P.T. Garuda Indonesia v Birgen Air
[2002] SGCA 12

Case Number : CA 600099/2001

Decision Date : 06 March 2002

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J

Counsel Name(s) : KS Rajah SC, Quahe Cheng Ann Lawrence, Sauntharajah Surenthiraraj and Michele Elias (Harry Elias Partnership) for the appellant; Vangat Ramayah and Rajaram Ramiyah (Wee Ramayah & Partners) for the respondent

Parties : P.T. Garuda Indonesia — Birgen Air

Arbitration – Award – Final award – Agreement that place of arbitration at Jakarta and Indonesian law as governing law – Delivery of final award in Jakarta although hearing in Singapore – Distinction between place of arbitration and venue of hearing – Applicability of s 24 of International Arbitration Act (Cap 143A, 1995 Ed) and art 34 of Model Law to final award – s 24 International Arbitration Act (Cap 143A, 1995 Ed) – Model Law on International Commercial Arbitration art 34

Civil Procedure – Service – Out of jurisdiction – Leave to serve notice of originating motion out of jurisdiction – Whether proper case to grant leave – O 69A r 4(2) Rules of Court

Conflict of Laws – Natural forum – Application for leave to serve out of jurisdiction – Whether Singapore most clearly connected with arbitration – Whether Singapore most appropriate forum to hear application

Judgment

GROUNDS OF DECISION

1. This was an appeal against the decision of the High Court setting aside an order of the Assistant Registrar granting leave to the appellants to serve an Originating Motion out of jurisdiction on the respondents. At the conclusion of the hearing we dismissed the appeal. We now give our reasons.

The background

2. The facts giving rise to the institution of this Originating Motion were largely undisputed. The appellant (Garuda), an Indonesian company, and the respondent (Birgen), a Belgium company, entered into an agreement dated 20 January 1996 whereby Birgen agreed to lease one DC 10-30 aircraft to Garuda for use by pilgrims to Saudi Arabia for the Hajj (the lease agreement). The lease agreement expressly provided that the governing law would be the law of Indonesia and that disputes arising therefrom were to be referred for arbitration in Jakarta.

3. Subsequently a dispute arose because Birgen proposed to substitute the aircraft under the lease agreement and the dispute was referred to arbitration in accordance with the terms thereof, with Garuda as the claimant and Birgen, the respondent.

4. The arbitral tribunal consisted of Dr Clyde Croft, as Chairman, and Professor Priyatna Abdurrasyid and Professor Nurkut Inan as co-arbitrators. From February 1999, the tribunal, through its Chairman, Dr Croft, sought to set dates for the hearing of the arbitration. As regards the place of hearing, the Chairman informed the parties on 24 February that the tribunal thought that Jakarta was not an appropriate place given the then situation prevailing in Indonesia and proposed that the tribunal should sit in Zurich. On 11 and 12 March 1999, Birgen and Garuda respectively responded but neither

made any comment on the tribunal's proposal to have the hearing in Zurich. On 30 March 1999, Dr Croft proposed that the hearing of the arbitration be carried out in Singapore rather than in Zurich.

5. On 7 April 1999, M/s Donald H Bunker and Associates (Donald Bunker), the lawyers for Birgen, replied requesting that the tribunal proceed to decide the case on the basis of the documents without any hearing but if that request were not granted then they were agreeable, inter alia, that "Jakarta is not an appropriate place for the hearing and accepts the tribunal's proposal to sit in Singapore."

6. On 21 May 1999, Dr Croft wrote to the lawyers for the parties asking for their comments on certain matters, including Birgen's application for "documents only arbitration". Nevertheless, he also notified the parties that "the tribunal had decided that this matter will be heard on 4, 5 and 6 August 1999 in Singapore". On 10 June 1999 Gani Djemat & Partners (Gani Djemat), lawyers for Garuda, wrote indicating, inter alia, that they agreed that "the hearing to take place on 4, 5 and 6 August 1999 in Singapore."

7. On 23 July 1999 by another letter to both Donald Bunker and Gani Djemat, the lawyers for the parties, Dr Croft reiterated that "a hearing will take place in Singapore" on the appointed dates.

8. The hearing was duly held in Singapore and a Final Award, dated 15 February 2000, was handed down which was signed by two members, Dr Croft and Prof Inan. The third member, Prof Abdurrasyid, declined to sign it and rendered a dissenting opinion.

9. The Final Award stated that it was delivered at Jakarta and the tribunal in 39 also made the following comments:-

> "It had not been suggested by either of the parties, nor is it the view of the Arbitral Tribunal, that the use of Singapore as a convenient place for the hearing had any substantive or procedural impact on the proceedings."

10. On 18 May 2000, the majority of the tribunal handed down an Addendum to the Final Award on account of a computational error.

11. On 3 January 2001, Garuda filed a Notice of Originating Motion (OM) in the High Court in Singapore to set aside the Final Award and the Addendum, and for various other reliefs. The application was based on s 24 of the International Arbitration Act (IA Act) and Article 34 of the Model Law. Article 34 sets out the grounds upon which an award governed by the Model Law may be set aside by the court. Section 24 sets out grounds, additional to those in Article 34, upon which the High Court may set aside an award. In the view of the judge below, s 24 and Article 34 are closely linked – if Article 34 is not applicable to an arbitration, then s 24 will also not be applicable. We agree with this construction. Garuda did not appeal against this determination.

12. On 27 March 2001 Garuda applied ex-parte for leave to serve the Notice of OM on Birgen out of Singapore and also for leave to serve the Notice by substituted service within Singapore (i.e., on Birgen's Singapore solicitors). On 30 March 2001, the Assistant Registrar made an order substantially in the terms prayed for by Garuda.

13. On 7 April 2001, Birgen applied to set aside the order of 30 March 2001 of the Assistant Registrar. On 26 July 2001, Woo Bih Li JC set aside the order and all proceedings taken pursuant thereof. Thus, this appeal by Garuda against the decision of Woo JC.

14. In coming to his decision, the judge below found –

(i) there was material non-disclosure on the part of Garuda and this ground alone was sufficient for him to set aside the leave to serve the Notice of OM out of jurisdiction. The non-disclosure related to terms in the lease agreement, clauses in the Terms of Reference for the arbitration, the exchange of correspondence and the views expressed by the tribunal on the question of the place of the arbitration as set out in the Award.

(ii) this was not a proper case to grant leave to Garuda to serve the papers out of jurisdiction as the place of arbitration remained at Jakarta.

15. We should further mention that the judge below had also set aside the leave granted to Garuda to serve the papers on Birgen in Singapore by substituted service. This aspect of the decision of Woo JC was not appealed against.

Issues on appeal

16. Garuda's application for leave to serve out of jurisdiction was made pursuant to Order 69A r 4. Under r 4(2) it is stated that no leave shall be granted unless "it shall be made sufficiently to appear to the Court that the case is a proper one for service out of jurisdiction." This test is almost identical to the test prescribed in O 11 r 2, which relates to service in general out of jurisdiction: the test of a proper case. Accordingly, in arriving at his decision the judge below relied on cases relating to O 11 r 2(2) which required that the applicant must show, first, that there were merits in the case and, second, that Singapore was a *forum conveniens.* In this regard the judge also adopted the opinion of the Court of Appeal in *Overseas Union Insurance Ltd v Incorporated General Insurance Ltd* [1992] 1 Lloyd's Rep 439.

17. Before us Garuda did not dispute that they must satisfy those two requirements. Birgen's case was that Garuda failed to satisfy both requirements by reason of the fact that the place of arbitration was not Singapore but Jakarta and thus Singapore courts did not have jurisdiction in the matter. However, the position taken by Garuda was that the parties had subsequently agreed to change "the place of arbitration" to Singapore.

18. There were, therefore, three main issues before us. First, whether there was an agreement between the parties, in the light of the correspondence referred to above, followed by the actual hearing of the arbitration in Singapore, to alter the place of the arbitration from Jakarta to Singapore. Second, whether Singapore was the place most clearly connected with the arbitration and whether this was the most appropriate forum to hear the application in the OM. Third, whether there was a material non-disclosure on the part of Garuda in their application for leave to serve out of jurisdiction and, if this were the case, what should be the consequence thereof.

Place of Arbitration

19. In filing the OM, Garuda relied upon the International Arbitration Act (IA Act), an Act to make provision for the conduct of international commercial arbitrations based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (the Model Law) on 21 June 1985. By s 3(1) of the IA Act, the Model Law (except Chapter VIII thereof) shall have the force of law in Singapore. Section 24 empowers the Singapore High Court to set aside the award of an arbitral tribunal in certain specified circumstances, other than those described in Article 34 of the Model Law.

20. Some of the relevant provisions of the Model Law are the following:-

"Article 1(2): Scope of application

The provisions of this Law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State ("this State" is defined to mean Singapore).

Article 20: Place of arbitration

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(2) Notwithstanding the provisions of paragraph (1) of this Article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among members, for hearing witnesses, experts or parties, or for inspection of goods, property or documents."

Article 31: Forms and contents of award

(3) The award shall state its date and the place of arbitration as determined in accordance with Article 20(1). The award shall be deemed to have been made at that place.

21. From Articles 1(2) and 20 it will be seen that unless Singapore is the "place of arbitration" the Singapore courts can only intervene in relation to an arbitration governed by the Model Law in the limited instances set out in Articles 8, 9, 35 and 36. Thus, Article 34 only applies if an arbitration has its "place of arbitration" in Singapore.

22. Garuda did not dispute that the Model Law is only applicable where the place of arbitration is Singapore. Their main plank of argument was that Singapore was the place of arbitration and not Jakarta and thus, the Model Law applied.

23. It should be apparent from Article 20 that there is a distinction between "place of arbitration" and the place where the arbitral tribunal carries on hearing witnesses, experts or the parties, namely, the "venue of hearing". The place of arbitration is a matter to be agreed by the parties. Where they have so agreed, the place of arbitration does not change even though the tribunal may meet to hear witnesses or do any other things in relation to the arbitration at a location other than the place of arbitration.

24. Thus the place of arbitration does not change merely because the tribunal holds its hearing at a different place or places. It only changes where the parties so agree. The significance of the place of arbitration lies in the fact that for legal reasons the arbitration is to be regarded as situated in that state or territory. It identifies a state or territory whose laws will govern the arbitral process. The following passage of Kerr LJ in *Naviera Amazonica Peruana SA v Cia International de Seguros* [1988] 1 Lloyd's Rep 116, (*Amazonica* case), while it did not relate to the Model Law, is nevertheless germane (at 120):-

"Finally, as I mentioned at the outset, it seems clear that the submissions advanced below confused the legal 'seat' etc. of an arbitration with the geographically convenient place or places for holding hearings. This distinction is nowadays a common feature of international arbitrations and is helpfully explained in Redfern and Hunter at p.69 in the following passage under the

heading 'The Place of Arbitration':

The preceding discussion has been on the basis that there is only one 'place' of arbitration. This will be the place chosen by or on behalf of the parties; and it will be designated in the arbitration agreement or the terms of reference or the minutes of proceedings or in some other way as the place or 'seat' of the arbitration. This does not mean, however, that the arbitral tribunal must hold all its meetings or hearings at the place of arbitration. International commercial arbitration often involves people of many different countries. In these circumstances, it is by no means unusual for an arbitral tribunal to hold meetings --or even hearings – in a place other than the designated place of arbitration, either for its own convenience or for the convenience of the parties or their witnesses … It may be more convenient for an arbitral tribunal sitting in one country to conduct a hearing in another country – for instance, for the purpose of taking evidence … In such circumstances, each move of the arbitral tribunal does not of itself mean that the seat of the arbitration changes. The seat of the arbitration remains the place initially agreed by or on behalf of the parties." (emphasis added).

It will be seen that the English concept of "seat of arbitration" is the same as "place of arbitration" under the Model Law.

25. While the agreement to change the place of arbitration may be implied, it must be clear. This is in the interest of certainty. By choosing the "place of arbitration" the parties would have also thereby decided on the law which is to govern the arbitration proceedings.

The evidence on place of arbitration

26. We shall now refer to the relevant provisions of the lease agreement which have a bearing on the question of the place of arbitration.

Clause 16.8: Governing Law

This Agreement shall in all respects be governed by, and construed in accordance with, the laws of the Republic of Indonesia, including all matters of construction, validity and performance.

Clause 16.9: Arbitration

In the event that a commercial controversy or claim …. such controversy or claim shall be settled by arbitration held before a board of three qualified arbiters. The parties agree that such arbitration shall be held in Jakarta, Indonesia and conducted in the English language in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce. (emphasis added).

27. Next we turn to the Terms of Reference of the arbitration which the parties had agreed. The following are pertinent:-

"6 Place of Arbitration.

6.1 The place of arbitration is Jakarta, Indonesia.

6.2 The arbitral Tribunal and the Parties may convene at any other location if necessary, for example, for a view.

6.3 ….

(emphasis added).

28. From these two documents, it is clear that the parties had agreed that the governing law of the lease agreement was Indonesian law and that the place of arbitration was Jakarta. So was there a subsequent agreement to alter the place of arbitration? We have in 4 to 7 set out the relevant correspondence. It would be recalled that in February 1999 the tribunal first suggested, in view of the turmoil in Indonesia, that it should sit in Zurich. It was on 30 March 1999 that the tribunal proposed Singapore in place of Zurich. On 7 April 1999 the lawyers for Birgen replied accepting the tribunal's proposal to sit in Singapore. There was no reply from Garuda on the proposal. On 21 May 1999, the tribunal informed the parties of the hearing in Singapore on 4-6 August 1999. It was only on 10 June 1999 that the lawyers for Garuda, Gani Djemat, replied stating that they agreed to the hearing in Singapore on the specified dates. The hearing was accordingly held here.

29. From these, Garuda contended that there was an implied agreement to change the place of arbitration, and thus the *lex fori*, or curial law, from Jakarta to Singapore and they relied upon the *Amazonica* case. But this authority is hardly relevant. In *Amazonica*, the plaintiffs insured their vessels with the defendants. The policy provided that the city of Lima was to have jurisdiction over all disputes. However, it also provided that arbitration was to be governed by the conditions and laws of England. A dispute arose between the parties and the issue for determination by the court was whether the arbitration was to be held in London or Lima. Quite clearly there was ambiguity in the clauses of the policy.

30. At first instance, the High Court ruled that the arbitration was to be held in Lima but governed by English law as the *lex fori.* The Court of Appeal reversed that decision and held that the seat of arbitration should be London where it would be governed by English law, thereby avoiding the situation of an arbitration in country X being governed by the law of country Y. The Court of Appeal made the following proposition:-

> Prima facie, i.e., in the absence of some express and clear provision to the contrary, it must follow that an agreement that the curial or procedural law of an arbitration is to be the law of X has the consequence that X is also to be the 'seat' of the arbitration. The *lex fori* is then the law of X, and accordingly, X is the agreed forum of the arbitration. A further consequence is then that the Courts which are competent to control or assist the arbitration are the Courts exercising jurisdiction at X.

31. Also relying on *Amazonica,* and in view of the fact that the parties agreed to the tribunal's suggestion of having the hearing in Singapore, Garuda made the alternative contention that it followed that the parties had chosen Singapore law as the law governing the arbitration, the curial law, and had thereby also impliedly chosen Singapore as the "place of arbitration". This argument is circular and is also flawed because it is based on the false premise that the parties had chosen Singapore law as the curial law. In fact, the parties made no such choice. By stating in the lease agreement and the Terms of Reference, that the place of arbitration was Jakarta, it must follow that the curial law would be Indonesian law. The curial law would be Singapore law only if it was established that the parties had agreed to alter the "place of arbitration" from Jakarta to Singapore.

32. The second case relied by Garuda was *Union of India v McDonnell Douglas Corporation* [1933] 2 Lloyd's Rep 48 where the contract provided that the arbitration should be conducted in accordance with the procedures provided in the Indian Arbitration Act 1940 and that the seat of arbitration proceedings should be in London. The issue was whether the law governing the arbitration

proceedings was English or Indian law. The court was of the view that by specifying London as the seat of arbitration, it was reasonable to assume from that choice that they attached some importance to the relevant laws of England. Saville J stated (at p.50):-

> It is clear from the authorities cited above that English law does admit of at least the theoretical possibility that the parties are free to choose to hold their arbitration in one country but subject to the procedural laws of another, but against this is the undoubted fact that such an agreement is calculated to give rise to great difficulties and complexities as Lord Justice Kerr observed in the *Amazonica* decision.

and concluded,

> ….. it seems to me that by their agreement, the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law.

33. The court also felt that the jurisdiction of the English Court under the Arbitration Acts over an arbitration in England could not be excluded by agreement between the parties to apply the laws of another country. We would emphasise that the court was there referring to an arbitration where the seat was in England. This was not the situation here. Clearly, if it was established that the parties had agreed to change the "place of arbitration" to Singapore, then it must follow that the curial law would be Singapore law.

34. It is incontrovertible that parties are at liberty to change the place of arbitration. In *ABB Lummus v Keppel FELS* (1999) 2 Lloyd's Rep 24, there was such an express agreement to alter the place of arbitration from Singapore to London. *ABB Lummus* cannot help us determine whether the parties here had, in fact, agreed to change the place of arbitration.

35. We were unable to accept Garuda's contention that just because the parties eventually agreed with the arbitrators' suggestion that the hearing be held in Singapore, there was in consequence such an agreement to alter the place of arbitration from Jakarta to Singapore. What was changed was the "venue of hearing". This comes out clearly from the language of the correspondence.

36. In our opinion, Garuda's argument failed to give effect to the provisions of Article 20(2) of the Model Law which expressly authorize the tribunal to meet at any place, other than the agreed place of arbitration, to hear witnesses and the parties. The opening words of Article 20(2), "notwithstanding the provisions of paragraph (1) of this Article", clearly mean that such a hearing by the tribunal at a different location from that of the place of arbitration does not alter what was the agreed place of arbitration. Indeed, the tribunal confirmed the hearing to be in Singapore even before receiving any indication from Garuda: see Dr Croft's letter of 21 May 1999.

37. This view of the matter is clearly consistent with the views of the learned authors of *Redfern & Hunter on International Arbitrations*, which were cited by Kerr LJ in *Amazonica* and which we have quoted in 24 above.

38. Garuda seemed to have placed great emphasis on the fact that the hearing of the arbitration was held entirely in Singapore and nowhere else. But an arbitration proceeding does not comprise only of the oral hearing and the submission. It encompasses an entire process, commencing from the appointment of the arbitrator or arbitrators to the rendering of the final award.

39. While both *Amazonica* and *Union Bank of India* did not involve the Model Law, and could be distinguished on that basis, the real differentiating feature there lies in the fact that in both those cases the relevant clauses were far from clear. We have alluded to that before. But in the instant case, the lease agreement was abundantly clear: the lease agreement was to be governed by Indonesian law and the place of arbitration was Jakarta, which must also mean that the arbitration proceedings were subject to Indonesian law.

40. In the result, Article 34 of the Model Law and s 24 of the IA Act did not apply to the Final Award. There was no basis for Garuda to file the OM in the Singapore High Court.

41. Following from this determination, and bearing in mind that Indonesian law governed both the lease agreement and the arbitration proceedings (the place of arbitration being Jakarta) and the award was rendered in Jakarta, it must necessarily follow that Indonesia was clearly the most appropriate forum. Accordingly, this was not a "proper case" where leave to serve the Notice of Originating Motion out of jurisdiction should be granted.

42. It is thus wholly unnecessary for us to go into the third issue, on material non-disclosure, set out in 18 above.

43. Before we conclude, we should mention that counsel for the respondent submitted that the judge below had perhaps gone a little too far when he stated in his judgment (at 94) that:-

> As the place of arbitration is not Singapore, neither Article 34 of the Model Law nor, for that matter, Part II of the Act, will apply.

Counsel seemed to be suggesting that while the Model Law will not apply to an international arbitration, as far as Singapore courts are concerned, if the place of arbitration is not Singapore, the same does not necessarily follow as regards Part II (except s 24) of the IA Act. As counsel for the appellant had not submitted on this aspect and as this point did not really concern the case, and in the absence of full arguments from both counsel, we are not inclined to offer any views on it.

Sgd:

CHAO HICK TIN
Judge of Appeal

Sgd:

TAN LEE MENG
Judge

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