Court of Appeal entrenches the principle of minimal curial intervention in a further pro-arbitration decision

In the recent decision in *BLC and others v BLB and another* [2014] SGCA 40 ("**BLC v BLB**"), the Singapore Court of Appeal ("**CA**") reversed the Singapore High Court's ("**HC**") decision to set aside part of an arbitral award on the ground of a breach of natural justice, suggesting that the principle of minimal curial intervention applies even where there has been a serious error of law and/or fact. This ruling continues the current trend of pro-arbitration jurisprudence emanating from Singapore and provides guidance on the options available to parties who receive an unfavourable arbitral award in relation to a Singapore seated arbitration.

The material facts of the case

The dispute arose from a joint venture between two groups of companies, with the Appellants commencing arbitration proceedings pursuant to the International Arbitration Act (Cap. 143A, 2002 Red Ed) and the Respondents launching their counterclaims ("**Respondents' Counterclaims**") in response. Following the close of the hearing, the sole arbitrator ("**Tribunal**") issued an award in favour of the Appellants but completely dismissed the Respondents' Counterclaims ("**Award**").

Dissatisfied with the Award, the Respondents applied to set it aside in its entirety. Before the HC, the Respondents argued that the Tribunal had failed to address one of the Respondents' Counterclaims ("**Disputed Counterclaim**"), thereby occasioning a breach of natural justice. The HC agreed with the Respondents and set aside the Tribunal's finding with respect to the Disputed Counterclaim. The HC also remitted the Disputed Counterclaim to a new tribunal (which was to be constituted).

The principle of minimal curial intervention at the forefront

On the facts, the CA disagreed with the HC's finding that the Tribunal did not consider the Disputed Counterclaim. Instead, the CA found that the Tribunal had rendered a decision in respect of that claim. The CA allowed the appeal and ruled that there was no breach of natural justice.

Key issues

- Parties, dissatisfied with an arbitral award, should first exhaust their remedies from the tribunal before approaching the Courts.
- The Court will be wary of attempts to fault an award for not considering arguments which were allegedly raised by the parties.
- Even if the threshold is met, the Court is likely to remit the matter to the originally constituted tribunal (instead of a new one).

Significantly, the CA strongly affirmed the principle of minimal curial intervention in the following terms:

(a) The substantive merits of the arbitral proceedings are beyond the remit of the Court. As the CA noted, there is "*no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact*";

(b) As for alleged breaches of natural justice, the Court is not required to conduct a "*hypercritical or excessively syntactical analysis*" of the arbitral award. Instead, arbitral awards are to be read such that only "*meaningful breaches … that have actually caused prejudice are ultimately remedied*"; and

(c) The Court should be wary of dissatisfied parties attempting to criticise an arbitrator for failing to consider arguments or points which were never before the arbitrator.

Guidance to dissatisfied parties to first consider remedies from the tribunal in appropriate cases

BLC v BLB is also significant for the CA's remarks as to how parties, dissatisfied with an arbitral award, should first attempt to seek redress from the tribunal before turning to the Court.

Under Article 33(3) of the Model Law, unless otherwise agreed by the parties, if a claim is presented in the arbitral proceedings but omitted from the arbitral award, a party may apply to the tribunal to make an additional award:

> ***Article 33. Correction and interpretation of award; additional award***
>
> *...*
>
> *(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.*

While the CA noted that Article 33(3) is not mandatory, the CA observed that the position under English law (i.e. which bars an applicant from relief if it has not exhausted the remedies before the tribunal) is consistent with the principle of minimal curial intervention which has been endorsed by the Singapore Courts.

As a caution to potential litigants in future matters, the CA commented that (at the least) a party's reasons for not invoking Article 33(3) are likely to affect how the Court will approach an application to set aside an award.

These significant observations of the CA are a clear warning that dissatisfied parties should approach the Court to set aside an arbitral award only as a remedy of last resort and after they have approached the tribunal in the first instance.

Court does not have the power to remit award to newly constituted tribunal under Article 34(4) of Model Law

The CA disagreed with the HC's decision to remit the Award to a newly constituted tribunal. According to the CA, the only explicable basis for the HC's remission of the matter was Article 34(4) of the Model Law, and the clear language of Article 34(4) does not permit the remission of an award to a newly constituted tribunal:

> ***Article 34. Application for setting aside as exclusive recourse against arbitral award***
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> …
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> *(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.*

The CA observed that if the Disputed Counterclaim had not been considered or determined because of a pure oversight, it would have been open to the HC to remit the Award dealing with the Disputed Counterclaim back to the Tribunal. If this was done, and if the arbitrator's ability to determine the Disputed Counterclaim was unchallenged by the Respondents, the parties could proceed to have the matter heard before the same arbitrator. It was only if the arbitrator himself decided to withdraw (for example if it was

improper or impossible to continue) that the parties would need to appoint a substitute arbitral tribunal.

The preference of the CA to remit an arbitral award back to the originally constituted tribunal, rather than to a newly constituted one, yet again illustrates the principle of minimal curial intervention.

Conclusion

This latest pronouncement from the CA is a welcome one in affirming the principle of minimal curial intervention and providing clear guidelines to parties who are faced with an unfavourable arbitral award in relation to a Singapore seated arbitration.

First, and at a practical level, aggrieved parties should avail themselves of any possible reliefs from the tribunal. Turning to the Court should only be a remedy of last resort.

Second, in deciding whether or not to launch an application to the Court to set aside an unfavourable award, parties should note the following:

(a) The Court will not consider the substantive merits of the *arbitral* proceedings; neither will an error of fact or law be sufficient to satisfy this threshold. Even in respect of breaches of natural justice, the Court will only remedy "*meaningful breaches*" of natural justice which have actually caused prejudice to a party.

(b) The Court will be wary of an aggrieved party's attempts to fault an award for not considering points or arguments which were allegedly raised by the parties. The Court will not hesitate to undertake a detailed analysis of the materials submitted before the tribunal to determine if the arguments were raised before the tribunal. Parties who are hoping to use the setting-aside procedure in an attempt to raise new arguments which were not before the tribunal should be cautioned.

(c) Even if the above-mentioned threshold is satisfied, the Court is likely to remit the matter to the originally constituted tribunal (instead of a new one) for correction or consideration of the new matters raised.

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