WHETHER A TRIBUNAL’S FAILURE TO GIVE REASONS IS A GROUND FOR SETTING ASIDE AN AWARD, AND IF SO, WHAT THE SCOPE OF THE TRIBUNAL’S DUTY TO GIVE REASONS IS (CVV AND OTHERS V CWB [2023] SGCA(I) 9)

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Introduction

In CVV and others v CWB SGCA(I) 9, the appeal arose from a decision of the Singapore International Commercial Court (the “SICC”) where the judge there (the “Judge”) refused to set aside an arbitral award for, inter alia, a breach of the rules of natural justice. While the court ultimately held that the alleged breach of natural justice in the appeal was in essence a challenge based on the merits of the award, the court made a few observations concerning two relatively unsettled issues of law, namely whether a tribunal’s failure to give reasons is a ground for setting aside an award, and if so, what the scope of the tribunal’s duty to give reasons is.

Facts

The fourth appellant, CVQ, is a fund management company incorporated in Singapore; and is the fund manager of two Singapore-incorporated funds, “Fund 1” and “Fund 2”. Funds 1 and 2 each have various subsidiaries that are incorporated in Ruritania and those subsidiaries were the other appellants. CVQ and the other appellants will be collectively referred to hereinafter as the appellants.

The respondent, CWB, was incorporated in Ruritania and is an advisory firm with a focus on real estate investments. The present dispute arose out of CVQ’s engagement of CWB as an asset advisor for Funds 1 and 2. More specifically, CWB claimed that CVQ had failed to pay fees that were due to it for its services as an asset advisor, and that dispute was subsequently referred to arbitration.

Procedural History

On 20 June 2022, the arbitral tribunal (the “Tribunal”) issued its final award (the “Award”). In the Award, the Tribunal dismissed all the appellants’ claims and allowed the respondent’s counterclaims. The Tribunal found that respondent had not breached is obligation under the advisory agreements and was entitled to payment of its outstanding advisory fees.

On 20 July 2022, the appellants filed an application in the General Division of the High Court of Singapore (the “High Court”), to set aside the Award. The application (“SIC 2”) was subsequently transferred to the SICC. Separately, on 18 October 2022, the respondent filed an application in the High Court, for permission to enforce the Award. The application was subsequently transferred to the SICC. The respondent’s application was granted by an assistant registrar on 31 October 2022.

On 16 November 2022, the appellants filed an application (“SUM 4149”) to set aside the order granting permission, or alternatively, for an order prohibiting the respondent from taking any enforcement steps until the determination of SIC 2. On 26 April 2023, the Judge issued his judgment dismissing SIC 2 and SUM

4149.

On 23 May 2023, the appellants filed the present appeal against the Judge’s decision. In the appeal, the appellants’ case was that the Tribunal breached the fair hearing rule by failing to apply its mind and/or to give reasons for its decision on essential issues in the Award. The appellants’ submissions largely mirrored those made before the Judge below.

Applicable Law

Before the court turned to assess the merits of the appellants’ argument, the court set out the applicable law concerning the law on setting aside an arbitral award for a breach of the rules of natural justice, and made a few observations on a tribunal’s duty to give reasons.

As set out in Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd 3 SLR(R) 86 (“Soh Beng Tee”), a party challenging an arbitration award as having contravened the rules of natural justice must establish: (a) which rule of natural justice was breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced its rights.

One of the two pillars of natural justice is that the parties must be given adequate notice and opportunity to be heard. Sub-branches of this principle are that each party must be given a fair hearing and fair opportunity to present its case. In BZW and another v BZV 1 SLR 1080, the court described two types of breaches of the fair hearing rule. The first, a breach arising from a tribunal’s failure to apply its mind to the essential issues arising from the parties’ arguments; and the second, a breach arising from the chain of reasoning which the tribunal adopts in its award.

The appellants took the position that another aspect of fairness in proceedings is the need for the tribunal to give reasons for its decision. The appellants relied on TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd 4 SLR 972 (“TMM Division”) for this proposition. In that case, the High Court judge observed that an arbitral tribunal is generally bound to give reasons for its decision, and suggested that a failure to give reasons would be a breach of Art 31(2) of the UNCITRAL Model Law on International Commercial (the “Model Law”) that would render an award liable to being set aside.

Given that the case law on the duty of an arbitral tribunal to give reasons was spare, the court took the opportunity to make two observations about this area of the law. First, the court observed that while Art 31(2) of the Model Law indeed places the arbitral tribunal under a general duty to give reasons, the court cautioned that it is not settled whether a tribunal’s failure to give adequate reasons is itself a reason to set aside an award.

In TMM Division, the court did not decide conclusively either way, and it may be observed that a failure to give adequate reasons has not been expressly recognised in the case law as a breach of the rules of natural justice, nor is it expressly named as a ground for setting aside under s 24 of the International Arbitration Act 1994 or Art 34 of the Model Law. Indeed, on the facts of TMM Division itself, the award was not set aside for a failure to give reasons.

Second, the court observed that it is also not entirely settled what the content of a tribunal's duty to give reasons is. In TMM Division, the judge there considered that the standards set out in Thong Ah Fat v Public Prosecutor 1 SLR 676 ("Thong Ah Fat") were "assistive indicia" to arbitrators in determining the scope of their duty to give reasons. However, the court respectfully disagreed with this observation as Thong Ah Fat set out the standards applicable to judges in court cases, and different considerations are at play in a court case as opposed to an arbitration.

For instance, in court cases, there is a need for open justice and to set out the court's reasons in detail, because a review by the appellate court would involve a re-examination of the merits. As the court in Thong Ah Fat observed, the judicial reasons to give reasons "ensures that the appellate court has the proper material to understand, and do justice to, the decisions taken at first instance", and is founded on the principle that "justice must not only be done but it must be seen to be done".

By contrast, arbitration proceedings are confidential in nature and not subject to a review of the merits at the setting-aside or enforcement stage. It follows that the scope of a tribunal's duty to give reasons would differ from that of a judge's, and is therefore inappropriate to apply standards applicable to judges in the context of arbitration proceedings.

The court's views expressed were consistent with the observations of the High Court of Australia in Westport Insurance Corporation v Gordian Runoff Ltd HCA 37 ("Westport Insurance"). In that case, the issue was whether the tribunal had failed to give adequate reasons for the award, such that there was a manifest error of law that would warrant the granting of leave to appeal against the award. The majority rejected the notion that an arbitrator is required to give reasons to a "judicial standard", instead preferring the view that what is required of the tribunal "will depend upon the nature of the dispute and the particular circumstances of the case".

Similarly, Kiefel J observed that there was nothing in the equivalent provision to Art 31(2) of the Model Law which suggested that a tribunal had to give reasons to a judicial standard. For completeness, the High Court judge in TMM Division had also referred to Westport Insurance, but nevertheless reached the conclusion that the standards of reasoning applicable to judges may also apply to arbitrators.

From the court's observations, there remain two relatively unsettled issues of law, namely whether a tribunal's failure to give reasons is a ground for setting aside an award, and if so, what the scope of the tribunal's duty to give reasons is. However, the court did not consider it necessary to pronounce on those issues for its present purposes as the appellants' case for setting aside the Award was ultimately premised on a breach of the rules of natural justice rather than the Tribunal's alleged failure to give reasons.

Conclusion

While the Model Law places arbitral tribunals with a general duty to give reasons, it remains to be seen whether a tribunal's failure to give adequate reasons is itself a reason to set aside an award. Further, although it has been observed that arbitrators should not be held to the same standards applicable to judges, it is uncertain how the courts will determine the scope of a tribunal's duty to give reasons.

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