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DEALS

WONGPARTNERSHIP LLP ACTS IN...

JPMorgan's Joint Venture with DBS and Temasek to Form New Blockchain-Based Platform, Partior

WongPartnership acted for JPMorgan in its joint venture with DBS and Temasek to create a new blockchain-based platform for payments, trade and foreign exchange settlement. The company, Partior, will leverage blockchain technology and digitise commercial bank money, with the aim of reducing current frictions and time delays in cross-border payments, trade and currency settlements.

As the Partior platform is intended to provide round-the-clock infrastructure, allowing more financial institutions and developers to co-create applications to support foreign exchange payment versus payment, delivery versus payment (DVP), and peer-to-peer escrows to complement and value-add to global financial ecosystems, the transaction required dealing with a wide gamut of issues given the novel nature and complexity of the transaction, and devising innovative solutions within a tight timeline. WongPartnership also advised JPMorgan on the Singapore antitrust / merger control aspects of the transaction.

Partners involved in the transaction are Chan Sing Yee from the Mergers and Acquisitions Practice, Ameera Ashraf and Chan Jia Hui from the Competition and Regulatory Practice and Tan Shao Tong from the Tax Practice.



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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	PRACTICE AREAS
Acted in the disposal of CapitaLand's 75% equity interest in Galaxis to Ascendas REIT for approximately S\$534.4 million.	Banking & Finance Corporate/Mergers & Acquisitions REITs
Acted in the S\$235 million private fundraising round by Cityneon Holdings and its chairman-CEO, Mr Ron Tan.	Capital Markets
Acted in the S\$320 million syndicated financing, arranged by UOB, Malayan Banking Berhad (Singapore), RHB Bank Berhad and HSBC, to ESR-REIT.	Banking & Finance REITs
Acted in the rollout of various greenfield digital services powered by data analytics, including transportation and lifestyle products, and integrated e-commerce marketplace services by an SGX-listed multinational transport company.	Intellectual Property, Technology & Data FinTech Financial Services Regulatory
Acted in the financing of the acquisition of a Caldecott site for S\$280.9 million by Perennial Real Estate Holdings.	Banking & Finance
Acted in the private placement of new units to raise gross proceeds of S\$270 million by Keppel REIT.	Equity Capital Markets
Advising on the mandatory conditional cash offer for Penguin International Limited by consortium involving Dymon Asia.	Banking & Finance Corporate/Mergers & Acquisitions
Acting as Singapore counsel in the divestment of Shiseido Co's personal care business to CVC Capital Partners.	Corporate/Mergers & Acquisitions Employment Tax Regulatory

DESCRIPTION	PRACTICE AREAS
Acted in the S\$1.22 billion green loan facility granted by a syndicate of lenders to South Beach Consortium Pte Ltd. for the refinancing of the landmark “South Beach” project.	Banking & Finance Corporate Real Estate
Acted in the grant of the US\$250 million sustainability-linked loan facility by DBS and OCBC to Manulife US Real Estate Investment Trust (“ Manulife US REIT ”). This is Manulife US REIT’s first sustainability-linked loan, which incorporates interest rate reductions linked to pre-determined sustainability performance targets.	Banking & Finance
Acting in the liquidation of various Novena Global Healthcare Group companies.	Restructuring & Insolvency

MAREVA INJUNCTIONS

Singapore Court of Appeal Clarifies Tests for Grant of Post-judgment *Mareva* Injunctions and Release of Plaintiff's Undertakings Relating to Post-judgment *Mareva* Injunctions

The Singapore Court of Appeal in a significant decision, provided guidance on two important aspects of the *Mareva* injunction (or freezing injunction):

- First, the Court confirmed that the conditions to be satisfied for a post-judgment *Mareva* injunction are: (a) there must be a real risk of the debtor dissipating his assets with the intention of depriving the creditor of satisfaction of the judgment debt; (b) the injunction must act as an aid to execution; and (c) it must be in the interests of justice to grant the injunction.
- Second, a party who has provided undertakings to the Court in the course of obtaining a *Mareva* injunction is entitled to have the undertakings removed if he can demonstrate: (a) cogent and persuasive reasons for the release; and (b) that the release would not occasion injustice to the defendant enjoined by the *Mareva* injunction or who disclosed information pursuant to any court order.

Our Comments

The *Mareva* injunction has been described in numerous judgments as one of the “*nuclear weapons*” of civil litigation. While the injunction does not act as a security for a plaintiff’s claim, it circumscribes a defendant’s right to deal with its own property. This helps ensure that the successful plaintiff is not left with a paper judgment of no real value as a result of the defendant having dissipated its assets. To facilitate this, the Court will also grant ancillary disclosure orders requiring the defendants to provide information on its assets to enable the plaintiff to police the injunction.

While *Mareva* injunctions are often sought and obtained prior to the plaintiff succeeding against the defendant, there are occasions where an application for a *Mareva* injunction is made only post-judgment. It is critical for parties to understand what the conditions for the grant of a post-judgment *Mareva* injunction are, and how they differ from the pre-judgment variant.

Given the extent of information provided to the plaintiff by the defendant as a result of the ancillary disclosure orders, there is a risk that the information might be used as a tool by the plaintiff to oppress the defendant. The plaintiff is therefore required to give undertakings to the Court when seeking a *Mareva* injunction. This typically involves the plaintiff undertaking to the Court that it shall not, without the Court’s leave, begin proceedings against the defendant in any other jurisdiction or to use the information obtained as a result of the *Mareva* injunction for the purpose of civil or criminal proceedings in any other jurisdiction.

The Court of Appeal’s approach seeks to strike a balance between the need to prevent the plaintiff from abusing the information obtained for ulterior purposes and to ensure that the plaintiff is not prejudiced in

its enforcement efforts overseas by having to seek leave of the Singapore Court each time it commences enforcement proceedings.

This update takes a look at the Court of Appeal's decision.

Background

The appellant brought proceedings in the Singapore High Court against eight respondents for deceit and conspiracy. The appellant's claims were initially dismissed by the High Court, but allowed on appeal. The appellant was ultimately successful in its claims against the first to seventh respondents, who were ordered to be jointly and severally liable to the appellant for US\$70,006,122.49 and S\$131,817.80 (collectively, "**Judgment Sum**").

Prior to this, the appellant had obtained a worldwide *Mareva* injunction against the first respondent and a domestic *Mareva* injunction against the second respondent, for up to US\$180 million. The Court of Appeal also extended the *Mareva* injunctions by 60 days.

The appellant subsequently sought: (1) an order for the reinstated *Mareva* injunctions to continue until the respondents fully satisfied the Judgment Sum, the costs of the appeal and the costs of the High Court trial; (2) disclosure of the first and second respondent's assets worldwide; and (3) to be released from certain undertakings provided when the worldwide *Mareva* injunctions were granted ("**Undertakings**"). The Undertakings prevented the appellant, without leave of the court, from (a) commencing proceedings against the first or third respondents in other jurisdictions or using information obtained as a result of an order of the court for the purpose of proceedings in other jurisdictions; and (b) seeking to enforce the *Mareva* injunctions outside Singapore or seeking a similar order, including orders conferring a charge or other security against the first or third respondents or their assets.

Meanwhile, the first and second respondents applied to have the enjoined quantum of US\$180 million reduced to US\$34 million. This took into account the Judgment Sum as well as the fact that the appellant had since been paid or recovered at least US\$37.6 million, and the sum of US\$34 million would be sufficient to cover the unpaid Judgment Sum and costs.

The Court of Appeal's Decision

Test for post-judgment Mareva injunctions

The Court of Appeal ordered the reinstated *Mareva* injunctions to be extended until the Judgment Sum and costs were paid by the respondents.

It is notable that this was the first occasion where the Court of Appeal specifically addressed in a written decision the conditions for the grant of a *Mareva* injunction *post-judgment* and the Court of Appeal affirmed the decision of Judith Prakash J (as she then was) in *Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose and another* [2001] 1 SLR(R) 762 where the Court laid down the following conditions for the granting of a post-judgment *Mareva* injunction:

- (a) there must be a real risk of the debtor dissipating his assets with the intention of depriving the creditor of satisfaction of the judgment debt;

- (b) the injunction must act as an aid to execution; and
- (c) it must be in the interests of justice to grant the injunction.

The Court of Appeal found that all three conditions were met in this case. The Court had no trouble finding that there was a real risk of dissipation because it had already “*undertaken this analysis twice*” and the first and second respondents did not “*clai[m] that anything ha[d] since occurred which would change [the Court’s] analysis*”. The Court of Appeal also found that because there was a real risk of dissipation, it would follow as a matter of course that the *Mareva* injunctions would “*indisputably facilitate execution of the Judgment Sum*”. There was also “*no injustice in enjoining the sum required to ensure that the Judgment Sum [wa]s promptly paid to the appellant*” since the Judgment Sum and costs orders were already ordered in favour of the appellant.

Enjoined quantum reduced

However, the Court of Appeal held that there was no principled reason to keep the injunctions at US\$142 million as the outstanding debt was only around US\$34 million.

In its view, to maintain a *Mareva* injunction of US\$142 million despite the clear knowledge that the balance Judgment Sum, costs and interests aggregated at most to only around US\$34 million would be a “*disproportionate and unprincipled reaction to the unsatisfactory state*” of the first and second respondents’ asset disclosure.

That said, the Court of Appeal accepted that, as the first and second respondents’ disclosed assets were primarily illiquid assets as well as shares whose values might fluctuate, it was appropriate to factor in some margin for such contingencies and order the quantum of the *enjoined sum* to be reduced to US\$50 million instead of US\$34 million as sought by the first and second respondents.

Notwithstanding the reduction in the enjoined sum to US\$50 million, the Court of Appeal, agreeing with the appellant that the assets disclosed by the first and second respondents were inflated or insufficient to satisfy the enjoined quantum of US\$50 million, ordered the first and second respondents to file a fresh, properly supported, affidavit within three weeks of the date of judgment to disclose assets up to US\$100 million. The Court of Appeal found that the first and second respondents were given a fair chance to adduce expert evidence to justify the valuation of their assets, but the valuations were manifestly unsatisfactory, and the appellant had to “*accept the consequences of their own unsatisfactory valuation*”. The Court also cautioned that should the respondents deal with or dispose of their assets in the belief that those assets are in excess of the enjoined quantum of US\$50 million, the respondents would bear the risk of being found in contempt if it transpires that the preserved assets are worth less than US\$50 million.

This sounds an important warning to defendants that they should provide proper justification for the valuation of their assets.

Test for modifying or removing undertakings relating to post-judgment Mareva injunction

The Court of Appeal’s decision was also significant as it laid down the appropriate test on the removal of undertakings in the context of post-judgment *Mareva* injunctions. The Court of Appeal did not accept the appellant’s contention that the undertakings can be removed “*if it is in the interests of justice to do so*”

(drawing reference from the test for the variation of *Mareva* injunctions adopted by the High Court in *Sumifru Singapore Pte Ltd v Felix Santos Ishizuka and others* [2020] 4 SLR 904). Instead, the Court of Appeal took the view that the legal test for modification/removal of undertakings in the context of discovery orders “*would be a more suitable test to transpose to the present case*” given that the purpose of such undertakings is likewise to protect the defendant by preventing the plaintiff from abusing the information obtained for ulterior purposes.

The Court of Appeal held that a plaintiff seeking to be released from his undertakings must demonstrate:

- (a) cogent and persuasive reasons for the release; and
- (b) that the release would not occasion injustice to the defendant who is enjoined by the *Mareva* injunction or who disclosed information pursuant to any court order.

On the facts of this case, the Court of Appeal found no cogent and persuasive reason to release the appellant from the Undertakings. The first and second respondents had evinced an intention to pay the Judgment Sum, and the *Mareva* injunctions would be adequate to safeguard the appellant’s interests. It therefore did not seem necessary to permit the appellant to commence foreign enforcement proceedings at the present time.

Further, should the appellant wish to commence foreign enforcement proceedings, it was at liberty to file a fresh application for the release of the Undertakings. The Court would retain control over such proceedings which the appellant might seek to commence to avoid oppression and incurring unnecessary time and costs, while allowing the appellant to proceed with enforcement where appropriate and meritorious to do so.

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INSOLVENCY

Navigating Between Scylla and Charybdis: Singapore High Court Clarifies Test for “Unfair Prejudice” and Intervening in Judicial Managers’ Decisions

Authored by Partners Joel Chng and Daniel Liu, with contribution from Senior Associates Clayton Chong and Muhammed Ismail Noordin

The Singapore High Court has clarified the test for determining when the court should, under section 227R of the Companies Act (now section 115 of the Insolvency, Restructuring and Dissolution Act 2018), intervene in decisions made by a judicial manager in managing the affairs of a company: *Re HTL International Holdings Pte Ltd* [2021] SGHC 86.

Our Comments

In Greek mythology, Scylla and Charybdis were mythical sea monsters situated on opposite sides of the Strait of Messina. Ships passing through these straits faced the threat of crashing into Scylla’s rocky shoals or the snare of the whirlpool of Charybdis. Any misstep in these treacherous waters could spell the doom of a ship and its crew.

In pursuit of steadying the ship, judicial managers stepping into an embattled company often need to navigate difficult waters in unfavourable conditions. Judicial managers have to make difficult decisions under time pressure, and constantly face scrutiny from creditors, shareholders, employees and other stakeholders. There are a myriad of factors that judicial managers have to contend with in deciding on a path forward. Often the preferences of different stakeholder groups may be at odds with each other. For example, a creditor may prefer a sale of assets and a quick recovery of his debts, while a shareholder may wish for the company to continue its operations in the hopes of recouping any excess value after the creditors are paid off.

The High Court in *Re HTL International Holdings Pte Ltd* [2021] SGHC 86 has provided guidance on when the courts will interfere with the commercial judgment of judicial managers where creditors or shareholders allege that there has been unfair prejudice to them. The judgment recognises the pressure and difficulties encountered by judicial managers and clarifies that the courts will rarely second-guess their decision unless their decision is not at all commercially justifiable.

This update takes a look at the High Court’s decision.

Background

In July 2020, HTL International Holdings Pte Ltd (“**Company**”) was placed under judicial management. Three judicial managers (“**JMs**”) were appointed.

The Company sought to sell its interests in its subsidiaries (“**Assets**”) to a potential buyer, Golden Hill Capital Pte Ltd (“**Golden Hill Capital**”). A few months later, another potential buyer, Man Wah Holdings Ltd (“**Man Wah**”) offered to buy the Assets.

Subsequently, in response to the JMs’ invitation, both Golden Hill Capital and Man Wah submitted revised and final offers. Shortly thereafter, the JMs sold the Assets to Golden Hill Capital.

The Company’s holding company and ultimate holding company (collectively, “**Shareholders**”) considered Man Wah’s offer superior to Golden Hill Capital’s, and applied to the High Court for the sale of the Assets to Golden Hill Capital to be set aside and that the JMs be directed to accept Man Wah’s offer.

The Shareholders’ application was brought under section 227R of the Companies Act (“**Section 227R**”) (which is now section 115 of the Insolvency, Restructuring and Dissolution Act 2018). Section 227R permits a creditor or member of a company which is the subject of a judicial management order to seek relief from the court on the ground that: (a) the judicial manager is managing the company’s affairs, business and property in a manner which is or was unfairly prejudicial to the interests of its creditors or members generally (or of some part of them); or (b) any actual or proposed act or omission of the judicial manager is or would be so prejudicial.

The Shareholders took the view that, in interpreting the term “unfairly prejudicial” in Section 227R, unfair harm could arise from a decision by a judicial manager to sell the company’s assets at an undervalue, which they alleged was what transpired here. The Shareholders also contended that the JMs’ general conduct lacked transparency and was unfair to the Shareholders, and thus perverse.

The High Court’s Decision

Dismissing the Shareholders’ application, the High Court found that it was not shown that the JMs had conducted the Company’s affairs in a manner that was unfairly prejudicial to the interests of its creditors or members generally (or some part of them).

In doing so, the High Court examined relevant English jurisprudence and distilled the following valuable guidance on the test for “unfair prejudice” and the scope of Section 227R:

- The court will not interfere with a decision of a judicial manager unless it can be shown that the judicial manager has committed plainly wrongful conduct, has been conspicuously unfair or has been perverse. Great leeway ought to be given to the judicial manager to exercise commercial judgment, which should only be impugned upon evidence of exceptional circumstances, such as those described above.
- The applicant must show the court that there has been unfair prejudice, which is more than bare prejudice. It will be very rare indeed for a commercial decision in respect of such a company to be one that is uncontroversial or spares everyone pain and loss. As most commercial decisions of a company in judicial management can be expected to cause detriment or prejudice to one or more of the creditors or members of the company, and some losses borne in unequal proportions, decisions by a judicial manager are not to be second-guessed or revisited by the court unless the

pain to the applicant is wholly unrequired, or the judicial manager's decision is not at all commercially justifiable, i.e., the pain caused to one is "out of whack" with the reward to others.

- In weighing the costs and benefits of a particular course of action, the judicial manager is justified in weighing the interests of creditors more than that of the members or shareholders.
- A sale at an undervalue can constitute unfair prejudice if the decision to sell the asset in question was perverse (that is, not logical or conspicuously unfair), e.g., not giving fair consideration to all other offers. However, a sale at an undervalue alone will not necessarily impugn the transaction; the court will generally not look behind the judicial manager's decision, unless there is something particularly lacking on the surface (e.g., refraining from taking any steps to evaluate other offers).
- The court's powers under Section 227R are not limited to forward-looking actions, but may extend to cover past, present and proposed acts or omissions.

On the facts of this case, the High Court found that the JMs' decision to sell the Assets to Golden Hill Capital was not unfairly prejudicial.

The High Court found, among other things, that:

- In the light of all the circumstances, particularly the need for a swift injection of funds to address the Assets' precarious financial position, the JMs' exercise of their commercial judgment to prefer the Golden Hill Capital offer did not evince any perverse, conspicuously unfair or plainly wrongful conduct.
- The JMs were justified in assessing that Golden Hill Capital's final offer promised greater shareholder returns, and had good grounds to find that Golden Hill Capital's final offer was at least comparable or equal to (if not better than) Man Wah's offer. In this regard, the court undertook a fact-specific inquiry into the terms of Man Wah's offer in coming to a conclusion that the JMs were justified in their assessment.
- Even if Golden Hill Capital's offer price might not have been the best, this on its own did not conclusively establish unfair prejudice. In particular, the situation of the Company meant that the additional delay of Man Wah's offer, compared to the speed with which Golden Hill Capital's offer could be effected, contributed to the High Court accepting the JMs' decision as being justifiable (the delay was about two to six months, to hold a general meeting to approve their acquisition of the Company as required under the Hong Kong listing rules). The High Court accepted, in particular, that the exigencies of the situation facing the Company were such that the JMs had to act swiftly, and that the urgency of the sale was the key thing that weighed on the JMs' minds. The JMs were therefore entitled to prefer Golden Hill Capital's offer to Man Wah's.
- The JMs had fairly evaluated both offers. The High Court noted in particular that the JMs had submitted a "detailed list of clarifications" to Man Wah, sought legal advice on the need for a shareholders' resolution under the Hong Kong listing rules for effecting Man Wah's offer, and also given both Man Wah and Golden Hill Capital equal opportunity to present "anything further" in respect of their offers before they made a final decision. Taking into account the commercial

pressures, the High Court considered that JMs could not be faulted for going ahead with what they considered was the more appropriate offer. Nor was there any misconduct by the JMs that would justify the court intervening in their decision to sell the Assets to Golden Hill Capital.

The High Court therefore dismissed the Shareholders' application.

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ARBITRATION

Singapore Court of Appeal Clarifies Scope of Parties' Submission to Arbitration (and Tribunal's Corresponding Jurisdiction) and When Indemnity Costs Would Be Imposed Following Unsuccessful Challenge

The Singapore Court of Appeal has clarified that the question of whether an issue is within the scope of the parties' dispute in an arbitration (and correspondingly the jurisdiction of the tribunal) is answerable not only by reference to the claimant's notice of arbitration and statement of claim, but the parties' pleadings as a whole, the parties' agreed list of issues, the parties' opening statements, the evidence adduced and the parties' closing submissions.

The Court of Appeal has also affirmed that, following an unsuccessful application to set aside an arbitral award, costs on an indemnity basis would be imposed only if there are exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis, and that, in deciding whether to order indemnity costs, regard should be had to all the circumstances of the case and whether a party has behaved unreasonably: *CDM and Anor v CDP* [2021] SGCA 45 ("**CDM v CDP**").

Our Comments

An application to set aside an arbitral award may be made on the ground that the arbitral tribunal has exceeded its jurisdiction by dealing with or considering issues that did not fall within the scope of the parties' submission to arbitration.

The jurisdiction of an arbitral tribunal is, for the most part, defined by the pleadings filed in the arbitration – but it would be incorrect to treat the pleadings as exhaustively defining the jurisdiction of the tribunal. The Court of Appeal in *CDM v CDP* has provided guidance on the primary determination to be made – which is whether any issue or dispute was properly before the tribunal. Such an assessment may extend beyond the scope of the parties' pleadings to include the parties' agreed list of issues, oral and written submissions and evidence adduced.

The Court of Appeal also declined to follow the Hong Kong default position that an unsuccessful application to set aside will attract indemnity costs. Instead, the Court of Appeal affirmed the well-established position in Singapore that the imposition of costs on an indemnity basis was dependent on there being exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis.

This update takes a look at the Court of Appeal's decision.

Background

The respondent shipbuilder ("**Respondent**") commenced arbitration proceedings against the appellants ("**Appellants**") for payment of the fourth instalment sum ("**Fourth Instalment**") due under a contract ("**Contract**") by which the Respondent agreed to design, build, launch, equip, commission, test, complete, sell and deliver to the first Appellant an offshore drilling rig ("**Hull**"). The second Appellant had, by way of

a company guarantee executed in favour of the Respondent, guaranteed payment of the sums payable by the first Appellant to the Respondent under the Contract.

Under addenda to the Contract, the parties agreed that the Fourth Instalment would become payable upon the “launching” of the Hull and that “launching” was to be subject to the prior approval of the first Appellant, the Respondent and the ship classification society.

Following an earlier purported launch of the Hull which the first Appellant disputed, the Hull was eventually launched on 3 May 2015 (“**Second Launch**”) and the Respondent demanded payment of the Fourth Instalment.

Despite repeated demands, the Appellants withheld payment of the Fourth Instalment and the Respondent commenced the arbitration against the Appellants, with the filing of the notice of arbitration on 26 September 2016. Thereafter, pleadings were exchanged, factual and expert witnesses were called at two oral hearings and detailed written closing and reply submissions were also exchanged.

While the Respondent did not advance arguments relating to the Second Launch in its notice of arbitration and statement of claim, the Appellants, anticipating that the point might subsequently be raised, referred to the Second Launch and expressly denied it in their defence and counterclaim. Thereafter, the issue of the Second Launch featured in the Respondent’s reply and defence to counterclaim, the Appellants’ rejoinder, the parties’ agreed list of issues (“**ALOI**”), the evidence adduced before the tribunal and the parties’ respective submissions.

The tribunal found that the Respondent and first Appellant had approved the launch of the Hull, with the first Appellant having given its approval for the Second Launch at a construction and progress meeting held on 28 April 2015. As such, the tribunal found that the Fourth Instalment fell due and that the Appellants had no valid reason to withhold payment, and in its award (“**Award**”) ordered the Appellants to pay the Respondent the Fourth Instalment with interest.

The Appellants applied to the High Court to set aside the part of the Award relating to the Respondent’s claim for the Fourth Instalment on the grounds that:

- (a) the tribunal had acted in excess of its jurisdiction in finding that the first Appellant had, on 28 April 2015, approved the Second Launch as the question of the Second Launch was not raised in either the Respondent’s notice of arbitration or its statement of claim; and
- (b) the Award had been made in breach of the rules of natural justice and the right of the Appellants to present their case because the ground that the tribunal had relied on (i.e., that approval had been given for the Second Launch) was not in issue in the arbitration.

The High Court dismissed the application, and the Appellants appealed to the Court of Appeal.

The Court of Appeal’s Decision

Dismissing the appeal, the Court of Appeal found that the tribunal had neither acted in excess of its jurisdiction nor breached the rules of natural justice.

Tribunal did not act in excess of its jurisdiction

The Court of Appeal noted that, while the jurisdiction of an arbitral tribunal is (for the most part) defined by the pleadings and that the notice of arbitration and the statement of claim lay out the dispute from the claimant's perspective, it would be incorrect to treat these documents as *exhaustively* defining the tribunal's jurisdiction. It was this flawed premise that the Appellants proceeded on that led to the dismissal of their application to set aside the tribunal's award.

Importantly, the Court of Appeal highlighted that the question of whether an issue is within the scope of the parties' submission to arbitration is premised on whether the issue was properly before the tribunal, and this in turn may be answerable by reference to five sources: (a) the parties' pleadings; (b) the parties' ALOI; (c) the parties' opening statements; (d) the evidence adduced; and (e) the parties' closing submissions.

Here, it was clear that the issue as to whether the parties had approved the Second Launch so that the Fourth Instalment became payable was squarely before the tribunal:

- the Appellants had introduced the Second Launch in their defence and counterclaim and the Respondent had in its reply and defence to the counterclaim unambiguously joined issue over whether the first Appellant had granted approval before the Second Launch; and
- the question whether the Second Launch had been approved by the parties such that the Fourth Instalment became payable also featured in the ALOI, in the parties' extensive arguments set out in the parties' opening statements, the evidence adduced by both the Respondent and the Appellants' witnesses, and the parties' closing submissions.

The Court of Appeal therefore saw no basis for the contention that the tribunal had exceeded its jurisdiction in finding that the parties had approved the Second Launch and that the Fourth Instalment had fallen due.

Award not made in breach of natural justice

The Court of Appeal's conclusion that the tribunal had not exceeded its jurisdiction and the Appellants' own acknowledgment that the alleged breach of the rules of natural justice was entirely dependent on the tribunal having in fact exceeded its jurisdiction rendered the Appellants' arguments on this point unsustainable.

In any event, the Court of Appeal added that the requirement for parties to have the opportunity to present their cases does not shield a party from its own failures or strategic choices not to utilise the opportunity afforded. Where an award is challenged for excess of jurisdiction, the fact that the parties might not have made extensive submissions on an issue would not remove that issue from the tribunal's jurisdiction if the issue had been submitted to the tribunal for adjudication.

Costs

The Respondent had, at first instance, sought costs on an indemnity basis by relying on the Hong Kong default position that indemnity costs will be granted when an award is unsuccessfully challenged in court, unless special circumstances can be shown (*A v R* [2009] 3 HKLRD 389). The Hong Kong position is premised on the following considerations:

- (a) a person who obtains an award in his favour pursuant to an arbitration agreement should be entitled to expect that a court will enforce the award as a matter of course;
- (b) an unmeritorious challenge against an award was incompatible with the award debtor's duty to assist the court in the just, cost-effective and efficient resolution of a dispute; and
- (c) the award creditor should not be made to incur costs arising from the losing party's attempt to challenge the award, particularly when the award creditor had already won at arbitration. If the losing party was only made to pay costs on a conventional party-and-party basis, the winning party would effectively be subsidising the losing party's abortive attempt to frustrate enforcement of a valid award and would be out of pocket for the remaining amount.

While the Respondent abandoned this position on appeal, the Court of Appeal nevertheless dealt briefly with the question of whether there should be a presumption of indemnity costs where an application to set aside an arbitral award fails, as this raised a "significant question of law".

In short, the Court of Appeal was not persuaded that there should be a default position that an unsuccessful application to set aside would attract indemnity costs.

Instead, the Court of Appeal preferred the traditional approach adopted in the recent High Court decision of *BTN v BTP* [2021] SGHC 38 – that costs on an indemnity basis would be imposed only if there were exceptional circumstances to warrant a departure from the usual course of awarding costs on a standard basis. In this connection, the Court of Appeal noted that:

- While the court has a broad discretion to award costs, particularly in exceptional circumstances under O 59 r 5 of the Rules of Court ("**ROC**"), the assessment of whether indemnity costs are warranted turns on a highly fact-specific assessment of all the facts and circumstances of the case. Thus, rather than create a presumption that indemnity costs apply in every instance of an unsuccessful application to set aside an award, the setting-aside context should be merely one of the factors the court takes into consideration – as it is empowered to under O 59 r 5 of the ROC – when deciding whether to order indemnity costs.
- While arbitration is a distinct species of dispute resolution, applications for setting aside, enforcement, or other relief before the courts would engage the courts' jurisdiction. It would be neither appropriate nor permissible for parties to seek to engage the jurisdiction of the courts to set aside an award, yet insist on different costs treatment from other litigants.

- The Hong Kong position fails to recognise that the limited avenues available to challenge an arbitral award are statutorily provided for in the same way as a right of appeal against a decision of the court below. There is no principled reason to draw any distinction between the two in assessing whether exceptional circumstances exist for the purpose of awarding indemnity costs.
- In deciding whether to order indemnity costs, the court should have regard to all the circumstances of the case and whether a party has behaved unreasonably.

Here, had the Respondent maintained its submission for indemnity costs, the Court of Appeal would have found that the threshold for awarding costs on an indemnity basis had not been crossed.

For these reasons, the Court of Appeal dismissed the appeal in its entirety and awarded the Respondent costs on the standard basis.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:



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