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Singapore High Court rejects application to adjourn enforcement of foreign arbitral award

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by Wei Ming Tan, Aaron Yoong and Chen Lixin*

Introduction

In the recent decision of *Man Diesel & Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132, the Singapore High Court (“HC”) rejected an application to adjourn the enforcement of an arbitral award that was also the subject of a setting aside application in Denmark, the seat of the arbitration.

This case is the first of its kind in Singapore and provides clarity as to when litigants can seek an adjournment of proceedings to enforce a foreign arbitral award.

Background of the case

The dispute arose out of two agreements governed by Danish law for the supply of engine-propeller shipsets by Man Diesel & Turbo SE (“Plaintiff”) to I.M. Skaugen Marine Services Pte Ltd (“Defendant”).

Following technical issues with two engine shipsets delivered by the Plaintiff, the Defendant refused to pay for the remaining two propeller shipsets. The Plaintiff thus commenced arbitration proceedings in Denmark, claiming damages and specific performance. The Defendant counterclaimed for damages and restitution of sums paid out as down-payment.

The final award (“the DIA Award”) was decided mostly in favour of the Plaintiff by a majority of a three-member tribunal in the Danish Institute of Arbitration (“DIA”). The Plaintiff then obtained ex parte leave of court to enforce the DIA Award in Singapore pursuant to section 29 of the International Arbitration Act (Cap. 143A) (“IAA”) and Order 69A of the Rules of Court (“the ex parte Leave Order”).

Unfortunately, further disputes arose regarding the expected performance of the DIA award. This resulted in the Defendant filing an application with the Danish Court to set aside the part of the DIA Award in the Plaintiff’s favour, and also commencing a new arbitration against the Plaintiff in the DIA.

Shortly after, the Defendant filed an application in the HC seeking to:

1. Primarily, challenge the enforcement of the Award on the grounds that:
 - a. the Defendant was unable to present its case (s 31(2)(c) IAA); and
 - b. the DIA Award was contrary to the public policy of Singapore (s 31(4)(b) IAA); and
2. Alternatively, stay and/or adjourn the enforcement of the Award pending the determination of the Defendant’s setting aside application in the Danish Court (s 31(5) IAA).

In response, the Plaintiff filed a cross-application for an order for security amounting to the sums due under the Award should an adjournment of the enforcement proceedings be granted.

The decision of the HC

Framing of prayers

As a preliminary point, the HC took issue with the manner in which the Defendant had framed its alternative prayer. In its view, to seek a stay and/or adjournment only upon failure of a challenge to enforcement “ignores the language” and “gives no regard” to the two-stage regime required under s 31(5) IAA.

Section 31(5) of the IAA provides:

Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting or the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may –

- (a) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and
- (b) on application of the party seeking to enforce the award, order the other party to give suitable security.

Specifically, the two-stage regime entailed:

- First, an application by the award-creditor for leave to enforce the award, following which, the leave order is served on the award-debtor.
- Secondly, an option for the award-debtor to resist the award enforcement. This stage effectively ends if the court rejects the challenge and enters judgment on the foreign award.

As enumerated by the wording of s 31(5) IAA, the court only has the power to adjourn the case at the second stage of the enforcement, i.e. before judgment is entered on the foreign award. Beyond that, the award debtor can only seek a stay of the execution order.

This crucial distinction meant that notwithstanding the structure of the Defendant's prayers, the HC proceeded to examine the adjournment issue.

Adjournment of proceedings

Undertaking an extensive review of s 31(5) IAA, the HC concluded that its "permissive nature" accorded the court with "wide statutory discretion" in deciding an adjournment application. In particular, the court considers pertinent factors such as:

- The bona fides of the application to set aside or whether it is simply a delaying tactic; and
- The length of adjournment and the resulting consequences or prejudice likely to occur.

The HC also noted that the provision of security often dovetails with the issue of adjournment and should be considered together. Unsurprisingly, the factors to be considered for an application for security are related to those for adjournment, including:

- The strength of the argument on the invalidity of the award, "as perceived on a brief consideration by the enforcing court"; and
- The ease of enforcement of the award.

It bears mentioning that the approach as to assessment on strength eschews determinative threshold tests such as "a serious issue to be tried" and "real prospect of success". It is instead decided on a sliding scale as between "manifest validity" and "manifest invalidity" of the award.

Applying its framework as above, the HC ultimately declined to grant the Defendant's application for adjournment, affirming the ex parte Leave Order.

This was because:

- The Defendant failed to demonstrate that the setting aside application in Denmark was meritorious on any of the three grounds raised;
 - In particular, the HC rejected a key argument raised by the Defendant, namely, that the Tribunal had violated the procedural rules in the Rules of Arbitration Procedure of the DIA by disallowing the Defendant’s counterclaim and related evidence. The HC was not satisfied that the Tribunal’s decision amounted to “a denial of procedural justice”, as it was within the Tribunal’s discretion to reject additional materials that were produced at the last minute and would have delayed the progress of the arbitration.
- Given that the Danish proceedings would only be completed in 2019/2020, the delay would be too long and cause prejudice to the Plaintiff; and
- There was evidence demonstrating that the Defendant’s assets could be dissipated upon further delay.

Key takeaways

Lessons for future litigants: As the first case in Singapore to consider the merits of an application to adjourn enforcement proceedings pursuant to s 31(5) IAA, this decision illustrates the importance of an awareness of the appropriate stage at which an adjournment can and should be sought.

In particular, the HC showed that it would be robust in ensuring that unmeritorious adjournment applications are not being taken out as a delay tactic against the enforcement of an arbitral award.

The court’s methodology: Despite the HC’s willingness to oversee the enforcement process in limited circumstances, implicit in the judgment is the importance of promoting the enforceability of awards. Indeed, the HC’s attitude of striking a careful balance is reflected through:

- The HC’s repeated emphasis to focus on the circumstances for an adjournment of proceedings, and a brief consideration on the strength of the argument on invalidity; and
- The reliance on a sliding scale and “practical justice” as indicative of a refusal to undertake an overly-punctilious examination of issues.

Degree of proof for dissipation of assets: Interestingly, the HC noted that a party seeking provision of security need not show that the risk of dissipation of assets is of the same degree as that required under a Mareva injunction.

The HC’s preference for a lower standard is certainly correct when viewed in light of the more severe consequences of granting a Mareva injunction.

This lower threshold promotes the enforceability of awards and is consistent with Singapore’s pro-arbitration stance.

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