IBA Conference Paper

**Judicial oversight of arbitrations in Singapore: is it a boon or bane for maritime arbitrations?**

Introduction

The current global trend, and indeed the way ahead in future, for dispute resolution in the maritime sphere is by way of arbitrations rather than to take the dispute to the national courts. There are several international hubs for maritime arbitration of which Singapore is one of them.

The benefits of maritime arbitration is well known. The current discussion is on one of the potential disadvantage of maritime arbitrations and how the Singapore courts have dealt with the problem.

While most maritime arbitrations are conducted properly and fairly, there may be instances where an arbitrator may have overstepped his boundaries or conducted the arbitration in a manner which is unfair to one of the parties. Since there are no appeals against an arbitral award under Singapore law, how should the Singapore courts balance the doctrine of party autonomy in choosing arbitration as the dispute resolution mechanism, and at the same time exercise its supervisory functions over a Singapore seated arbitration?

That balance is struck in Singapore by;

1. Recognising that the court is not sitting as an appellate court over an arbitral tribunal. The courts will not interfere with an arbitral award even if it is clear that the tribunal made a wrong finding of fact or a wrong application of the law.
2. The court will not shy away from scrutinizing an arbitral award in detail, including reviewing the submissions, evidence submitted and arguments made, but for the very clear purpose of ascertaining if there was any breach of the rules of natural justice or if the tribunal exceeded its jurisdiction.

Between the High Court of Singapore and the Court of Appeal, in the period between January 2021 and May 2022, there were a total of 29 reported judgments arising from cases where applications were made to set aside arbitral awards. Of the 29 reported judgments, only 6 reported judgments ordered that the arbitral awards be set aside.

In the case of CAJ v. CAI [2021] SGCA 102, the Court of Appeal noted that in the past 20 years, approximately only 20% of applications to set aside arbitral awards were allowed and this attests to the fact that the Singapore courts will only set aside arbitral awards in exceptional cases.

It was also noted that typically, arbitral awards that were set aside were on the grounds of breach of natural justice or where the tribunal acted in excess of its jurisdiction.

Power to set aside an arbitral award under Singapore law

The court’s powers to set aside an arbitral award is limited to the circumstances set out in Section 24 of the International Arbitration Act 1994 (“IAA”) and Article 34 of the UNCITRAL Model Law which has force of law in Singapore.

Section 24 of the IAA provides that the court may set aside an arbitral award if it was induced by fraud or corruption, or where there is a breach of the rules of natural justice in connection with the making of the award.

Article 34 of the Model Law sets out several grounds by which an arbitral award may be set aside but the grounds most frequently relied on are when a party was unable to present its case, or when the award deals with a dispute that was not contemplated by or falling within the terms of the submission to arbitration.

Role of the courts

It has been held in numerous cases that the role of the courts when considering an application to set aside an award is not to hear it as though it was an appeal. Even if the tribunal made an error in its finding of fact or finding of law, the courts will not intervene to set aside the award.

The role of the courts is supervisory in nature, and its supervisory function is to ensure that arbitrations are properly conducted in the sense that tribunals do not go beyond the scope of their jurisdictions and that the decision making process is fair to both parties and there are no breaches of the rules of natural justice.

When exercising its supervisory function, there is a potentially a spectrum of the degree of scrutiny that may be taken by the courts. On one end of the spectrum, it is possible for the courts to adopt a more hands-off approach by merely reviewing the reasoned arbitral award on the face of the award, and to determine whether there was any breach of natural justice or acting in excess of the tribunal’s jurisdiction and to set aside the arbitral award only in cases where it appears on the face of it that there was an egregious breach of the rules of natural justice.

The other end of the spectrum would be where the courts adopt a more interventionist approach and scrutinize all documents and submissions made before the tribunal and effectively act as though it is hearing an appeal from the decision of the tribunal.

I would argue that the Singapore courts have adopted a more nuanced and balanced approach when it is exercising its supervisory function over arbitrations that are subject to Singapore’s jurisdiction.

In doing so, the Singapore courts recognized and gave effect to the doctrine of party autonomy where the parties are free to choose how they want to have their disputes adjudicated, who they want to appoint to adjudicate their disputes and the procedures that they have agreed upon.

At the same time, the Singapore courts are prepared to scrutinize an arbitral award very closely to ensure that there is proper conduct of the arbitration and to ensure that there is fair play between the two parties, while at the same time, not interfere with the Tribunal’s decision on the merits.

I will illustrate this by referring to two very recent Court of Appeal decisions.

*CAJ v. CAI* [2021] SGCA 102

In the case of *CAJ v. CAI* [2021] SGCA 102, a dispute in relation to a construction project was referred to arbitration. The claimant in the arbitration claimed liquidated damages from the respondent for delay in the completion of the project.

The respondent’s pleaded defence was that the project was completed on time as the defects did not materially affect the operation of the project. Alternatively, the delay was due to the respondent acting on the instructions of the claimant and the claimant is estopped from making the claim for delay.

The contract between the parties contained a clause which provides that the time for completion could be extended if the delay was due to any act or omission by the claimant’s subsidiary company. Although this was a defence that was available to the respondent, for reasons unknown, the respondent did not at any time raise this as a defence in the pleadings or during the evidentiary hearing.

This defence, which was referred to as the extension of time defence (the “EOT Defence”) was raised for the first time in the respondent’s written closing submissions.

The claimant in its written closing submissions objected to the introduction of the EOT Defence on the basis that it was never pleaded nor raised previously. The tribunal however ruled in favour of the respondent and allowed the EOT Defence.

The Court of Appeal held that even though the claimant had made submissions regarding the EOT Defence in its closing submissions, it only falls within the scope of the parties’ submission to arbitration upon the introduction of the defence by way of an amendment to the pleadings. Unless and until this was done, this issue was simply not within the scope of the parties submission for arbitration. If a new issue is raised, the established process is to raise it in the form of an amended pleading so that the other party is able to properly respond to it, and to adduce additional evidence if necessary.

It was held that the making of an award on this issue exceeded the tribunal’s jurisdiction.

The Court of Appeal also held that the award based on the EOT Defence was also in breach of the rules of natural justice as the claimant was not given a fair and reasonable opportunity to respond to the EOT Defence. By merely allowing the claimant a right to respond in the closing submissions was insufficient as the claimant had lost its rights to lead further evidence or to test the respondent’s evidence.

Further, the tribunal had made the award on the EOT Defence based on its own experience which was not articulated by the tribunal. The Court of Appeal held that the tribunal’s own experience in other construction projects is immaterial in deciding on the appropriate time extension for this case. This is a matter for parties to adduce evidence on and by deciding based on its own prior experience, the tribunal had failed to afford the claimant any opportunity to address the tribunal on this issue.

*BZW v. BZV* [2022] SGCA 1

This case arose from a ship-building dispute. The claimant claimed against builder for liquidated damages arising from the delay in delivery (the “Delay Claim”), and for damages in the installation of contractually inadequate generators (the “Rating Claim”).

After reviewing the award, the court found it impossible on the face of the award to distinguish the findings which form part of the tribunal’s chain of reasoning on the Delay Claim and those which form part of its chain of reasoning for the Rating Claim. As a result, the court had to extract parts of the award and “… *attempt with generosity to arrange those findings into a coherent chain of reasoning*”.

It was argued before the Court of Appeal that the judge below was wrong to have pored over all the documents and submissions and to examine the merits of the case in order to identify the errors of fact that was made by the tribunal.

The Court of Appeal did not accept that argument. It was noted that the award and the chain of reasoning adopted by the tribunal had no nexus to the case that was actually presented to the tribunal. It was said by the Court of Appeal that:-

“*If it takes time to make sense of an award to ascertain whether an important point was overlooked or addressed at all or whether the tribunal decided on a point that the parties did not have the opportunity to address, then the judge will have to look at the award, the pleadings, the submissions and any other documents that may throw light on what happened in the arbitral proceedings and what cases the parties were running. Then the judge will have to analyse the award in some depth in order to decide whether the allegations made by the party seeking to impugn the award on the basis of breach of natural justice have substance.*”

The court took the view that the fair hearing rule requires the tribunal to pay attention to what is put before it and give its reasoned decision on the arguments and evidence presented. If its decision is manifestly incoherent, the requirement of the fair hearing rule is not met and it shows that the tribunal has not understood or dealt with the case at all. This meant that the parties have not been accorded a fair hearing.

The Court of Appeal took pains to clarify that if it can be shown that the tribunal applied its mind to the issues arising from the parties’ arguments but failed to comprehend the submissions, or comprehends them erroneously, that is simply an error of fact or law and the arbitral award will not be set aside.

The award will be set aside for a breach of the fair hearing rule only if it can be demonstrated that the tribunal did not apply its mind to the issues raised. One way of showing that the tribunal did not apply its mind is to look at the chain of reasoning adopted by the tribunal. The chain of reasoning must be one that (i) the parties had reasonable notice that the tribunal could adopt and (ii) one which has a sufficient nexus to the parties’ arguments.

Is the balance adopted by the Singapore courts a boon or bane for maritime arbitrations in Singapore?

I will argue that this balance is beneficial to the maritime arbitration community. There is ample judicial guidance on what is required of an arbitrator and the standards that is required.

Anyone seeking to practice as an arbitrator in a Singapore-seated arbitration should take heed of the extent to which the Singapore courts will scrutinize an arbitral award in order to ensure that there is no breach of the rules of natural justice and that the arbitrator does not act beyond the scope of his jurisdiction.

The parties to a maritime arbitration will also be sure that the Singapore courts will not sit as an appellate court and there is no judicial intervention if the allegation made is that the award was based on any errors of fact or errors of law.

But the Singapore courts will not shy away from ensuring that there is procedural fairness adopted by the tribunal, and that both parties must be given their right to properly present their cases. It would also ensure that arbitrators properly consider the parties’ respective cases and come to a properly reasoned decision.

In my view, this will in time help to improve the quality and standard of maritime arbitrations in Singapore.

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