Adducing a new fact in an arbitration

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An oft-contested issue is whether a new fact which arises after the submission of the dispute to arbitration is ancillary to the dispute submitted, or constitutes a new facet which has not been previously submitted. Following from this, arises the even more contested issue of the scope of the tribunal's power to deal with such an issue. The Singapore High Court (the "Court") in *AYH v AYI and another* [2015] SGHC 300, considered the settled law and put the aforementioned issues in perspective.

Background

The disputes in the underlying arbitration under the SIAC Rules (the "Arbitration") arose from a Settlement Deed (the "Deed") dated 26 June 2013 executed between AYH (the Plaintiff in the Court proceedings) on one side, and AYI (the Second Respondent in the Court proceedings) and AYJ (the First Respondent in the Court proceedings) on the other to settle disputes relating to the operations of an Indonesian mining company (the "Company").

The disputes arose as a result of investigations carried out on certain capital expenditure transactions undertaken by the Company, after AYI took over AYJ and other companies in its group. The Company, till March 2013, was run by AYH, who was also a director of AYJ, which, indirectly, held 90% of the shares of the Company.

AYH contested the view taken by the new management that the impugned payments and transactions did not have proper business purposes and refused repayments. After much negotiation, AYH on one side and AYI and AYJ on the other finally executed the Deed settling all disputes with the agreement that AYH would transferred assets and cash to AYJ in accordance with the schedule of payments and he would be released of the potential claims by an equal amount. A tabulation of all expenditures and transactions considered outside the normal course of business (the "Exceptional Costs Table") was prepared and was provided to AYH. However, the Company was not a party to the Deed.

AYH defaulted and the arbitration ensued.

In the arbitration proceedings, AYH argued that the Deed was void because it was entered on the mistaken premise that (a) the payments classified in the Exceptional Costs Table were all made by AYJ (the "First Common Mistake"), when a bulk of the payments were made by the Company; and that (b) the Deed contained a self-executing release - that AYH would be automatically released from all potential claims in relation to the payments upon the transfer of assets referred to in the Deed (the "Second Common Mistake") as the Company was not a party to the Deed.

With a view to cure this potential defect and take the steam out of AYH's argument of impossibility of performance, with less than a week to go before the hearing of the Arbitration commenced, AYI, AYJ and the Company entered into an agreement (the "August 2014 Agreement") by which AYI and AYJ undertook that in the event that AYH transferred

cash or assets to AYJ, they would transfer the same to the Company. In return, the Company undertook that it would release AYH from potential claims by an amount equal to the value of the assets transferred. AYJ without admitting to the validity or legal effect of the August 2014 Agreement, confirmed that he would not object to its production and admission at the hearing.

The tribunal in its Award dated 29 December 2014 (the "Award") rejected AYH's arguments on both the First Common Mistake and the Second Common Mistake and held that the inaccurate description in the Deed could be corrected by way of construction, implication or rectification. The tribunal then went on to order specific performance of the Deed, as amended.

AYH applied for the setting aside of the Award. The two grounds which he put forward as warranting the setting aside of the Award were both focused on the validity and effect of the August 2014 Agreement.

(1) Whether the award dealt with a dispute beyond the scope of the Arbitration

The first ground for setting aside was rooted in AYH's argument that the tribunal in considering the August 2014 Agreement and affirming that it validly granted him release from potential claims by the Company, exceeded the terms and scope of the Arbitration.

The Court rejected this argument. In considering the terms and scope of the Arbitration and the dynamic that resulted from the admission of the August 2014 Agreement, it relied on the authority of *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("PT Prima"). In PT Prima, the Court of Appeal held that any new fact which arose after submission to arbitration, which was ancillary to the dispute submitted for arbitration and which was known to all the parties to the arbitration, was part of that dispute and need not be specifically pleaded. It may be raised in the arbitration proceedings as long as the other party was given sufficient notice of it and the opportunity to meet it.

The Court held that the August 2014 Agreement was evidence adduced in the Arbitration to support the contention that there was no impossibility of performance of the Deed, and that AYI and AYJ would be able to procure a release from potential claims from the Company. It accepted that the legal effect of the August 2014 Agreement was not separately an issue and was merely one aspect of the broader issue of whether the Second Common Mistake rendered performance of the Deed impossible.

The Court was satisfied that the issue regarding what the August 2014 Agreement meant had been brought to AYH's notice and that he was given an opportunity to respond. It also accepted the submission on behalf of AYJ and AYI that rule 24(n) of the SIAC Rules permitted the tribunal to consider the legal effect of the August 2014 Agreement. Rule 24(n) of the SIAC Rules which defines the 'Additional Powers of the Tribunal' follows the tone and tenor of the decision of PT Prima (supra).

On the facts, the Court rejected AYH's argument that he was prejudiced by the tribunal's erroneous substantive finding that the August 2014 Agreement validly granted him the necessary release under the Deed. The Court held that the tribunal had not found that the August 2014 Agreement itself constituted an actual release as AYH had not transferred the requisite assets and cash.

(2) Whether there was a breach of natural justice

The breach of natural justice often gets argued, in one form or another, in setting aside proceedings. This case was no different. AYH submitted that the tribunal had breached the rules of natural justice by, *firstly*, making a finding that the August 2014 Agreement provided AYH with a valid release from potential claims by the Company, an issue which

was outside the scope of submission to the Arbitration, and regarding which AYH had not been given sufficient opportunity to address; and *secondly*, relying on the August 2014 Agreement as a valid release mechanism to determine the issue of common mistake, without giving AYH an opportunity to submit on the effect of the August 2014 Agreement on the Deed.

The Court, following from the above mentioned findings, rejected the arguments. The Court was satisfied that AYH had a full opportunity to be heard on the issue of the August 2014 Agreement and if he thought that he did not make full use of that opportunity, that was not a ground on which to allege a denial of natural justice.

Conclusion

New facts that arise as the dispute progresses will not change the scope of arbitration if these issues are ancillary to the dispute which has already been submitted for arbitration. Parties must remember that courts in established seats like Singapore frown upon attempts at a second bite of the cherry. Therefore, parties would be well advised to ventilate all grievances and test all arguments before the arbitral tribunal and not keep a potential arrow in its quiver for the court proceedings.

End note

This matter is under appeal before the Court of Appeal.

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