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The Singapore Approach to Scrutiny of Arbitral Awards

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International arbitration must of necessity rely on the courts to uphold and enforce arbitral awards and to support the arbitral process. In words of Professor Jan Paulsson, *"the great paradox of arbitration is that it seeks the cooperation of the very public authorities from which it wants to free itself."* (Jan Paulsson, *Arbitration in Three Dimensions*, LSE Legal Studies Working Paper No. 2/2010 (January 13, 2010)) The courts, not the arbitrators, have to give effect to the arbitral award. Hence, one of the major issues in the law of arbitration continues to be the tension between the courts and the arbitral process: while judicial support is vital to the arbitral process, excessive intervention may diminish the party autonomy and efficient resolution of disputes through arbitration.

The Singapore courts recognise that a harmonious relationship between courts and arbitration is crucial for the parties to resolve their disputes efficiently, fairly, and according to their chosen method of dispute resolution. Most commentaries dealing with Singapore cases highlight the pro-arbitration stance of the Singapore courts. No doubt, the Singapore courts have adopted an *"unequivocal judicial policy of facilitating and promoting arbitration"* (*Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28]) which is based on the principle of minimum curial intervention. The courts have consistently held that parties have a *"very limited right to recourse to courts"* against arbitral awards on the basis of statutory grounds available under Article 34 of the Model Law and Section 24 of International Arbitration Act (Cap 143A) (See *BLC v BLB* [2014] 4 SLR 79 at [51]-[52]; Section 24 of the International Arbitration Act (Cap 143A) provides that the court *"may set aside the award of the arbitral tribunal if – (a) the making of the award was induced or affected by fraud or corruption; or a breach of rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced."*).

At the same time, the statutory grounds for setting aside the arbitral award aim to ensure that the courts protect the legitimacy, fairness, and integrity of the arbitral process. While Singapore courts give due deference to the arbitral process, they are cognizant of their role, albeit limited, to preserve the legitimacy and integrity of the arbitral process. In this regard, the Singapore courts appear to adopt a more critical view of the arbitration awards particularly in cases where grounds for setting aside or refusing the enforcement of the arbitral awards are apparent on the face of the arbitral awards.

In a number of recent cases, the Singapore courts have exercised the discretion to set aside arbitral awards where the arbitral tribunal acted in breach of the rules of natural justice. In *L W*

Infrastructure v Lim Chin San [2012] SGCA 57, the plaintiff applied to the court to set aside an additional award for grant of pre-award interest on the ground that the arbitrator breached the rules of natural justice. The Court of Appeal found that the arbitral tribunal rendered the award without affording the plaintiff an opportunity to be heard on its submissions regarding the jurisdiction of the arbitral tribunal to make such an award. The Court further held that the plaintiff suffered actual prejudice *"because the arguments the Plaintiff may have made on some or perhaps even all of these points could reasonably have affected the outcome of the Arbitrator's decision."* (*L W Infrastructure v Lim Chin San* [2012] SGCA 57 at [91]) On this basis, the Court decided to set aside the additional award.

In another case dealing with the rules of natural justice, *AKM v AKN* [2014] SGHC 148, the Singapore High Court decided to set aside an arbitral award on the basis, amongst others, that the arbitral tribunal failed to engage with the parties' submissions and *"a general statement by a tribunal that it had considered the [party's] submissions could not in itself resolve the issue of whether the tribunal actually did so"*. (*AKM v AKN* [2014] SGHC 148 at [100]) The Court further found that arbitral tribunal re-characterized the defendant's claims during its oral closing submissions, which deprived the parties of the opportunity to adduce evidence and make submissions on the revised claim. The Court, therefore, allowed the application to set aside the arbitral award.

Addressing the grounds for refusing enforcement under the International Arbitration Act (Cap 143A), in *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, the Court of Appeal refused to enforce arbitral awards rendered in Singapore in light of the finding that arbitral tribunal had improperly exercised its powers under the SIAC Rules to join third parties in the arbitration. As these third parties were not party to the arbitration agreement, the Court found that the awards *"rendered in their favor therefore suffer from a deficit in jurisdiction"* and were refused enforcement.(*PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57 at [230])

The cases above do not necessarily deviate from the general approach of the Singapore courts to refrain from *"a hypercritical or excessively syntactical analysis of what the arbitrator has written"*.(See *BLC v BLB* [2014] 4 SLR 79 at [86]) However, the cases above also demonstrate that the courts may in certain cases review the arbitral awards in necessary detail particularly in cases where the arbitral award is deficient on its face.(See *TMM Division Martima v Pacific Richfield Marine* [2014] SGHC 186 at [125], *"Any real and substantial cause for concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions."*) In some cases, such as *AKM v AKN* [2014] SGHC 148, the courts adopted a rigorous approach to review the parties' pleadings, evidence, submissions, and transcripts of the hearing to determine whether the tribunal breached the rules of natural justice. Therefore, the standard of review that the Singapore courts may adopt in scrutinizing an arbitral award may involve equilibrium between deference to the arbitral award and a rigorous analysis of whether any grounds to challenge the arbitral award are satisfied.

The approach of the Singapore courts, therefore, is hinged on the delicate balance between party autonomy and efficiency on one hand, which requires limited recourse against arbitral award, and legitimacy and integrity of the arbitral process, which require rigorous scrutiny of arbitral awards within the framework of minimum curial intervention. Justice Andrew Phang in his recent speech at the China-ASEAN Justice Forum 2014 described this view as follows:

> "A pro-arbitration policy is therefore one that recognises the interface between national courts and arbitral tribunals as one of co-existence and collaboration and which finds the right equilibrium between furthering the efficacy and legitimacy of arbitration on the one hand and respect for the parties' autonomy on the other. This is well illustrated by the ostensible reversal of the minimal intervention approach when the courts are called upon to play a supporting role." (Justice Andrew Phang, *Alternative Dispute Resolution and Regional Prosperity: A View from Singapore*, China-ASEAN Justice Forum 2014)

The Singapore approach, therefore, is not pro-arbitration in the sense that the courts are willing to uphold the arbitration awards in all circumstances. On the other hand, the Singapore approach is driven not only by the deference to the dispute resolution process chosen by the parties, but also by ensuring that the parties have the minimum safeguards available under the Article 34 of the Model Law and Section 24 of International Arbitration Act (Cap 143A).

The Singapore courts recognise that the exercise of judicial power to set aside or refuse to enforce an arbitral award is essential for facilitation and promotion of international arbitration. The relationship between the courts and arbitral tribunals does not necessarily need to be cast in a negative light. As Lord Mustill thoughtfully observe, *"in recent years wiser counsels have prevailed, and it has, I believe, generally come to be recognised on both sides of the procedural divide that the courts must be partners, not superiors or antagonist, in a process which is vital to commerce at home or abroad."* (Foreword to OP Malhotra SC, *The Law and Practice of Arbitration and Conciliation* (New Delhi: Lexis Nexis, 2002), quoted by Professor A R Williams, *Defining the Role of the Courts in Modern International Commercial Arbitration*, Herbert Smith Freehills – SMU Asian Arbitration Lecture, Singapore (2012)) The policy in Singapore appears to be that of "partners, not superiors or antagonist", which would ultimately be conducive for strengthening the confidence of the parties in the international arbitration as an efficient, effective, and fair dispute resolution mechanism.

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