Singapore Court Reiterates High Bar for Set Aside of Arbitral Awards—*Swire Shipping Pte Ltd v Ace Exim Pte Ltd* [2024] SGHC 211

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Introduction

A key benefit of arbitration is that there is generally no right of appeal against a decision of an arbitral tribunal. Typically, this enables faster enforcement of an arbitral award than court judgments, which may be subject to several levels of appeal. In limited circumstances, an award debtor may apply for an award to be set aside at the courts of the seat of arbitration. However, courts in various jurisdictions have emphasised that a high threshold must be satisfied before a court should set aside an arbitral award.

Swire Shipping Pte Ltd v Ace Exim Pte Ltd [2024] SGHC 211 concerned an application to set aside an arbitration award on the basis of breaches of the rules of natural justice. The Singapore High Court traversed in its judgment much of the jurisprudence on the set aside of arbitral awards, all of which ultimately provides limited grounds for set aside. Equally significant is the strong language used by the Court in describing the "*proliferation of challenges against arbitral awards*" that are "*nothing more than disguised attacks on the merits of the arbitral tribunal's findings*". The Court reminded parties that in agreeing to resolve their disputes by arbitration they accept that "*a duly rendered arbitral award would bind the parties on a good day – where they like the outcome—as much as a bad day – where they do not*".

This is consistent with the position taken in other common law jurisdictions, including Hong Kong. In a decision earlier this year, the Hong Kong High Court noted that the clear principles concerning the limited grounds on which awards may be set aside "*have somehow not been effective in discouraging parties from embarking on expensive and time-consuming proceedings by way of unwarranted challenges to an award*".[1]

[1] *CNG v G* [2024] HKCFI 5675.

Factual Background

Two Singapore incorporated companies, Swire and Ace, entered into an English law-governed contract, under which Ace would purchase a vessel from Swire. Ace paid a 30% deposit, with the balance payable after tender of a notice of readiness ("NOR") by Swire. The agreed place of delivery was the Port of Alang in India. If the Port was inaccessible, and Ace failed to nominate a different location, the vessel would remain at a "customary waiting place".

At the time of delivery, the Port became inaccessible due to COVID-19 measures imposed by the Indian government. Despite Swire's request, Ace failed to designate an alternative place of delivery. Swire ordered the vessel to proceed in the direction of the Port. Upon the vessel's arrival at the "Jafarabad Waiting Place", Swire tendered its NOR. Ace rejected this on the basis that the vessel was not at a contractual place of delivery.

A dispute arose as to whether Swire had validly tendered the NOR and Ace was bound to complete the purchase. Ace commenced arbitration seated in Singapore under the 2015 Rules of the Singapore Chamber of Maritime Arbitration. Ace claimed the 30% deposit already paid. Swire counterclaimed for the balance of the purchase price. On 23 September 2023, the sole arbitrator issued a 386-page Final Award in favour of Ace.

The Court's Judgment

Swire applied to set aside the Final Award under section 24(b) of the Singapore International Arbitration Act. This provides limited grounds for set aside, including if "*a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced*". Swire argued that the arbitrator had made two findings in breach of natural justice, which led to the arbitrator making findings that Swire had no notice of.

The first finding was that the Jafarabad Waiting Place was only a customary waiting place for heavily laden vessels (the "Jafarabad Finding"). Swire argued that it did not have a reasonable opportunity to present its case on this issue, and in the alternative that the Jafarabad Finding was made by the arbitrator in excess of his jurisdiction.

The Court dismissed both arguments. The Court held that the arbitrator had jurisdiction to make the Jafarabad Finding, because it was intertwined with major issues that the tribunal had to decide, and therefore within the scope of the reference to arbitration. The Court noted that Swire's submission amounted to an argument that any

finding by the arbitrator other than one accepting Swire's position would be exceeding his jurisdiction, which the Court labelled as a "*plainly absurd suggestion*".

The Court held that Swire had a reasonable opportunity to address the Jafarabad Finding. This had been raised in Ace's submissions and evidence at the hearing and addressed by Swire in its closing submissions. The Court noted that not only had Swire failed to raise any objections to the supposed belated raising of the issue in Ace's submissions, but had expressly confirmed to the arbitrator that Swire did not require the opportunity to respond to any point arising out of Ace's reply submissions (where the issue was first raised). Swire also failed to give "*fair intimation*" to the tribunal of its intention to raise an allegation of breach of natural justice. Further fatal to this head of challenge was that the Jafarabad Finding was reasonably connected to the arguments raised by the parties, and that even if there had been a breach of natural justice in the making of the Jafarabad Finding, Swire had not demonstrated that the Jafarabad Finding prejudiced its rights.

The second finding that Swire took issue with was the arbitrator's finding that Swire's expert witness had given evidence aligned with the Jafarabad Finding. Swire contended that this finding was in breach of natural justice because it was a dramatic departure from the parties' submissions in the arbitration and at odds with the evidence on record. Swire also relied on what it termed the "*incoherence*" of the award in arguing that the arbitrator did not properly consider its witness's evidence. The Court dismissed this ground of challenge on the basis that it was essentially another complaint against the merits of the arbitrator's (unappealable) factual findings. Swire's complaint was essentially that the arbitrator had made the wrong inference from Swire's expert witness's evidence. This challenge on the correctness of the arbitrator's interpretation of evidence fell outside the ambit of a set aside application.

The High Bar to Set Aside Arbitral Awards

The Court's judgment emphasises the high bar to set aside arbitral awards in Singapore. The Court highlighted that the courts take a serious view of challenges to arbitral awards based on alleged breaches of natural justice, and that successful challenges would be "*few and far between*", and limited to cases where the error is "*clear on the face of the record*". The Court would also not condone a complainant "hedging" against an adverse result in the arbitration by only raising such challenges after the arbitration, without giving "*fair intimation*" to the tribunal during the proceedings.

Significantly, the Court refused to set aside even though it considered that "*Swire's aggrievement at the lack of quality of the Final Award was justified*". The Court considered

that the Final Award was difficult to read and understand, and that this was the rather ironic result of the arbitrator's attempt to make the Final Award safe from set aside applications. This led to an attempt by the arbitrator to "*cover every 'blade of grass'*", leading to a Final Award that was "*structured as a labyrinth*". However, "'*incoherence' of an award was not a freestanding ground on which the award could be set aside*". The decision highlights that the Singapore courts will set aside arbitral awards only on the limited grounds available.

The Court's judgment is consistent with recent statements from the Hong Kong courts aimed at dissuading parties and their lawyers from bringing unmeritorious set aside applications. Earlier this year in *CNG v G* [2024] HKCFI 575, the Honourable Madam Justice Mimmie Chan reminded parties that "*arbitration is a consensual process of final dispute resolution to which they voluntarily agree, with whatever inherent defects and risks there may be, and there are only limited avenues of appeal and challenge to the award.*" Her Ladyship stressed that the possibility of set aside applications is not intended to afford parties an opportunity to request the court "*to go through the award with a fine-tooth comb, to look for defects and imperfections under the guise that the tribunal had failed to act in accordance with its remit or the agreed procedure.*" The purpose of a set aside application is not to reargue the case that has already been determined by the arbitral tribunal, and the courts discourage parties from pursuing unmeritorious applications.

Costs Consequences of Set Aside Applications

Applicants will likely face a costs award following an unsuccessful set aside attempt. The Singapore Court of Appeal has clarified that indemnity costs are not the default position for an unsuccessful set aside application, and the usual rules of costs recovery apply.[2] In the *Swire Shipping* case, the Court awarded Ace its costs of the application, albeit not on an indemnity basis. This is in contrast to the default position in Hong Kong, where absent special circumstances, an unsuccessful applicant faces an award of indemnity costs.[3]

Before applying to set aside an award in Singapore or Hong Kong, an assessment should be conducted as to the likelihood of a successful application, against the scope and amount of costs that may be awarded if the award survives the challenge.

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2 *CDM v CDP* [2021] SGCA 45 (CDM).

3 *Pacific China Holdings Ltd (in Liquidation) v Grand Pacific Holdings Ltd* [2012] 6 HKC 40.

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