

The Singapore Approach to Allegations of Awards Infra Petita - BLC and Ors v. BLB and Anor [2014] SGCA 40

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In further nod to the non-interventionist and pro-arbitration stance of the Singapore courts, the Singapore Court of Appeal in *BLC and ors v. BLB and anor* [2014] SGCA 40 (*"the BLC decision"*) reversed the decision of the High Court to set aside part of an arbitration award (*"Award"*) on the ground of a breach of natural justice. The court also provided valuable guidance on Articles 33(3) and 34(4) of the UNCITRAL Model Law on International Commercial Arbitration (*"Model Law"*).

Background facts

The dispute arose out of an unsuccessful joint venture between the parties. The appellants commenced arbitration against the respondents alleging that they had breached several agreements, in particular clause 4.1 of a License Agreement by manufacturing goods which failed to meet the applicable standards, and claimed rectification costs. The respondents in turn counterclaimed for various amounts, including monies allegedly owing for goods delivered to the appellants (*"Counterclaim"*). In his Award, the arbitrator found in favour of some of the appellants' claims, but dismissed the Counterclaim in its entirety.

The respondents applied to set aside the entire award on three primary bases, in particular that the arbitrator failed to deal with the Counterclaim because he had extensively adopted the appellants' list of issues over the respondents' list, and had thereby breached the rules of natural justice contrary to s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) (*"the IAA"*).

The High Court accepted this argument. It found that the arbitrator had failed to appreciate that the Counterclaim was an independent and distinct claim (for payment over goods termed as Group B goods) instead of a relief premised on the outcome of the appellants' claims (over a separate category termed as Group A goods), and had therefore failed to properly consider the Counterclaim. According to the court, this was due to the arbitrator extensively adopting the appellant's list of issues over the respondents' list. The court concluded that the failure of the arbitrator to deal with a discrete head of counterclaim which, if considered could have made a material difference in the award, constituted a breach of natural justice. On this basis, the court remitted the issue of the respondents' Counterclaim to a new tribunal to be constituted.

Decision of the Court of Appeal

The High Court's decision was reversed on appeal, on the following grounds:

(i) having regard to the Award and the pleadings, the arbitrator did in fact address his mind to the Counterclaim, and had rendered a decision on the same;

(ii) it was clear from the pleadings, lists of issues and written submissions that the respondents' own case in the arbitration was that Counterclaim was directly linked to the outcome of the appellant's claim. Accordingly, when the arbitrator found that the respondents had supplied goods that did not conform to the required standard, he had determined the Counterclaim on the respondents' own case;

(iii) even if it were true that the arbitrator had erred in failing to deal with the Counterclaim as an independent and distinct claim, such error went merely to the substantive merits of the arbitrator's decision, and did not amount to a breach of natural justice justifying the intervention of the court.

The Court also went on to consider whether parties ought to have requested, pursuant to Article 33(3) of the Model Law, that the arbitrator make an additional award on claims presented in proceedings but omitted from the Award before applying to court under Article 34. It held that whilst the language of Article 33(3) (and commentary from drafters of the Model Law) suggests that the provision is not mandatory, it would be consistent with the principle of minimal curial intervention to require that parties first seek relief from the tribunal before resorting to court proceedings. The court therefore suggested that a party who invokes Article 34 without first seeking recourse from the tribunal will bear the risk that the court would not exercise its discretion to set aside or remit any part of the award under Article 34(4). The reasons for failing to invoke Article 33(3) might also affect how the Court will approach an application to set aside an award.

Finally, the Court of Appeal disagreed with the decision to remit the Award to a newly constituted tribunal. It held that the only explicable basis for remission was Article 34(4) of the Model Law, which requires that the award be remitted to the original tribunal that had heard the matter.

Discussion

The Court of Appeal's decision is notable in several respects.

Implicit in the Court of Appeal's decision is the acceptance that a failure by the arbitrator to consider a specific claim or issue may constitute a breach of natural justice under section 24(b) of the IAA. Nevertheless, as enunciated by the High Court (at [91]), the claim in question must be one that '*could have reasonably made a difference to the final result*' such that the applicant can be said to have suffered actual prejudice.

The decision also provides valuable guidance on how a court will approach the question of whether a tribunal had in fact failed to deal with an essential issue:

(i) as a starting point, the court will be wary of attempts by parties to recharacterise their respective cases in the arbitration for the purposes of challenging an award on the basis of an alleged breach of natural justice;

(ii) accordingly, the court will scrutinize how parties had approached their case in the arbitration, in particular the respective issues and arguments that they had put before the tribunal. In doing so, the court will not confine itself to parties' list of issues or the characterization of the issues set out in the award, but will have regard to all the relevant documents in the proceedings, including the pleadings, and written submissions put forth by each party;

(iii) the court will then review the award with reference to the parties' respective cases. In doing so, and consistent with the non-interventionist approach adopted by the Singapore courts, the court will apply a '*generous approach*'. This means that the court will adopt a reasonable and commercial reading of the award as a whole, instead of analysing isolated portions for errors. In the BLC Decision, the court declined to rely on a literal reading of certain paragraphs of the award that suggested that the decision to disallow the Counterclaim was independent from the arbitrators' finding on whether defective goods were supplied. Instead, it determined, based on a reading of the entire award, that the arbitrator had decided the Counterclaim based on the respondents' own case; and

(iv) where the analysis discloses errors (even serious errors) of law and/or fact by the tribunal, but no meaningful breach of natural justice, the court will not (and cannot) interfere with the award.

The threshold is therefore a high one to meet, and rightly so. By going beyond the face of the arbitral award to examine (in some detail) how parties' respective cases were run in the arbitration, the court ensures that it is properly positioned to decide if the tribunal had in fact omitted to deal with an essential issue. The BLC Decision therefore illustrates and underlines the commitment of the Singapore courts to the principle of minimal intervention in practice, and provides further assurance to the business community that agreements by parties to have their disputes fully and finally determined by arbitration will be upheld, save where absolutely justified.

The court's guidance on the operation of Article 33(3) of the Model Law is also welcome, and strikes a commendable balance between the non-mandatory language of Article 33 on the one hand, and the principle of minimal curial intervention on the other. The indication that the reasons for failing to first invoke Article 33(3) may impact upon the outcome of a setting aside application provides a powerful incentive for parties to first seek assistance from the tribunal before resorting to the courts, and reinforces the primacy of the arbitral process.

It is submitted that the courts can go even further to discourage unmeritorious challenges to arbitration awards. One option is the use of costs orders against the unsuccessful party. In *Pacific China Holdings Ltd (In Liquidation) v. Grand Pacific Holdings Ltd* [2012] HKCA 332, the Hong Kong Court of Appeal affirmed the general principle that the respondent to a failed setting aside application was entitled to costs on an indemnity basis from the applicant. In particular, the court agreed that ordering costs on a standard basis in such situations would in effect be '*to subsidise the losing party's abortive attempt to frustrate enforcement of a valid award*'. Whilst the Singapore courts have thus far not adopted this as a general position for unsuccessful challenges, it is submitted that the courts should be willing to order costs on an indemnity basis where parties could have but did not first invoke Article 33, and subsequently failed to succeed in a setting aside application. Along with the guidance on Article 33(3), the prospect of a hefty costs order would further cement the commitment of the Singapore courts to minimal curial interference, and discourage resort to judicial intervention save in the most egregious circumstances.