IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 59

Originating Summons No 291 of 2017
(Summons No 1197 of 2017)

In the matter of Section 10 of the International Arbitration Act (Cap 143A)

And

In the Matter of Order 69A, Rule 2 of the Rules of Court (Cap 322, Rule 5)

And

In the Matter of an arbitration between (1) Origin & Co., Ltd as Claimant and Counterclaim Respondent; (2) ILJIN Materials Co., Ltd as Counterclaim Respondent; and (1) JFI Global Purchasing, Ltd as Counterclaimant and Respondent; (2) Loblaw Companies Limited as Respondent

Between

Loblaw Companies Limited

… *Plaintiff*

And

(1) Origin & Co. Ltd

(2) ILJIN Materials Co. Ltd

… Defendants

EXTEMPORE JUDGMENT

[Arbitration] — [Stay of arbitral proceedings]

Loblaw Companies Limited
v
Origin & Co Ltd & Another

[2017] SGHC 59

High Court — Originating Summons No 291 of 2017 (Summons No 1197 of 2017)
Belinda Ang Saw Ean J
24 March 2017

27 March 2017 Extempore Judgment

Belinda Ang Saw Ean J:

Introduction

1 Summons No 1197 of 2017 ("SUM 1197") is an application to stay International Chamber of Commerce Case No. 21763/CYK/PTA (c.21992/CYK) ("the Arbitration") under s 10(9) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), pending the final determination of Originating Summons No 291 of 2017 ("OS 291"), an application made under s 10(3) of the IAA to review the Tribunal's ruling on its jurisdiction as a preliminary issue. Having considered arguments and submissions, I decline to exercise the court's discretion to stay the Arbitration pending the final determination of OS 291, and accordingly, SUM 1197 is dismissed. The grounds of my decision are as follows.

Preliminary observation

2 Before I turn to the application proper, I make one preliminary observation. During the hearing, I invited Mr Alvin Yeo, SC ("Mr Yeo"), who represents the Plaintiff, to indicate which limb(s) of s 10(9) of the IAA the Plaintiff was relying on. Section 10(9) provides:

> (9) Where an application is made pursuant to Article 16(3) of the Model Law or this section —
>
> > (a) such application shall not operate as a stay of the arbitral proceedings or of execution of any award or order made in the arbitral proceedings unless the High Court orders otherwise; and
> >
> > (b) no intermediate act or proceeding shall be invalidated except so far as the High Court may direct.

3 Mr Yeo clarified that the Plaintiff was only relying on s 10(9)(*a*) to ask for a "stay of the arbitral proceedings overall", and that it was not seeking to invalidate the Tribunal's Ruling on Document Production Requests (dated 11 March 2017) ("Production Order") under s 10(9)(*b*) of the IAA. In the premises, the Production Order and the directions contained therein stood as ordered. I wish to refer to the alternative limb in s 10(9)(*a*), namely, the application for curial review of a tribunal's ruling on jurisdiction shall not operate as a stay "of execution of any award or order made in the arbitral proceedings". In this regard, whilst the Production Order is not an "award" within the definition of s 2 of the IAA, the Production Order is arguably an order under s 12(6) which is capable of enforcement as a court order if leave is granted by the High Court. I do not propose to say more since this alternative limb (the result of an amendment to s 10 in 2012) was not part of SUM 1197 and was not discussed at the hearing.

4 Returning to Mr Yeo's clarification, and if the Plaintiff's stay application is successful, the effect of a stay on the arbitral proceedings is

necessarily prospective by virtue of the date of the order made in SUM 1197, and the Production Order, being a ruling made before SUM 1197 was filed and heard, must still be complied with even if the timelines set under the Production Order extend beyond the date of the granting of any stay. As I alluded to earlier, the Production Order is capable of being enforced as an order of High Court under s 12(6) of the IAA. Although I alluded to this concern in the context of s 10(9)(*b*), the position ought to be no different in an application made under s 10(9)(*a*). Mr Yeo's view (which is a sensible one) is that it he would leave it to his instructing solicitors to make arguments before the Tribunal that compliance with the Production Order ought to be held in abeyance as well if I were to grant a stay of arbitral proceedings.

Principles for the granting of a stay under s 10(9)(*a*) of the IAA

5 At the outset, both parties have pointed to a paucity of legal authorities setting out the appropriate test to be applied for stay of arbitrations under s 10(9)(*a*) of the IAA. This was acknowledged in the sole authority that has dealt with this point: *AYY v AYZ and another* [2015] SGHCR 22 ("*AYY v AYZ*") at [3]. In *AYY v AYZ*, the Assistant Registrar sought to "sow some jurisprudential seeds in the existing corpus of law". Drawing from established principles that apply to the stay of execution of court judgments pending appeal, he held that a stay of arbitral proceedings will generally be ordered if an applicant is able to demonstrate with reasonable and credible substantiation that a refusal of stay would result in detriment or prejudice that could not be adequately compensated with costs (at [7]–[9]). Mr Yeo referred to the test propounded in *AYY v AYZ* as the irreparable prejudice test. The Assistant Registrar also offered an illustration: in his view, if a party is compelled to disclose confidential or sensitive information to an industry competitor in order to defend arbitral proceedings, that party would have suffered

irreparable prejudice.

6 Mr Yeo does not accept the irreparable prejudice test in *AYY v AYZ*, arguing that a more appropriate test for the court to apply in deciding whether to exercise discretion to grant a stay of arbitral proceedings is that of a "balance of convenience". Mr Yeo points out that the jurisprudential underpinnings for seeking a stay under s 10(9)(*a*) of the IAA are markedly different from that for seeking a stay of execution pending appeal. For the latter, the overarching consideration is to not deprive the successful litigant of the fruits of his litigation; for the former, Mr Yeo submits that the key consideration is the balance between the prejudice that may result from the carrying out of an unnecessary arbitration and the prejudice that would result from a delay in the arbitration. Mr Yeo bases his view on the drafting history of Article 16(3) of the Model Law.

7 Mr Cavinder Bull, SC, represents the Defendants. Mr Bull submits that since the default position is that the court should not grant a stay, the Plaintiff must show the existence of special circumstances before the court would exercise its discretion to grant a stay of the arbitral proceedings. There must be something that is over and above inconvenience, time wasted and exposure to costs even though all of these matters could be occasioned if the arbitration turns out to be unnecessary in the end. All these matters are often the experience of the parties in an arbitration whenever a tribunal in its discretion has decided to proceed with the arbitration pending an Art 16(3) review. Mr Bull also submits that the balance of convenience test cannot be accepted given that both s 10 of the IAA and Article 16(3) of the Model Law envisage minimal curial intervention.

8 I agree with Mr Bull that the court's approach to the exercise of its

statutory discretion is not based on a balance of convenience test. The starting point is the statutory scheme as outlined in s 10 which allows for curial review of a tribunal's ruling on jurisdiction but under the conditions statutorily prescribed. Section 10(9)(*a*) states that an application for curial review of the tribunal's ruling on jurisdiction "shall not operate as a stay of the arbitral proceedings… ." However, the court, at the same time, is given the statutory discretion to stay arbitral proceedings pending curial review of a tribunal's ruling on jurisdiction in circumstances where the default position creates ill-effects that may lead to injustice and unfairness. The court's statutory discretion must be exercised judicially and this requires the court to exercise its discretion by reference to all the circumstances of the particular case. Bearing in mind that the discretion must not be so easily exercised as to render the default position meaningless, there must be special facts and circumstances that warrant the court's exercise of its statutory discretion to depart from the statutory default position. From this perspective, the expression "irreparable prejudice" is basically the consequence or outcome of a court not granting a stay, but the consequence and outcome stems from the existence of special facts and circumstances present in the particular case.

9 To elaborate, the approach to the exercise of the statutory discretion under s 10(9)(*a*) must accord with the purpose of the provision and this brings me to Mr Bull's remark on the relationship between s 10 of the IAA and Article 16(3) of the Model Law. It is fairly uncontroversial that the re-enactment of s 10 of the IAA under the International Arbitration (Amendment) Bill (Bill No 10 of 2012) retains Article 16(3) of the Model Law within the scheme of the IAA. Article 16(3) deals with a positive ruling on a tribunal's jurisdiction. As Mr Bull submits, "[s]ection 10 of the IAA has its genesis in Article 16(3)". All the amended s 10 of the IAA serves to do is to "modify" the position under the Model Law by permitting the review of negative

jurisdictional rulings and allowing decisions under s 10(3) of the IAA to be appealable to the Court of Appeal with leave from the High Court (see the Explanatory Statement to the International Arbitration (Amendment) Bill (Bill No 10 of 2012) ("the Explanatory Statement"); *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon editor-in-chief, David Brock gen ed) (Sweet & Maxwell, 2014) at para 3.084).

10 That arbitral proceedings can continue despite an application is filed for curial review is a fundamental feature of Article 16(3). Section 10(9) of the IAA *reinforces* this whether or not the application for crucial review is brought under Article 16(3) or "this section" (see the opening sentence of s 10(9)(*a*)). The Explanatory Statement notes that ss 10(9) and (10) were inserted "to *clarify* that any appeal to the High Court or the Court of Appeal on a jurisdictional ruling… will not operate as a stay of the arbitral proceedings or of execution of any award or order made in the arbitral proceedings unless otherwise ordered by the Court." [emphasis added]

11 It is also uncontroversial that Article 16(3) was intended to reflect the balance that the drafters of Model Law had struck between the countervailing considerations of allowing the courts to have control over a tribunal's decision on jurisdiction on the one hand, and the need to ward against the abuse of such recourse as a dilatory tactic to hold up the arbitration on the other. While Article 16(3) allows jurisdictional rulings to come under court control, this allowance must be subject to the following conditions: first, there must be a short-time period for court resort; second, appeals are to be excluded (the position under Singapore law has been modified by s 10(4) of the IAA); and third, arbitral proceedings must be allowed to continue (see *International Arbitration in a Changing World,* ICCA Congress Series Vol 6 (Kluwer Law International, 1994) at p 47). In *AQZ v ARA* [2015] 2 SLR 972 ("*AQZ v*

ARA"), the following extract from *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1989) was cited (at [68]):

> … *Second, under Article 16, the arbitral tribunal has a choice whether to decide a jurisdictional question preliminarily or only in the final award. If it issues a preliminary ruling, that is subject to immediate review by a court. Otherwise, review must wait for a setting aside proceeding.* The advantage of this procedure is that the arbitral tribunal can assess in each case and with regard to each jurisdictional question whether the risk of dilatory tactics is greater than the danger of wasting money and time in a useless arbitration. The dangers of delay in the arbitration while the court is reviewing a preliminary ruling are further reduced by provision of short time period for seeking court review, finality in the court's decision, and **discretion in the arbitral tribunal to continue the proceedings while the court review is going on**. These procedures … allow the tribunal to postpone decision of frivolous or dilatory objections, or ones that are difficult to separate from the merits of the case.
>
> [emphasis in original in italics; emphasis added in bold]

12 The upshot of the above analysis is that the balance the Plaintiff speaks of (see [6] above) has already been struck by the drafters of the Model Law: a tribunal's discretion to continue arbitral proceedings is the very embodiment of the balance struck. The same balance is retained by Parliament in the adoption of the default position in s 10(9) and s 10(10). From this perspective, I do not accept the Plaintiff's proposed "balance of convenience" test.

13 When then should the court exercise its statutory discretion? I agree with Mr Bull that a stay ought to be granted when there are special circumstances to do so given the specific facts of the particular case. Some guidelines of what can and do not constitute special circumstances (and the guidelines are by no means exhaustive) may be of assistance in the court's approach to exercise of the statutory discretion.

14 First, as stated in [8] above, the court exercises discretion by reference to all the circumstances of the particular case. I repeat the point made earlier that the statutory discretion must not be so easily exercised as to render the default position meaningless, and in order to depart from the statutory default position, there must be special facts and circumstances that warrant the exercise of its statutory discretion. The phrase "special circumstances" is wide enough to include the conduct of the other party in relation to the arbitral proceedings that warrant a stay of the arbitral proceedings.

15 Secondly, as circumstances must be "special", so-called prejudice or detriment derived from wasted time and costs of what could be a potentially useless arbitration is a usual and attendant by-product or consequence of a tribunal's decision to continue with the arbitral proceedings and hence cannot, in and of itself, justify a stay. Neither can potential prejudice or detriment stemming from the rendering of an arbitral award if the pending application for curial review has yet to be heard or concluded. As Mr Bull points out, Article 16(3) of the Model Law provides that even while a request for a jurisdictional ruling is pending, "the arbitral tribunal may continue the arbitral proceedings *and make an award*" [emphasis added]. On a similar note, s 10(9)(*a*) of the IAA states that applications made under s 10 will not operate as a stay "of execution of any award or order". Implicit in these provisions is the recognition that an award on the merits could be rendered before the application to review the jurisdictional ruling is heard by the High Court or the Court of Appeal as the case may be.

16 Given the obvious possibility that there might be an eventual determination that the tribunal did not have jurisdiction to hear the dispute in the first place, the necessary corollary of allowing the continuation of arbitral proceedings nonetheless is that factors such as the time and costs expended on

an unnecessary arbitration are not "special" enough to warrant the granting of a stay. The same can be said of the inconvenience and uncertainty associated with the need to set aside the award or resist the enforcement of the award using the court's adverse ruling on jurisdiction. *A fortiori*, that the party seeking a review of the tribunal's jurisdictional ruling has to make a strategic choice of whether it ought to participate in the arbitration proceedings will not amount to a special circumstance in light of the default position prescribed by statute. In this case, Mr Yeo has informed the court that the Plaintiff has already informed the Tribunal that it would not participate in the Arbitration.

17 Thirdly, the strength of the jurisdictional objection cannot, in and of itself, be a reason to grant a stay. Given that every application under s 10(9)(*a*) of the IAA will be filed pursuant to an application challenging the jurisdictional ruling of the tribunal under s 10(3) of the IAA, the strength of the jurisdictional objection is not a special circumstance. Nor can it be the focus of the inquiry lest the anterior stay application shades into the challenge of jurisdiction proper.

18 Lastly, I deal with the Assistant Registrar's decision in *AYY v AYZ*. At the outset, I accept that there is some ostensible degree of overlap between the irreparable prejudice test and the requirement to show special circumstances. But as explained in [8] above, irreparable prejudice is the consequence or outcome that arises given the existence of some special circumstances in the case.

19 Besides, the irreparable prejudice test does not adequately address the underpinnings of the IAA and the Model Law. As a result, it is over-inclusive. For instance, if a tribunal directs parties to disclose confidential documents in furtherance of arbitral proceedings, strictly speaking, such disclosure cannot

be undone or compensated by a costs order in the event that the tribunal was wrong in finding that it has jurisdiction. But this is to be expected in the usual course of arbitral proceedings. It does not amount to special circumstances. That said, I do not foreclose the possibility where in a proper case the documents are of such a sensitive nature that the disclosure of such documents might constitute a special circumstance. Despite Mr Yeo's valiant attempt, the Plaintiff's case falls outside the rubric of special circumstances.

20 The irreparable prejudice test is also under-inclusive. In certain situations, even though parties have not suffered any harm or prejudice *per se*, a stay of proceedings may be warranted. Mr Bull posited that if, for instance, a hearing of the merits is slated to take place far later than the scheduled hearing for the review application under s 10(3) of the IAA, it might make little sense to deny a stay if nothing much is going on in the arbitral proceedings. In such a case, I suspect the parties would mutually agree to a stay for practical reasons. If there is no agreement, the conduct of the other party may be relevant to the exercise of discretion. On a separate note, in the off-chance that the tribunal is acting in a manner that is manifestly and egregiously improper, that might constitute special circumstances requiring the court to exercise its powers under s 10(9)(*a*) and (*b*) of the IAA. Ultimately, very much depends on the unique facts and circumstances of each case.

Application

21 With the guidelines in mind, I turn now to the factors raised in the affidavits. Dealing first with Mr Yeo's submissions on the Production Order, his argument is that the stay ought to be granted because the Production Order compels the Plaintiff to produce sensitive and confidential information – such information being minutes of board-level meetings, expansion plans,

marketing plans, as well as documents relating to the Plaintiff's financial performance, sales and marketing expenditure, market share, revenue and other information relating to the Plaintiff's relationship with the Defendants. The Plaintiff also pre-empted the Defendants' argument that most of the documents would have to be provided by the other respondent in the Arbitration, JFI Global Purchasing Ltd ("JFI"), anyway. The Plaintiff's reply is that JFI was a "fourth-level affiliate" that would not have access to many of the documents in the Production Order. In response, the Defendants noted that a JFI employee, Ms Norah Hanratty, had claimed to have received and seen minutes of the Plaintiff's board meetings.

22 I also note that some peripheral arguments were made in relation to the fact that the underlying agreement was a vertical distributorship agreement, and that the parties were not competitors, and therefore, the possibility of prejudice and detriment is not as real as the Plaintiff makes it out to be.

23 In my view, two points are determinative. First, the Plaintiff has not satisfactorily demonstrated how the information contained in documents in the Production Order is *so sensitive or confidential* that it warrants protection afforded by the granting of a stay application. Mr Bull's point is that disclosure orders are commonplace in arbitration proceedings and if the Plaintiff's objections suffice as a reason for the court to grant a stay, the balance struck by the IAA and the Model Law would be upset in that the default position would be turned on its head – stays would be routinely granted instead as tribunals have to make disclosure orders before the arbitration can even *continue* to the merits of the dispute.

24 On a separate but related note, the authority relied upon by the Plaintiff, *O'Connor v Nova Scotia* [2001] NSCA 47, to support the general

proposition that discovery once given cannot be taken back in that the documents have been revealed. That case concerned government programs carried out by the Priorities and Planning Committee. The present case relates to information of a very different nature, and is therefore distinguishable as Mr Bull contends.

25 The second point relates to how the confidentiality of the documents (if disclosed) would be protected. As Mr Bull points out, the Terms of Reference include a clause committing all parties to protect the confidentiality of the Arbitration. A further safeguard provided by the Tribunal in the Production Order is that for particularly sensitive information, "additional confidentiality arrangements may be prudent". It then invited the parties to undergo a process of mutual consultation to come up with arrangements to preserve the confidentiality and sensitivity of the information disclosed, while allowing for the production of such information. Should parties fail to come to an agreement, the Tribunal can also make appropriate arrangements on the request of any of the parties. Given that such safeguards exist, I do not find that circumstances surrounding the Production Order warrant an overall stay of the arbitral proceedings.

26 Mr Yeo's other argument relates generally to the prejudice the Plaintiff would suffer if it were to participate in the Arbitration pending the court's crucial review on the Tribunal's ruling on jurisdiction. Mr Yeo submits that such participation could amount to a waiver of its jurisdictional objections, and that substantial and unrecoverable management time and costs would have to be expended. I do not see any merit in these contentions. As Mr Bull rightly argues, the "waiver" concern is overstated as the Plaintiff had clearly and unequivocally raised its jurisdictional objection to the Tribunal (such objection forming the nub of the dispute at the Arbitration's jurisdiction phase) and

maintained this objection by filing an application seeking a review of the Tribunal's positive jurisdictional ruling. Further, management time and costs would inevitably be expended when arbitral proceedings continue. It does not amount to special circumstances. As for wasted costs, Mr Bull relies on s 10(7) of the IAA where the High Court could make a costs order accompanying a ruling that the Tribunal had no jurisdiction over the Plaintiff. Finally, I do not see the need to comment on his observation that JFI is not disputing the Tribunal's jurisdiction, and that costs would have to be expended in defending JFI in the Arbitration anyway. In that sense, so his argument develops, the extra costs that the Plaintiff would incur in participating in the Arbitration would not be significant.

27 Mr Yeo's remaining arguments relate to the repercussions of the court's refusal to grant a stay, and the Plaintiff's election to not participate in the Arbitration. Mr Yeo's argument is that adverse inferences would be drawn against the Plaintiff for non-compliance with the Production Order, and hence the resulting award on the merits would be in the Defendants' favour, the Plaintiff having not defended in the Arbitration. There is nothing to Mr Yeo's contention on adverse inferences.

28 For the reasons stated, I find that there are no special circumstances in this particular case warranting a stay of the arbitral proceedings under s 10(9)(*a*) of the IAA. I will hear parties on costs.

Belinda Ang Saw Ean
Judge

Alvin Yeo Khirn Hai S.C., Wendy Lin Weiqi and Mak Shin Yi (WongPartnership LLP) for the plaintiff;
Cavinder Bull S.C. and Foo Yuet Min (Drew & Napier LLC) for the defendants;