Challenging an Arbitral Award: Setting Aside and Consequential Orders

Introduction

Arbitration of commercial disputes is a common alternative to litigation, but parties still have recourse to the courts when challenging an arbitral award. In a recent set of decisions, the Singapore Court of Appeal looked at the grounds under which an award may be set aside, as well as the consequential orders that may be made as a practical follow up.

In AKN and another v ALC and others and other appeals [2015] 3 SLR 488 (“the 1st Judgment”), the Singapore Court of Appeal considered, among other things, whether it should set aside an arbitral award issued by a three-member tribunal which the respondents submitted was rendered in excess of jurisdiction and in breach of natural justice (specifically, the audi alteram partem rule) on a host of inter-related issues. Rajah & Tann Singapore LLP acted for the purchasers, whose appeals succeeded in part before the Court of Appeal.

The 1st Judgment is important as it reaffirms the judicial policy of minimum curial intervention in arbitral proceedings and the Singapore courts' continued refusal to interfere with the merits of an award. Furthermore, the Court of Appeal highlighted the distinction between:

(i) a situation where the arbitral tribunal misunderstood a party's argument and therefore failed to appreciate its merits (which is a mere error of law not amounting to a breach of natural justice); and

(ii) a situation where the arbitral tribunal failed to even consider an important pleaded issue or argument, and therefore did not apply its mind at all to the dispute (or an important part thereof) before it (which would be a breach of the audi alteram partem rule justifying a setting-aside).

We have previously released a Client Update on the 1st Judgment, which you can access [here](#).

The Court of Appeal subsequently had to consider issues of costs and consequential orders in AKN and another v ALC and others and other appeals [2015] SGCA 63 (“the 2nd Judgment”). The court examined the orders that it was entitled to make after the setting aside of an arbitral award, in particular, whether it could refer matters back to the same or a new tribunal. The court also discussed the effects of a setting aside order on the state of the arbitration, the arbitration agreement, and subsequent proceedings.

The 2nd Judgment provides some much-needed guidance as to what happens after an arbitral award is set aside, and the practical measures that may be taken to resolve outstanding matters.

Facts leading to the arbitration

The dispute arose between the liquidator of a corporation, the corporation’s secured creditors and the purchasers. These parties entered into an asset purchase agreement (“APA”) whereby the purchasers bought the corporation’s production facility and the land on which it was situated (“the assets”) “free from and clear of all liens of any kind”. After completion, by reason of unpaid taxes in respect of the assets, title to the assets could not be transferred to the purchasers. The purchasers claimed *inter alia* that this was a breach of the obligation on the part of the liquidator and the secured creditors to deliver the assets “free from and clear of all liens of any kind”. The purchasers thereafter commenced arbitration proceedings against the liquidators and the secured creditors.
The arbitration

The main issue at arbitration was whether the obligation under the APA to deliver the assets free from encumbrances had been breached. The tribunal found that the liquidator and the secured creditors were in breach of the aforesaid obligation and awarded damages on the basis of a loss of chance, holding that the purchasers had lost a 55% chance to make profits. It further found inter alia that the secured creditors had also breached an obligation under the APA to settle third party legal proceedings wherein the relevant parties claimed ownership over portions of the land on which the production facility was situated, even though the time for performance of this obligation had not expired.

The first Court of Appeal decision

The Singapore High Court set aside the tribunal’s award in its entirety on the basis that it had breached natural justice and had exceeded its jurisdiction. In the 1st Judgment, the Court of Appeal allowed the purchasers’ appeals in part and held that the court below had erred in its approach towards the issues concerning the obligation to deliver clean title to the assets. While the correct inquiry should be restricted to whether an arbitral tribunal had committed a breach of natural justice, the court below seemed to have engaged with the merits of the underlying dispute by way of its “detailed and exceedingly fine analysis” of the tribunal's award.

The Court of Appeal nevertheless upheld the argument by the respondents that the arbitral tribunal acted in breach of natural justice by deciding the issue of damages from a “loss of chance” perspective when the parties had only argued “loss of profits” damages during the arbitration. The Court of Appeal also found that the tribunal’s decision on the obligation under the APA to settle third party legal proceedings was arrived at in breach of natural justice as the tribunal had assumed that the liquidator had conceded that he was unable to transfer the disputed land to the purchasers in any event, where there was no such concession. This resulted in the tribunal overlooking and not considering the merits of the secured creditors’ case in this respect.

Consistent with the policy of minimal curial intervention, the Court of Appeal however emphasized that the award should not be set aside in its entirety but only those portions of the award affected by the aforesaid breaches of natural justice.

The second Court of Appeal decision

After the 1st Judgment was issued, the Court of Appeal invited parties to file written submissions on costs and consequential orders. A further hearing on 12 August 2015 was also held.

Arising therefrom, the Court of Appeal issued the 2nd Judgment on 27 November 2015 to deal with the matters raised by the parties in the written submissions as well as during the aforesaid hearing.

In the 2nd Judgment, the Court of Appeal firstly held that :-

(i) where an award is set aside, it is only the dispositive parts of the award that have been set aside; the court cannot make an order in relation to specific paragraphs of the award that concern the reasoning of the tribunal;

(ii) the court has no power to refer matters to arbitration before a new tribunal after having set aside an arbitral award.

The Court of Appeal also held that it does not have any power to remit matters arising from an award back to the very same tribunal which made the award, after it had been set aside. After issuing a final award, a tribunal would have exhausted its mandate in respect of the matters covered in an award and would no longer be able to vary, review or amend its award. While Article 34(4) of the Model Law vests in the court the limited power to remit an award to the same tribunal, it would not apply after the award has
been set aside. In so holding, the Court of Appeal clarified that remission under Article 34(4) is an alternative to setting aside and is a curative option that is available to the court in certain circumstances where it considers it possible to avoid setting aside an award. For that reason, remission will always be to the same tribunal that made the award that was being considered by the court.

The Court of Appeal then looked at the various effects of a court’s decision to set aside an award. In response to the purchasers’ argument that the arbitration was revived as a consequence of the award being set aside partially so that the issue of damages as well as the obligation under the APA to settle third party legal proceedings could be “reargued” before the same tribunal, the Court of Appeal held that the tribunal had no further jurisdiction, power or mandate to deal with these issues unless it was restored pursuant to an order remitting the award for further consideration of the tribunal under Article 34(4).

The fact that an award had been set aside would not, in and of itself, affect the continued validity and force of the arbitration agreement between the parties, save in the situation where the award was set aside on the ground that there was no arbitration agreement between the parties.

In holding that a party would need to commence fresh arbitration proceedings after an award has been set aside, the Court of Appeal highlighted at least three possible limitations, namely: (1) a limitation defence which might have accrued by the time the fresh set of proceedings is commenced; (2) any attempt by a party to re-appoint a member of the previous tribunal may be objected to on the grounds that there exist justifiable doubts as to the impartiality of the prospective appointee by reason of his prior involvement; and (3) the issue of res judicata.

The Court of Appeal highlighted, in particular, the relevance of res judicata to the claim for damages by the purchasers as well as the issue concerning the obligation on the part of the liquidator and the secured creditors under the APA to settle third party legal proceedings. Given that the tribunal had not accepted the case put forward by the purchasers seeking recovery of actual loss of profits, it was not possible for the purchasers to start a fresh arbitration to revive the issue of damages. However, given that the tribunal never engaged with the merits of the secured creditors’ case on the aforementioned obligation to settle third party proceedings, the doctrine of res judicata was not engaged to prevent a fresh arbitration on the issue.

The Court of Appeal also considered s 8A(2) of the IAA, which allowed the High Court to exclude the period between the commencement of any arbitration and the date of any setting aside order made in respect of any award when computing time prescribed by limitation law. It was held that the intentional use of the words “High Court” in that provision required any application thereunder to be first made to the High Court and not directly to the Court of Appeal.

Our comments / analysis

The 2nd Judgment has definitively clarified many important aspects of international arbitration law in Singapore. First, remission under Article 34(4) is an alternative to setting aside and is a curative option that is available in limited circumstances. There is no basis under the IAA or the Model Law for matters to be remitted to the same tribunal after an award has been set aside. Second, when an award has been set aside, whether wholly or in part, the matters covered by the impinged portions of the award would have to be determined by way of fresh arbitration proceedings. Third, there are limitations in connection with such fresh arbitration proceedings. To the extent that a limitation defence may accrue to prevent a fresh arbitration, an application may be made under s 8A(2) of the IAA to the High Court to exclude the period between the commencement of any arbitration and the date of any setting aside order made in respect of any award when computing time prescribed by limitation law.

Parties wishing to consult on arbitration or any related matters may contact our team below.
ASEAN Economic Community Portal

Ahead of the launch of the ASEAN Economic Community ("AEC") in December this year, businesses looking to tap the opportunities presented by the integrated markets of the AEC can now get help a click away. Rajah & Tann Asia, United Overseas Bank and RSM Chio Lim Stone Forest, have teamed up to launch “Business in ASEAN”, a portal that provides companies with a single platform that helps businesses navigate the complexities of setting up operations in ASEAN.

By tapping into the professional knowledge and resources of the three organisations through this portal, small- and medium-sized enterprises across the 10-member economic grouping can equip themselves with the tools and know-how to navigate ASEAN’s business landscape. Of particular interest to businesses is the "Ask a Question" feature of the portal which enables companies to pose questions to the three organisations which have an extensive network in the region. The portal can be accessed at http://www.businessinasean.com/.
Our regional presence

Our regional contacts

RAJAH & TANN | Singapore

Rajah & Tann Singapore LLP
9 Battery Road #25-01
Straits Trading Building
Singapore 049910
T +65 6535 3600  F +65 6225 9630
sg.rajahtannasia.com

R&T Sok & Heng
Vattanac Capital Office Tower, Level 17, No. 66
Preah Monivong Boulevard, Sangkat Wat Phnom
Khan Daun Penh, 12202 Phnom Penh, Cambodia
T +855 23 963 112 / 113  F +855 963 116
kh.rajahtannasia.com

*Rajah & Tann Singapore LLP in association with Rajah & Tann Singapore LLP*

RAJAH & TANN REPRESENTATIVE OFFICE | China

Rajah & Tann Singapore LLP
Shanghai Representative Office
Unit 1905-1906, Shui On Plaza, 333 Huai Hai Middle Road
Shanghai 200021, People’s Republic of China
T +86 21 6120 8818  F +86 21 6120 8820
cn.rajahtannasia.com

RAJAH & TANN NK LEGAL | Myanmar

Rajah & Tann NK Legal Myanmar Company Limited
Office Suite 007, Inya Lake Hotel No. 37, Kaba Aye Pagoda Road, Mayangone Township, Yangon, Myanmar
T +95 9 73040763 / +95 1 657902 / +95 1 657903
F +95 1 9695537
my.mm.rajahtannasia.com
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