Kluwer Arbitration Blog

Swinging the Pendulum towards Arbitral Independence: A growing Consensus on the Treatment of Interim Orders in Arbitral Proceedings by National Courts?

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In the recent decision of *PT Pukuafu Indah and others v. Newmont Indonesia Ltd and another* ([2012] SGHC 187) the Singapore High Court (the Court) confirmed that it did not have jurisdiction to set aside an interim anti-suit injunction ordered by an arbitral tribunal. In reaching this decision, the Court added to a growing body of jurisprudence from other jurisdictions, supporting a non-interventionist approach by national courts towards interim orders made by arbitral tribunals.

The parties to the dispute in *PT Pukuafu Indah* were shareholders of an Indonesian company that operated a copper and gold mine in Indonesia. The parties had signed a release agreement under which the claimants were purportedly bound to discontinue proceedings commenced in the Indonesian courts. In an alleged breach of the release agreement, the claimants took no steps to discontinue the proceedings and instead commenced a further three suits before the South Jakarta District Court.[1)]

In response, and in accordance with the release agreement, the defendants commenced arbitration proceedings under the Singapore International Arbitration Centre Rules 2010 (SIAC Rules). They successfully applied to the tribunal for an interim order under r26.1 of the SIAC Rules (the Order) to prevent the claimants from continuing the existing proceedings, and commencing new proceedings in relation to the dispute. The Court granted the defendants leave to enforce the Order.

The claimants subsequently applied to the Court under section 24 of the Singapore International Arbitration Act (IAA) and Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (Model Law) to have the Order set aside. These provisions contain powers for the Court to set aside an arbitral award. Therefore the Court recognised that its jurisdiction could be triggered only if the Order constituted an 'award' under the IAA:

- The IAA defines an 'award' as:

  '*a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any orders or directions made under section 12*'.

- Section 12(1) IAA includes, among others, '*an interim injunction or any other interim measure*'.

In finding that the Order fell within section 12(1) IAA (and outside of the Court's jurisdiction) the Court noted that:

- There was an important distinction to be drawn between substance and procedure. To be an 'award' for the purposes of Article 34 of the Model Law, an arbitral tribunal's decision must be on the substance of the dispute (*PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA* applied [2007] 1 SLR 597). Conversely, the orders and directions excluded from the definition of 'award' under section 12 IAA, concerned '*procedural matters or protective measures*' and did not determine the substantive merits of a claim ([2012] SGHC 187 at 12). The Court, therefore, determined that its jurisdiction was confined to awards on the substance of the dispute and did not extend to procedural or administrative issues ([2012] SGHC 187 at 12-13 and 19).
- When determining whether an arbitral tribunal's ruling is an order or an award, it is the substance of the ruling that is decisive, not the label given to it by a tribunal ([2012] SGHC 187 at 14).
- On the facts, even though the Order did not state on its face that it was an order under section 12 IAA, the Court noted that it had only interim effect and was capable of being modified. The intent of the Order was only to preserve the status quo until the tribunal could hear the parties on the merits of the claim, as opposed to a final decision ([2012] SGHC 187 at 16-17).

A similar approach was taken by the English High Court in *Michael Wilson & Partners Limited v. John Forster Emmott* ([2008] EWHC 2684 (Comm)). In *Emmott* it was held that section 67 of the Arbitration Act 1996 (permitting challenge of an award as to its substantive jurisdiction) (the Act) does not extend to a procedural order not amounting to an award.[2)] On the facts, the English High Court held a tribunal's decision to allow amendment to a counterclaim and order specific disclosure to be a procedural order, not an award as to its substantive jurisdiction.

Recognising that whether or not an arbitral decision is an award is a question of substance and not of form, the test applied in *Emmott* was whether a reasonable recipient would have considered the order to be the tribunal's final ruling on jurisdiction ([2008] EWHC 2684 (Comm) at 19 and 20). In applying the test, the English High Court noted that:

- the contents of the order concerned the resolution of two procedural disputes – permission to amend a counterclaim and an order for specific disclosure;
- the tribunal entitled the decision 'Sixth *Procedural* Order', not 'award'; and
- the language used in the decision was not the formal language usually used in a final and binding decision – the tribunal expressed '*the view*' that the amended counterclaim fell within the arbitration clause ([2008] EWHC 2684 (Comm) at 19 and 20).

The English High Court therefore also drew a distinction between: (i) an award on a substantive issue in the dispute; and (ii) a procedural ruling which does not deal with the substantive issues, is not final and cannot be challenged under section 67 of the Act.[3)] The English High Court applied *K/S A/S Bill Biakh v. Hyundai Corporation* ([1988] 1 Lloyd's Rep. 187) and *The Smaro* ([1999] 1 Lloyd's Rep. 225) confirming that the English courts do not have a general jurisdiction to set aside interlocutory orders made by an arbitral tribunal.

Three recent Canadian cases have also confirmed a non-interventionist approach towards procedural orders in the Quebec and Ontario courts. In *Terrawinds Resources Corp v. ABB Inc* (2009 QCCS 5820) and *Endorecherche Inc v. Université Laval* (2010 QCCA 232) the Quebec Superior Court and Court of Appeal confirmed that the Quebec courts have no general power to review procedural rulings by arbitrators under Title I of book VII of the Quebec Code of Civil Procedure. Similarly, in Canadian domestic arbitration proceedings, the Ontario Court of Appeal held in *Inforica Inc v. CGI Information Systems and Management Consultants Inc* (2009 ONCA 642) that that an order for security for costs did not constitute an award under the Ontario Arbitration Act. Courts in Tunisia and Germany have also held that under Article 34 of the Model Law, setting aside proceedings against interim orders by arbitral tribunals are inadmissible.[4)]

Although the above decisions were not all decisions under section 34 of the Model Law, the national courts involved all recognised the advantages of a non-interventionist approach towards interim orders in arbitration proceedings. The courts also identified the likely negative effect on party autonomy and the efficiency of the arbitral process if it were possible to challenge such interlocutory orders in the national courts, in particular, through increasing the risk of delay and/or tactical attempts to obstruct the arbitral process ([2012] SGHC 187 at 25).

As the Court stated in *PT Pukuafu Indah*:

> 'the pendulum swings between independence and interventionism, but the overarching aim is always to facilitate the efficiency of arbitration. The issue of whether interlocutory orders may be subject to judicial challenge is simply another manifestation of the perennial debate over the role that courts should play in arbitration; and under the IAA, the scales have come down firmly in favour of independence in the ongoing conduct of arbitral proceedings ([2012] SGHC 187 at 22).'

It is hoped that this growing body of jurisprudence will encourage more national courts to follow suit.

References

?1 Henderson, Alastair and Izor, Sean, 'Singapore High Court Examines its Approach towards Interlocutory Orders in Arbitral Proceedings', *Practical Law Company* (1 November 2012).

?2 *Chitty on Contracts*, 30th Ed. Vol. 2, at 32-156.

?3 'Arbitral Award or Procedural Order', *Practical Law Company Dispute Resolution* (11 November 2008).

?4 See Oberlandesgericht Köln, Germany, 9 Sch 06/03, 3 June 2003 and Court of Appeal, Tunisia, 8 May 2001, Case. No. 83 as cited in the *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*.

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