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Public policy arguments and Mareva injunction in proceedings for the enforcement of foreign arbitration awards

Strandore Invest A/S and others v Soh Kim Wat [2010] SGHC 151

Summary

In a case involving the enforcement of foreign arbitration award from Denmark (entitled to benefit under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) against a Singaporean national, the High Court has reiterated the rule that courts have very limited powers of review over such arbitration awards. The Court held that, under the International Arbitration Act (IAA), public policy arguments against the enforcement of foreign arbitration award may be sustained only in cases where it is shown that the award would 'shock the conscience' or would 'clearly [be] injurious to the public good.' Absent such circumstances, the foreign arbitration award should be respected and enforced.

Acting for the Applicants, Colin Ng & Partners LLP successfully obtained leave to enforce the Danish arbitration award and a Mareva injunction in aid of such enforcement. The Applicants were successful in defending against the Respondent's application to essentially stay and/or refuse enforcement of the foreign arbitration award in Singapore and to set aside the order granting the Mareva injunction.

Background

The 3 Danish companies ("the Applicants") were shareholders of LKE Electric (M) Sdn Bhd ("the Company") while the Respondent is a director and shareholder of the Company.

Parties entered into 3 Share Sale Agreements ("the Agreements") where the Respondent was to purchase all the shares held by the Applicants in the Company. The Agreements contained identical arbitration clause where Danish Law was the governing law and where it was agreed that any dispute was to be resolved by arbitration in Denmark under the auspices of the Danish Institute of Arbitration (DIA). The arbitration was to be conducted under the Rules of the DIA ("DIA Rules").

As the Respondent failed to pay the purchase price, the Applicants initiated an action before the Singapore courts in Suit No 55 of 2006 ("Suit No 55"). On May 2006, upon the application of the Respondent, Suit No 55 was however stayed pursuant to s 6 of the IAA. The parties were referred to arbitration in Denmark. Subsequently, the Applicants filed their Request for Arbitration ("Request") before the DIA in June 2006, thus initiating the arbitration proceedings in accordance with the Respondent's wishes in Suit No 55.

The Respondent was admittedly served with the Request, the Rules of the DIA and letter requesting that he appoint his arbitrator in November 2006. Nonetheless, throughout the remainder of the proceedings and despite such notice, the Respondent raised various procedural objections, failed to nominate his arbitrator and failed to meaningfully participate in the arbitration proceedings.

In accordance with its Rules, the DIA proposed the appointment of the 3 members of the Arbitral Tribunal and requested parties to either confirm the appointment or nominate another arbitrator. In the absence of a nomination from The Respondent, the DIA appointed the proposed Arbitral Tribunal.

The Respondent did not file a Statement of Defence or attend the scheduled hearing before the Tribunal, despite notice.

On 30 April 2008, the Arbitral Tribunal rendered the Final Award in favor of the Applicants. Subsequently, in early June, the Applicants commenced proceedings to enforce the Final Award here in Singapore in 2008. At or about the same time, the Respondent challenged the Final Award before the City Court of Helsingore.

While the Applicants initially obtained leave to enforce the Final Award in Singapore, such leave to enforce was set aside by the Respondent because of his challenge of the award in the Danish courts.

The City Court of Helsingore dismissed the Respondent's application to set aside the Final Award on 25 June 2009. The Respondent's subsequent appeal against the dismissal to the High Court of Denmark was likewise dismissed on 19 November 2009. At or about the time of the dismissal of the appeal in Denmark, the Applicants found out that the Respondent was disposing of his bungalow in Singapore.

The Respondent filed a writ action before the Singapore courts in Suit No 968 of 2009 ("Suit No 968") which, in effect, sought to challenge the Final Award and to re-open the entire case between the parties. The Respondent relied principally on the allegation that the 3 Agreements were not meant to be enforced as against him. (This writ action however has at the time of the hearing, yet to be served upon the Applicants.)

In light of the dismissal of the Respondent's challenge by the Danish High Court the Applicants filed OS No 19 of 2010 ("OS No 19") for leave to enforce the Final Award. The Applicants likewise applied for and obtained a worldwide Mareva Injunction against The Respondent which restrained the latter from removing from Singapore the amount of up to S\$2.6M of his moneys, including the proceeds of his sale of the property.

The Respondent filed successive summons in OS No 19 seeking to (a) stay OS No 19 pending the resolution of Suit No 968, or, in the alternative, continue OS No 19 as if the same had been commenced by way of Writ of Summons and consolidate OS No 19 with Suit No 968 and (b) to discharge the Mareva Injunction issued in favour of the Applicants.

The High Court on 9 April 2010 granted Applicants leave to enforce the Final Award and dismissed both summons for discharge of the Mareva Injunction and a stay of OS No. 19 in its judgment.

Ruling

The salient points of the Court's ruling are as follows:

- a party in the Respondent's position is not bound to challenge the award before the supervisory court in order to challenge its enforcement in another jurisdiction;
- the grounds for challenging the award under the IAA are limited;

- the challenge under Section 31 IAA may entail a rehearing of the merits of the case;
- public policy arguments against enforcement of an arbitration award must be that which 'shocks the conscience' or "clearly injurious to the public good"; and,
- Mareva injunction may be obtained in aid of enforcement of a foreign arbitration award in Singapore.

Leave to enforce

The Court held that enforcement of a foreign arbitration award under the IAA and Order 69A of the Rules of Court is a mechanistic process and that "the examination that the court must make of the documents under O69A r6 RSC is a formalistic and not substantive one." Having complied with the procedural requirements under the IAA and the Rules, the Applicants were entitled to the grant of leave to enforce the Final Award and, given the factual milieu of this case, no further extensive judicial investigation was required.

The Court, however, aired its reservations as to the extensive application of the mechanistic approach in reviewing foreign arbitration awards. The Court intimated that there could be circumstances involving challenge grounded on s. 31 of the IAA when further judicial scrutiny could be required.

The Court also struck down the argument of the Respondent under s. 31(4) (b) of the IAA that enforcement of the Final Award must be refused since such enforcement would be contrary to the public policy of Singapore. The Court held that the courts have limited powers of review of arbitration awards. According to the Court, such judicial review is allowed only in cases where the arbitration award would 'shock the conscience' or is 'clearly injurious to the public good', or 'wholly offensive to the ordinary reasonable and fully informed member of the public,' or where such an award 'violates the forum's most basic notion of morality and justice.' The Respondent's arguments that the 3 Agreements were 'unusual' and were not meant to be enforced as against him, failed to satisfy the standards justifying judicial review and investigation of the Final Award.

The Court observed that the Respondent had taken every procedural step to delay the enforcement of the Final Award.

In the end, the Court concluded that, having been given the opportunity to participate in the Danish arbitration proceedings, the Respondent's various contentions should have been brought up in said proceedings and not during the enforcement proceedings here in Singapore.

Mareva Injunction

With this ruling, the Court has settled that a Mareva injunction may be availed of to aid enforcement of a foreign arbitration award in Singapore.

In dismissing the subsequent application of the Respondent to set aside the Mareva injunction on the ground that there was no real risk of dissipation of assets, the Court cited the timing of the sale of the Respondent's property in Singapore coupled with the Respondent's act of 'resisting the Final Award' as showing that the Respondent was trying "to liquidate that property to defeat the Applicant's enforcement in Singapore."

The Court explained that, at the time of the sale of the property, the Respondent knew fully well that the Applicants were intent at enforcing the Final Award in Singapore as shown in OS No 999. The Respondent successfully set aside the initial order granting Applicants leave to enforce the Final Award leveraging on the challenge which he filed in the City Court of Helsingore. With the dismissal of his challenge before the City Court, the Respondent filed an appeal to the High Court of Denmark only to allow it to be dismissed by his failure to pay the appeal fees. To the Court, the Respondent's actions were for the purpose of buying time to dispose of the property and that the Respondent's appeal to the High Court of Denmark was not genuine.

To the allegation that the Respondent has properties in other countries, the Court explained that the issue that it had to address was whether the Respondent was dissipating his assets located in Singapore and not elsewhere. The Court further noted that the Respondent's explanation that he and his wife wanted to sell the property as they were getting older, as the property was too big to maintain and as they wanted to purchase and develop other properties was belied by the Respondent's earlier affidavit where he explained that he and his wife were separated for many years.

If you wish to have further information on this update or wish to discuss how it may potentially have an impact on your business, please feel free to contact the following:



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