Kluwer Arbitration Blog

The Tension Between Principle and Policy: Calibrating the Right of Non-Participating Respondents to Challenge Awards

Nicholas Poon (Breakpoint LLC) · Tuesday, November 13th, 2018

Introduction

On 23 July 2018, this blog posted a commentary entitled "Choice of Remedies Doctrine – A Jack-In-The-Box?"

The commentary explored the Singapore High Court's decision in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78 ("***Rakna***"), and its implications. The commentary also revisited the Singapore Court of Appeal's decision in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 ("***Astro***") which upheld the "choice of remedies doctrine".

Revisiting the choice of remedies doctrine in *Rakna*

Simply put, the doctrine recognises that an award debtor has the right to elect between an active remedy in the form of attacking an award by applying to have it set aside, and a passive remedy in the form of resisting enforcement only when the award creditor brings enforcement proceedings. An award debtor's decision not to avail itself of an active remedy does not preclude it from resorting to the passive remedy later on. Suffice to say, *Astro* has generated controversy, with the legal position differing across jurisdictions.[1)]

Referring to an earlier piece which I had written and in which I had argued that the choice of remedies doctrine should not be viewed as "anti-arbitration", the commentary suggests that the conduct of a "" respondent who refuses to participate in the arbitration proceedings and/or take steps earlier to challenge the tribunal's jurisdiction, but subsequently objects to the tribunal's jurisdiction at the setting aside or enforcement stage may be "anti-arbitration". The commentary raises a number of insightful, credible arguments in support of the notion that such anti-arbitration conduct should be sanctioned, for instance, by precluding the recalcitrant respondent from raising its jurisdictional objections at the setting aside and even the enforcement stage.

There is no need to repeat here the salient facts and holding of *Rakna* which are amply set out in the commentary. As the commentary rightly points out, from the claimant's perspective, the conduct of the recalcitrant respondent leaves much to be desired. It is also true that there would be a substantial wastage of resources if the recalcitrant respondent is allowed to raise jurisdictional objection after the final award is rendered, and succeeds in doing so, at least from the claimant's and perhaps a neutral observer's perspective.

Going beyond the distracting labels of pro- and anti-arbitration

But important as it is to focus on the unfortunate ramifications of any successful challenge against an award, the ideal of justice is – and must be seen to be – party-blind. It would be wrong, even in an arbitration-friendly jurisdiction such as Singapore, for justice, manifested in the arbitral jurisprudence and policies, to be seen to be predisposed to claimants in an arbitration.

Accordingly, any analysis of the fairness of a policy cannot begin and end from only the perspective of only one party to the dispute. Indeed, intentionally favouring the claimant is not "pro-arbitration"; it is simply "pro-claimant". In the same vein, strong-arming the respondent to submit to arbitration by undermining its ability to mount legitimate challenges against an arbitral award is not "anti-arbitration"; it is "anti-respondent".

There is no merit in an efficient dispute resolution mechanism if it does not further the interest of justice. A respondent cannot fairly be described as being recalcitrant, when it has a legitimate jurisdictional objection. The jurisprudence in Singapore, conventionally seen as a "pro-arbitration" jurisdiction, is dotted with examples of awards being set aside or refused enforcement on jurisdictional grounds. *Astro* is but one example.

As persuasive as the argument is that jurisdictional objections should be resolved as early as practicable, there is equal force in the argument that a claimant who pursues arbitration in spite of an evident jurisdictional defect undertakes the risk that the resources invested into the process may come to naught. That is neither the fault of the system nor the respondent. Hence, instead of characterising a particular conduct, approach or policy as "anti-arbitration" or "pro-arbitration", which is merely a label that detracts from the underlying merits, in the words of Chief Justice Sundaresh Menon, it is "much more useful" to look at the reasoning of the Courts in enforcing, adopting and/or reject the conduct, approach or policy.[2)]

In *Rakna*, the respondent "stayed away from the arbitration, did not file a response, did not nominate an arbitrator, refused to pay any fees, did not file a statement of defence and then raised a jurisdictional challenge by way of a terse letter and absented itself from the preliminary meeting, refused to file any submissions in support of its stand and allowed the arbitration to proceed without participation" (see *Rakna* at [72]). In the High Court's judgment, the respondent's conduct was in blatant disregard of the policy behind Article 16(3) of the Model Law and amounted to an "abuse of process".

But, as the commentary correctly points out, on the authority of *Astro*, the very same "abusive conduct" would not have prevented the respondent from resisting enforcement of the award in reliance on the same jurisdictional objections.

The challenge of reconciling policy with principle

The abuse of process is understandable, from a policy perspective, if it is rationalised as arising from pursuing a similar (but not identical) active remedy in the form of setting aside proceedings despite failing to take advantage of an active remedy available at an earlier stage to challenge the tribunal's ruling on jurisdiction, i.e. Article 16(3) of the Model Law. However, the application of the abuse of process doctrine as a policy response meets stern resistance in the form of legal principle.

The *travaux*, in particular the Analytical Commentary (see *Rakna* at [68]), puts it beyond argument that **both** active (setting aside) and passive (resisting enforcement) remedies remain available to a party who did not participate in the arbitration. It is worth noting in this regard that the part of the *travaux* referred to by the High Court in *Rakna* in support of its conclusion predates the Analytical Commentary. Applying the *travaux* strictly, therefore, the respondent in *Rakna* was fully entitled to wait until the final award is issued and only thereafter apply to set aside the final award on the basis of its jurisdictional objections.

Whether the Court of Appeal will land on the same side as the High Court is anyone's guess. But this is unlikely to be one of those cases where the Court of Appeal has plainly no reason to disagree from the High Court. Quite apart from whether the intention in the *travaux* should be given effect to in construing Article 16(3) of the Model Law and/or section 10 of the International Arbitration Act ("**IAA**"), there is also the deeper, fundamental question whether it is right to burden a respondent who has a meritorious jurisdictional objection with taking positive steps to challenge a preliminary ruling on jurisdiction that has been issued within the time limited under the Model Law and section 10 of the IAA.

This question admits of no easy answer, but any answer must account for and recognise that placing this burden on the respondent has the potential effect of restricting the respondent's access and right to present its jurisdictional arguments to the Court of Appeal. This is because the High Court's decision in a challenge of a preliminary ruling on jurisdiction under section 10 of the IAA is not appealable to the Court of Appeal unless leave is granted by the High Court, unlike a decision in setting aside and resisting of enforcement proceedings which is appealable to the Court of Appeal as of right.

Restricting a party's right of appeal is not inherently wrong. But where the restriction hinges on the tribunal exercising its unfettered discretion in favour of deciding its jurisdiction in a preliminary ruling and not together with the merits in a final award, which invariably leaves the respondent's right of appeal at the mercy of the tribunal, the justification for endorsing the restriction will have to be exceptionally strong.

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References

↑1 See for e.g. Jonathan Hill, "*Enforcement of Awards under the New York Convention: Choice of Remedies and the Significance of Time Limits*" (25 June 2018) (link).

↑2 See Sundaresh Menon, "The Somewhat Uncommon Law of Commerce" (2014) 26 SAcLJ 23 at [59].

This entry was posted on Tuesday, November 13th, 2018 at 2:00 pm and is filed under Enforcement, Set aside an international arbitral award, Singapore Court of Appeal
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