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Options available to an unsuccessful party in an arbitration

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Options Available To An Unsuccessful Party In An Arbitration

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In *Galsworthy Ltd of the Republic of Liberia v Glory of Wealth Shipping Pte Ltd* [2010] SGHC 304 (*"Galsworthy*"), the Singapore High Court held that a losing party to an arbitration seeking to challenge an arbitral award had the "alternative and not cumulative options" of applying to set aside the award, or, applying to set aside any leave granted to enforce the award. This choice of wording is unfortunate because it gives the mistaken impression that the options described are mutually exclusive, when they are not.

The facts of the case are easy. There was a dispute over a charter party and an arbitration seated in London had issued an award against Glory of Wealth Shipping Pte Ltd ("Glory of Wealth Shipping"). Glory of Wealth Shipping applied to challenge the award before the English High Court on grounds of irregularity ("the first English application"). The opposing party, Galsworthy, applied for security of costs, which was granted by the English High Court. Glory of Wealth Shipping failed to furnish security, leading to a dismissal of their application without a hearing on the merits. Glory of Wealth Shipping also appealed against the arbitral award on a point of law, but the appeal was heard and dismissed by the English High Court.

Subsequently, Galsworthy obtained permission from the Singapore courts to enforce the award in Singapore. Glory of Wealth Shipping applied to set aside the order granting permission to enforce the award. The application was heard and dismissed by an Assistant Registrar, and failed again on appeal.

But the view of the learned Judge hearing the appeal at the High Court differed from the Assistant Registrar's on one preliminary issue. That issue was whether Glory of Wealth Shipping was entitled to apply to set aside the order granting permission to enforce the arbitral award when it had already challenged the award before the English courts.

The Assistant Registrar was of the view that Glory of Wealth Shipping was still entitled to take up the application to set aside the leave to enforce the award and had proceeded to hear the application on its merits. The learned Judge, however, held that Glory of Wealth Shipping was not entitled to make the application because it had "elected" to proceed in the English courts and the application in the Singapore High Court amounted to "an abuse of process".

The reasoning of the learned Judge can be summarised as follows:

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(a) Glory of Wealth Shipping's application to set aside the order granting leave to enforce was a "considered decision on its part to avoid the need to furnish security to the English court".

(b) Glory of Wealth Shipping had "elected their forum of challenge and they ought to be bound by it".

(c) There were no exceptional circumstances permitting the derogation from the principle of comity of nations requiring the Singapore courts to be slow to undermine the orders of foreign courts.

(d) If the application was allowed, it could result in a "duplication or conflict of judicial orders".

(e) If the first English application was heard on the merits and failed, Glory Wealth Shipping would be entitled to challenge the enforcement of the final award in the enforcement court if the grounds and standards between the supervising and enforcement jurisdiction are different.

The learned Judge consequently held that a party seeking challenge of an arbitral award can either apply to the curial court to set aside the award, or, apply to the enforcement court to set aside any leave granted to the opposing party to enforce. These options were, as he described, "alternative and not cumulative".

This phrasing is inadequate because it covers too much and too little at once. It over-includes because it lends itself to the mistaken impression that the options are mutually exclusive, such that one option can no longer be exercised once the other has been elected. It under-includes because it does not explain whether one option can still be exercised if the legal grounds relied upon for the second option are different from the first.

It may be useful to set out with precision how the options of an unsuccessful party in an arbitration interact. Generally, under the New York Convention, three general principles, which are by no means exhaustive, can be set out:

a) The unsuccessful party in the arbitration can resist enforcement at the enforcement jurisdiction, without having to first apply to set aside the award at the seat (see *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, *per* Lord Mance at [28]).

(b) The unsuccessful party in the arbitration can apply to set aside the award at the seat, whilst at the same time, resist enforcement if enforcement is being sought in another jurisdiction. That explains why Art. VI of the New York Convention allows an enforcement court to order a stay of the enforcement proceedings if setting aside proceedings are pending at the curial court.

(c) Regardless of whether the setting aside of an award is successful at the seat, the ruling of the curial court can create an issue estoppel in jurisdictions where such a doctrine (or its equivalent) exists (see D*allah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, *per* Lord Collins at [98]). However, even if there is a successful annulment, the unsuccessful party in the arbitration may still find itself having to defend enforcement proceedings because certain courts may still enforce an award that had already been set aside (see *Pabalk Ticaret Sirketi v Norsolor*, Cour de cassation, 9 October 1984, 1985 Rev Crit 431; *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663; *République arabe d'Egypte v Chromalloy Aero Services*, Paris Cour d'appel, 14 January 1997 (1997) 22 Yb Comm Arb 691; *Soc PT Putrabali Adyamulia v Soc Rena Holding,* Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299; *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996).

The foundation of these principles stems from the way setting aside proceedings and enforcement proceedings are in fact designed as two separate and independent juridical proceedings. One may, and more critically, may *not* affect the other if, for instance, a result has already been reached in one or if setting aside proceedings are already pending.

Consequently, if a party aborts a setting aside proceeding before it is heard, that should not prejudice its application to defend enforcement proceedings in another jurisdiction. It is fully within that party's prerogative to take the view that any security for costs ordered against it in the setting aside proceedings would not justify carrying through with the setting aside proceedings. In such a circumstance, it is entirely within that party's option to terminate the setting aside proceedings, and respond to enforcement proceedings only when enforcement proceedings are commenced by the successful party in the arbitration.

It is therefore difficult to see how an "abuse of process" happened in *Galsworthy*. A possible abuse of process could arguably be made out in the rare instance where the unsuccessful party withdraws setting aside proceedings at the very last minute after a hearing of the merits when it became clear that it was losing that application, so as to avoid a final judgment which may have preclusive effect on subsequent enforcement proceedings. But even then, any abuse was of the process in the court of the seat, and not at the court of enforcement.

By dint of reasoning, the language of "election" used by the Singapore High Court in *Galsworthy* was unfortunate. There was no obligation on Glory Wealth Shipping to challenge the award in England, and even if it did so but aborted it ostensibly because of a security for costs order, that in itself does not affect its separate and independent right to defend enforcement proceedings in Singapore.

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