

Singapore court refuses to adjourn enforcement pending award set-aside application at seat

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Authors: [Matthew Secomb](#), [Adam Wallin](#)

For the first time, the Singapore courts have considered whether to adjourn enforcement of an arbitral award while courts at the seat hear an application to set the award aside. The decision clarifies that the court will only adjourn enforcement if the set-aside application has merit, and it is otherwise just to do so.

Decision: *Man Diesel Turbo SE v I.M. Skaugen Marine Services Pte Ltd* [2018] SGHC 132

Facts

Man Diesel agreed to supply four engine and propeller shipsets to Skaugen. The parties entered one contract for the engines, and another for the propellers.

Skaugen paid for and took delivery of the first two shipsets. Technical issues with those shipsets arose, and Skaugen sought to postpone delivery of the others. Around the same time, irregularities emerged about Man Diesel's fuel consumption testing on some of its engines (unrelated to those sold to Skaugen).

Man Diesel commenced arbitration in Denmark seeking damages for breach of the engine contract, which it claimed to have terminated. It also sought a declaration requiring Skaugen to accept and pay for the remaining propellers.

Skaugen defended the claim on various grounds. These included that Man Diesel had failed to disclose irregularities in fuel consumption testing at the time of the contracts. Later, less than a month before the final hearing, Skaugen made a new counterclaim relating to excessive fuel consumption. It sought disclosure of Man Diesel's internal investigation on fuel consumption testing, and sought permission to adduce a related expert report. The Tribunal rejected this.

The Tribunal made a majority award largely in Man Diesel's favour. It ordered Skaugen to pay damages for breach of the engine contract. It also ordered Skaugen to accept and pay for the remaining propellers.

Man Diesel obtained leave to enforce the award in Singapore.

Skaugen then applied to set aside the award in the Danish Courts, claiming that:

- It was denied the opportunity to present its case, because its submissions on fuel consumption and Man Diesel's factory testing were ruled inadmissible, and its application for related disclosure was rejected;

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- The tribunal violated its mandate, for similar reasons; and
 - The award was contrary to public policy, due to (i) the tribunal's management of the arbitration and (ii) various arguments based on fraud.

Skaugen then challenged the Singapore court's order permitting enforcement. Alternatively, Skaugen sought to adjourn the enforcement proceedings pending the Danish set-aside application.

Decision

The court refused to adjourn the enforcement proceedings, and allowed Man Diesel to enforce the award in Singapore.

No adjournment

The court concluded that it has a wide discretion to adjourn enforcement proceedings.¹ It rejected any definitive threshold test.² Instead, it decided that the correct approach was to:

- i. Carry out a brief, preliminary assessment of the merits of the set-aside application, focussing particularly on whether it is meritorious and pursued in good faith;
- ii. Consider the likely consequences of adjournment, assessing the likely prejudice to either party if enforcement is adjourned; and
- iii. Take account of all other relevant circumstances of the case.

Here, the court rejected Skaugen's adjournment application because:

- i. Even on a preliminary assessment, Skaugen's set-aside application in Denmark lacked merit:
 - (a) The tribunal's award dealt extensively with its decision to reject Skaugen's disclosure and expert evidence applications. Skaugen had failed to demonstrate that the tribunal acted outside the bounds of its discretion.
 - (b) The Court was also unconvinced by Skaugen's other arguments that Man Diesel had acted fraudulently in the arbitration.
- ii. Set-aside proceedings in Denmark could take several years. This risked unfairly prejudicing Man Diesel. Conversely, since the set-aside application lacked merit, Skaugen faced little or no risk of prejudice.
- iii. Skaugen only filed its set-aside application in Denmark *after* Man Diesel tried to enforce the award in Singapore. Moreover, before applying to set aside the award, Skaugen had started a new arbitration predicated on the validity of the original award.³
- iv. Evidence submitted by Man Diesel suggested that Skaugen might remove assets from Singapore. Enforcement could thus be more difficult if an adjournment was granted.⁴

Immediate enforcement

The court also rejected Skaugen's application to refuse permission to enforce the award, largely for the reasons above.

¹ The discretion to adjourn enforcement proceedings pending a set-aside application at the seat arises under s. 31(5) of Singapore's International Arbitration Act. That provision reflects Art VI of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

² Such as whether there is a "serious issue to be tried" in the set-aside application (see *Man Diesel*, [62]).

³ After the award was issued, a dispute arose about the timing for delivery and payment of the propellers. Skaugen started a new arbitration, claiming that it had no obligation to pay for or accept delivery due to Man Diesel's post-award conduct. In short, Skaugen alleged that Man Diesel had told the tribunal that the propellers could be delivered 'on short notice', but after the award was made, it transpired that delivery would take about 14 weeks.

⁴ If the court had granted an adjournment, the risk of dissipation may have been a basis for ordering Skaugen to give security. However, since the adjournment application was rejected, the issue of security did not arise.

On Skaugen’s public policy argument, the court emphasised that the evidential threshold for refusing enforcement due to fraud in Singapore is high. A causal connection must exist between the fraud and the tribunal’s decision.⁵ No public policy considerations for refusing enforcement arose here.

Comment

The decision appears to be the first time that the Singapore courts have considered an adjournment application pending a set-aside application at the seat. The court drew on practice in other jurisdictions, particularly England.⁶ The result is a flexible approach that ultimately seeks to balance the interests of justice and circumstances of the case, rather than apply a bright line test.

Ultimately, as the court noted, there is a ‘perennial tension’ between (i) ensuring the finality and swift enforcement of awards; and (ii) allowing an award debtor to challenge the award at the seat, or to resist enforcement. The court recognised a common concern that award debtors can however sometimes raise challenges ‘purely as a delaying tactic’. The decision reiterates that such tactics will not be tolerated in Singapore.

White & Case Pte. Ltd.
8 Marina View #27-01
Asia Square Tower 1
Singapore 018960

T +65 6225 6000

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⁵ Citing the recent English Court of Appeal case of *RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2018] EWCA 838.

⁶ See *Man Diesel* §§49-62.