

Himalaya Food International Ltd v Simplot India LLC and another
[2020] SGHC 222

Case Number : Originating Summons No 760 of 2020
Decision Date : 16 October 2020
Tribunal/Court : High Court
Coram : Andre Maniam JC
Counsel Name(s) : Goh Siong Pheck Francis and Toh Wei Qing Geraldine (Harry Elias Partnership LLP) for the plaintiff; Prakash Pillai, Koh Junxiang and Charis Toh Si Ying (Clasis LLC) for the defendants.
Parties : Himalaya Food International Ltd — Simplot India LLC — Simplot India Foods Pvt Ltd

Arbitration – Arbitral tribunal – Jurisdiction

Arbitration – Award – Recourse against award – Setting aside

Arbitration – Costs – Awarded

16 October 2020

Andre Maniam JC (delivering the judgment of the court *ex tempore*):

Introduction

1 Does an arbitral tribunal only have jurisdiction to decide a matter correctly, such that an erroneous decision would go beyond the scope of submission to arbitration and justify setting aside the resulting award? That would be tantamount to allowing a right of appeal, when it is well accepted that there is generally no such right: see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 (“*Sui Southern*”) at [15]–[22] and [40]; *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 at [65(c)].

2 Mindful of this, the plaintiff (“HIL”, formerly known as “Himalya International Ltd”) stresses that it is not mounting a backdoor appeal, [\[note: 1\]](#) and that it is not merely complaining about an error of law. [\[note: 2\]](#) But HIL’s contention that the tribunal had exceeded the scope of its reference is based on a contentious *interpretation* of the relevant contract; it says that the tribunal could not properly have interpreted the contract otherwise. If that is not a mere error of law, what is?

Background

3 In 2001, HIL and the first respondent (“Simplot USA”, also known as “Simplot India LLC”) entered into a shareholders agreement (“SA”) in respect of a joint venture company, Himalya Simplot Pvt Ltd (“HSPL”), which was subsequently incorporated. In 2012, the defendants (collectively, “Simplot”) and HIL entered into a master agreement (“MA”), to which HSPL was also a party.

4 Pursuant to the MA, the second respondent (“Simplot India”, also known as “Simplot India Foods Pvt Ltd” and formerly known as “Comida Foods Pvt Ltd”) agreed to purchase the equipment (the “Potato Processing Equipment” or “PPE”) that HIL had been using to produce potato products,

and to lease a portion of HIL's food processing plant at Vadnagar, Gujarat, India. The MA envisaged that Simplot India would use the PPE to produce and sell potato products to HSPL for marketing and resale.

5 Pursuant to the MA, HIL was to receive a total consideration of US\$12.75m (including a US\$500,000 Holdback Amount). The Holdback Amount was to be held in escrow and paid out from time to time following the consummation of certain transactions. Clause 1.03(c) of the MA provided for the Holdback Amount to be used as follows:

... to fund upgrades and improvements and/or replacements and additions to the Potato Processing Equipment such that the equipment is capable of consistently meeting the Production Requirements. For the purposes hereof, the Potato Processing Equipment shall be deemed to have met the "**Production Requirements**," if Line 1 is capable of consistently producing 50 million pounds of Potato Products per year (and 10,000 pounds per hour), and Line 2 is capable of consistently producing 20 million pounds of Potato Products per year (and 4,000 pounds per hour). At such time as the Production Requirements have been consistently met, to the reasonable satisfaction of HIL and Simplot India, the balance of the Holdback Amount, if any, shall be released to HIL out of Escrow. [\[note: 3\]](#)

[emphasis in original in bold]

6 By clause 9.01 of the MA, HIL gave various representations and warranties to Simplot India, including: [\[note: 4\]](#)

(e) **Capacity** . Line 1 of the Potato Processing Equipment is capable of consistently processing 50 million pounds of Potato Products per year (and 10,000 pounds per hour); and Line 2 of the Potato Processing Equipment is capable of consistently processing 20 million pounds of Potato Products per year (and 4,000 pounds per hour).

...

(g) **Operation and Condition of Equipment** . Other than the recent fire damage, the Potato Processing Equipment has not been damaged or in any way altered by HIL and is free from defects in design, material and workmanship, both latent or patent, and is fit for the use reasonably intended. The Potato Processing Equipment has been operated and maintained in accordance with manufacturer's instructions and specifications.

[emphasis in original in bold italics]

7 Clause 9.01(e) was a representation and warranty that the PPE meets the Production Requirements as defined in clause 1.03(c), and clause 9.01(g) contained further representations and warranties, *inter alia*, that the PPE "is fit for the use reasonably intended".

The arbitration

8 In 2017, Simplot gave notice of arbitration to HIL pursuant to clause 10.09 of the MA, which provided as follows:

In the event of any Dispute between the Parties relating to this Agreement, the Parties shall submit the Dispute for resolution pursuant to the procedures set forth in clause 12.3 (Other Dispute Resolution) of the Shareholders Agreement. [\[note: 5\]](#)

[emphasis in original omitted]

9 Clauses 12.1 and 12.2 of the SA made provision for certain “Deadlock” matters. [\[note: 6\]](#) Clause 12.3 of the SA then provided, in material part, as follows:

12.3 Other Dispute Resolution.

(a) In the event of any other dispute or claim, that is not a Deadlock matter, arising from or related to this Agreement, is raised by any Party, including with respect to an Event of Default (a “**Dispute**”), the Members shall endeavour to settle, through their respective designees to the Board of Directors, the Dispute. All Disputes arising under this Agreement that are not resolved by the Board of Directors shall be resolved as follows: the Company shall first submit the matter to the Senior Representatives of the Members by providing notice of the Dispute to the Members. The Chairmen of the Members shall then make a good faith effort to resolve the Dispute.

...

(c) If the Dispute cannot be settled by mediation within 30 days, then, subject to clause 12.4, the matter shall be resolved exclusively by binding arbitration in Singapore, before a panel of three (3) arbitrators in accordance with the SIAC Rules of the Singapore International Arbitration Centre (SIAC). ... [\[note: 7\]](#)

[emphasis in original in bold and underlined]

10 HIL and Simplot USA were the “Members” for the purposes of clause 12.3 of the SA, and HSPL was the “Company”. [\[note: 8\]](#)

11 The ensuing arbitration culminated in the arbitral award dated 23 March 2020 [\[note: 9\]](#) as corrected by a memorandum of correction dated 8 May 2020 (the “Award”). [\[note: 10\]](#) The tribunal found that HIL (which was the respondent in the arbitration) had breached clauses 9.01(e) and 9.01(g) of the MA. The following paragraphs from section C3 (“Decision on Breach of Contract”) running from paragraphs 562 to 765 of the Award [\[note: 11\]](#) are of note:

563. **Fitness for purpose – PPE:** The MA clearly states in representations 9.01(e) and (g) that the PPE is fit for the use reasonably intended, and is capable of meeting the Production Requirements. It is common ground between the Parties that this includes an element of producing a quality product of the required volume. The Production Requirements are set out specifically, and also not in dispute. Indeed, the Respondent maintained throughout this case that the PPE was capable of meeting the Production Requirements as stated. The Tribunal refers to “Fitness for Purpose” as a convenient shorthand for the PPE being able consistently to produce a volume of quality commercially saleable product at the level of the Production Requirements.

...

616. **Product Quality:** The Parties agree that reasonable product quality is an important aspect of fitness for purpose and meeting the Production Requirements. Mr Matters refers to the evidence of customer complaints, and concludes that these complaints evidence defects with the PPE itself. In his view, these quality issues would have been exacerbated had the Main Line been operating at higher capacities. The Claimants also rely on the evidence of Mr Tandon. The issues

can be summarised as follows: The Fries were slightly black in colour or discoloured, of poor taste, broken, took too long to fry, were uneven in size and cut, were not crunchy, or were dull after frying.

...

628. **Conclusion on the PPE:** The Tribunal finds that the PPE was not Fit for Purpose. This applies in particular to the Fryer and the Dryer, but also to a number of other components. The frequent extensive downtimes and customer quality complaints reinforce this conclusion. The Tribunal finds that the work needed to bring the PPE up to Fitness for Purpose would cost very substantially more than the Holdback Amount. The fact that the PPE is to be measured with a latitude of some USD 500,000.00 of further improvements does not, therefore, assist the Respondent. The Respondent is therefore in breach of representations MA 9.01(e) and (g).

[emphasis in original in bold]

12 The tribunal awarded Simplot damages including US\$1,395,334 for the PPE Main Line, US\$597,484 for the Specialty Line, and US\$158,180 for loss on potato crop (see the Award at paras 895–896, 898, and 900–901 respectively, as well as at para 902). [\[note: 12\]](#) The tribunal held that Simplot could retain the Holdback Amount partly to cover expenditure on the PPE, and partly as part payment towards the damages due to Simplot for the PPE (see paras 899 and 902 of the Award). [\[note: 13\]](#) The tribunal also awarded Simplot, *inter alia*, interest and costs. [\[note: 14\]](#)

The setting-aside application

13 By this originating summons (“OS”), HIL applied to set aside all of the findings in respect of and in relation to its breaches of clauses 9.01(e) and 9.01(g) of the MA, on the basis that “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”.

14 HIL relies on Art 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”), which has the force of law in Singapore by virtue of s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (the “IAA”). [\[note: 15\]](#) Article 34(2)(a)(iii) of the Model Law states that an arbitral award may be set aside only if the applicant furnishes proof that “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 ...”

15 HIL accepts that a mere error of law (or even fact) does not constitute a valid ground for setting aside an arbitral award, per *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 (“*CRW*”) at [33]. [\[note: 16\]](#) More specifically, HIL accepts that if a tribunal’s interpretation of a contract between the parties is supposedly wrong, the tribunal has not thereby exceeded the scope of the reference: see *Sui Southern* ([1] *supra*) at [26]–[28], [36] and [38]. [\[note: 17\]](#)

Did the tribunal exceed the scope of the reference?

Was the issue of “quality” within the scope of the reference?

16 HIL contends that the tribunal had exceeded the scope of submission to arbitration because the warranties in the MA did not make any express reference to the PPE producing “quality” potato

products: accordingly, in finding that the PPE had to be capable of doing so, the tribunal had decided an issue that was not properly before it.

17 In the arbitration, Simplot asserted, *inter alia*, that HIL had breached clauses 9.01(e) and 9.01(g) of the MA; HIL disputed this. *Prima facie*, there was within the agreement to arbitrate, a dispute which Simplot could and did submit to arbitration (see [8]–[10] above).

18 Indeed, HIL accepts that the scope of submission to arbitration included whether clause 9.01(g) of the MA had been breached, [\[note: 18\]](#) but it contends that under Indian law (which governs the MA), there was a sale of the PPE by description, and there is generally no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale by description. [\[note: 19\]](#)

19 Further, HIL recognises that Simplot had asserted in the arbitration that the warranties included the aspect of the potato products being “quality” products: [\[note: 20\]](#) Simplot had raised this in the notice of arbitration, the pleadings, and in the course of the arbitration. [\[note: 21\]](#) Nevertheless, HIL contends that the “quality” issue was outside the scope of the arbitration agreement in the first place, and so although Simplot had repeatedly raised the issue, the tribunal exceeded the scope of the reference by dealing with it.

20 HIL’s written submissions however fail to address the express reference in clause 9.01(g) to the PPE being “fit for the use reasonably intended”. What that encompasses, and whether the PPE had failed to meet the requisite standard, were issues before the tribunal. Ironically, in one of the affidavits HIL filed in support of this setting-aside application, the deponent recognised that fitness for purpose *did* involve the potato products being of “sellable” quality: [\[note: 22\]](#)

22. What was essentially promised to the Defendants is as follows:

- a. The PPE could meet the Production Requirements (Clause 9.01(e) of the MA); and
- b. The PPE is fit for the use reasonably intended, that is, it could produce potato products which were *sellable* (Clause 9.01(g) of the MA).

[emphasis added]

I note that the deponent’s understanding of fitness for purpose was materially the same as that of the tribunal, which stated at para 563 of the Award (see [11] above) that “[t]he Tribunal refers to “Fitness for Purpose” as a convenient shorthand for the PPE being able consistently to produce a volume of *quality commercially saleable product at the level of the Production Requirements*” [emphasis added].

21 Indeed, it was *common ground* before the tribunal that the potato products produced had to be “quality” products or “quality commercially saleable” products or of “reasonable product quality” (see paras 563 and 616 of the Award, quoted above at [11]).

22 Thus, in HIL’s closing submissions in the arbitration dated 29 April 2019, it stated at paras 302 and 309: [\[note: 23\]](#)

302. The Respondent and the Claimants accept that if the PPE was fit for the use reasonably intended, it must be able to produce good quality product.

...

309. Accordingly, the Claimants have not discharged their burden of proof to conclusively show that the PPE was not capable of producing good quality product. Thus, the Respondent also had not made any misrepresentation with regard to PPE and its fitness for the use reasonably intended.

23 Similarly, in HIL's reply submissions in the arbitration dated 31 May 2019, it stated at para 178: [\[note: 24\]](#)

Further, the Respondent agrees with the Claimants apart from a quantitative aspect to the PPE being fit for purpose, there is also a qualitative aspect. The PPE being "fit for the use reasonably intended" must mean that it should be able to produce good quality product ...

24 An agreement to arbitrate is the foundation of an arbitral tribunal's jurisdiction. Where the parties have agreed on what is in issue before the tribunal, the losing party cannot thereafter fault the tribunal for dealing with that issue. Here, it was common ground that whether the PPE could produce potato products of "quality" was in issue, and the tribunal did not exceed the scope of submission to arbitration in deciding that issue.

25 The issue of whether the PPE was capable of producing "quality" products was within the scope of the dispute resolution clause in the MA read with the SA (see [8]–[10] above). But even if that were not so, the parties by their conduct in the course of the arbitration would have conferred jurisdiction on the tribunal to deal with that issue – see *PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 at [32]:

An arbitration agreement is merely an agreement between parties to submit their disputes for arbitration. *The disputes submitted for arbitration determine the scope of the arbitration.* ... An arbitral tribunal has no jurisdiction to resolve disputes which have not been referred to it in the submission to arbitration. Simply put, a party cannot raise a new dispute in an arbitration *without the consent of the other party.* ...

[emphasis added]

26 In stark contrast to the submissions made in this OS, in the arbitration HIL did not dispute its *obligation* to ensure that the PPE could produce quality potato products; it simply disputed the *breach* of that obligation.

27 In any event, the tribunal decided that the warranties had been breached not only because the PPE could not produce "quality" potato products, but *also* because the PPE could not meet the Production Requirements (see [11] above). HIL recognises this. [\[note: 25\]](#)

28 HIL however argues that the tribunal's finding in relation to the Production Requirements was inextricably linked to its finding on the "quality" issue, [\[note: 26\]](#) in the sense that the finding of breach of clause 9.01(e) was dependent on the finding of breach of clause 9.01(g). However, it is clear from the Award that this was not so.

29 The tribunal framed the issue as follows: "Whether the PPE was of satisfactory quality *and/or* was fit for purpose, including whether the PPE was capable of meeting the Production Requirements *and* producing quality Fries" [\[note: 27\]](#) [emphasis added]. Nothing in that suggests that a finding on

whether the PPE could meet the Production Requirements would be dependent on whether quality fries could be produced. Rather, there were two distinct obligations on HIL – the PPE had to:

- (a) meet the Production Requirements; and
- (b) produce quality fries.

30 As the tribunal put it at para 563 of the Award (quoted above at [11]), the PPE had to be able “consistently to produce a volume of quality commercially saleable product at the level of the Production Requirements”. It is clear from the Award that the tribunal’s finding on breach of clause 9.01(e) was not dependent on a finding of breach of clause 9.01(g) or the issue of “quality” – see further paras 578, 580, 587, 588, 592, 595, 609 and 610 of the Award. [\[note: 28\]](#)

Did the tribunal exceed the scope of the reference, in awarding damages and costs as it did?

31 HIL also submits that the tribunal exceeded the scope of the reference when it awarded damages in excess of the Holdback Amount. [\[note: 29\]](#) HIL’s argument appears to be that if the PPE failed to meet the Production Requirements, Simplot was only entitled to the Holdback Amount, and the tribunal had no jurisdiction to award Simplot any sum beyond that (even if Simplot would have to spend more than the Holdback Amount for the PPE to meet the Production Requirements).

32 HIL’s counsel however clarified in oral submissions that if the “quality” aspect had not featured at all, an award of damages going beyond the Holdback Amount in clause 1.03(c) of the MA (see [5] above) would not exceed the scope of the reference. But HIL argues that here, the tribunal had taken both qualitative and quantitative aspects into account in awarding damages.

33 What damages Simplot should receive for HIL’s breach of clauses 9.01(e) and 9.01(g), and how that related to clause 1.03(c) on the Holdback Amount, were issues before the tribunal. HIL’s argument on damages is dependent on its argument on “quality”, and HIL seeks to challenge a point which it had *accepted* before the tribunal: that the warranties did include an aspect of the quality of the potato products produced. HIL’s case is premised on a contentious interpretation of the MA; it is a challenge to the substantive correctness of the tribunal’s decision; it is a backdoor appeal.

34 Finally, it is stated in the affidavit of HIL’s Chairman and Managing Director, Mr Malik, that the tribunal’s award on costs should, in any event, be set aside for being “excessive”. [\[note: 30\]](#) This is however not mentioned in HIL’s written submissions, and was not pursued in oral submissions. HIL’s counsel accepted that this point could not be pressed within the scope of HIL’s setting-aside application: HIL does not argue that a supposedly “excessive” award on costs is thereby beyond the scope of submission to arbitration.

Conclusion

35 The tribunal had not exceeded the scope of the reference, and HIL has not established any basis for setting aside the adverse findings it complained of.

36 Accordingly, I dismiss HIL’s application with costs.

Postscript – foreign lawyer’s affidavit on the merits of the application

37 In support of its application, HIL filed an affidavit from an Indian-qualified lawyer [\[note: 31\]](#) who

gave his opinion that the tribunal had exceeded the scope of submission to arbitration.

38 The foreign lawyer had however not been admitted to the Singapore bar such that he could properly make submissions on behalf of HIL.

39 Nor was the affidavit properly an expert affidavit on foreign law. Although the MA was governed by Indian law, the issue in this OS was whether the tribunal had exceeded the scope of submission to arbitration (under the IAA and the Model Law) – that was not an issue of Indian law. If HIL were merely relying on the foreign lawyer’s affidavit as an Indian legal opinion on how the MA should have been construed (so as to resile from the position it had taken in the arbitration), this was not the time or place to do so. Moreover, the affidavit did not satisfy the requirements for expert affidavits under O 40A r 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) – it did not contain a statement that the expert understands that in giving his report, his duty is to the Court and that he complies with that duty (per O 40A r 3(2)(h)). Understandably there was no such statement, because the foreign lawyer was effectively acting as the plaintiff’s lawyer rather than as an independent expert.

40 In *Gleeson v J Wippell & Co Ltd* [1977] 1 WLR 510 at 519, Megarry VC deprecated the inclusion in an affidavit of a Queen’s Counsel’s opinion and a journal article:

In Mr. Brown’s affidavit he quotes a passage from an opinion of a silk, and he exhibits an article in a journal concerned with patents. The object appears to be to demonstrate that the plaintiff has prospects of success against Wippell if her action is not halted. The main objection to the extracts from the article is that they do not appear to me to constitute any evidence; and the purpose of affidavits is, or should be, to provide evidence. As I told Mr. Jacob, I would listen with pleasure to any submission upon the subject that he chose to put before me, whatever his source of inspiration, but I would not listen to the words of a Queen’s Counsel, however eminent, or the author of an article, when proffered as evidence of the legal rights and prospects of a litigant. A court does not hear expert evidence on what the law of England is, or what the rights of parties are under that law.

41 I respectfully agree with those views. The foreign lawyer’s affidavit in the present case should never have been filed.

[\[note: 1\]](#) Plaintiff’s written submissions, para 63.

[\[note: 2\]](#) Plaintiff’s written submissions, para 28.

[\[note: 3\]](#) Plaintiff’s Bundle of Documents, vol 1 (“1PBOD”), pages 267-268.

[\[note: 4\]](#) 1PBOD, page 288.

[\[note: 5\]](#) 1PBOD, page 291.

[\[note: 6\]](#) 1PBOD, pages 592-650 at 627-628.

[\[note: 7\]](#) 1PBOD, page 629.

[\[note: 8\]](#) 1PBOD, page 596.

[\[note: 9\]](#) 1PBOD, page 742.

[\[note: 10\]](#) 1PBOD, page 950.

[\[note: 11\]](#) 1PBOD, pages 849-889.

[\[note: 12\]](#) 1PBOD, pages 914-916.

[\[note: 13\]](#) 1PBOD, pages 914-916.

[\[note: 14\]](#) 1PBOD, pages 930-932.

[\[note: 15\]](#) Plaintiff's written submissions, para 2.

[\[note: 16\]](#) Plaintiff's written submissions, para 28.

[\[note: 17\]](#) Plaintiff's written submissions, para 32(b).

[\[note: 18\]](#) Plaintiff's written submissions, para 38(b).

[\[note: 19\]](#) Plaintiff's written submissions, para 48.

[\[note: 20\]](#) Plaintiff's written submissions, paras 56 and 58-62.

[\[note: 21\]](#) Plaintiff's written submissions, para 60.

[\[note: 22\]](#) Affidavit of Mr Manmohan Malik s/o Shri C.S. Malik ("Mr Malik") dated 31 July 2020, para 22 (1PBOD, page 525).

[\[note: 23\]](#) 2PBOD, pages 293-294.

[\[note: 24\]](#) 2PBOD, pages 306-307.

[\[note: 25\]](#) Plaintiff's written submissions, paras 21-22 and 69(b).

[\[note: 26\]](#) Plaintiff's written submissions, paras 68-69.

[\[note: 27\]](#) 1PBOD, page 773, para 156.

[\[note: 28\]](#) 1PBOD, pages 852-859.

[\[note: 29\]](#) Plaintiff's written submissions, paras 74-75.

[\[note: 30\]](#) Mr Malik's affidavit dated 31 July 2020, paras 51-54 (1PBOD, pages 533-534).

[\[note: 31\]](#) Affidavit of Punit Dutt Tyagi dated 31 July 2020 (1PBOD, page 10).

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