CES v International Air Transport Association

SUPREME COURT OF SINGAPORE

30 April 2020 (Note: The judgment was released to parties on 25 March 2020)

Case summary

Originating Summons No 7 of 2019
CES v International Air Transport Association [2020] SGHC(I) 08

Decision of the Singapore International Commercial Court (delivered by International Judge Roger Giles):

Outcome: Court holds that an arbitral tribunal has jurisdiction to hear the claim by the respondent against the applicant.

Facts

1. CES entered into an agency agreement ("the Agreement") with the International Air Transport Association ("IATA"). Under the Agreement, CES was authorised to sell air passenger transportation on the services of airline carriers that were members of IATA. The Agreement further provided that CES's and IATA's relationship would be governed by rules in IATA's Travel Agent's Handbook ("the Handbook"). Its governing law was Indian law.

2. The Handbook contained a collection of "Resolutions". Resolution 820e provided that certain disputes "shall be finally settled, subject to review by arbitration", by the Travel Agency Commissioner ("the TAC"). The TAC's jurisdiction could be "initiated" in different specified instances by CES or IATA. After the TAC's decision had been rendered, pursuant to Resolution 818g, any party would then have the right to submit the TAC's decision to *de novo* review by arbitration.

Background to the parties' dispute

3. Under the rules in the Handbook, an agent such as CES was obliged to remit monies received from the sale of the tickets of member airlines of IATA by stated dates. For example, for domestic air tickets sold between the 1st and 15th days of the month, the money received by the agent had to be remitted by the 25th day of the same month.

4. CES failed to remit INR 46,43,37,605 for the period of 1 to 15 March 2013. IATA demanded payment of said sum by 28 March 2013. When payment was not made, according to CES due to a credit limit issue with its new bank, IATA wrote to CES on

28 March 2013, advising CES that its agency was declared in default, and that IATA's member airlines would be notified of such default. CES's ticketing facilities would also be withdrawn, and its agency would be terminated effective on 30 April 2013, subject to the payment of the money by that date or 50% of the money and an agreed firm schedule for repayment. CES did not reply to this, nor did it pay or agree to a schedule for repayment. Under the rules, IATA, as manager of the payment system, was required to make the demand and take the default action.

5. On 1 May 2013, IATA wrote to CES, advising that the agency agreement was terminated with immediate effect. CES was advised that it could seek review by the TAC if it disagreed with this decision. CES took no action at that time.

6. Over a year later, on 23 May 2014, CES wrote to the TAC; while the letter was not in any clear way an initiation of review by the TAC of any action or decision of IATA, the TAC appears to have regarded it as an initiation of a review of the termination of the agency agreement. The TAC replied that the application for review was time-barred, as it was brought well in excess of the 30 day time limit in Resolution 820e. Accordingly, the TAC declined to intervene.

Indian court proceedings and arbitration

7. On 27 January 2016, IATA began court proceedings in Delhi, India, claiming INR 124,31,69,623 for tickets sold by CES from 1 to 25 March 2013 ("the Indian court proceedings"). CES filed an application for the court to "reject the suit" for a variety of reasons, with one being that it was not maintainable and was to be referred to arbitration pursuant to s 8(1) of the Arbitration and Conciliation Act, 1996 (India) ("the ACA"). CES's application was allowed, and the Indian proceedings was disposed of, with the parties being referred to arbitration.

8. On 29 March 2018, IATA began arbitration proceedings against CES, claiming the same amount it had claimed in the Indian proceedings. CES challenged the arbitral tribunal's ("the Tribunal") jurisdiction as, among others, there had not been a decision rendered by the TAC. The Tribunal issued its award on jurisdiction on 16 May 2019, holding that it had jurisdiction to hear the claim. CES applied to the Singapore court to set aside the Tribunal's award on jurisdiction. By agreement, the arbitral proceedings was stayed pending the disposal of CES's application.

Decision of the Court

9. A decision of the TAC was a precondition to arbitration. Two issues arose for the Court's consideration. The first issue was whether, notwithstanding the absence of a TAC decision, the Tribunal nonetheless had jurisdiction because the absence of a decision should be attributed to CES's failure to initiate a review ("the default question"). The second issue, which arose only if the first issue was answered in the negative, was whether CES was estopped from denying the Tribunal's jurisdiction, or had waived the fulfilment of the pre-condition of having a TAC decision, by reason of representations concerning arbitration which it had made in the course of the Indian proceedings ("the estoppel/waiver question").

The default question

10. Resolutions 820e and 818g of the Handbook said in different language that what was reviewed by arbitration was a decision of the TAC. So, as held in *Delhi Express Travels Pvt Ltd v International Air Transport Association & others [2009] 3 Arb LR 303 ("Delhi Express")* at [21], a decision of the TAC was a precursor or pre-requisite step to arbitration: at **[45]**.

11. Nonetheless, in *Delhi Express* it was held that the agent could not rely on the absence of a TAC decision when it could have initiated review by the TAC but failed to do so. At the hearing, CES accepted that if it alone could have initiated a review by the TAC and did not do so, it could not rely on the absence of a decision of the TAC in order to avoid an arbitration. With that acceptance, the default question came down to whether IATA could have initiated a review by the TAC, so that the absence of a decision by the TAC was not due to CES's default alone: at **[51] and [52]**.

12. This was a question of construction of the rules contained in the Handbook. The evidence of IATA's expert on Indian rules of interpretation was consistent with the familiar principles of interpretation at the common law, requiring that the parties' intentions be discerned from the contractual document(s), and that the interpretation adopted be one which gave effect to all parts of the document(s) and did not reject any part of them: at **[54] and [55]**.

13. While Resolution 820e provided that a TAC review could be initiated by either an agent (being CES) or by IATA, the initiation of a TAC review was premised on certain conditions. In this case, CES accepted that it could have initiated a review pursuant to Resolution 820e. Reviewing the relevant provisions in the Handbook, the Court

concluded that IATA was unable to initiate a TAC review of the relevant decision. Accordingly, CES could not rely on the absence of a TAC decision to dispute the Tribunal's jurisdiction. Hence, notwithstanding the absence of a TAC decision, the Tribunal had jurisdiction to arbitrate the dispute: at **[56]–[70].**

The estoppel/waiver question

14. The finding that the Tribunal had jurisdiction rendered the estoppel/waiver question moot. Nonetheless, the Court proceeded to consider the issue in case of an appeal. IATA submitted that the absence of a TAC decision and the fact that it was no longer possible to obtain such a decision had clearly been raised by IATA in resisting CES's application pursuant to s 8(1) of the ACA to refer the Indian court proceedings to arbitration. IATA said that by its various assertions of arbitration nonetheless, and by maintaining the application for the claim to be referred to arbitration, CES was estopped from raising the absence of a TAC decision as a bar to arbitration. Alternatively, it said that in maintaining arbitrability in the Indian court proceedings although the absence of a TAC decision had been brought out, CES waived the need for a prior TAC decision: at **[87]**.

15. According to the experts on Indian law for both IATA and CES, in an application under s 8(1) of the ACA, the court looked only to whether *prima facie* there is a valid arbitration agreement. If the court was of the opinion that *prima facie* an arbitration agreement existed, it ought to refer the dispute to arbitration and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. As held in *Hindustan Petroleum Corporation v M/S Pinhcity Medway Petroleums* (2003) 6 SCC 503, referral to arbitration was mandatory once there was an arbitration clause in the agreement between the parties, even though "the applicability thereof [was] disputed by the respondent". Any objection to the applicability of the arbitration clause had to be raised before the arbitral tribunal, and was left to be determined by the tribunal: at **[90] and [91]**.

16. Although the experts did not directly address the specific question of whether, in an application under s 8(1) of the ACA, referral to arbitration could be resisted by contending that although there was an arbitration agreement, a precondition to arbitration was not satisfied, from the expert evidence and the decision in *Delhi Express,* the answer was no: at [**92]**.

17. CES's assertions in the documents filed in the Indian court proceedings, when read in context, simply said that the dispute was the subject of an arbitration agreement, and that it fell within s 8(1) of the ACA. There was no clear acceptance that, despite the absence of a TAC decision, the arbitration could proceed with the arbitrator having jurisdiction to determine the dispute. Hence, the estoppel ground, which required a clear and unequivocal represented by words or conduct on which reliance was placed, failed. For similar reasons, the waiver by election ground, which required an unequivocal representation in relation to the right or remedy being waived, also failed: at **[94]–[95] and [99]**.

Observations on the evidence

18. The function of an expert witness on foreign law is to inform the court of the foreign law, to identify relevant judgments or other authorities, and if there is no authority directly in point to assist the court in finding what the foreign court's ruling would be if the issue arose for decision. The expert should not give opinions on the conclusions which the Court ought to draw, as those conclusions should be the subject of counsel's submissions. It was appropriate to remind practitioners that the instructing lawyers ought not to ask the expert to opine beyond his or her proper role, and that they ought to bring to the expert's attention the limits of that role: at **[101]–[104].**

19. Similarly, evidentiary affidavits are there to place facts before the court, including disputed facts. They are not there for submissions on conclusions of fact or legal argument, and ought not to include either: those were matters for counsel in written or oral submissions. Practitioners were reminded to ensure that the proper bounds of evidentiary affidavits were not transgressed, and that they ought to restrain their client's enthusiasm to take on the advocate's role: at **[105]–[106].**

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.