BRIEFING NOTE

ARBITRATION AND THE ARBITRAL TRIBUNAL "EVEN ACHILLES IS ONLY AS STRONG AS HIS HEEL"

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Introduction

Arbitration is said to have three main advantages over litigation, being that the parties can nominate their preferred arbitrators to the Tribunal and, for the most part, proceedings are confidential and the awards cannot be appealed. But two recent appeals before the Singapore Courts that have resulted in the setting aside of arbitral awards have highlighted arbitration's Achilles' heel: that the arbitral procedure is only as good as the arbitral tribunal. And that when the Tribunal fails in its most basic duties, to stay within its jurisdiction and deliver natural justice, the Tribunal's award can, in part or in whole, be set aside by the Courts.

CAJ v CAI [2021] SGCA 102

In this case, the Claimant employed the Respondent to construct a polysilicone plant. The Claimant commenced an arbitration seeking liquidated damages for 144 days delay in the mechanical completion of the project. In their written closing submissions, the Respondent raised a new argument in the proceedings, that the contract permitted a time extension for mechanical completion. The Tribunal, comprising Prof. Colin Ong, Dr. Reinhard Neumann and Prof. Doug Jones, accepted this argument and reduced the amount of damages by 25 days.

The Claimant then applied to the Singapore High Court to set aside that part of the Tribunal's award that allowed for the 25 days extension. It argued that as the time extension had only been raised in the Respondent's closing submissions, the Claimant did not have a fair and reasonable opportunity to respond and that in relying on its own experience and not the evidence submitted in the arbitration, the Tribunal had breached the rules of natural justice. The Singapore High Court and the Court of Appeal accepted the Claimant's argument, holding that this was a classic case of breach of natural justice and reinstating the 25 days deducted.

BZW v BZV [2022] SGCA 1

In this case, claims and counterclaims arose out of a shipbuilding dispute. The Tribunal, comprising Prof. Colin Ong, Mr. David Bateson and Mr. Goh Kok Leong, dismissed the claims of the Claimant (the buyer) and the counterclaims of the Respondent (the ship builder).

The Claimant then applied to the Singapore High Court to set aside that part of the Tribunal's award that dismissed the buyer's claims on the basis that there was a breach of natural justice and that it had not been afforded a fair hearing. The High Court allowed the application, finding that the Tribunal adopted a chain of reasoning which had no nexus to the parties' cases and failed to apply its mind to an essential issue arising from the parties' arguments. The Court of Appeal upheld the judgment, finding that a manifestly incoherent decision would demonstrate that the Tribunal had not understood the issues or dealt with the case at all such that the parties had not been afforded a fair hearing and may apply to set the award aside.

One in Five Applications to Set Aside Succeed

In CAJ v CAI, the Court of Appeal noted that only one in five applications to set aside an arbitral award succeed. In other words, four out of five awards which the unsuccessful party applies to set aside will be upheld because the applicant, albeit unsuccessful, has had a fair hearing. But the fact remains that in 20% of all matters in which the unsuccessful party believes that it has not had a fair hearing, the Court agrees. And given the amounts that parties who take their disputes to arbitration pay the arbitrators, that percentage is far too high. To drive this point home, visit the SIAC's cost calculator on the SIAC website and you will see that the average fee of a three-person tribunal determining a S$ 5 million dispute is S$ 285,000.00.

What to Do?

When Thetis dipped her son Achilles in the River Styx, she had to hold on to something, and the something that minimised Achilles' mortality was his heel. So how do parties and their counsel minimise the possibility of appointing a tribunal that relies on its own experience and not the submitted evidence, delivers an award that is manifestly incoherent or otherwise fails to adhere to the rules of natural justice and renders the award open to challenge?

First, agree the sole arbitrator or the Chairman of the Tribunal. Whilst this exercise requires lawyers to put aside their hubris and engage with opposing counsel, two minds tend to be greater than one and can lead to the appointment of an arbitrator or Chairman who is experienced in arbitration, aware of the procedural rules and has the time to dedicate to the arbitration. "Busy" arbitrators should be avoided. They do not have the time to dedicate to the arbitration that the investment in the arbitration procedure demands. Agreement avoids having to defer that appointment to the opaque procedures of arbitration institutions.

Second, appoint an arbitrator who is familiar with the industry from which the dispute arises and the technical evidence on which the dispute may turn. This takes some courage because the default position is to appoint a lawyer. But lawyers become lawyers because they never understood science or maths at school, which is clearly a disadvantage when it comes to considering the expert engineering or forensic accounting evidence on which a dispute may turn. Perhaps the low point of the author's experience with arbitral tribunals was to hear a Tribunal Chairman confess that he still found the engineering evidence "very challenging", notwithstanding the assistance provided by two of the world's leading experts and detailed expert reports that could not have been dumbed down further without the use of cartoons.

Third, insist that the Tribunal produces a list of issues, or at least considers two competing lists of issues produced by parties' counsel, as well as a damages calculator produced by the parties' damages or accounting experts. The list of issues, produced after the Statements of Claim and Defence have been filed, provide a road map for the arbitration and a decision tree for the Tribunal. The damages calculator calculates the amount payable depending upon the variables, determined by reference to the list of issues, allowed or dismissed by the Tribunal.

Finally, talk. The professional conduct rules have been relaxed to allow parties and their counsel to interview or beauty parade arbitrators before selecting an arbitrator. Although parties cannot discuss the merits of the case, selecting an arbitrator because he/she is "much

in demand", "highly regarded", "pre-eminent" or carries a "stellar reputation" does not assist a party in understanding how the arbitrator will manage the case in such a way as to ensure that both parties will, within a reasonable time frame, receive a fair hearing that results in an award that is enforceable and will not be set aside for breach of natural justice.

Here are some questions that may be asked in the course of the selection procedure:

1. Have you any relationship with [counter party]?
2. Have you any relationship with [counter party counsel]?
3. How many times have you been appointed by [counter party]?
4. How many times have you been appointed by [counter party counsel]?
5. What experience do you have of [Arbitral Institution Rules]?
6. What experience do you have of [industry]?
7. What experience do you have of [technical discipline]?
8. What experience do you have of the calculation of [valuation/loss of profit/damage]?
9. What is your availability for a [10] day hearing on or before [date]?
10. What is your hourly rate / Will you accept scale fees?

Way Forward

The Tribunal is the key to a successful arbitration. Win or lose, provided that they have had a fair hearing, most participants will abide by the Tribunal's award. But if they have not received due process or natural justice then they should apply to set aside the Tribunal's award. And if the Tribunal has overreached its jurisdiction or produced a manifestly incoherent decision, the Singapore Court will set the award aside. And the parties may have to start all over again.

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