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SINGAPORE HIGH COURT REITERATES THE HIGH THRESHOLD FOR SETTING ASIDE ARBITRAL AWARDS

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INTRODUCTION

- Traditionally, the cardinal principle of minimal curial intervention underscores the relationship between the courts and arbitral tribunals. Where commercial parties have made a contractual decision to limit the role of the courts in the event of a dispute, they are generally deemed to have accepted the attendant risks of having limited recourse to the courts.

- One of these risks would, unfortunately, include the potential for an arbitral award to be incoherent or unintelligible. In the High Court case of *Swire Shipping Pte Ltd v Ace Exim Pte Ltd[1]*, such a risk actualised on the facts, in an application to set-aside the arbitral award.

- The applicant – Swire Shipping Pte Ltd. ("Swire") was a shipowner who agreed to sell a vessel to the respondent purchaser – Ace Exim Pte Ltd. ("Ace"), who was in the business of purchasing vessels for recycling.

- The heart of the dispute centred around where the contractual place of delivery for the vessel was supposed to be. Swire argued that the south of Jafarabad ("the Jafarabad Waiting Place") was a customary waiting place that was within the ambit of the contract. Ace, on the other hand, argued that Bhavnagar Anchorage was the correct customary waiting place, and that the Jafarabad Waiting Place only applied to heavily laden vessels (as opposed to vessels bound for recycling). The dispute was then sent for arbitration.

- The arbitrator ultimately issued an award in favour of Ace, holding that Jafarabad was limited to being a customary waiting place for heavily laden vessels ("Jafarabad Finding" / "Jafarabad Issue"). What was unusual, however, was that the award ended up being difficult to read and understand. As the court put it, the award was "structured as a labyrinth for the reader to navigate through and conquer, requiring the utmost willpower and concentration just to try to understand the Arbitrator's reasoning".

- To that extent, Swire applied for the award to be set-aside, arguing that the Jafarabad Finding was (i) made in excess of jurisdiction (i.e. the tribunal was not empowered to make such a finding), (ii) occasioned a breach of natural justice, and that (iii) the interpretation of the evidence was irrational.

EXCESS OF JURISDICTION

- Surveying the authorities, the court held that it would "take a substance-over-form approach" in analysing whether a tribunal made a finding that was not linked to the specific framing of the issues.

- Ultimately, the mere fact that a tribunal "does not answer an issue submitted to it letter-for-letter but answers it in a different way based on evidence that is before it" does not mean that it has acted in excess of jurisdiction.

- The court held that the Jafarabad Finding was made within the tribunal's jurisdiction as it was intertwined with the broader (and the crucial) issue of whether the Jafarabad Waiting Place was a customary waiting place.

- The court also held that although the Jafarabad Issue was initially not the subject of any specific pleading, it arose as a live issue in the evidence adduced by the parties and their written submissions.

BREACH OF NATURAL JUSTICE

- While a challenge to jurisdiction requires the court to "[look] at the arbitration in the round to see whether or not an issue was live", a challenge based on natural justice raises "the question of whether an issue had been sufficiently raised by or to the parties". In other words, an alleged breach of natural justice accuses the tribunal of not adhering to the requisite standard of due process (e.g. a tribunal not giving parties an adequate opportunity to address an issue).

- The court held that the Jafarabad Issue was decided in breach of natural justice as Swire had reasonable opportunity to address it during the leading of evidence and the parties' closing submissions. The court held that even if Swire only genuinely considered the Jafarabad Issue during Ace's reply submissions, it would have been the onus of Swire to raise their concerns to the arbitrator.

- The rationale behind the imposition of such an onus is to prevent "the complainant [from engaging] in "hedging" against an adverse result in the arbitration, by warehousing its natural justice complaint for potential deployment in the event that it turns out dissatisfied with the substantive outcome of the arbitration".

IRRATIONALITY AND "MANIFEST INCOHERENCE"

- Swire, relying on the decision in *BZW v BZV*[2], argued that the "manifest incoherence" of the arbitral award showed that the tribunal did not understand Swire's case. However, the court held that the incoherence of an award per se "does not move the needle; rather, what is important is whether this incoherence is sufficient, whether directly or through some inference, to bring the case within one of the recognised grounds for setting aside an award".

- Despite "presenting his views in a cypher", the court held that the arbitrator had properly applied his mind to the evidence. Even if the arbitrator's interpretation of the evidence had no basis, the court held that such an event would not be a breach of natural justice under Singapore law as it would run contrary to the policy of minimal curial intervention.

Takeaways:

- Arbitration Practitioners will find this judgment very useful as it elucidates almost every key principle and precedent from the

past 30 years in Singapore's jurisprudence relevant to these sorts of challenges against awards.

- Throughout the judgment, the court critically characterised Swire's arguments as "nothing more than a substantive appeal against the merits dressed up as a jurisdictional objection and/or due process violation". Pursuant to the policy of minimal curial intervention, parties to arbitration are cautioned that a duly rendered arbitral award would bind parties regardless of whether the outcome is favourable or not. Therefore, parties in a dispute should assess the suitability of arbitration as a dispute resolution mechanism before committing to it.

- Moreover, the court highlighted the phenomenon of "due process paranoia". Such a term refers to "the tendency of arbitral tribunals to act defensively in their procedural decisions and general conduct of the arbitration, borne out of a concern that exhibiting robustness may be subsequently challenged as a violation of a party's due process rights". It is submitted that when arbitrators are more concerned with preventing their awards from being set-aside (as opposed to resolving disputes in a reasoned and understandable manner), it ultimately defeats the prime benefit of arbitration being a cost-friendly and efficient mechanism to resolve disputes.

- To that extent, this case emphasises the importance of appointing the right arbitrator for the dispute. The freedom to choose an arbitrator, one who possesses industry knowledge and adjudicative experience, is also another prime benefit of arbitration that should be exploited to its fullest. Therefore, parties in a dispute should seek advice as to the appointment of a trusted arbitrator who is able to render a fair and coherent award.

This article was authored by our Partner and Head of Shipping Prakaash Silvam, Senior Associate Tan Yu Hang, and Foreign Lawyer Vedanta Vishwakarma. The authors thank Brandon Lim from the University of Cambridge for his valuable assistance with the article.

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[1] *[2024] SGHC 211*

[2] *[2022] 1 SLR 1080*