

Application to adjourn enforcement proceedings dismissed (Singapore High Court)

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In *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132*, the Singapore High Court rejected an application to adjourn enforcement proceedings and to challenge the enforcement of an award rendered by the Danish Institute of Arbitration.

Speedread

The Singapore High Court has refused an application to challenge the enforcement of a Danish Institute of Arbitration award, and dismissed an alternate argument for the adjournment of the enforcement proceedings.

The applications to challenge enforcement were made pursuant to section 31(2)(c) and section 31(4)(b) of the International Arbitration Act (IAA) (*Cap 143A, 2002 Rev Ed*), on the basis that the applicant had been unable to properly present its case in the arbitration and that enforcement of the award would be contrary to the public policy of Singapore because of allegations of fraud committed by the respondent. However, the court found that no case for fraud had been made out and that the award should be immediately enforced.

For the first time the Singapore court also considered the application of section 31(5)(a) of the IAA, that the enforcement of the award should be adjourned pending determination of an application to set aside the award at the seat, which in this case was Denmark. The court concluded that no adjournment should be granted and noted that the approach in Singapore to an application under section 31(5)(a) is to strike a balance between the competing interests of the parties; the court will come down on the side of an outcome that is the most just or the least unjust. (*Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132, 28 May 2018*).

Background

Section 31(2)(c) of the International Arbitration Act (IAA) provides:

"2. A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought provides to the satisfaction of the court that –

(c) he 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."

Section 31(4)(b) of the IAA provides:

"4. In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may refuse to enforce the award if it finds that –

(b) enforcement of the award would be contrary to the public policy of Singapore."

Section 31(5)(a) of the IAA provides:

"31 (5) – 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 and 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.

Facts

The claimant in the arbitration, Man Diesel & Turbo SE (Man Diesel), a German manufacturer of marine engines, commenced arbitration proceedings in Denmark to compel the respondent, a Singaporean subsidiary of the Norwegian LNPG carrier group IM Skaugen SE (Skaugen), to fulfil its outstanding contractual obligations under sale and purchase agreements (SPAs) for four marine diesel engines and propellers (Shipsets).

In 2008, Skaugen took delivery and paid for the first two Shipsets. However, Skaugen made several attempts at postponing the delivery for the remaining two Shipsets for various reasons. Separately, technical problems arose in relation to the first two Shipsets, and further issues arose when irregularities relating to Factory Acceptance Tests (FATs) on the diesel engines in those Shipsets came to light in 2011. Man Diesel maintained that Skaugen had simply lost interest in Shipsets 3 and 4 as a result of the 2008 global financial crisis, which affected the shipping industry, and instead viewed Skaugen's allegations of irregularities in the FATs as an excuse to get out of the SPAs with Man Diesel.

Skaugen argued that it was not obligated to take delivery of the remaining two Shipsets as:

- It had been fraudulently induced by Man Diesel to enter into the SPAs.
- The SPAs had been terminated in 2012 by mutual agreement of the parties.
- The SPAs were terminated for cause, namely for defects relating to two of the Shipsets.

Man Diesel argued in response that the defects occurred long after the expiry of the warranty period in the SPAs and that the irregularities in the FATs were irrelevant.

Skaugen also applied to include a new counterclaim regarding excessive fuel consumption relating to the engines in the first two Shipsets. In support of its new counterclaim, Skaugen sought disclosure of documents relating to Man

Diesel's internal investigations of fuel consumption tests and also sought to adduce an expert report that showed that Man Diesel had manipulated the fuel consumption tests of its engines. Skaugen also requested a postponement of the oral hearing.

The tribunal rejected Skaugen's application to postpone the oral hearing. It also declared as inadmissible, and struck from the record, both Skaugen's new counterclaim and the expert report prepared in support of the new counterclaim, and disallowed any further disclosure.

The award

The final award was rendered with a majority decision finding that the SPA for the diesel engines had been terminated by Man Diesel on the account of Skaugen's refusal to take delivery of engines 3 and 4, and to pay the outstanding price. It also determined that the SPA for the propellers remained valid and binding, and Skaugen was ordered to take delivery of propellers 3 and 4.

Skaugen made an application to the Singapore High Court to challenge enforcement of the award, or alternatively to stay or adjourn the enforcement of the award pending the determination of Skaugen's application in the Danish courts to set it aside.

Skaugen argued:

- It had a strong case in the setting aside proceedings before the Danish courts. An immediate enforcement of the award would pre-empt the decision of the court of the seat.
- The setting aside proceedings before the Danish courts would be disposed within a relatively short period of time.
- There would be no prejudice to Man Diesel if an adjournment were granted as there were no assets in the jurisdiction against which enforcement could be sought.

Decision

The Singapore High Court rejected the application to adjourn the enforcement proceedings.

A decision regarding an adjournment of the enforcement proceedings is a matter of discretion for the enforcing court and therefore, when faced with a section 31(5)(a) application, there is no threshold test. Rather, the enforcing court is required to strike a fair balance and come down on the side of an outcome that is the most just or least unjust.

The court also noted that the applicant must at least show, from the strength of its arguments, that it is demonstrably pursuing a meritorious setting aside application before the court of the seat. This is aimed at guarding against attempts at frustrating or delaying the enforcement of a valid foreign award. It considered that if the setting aside application was lacking in merits, there would be little or no tangible prejudice to the award debtor if their application for an adjournment was refused.

The court also noted that another factor the enforcing court is concerned with is the likely consequences of an adjournment; in particular, the likely length of delay. In this case, the court considered that the delay would be too long and the adjournment sought would therefore prejudice Man Diesel.

As there were no Singapore decisions on a section 31(5) adjournment application, the court considered it should therefore take guidance from English authorities. In this regard, the court noted that the English authorities show a number of factors that should be considered:

- Whether the application to set aside before the court of the seat is *bona fide* and not simply a delay tactic.
- The length of adjournment, the likely consequences of an adjournment and any resulting prejudice.
- The specific circumstances of each case.

Ultimately, the court took the view that no adjournment should be granted.

The setting aside application before the seat-court

One of the factors raised by Skaugen in its application for an adjournment was that it had a strong case in the setting aside proceedings before the Danish courts, and an immediate enforcement of the award would pre-empt the decision of the Danish courts.

The substance of Skaugen's application for setting aside the award in the Danish courts arose from the tribunal's decision to disallow Skaugen's new counterclaim and its related expert evidence. However, the court found that Skaugen had not shown that the tribunal had acted beyond the bounds of its discretion, nor shown how the tribunal's rejection of the additional material was a denial of procedural justice. The court added that it is 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, subject to any procedure agreed to by the parties and that it is in a manner that is neither manifestly unfair nor contrary to natural justice.

Challenge to enforcement of the award

The grounds raised by Skaugen to resist enforcement were the same as the grounds relied upon in the setting aside application before the Danish courts. The court noted that for a challenge under section 31(4)(b) of the IAA, the court has to consider the public policy of Singapore, and the court found that Skaugen had not demonstrated that the public policy of Singapore was in any way engaged. It noted that the evidential threshold for establishing fraud is a high one as demonstrated in *Prometheus Marine Pte Ltd v Ann Rita King* [2018] 1 SLR at [55]. Further, the court referred to the recent decision of the English Court of Appeal in *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA 838, (see [Legal update, Enforcement of CIETAC award not contrary to public policy in case of possible attempted fraud \(English Court of Appeal\)](#)), which is illustrative of the high evidential requirement to prove fraud and further demonstrates the need to show a causal connection between the alleged fraud and the tribunal's decision

Comment

This is the first decision in Singapore concerning the application of section 31(5)(a) of the IAA. The Singapore High Court examined the circumstances in which proceedings for the enforcement of a foreign award may be adjourned and noted that whilst section 31(5)(a) does not provide a threshold test in respect of a grant of an adjournment, the approach in Singapore is to strike a balance between the competing interests and the court will come down on the side of an outcome that is the most just or least unjust.

In this case, the applicant sought to set aside the award in Denmark, and if it failed in that challenge, to then resist enforcement of the award in Singapore. At the same time, it sought an adjournment of the enforcement proceedings in Singapore pending the outcome of the setting aside application in Denmark.

Such conduct, the Singapore court said, brought to the surface the perennial tension between the notion of finality of an international arbitral award and the two remedies available to an award debtor, that is, to set aside an award at the seat and/or resist enforcement at the enforcement court. The court noted that the concern most often voiced is the award debtor's deployment of one or both of these remedies as a delay tactic used when there is no valid reason to challenge the award at the seat or to resist enforcement in other jurisdictions. It is left to the enforcing court to decide whether or not to adjourn enforcement proceedings. Therefore, an applicant must therefore show that it is demonstrably pursuing a meritorious setting aside application at the seat so as to guard against delay tactics.

Case

Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd [2018] SGHC 132 (28 May 2018) (Belinda Ang Saw Ean J).

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