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AKN v ALC: Singapore Court of Appeal Clarifies Approach to Infra and Ultra Petita Challenges to Awards

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In *AKN v ALC* [2015] SGCA 18, the Singapore Court of Appeal ("SGCA") partially allowed a set of three appeals against a High Court decision to set aside a SIAC award. The result of this decision was to effectively allow the setting-aside, but under a more constrained reading of the grounds for challenge under the International Arbitration Act ("the IAA") and Model Law, with the SGCA reversing three of the five grounds the High Court had relied upon for the first instance set aside.

In a keenly reasoned judgment justifying its rare decision to set aside an arbitral award, Singapore's apex court affirmed the role of curial courts in safeguarding the adherence by arbitrators to principles of natural justice and the contractual limits to their powers, while underscoring that any grounds for challenge to awards would be narrowly circumscribed. This decision sets out clear parameters for practitioners, tribunals and courts in relation to future set-aside applications – particularly in relation to *infra petita* and *ultra petita* challenges in complex, multi-party arbitrations.

Background: the Arbitration Proceedings and Award

The arbitration arose out of the liquidation of a company in Moria ("the Corporation") (Both the High Court and SGCA judgments redact the names of parties and places in dispute, using fictitious *Lord of the Rings* references instead. These names have, however, been reported by the Global Arbitration Review.). The liquidator devised an arrangement to sell some of the Corporation's assets ("the Plant Assets") to two purchasers. At the time of the sale, the Corporation was heavily indebted to several secured creditors, as well as to the Morian city of Erebor in respect of unpaid taxes. Two agreements were entered into to effect this – an asset purchase agreement ("the APA") and an omnibus agreement ("the OMNA").

Under s. 2.1 of the APA, the liquidator, the secured creditors, and the Corporation's shareholders agreed to convey the Plant Assets to the purchasers "free and clear of all Liens of any kind." In exchange, the purchasers agreed to issue two notes ("the Notes") for the benefit of the secured creditors, the terms of which were set out in the OMNA. The APA contained an arbitration clause contemplating SIAC arbitration in Singapore, while the OMNA contained a non-exclusive jurisdiction clause that pointed to the Morian courts.

Under the APA, a condition precedent for the transaction closing was the approval by the Erebor authorities of a deferred payment scheme for the unpaid taxes. The liquidator procured a tax amnesty agreement ("the TAA") with the Erebor authorities, which deferred the unpaid taxes and allowed them to be settled in eight instalments over eight years. The TAA was liable to be revoked if any taxes were not paid on time.

A dispute arose shortly after the closing, when certain tax liabilities were not paid as instalments fell due, and the TAA was subsequently revoked. Upon revocation, the purchasers stopped payment under the Notes, and commenced arbitration in Singapore against the liquidator, the Corporation's shareholders and 24 secured creditors. The purchasers claimed for losses caused by the liquidator and secured creditors' breach of their obligation under the APA to transfer clean title, and for the secured creditors' failure to settle certain "Lost Land Claims" brought by third parties against a portion of the Plant Assets.

The Tribunal found for the claimant purchasers, and awarded: (a) US$80 million in damages for the loss of an opportunity to earn profits as a result of the liquidator's and the secured creditors' failure to transfer clean title; (b) US$23.7 million as an indemnity in respect of the Lost Land Claims; and (c) a declaration that the purchasers were entitled to suspend performance of their payment obligations under the Notes.

By the time of the arbitral proceedings, some of the original secured creditors had sold their rights under the notes to third parties, including a number of investment funds. These funds were not named as respondents to the arbitration and joined the proceedings only belatedly – 8 days after the commencement of the merits hearing. In both the proceedings and the award, the Tribunal treated the funds interchangeably with, and as part of, the secured creditors.

First Instance Decision

The liquidator, 11 of the secured creditors and the funds then applied to the High Court to set aside the award. Collectively they raised a total seven grounds for challenging the award –framed either as a breach of natural justice pursuant to s. 24(b) of the IAA read with Art. 34(2)(a)(ii) of the Model Law, or excess of jurisdiction pursuant to Art. 34(2)(a)(iii) of the Model Law. In particular, they argued that the Tribunal:

i. failed to consider the liquidator's arguments, evidence and submissions on whether ss. 2.1 and 7.1 of the APA was qualified by the TAA;
ii. failed to consider the liquidator's and the secured creditor's arguments, evidence and submissions on the issue of whether the purchasers were responsible for the revocation of the TAA;
iii. in awarding damages for a loss of opportunity to earn profits, exceeded its jurisdiction by dealing with a matter that had not been submitted to it;
iv. in awarding damages for a loss of opportunity to earn profits, failed to give the liquidator and secured creditors an opportunity to address the Tribunal on the issue;
v. failed to consider the secured creditors' arguments, evidence and submissions in relation to the Lost Land Claim;
vi. exceeded its jurisdiction by granting relief in respect of the OMNA and the Notes; and
vii. exceeded its jurisdiction or acted in breach of natural justice by holding the funds liable along with the other secured creditors for breaches of the APA.

The High Court set aside the award, finding that each of the first five grounds was satisfied and would provide an independent basis for setting aside the whole award. The High Court also held that the sixth ground was satisfied and that the seventh ground was not made out, i.e. the Tribunal had neither exceeded its jurisdiction nor acted improperly in relation to the funds – but these conclusions were immaterial in light of its other findings.

Decision of the Court of Appeal

On appeal, the SGCA reversed the High Court's decision on four of the seven grounds. Although the judgment affirmed the setting-aside of the award on the fourth, fifth and seventh grounds, it also severely cautioned the High Court for going too far in scrutinizing faults in the award and impermissibly engaging with the merits of the underlying dispute, and restricted the effect of any successful challenge only to affected portions of the award.

Regarding the first ground, the SGCA disagreed with the High Court's view that the Tribunal was "rejecting an argument that was never made to it" and "ignoring the arguments that were made to it" by mischaracterizing the liquidator's primary argument (that the TAA had *qualified* its obligation to deliver clean title) and adopting a secondary version of that argument (that the the TAA *postponed* the obligation) instead. The SGCA found that, in its view, there was no breach of natural justice because the Tribunal did engage the liquidator's primary argument, and in fact rejected it on the evidence – it might be said that this rejection was wrong, or even based on a misunderstanding, but there could be no inference that the Tribunal had failed to apply its mind at all to the argument.

As for the second ground, the SGCA accepted the High Court's view that the Tribunal had gotten into a muddle on the issue of responsibility for revocation – attributing the argument made by the secured creditors to the liquidator and then discrediting the argument on the basis that it had been advanced by the wrong party – but found that this was not a sufficient basis to set aside the award as the arbitrators had applied their minds to the issue and arguments, however erroneously. The SGCA also held that any breach of natural justice would have in any event been immaterial, as the Tribunal had treated the issue of responsibility for revocation as irrelevant to the question of breach.

The third and fourth grounds concern the Tribunal's re-characterization of the purchasers' claim from one for loss of profits to one for a loss of an *opportunity* to earn profits. The parties had proceeded on the former claim throughout the arbitration, and the latter characterization had emerged only on the final day of a 20-day hearing. The SGCA disagreed with the High Court that this amounted to an excess of jurisdiction, and held that the loss of chance claim was subsumed within the purchasers' claim for generic damages.

But the SGCA agreed with the High Court that, because the point was raised *sua sponte* by the Tribunal only at the eleventh hour, the parties were denied the opportunity to address the Tribunal on a material issue. The Tribunal reached its conclusions on the quantum of the chance lost (55%) without submissions having been sought or made, and the secured creditors did not have the opportunity to adduce factual or expert evidence on the issue. This was held to be a breach of natural justice, although the SGCA qualified that only the affected portions of the award – i.e. relating to the "loss of opportunity" claim – would be set aside.

The SGCA also agreed with the High Court that the Tribunal had failed to consider the secured

creditors' arguments in relation to the Lost Land Claims (that the time for performance had not yet expired and they might still fulfil their obligation to deliver clean title), and that this was a breach of natural justice that caused material prejudice. While reiterating that the threshold of proof for such challenges was very high – any inferences had to be "clear and virtually inescapable – the SGCA held that this was met on the facts because the Tribunal had mistakenly thought the point had been conceded by counsel, and thus failed to apply its mind at all to the merits of the secured creditor's argument. In contrast to the High Court, however, the SGCA annulled only the part of the award on the Lost Land Claims.

The sixth and seventh grounds were jurisdictional challenges concerning the scope of and parties to the arbitration agreement in the APA. The SGCA agreed with the High Court that the Tribunal did not have jurisdiction over disputes relating to payment obligations under the Notes, as these fell within s. 10.3 of the APA, which excludes arbitration and invokes the dispute resolution mechanism in the OMNA. As for the funds, the SGCA disagreed with the High Court and found that the funds had merely vested a limited jurisdiction in the Tribunal to make findings of fact in relation to the payment obligations under the Notes, as they had purchased rights under those Notes – but did not vest jurisdiction in the Tribunal to determine whether they had assumed obligations under the APA to the purchasers qua secured creditors, with liabilities in excess of US$100 million.

Commentary

While reaching a substantially unchanged outcome, the SGCA's reversal of the High Court's grounds of decision makes clear the high threshold that needs to be met by a successful challenge on *infra petita* or *ultra petita* grounds under Singapore law. The judgment also illustrates the difficult task faced by curial courts in relation to such challenges, which requires judges to conduct careful scrutiny of the parties' arguments, the hearing transcripts and the awards – but without allowing this to descend into a "disguised appeal" on the merits.

Even though there is no provision under the Model Law or the IAA for dealing expressly with annulment on *infra petita* grounds – unlike, for example, s. 68(2)(d) of the English Arbitration Act – the Singapore courts have analyzed and will address the failure to consider material issues or claims in the parties' submissions as a potential breach of natural justice that would justify a set-aside (s. 24(b) of the IAA and Art. 34(2)(a)(ii) of the Model Law). This is in contrast to the approach of some jurisdictions such as France, where an award cannot be set aside on *infra petita* grounds. (See Judgment of 27 May 2010, *M. Cohen v. Société Total Outre Mer SA*, Case No. 09/08191 (Paris Cour d'appel). See also G. Born, International Commercial Arbitration, 2nd ed., 2014, at p. 3294.)

The better approach is the one taken by the SGCA in *AKN v ALC*, which is similar to the Swiss approach and provides that awards may be subject to annulment when tribunals have decided *infra petita* and failed to consider a material issue or argument, thereby causing prejudice – although there is a presumption rebuttable only by incontrovertibly clear evidence that the arbitrators have addressed all the issues and claims submitted to them. (See G. Born, International Commercial Arbitration, 2nd ed., 2014, at p. 3294; Judgment of 10 December 2012, DFT_4A_635/2012 (Swiss Federal Tribunal).) This very high standard was ultimately met in *AKN v ALC* because the Tribunal had closed its mind to the issue entirely, on the mistaken assumption that the point was "gone" and already conceded by counsel.

AKN v ALC also clarifies the approach of the Singapore courts to *ultra petita* challenges. The judgment makes clear that when a tribunal decides on a different legal basis that none of the parties had relied on in submissions, challenges based on excess of jurisdiction or authority will be hard to sustain – unless the tribunal awards relief or decides an issue that the parties did not seek in a manner completely unrelated to the other issues or relief sought. Otherwise, Singapore courts will generally accord substantial deference to the arbitrators in terms of their powers to grant relief and the scope of the reference. (See also *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98.)

In such scenarios, the real issue will be whether the parties have had a reasonable opportunity to address or respond to the new point or basis for decision, and whether that point is so material that the denial of such opportunity caused prejudice. The arbitrators are entitled to form different characterizations of legal or factual issues; but, as *AKN v ALC* shows, to the extent this raises new points not previously addressed in submissions, witness statements or expert reports – particularly in relation to the quantum and basis for calculating of damages – the parties must be given a reasonable opportunity to respond.

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