Kluwer Arbitration Blog

Why Bother Going Back to the Errant Tribunal When You Can Turn to the Court Instead? Or Should You?

Gentrita Bajrami · Monday, November 2nd, 2020

Readers of this blog are well familiar with the sharp criticism international arbitration faces on account of the quality of legal reasoning in arbitral awards. Traditionally, much of the prolific debate has revolved around the arbitrators' duty to give reasons. Recent cases (here and here), however, have sparked a discussion on the arbitrators' failure to address claims submitted by the parties; claims that although presented during the proceedings, are omitted from the award.

This blog post casts light on the remedies parties should (not) make use of when being handed an *infra petita* award (i.e. an award which fails to address the parties' case in its entirety).

Infra Petita Awards: The Fuss, the Law, the Practice

The scenario of an arbitral tribunal issuing an *infra petita* award is by far an undesirable one. Awards of such nature leave issues unresolved between the parties and frustrate their legitimate expectations towards the tribunal's adjudicative function. Unsurprisingly, therefore, it seems natural for the aggrieved party to lose confidence in the tribunal and accordingly attempt to challenge the award in front of a court.

Although it may sound paradoxical to some that parties would want to set aside the whole award merely because certain claims have been left out of it, practice shows that challenges on *infra petita* grounds are far from moderate. A purview of case law in Model Law jurisdictions suggests that parties are more prone to turn to courts with a setting aside application, than go back to the errant tribunal for an additional award. This is despite the ambiguous procedure for setting aside *infra petita* awards under the Model Law, compared to the rather straightforward application for an additional award.

Art. 34 of the Model Law, which holds the exhaustive list of grounds for setting aside, makes no explicit reference to *infra petita* awards. The only time the Model Law deals with awards of such nature is through Art. 33(3) which allows parties to request an additional award for claims presented during the proceedings, but omitted from the award. It appears, therefore, that this deliberate omission by the draftsmen is strongly suggestive that *infra petita* awards were never meant to be set aside. Rather, it was intended they be rectified by means of an additional award only. Indeed, this position gains further support when accounting for the fact that the Model Law was intended to mirror the New York Convention, and the Convention does not preclude enforcement on *infra petita* grounds. However, a closer reading of Art. 33(3) would negate this

conclusion. Seeing how the provision is not one of mandatory nature, to say that it is the sole remedy, would be rather implausible. By the same token, any argument claiming that a request for an additional award is a prerequisite to a setting aside application, would likely fall short.

Building on this idea, parties have challenged *infra petita* awards and, in some cases, been successful in invoking Art. 34(2)(a)(iii) and Art. 34(2)(b)(ii) of the Model Law as a first resort. Granted, there is a tempting attraction to the idea of challenging an unfavourable award, for this gives the aggrieved party a chance at a second bite of the cherry. However, if the parties' true quarrel is, indeed, with claims being omitted from the award, then it is humbly submitted here that rushing to the court might do more wrong than it does right.

Minimal Curial Intervention

CEB v CEC and another matter is a recent case which demonstrates this with stark clarity. Here, the award was challenged on account of a relatively small claim being left out. No prior request for an additional award was submitted to the tribunal. In refusing the party's application for setting aside, the court noted that although the failure to request an additional award was not *fatal* to the party's case, it was, nonetheless, a contributing factor. Seeing how Art. 33(3) was designed precisely to remedy omissions, to allow a setting aside application notwithstanding the absence of a request for an additional award, would be neither appropriate nor efficient. Any other scenario would counteract the principle of minimal curial intervention.

The decision is a robust affirmation of the primacy of the arbitral process. The key takeaway here is, thus, clear: while parties are certainly free to turn to courts without asking the tribunal for an additional award, they run the risk of having their application denied precisely on account of their failure to do so.

(Ab)use of the Setting-Aside Process

In a similar vein, in *BLC and others v BLB and another* reference was made to the possibility of penalizing a party for invoking Art. 34 before relying on Art. 33(3) of the Model Law. Allowing parties to set aside the award before first attempting to eliminate the ground the justifies the setting aside, can, according to the court, amount to an abuse of the setting aside process. Accordingly, as a penalty for failing to utilize available arbitral mechanisms, the court may refuse to set aside the award.

There is certainly merit in the argument that parties ought to be penalized for turning to the court before giving the tribunal the chance to rectify the award. Any other conclusion would stand at odds with the pro-arbitration ethos embedded in the Model Law and leave parties disincentivized of using Art. 33(3). What is more, the idea of penalizing parties for abusing the setting aside process is not entirely unheard of in Model Law jurisdictions. Courts in Hong Kong have long used indemnity costs orders against parties who *trouble* the court with unmeritorious challenges (here, here, and here). Admittedly, these orders were not given in the context established in this blog. Nevertheless, there is nothing to suggest that the same principle would not apply in such cases as well.

Waiver of the Right to Request the Setting Aside

In addition, there are commentators[1)] who posit that parties might be deemed to have waived their

right to challenge the award on *infra petita* grounds, if they did not try to rectify it with the arbitral tribunal first. This, in fact, is the logic we find behind s70(2) of the UK Act and Art. 1065(6) of the Dutch Code of Civil Procedure. In both countries, it is explicitly stipulated that parties will lose their right to challenge the award, if they do not exhaust available remedies in the arbitral proceedings first.

Although such provision is not present in the Model Law, it should, nonetheless, be noted that the English position appears to have been influential on the analysis of courts operating in Model Law jurisdictions. *Todd Petroleum Mining Company Limited v Shell (Petroleum Mining) Company Limited* illustrates that. Therein, the New Zealand's Court of Appeal, alluding to the principle of minimal curial intervention embedded in the Model Law, emphasized that s70(2) of the UK Act '*merely makes express in the UK what is implicit in New Zealand'*. Thus, when challenging *infra petita* awards, parties should be mindful that in addition to explicit provisions, implicit ones may also apply.

Veiled Attempt to Review the Award on its Merits

Finally, what we see way too often is parties disappointed with the outcome of the award throwing everything but the proverbial kitchen sink in their setting aside application, in hopes of prevailing at the one shot they have in arbitration. When this seems to be the case, courts tend to be particularly careful, for '*sieving out the genuine challenges from those which are effectively appeals on the merits'* is no easy task.

This is perhaps most clearly seen in *Huawei Technologies (Malaysia) Sdn Bhd v Maxbury Communications Sdn Bhd* where the award was challenged, among others, on *infra petita* grounds, despite the tribunal having had considered all issues raised by the parties. In refusing to set aside the award, the court was swayed by the fact that the application was nothing more than a thinly-disguised attack on the merits of the award.

Thus, when thinking of pulling such "trick", parties should be cognizant that courts will be highly vigilant in separating genuine setting aside applications from what appear to be *de facto* appeals on the merits. The absence of a request for an additional award, therefore, might just hint that the party's problem is, in fact, with the merits of the award rather than with the omitted claims.

Conclusion

A tribunal's failure to address the entirety of the parties' case is certainly not desirable. If the attractiveness of arbitration as a credible alternative to court proceedings is to be maintained, then arbitrators are expected to issue well-reasoned awards that address the parties' case entirely. In the event of omissions, parties, as a rule of thumb, are advised to first attempt to rectify the situation with the tribunal. If dissatisfactions still remain, then setting aside proceedings can be pursued. In doing so, parties uphold the primacy of the arbitral process and avoid the risk of having their setting aside application denied on account of their failure to do so.

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References

?1 Robert Merkin and Johanna Hjalmarsson, Singapore Arbitration Legislation Annotated (Informa, 2009), page 105.

This entry was posted on Monday, November 2nd, 2020 at 8:33 am and is filed under Infra and Ultra Petita Challenges, Set aside an arbitral award, UNCITRAL Model Law
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