

Commentary

Quarella SpA v Scelta Marble Australia Pty Ltd [2012] SGHC 166

By
Andrew Battisson
and
Sunil Mawkin

[Editor's Note: Andrew Battisson is a Senior Associate in the international arbitration group of Allen and Overy's Singapore office. He specialises in international arbitration and has represented a number of multinational companies under the major arbitral rules. Sunil Mawkin is an associate in the international arbitration group of Allen and Overy's Singapore office and also specialises in international arbitration. Copyright © 2012 by Andrew Battisson and Sunil Mawkin. Responses are welcome.]

I. Background

Quarella SpA (**Quarella**), an Italian company which manufactures and exports composite stone products, entered into a distributorship agreement (the **Agreement**) in January 2000 with Scelta Marble Australia Pty Ltd (**Scelta**), an Australian incorporated company, for the distribution of Quarella's products in Australia.

Clause 25 of the Agreement expressed that it was to be governed by the Uniform Law for International Sales under the United National Convention of April 11, 1980 (Vienna) (the **CISG**) and where not applicable, by Italian law. The Agreement further provided that any dispute would be determined by ICC arbitration with a seat in Singapore.

A dispute subsequently arose between the parties which was referred to arbitration in accordance with the Agreement. In November 2011 the Tribunal issued a partial award on all substantive issues in Scelta's favour and ordered Quarella to pay A\$1,075,964.25 in damages for wrongful termination and breach of the Agreement (the **Substantive Award**). In December 2011, the Tribunal issued a costs award in Scelta's favour in the amount of A\$824,917.50 (the **Costs Award**).

An important issue which the Tribunal was asked to consider, at a very late stage in the proceedings, was the applicable law of the Agreement.

II. The Applicable Law

At the commencement of the arbitration proceedings, the applicable law did not appear to be in doubt. Scelta submitted that Italian law was applicable as opposed to the CISG, and Quarella appeared to agree, conceding in its Answer to the Request for Arbitration that the CISG had limited application as it does not govern distributorship agreements.

Three weeks prior to the arbitration hearing, however, Quarella changed its position and alleged that the CISG was the applicable law. Quarella therefore asked the Tribunal to determine the dispute on the basis of the rules of the CISG rather than Italian law.

1. The Preliminary Issues

Before turning to consider what the applicable law of the Agreement was, the Tribunal considered 3 preliminary issues:

- A. Whether to allow Quarella to raise its arguments regarding the applicable law at such a late stage in the proceedings. In deciding on this, the Tribunal allowed Quarella to advance its arguments and gave Scelta the opportunity to respond.
- B. Whether the parties agreement as to the applicable law in Clause 25 of the Agreement was modified by the mutual agreement of the parties so that the CISG did not apply.

The Tribunal determined that there had been no modification of Clause 25 to completely exclude the application of the CISG.

- C. Whether Clause 25 of the Agreement should be interpreted as a direct choice of the substantive rules of the CISG by the parties so that it applied even if the conditions for the application of the CISG as stated in the CISG were not met. On this, the Tribunal held that the Parties intended that the CISG was to apply only to the extent that the CISG was applicable, accordingly to its own rules of applicability, and if it did not apply in whole or in part then Italian law applied.

2. The Tribunal's decision on the Applicable law

The Tribunal then went on to consider whether the CISG, based on its own rules of applicability, applied to the Agreement. It held that it did not apply as the Agreement did not contain a contract of sale but was rather a framework/distributorship agreement which (as had been previously recognised by Quarella), was outside the scope of the CISG. Therefore the Tribunal held that Italian law was the applicable law to determine the dispute.

3. The Tribunal's determination of the underlying dispute

Having considered the preliminary issues, and made its decision on the applicable law, the Tribunal then proceeded to determine the dispute on the basis on Italian law. In doing so, it found Quarella had wrongfully terminated and breached the Agreement, and accordingly issued the Substantive Award and Costs Award in Scelta's favour.

III. The Singapore High Court Proceedings

Quarella attempted to prevent enforcement of the Substantive Award and Costs Award by applying to the Singapore High Court, (Singapore being the jurisdiction overseeing the arbitration proceedings), to set them aside on the basis that the Tribunal had erroneously applied the wrong applicable law to determine the dispute. The case was heard by Justice Judith Prakash, and judgment was delivered in August 2012.

Quarella argued that under Article 17 of the ICC Rules, the parties were free to choose the rules of law to govern the Agreement, and only in the absence of such agreement was the Tribunal free to apply the rules of law it determines to be appropriate. Quarella argued that the Tribunal should have applied the rules of the CISG, and only applied Italian law to supplement the CISG, it where there was a gap. Accordingly, Quarella asked Prakash J to re-consider the Tribunal's findings on applicable law, and if incorrect, to determine which provisions of the CISG should have applied to the Agreement, and how this would have impacted the Substantive Award.

In its defence, Scelta argued that the Tribunal applied the correct substantive law. In any event, however, Scelta argued that even if the Tribunal was wrong to apply Italian law rather than the CISG to the merits, this was no ground for setting aside the Substantive Award under Article 34(2)(a)(iv) of the Model Law¹ nor was it a ground for setting aside the Substantive Award under Article 34(2)(a)(iii) of the Model law.

Prakash J was therefore tasked with determining whether the Tribunal had acted in accordance with the ICC Rules, or whether there were sufficient grounds for setting aside the Tribunal's awards under the Model Law.

1. Article 34(2)(a)(iv) of the Model Law

Under Article 34(2)(a)(iv) of the Model Law, an arbitral award may be set aside if the "*composition of the arbitral panel or the arbitral procedure was not in accordance with the agreement of the parties*". Quarella argued that in applying Italian law rather than the CISG, the Tribunal had failed to comply with Article 17 of the ICC Rules and therefore, that the arbitral procedure was not in accordance with the agreement of the parties.

In determining whether the Tribunal had complied with Article 17 of the ICC Rules, Prakash J considered the conduct of the parties, particularly Quarella, in the lead up to the arbitration hearing. She reflected on how Quarella had originally accepted the applicability of Italian law in its Answer to the Request for Arbitration and throughout its initial pleadings, and how it had even provided an expert witness on Italian law who addressed many of the key legal issues concerning the dispute, but who had never considered the same issues under the CISG. Prakash J also considered the lateness of Quarella's objection to the choice of Italian law.

Prakash J also considered the arguments raised by the parties in respect of the three preliminary issues which the Tribunal considered, particularly the third issue relating to the applicability of the CISG according to its own rules. Quarella advanced various arguments to the Tribunal regarding the applicability of the CISG which the Tribunal considered in some detail, before making its determination that the CISG was not applicable to the dispute. Prakash J referred to these arguments, and the Tribunal's deliberations in her judgment, and in doing so determined the Tribunal did, "pursuant to Article 17 of the ICC Rules, respect the choice of law clause set out in the contract".²

Quarella's complaint, in reality was that the Tribunal had applied the chosen law incorrectly. Prakash J held, however, that this was not a dispute which engaged Article 34(2)(a)(iv) of the Model Law, and accordingly she declined to set aside the Substantive Award under this provision.

2. Article 34(2)(a)(iii) of the Model Law

Article 34(2)(a)(iii) of the Model Law provides a ground by which an award may be set aside if "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. . ."

Quarella argued that in applying Italian law the Tribunal had gone beyond the scope of the submission to arbitration as this was not the law expressly chosen by the Parties.³ In its defence, Scelta contended that Quarella was arguing that the Tribunal made the wrong decision regarding the applicable law to determine the dispute, and that this was insufficient ground to set aside the Substantive Award. Scelta also argued that the Tribunal had not considered matters beyond its ambit of reference as the Tribunal was specifically asked by Quarella to decide on the applicability of the CISG.

Prakash J reviewed a number of authorities which had considered Article 34(2)(a)(iii) of the Model Law, including PT Auransi Jasa Indonesia (Persero) v. Dexia Bank⁴ where the court summarised 3 key principles regarding this provision:

- A. Article 34(2)(a)(iii) is not concerned with the situation where the tribunal did not have jurisdiction to deal with a dispute which it purported to determine. Rather,

it applies where the arbitral tribunal improperly decided matters that had not been submitted to it, or failed to decide matters that had been submitted to it;

- B. Secondly, the failure by an arbitral tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute;
- C. Thirdly, mere errors of law or even fact are not sufficient to warrant setting aside an award under Article 34(2)(a)(iii).

Ultimately, (and unsurprisingly) Prakash J rejected Quarella's argument to set aside the award under Article 34(2)(a)(iii). Prakash J commented on how the issue of the applicable law had been submitted to the Tribunal and had been explicitly addressed in the Substantive Award. She was also fairly critical of the arguments Quarella advanced to set aside the Substantive Award on this ground, commenting that they were "scant and lacking in substance"⁵ and how Quarella would not have had to venture too far into authorities and literature to determine that its prospects for succeeding in the setting aside application on this ground were "dim".⁶

In summary, Prakash J commented that Quarella's attempt to set aside the Substantive Award under 34(2)(a)(iii) was based entirely on a dispute with the Tribunal's interpretation of the choice of law clause in the Agreement, and this was not a dispute which engaged Article 34(2)(a)(iii).

Having rejected Quarella's arguments to set aside the Substantive Award it followed that, Quarella also failed to convince Prakash J to set aside the Costs Award.

IV. Commentary

There are very limited grounds under the UNCITRAL Model Law for setting aside an arbitral award. Although the facts of this case and the weaknesses in Quarella's arguments weighed heavily in Scelta's favour, the swiftness with which Prakash J rejected Quarella's arguments to set aside the award, reflects the high judicial standard applied by the Singapore Courts to set aside an arbitral award, and the pro-arbitration stance of the Singapore courts. Furthermore, this case adds to the

growing body of jurisprudence in Singapore upholding arbitral awards.

V. Endnotes

1. The UNCITRAL Model Law on International Commercial Arbitration, was adopted in Singapore under the International Arbitration Act 1994.
2. [2012] SGHC 166 at paragraph 40.
3. [2012] SGHC 166 at paragraph 42.
4. [2007] 1 SLR 597.
5. [2012] SGHC 166 at paragraph 42.
6. [2012] SGHC 166 at paragraph 54. ■