Challenging Arbitral Awards in Singapore

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The Singapore courts have a well-earned reputation for supporting arbitration proceedings and favouring minimal curial intervention. That reputation has been enhanced by a number of recent decisions in which the courts have either granted stays of court actions pending the resolution of arbitration proceedings or rejected applications for arbitral awards to be set aside, including two recent cases, *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] SGHC 186 and *BLC and others v BLB and another* [2014] SGCA 40. By contrast, the recent decision of the Singapore High Court in *AKM v AKN and another and other matters* [2014] SGHC 148 provides a rare example of the courts granting an application for an award to be set aside. This article reviews the courts' approach to applications to set aside arbitral awards as taken in those cases and considers what a successful applicant is required to show.

Legislation

International arbitration awards made in Singapore are final and binding on the parties, and not subject to a right of appeal, pursuant to section 19B of Singapore's International Arbitration Act (the "IAA"). Applications for arbitration awards to be set aside can be granted if one of the limited grounds in Article 34(2) of the UNCITRAL Model Law (which is annexed to, and forms part of, the IAA) are met, the most relevant of which are that *"the party making the application was … unable to present his case"* (Article 34(2)(a)(ii)) and 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…"* (Article 34(2)(a)(iii)).

The Singapore courts are further empowered to set aside an arbitral award by section 24 of the IAA, which provides that an award may be set aside if *"a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced"*.

AKM v AKN

In *AKM v AKN*, the court allowed the application for the award be set aside, accepting the applicant's arguments that the tribunal had failed to engage with the claimant's submissions on certain issues and that the tribunal had exceeded its jurisdiction by (i) deciding a further issue in a way which had not been pleaded by either party, and (ii) awarding damages on a loss of opportunity measure (a form of relief which had not been claimed).

In reaching its conclusion, the court conducted a detailed review of the award, the submissions and evidence filed in the arbitration and the hearing transcripts. The court agreed with the applicant that, on the facts of the case, the tribunal had not engaged with various of its submissions and evidence in reaching its award. The court refused to accept the tribunal's general statement that it had

considered the parties' submissions and evidence as proof that it had in fact done so and simply preferred one side's submissions. Instead, the court found that on one key issue *"the line of reasoning adopted by the tribunal does not suggest that it had even considered the [claimant's] submissions."* The court agreed that this demonstrated that the applicant had been denied its right to be heard, contrary to the principles of natural justice, and held that the award should be set aside under section 24 of the IAA.

The court found that the award could also be set aside because the tribunal had exceeded its jurisdiction by departing from the parties' pleaded submissions in determining a further issue in dispute and that in doing so it had deciding an issue that was not in the reference to arbitration, contrary to Article 34(2)(a)(iii) of the Model Law. The court also agreed that the tribunal had exceeded its jurisdiction by awarding damages on a loss of opportunity measure. The court found that in its award the tribunal had expressly re-characterised the claim, acknowledging that it was made as a claim for loss of profits but stating that in its view it was better considered a claim for the loss of an opportunity. This was in spite of the fact that it had not heard, or invited the parties to provide, submissions on the claim being decided on a loss of opportunity basis. The court therefore held that the tribunal had again decided an issue that was not within the scope of the reference to arbitration, in breach of Article 34(2)(a)(iii) of the Model Law.

BLB v BLC & TMM Division Maritima

On its face, the level of scrutiny to which the court in *AKM v AKN* subjected the tribunal's award is surprising. It appears at odds with the Singapore courts' reputation for minimal curial intervention and statements made by the courts in the recent decisions *TMM Division Maritima* and *BLB v BLC*. In those decisions the court emphasised that its powers to set aside awards *"must and should only be exercised charily"* (*TMM Division Maritima*), warned against *"over-jealous scrutiny"* of arbitral awards (noting the inevitable tactical delaying tactics this could encourage), stressed that *"an award should be read generously"* (in line with previously settled case law) and that the courts should not *"approach an award with a meticulous legal eye endeavouring to pick holes, inconsistences and faults in awards."*

These statements can give the impression that the courts may be too "hands off" in their supervision of arbitration. However, in *TMM Division Maritima* and *BLB v BLC* the court concluded that the applicants' real issue was with the tribunals' findings of fact and law, which, the court stressed are final and binding on the parties and cannot not give rise to a right to set aside an award. The court further stressed that losing parties must be prevented from having a "second bite at the cherry" by re-characterising and re-pleading the merits of their cases before the courts. In contrast, the issues on which the court allowed the application to set aside the arbitration award in *AKM* related to the tribunal's conduct of proceedings.

Comment

Taken together, these decisions demonstrate the courts' continuing efforts to preserve the balance between upholding the finality of the arbitration process and safeguarding its integrity. The rigorous approach taken by the court in *AKM v AKN* sends a clear message to arbitrators that they must actively engage with parties' submissions and expressly deal with them, and all relevant evidence, in their awards (and not just in their internal deliberations). This requirement for considered and detailed awards will ensure that cases are properly decided and will be welcomed by arbitration users given the lack of a right of appeal in Singapore seated arbitrations, especially losing parties who are entitled to know why their submissions and evidence were not accepted by their tribunals. The decision will also give practitioners confidence that the Singapore courts' principle of minimal curial intervention, so often referred to when declining applications to set aside awards, does not come at the expense of

proper supervision of the arbitration process and that the courts will intervene if an applicant can show that an arbitration has not been conducted properly.