Michaelmas Term
[2021] UKPC 32
Privy Council Appeal No 0106 of 2019

JUDGMENT

Flashbird Ltd (Appellant) vCompagnie de Sécurité Privée et Industrielle SARL (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Briggs
Lady Arden
Lord Hamblen
Lord Leggatt
Lady Rose

JUDGMENT GIVEN ON
13 December 2021

Heard on 21 October 2021

Appellant
Paul Chong Leung
(Instructed by Richard Slade and Company)

Respondent
Jamsheed Peeroo
(Instructed by Sheridans)

LORD HAMBLEN:

Introduction

1.
This is an appeal as of right from the decision of the Supreme Court of Mauritius to dismiss the application of the appellant, Flashbird Ltd, to set aside an arbitration award under section 39(2)(a)(iv) of the International Arbitration Act 2008 ("the Act").

2.
The dispute referred to arbitration arose out of a consultancy contract entered into in March/April 2013 under which the appellant was to assist the respondent, Compagnie de Sécurité Privée et

Industrielle SARL, in obtaining a contract for the management and development of security and safety services at international airports in the Republic of Madagascar.

3.
On 24 August 2016 the respondent filed a request for arbitration with the Secretariat of the Arbitration and Mediation Center ("MARC") of the Mauritius Chamber of Commerce and Industry. The request sought judicial termination of the consultancy contract due to the appellant's alleged non-performance of its contractual obligations, the refund of payments made by the respondent and damages.

4.
On 28 October 2016 MARC designated Dr Jalal El Ahdab as sole arbitrator to determine the dispute. The appellant objected to the appointment of a sole arbitrator and on 13 December 2016 applied to the Permanent Court of Arbitration at the Hague ("PCA") under section 12 of the Act to seek the appointment of a tribunal of three arbitrators. This application was rejected by the PCA as set out in a letter from its legal counsellor of 21 December 2016.

5.
The arbitration proceeded without the participation of the appellant. On 24 October 2017 the arbitrator issued a final arbitral award terminating the contract and awarding the respondent repayment of EUR80,000 and USD15,000, damages of €24,000 and arbitration and legal costs.

6.
By a notice of motion dated 18 December 2017 the appellant applied to the Supreme Court to set aside the award pursuant to section 39(2)(a)(iv) of the Act on the grounds that the arbitral procedure was not in accordance with the agreement of the parties. The appellant contended that on the proper interpretation of the arbitration agreement the arbitral procedure, and in particular the constitution of the tribunal, should have been in accordance with the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC") rather than the rules of MARC.

7.
In its judgment dated 30 November 2018 the Supreme Court dismissed the appellant's application.

The legal background

8.
The arbitration clause in the contract was in the following terms:

"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."

9.
The clause may be translated as follows:

“14. The law applicable and the settlement of disputes

Mauritius has a permanent Court of arbitration at the Chamber of commerce and industry (http://www.jurisint.org/fr/ctr/75.html).

All disputes arising out of this Contract or in connection with it, such as with regard to additional clauses, shall be finally determined according to the arbitration Rules of the international Chamber of commerce by one or more arbitrators appointed in accordance with those Rules.

The applicable law shall be malagasy law.

The arbitration shall be held at Port Louis, Mauritius.”

10.
The parties were agreed that the “Règlement d’arbitrage” referred to in the second paragraph of the clause were the Rules of Arbitration of the ICC. If so, the arbitration clause raises what the arbitrator described as a “clash or a contradiction” between the chosen arbitration institution (MARC) and the chosen arbitration rules (ICC Rules). This tension is heightened by the fact that the MARC rules provide that by nominating MARC as the arbitration institution the parties are bound by the MARC rules (article 1.2), whereas the ICC Rules (2012 version) provide that the International Court of Arbitration of the ICC is the only organisation authorised to administer arbitrations under the ICC Rules (article 1.2).

11.
The arbitrator resolved this “contradiction” by holding that the first paragraph of the clause and the choice there made of MARC should prevail, that the mention of “international” in the second paragraph was in error and is properly to be interpreted as being a reference to the Mauritius Chamber of Commerce and to MARC and its “Règlement d’arbitrage”. He stated as follows at para 156 of the award:

“What interpretation - and therefore which paragraph - must here prevail? An initial reading and interpretation of the Arbitration Clause could legitimately conclude the first paragraph to have precedence over the second one. The Arbitration Tribunal cannot disregard the order of the Arbitration Clause. In fact, it appears that the Parties, while drawing up the Arbitration Clause are also parties to the hypothesis that the arbitration centre of Mauritius should be competent to determine the arbitration, even going up to reproducing an hypertext relation which refers, it is supposed, to the page to what was the predecessor of MARC: the permanent court of arbitration of the Chamber of Commerce and Industry of Mauritius. It appears more logical and reasonable to the Arbitration Tribunal that the resolution of the uncertainty resulting from the reading of the Arbitration Clause favours the first paragraph. It appears in fact reasonable to consider that the mention international has been through error substituted to the mention and industry in the second paragraph, as has been raised by the applicant in its answers of 18 August 2017. The connection to an arbitration centre physically located in Mauritius is also reinforced by the designation of the seat at Port Louis, Mauritius. This explanation seems to be the only one to give a useful effect to the Arbitration Clause in application of article 1157 of the Mauritian Civil Code.”

12.
It is the appellant’s case that this interpretation is wrong and that the clause is a “hybrid” arbitration clause under which MARC was to administer the arbitration, but the arbitration was to be conducted in accordance with ICC Rules. It pointed out that there are a number of decisions in which the validity

of such clauses has been upheld - see, for example, lnsigma Technology Co Ltd v Alstom Technology Ltd [2009] SGCA 24 (Singapore International Arbitration Centre ("SIAC") arbitration under ICC Rules); IM Badprim SRL v The Government of the Russian Federation (Case No T-2454/14) (Arbitration Institute of the Stockholm Chamber of Commerce arbitration under ICC Rules) and Top Gains Minerals Macao Commercial Offshore Ltd v TL Resources Pte Ltd (2015) HCMP 1622/2015 (SIAC arbitration under ICC Rules). The arbitral procedure, and in particular the constitution of the tribunal, should accordingly have been conducted in accordance with ICC Rules rather than MARC rules.

13.
In these circumstances the appellant contends that the award should have been set aside pursuant to section 39(2)(a)(iv) of the Act which provides:

"**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 -

…

(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; …"

The decision of the Supreme Court

14.
The Supreme Court noted that the appellant's case was 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" and 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."

15.
The Supreme Court rejected this case, pointing out that under the ICC Rules "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". It referred to 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 also referred to extracts from Handbook of ICC Arbitration - Commentary, Precedents, Materials (3rd ed) - Thomas H Webster and Michael W Buhler including at article 12-17 which provide:

"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% 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."

16.
The Supreme Court held:

"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."

17.
As it had not been shown the constitution of the tribunal would have been any different if the number of arbitrators had been determined in accordance with article 12 of the ICC Rules, the Supreme Court held that appellant had "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(2)(a)(iv) of the Act."

18.
Further or alternatively, the Supreme Court held that in order for the court to set aside the award under section 39(2)(a)(iv) of the Act it was necessary for the applicant to show that "substantial prejudice" had been suffered as a result of the arbitration procedure not being in accordance with the agreement of the parties. The Supreme Court referred to jurisprudence on article V(1)(d) of the New YorkConvention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"), the wording of which is mirrored by section 39(2)(a)(iv), such as Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd[2014] SGHC 220 andCompagnie des Bauxites de Guinee v Hammermills, Inc 1992 WL 122712 (US District Court, DC, 29 May 1992). It held that no such prejudice had been shown as there was no evidence to suggest that "if the arbitration were to be administered by the ICC, the ICC would necessarily have appointed three arbitrators in the case."

The issues on the appeal

19.
The appellant puts forward four grounds of appeal, namely that the Supreme Court erred:

(i)
In failing to find that the arbitrator erred in his interpretation of the arbitration clause in applying MARC rules instead of the ICC Rules.

(ii)
In failing to find that the arbitration should have been governed by the ICC Rules even though the tribunal was one appointed by MARC.

(iii)

In not ruling in favour of the appellant as it had no objection to a MARC tribunal being designated by a new agreement to be signed by both parties which was to be constituted with three arbitrators instead of one.

(iv)
In not taking into consideration that the respondent had submitted to the arbitrator what were alleged to be forged documents and which were subsequently withdrawn by it.

20.
Grounds (3) and (4) may be dealt with shortly. Neither issue was raised before the Supreme Court. As stated by the Board in Baker v The Queen[1975] AC 774, 788:

"… its normal practice is not to allow the parties to raise for the first time in an appeal to the Board a point of law which has not been argued in the court from which the appeal is brought. Exceptionally it allows this practice to be departed from if the new point of law sought to be raised is one which in the Board's view is incapable of depending upon an appreciation of matters of evidence or of facts of which judicial notice might be taken and is also one upon which in the Board's view they would not derive assistance from learning the opinions of judges of the local courts upon it."

21.
For recent examples of that normal practice being applied, see Sahatoo v The Attorney General of Trinidad and Tobago[2019] UKPC 19, para 28 and Port Authority of Trinidad and Tobago v Daban[2019] UKPC 22; [2020] 1 All ER 373, para 26.

22.
Both grounds (3) and (4) raise issues of fact and do not fall within the exceptional category of case identified in Baker v The Queen. The same applies to further issues sought to be raised on behalf of the appellant in oral argument, such as in relation to the independence of the sole arbitrator and the status of the PCA letter of 21 December 2016. In these circumstances the Board does not consider that it is open to the appellant to seek to raise such issues on this appeal. In any event, the limited evidential material before the Board would not establish either of grounds (3) or (4) and ground (4) is of no legal relevance to the application.

23.
Grounds (1) and (2) may conveniently be considered together. They are based on the appellant's contention that the arbitration clause was a "hybrid" clause and that the arbitration, and in particular the constitution of the tribunal, should have been conducted in accordance with ICC Rules.

24.
The Supreme Court did not consider that it was necessary to rule on the question of the proper interpretation of the arbitration clause. Its view was that, even if the appellant was correct, it had not been shown (i) that the appointment of a sole arbitrator was not in accordance with the agreement of the parties and (ii) if it was not, that prejudice sufficient to justify the exercise of the court's power to set aside the award under section 39(2)(a)(iv) had been made out. The Board agrees with the conclusion of the Supreme Court on both of these issues.

25.
As to (i), the Supreme Court held that the only material failure to act in accordance with the parties' agreement as to arbitral procedure alleged by the applicant related to the constitution of the arbitral tribunal as consisting of a sole arbitrator rather than a panel of three arbitrators. No complaint was

made before them as to the identity of that sole arbitrator. The Supreme Court held that to make good such a case the appellant needed to show that following the ICC arbitral procedure would be likely to have led to the appointment of three arbitrators rather than a sole arbitrator. Having regard to the terms of article 12 of the ICC Rules and the nature of the dispute, the Supreme Court concluded that this had not been established. In those circumstances it had not been shown that the appointment of a sole arbitrator was not in accordance with the parties' agreement as to arbitral procedure. Subject to one point, the Board agrees with the Supreme Court's approach. The qualification which the Board would make is that if this is a hybrid arbitration clause then the question would be whether MARC applying ICC Rules would be likely to have proceeded to appoint a panel of three arbitrators instead of a sole arbitrator rather than, as the Supreme Court suggested, whether the ICC would have done so. This makes no difference, however, to the conclusion which the Supreme Court justifiably reached.

26.
As to (ii), the Supreme Court's approach is supported by the jurisprudence relating to article V(1)(d) of the New York Convention. In Born, International Commercial Arbitration,3rd ed, (2021) at p 3908 under the heading "Material Prejudice Ordinarily Required for Non-Recognition Under Article V(1)(d)" it is stated:

"As with article V(1)(b), it is generally necessary for an award-debtor seeking non-recognition under article V(1)(d)'s first prong to show that the violation of the parties' agreed arbitral procedures materially affected the party's rights. It is not enough merely to demonstrate that the arbitral procedures failed to comply with the provisions of the parties' agreement, including material provisions of that agreement; in addition, the non-compliance must have had a meaningful effect on the arbitral process that produced the award in question."

27.
In support of this approach Borncites by way of example a number of authorities from various jurisdictions including the United States, Switzerland, Germany, Austria, Italy and Brazil, as set out in footnote 1070.

28.
A recent relevant English law decision is Eastern European Engineering Ltd v Vijay Construction (Proprietary) Ltd [2018] EWHC 2713 (Comm); [2019] 1 Lloyd's Rep 1 in which Cockerill J, citing the earlier Commercial Court decision in Tongyuan (USA) International Trading Group v Uni-Clan Ltd 19January 2001 unreported (Comm), stated at para 63:

"It is not in issue that in order to succeed on this ground the applicant must show a material breach of the arbitration agreement that was not an inconsequential irregularity."

29.
It is right to observe that in the following paragraph in his book Born suggests that a failure to follow an express agreement as to the basic architecture of the arbitration such as will typically have a substantial impact on the arbitral proceedings may not require showing material prejudice. A failure to follow the agreed institutional rules could fall into this category, but in circumstances where the only material failure alleged relates to the constitution of the tribunal as a sole arbitrator rather than a panel of three arbitrators, and where it has not been shown that following the correct rules would be likely to have made any difference, the Board considers that the Supreme Court was justified in concluding that this was a case in which material prejudice was required to be established if it was to exercise its discretion under section 39(2)(a)(iv) to set aside the award. As it found, no such prejudice had been shown.

30.
In these circumstances, it is not necessary for the Board to determine whether or not the arbitration clause is a “hybrid” arbitration clause. The Board would, however, observe that there is force in the arbitrator’s conclusion that the second paragraph of the clause should be interpreted as referring to MARC rules. In particular: (i) in both the first and second paragraphs the reference is to “la Chambre de commerce”; (ii) as is common ground, the reference in the first paragraph is to MARC, and the weblink is to its webpage; (iii) although in the second paragraph the “Chambre de commerce” is described as “internationale”, MARC is an international arbitration centre; (iv) the ICC would ordinarily be referred to in capital letters; (v) so to construe the clause gives a coherent and consistent meaning to the clause as a whole, and (vi) whilst it is possible to agree to a “hybrid” arbitration clause, there are manifest complications and disadvantages in doing so and so clear words should be required to establish such an agreement.

31.
As to the complications and disadvantages of agreeing a “hybrid” arbitration clause, many of these are discussed in Esteban: Hybrid (institutional) arbitration clauses; party autonomy gone wild” in Arbitration International [2020] vol 36, issue 4, p 475. They include: (i) likely jurisdictional disputes and consequent costs; (ii) procedural uncertainty and difficulties consequent upon compelling an arbitration institution to act within an unfamiliar framework; (iii) a “patchwork” of rules, reflecting the best efforts of the arbitration institution rather than the parties’ choice, as a result of the need to adapt the bodies and procedures of the arbitration institution to the chosen rules; and (iv) a dependence on the willingness of the arbitration institution to act in accordance with different institutional rules and uncertainty if the arbitration institution is not prepared to do so. Esteban concludes (at p 489) that “virtually all cited decisions consider that hybrid arbitration is a bad idea since it creates problems in terms of certainty and litigiousness” and that it should be avoided in the interest of safeguarding the principle of efficiency of arbitral procedure.

32.
For reasons already stated, in the present case it is not necessary to seek to resolve the tension between party autonomy and procedural efficiency raised by the issue of whether or not the arbitration clause is a “hybrid” arbitration clause, and the Board does not propose to determine that issue.

Conclusion

33.
For the reasons set out above, the appeal must be dismissed.