DennisMathiew

Case Law Update

23 October 2024

DFM v DFL [2024] SGCA 41

Introduction

In *DFM v DFL* [2024] SGCA 41 ("***DFM v DFL***") the Singapore Court of Appeal ("**CA**") has confirmed that a party to an arbitration may be considered to have acceded to the jurisdiction of the arbitral tribunal for the purposes of an interim application for relief, even where it has challenged the tribunal's jurisdiction to decide the merits of the substantive dispute in the arbitration.

The judgment of the CA serves as a cautionary statement that a party cannot effectively "reserve" an objection to the arbitral tribunal's jurisdiction to determine an interim application and raise it subsequently, such as at the enforcement stage. The courts are likely to view this as an impermissible "hedging" exercise.

Relevant Background

In *DFM v DFL,* the Respondent had obtained permission from the Singapore courts (the "**Leave Order**") to enforce a provisional award for interim relief (a freezing order) (the "**Provisional Award**") granted by an arbitral tribunal (the "**Tribunal**") in a Dubai International Arbitration Centre arbitration (the "**Arbitration**").

The Appellant had applied to set aside the Leave Order under section 31(2)(e) of the International Arbitration Act (2020 Rev Ed) on the basis that the composition of the arbitral authority or tribunal had not been in accordance with the agreement of the parties.

The General Division of the High Court had dismissed the Appellant's application on the basis that he had submitted to the Tribunal's jurisdiction in respect of the Respondent's interim relief application (the "**Interim Relief Application**").

The Court of Appeal's Decision

The CA dismissed the appeal on the basis that the Appellant had waived his right to challenge the Tribunal's jurisdiction to hear and determine the Interim Relief Application as he had been content to proceed with the hearing of the Interim Relief Application without raising any objection to the Tribunal's jurisdiction in that application. It was therefore not permissible for him to attack the Provisional Award at the enforcement stage on the basis of an objection to the composition of the Tribunal.

Further, the CA did not accept the Appellant's contention that he had expressly challenged the Tribunal's jurisdiction to hear the Arbitration *"as a whole"* which *"necessarily applie[d] to the Tribunal's jurisdiction to hear the [Interim Relief Application]"*. In particular the CA took note of three key aspects of the Appellant's conduct:

- First, although the Appellant had raised jurisdictional objections in his statement of defence, he had been content to allow the hearing on the merits

of the Interim Relief Application to proceed without his jurisdictional objections being canvassed or argued before the Tribunal.

- Second, the Tribunal's own understanding that the issue of its jurisdiction over the Appellant was only to be determined at a later stage of the Arbitration combined with the fact that the Appellant had not made jurisdictional objections in the Interim Relief Application, led to the irresistible inference that the Tribunal and the parties had understood that the Appellant had not pursued his jurisdictional objections in the Interim Relief Application.

- Third, and most tellingly, the Appellant had not raised any jurisdictional objections to the Tribunal *after* the Provisional Award had been rendered but did so only at the enforcement stage in Singapore.

In its judgment the CA made several observations:

- Where an application for interim relief involved some consideration of issues that may appear to touch on the merits of the claim, it was not necessarily inconsistent for a party to submit to the jurisdiction of the arbitral tribunal in respect of the interim relief application, while retaining its jurisdictional objection in respect of the rest of the arbitral proceedings.

- It was trite that even where a ground for resisting enforcement of an award was made out, a party could have waived its right to rely on this by its conduct (see *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] 5 SLR 228 at [156]).

- The question of whether a party had waived its right to object, even where it was a question of Singapore law, had to be considered in the *context* of the law of the seat and the arbitral rules which the parties had chosen (in the present case the Arbitration was seated in London, United Kingdom).

- Under Singapore law, a party may be found to have waived its right to challenge an arbitral tribunal's jurisdiction where it has failed to make a timely objection to such jurisdiction (see *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695 at [168] & [170]).

- The assessment of whether a party had waived its right to contest the jurisdiction of an arbitral tribunal would be conducted in a *"practical and commonsensical way"* which considers all the circumstances surrounding a party's conduct (see *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [52]).

Key Takeaways

The CA's judgment demonstrates that a party to an arbitration must tread very carefully where its participation in arbitral proceedings is concerned, especially where there are potential grounds to challenge the tribunal's jurisdiction. Participation in interim proceedings may well amount to a submission to *those* interim proceedings even where the party has made an express challenge to the tribunal's jurisdiction to determine the substantive merits of the reference.

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DennisMathiew can assist parties faced with arbitral proceedings as to potential jurisdictional challenges and whether and how these should be pursued, as a matter of litigation strategy.

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How DennisMathiew can help

If you have any queries on this article or require legal advice on similar issues you may be facing, please click here: https://www.dennismathiew.com/contact/ to get in touch with our team.

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