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Standard v. Indemnity Costs in an Unsuccessful Application to Set Aside an Arbitral Award: A Singapore Perspective

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Where a plaintiff unsuccessfully applies to set aside an arbitral award or resist enforcement of the same, should the costs of the application, as a default rule, be awarded to the defendant on a standard or indemnity basis? The recent string of Singapore decisions on *BTN v BTP* address this question from a Singapore perspective.

Background

In *BTN v BTP* [2019] SGHC 212 (“**First Proceedings**”), the Singapore High Court dismissed the plaintiffs’ setting aside application and awarded costs to the defendants. On appeal by the plaintiffs in *BTN v BTP* [2020] SGCA 105 (“**Second Proceedings**”), the defendants tried to persuade the Court of Appeal to order the costs in the First Proceedings on an indemnity basis instead of a standard basis (which is generally the default position for costs awards in Singapore). The Court of Appeal dismissed the plaintiffs’ appeal, declined to disturb the costs order below and awarded the defendants fixed costs with regard to the costs of the appeal. As the parties were not able to amicably resolve the quantum of costs, parties made submissions on that to the High Court, which issued a supplementary judgment on the quantum of costs in *BTN v BTP* [2021] SGHC 38 (“**Third Proceedings**”).

In the Third Proceedings, the High Court:

1. Highlighted that the Court’s reference in the First Proceedings to ‘costs’ meant that the costs would be considered as ‘standard costs’. The High Court stated that “[u]nless the court orders otherwise, a dismissal with costs means that the party and party costs would be taxed on a standard basis” (para 3).
2. Noted that the Court of Appeal had already decided in the Second Proceedings that it would not disturb the costs order made in the First Proceedings, and therefore it was impermissible for the defendants to try to re-argue that issue before the Court in the Third Proceedings (para 3).

Therefore, the Court held that the defendants were not permitted to argue for a higher quantum of costs by seeking to switch the basis of the costs ordered from standard to indemnity basis (para 3).

Whether the default rule should be assessment on a standard or indemnity basis

Interestingly, after having reached that decision, the High Court nonetheless went on to explain why the Court in the First Proceedings ordered standard costs instead of indemnity costs.

The Court explained that the usual course is to award a successful litigant party and party costs on a standard basis. Costs on an indemnity basis is dependent upon there being exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis (para 8). This general rule applies equally in an unsuccessful application to set aside an arbitral award or to resist enforcement of the same, as such applications are not treated as a category of exceptional circumstances in which indemnity costs may be ordered (para 9).

The High Court also considered whether the grounds outlined by the defendants constituted exceptional circumstance that would warrant an order for indemnity costs, and stated obiter that they did not (para 14). The Court explained that the defendants' claims that the plaintiffs, "*in mounting other grounds of challenges, added to the complexity of the proceedings and protracted the same, thereby causing the defendants to incur substantial costs, including the expense of instructing senior counsel*", did not constitute exceptional circumstances that warranted an order of indemnity costs (para 11). A critical requirement for indemnity costs is the existence of some conduct that takes the case "*out of the norm*" (para 15).

The Hong Kong position

In contrast to the Singapore position, the default rule in Hong Kong is that indemnity costs will be granted where an arbitral award is unsuccessfully challenged in court proceedings, unless special circumstances can be demonstrated: *A v R* [2010] 3 HKC 67 ("*A v R*"). This case has previously been featured on the [Blog](#). The rationale behind this rule is that the parties, by submitting their dispute to arbitration, have undertaken to respect the enforcement of the arbitral award and therefore have the duty to assist the court in the just, cost-effective and efficient resolution of the dispute.¹⁾ Consequently, unmeritorious challenges against an award "*should be regarded as exceptional events, and where such a party unsuccessfully makes such an application, the court will normally award indemnity costs, absent special circumstances*".²⁾

This default rule has been affirmed by the Hong Kong Court of Appeal.³⁾ However, further guidance is required from the Hong Kong courts on what amounts to "*special circumstances*" that would warrant a departure from the general rule.

As seen from *BTN v BTP*, the Singapore courts have intentionally chosen to take a different approach by retaining the usual position that costs are awarded on a standard basis, even in an unsuccessful application to set aside an arbitral award or to resist enforcement of the same. In this way, the burden of proof with regards to proving that indemnity costs is warranted is reversed, in comparison to the Hong Kong position.⁴⁾

Commenting on the different positions in the two jurisdictions, the Singapore High Court in the Third Proceedings highlighted the different objectives of the two legal systems (para 15):

“[T]he Hong Kong court’s approach in justifying indemnity costs is intended to give effect to the underlying objectives of its Civil Justice Reform, one of which is the cost-effective and efficient resolution of a dispute (A v R at [69]; Gao Haiyan at [7] and [10]). While these considerations are also acknowledged in Singapore in variant forms when the court evaluates how the party conducted its case in the litigation, they are not absolute trumps. [...] O 59 r 5 sets out several non exhaustive factors which a court exercising its discretion would take into account in considering whether it is “appropriate” to make an exceptional award of indemnity costs.”

Further analysis

By contrasting the Singapore and Hong Kong positions, it is clear that the default rule adopted by national courts in relation to the costs award in unsuccessful applications to set aside an arbitral award or resist enforcement of the same is significant in a few ways:

1. First, the default rule will determine the burden of proof for an award of indemnity costs. If the court opts for standard costs as the default rule, the defendant will need to prove exceptional circumstances to obtain indemnity costs, and vice versa.
2. Second, and relatedly, a jurisdiction that chooses a default rule of indemnity costs may therefore appear to be more pro-enforcement of arbitration awards. A default rule of indemnity costs may incentivise parties to voluntarily comply with the arbitral award and also deter unmeritorious challenges to the award, since the quantum of costs assessed on an indemnity basis would be higher than that assessed on a standard basis.

In any event, a national court’s choice between the two default rules will largely depend on the jurisdiction’s legal culture and objectives as regards arbitration and civil justice.

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References

?1 *A v R* at para 69.

?2 *A v R* at paras 68 to 72.

?3 *Gao Haiyan and another v Keeneye Holdings Ltd and another* [2012] HKCU 226.

?4 *CCM Industrial Pte Ltd v Uniquetech Pte Ltd* [2009] 2 SLR(R) 20 at [32].

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