

## Arbitration Alert

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### Singapore High Court determines court entitled to rehearing in enforcement of foreign arbitral award action

In the latest arbitration-related decision from the Singapore High Court, the court clarified that it will have a rehearing in evaluating whether the limited grounds to set aside an arbitral award, as provided for in the International Arbitration Act (the “**IAA**”), have been made out. In *Denmark Skibstekniske Konsulenter A/S I Likvidation (formerly known as Knud E Hansen A/S) v Ultrapolis 3000 Investments Ltd (formerly known as Ultrapolis 3000 Theme Park Investments Ltd)* [2010] SGHC 108 (the “**Denmark case**”), Belinda Ang J held that when the enforcement of a foreign arbitral award is challenged based on the grounds set out in section 31(2) of the IAA, the court is entitled to conduct a rehearing in order to determine whether any of those grounds have been established.

Section 31(2) of the IAA provides that a Singapore court may refuse to enforce a foreign award if the person against whom enforcement is sought proves any of the following grounds to the satisfaction of the court:

- (a) A party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity when the agreement was made;
- (b) The arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
- (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;
- (d) Subject to section 31(3) of the IAA, the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;
- (e) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) The award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

### Enforcement of foreign arbitral award

In the *Denmark case*, the applicant Denmark Skibstekniske Konsulenter A/S I Likvidation (“**DSK**”) applied for leave under section 29 of the IAA to enforce a final award made by the Danish Arbitration Institute against the respondent Ultrapolis 3000 Investments Ltd (“**Ultrapolis**”).

Ultrapolis resisted enforcement of the award on the basis that:

- (i) DSK was unable to produce the original arbitration agreement and that the copy that was produced did not constitute an arbitration agreement;
- (ii) The award which DSK sought to enforce was founded on a non-existent arbitration agreement;

- (iii) The arbitral tribunal was not composed in accordance with the arbitration agreement; and
- (iv) The award was made when the arbitral tribunal was *functus officio*.

### **Court entitled to conduct a rehearing**

In relation to point (i) above, section 30(1)(b) of the IAA provides that where the enforcement of a foreign award is sought, the original award and arbitration agreement or certified copies should be provided to the court.

In interpreting this requirement, Belinda Ang J adopted the mechanistic approach favoured by Judith Prakash J in *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 and held that at this stage of enforcement, which was the first stage of enforcement under section 30(1)(b) of the IAA (the second stage being the refusal of enforcement covered section 31(2) of the IAA), the applicant need not produce a signed document between the parties. All the applicant needed to produce was the arbitration agreement under which the award was purportedly made. In this case, DSK was able to adduce via affidavit evidence, a certified true copy of the arbitration agreement under which the award was purported to have been made and the court held that this would be enough to satisfy the requirements of section 30(1)(b) of the IAA.

However, it is worth noting Belinda Ang J's approach in relation to points (ii) - (iv) above. With regards to the challenge to the existence of the arbitration agreement under section 31(2) of the IAA, Belinda Ang J held that the court is *entitled to conduct a rehearing* on the basis of that provision. However, the court stressed that the party opposing enforcement has the burden of establishing, on a balance of probabilities, the existence of one of the grounds in section 31(2) of the IAA.

Belinda Ang J examined the evidence, largely adduced via affidavit, and concluded that Ultrapolis did not discharge its burden of proof with regards to points (ii) - (iv) above.

### **Comment**

While Belinda Ang J ultimately declined to exercise her discretion to set aside the award, the *Denmark* case shows that the courts may perhaps be said to be more willing to set aside an award if, following a rehearing, the applicant is able to convince the court that enforcement of the award should be refused based on one of the established grounds under section 31(2) of the IAA.

### **Further information**

Should you have any queries as to how this may affect your business, please do not hesitate to get in touch with your usual contact at Allen & Gledhill LLP or either of the following:

Dinesh Dhillon  
Tel: +65 6890 7822  
E-mail: [dinesh.dhillon@allenandgledhill.com](mailto:dinesh.dhillon@allenandgledhill.com)

Edwin Tong  
Tel: +65 6890 7867  
E-mail: [edwin.tong@allenandgledhill.com](mailto:edwin.tong@allenandgledhill.com)

Yours faithfully  
**Allen & Gledhill LLP**  
Singapore

Allen & Gledhill LLP  
T +65 6890 7188 | F +65 6327 3800 | [publications@allenandgledhill.com](mailto:publications@allenandgledhill.com)  
One Marina Boulevard #28-00 Singapore 018989 | [www.allenandgledhill.com](http://www.allenandgledhill.com)

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