

SINGAPORE COURT OF APPEAL CONFIRMS THAT AWARD CANNOT BE REMITTED TO THE TRIBUNAL AFTER BEING SET ASIDE BY THE COURTS

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A party, say a Claimant, obtains an award in its favour against another party, say a Respondent. So far, so good. But what happens if the award is then set aside by the Courts? Can the Court remit the award back to the original Tribunal? Can (or must) the Claimant issue fresh arbitral proceedings with respect to the same matters? Or is that the end of the road for the Claimant?

The Singapore Court of Appeal (the “**SGCA**”), in the recent decision of *AKN and another v ALC and others and other appeals [2015] SGCA 63*, has considered these questions and suggested some answers. In short, where an award is set aside, the original Tribunal remains functus officio (i.e. the Tribunal’s mandate is spent) and it cannot be asked to reconsider any matters covered by the award. It is also likely that, in the interests of finality, any matters covered by the award cannot be re-arbitrated before a different Tribunal, although there may be exceptions in some circumstances.

Background

The underlying dispute arose from an Asset Purchase Agreement (the “**APA**”) entered into by the liquidators of an insolvent corporation, the corporation’s secured creditors and

purchasers. The APA was for the purchase of a production facility (and its machinery) from the corporation. Under the APA, the liquidators and the secured creditors were to sell the company’s assets to the purchasers and the secured creditors entered into another agreement under which the purchasers would issue notes to the secured creditors and make subsequent payments based on these notes.

The purchasers later discovered that certain taxes for the assets had not been paid. They claimed that this constituted a failure to deliver free and clear of all liens, and was therefore a breach of the APA by the liquidator and the secured creditors. The aggrieved purchasers commenced SIAC arbitration against the liquidator and the secured creditors, and obtained an award in their favour.

The liquidator and the secured creditors subsequently obtained orders from the SGCA setting aside parts (although not all) of the SIAC award (see the earlier judgment of *AKN v ALC [2015] 3 SLR 488*). The award having been set aside in part, the parties then sought guidance from the SGCA about what should happen next. Should the matters covered by those parties of the award which had been set

aside in part, the parties then sought guidance from the SGCA about what should happen next. Should the matters covered by those parties of the award which had been set aside now be remitted back to the Tribunal for further consideration? Was it possible for any of the parties to re-issue arbitration proceedings with respect to any matters?

Decision

If the Court sets aside an award, can the Court then remit the award back to the original Tribunal for further consideration?

The Singapore Courts have the power to set aside an award on certain narrow grounds, pursuant to Section 24 of the International Arbitration Act (IAA) and Article 34(a) of the Model Law (which is given force in Singapore under the IAA). Article 34(4) of the Model Law provides further that where the Court *"is asked to set aside an award"*, the Court *"may" "suspend the setting aside proceedings...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"*.

Some earlier decisions of the Singapore Courts had been thought to suggest that, where the Courts had set aside an award, the Court could refer back to the original Tribunal (or "remit") certain matters arising from the award. The SGCA considered that, in view of "the plain words of Art 34(4) [Model Law]" and "good sense", there was no power to remit any matters under the IAA or Model Law once the Court has set aside an award.

In short, the Court can either remit or set aside an award. It cannot do both. Once an award is set aside, the Court has no power to remit the award.

If an award is set aside, does the

original Tribunal still have jurisdiction to reconsider any matters arising from the award?

It was undisputed that were an award was set aside, the award itself would cease to have any legal effect. However, the purchasers went on to argue that, in those circumstances, the award should be treated as having not been made in the first place. Accordingly, parties to the arbitration are entitled to have the issued in dispute, that are covered by the portions of the award that have been set aside, re-heard by the original Tribunal – i.e. because the original award is treated as having never been made, the Tribunal is still in a position to now issue its award (perhaps after considering matters further).

The SGCA considered this to be "plainly counter-intuitive" and "rather odd", and confirmed that such an approach is wrong. The Tribunal's mandate ends with the making of its award unless the Tribunal is restored pursuant to an order from the Court (which is only possible in certain narrow circumstances). Setting aside an award does not restore or revive the Tribunal's jurisdiction.

If an award is set aside, can parties issue fresh proceedings before a newly constituted Tribunal?

The SGCA clarified that, save where the award was set aside on the ground that there was no arbitration agreement between the parties, the arbitration agreement would survive the setting aside of an award. Furthermore, in principle, parties who have had their arbitration award set aside by the Court may be entitled to start fresh arbitration proceedings, but there are limitations to this right.

The SGCA emphasised the applicability of res judicata in arbitration, stating that *"just as finality is of significance to the courts, so too is*

it of importance to arbitration. Thus the courts will typically not rehear matters that have already been determined in arbitration”.

In view of the doctrine of *res judicata*, if a dispute is considered to have been dealt with and decided by a tribunal, and assuming the dispute was capable of being arbitrated and fell within the parties’ arbitration agreement, that dispute cannot subsequently be the subject of a fresh reference to arbitration. Furthermore, where a party could have been expected to raise certain issues in an arbitration but chose not to do so, the doctrine of *res judicata* will preclude the reopening of such matters. However, where the Tribunal could be said to have not dealt with the matters raised (e.g. it had plainly overlooked, and never engaged with, the merits of a party’s case), then the doctrine of *res judicata* would not be engaged. Fresh arbitration proceedings before a new Tribunal may be commenced.

In the present case, the original Tribunal had rejected certain claims made by the purchasers, but had allowed the purchasers to succeed on certain alternate claims. The alternate claims had never been squarely advanced by the purchasers. The SGCA set aside the award with respect to these claims, as the other parties had not had a proper opportunity to address them. However, this did not entitle the purchasers to re-arbitrate these claims. The purchasers had not raised the claims in the

original arbitration and, notwithstanding the award being set aside, it was too late to raise them now. In contrast, the SGCA also set aside certain other findings of the Tribunal concerning claims raised by the secured creditors, because the Tribunal had not properly engaged in the merits of these claims. The secured creditors were free to issue fresh arbitral proceedings with respect to these claims, as the Tribunal had never considered them.

Comment

This case confirms that an award cannot be remitted once it has been set aside. This is even if the award has only been set aside in part. The Tribunal has no mandate to rehear portions of the award that have been set aside. The case also confirms that the doctrine of *res judicata* applies to arbitration. The application of this doctrine, and therefore whether a party can or cannot commence fresh arbitration proceedings before a new tribunal where an award is set aside, is likely to be highly fact-dependent. However, what is clear is that parties in any arbitration should be careful to squarely raise any claims or issues which they believe have merit. If they fail to do so, then it may be too late to raise these issues in any subsequent proceedings. This is part of the extended *res judicata* doctrine.

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