Kluwer Arbitration Blog

Challenging Arbitral Awards before the Singapore Courts for a Tribunal's Failure to Give Reasons (Part 1 of 2)

Jordan Tan, Andrew Foo (Clifford Chance Asia) · Monday, March 12th, 2018

At the end of a lengthy and complex arbitration, the tribunal issues an award that summarises the evidence and submissions of both parties, and concludes with a single paragraph which states, "For the reasons given by the Claimant, which are accepted by this Tribunal, the claim is allowed in full." Can an award of this nature be set-aside in Singapore for lack of reasons? In the first of a two-part series, we examine the arbitrator's duty to give reasons.

Introduction

Under Singapore legislation, an arbitral award may be set aside if "the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place" (under Article 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") for awards emanating from international arbitration; section 48(1)(a)(v) of the Singapore Arbitration Act, concerning awards emanating from domestic arbitration, is similar).

The foregoing raises a number of issues:

1. What is the content of an arbitrator's duty to give reasons?

2. In what circumstances is an arbitrator held to a "judicial standard" in discharging his or her duty to give reasons?

3. Is there a difference in standard if an arbitrator is an expert in the subject-matter, as compared with the situation where the arbitrator is not an expert?

***

Content of an Arbitrator's Duty to Give Reasons – a Judicial Standard?

One of the duties of an arbitral tribunal is to give reasons for its decision (Article 31(2) of the Model Law).

However, while curial intervention may be warranted if the tribunal's reasons and explanations lack sufficient detail, the level of detail required is a question of degree (see *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM*") at [99]).

In *TMM*, Justice Chan Seng Onn considered this question and noted that in this regard, the standards applicable to judges are useful indicia for arbitrators, given that arbitral tribunals are subject to the same ideals of due process and justice as courts (see *TMM* at [102]–[103]).

The duty to give reasons entails the duty to give sufficient reasons that adequately engage with the circumstances of each case (see *Thong Ah Fat v Public Prosecutor* [2012] 1 SLR 676 ("*Thong Ah Fat*") at [30], [33]).

The seminal case of *Thong Ah Fat*, which sets out the scope and content of the court's duty to give reasons, was recognised as an instructive parallel to arbitrators (see *TMM* at [102]).

Thong Ah Fat concerned a criminal appeal against the decision of the trial judge convicting the appellant and sentencing him to the mandatory death penalty for a drug offence.

In that case, the Singapore Court of Appeal noted that it was an elementary principle

of fairness that parties are not only given a fair opportunity to be heard, but also apprised of how and why a judge has reached his decision (see *Thong Ah Fat* at [14]–[15]).

Indeed, the spirit behind the court's duty to provide reasons is to enable the parties to be apprised of why and how a decision turned out the way it did (see *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2015] SGCA 41 at [53]).

The Court of Appeal in *Thong Ah Fat* articulated the following principles:

1. There should be a summary of all key relevant evidence, although not all detailed evidence need be referred to (see *Thong Ah Fat* at [34]).

2. The parties' opposing stance and the judge's findings of fact on the material issues should be set out; however, the judge does not have to explicitly rule on every factual issue (see *Thong Ah Fat* at [35]–[36]).

3. The decision should demonstrate an examination of the relevant evidence and the facts found, with a view to explaining the final outcome on each material issue (see *Thong Ah Fat* at [36]).

4. The judge has to explicate how he arrived at a particular conclusion, and impressionistic statements are generally not helpful (see *Thong Ah Fat* at [37]).

In *TMM*, the Judge considered, but ultimately rejected, the argument that the arbitrator had failed to give reasons:

1. It would not have sufficed if the tribunal had merely stated that it had considered both parties' submissions and evidence (see *TMM* at [106]).

2. However, the tribunal in *TMM* had done more – it had summarised the relevant facts and evidence, crystallised the parties' cases, and set out its conclusions on the construction of the relevant documents and the merits of certain arguments

(see *TMM* at [106]).

3. Accordingly, the plaintiff evidently knew how and on what basis the tribunal had arrived at its decision, and also knew that the tribunal had preferred a particular version of events (see *TMM* at [106], [120]).

This issue has also been given careful analysis by the Australian courts. On the question of whether arbitrators should in all cases be held to the same standards as judges, i.e. obliged to give reasons of a "judicial standard", the Australian courts have opined as follows.

1. In *BHP Petroleum Pty Ltd v Oil Basins Ltd* [2006] VSC 402, the Supreme Court of Victoria held that an arbitrator must give reasons commensurate to those provided by judges in their determinations.

2. However, the High Court of Australia subsequently rejected the notion that a single judicial standard of reasoning should apply to all arbitrations (see *Westport Insurance Corporation v Gordian Runoff Ltd* [2011] HCA 37 at [168]-[169]).

It may therefore be appropriate to abandon a one-size-fits-all conception of the requisite standard of reasoning, and instead consider, in each case, what standard of reasoning is required to inform the parties of the bases on which the arbitral tribunal reached its decision on critical issues, taking into account:

1. Complexity of the dispute, e.g. whether there are multiple complicated issues of fact and law;

2. Legal qualification(s) (or lack thereof) of the arbitral tribunal;

3. Whether the parties have agreed that the tribunal may state its reasons in summary form (see e.g. Arbitration Rules of the Singapore International Arbitration Centre, 6th Edition, Rule 5.2(e) – expedited procedure, Rule 29.4 – early dismissal of claims and defences, Schedule 1, Article 8 – emergency arbitrator); and

4. Whether the arbitrator(s) are experts in the subject-matter of the dispute. We explain below the relevance of the tribunal's subject-matter expertise.

In summary, while the rules of natural justice dictate that parties should be apprised of how and why an arbitrator has reached his decision, **the ultimate question is whether the contents of the arbitral award, taken as a whole, inform the parties of the bases on which the arbitral tribunal reached its decision on the material or essential issues**.

This is consistent with the views of the New Zealand Courts, which have been discussed in two prior posts on this blog here and here.

***

Expertise of the Tribunal

An arbitral tribunal's duty to give reasons includes a duty to inform the parties of the bases on which it has decided key issues of *expert evidence*.

In particular, in arbitrations where the arbitral tribunal does not possess qualifications or experience in a particular area of expertise and the parties have adduced expert evidence on issues within that area of expertise, the arbitral tribunal is obliged to explain why it prefers the evidence of one expert over the other's, or indeed why it does not accept either expert's evidence.

The appointment of experts, even by the tribunal itself, does not negate this duty. This is because experts are appointed to *report* on specific issues, but not to *determine* them (s27 of the Arbitration Act, Article 26 of the Model Law, and the definitions of "Party-Appointed Expert" and "Tribunal-Appointed Expert" in the IBA Rules on the Taking of Evidence in International Arbitration (the "IBA Rules").

It is instead the tribunal that is expressly empowered to determine the relevance, materiality, and weight of evidence, including evidence given by experts (s23(3) of the Arbitration Act, Article 19(2) of the Model Law, and Article 9(1) of the IBA Rules).

Therefore, the following practices cannot, without more, discharge an arbitral tribunal's duty to give reasons where expert evidence is in issue:

1. Summarising expert reports, or fixating on isolated aspects of expert reports, and not dealing with other relevant aspects;

2. 'Splitting the difference' between experts (e.g. as to quantum to be awarded);

3. Where an expert's views are explicable, brushing aside those views on the basis that the expert's explanations are 'unclear' or 'difficult to follow'; and

4. Asserting without explanation that the tribunal's determination of a particular expert issue is 'prudent', 'reasonable', or 'fair'.

In summary, even if an expert issue pertains solely to a relatively small claim among numerous large claims (e.g. a $1,000 claim for variations in a $100 million construction dispute), **the tribunal's decision must demonstrate that it has grappled with the expert evidence put forward, and explain why it has decided as it has, e.g. why it is more persuaded by one expert than the other.**

***

Conclusion

Arbitrators should be conscious of, and conscientious to fulfil, their duty to render adequately reasoned awards: that is, awards that inform the parties of the bases on which the tribunal reached its decision on the material or essential issues.

Arbitrators should not regard the appointment of experts as exculpatory of the arbitrator's duty, and should go beyond mere regurgitation of evidence / submissions and glib statements of agreement and disagreement.

In the second part of this series, we shall examine the remedies parties may seek in cases where this duty has been breached.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Monday, March 12th, 2018 at 2:00 pm and is filed under Reasoned Awards, Set aside an arbitral award, Tribunal duties
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.