Kluwer Arbitration Blog

The Choice of Remedies Doctrine – a Jack-In-The-Box?

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Introduction

The case of *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Private) Limited* [2018] SGHC 78 ("***Rakna Arakshaka***") was a timely opportunity for the Singapore High Court ("***SGHC***") to address a lacuna with respect to whether an award debtor who chooses not to raise jurisdictional challenges early in the arbitral proceedings, is later entitled to raise jurisdictional objections as a ground to set aside a final award. The case of *Rakna Arakshaka* is also food for thought on whether the choice of remedies doctrine in the Model Law, that was advocated by the Singapore Court of Appeal ("***SGCA***") 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 ("***PT First Media***") and endorsed in an article by Nicholas Poon ("***Nicholas Poon's article***"), is satisfactory for the arbitration landscape in Singapore.

Brief background to *PT First Media* and *Rakna Arakshaka*

In *PT First Media*, Astro sought to enforce an award that it had obtained against Lippo but Lippo resisted enforcement of the award on the basis that the tribunal had joined some parties to the arbitration in excess of its jurisdiction. In response, Astro argued that Lippo cannot raise such jurisdictional objections at the enforcement stage because Lippo failed to raise any jurisdictional objections following the tribunal's preliminary ruling on its jurisdiction pursuant to Article 16(3) of the Model Law. The SGCA endorsed the choice of remedies doctrine and held that Lippo was not precluded from raising jurisdictional objections to resist enforcement of the award under Article 36 (a passive remedy), notwithstanding its failure to raise such jurisdictional objections at an earlier stage of the arbitration proceedings pursuant to Article 16(3) (an active remedy).

Weight was given to the fact that, although Lippo actively participated in the arbitration proceedings until the end, it expressly reserved its rights in relation to the tribunal's jurisdiction throughout the arbitration proceedings. The SGCA found that Lippo did not do anything that would amount to a waiver, or would estop Lippo from raising objections to the tribunal's jurisdiction.

In contrast, in *Rakna Arakshaka*, Rakna Arakshaka Lanka Ltd ("***RALL***") did not participate in most parts of the arbitration proceedings. RALL did not file a response, did not nominate an arbitrator, refused to pay any fees, did not file a statement of defence, raised a jurisdictional challenge by way of a terse letter, absented itself from the preliminary meeting, refused to file any supporting submissions and allowed the arbitration to proceed without participation. The SGHC

followed *obiter dicta* in *PT First Media* and held that the challenging party is precluded from raising jurisdictional objections in a setting aside application if it failed to raise it earlier under Article 16 as both are active remedies in arbitration.

The SGHC further opined that it would be an abuse of process to allow RALL, who raised a jurisdictional challenge but chose not to participate in the arbitration proceedings, to wait to challenge the tribunal's jurisdiction in a setting aside application in blatant disregard of Article 16(3) of the Model Law.

Food for thought

Where the tribunal rules that it has jurisdiction as a preliminary question, the party wishing to challenge the tribunal's jurisdiction has to raise any jurisdictional objections with the supervisory court within thirty days after having received notice of that preliminary ruling pursuant to Article 16(3) of the Model Law. If that party fails to do so, following *Rakna Arakshaka*, that party would be precluded from subsequently raising jurisdictional objections to set aside the arbitral award under Article 34 of the Model Law. However, that party would still be able to resist enforcement of the award under Article 36 of the Model Law, pursuant to *PT First Media*.

One would question if the difference between *Rakna Arakshaka* and *PT First Media* is artificial. If RALL had chosen to resist enforcement proceedings in Singapore, applying *PT First Media*, it would have been entitled to do so despite not having raised its jurisdictional objections at an earlier stage under Article 16. Yet, the SGHC held that RALL was not entitled to set aside on jurisdictional grounds where it had failed to raise jurisdictional objections under Article 16. This is in spite of the fact that the grounds for setting aside and resisting enforcement are almost exactly the same under the Model Law, save for the additional ground under Article 36(1)(a)(v) of the Model Law.

One possible way to get around the risk of a respondent resisting enforcement of an arbitral award on the ground of jurisdictional objections is to apply to the Singapore courts under Article 16 to confirm the ruling. Such a decision by the High Court will be non-appealable pursuant to Article 16(3). In this event, if an evasive respondent tries to resist enforcement of an arbitral award in Singapore, the issue of the tribunal's jurisdiction would be considered to have already been decided in the earlier High Court decision, which should be a sufficient reason to dismiss any resistance against enforcement proceedings on jurisdictional grounds. However, such a mechanism is limited in scope. Where enforcement proceedings are brought in jurisdictions other than Singapore, whether the Singapore Court decision would have effect in foreign jurisdictions would depend on those jurisdictions' laws on enforcement of foreign judgments. For instance, in India, a foreign judgment which has not been decided on the merits may not be enforced in India pursuant to Section 13 of the Code of Civil Procedure, 1908.

Another possible approach to overcome the risk of a party challenging enforcement of an arbitral award on the ground of jurisdictional objections is to request the tribunal to codify its jurisdictional ruling in an award, and thereafter enforce the same. However, such an approach is, with all due respect, flawed at least in Singapore, because a tribunal's ruling on jurisdiction is not an award that can be subsequently enforced: see *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and another* [2013] 1 SLR(R) 973. Thus, such an approach is unlikely to work in Singapore.

This then raises the further interesting question of whether the choice of remedies doctrine should be tempered by policy considerations of good faith and efficiency. The outcomes reached in both *PT First Media* and *Rakna Arakshaka* are no doubt correct since the conduct of the respondent in *PT First Media* was less reprehensible than the conduct of the respondent in *Rakna Arakshaka*. This still leaves open the debate of whether a respondent, whose conduct is truly recalcitrant, will be entitled to keep silent and resist enforcement of an award at a later stage. Since the Singapore courts have recognized the concept of abuse of process, perhaps an overriding policy consideration of preventing an abuse of process could also be recognized in arbitration proceedings, as was alluded to in *PT First Media* and *Rakna Arakshaka*. Such a policy consideration is even more important in arbitration, given that it is intended to serve as a cheaper form of alternative dispute resolution mechanism to the courts.

Finally, there is at least one commentary (see Nicholas Poon's article) that took the view that the "choice of remedies" doctrine is not anti-arbitration. It was reasoned that since the arbitration rules seek to protect award debtors from unjustified awards, a successful challenge to an award is not anti–arbitration because it is a principled application of the arbitration rules and therefore upholds the integrity of the arbitral process. Moreover, even if an award debtor succeeds in resisting enforcement in one jurisdiction, the award remains valid and may still be enforced in another jurisdiction.

However, the lack of certainty, where a recalcitrant respondent refuses to participate in the arbitration proceedings and later raises objections like a jack-in-a-box, may be anti-arbitration. Under the present legal framework, a claimant seeking certainty that it would be able to realize the fruits of its labour has to expend significant time, effort and costs in not just the arbitration, but also court proceedings to obtain curial blessing of the tribunal's jurisdictional ruling. Instead of getting its bargain of having the private dispute resolved by arbitration, a claimant may end up having to commence proceedings in multiple forums. While it may be extreme to suggest reconsidering the choice of remedies doctrine, it may be timely for the legislature to take a leaf from the position in England under Section 73(2) of the Arbitration Act 1996, which draws no distinction between the 'active remedy' of setting aside and the 'passive remedy' of resisting enforcement – Section 73(2) indiscriminately precludes a party who could have but did not object to the tribunal's ruling on its jurisdiction, from later raising objections to the tribunal's jurisdiction on a ground which was the subject of that ruling.

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