Kluwer Arbitration Blog

Does the Issuance of an Award Before the Conclusion of an Arbitrator Challenge for Delay Frustrate the Challenge? – Guidance from Singapore and Hong Kong

Kelvin Poon (Rajah & Tann Singapore LLP) · Monday, June 1st, 2015

and Alessa Pang, Rajah & Tann Singapore LLP

Arbitrator challenges for inordinate delay can be awkward. However, what happens if the arbitrator decides to render an award before the challenge is concluded? Does rendering the award resolve the matter?

Under Article 14(1) of the UNCITRAL Model Law ("**Model Law**"), an arbitrator's mandate may be terminated for his failure to act without undue delay in arbitration proceedings. If the arbitrator does not withdraw voluntarily, or if parties fail to agree on the termination, an aggrieved party may apply to the national court or other authority specified in Article 6 to decide on the termination of the mandate.

Unlike certain institutional rules (for e.g., Rule 12.2 of the SIAC Rules 2013 and Rule 9(6) of the ICSID Convention Rules of Procedure for Arbitration Proceedings), the Model Law does not provide for the suspension of arbitral proceedings while an arbitrator is being challenged for dilatory conduct. The Singapore High Court decision of *Mitsui Engineering and Shipbuilding Co Ltd v Easton Graham Rush* [2004] 2 SLR(R) 14 rightly points out that a supervising court has no power under the Model Law to restrain the arbitrator from continuing with arbitral proceedings. Thus, an arbitrator facing an Article 14 challenge can issue an award if he so wishes.

If the issuance of an award renders an arbitrator *functus officio*, is there any point for the Court to determine the Article 14(1) challenge application? Does this mean that arbitrators are in a position to frustrate an Article 14 challenge simply by issuing an award?

In the recent Singapore High Court decision of *PT Central Investindo v Franciscus Wongso and others and another matter* [2014] SGHC 190 ("***PT Central***"), the arbitrator rendered his final award after an Article 13 challenge was filed against him for alleged bias, but before the application was heard.

The High Court held that even if the arbitrator had become *functus officio*, there was still "*legal, procedural and practical utility*" in determining the challenge application as this determination would likely have an effect on any subsequent setting-aside application (*PT Central* at [45]). The High Court reached this conclusion partly on the basis that a removal order would confirm that the

arbitrator was biased and the successful applicant could rely on the Court's decision in any subsequent application to set aside the award under Articles 34(2)(a)(iv) and 34(2)(b)(ii) of the Model Law for breach of natural justice and violation of public policy respectively. This was an important consideration for the High Court as it was cognisant of the fact that the Model Law does not provide the Court with any consequential powers to set aside the award, and that the removal of an arbitrator, *per se*, is not a ground for setting aside an award under Article 34 of the Model Law and/or the Singapore International Arbitration Act.

If the reasoning in *PT Central* is applied in the case of an Article 14 challenge, the Court may well conclude that there is no '*legal, procedural and practical utility*' in determining the application. Whilst an Article 13(3) court order to remove an arbitrator for his lack of impartiality can be easily subsumed under the breach of natural justice ground for setting aside an award, the same cannot be said for an Article 14 order removing an arbitrator for his failure to act without undue delay. After all, it has been held that an arbitrator's delay in issuing an award is not a ground to set aside the award (see *Hong Huat Development Co (Pte) Ltd v Hiap Hong & Co Pte Ltd* [2000] 1 SLR(R) 510 at [57]; *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65 at [65]).

The Singapore courts have rebuffed attempts to masquerade delay as an Article 34 ground for setting aside. In the recent decision of *Coal & Oil Co LLC v GHCL Ltd* [2015] SGHC 65, the Singapore High Court rejected an applicant's attempt to set aside an award for violation of public policy due to the arbitrator's 19-month delay in issuing an award. The Court stated at [63] of its judgment that while delay in the release of an arbitral award may not necessarily be in the public interest, "*it cannot, in itself without more, constitute a violation of public policy*" (emphasis added). The applicant relied on the alternative argument that the arbitrator's delay had resulted in procedural irregularity amounting to a breach of natural justice, giving rise to grounds for setting aside the arbitrator's award. This too was rejected as the applicant had failed to identify which particular rule of natural justice had been infringed and the Court was unable to see how the rules of natural justice could have been breached in the circumstances. Further, given that dilatory arbitral proceedings would affect both parties, one would also not be able to draw an inference of bias against an arbitrator on the basis of delay.

In light of the above, is there no recourse for an aggrieved party if the arbitrator issues his award prior to the Court's determination of the Article 14 challenge? Not only would the aggrieved party's application be stymied, he would also be left with an award from an arbitrator which he wanted removed in the first place. The aggrieved party may well feel that the adverse award was written in *reaction* to his attempt to remove the arbitrator.

The mere fact that an Article 14 removal order might not be useful in a *subsequent* setting aside application does not necessarily deprive such an order of legal utility after the award has been issued. If the removal order is held to take effect from the date of the application, as opposed to the date of the order, then arguably any award made after the application date would be a nullity because the arbitrator would cease to have jurisdiction from that date.

The Hong Kong Court of Appeal has previously made such a "backdated" order. In *Kailay Engineering Co (HK) Ltd v Charles W Farrance* [1999] HKCA 565 ("***Kailay***"), an application was made under Section 15(3) of the Hong Kong Arbitration Ordinance (Cap 341) (replaced in 2011 with the Hong Kong Arbitration Ordinance (Cap 609)) to remove an arbitrator for his failure to issue an award on the basis that this amounted to a failure to use all reasonable dispatch in the conduct of the arbitral proceedings. It should be noted that Section 15(3) of the Hong Kong

Arbitration Ordinance (Cap 341) and Article 14(1) of the Model Law are substantively similar despite the differences in wording.

The arbitrator, however, published his award *prior* to the court's determination of the application. Counsel for the arbitrator argued that the court no longer had jurisdiction to remove the arbitrator because he was *functus officio*. This argument was rejected. The Hong Kong Court of Appeal held that the order removing the arbitrator should take effect from the *date on which the application was made*. This would prevent an arbitrator from unilaterally depriving the court of its power to remove him "*simply by making his award, willy-nilly, good or bad, properly considered or not properly considered, before the order is made.*" (*Kailay* at [5]).

This entry was posted on Monday, June 1st, 2015 at 12:01 am and is filed under Arbitrator Challenges, Hong Kong, Singapore, Uncategorized, UNCITRAL Model Law
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.