

Singapore Court of Appeal Overturns Arbitral Award for Failure of Natural Justice

10 November 2020

BRS V BRQ AND ANO'R [2020] SGCA 108

The Singapore Court of Appeal in *BRS v BRQ & ano'r* has overturned an arbitral award and remitted the matter to the tribunal for further consideration after finding that the tribunal's failure to consider a party's evidence and arguments amounted to a breach of natural justice.

BACKGROUND

The Respondent in the arbitration, BRS, was awarded a government concession to build and operate a hydroelectric power plant (the "Project"). The Respondent established a subsidiary company, BRR, as a special purpose vehicle to pursue the Project.

After four years of work, BRR ran out of funds. An external investor, BRQ, the Claimant in the arbitration, was found to provide the funding needed to complete the Project. In 2012, the Respondent sold all of its shares in BRR to the Claimant. The terms of the Share Purchase Agreement (the "SPA") included express provisions that: (a) if the costs to complete the remaining works exceeded a stated sum, the excess "Overrun Costs" would be borne solely by the Respondent; and (b) the Project would be commissioned and completed by 31 March 2013, failing which the Claimant would be entitled to take over the works and complete them itself at the Respondent's expense, subject to an obligation for the Claimant to conduct the works in the most "prudent and cost effective manner".

In fact, the Project was not commissioned until 31 October 2015. The Claimant notified claims for excess costs and, in March 2014, took over the works until their completion. In December 2014, the Claimant initiated arbitration proceedings against the Respondent, claiming payment for additional costs and damages.

The arbitral tribunal issued its Award in January 2018. It largely granted the Claimant's claims. However, it determined that time-related Overrun Costs would be limited to those incurred before 30 June 2014 (the "Cut-off Date"), finding that the Claimant would have achieved commissioning and completion of the works by that date if it had approached the Project in a "prudent and cost-effective manner" as the SPA required.

Both parties applied to the Singaporean court to set aside different portions of the Award. The Claimant alleged that the finding in relation to the Cut-off Date was contrary to the rules of natural justice. The Respondent also claimed that there had been breaches of natural justice and said that parts of the tribunal's award were given in excess of its jurisdiction. In response, the Claimant alleged that the Respondent's challenge should be dismissed as it had been brought after the three-month deadline stated in the UNCITRAL Model Law on International Commercial Arbitration, which is incorporated into the Singapore International Arbitration Act.

DECISION OF THE HIGH COURT

Vindoh Coomaraswamy J in the Singapore High Court found that the Respondent's challenge had been raised in time but dismissed each party's claims alleging breach of natural justice. He upheld the award.

Both parties appealed.

DECISION OF THE COURT OF THE APPEAL

The Respondent's Challenge Was Out of Time

The Court of Appeal reversed the decision of the first-instance judge. It found that Article 34(3) of the Model Law requires that "[a]n application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal." Article 33 permits a party to ask the tribunal to correct computational, clerical or typographical errors, give an interpretation of a specific part of the award or make an additional award on claims made in the proceedings but omitted from the award.

The Court concluded that, although the Respondent had written to the tribunal in this case to raise questions and corrections about the award, the purported "corrections" were in fact requests for the tribunal to review or revisit its decision on certain matters

rather than to correct clerical errors. As such, the Court found that these “corrections” fell outside the scope of Article 33 of the Model Law.

Accordingly, since the Respondent’s set-aside application was filed more than three months after the award had been received by the parties, and importantly, the Court did not have any power to extend this time limit, the Respondent’s challenge was time-barred.

The Tribunal’s Award Was Contrary to Principles of Natural Justice

The Claimant challenged the tribunal’s finding that the Claimant’s method of completing the works after March 2014 was neither prudent nor cost-effective. The Claimant said that, in breach of the principles of natural justice, when making its decision on the Cut-off Date, the tribunal had failed to consider evidence:

- that the Claimant’s completion method was necessary and so the most prudent and cost-effective manner of achieving commissioning on the Project (the “Method Evidence”); and
- that the Respondent’s design suffered from flaws requiring corrective work, which meant that the Project could not be commissioned until 17 October 2015, long after the Cut-off Date found by the tribunal (the “Design Evidence”).

The Court of Appeal set out what a party seeking to set aside an arbitral award as contrary to natural justice must demonstrate: (a) the relevant rule of natural justice that was breached; (b) how the rule was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the party’s rights.

Here, the relevant rule of natural justice which the Claimant alleged had been breached was the ‘fair hearing’ rule, which requires a tribunal to consider all important issues. The Court held that, where a party alleges that a tribunal has “*wholly missed one or more important pleaded issues*”, “*the inference, if it was to be drawn at all, must be shown to be clear and virtually inescapable*”. It would be insufficient to show that a tribunal was mistaken as to the law or that it had misunderstood a party’s case. Only a “*failure to even consider that argument*” would amount to a breach of natural justice.

The Court further identified that even if a rule of natural justice had been breached and the breach was connected to the making of the award, it would be necessary to prove that the breach caused “*actual or real prejudice*” to the party seeking to set aside the award.

The Method Evidence

The Court found that it was not a “*clear and virtually inescapable*” conclusion that the tribunal had missed arguments pertaining to the Method Evidence. The Court noted that the tribunal had expressly acknowledged the evidence that the Claimant alleged had been omitted and also that such evidence had been subjected to cross-examination. However, the tribunal was entitled to focus upon and prefer other evidence which suggested that another method of repair would have sufficed.

In any event, even if there had been an omission to consider the Method Evidence, the Court concluded that no real prejudice resulted. On the facts, in completing the works the Claimant had included additional safety features that went beyond the original contract scope. The Respondent was not responsible for the additional costs and delays resulting from this departure from the contractual specifications, and the tribunal therefore would not have awarded the Claimant its additional costs in any event.

The Design Evidence

Perhaps unusually, there was no dispute between the parties that the tribunal had failed to consider the Design Evidence. The Claimant had alleged the defects as a separate cause of the delay in achieving commissioning. Conversely, the Respondent’s defence was that it was not liable for the defects because the Claimant was the “*de facto controller of the works*”. However, the award did not address this allegation, nor the Design Evidence that supported it. Instead, the Cut-off Date set by the tribunal was set on the premise that the Claimant’s failure to complete the Project was caused *solely* by its failure to undertake the repairs in the most prudent and cost effective manner.

The Court decided that the award demonstrated that the tribunal had failed to take the Design Evidence into consideration at all, and confirmed that this failure amounted to a breach of natural justice. Further, this breach caused “*real and actual prejudice*” to the Claimant by limiting the Claimant’s entitlement to costs beyond the Cut-off Date.

The Court therefore remitted the question of whether delays associated with rectifying the design would alter the Cut-off Date back to the Tribunal for further consideration, noting that it was an isolated issue that would affect only the quantum of indemnity payable by the Respondent to the Claimant. The rest of the award, however, remained intact.

COMMENT

In this judgment, the Singaporean Court of Appeal has confirmed the high bar faced by any party that wishes to challenge an arbitral award for an alleged failure to comply with the principles of natural justice. However, the Court has also confirmed that,

where it is apparent that a tribunal has not duly addressed a point raised by the parties, that failure can be a basis for setting aside an award. In this case, the effect of the set-aside was limited to one issue, which was remitted to the tribunal for further consideration, but in other cases the effect on an award could be more drastic.

The judgment also provides an important reminder of the need to observe statutory time limits for bringing challenges against arbitration awards and of the fact that Courts typically do not have any power to entertain requests for those time limits to be extended. Parties should be particularly careful of time limits in cases, such as this one, where a party seeks clarification of an award before raising its challenge, as an error about the true nature of a clarification request can mean that the party misses a time limit it had believed to be extended.

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