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Reflecting on Appeals on Questions of Law Arising Out of Domestic Arbitration Awards

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***Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2011] SGCA 58**

Domestic arbitration awards rendered under the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") can be subject to appeal on a question of law arising out of an award. Unless parties consent, an appeal can only be brought with the leave of court. Leave shall only be given if the court is satisfied that:[1]

> (a) the determination of the question will substantially affect the rights of one or more of the parties;
>
> (b) the question is one which the arbitral tribunal was asked to determine;
>
> (c) on the basis of the findings of fact in the award —
>
> > (i) the decision of the arbitral tribunal on the question is obviously wrong; or
> >
> > (ii) the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and
>
> (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the Court to determine the question.

Facts and decision

In *Motor Image Enterprises Pte Ltd v SCDA Architects Pte Ltd* [2011] SGCA 58, the Singapore High Court had granted leave to appeal on a question of law arising out of an award ("the leave stage"). There was an appeal on the learned Judge's decision to grant leave, which she dismissed. On hearing the main appeal on the question of law, the same Judge dismissed the appeal on the ground that the question of law had not properly arisen as it had

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[1] Section 49(5) of Arbitration Act (Cap 10, 2002 Rev Ed).

not been premised on the facts that the arbitrator had found, despite her being satisfied at the leave stage that the question of law was proper. This dismissal became the subject of an appeal before the Singapore Court of Appeal.

The primary issue before the Court of Appeal was whether a Judge, who after giving leave to appeal on a question of law arising out of an award, can upon the subsequent hearing of that appeal, decide that the question of law was one that actually did not arise out of the award.

The appellant argued that, once leave to appeal had been given, a right of appeal vests in the appellant and subsists until and unless the matter is resolved by the Court of Appeal in accordance with the statutory scheme. The appellant contended that the High Court had abrogated its right of appeal. The Court of Appeal rejected that contention. The decision below was upheld and the issue was answered in the affirmative. The Court of Appeal (*per* VK Rajah JA) dealt with the appellant's argument — which it labeled "novel and ingenious" — by stating that if the jurisdictional requirements for leave to be given were not satisfied in the first place, no right to appeal can arise. The learned Judge was entitled to decide, upon the substantive hearing on the question of law, that because the jurisdictional requirements had not been met, no right to appeal could arise. Consequently there was no right of appeal to abrogate.

Comment

This decision is a sound one, for otherwise, as the Court of Appeal pointed out, it would lead to the absurd scenario where if an arbitrator made an award on the basis of certain facts, a Judge who had previously granted leave to appeal, would be compelled to then answer a question of law based on different facts which were never found by the arbitrator.

Moreover, different standards of scrutiny apply at the leave stage as compared to the substantive appeal stage. At the leave stage, the question under s 49(5)(c)(ii) of the Act is whether the arbitrator's decision is "not even open to serious doubt" (*Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191). A final and conclusive decision is only taken at the substantive appeal stage. It is not, therefore, surprising if a judge were to be of the view that a certain issue of law is proper for hearing at the leave stage but decides otherwise subsequently upon more exacting examination of the facts.

Drawing on comparative jurisprudence, we make three further inter-related observations.

First, under the English Arbitration Act 1996 where the statutory provisions are *in pari materia*, an application for leave to appeal on a question of law is normally to be determined *without* a hearing unless the court is of the view that a hearing is required. There are restrictions on the length of submissions, and permission has to be sought if submissions exceed a certain length. A Judge only needs to provide brief reasons in refusing to grant leave. These measures, provided for under the English Practice Directions,[2] are consonant with what the learned High Court Judge rightly observed was the function of the leave stage: it functions as a time and cost-saving filter against cases which are not even open to serious doubt.

In the authors' experience before the Singapore courts, hearings seeking leave to appeal on a question of law some times take up a disproportionate amount of time, with the arguments at the leave stage frequently shading into the arguments pertaining to the main hearing itself. Should leave be granted, much of the arguments get rehashed at the main hearing. The hearing at the leave stage often ends up, in the words of the High Court Judge, a full-dress

[2] See para 12.1 of Practice Direction 62 supplementing Part 62 of the English Civil Procedure Rules.

rehearsal for the main hearing. The English measures have much to commend itself for in terms of judicial economy and ought to be considered seriously.

Tactically, mounting lengthy submissions at the leave stage may also be self-defeating if an applicant is asserting that the decision of the arbitral tribunal was "obviously wrong". If hours of legal argument are required, it would be counter-intuitive for the court to find that the award was "obviously" wrong (much like an application for summary judgment).

The second observation is that the learned High Court judge had dismissed an appeal against her decision at the leave stage by relying on the English authorities of *The Antaois* (*op cit*) and *CMA CGM SA v Beteiligungs-Kommanditgesellschaft MS "Northern Pioneer" Schiffahrtsgesellschaft mbH & Co* [2003] 1 Lloyd's Rep 212. These authorities stand for the proposition that leave to appeal against a Judge's decision at the leave stage will only be granted if the statutory guidelines governing the leave stage required some elucidation.

This holding was undisturbed. *Sub silentio* these English authorities now appear to hold sway in Singapore. This approach is to be welcomed because it dovetails neatly with the objective of the leave stage set out above. A party who loses at the leave stage can always present its case in greater detail at the main hearing. It also avoids tricky arguments (which the appellant unsuccessfully raised in the present case), that a party who loses an appeal against a Judge's decision at the leave stage is estopped from raising the same grounds at the main hearing.

The final observation is that it must be "just and proper" for the High Court to grant leave to appeal on a question of law. In this connection, the New Zealand Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] NZCA 131 laid down the following criteria to guide the court's discretion:

> (a) whether the question of law was incidental or whether it was the very point of the arbitration;
>
> (b) the qualifications of the arbitrators, for if the arbitrator is a lawyer, there is less justification for permission to appeal as the parties can be assumed to have wanted to rely upon his expertise;
>
> (c) the significance of the dispute to the parties in money and other terms;
>
> (d) the amount of delay involved in going through the courts, as the cost of going through the courts must not be disproportionate to the amount at stake;
>
> (e) whether the contract provides for the award to be final and binding; if so there is a strong presumption against granting leave (in Singapore, this point appears to be open).

Whilst some of these factors may already be subsumed within our statutory scheme, these criteria and others, are nonetheless helpful in assisting both counsel and the court.

Conclusion

To conclude, we are of the view that the decision of the Court of Appeal is eminently sensible and entirely consistent with the purpose that informs s 49 of the Act. Be that as it may, the case gives rise to a timely occasion to reflect upon how Singapore can and should fine-tune the procedure and process attendant to s 49. One viable way might be to adapt to our circumstances practice directions prevailing in England.