Taking a Second Bite of the Cherry: When is it Appropriate to Remit an Award Instead of Setting it Aside in Singapore?

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Much ink has been spilt on the legal consequences of remitting an award back to an arbitral tribunal vis-à-vis setting it aside. The Singapore Court of Appeal in the seminal decision of AKN v. ALC [2015] SGCA 63 has settled that remission is not possible after an award has been set aside. Rather, remission is a curative alternative available in circumstances where setting aside of an award is preventable. These two remedies available under Article 34(4) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") are thus mutually exclusive.

Background of the Case

In its earlier decision in *AKN v ALC* [2015] 3 SLR 488, the Singapore Court of Appeal allowed appeals in part against a High Court decision to set aside an arbitral award. The crux of the dispute at the arbitration was whether or not the liquidator and secured creditors of an insolvent corporation had breached their obligation under an Asset Purchase Agreement to deliver certain assets free from encumbrances to the purchasers. The Tribunal found for the purchasers. However, the High Court set aside the award in its entirety on the grounds of breaches of natural justice and excess of jurisdiction. On appeal by the purchasers, the Singapore Court of Appeal held that only some parts of the award should be set aside. The Court also directed parties to file written submissions on costs and consequential orders. The decision being analysed arose from these subsequent proceedings.

The Court framed the following issues, *inter alia*, for adjudication: (1) Does the court have the power to remit matters to a new tribunal? (2) Can the court remit any matter, which is the subject of an award that has been set aside, to the same tribunal that made the award? (3) What are the various consequences of setting aside an arbitral award? While the issues were worded broadly, the Court confined its analysis to cases governed by the Singapore International Arbitration Act and the Model Law.

Decision of the Singapore Court of Appeal

On the first issue, the parties agreed that courts have no power to remit an award to a newly

constituted tribunal. The Court cited its decision in *BLC v BLB* [2014] 4 SLR 79, where it was observed that the clear language of Art 34(4) of the Model Law only envisions the possibility of remitting an award to the same tribunal which delivered it.

On the second issue, the Court held that remission operated as an alternative to setting aside. Thus, the question of remitting an award after it had been set aside could not arise in any case. Since a tribunal becomes *functus officio* after issuing a final award, a court may only direct it to review its award in accordance with Article 34(4), which requires a court to 'suspend setting aside proceedings for this purpose. Based on 'good sense' and an ordinary reading of Article 34(4), the Court held that it was not competent to remit an award after it had been set aside. Support for the proposition that remission was meant to be an alternative curative provision to prevent the setting aside of an award was also found in the *travaux préparatories* of the Model Law.

On the third issue, the Court considered the consequences of setting aside an award. It found that while an award ceases to have legal effect, it does not affect the continued validity and force of the arbitration agreement between the parties. A tribunal's mandate also ends with the making of an award, unless it is restored pursuant to an order remitting it back for further consideration of the tribunal.

Commentary

Previously, Singapore courts have employed remission both after setting aside an award (*see Kempinski Hotels SA v. PT Prima International Development* [2012] SGCA 35), and to refer matters to newly constituted tribunals (*see Front Row Investment Holdings v. Daimler South East Asia* [2010] SGHC 80). The decision in *AKN v ALC* is welcome, as it has resolved that the power to remit under Article 34(4) of the Model Law may only be invoked for reconsideration by the same tribunal before an award has been set aside.

However, the significant question of when it is appropriate to remit an award to the same tribunal instead of setting it aside has not been adequately addressed by both courts and the academic community in Singapore. For example, in *BLC v. BLB* [2014] SGCA 40, the Court of Appeal reversed the High Court decision remitting the matter to a new tribunal. Although the issue was not strictly before the Court, it went on to summarily hypothesize about an appropriate case for remission. Without laying down any definitive threshold, the Court weighed in two relevant factors to determine whether or not to remit an award: the pure oversight of the arbitrator in overlooking an issue, and his ability to determine it again. Thus, in an application for remission vis-à-vis setting aside in the future, courts will have little assistance from national precedents on the scope and substance of this remedy. While the *AKN* decision has provided clarity on some aspects, it remains to be seen how Singapore courts will carve out meaningful contours for determining the appropriateness of remission under Article 34(4) of the Model Law.