals deal with matters not falling within the questions submitted to the tribunal (also known as the tribunal's mandate), that would be caught by Art V(1)(c) as well. It is suggested here that this view is consistent with the consensual nature of arbitration. Parties can confer a mandate on the tribunal that delimits the issues submitted to arbitration in spite of the presence of an existing arbitration agreement, and there is no reason why the law should deny binding effect to that mandate any less than an arbitration agreement.

In arbitral practice, the matters submitted for arbitration can be gleaned from various documents, such as the equivalent of a Notice of Arbitration, the equivalent of a Response to the Notice of Arbitration, a Terms of Reference, and of course, the pleadings. The ICC Terms of Reference for instance requires a list of issues to be set out unless the arbitral tribunal considers it inappropriate. It is commonplace for a ICC tribunal and parties to set out a list of issues but to include a statement that the list of issues will be subject to review and modification in accordance with the parties' submissions. In like vein, the ICC Practical Guide for the drafting of Terms of Reference suggests adding the following reservation:

The issues to be determined shall be those resulting from the parties' submissions and which are relevant to adjudication of the parties' respective claims and defenses. In particular, the Arbitral Tribunal may have to consider the following issues (but not necessarily all of these, and only these, and not in the following order…). [emphasis added]

This approach of having regard to the parties' submissions as they develop through the course of the arbitral proceedings, rather than the strict state of the pleadings, may not sit well with the holding at hand. The holding could permit a party to effectively re-open a case based on allegedly deficient pleadings even if the particular matter that was not pleaded had already been substantively (and many times, exhaustively) argued before the tribunal.