

# THE SINGAPORE APPROACH TO THE ADJOURNMENT OF PROCEEDINGS TO ENFORCE A FOREIGN ARBITRAL AWARD

[2018] SAL Prac 2

Margaret Joan LING

LLB (National University of Singapore);

Partner, Litigation and Dispute Resolution Practice Group,  
Allen & Gledhill LLP, Singapore.

1 The decision of *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd*<sup>1</sup> (“*Man Diesel Turbo*”) is the first local decision by the Singapore High Court regarding an application by an award debtor to adjourn proceedings to enforce a foreign arbitral award under s 31(5) of the International Arbitration Act<sup>2</sup> (“IAA”). This case provides useful guidance to arbitration practitioners on the relevant legal principles and the practical points to bear in mind when taking out such an application.

## I. Applications before the Singapore High Court

2 The plaintiff had obtained leave of court (the “Leave Order”) to enforce a final award dated 4 April 2017 made in the Danish Institute of Arbitration (“DIA”) Case No E-2230 (the “Award”) by a duly constituted three-member tribunal (the “Tribunal”) against the defendant.

3 Under O 69A r 6 of the Rules of Court,<sup>3</sup> the application for leave to enforce a foreign arbitral award is made on an *ex parte* basis. The order granting leave to enforce must then be

---

1 [2018] SGHC 132.

2 Cap 143A, 2002 Rev Ed. This provision states:

Where, in any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court is satisfied that an application for the setting aside or for the suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may —

(a) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, so much of the proceedings as relates to the award; and

(b) on the application of the party seeking to enforce the award, order the other party to give suitable security.

3 Cap 322, R 5, 2014 Rev Ed.

served on the award debtor, who has 14 days from the date of service (or where service is to be effected out of jurisdiction, within such other period as the court may fix) to apply to set aside the order. During this period, the award cannot be enforced.

4 Unsurprisingly, in response to the Leave Order, the defendant filed an application to challenge the enforcement of the Award pursuant to s 31(2)(c)<sup>4</sup> and s 31(4)(b)<sup>5</sup> of the IAA. The defendant’s application contained an alternative prayer to “stay and/or adjourn” the enforcement of the Award pending the determination of its application before the Danish court to set aside the Award.

5 In turn, the plaintiff filed a cross-application for an order that the defendant furnish the plaintiff with security amounting to the sums due under the Award in the event the enforcement of the Award was adjourned.

## **II. Background facts**

### **A. Contracts between parties**

6 The parties had entered into sale and purchase agreements for four two-stroke marine diesel engines (the “Engines Contract”) and propellers (the “Propellers Contract”) (collectively referred to as the “Contracts”).

7 Under the Contracts, the defendant purchased four two-stroke engines and propellers that were to be delivered in two tranches: Engines/Propellers 1 and 2 were to be delivered in 2008 while Engines/Propellers 3 and 4 were to be delivered in 2009. The engines and propellers were intended to be installed on the defendant’s LNPG carriers with each engine interfacing with a propeller (the engine-propeller combinations were referred to as “shipsets”).

---

4 This provision states that enforcement may be refused where the aggrieved party “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings”.

5 This provision states that enforcement may be refused where the enforcement of the foreign award would be contrary to the public policy of Singapore.

**B. Disputes between parties**

8 The defendant took delivery and paid for the first two of the four shipsets (Shipsets 1 and 2). Technical problems subsequently arose in respect of these shipsets. As for Shipsets 3 and 4, the plaintiff alleged that the defendant was postponing delivery of the same.

**C. Commencement of arbitration and Award**

9 The plaintiff commenced the DIA arbitration to compel the defendant to perform the Contracts. The plaintiff contended, *inter alia*, that the defendant's failure to take delivery of Shipsets 3 and 4 constituted breaches under the Contracts and insisted that the defendant take delivery of Propellers 3 and 4.

10 The defendant's defence was that it was not obligated to take delivery of Shipsets 3 and 4. Among other matters, the defendant contended that it was fraudulently induced by the plaintiff to enter into the Contracts. In this connection, the defendant claimed that it would not have agreed to the Contracts had the plaintiff disclosed its alleged manipulation of fuel consumption tests in relation to the engines.

11 In the course of the arbitration, the defendant filed its third pleading which introduced a new counterclaim for the excessive fuel consumption relating to Engines 1 and 2. Among other things, the defendant also sought:

- (a) a postponement of the oral hearing; and
- (b) in support of its new counterclaim, disclosure of documents relating to the plaintiff's internal investigations on the manipulation of fuel consumption tests. Additionally, the defendant wanted to adduce an expert report which apparently showed the manipulation of these tests.

12 The Tribunal rejected the defendant's application to postpone the oral hearing. It also declared that the defendant's new counterclaim and the expert report prepared in support thereof were irrelevant and inadmissible.

13 Following the oral hearing, the Award was released which ordered, *inter alia*, that the defendant pay the plaintiff

damages in respect of the Engines Contract, and that the defendant was to take delivery of Propellers 3 and 4 under the Propellers Contract.

**D. Post-Award events**

14 After the Award was issued, a dispute arose between the parties over the performance of the Award in relation to the delivery of Propellers 3 and 4. The defendant took issue with the fact that the plaintiff had indicated in its post-hearing brief that it could deliver Propellers 3 and 4 “on short notice”. However, in its correspondence with the defendant subsequent to the Award, the plaintiff stated that the propellers would be “ready for delivery within approximately 14 weeks from receipt of payment”. The defendant took the position that the propellers were to be delivered without any delay.

15 This culminated in the defendant commencing a new DIA arbitration against the plaintiff for failure to comply with the Award prior to the Leave Order being made.

16 After the Leave Order was made, the defendant filed the application in the Danish courts to set aside in part the Award that was decided in the plaintiff’s favour. Both the subsequent arbitration and the setting aside proceedings were ongoing at the time the defendant took out the application under s 31(5) of the IAA.

**III. Approach of the Singapore High Court**

**A. Section 31(5) of International Arbitration Act**

17 The court noted that s 31(5) of the IAA was “silent on the test or standard to be satisfied on what amounts to a proper case for adjournment”.<sup>6</sup> It opined that in determining whether an adjournment should be granted, the Singapore courts will adopt “a multi-factorial approach to the exercise of its discretion”, and “[i]n deciding where to strike a fair

---

6 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [45].

balance, the court will come down on the side of an outcome that is the most just or least unjust”.<sup>7</sup>

18 The High Court further stated that the burden is on the applicant to show that he is “demonstrably pursuing a meritorious application in the seat-court”.<sup>8</sup> This is to ensure that the setting-aside application is taken out in good faith and not as a delaying tactic. That being said, the court made clear that it would not “engage in a detailed assessment of the facts or legal argument of the setting aside proceedings”.<sup>9</sup> The High Court also declined the suggestion by the defendant’s counsel to adopt a threshold test<sup>10</sup> for considering the *bona fides* of the setting-aside application on the basis that such an approach was “unsatisfactory or unhelpful”.<sup>11</sup>

19 Apart from the *bona fides* of the setting-aside application, the High Court opined that it would also consider the likely consequences of an adjournment in deciding whether an order should be made under s 31(5) of the IAA, which would also be relevant to an application under s 31(5)(b) of the IAA (*ie*, the enforcing court would take into account the length of delay an adjournment may cause as this could have a consequential prejudicial effect on the award creditor on the basis that assets amenable to enforcement may diminish or be transferred out of the jurisdiction).

## **B. Decision on defendant’s application for adjournment**

20 In support of its application for an adjournment, the defendant made the following points:

- (a) It had a strong case in the setting-aside proceedings before the Danish court.

---

7 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [46].

8 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [47].

9 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [47].

10 One of the threshold tests suggested by the defendant’s counsel was whether the grounds for setting aside before the curial court raised a serious question to be tried.

11 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [62].

(b) The setting-aside proceedings could be disposed of within a relatively short period of time.

(c) No prejudice would be caused to the plaintiff as the defendant had no assets in Singapore that were amenable to enforcement.

21 The Singapore High Court rejected all of the above arguments.

*(1) Defendant's first point: Setting-aside application was meritorious*

22 The defendant's application to set aside the Award rested on three grounds, namely: (a) the defendant was unable to present its full case; (b) the Tribunal had violated the parties' agreed procedure; and (c) the Award was contrary to the public policy of Denmark. Significantly, all the grounds raised by the defendant stemmed from the Tribunal's decision to disallow the defendant's new counterclaim and its related evidence.

23 The Singapore High Court noted that it would need sufficient information on the foreign law in question (*ie*, Danish law) to be in a position to assess the strength of the arguments of the challenge before the seat-court. This was the case even if the seat had adopted the Model Law like Singapore. Hence, it was preferable for parties to have adduced expert evidence on foreign law, especially given that the public policy of Denmark was one of the grounds which the defendant relied on in its setting-aside application. However, the court cautioned that lengthy arguments about foreign law should be avoided if possible.

24 While the defendant's counsel made an oral application for leave to adduce expert evidence during the hearing, this was rejected as being made too late in the day. As a secondary argument, the defendant invited the court to assess the setting-aside application against international standards (as opposed to the law of the seat). This was also rejected by the High Court on the basis that the merits of a setting-aside application are determined by the curial law.

25 Given that no expert evidence was adduced on Danish law regarding the setting aside of arbitral awards, the Singapore High Court proceeded on the basis that:

- (a) the grounds for setting aside under Danish law were likely similar to, or premised on, those under Art 34 of the Model Law; and
- (b) since the general principles on Art 34 are well known, guidance could be gleaned from cases where such principles have been applied.

26 In the opinion of the Singapore High Court, the defendant's application was not meritorious for the following reasons:

- (a) It was a well-accepted principle of arbitration that a tribunal is master of its own procedure and has wide discretionary powers to conduct the arbitration in any way it sees fit, provided that it exercises its discretion within the procedure agreed to by the parties in a manner that is neither manifestly unfair nor contrary to natural justice.
- (b) The defendant failed to show how the Tribunal's rejection of the defendant's additional material was a denial of procedural justice. On the contrary, the Tribunal's procedural decision fell squarely within its discretion to determine that the additional material was irrelevant and, hence, inadmissible.
- (c) In relation to the defendant's arguments on public policy, the following findings were made:
  - (i) The defendant's argument that the plaintiff had falsely misrepresented to the Tribunal that it was able to deliver Propellers 3 and 4 on short notice was rejected. It was in fact acknowledged in the Award that the plaintiff would have needed sufficient lead time to have Propellers 3 and 4 ready for delivery.
  - (ii) The Singapore court also dismissed the defendant's contention that enforcement of the Award would be tantamount to enforcing contracts procured by fraud. The defendant's argument – that the Award upheld a contractual bargain that was tainted by the fraud which the plaintiff had perpetrated on the defendant – went into the merits of the Tribunal's decision and was not a ground for setting aside.

(2) *Second point: Time to dispose of setting-aside application*

27 The defendant had initially filed the setting-aside application in the Copenhagen City Court. However, at the time the defendant's application was being heard before the Singapore High Court, the defendant was seeking to have the case transferred to the High Court of Eastern Denmark where an avenue for appeal was available.

28 The Singapore High Court estimated that if the transfer were permitted, it would be 2019/2020 before the setting-aside application could be disposed of. This, in the court's view, was too long a delay and the adjournment sought would prejudice the plaintiff.

(3) *Third point: Prejudice*

29 The High Court found that there would be little or no prejudice to the defendant if an adjournment were granted as the defendant had not made out its case that the Award was impeachable. In relation to the defendant's argument about its lack of assets in Singapore, the court dealt with this point in the context of whether the defendant should be ordered to provide security.

**C. *Decision on issue of security***

30 The High Court found that the defendant's conduct gave rise to "concerns over a risk of dissipation of undisclosed assets".<sup>12</sup> In this connection, the plaintiff had, among other matters, referred to evidence which pointed to, and demonstrated, the defendant's propensity to dissipate assets in anticipation of the outcome of legal proceedings.

31 The Singapore court rejected the argument by the defendant's counsel that the evidence of dissipation shown by the plaintiff was insufficient, and that the level of evidence required must be akin to that of a *Mareva* injunction. The court was of the view that it would be incongruous to analogise the evidential requirements of a *Mareva* injunction to an application to adjourn enforcement or grant security under

---

12 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [104].



s 31(5) of the IAA. In particular, the court opined that the “key point ... [was] that there is substantial evidence to suggest that enforcement of the award would be more difficult if an adjournment is granted and no security is ordered”.<sup>13</sup>

#### **D. Decision on enforcement of Award**

32 As the grounds raised by the defendant to resist enforcement of the Award were the same as those relied upon in its setting-aside application, the High Court adopted the same reasoning *vis-à-vis* its decision on the merits of the defendant’s setting-aside application and opined that the Award should be enforced immediately.

#### **IV. Significance of *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd***

33 The case of *Man Diesel* is instructive on the approach the Singapore courts will take in deciding whether to adjourn enforcement proceedings and when an award debtor will be ordered to provide security.

34 In seeking to strike a balance between the finality and enforceability of international arbitral awards on the one hand, and preserving judicial oversight of the arbitral award by the seat-court on the other, the Singapore High Court has stated that it will take a broad-brush approach in deciding whether an adjournment should be granted. In particular, the High Court has confirmed that it will not delve into a detailed consideration of the merits of the setting-aside application but will “come down on the side of an outcome that is the most just or least unjust”.<sup>14</sup>

35 This case is noteworthy because it highlights the Singapore court’s respect for the finality of international arbitral awards, notwithstanding the existence of an ongoing setting-aside application in the seat-court. Yet, the Singapore court was also careful not to impinge on the jurisdiction of the seat-court to determine the setting-aside application. In

---

13 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [105].

14 *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132 at [62].

particular, the Singapore court took the position that the award debtor ought to have adduced expert evidence regarding the curial law on setting aside, with the caveat that detailed arguments on foreign law should be avoided. As a practical matter, this case also provides useful guidance to counsel on the need to adduce expert evidence regarding the laws of the seat where an application is taken out pursuant to s 31(5) of the IAA.