Be Careful What You Wish For: Hastily Rendered Award Set Aside by Singapore High Court

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Introduction

When does the issuance and the enforcement of the terms of a peremptory order in international arbitration cross the line such as to amount to a denial of justice? That was the principal issue in *Sai Wan Shipping Ltd v Landmark Line Co Ltd* [2022] SGHC 8 where Phillip Jeyaretnam J found the arbitrator to have acted in breach of the principles of natural justice and equality of treatment of the parties in setting aside an arbitral award.

Background Facts

The case involved an application to set aside an award issued in a Singapore-seated *ad hoc* arbitration in relation to disputes under a charterparty.

The Owner of the vessel had commenced arbitration, claiming for the total sum of US$248,338.24 under the charterparty. Initially, the Charterer failed to participate in the arbitration altogether with the result that the Owner's nominated arbitrator became the sole arbitrator in the reference ("**Arbitrator**"). In addition, the Owner obtained an interim award for US$48,658.74. The setting aside application did not concern the first award.

Some 10 months issuance of the interim award, the Owner served further submissions to recover the balance claim of US$199,679.50. The Owner stated in these submissions that the Charterer should serve its defence submissions by 31 March 2021, failing which the Owner would seek a default award. Without inviting any

submission from the Charterer on the time needed to serve the defence submissions, the Arbitrator ordered that the Charterer was to serve its defence by 4 p.m. London time on 31 March 2021 and noted that if the Charterer failed to respond to the order, the Owner could apply for a short final and peremptory order which would include a severe sanction against the Charterer. The Charterer did not respond to the Arbitrator's order, but as will be explained below, the parties' lawyers had communicated with each other on an extension of time until 9 April 2021.

In the event, the Charterer did not serve its defence submissions on 31 March 2021. The Owner's lawyers then wrote to the Arbitrator the following day asking the Arbitrator to "*review the exchange [of correspondence between the parties' lawyers] and make whatever order it considers appropriate*".

The Arbitrator then proceeded to issue what he described as a final and peremptory order on the same day he received the Owner's said email, ordering that the defence submissions be served by 5 p.m., London time on 9 April 2021. He warned that if the order was not complied with, then the Charterer would be barred from advancing any positive defences or evidence in the arbitration. The upshot of this was that it would then simply be for the Owner to prove its case.

The Charterer served the defence submissions on 9 April 2021 but after the 5 p.m. deadline. The Charterer's lawyers apologized for the slight delay, explaining that it was due to "*some trouble with the internet connection*". Despite this, the Arbitrator sent an email the next day stating that he would abide by the terms of his order and that the Charterer's defence submissions would be excluded unless the Owner was prepared to accept them into evidence. The Owner's lawyers took 14 days to respond only to say that the defence submissions ought to be barred.

The Arbitrator then ruled that the defence submissions should not be admitted despite the Charterer's protestation that no prejudice was caused by the slight delay in serving the defence submissions. Upon the Arbitrator's invitation, the Owner submitted further evidence and submissions to prove its case, without giving the Charterer any opportunity to respond. Thereafter, the Arbitrator issued a second award on 27 May 2021 ("**Second Award**"), without hearing witnesses and on a documents-only basis as requested by the Owner.

The Charterer applied to the Singapore High Court to set aside the Second Award on the basis that it was not given adequate notice and opportunity to be heard and was not treated with equality. The Owner argued that it was within the Arbitrator's powers to issue a peremptory order of the kind that he did, and that the Charterer only had itself to blame for failing to meet the deadline.

Applicable Principles

The High Court observed that an arbitrator's powers derive from the arbitration agreement between the parties. In this regard, the choice of the seat of the arbitration and the agreed arbitral rules (if any) will inform the powers of the arbitrator.

Given that the parties had agreed to *ad hoc* arbitration seated in Singapore, the Court held that the Arbitrator's reliance on the powers under the UK Arbitration Act to make the peremptory orders was erroneous. The Arbitrator should instead have referred to the provisions of the UNICTRAL Model Law on International Arbitration (the "**Model Law**"), which has force of law in Singapore pursuant to section 3 of the International Arbitration Act (Cap 143A) (the "**IAA**"), in considering whether to make or enforce peremptory orders.

Turning to the Model Law, the Court noted that the phrase "peremptory order" does not appear in the Model Law. Instead, reading Articles 23 and 25 together, the Model Law provides that where a respondent does not communicate his statement of defence within time without showing sufficient cause, then the arbitral tribunal can continue the proceedings without treating such failure itself as an admission of the claimant's allegation.

The Court broke down the elements of Articles 23 and 25 as follows:

1. The respondent has a period of time to communicate his statement of defence as agreed by the parties or determined by the tribunal;

2. If he fails to do so, unless otherwise agreed by the parties, the arbitrator must consider whether the party in default has shown sufficient cause for the failure; then

3. The arbitrator shall continue with the proceedings without treating such failure as an admission of the claimant's allegations.

As regards (1), the Court stated that an arbitrator should, before determining the period of time for communicating the statement of defence in the absence of agreement, consult both parties. Further, if for whatever reason, the arbitrator fixes a time on his own accord he must be open to reconsidering the time fixed upon request by either party, but *especially the party bound by the timeline he has fixed unilaterally*.

As to (2), the Court stated that when considering whether the party in default has shown sufficient cause for the failure to communicate the statement of defence within the period fixed for serving the defence submissions, the arbitrator must hear both parties. If he gives both parties reasonable opportunity to be heard on the question of sufficiency of cause, then it is for him to determine whether sufficient cause for the failure had been shown.

The Court however cautioned that the arbitrator's determination on the sufficiency (or otherwise) of the cause does not mean that his decision is immune from review. Rather, his decision is open to the Court's review as to whether it falls within the range of what a reasonable and fair-minded tribunal in the circumstances might have done.

With respect to (3), the Court noted that Article 25 does not mandate general peremptory orders or unless orders and is different from provisions for striking out or default judgment in court rules. Continuing with proceedings in the absence of defence but without any admission of the claim is a simple and necessary provision to enable claimants to obtain an arbitration award where the respondent does not participate in proceedings. Accordingly, there is no requirement that the arbitrator first find that the order in (1) has been breached intentionally, contumeliously or contumaciously before exercising powers under Article 25, although the defaulter's conduct would be relevant as to whether there was sufficient cause for the default.

Application of Principles, Decision of High Court

Applying the principles above to the facts of this case, the Court found the Arbitrator to have acted in breach of natural justice in not giving the Charterer sufficient opportunity to be heard and in failing to give equal treatment to the parties as follows:

1. In fixing the period for serving the defence, the Arbitrator failed to invite the Charterer to state their position on the time needed. It did not appear that the Arbitrator even asked himself whether the

period of 28 days would be enough given that the Owner took 10 months after the first award to provide its claim submissions and there was no reason to think that the Charterer was expecting the service of any claim submissions at that time.

2. The order made on 4 March 2021 was not a peremptory order. Instead, it was one which warned that if the deadline for filing the defence submissions was not complied with, the Owner could apply for one which might include severe sanctions for non-compliance. In this case, the parties appear to have reached an agreement to extend the time for filing the defence submissions to 9 April 2021. The Arbitrator did not appear to have appreciated this.

3. In any case, the Owner could only apply for a peremptory order after the expiry of the extended period and the Charterer would be entitled to be heard. Even if the Arbitrator had formed the view that the parties had not agreed to any extension of time, he should have invited the Charterer to make submissions on the appropriateness of making a peremptory order and the ensuing sanction if there is a breach thereof, but he did not.

4. In reality, the Owner had not sought any peremptory order; the Arbitrator leapt to one of his own accord.

5. There was no evidence that in making the peremptory order, the Arbitrator had considered if there was sufficient cause shown for the failure to serve the defence submissions by 4 p.m. on 31 March 2021. If he had done so, he would have taken into consideration the fact that the Charterer believed an extension had been agreed, that the Charterer had only recently appointed lawyers and that the lawyers needed time to have the draft checked by the Charterer.

6. The sanction imposed by the order did not track the wording of Article 25 of the Model Law but instead barred the Charterer from raising any positive defences or evidence. In practice, the order had the effect of barring the Charterer from challenging the Owner's case altogether, especially when the Arbitrator acceded to the Owner's request for a documents-only arbitration and did not offer the Charterer any opportunity to respond to the Owner's additional submissions. The sanction imposed by the Arbitrator therefore exceeded his powers under Article 25 of the Model Law.

7. The Arbitrator was wrong in concluding that that he had no discretion whether to allow the late submissions once the peremptory order had been made. Even if there was non-compliance with a peremptory order, the parties ought to be heard on whether the sanction should apply. There was a breach of natural justice in failing to give the Charterer an opportunity to be heard on the Charterer's reasons for non-compliance and whether the sanction should befall the Charterer notwithstanding those reasons.

In the premises, the Court found that there was a breach of natural justice which was closely connected to the making of the Award and caused prejudice to the Charterer. It also held that the Arbitrator had failed to treat the parties in an even-handed fashion. As such, the Award was set aside.

Conclusion

The decision above is a salutary reminder to both tribunals and parties in arbitrations to ensure that all parties in such proceedings have had a reasonable chance to present their case.

While it might be tempting for an arbitration claimant to seek to obtain an award in its favour through procedural means (such as unless orders or default awards) when faced with an apparently recalcitrant respondent, a great deal of caution must be exercised in taking such an approach. A less aggressive approach may be more prudent, particularly in circumstances where the respondent is actively seeking to participate in the arbitration, to avoid any award issued from subsequently being set aside.

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