1-2012

A trilogy of "difficult and complex" arbitration issues in 2012

Darius CHAN
Singapore Management University, dariuschan@smu.edu.sg

SINGAPORE LAW WATCH
SINGAPORE DAILY LEGAL NEWS

SLW COMMENTARY

Issue 1/Jan 2012

A Trilogy of "Difficult and Complex" Arbitration Issues in 2012

Darius Chan*

Re David Joseph QC [2011] SGHC 262

At the end of 2011, the Singapore High Court in *Re David Joseph QC* [2011] SGHC 262 (*per* VK Rajah JA) permitted the admission of an English Queen's Counsel, David Joseph QC, to represent eight entities of the Astro Group, a Malaysian broadcasting and media entity, in proceedings arising from an arbitration with three subsidiaries of Indonesia's Lippo Group. Under Singapore's current statutory scheme, the court may admit QCs on an ad hoc basis if a matter contains issues of fact or law of "sufficient difficulty and complexity", and if the circumstances of the case warrant it.

The High Court judge, Justice of Appeal VK Rajah, foreshadowed three issues in his judgment. All are worthy of the close attention of the international arbitration community.

Background

The court proceedings arise from a SIAC arbitration seated in Singapore over a failed joint venture relating to the supply of satellite television services in Indonesia. In the arbitration, David Joseph QC was lead counsel to claimant Astro, while Laurence Rabinowitz QC, *inter alios*, was counsel to Lippo.

The tribunal consisted of Sir Gordon Langley (appointed by Astro), Stewart Boyd QC (appointed by Lippo) and Sir Simon Tuckey (jointly appointed by both parties).

At the end of the arbitration, the tribunal unanimously granted Astro five damages awards in various different currencies. Astro successfully obtained two orders from the Singapore courts granting leave to enforce the awards. The orders provided that, in the event that they were served on Lippo outside Singapore, the Indonesian group would be able to apply to set them aside within 21 days.

Astro in fact served the orders on Lippo in Indonesia, but Lippo did not file a challenge and the Astro subsequently secured Singaporean court judgments reflecting the terms of the awards.

* Associate, Wilmer Cutler Pickering Hale and Dorr LLP, London. LL.B. (First), NUS, LL.M. (Int'l Business Regulation, Litigation and Arbitration), NYU. Advocate & Solicitor, Supreme Court of Singapore, Attorney & Counselor at Law, State of New York.

Lippo later attempted to set aside these judgments on the basis that the service of the enforcement orders was not valid, having obtained an Indonesian ruling to that effect.

At the same time, related proceedings were going on in Hong Kong, where Astro was seeking to seize the goods of a creditor of one of the Lippo entities in the arbitration, and in the Indonesian Supreme Court, where Astro was seeking the recognition of the five awards in its favour (the court had already refused to recognise the first of them).

VK Rajah JA set out the complex and difficult issues that warranted the admission of a QC as follows.

Issue one: Whether a party is entitled to resist enforcement of awards in the country in which the awards were made when it did not take any steps within the requisite period to set aside the same awards

Counsel to Lippo cited the well known UK Supreme Court judgment in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*[1] in support of the proposition that Lippo was still entitled to resist enforcement of the awards in Singapore, even though it had not applied to set them aside. The learned judge recognised that Dallah has been the centre of controversy. He also noted an important distinction between that case and the one before him: in Dallah, the curial and enforcement courts were in different jurisdictions; in the present case they were one and the same.

An authoritative clarification of the jurisprudence on this issue would be timely. Two Singapore High Court precedents, *Newspeed International Ltd v Citus Trading Pte Ltd*[2] and *Galsworthy Ltd of the Republic of Liberia v Glory of Wealth Shipping*,[3] suggest – unfortunately, in this writer's view – that an unsuccessful party in an arbitration had the 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 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.

A different High Court bench in *Aloe Vera America, Incorporated v Asianic Food*[4] sought to place a gloss on *Newspeed* in the 2006 case of, perhaps recognising the difficulty *Newspeed* created. In an approach foreshadowing *Dallah*, the learned Judge in *Aloe Vera* explained – rightly, in this writer's view – that the options may be cumulative.

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.[5]

[1] [2010] UKSC 46 ("*Dallah*").
[2] [2001] SGHC 126.
[3] [2010] SGHC 304.
[4] [2006] SGHC 78.
[5] See *Dallah* 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. In fact, one criticism of *Dallah* was that the English courts ought to have stayed the proceedings before it since similar proceedings were afoot before the French courts.

(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.[6] 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.[7]

Issue two: Whether a party has the right to revive a challenge based on the alleged lack of an arbitration agreement and misjoinder of parties

Whilst it is normal for an unsuccessful party in an arbitration to challenge any jurisdictional decision by the tribunal before an appropriate court, the complexity in this case concern the tribunal's decision on the joinder of parties. Before the Singapore court, counsel to Lippo argued that the enforcement orders should be set aside because the group was never party to an arbitration agreement with three of the claimants in the arbitration, and consequently the tribunal lacked jurisdiction to join those three claimants to the arbitration.

Lippo's argument was based on a reference to the arbitration clause in the underlying contract, to which the three claimants were not signatories. The tribunal had addressed this very issue in its first award, drawing a distinction between an agreement to refer future disputes to arbitration, and an agreement that arises when the parties refer an existing dispute to arbitration – which the tribunal said existed in this case. In English case law, this distinction is known as the principle of "double-severability",[8] but has yet to feature prominently.

The principle can be explained in another way: an individual reference to arbitration under a continuing arbitration agreement itself creates a fresh contract. This has two effects. First, the individual reference may be governed by a proper law different to that of the arbitration agreement. Secondly, a particular reference to arbitration can be discharged by frustration or an accepted repudiation, without bringing to an end the possibility that future disputes will be referred to arbitration.

This principle has yet to debut in Singapore. Consequently, its applicability merits careful examination. The issue is further complicated by Lippo's contention the tribunal has the power to order a joinder only if Lippo had consented. Astro countered that, after the first award was published, Lippo had in fact signed a Memorandum of Issues confirming the independent and separate existence of an agreement to arbitrate.

---

[6] See *Dallah* at [98].
[7] 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).
[8] *Syska v Vivendi Universal SA & Ors* [2008] 2 Lloyd's Rep 636.

Issue three: Whether the enforcement of an award in Singapore is affected by a ruling from another country over the enforcement of the same award

Lippo contended that the decision of the Indonesian Supreme Court not to enforce the first award in favour of Astro had no bearing on the enforcement of the awards in Singapore.

It has been observed above that the ruling of a curial court can create an issue estoppel in jurisdictions where such a doctrine (or its equivalent) exists. By dint of reasoning, any prior ruling of an enforcement court may also create an issue estoppel in other jurisdictions.

As mentioned above, even if an award were to be annulled by a curial court, the unsuccessful party in the arbitration might still have to defend enforcement proceedings because certain courts are prepared to enforce awards that have been set aside elsewhere. This controversy is well-known to international arbitration practitioners; different approaches have been taken by different courts in cases. It is suggested here that, by the designation of an arbitral seat, parties could be said to have subjected the international validity of an award solely to the laws of the seat. Be that as it may, the French courts have enforced awards that had been set aside at their seats on the ground that an award is not wedded to any particular national system.

Here, the issue takes on a different but related twist. It is whether, and if so how, an enforcement court would give effect to the decision of another enforcement court if the ground of objection to the award is similar. It could be argued that issue estoppel has no place within the realm regulated by the New York Convention. How the Singapore court will resolve this controversy remains to be seen. The resolution of this debate may hint towards the Singapore court's view of the appropriate legal philosophy or theory that underlies international arbitration.[9]

The resolution of these three issues by the courts will place Singapore at the forefront of international arbitration jurisprudence. As we progress into the new year, any decision would be highly anticipated by the international arbitration community.

[9] See Emmanuel Gaillard, *Legal Theory of International Arbitration* (2010).