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International Arbitration 2021

Maldives

Law & Practice
and
Trends & Developments

Mohamed Shahdy Anwar, Zain Shaheed
and Juni Latheef
S&A Lawyers LLP

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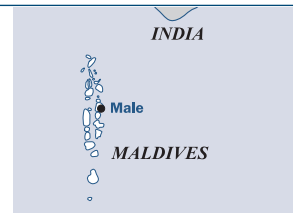
MALDIVES

Law and Practice

Contributed by:
Mohamed Shahdy Anwar, Zain Shaheed and Juni Latheef
S&A Lawyers LLP ***see p.18***



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1. GENERAL

1.1 Prevalence of Arbitration

Litigation is the most widely utilised form of dispute resolution in Maldives. Litigation in Maldives is, however, fraught with red tape and consequent delays, as a result of which a growing reluctance for commercial actors to refer their disputes to the courts has been observed. The use of foreign-seated arbitration as a means of dispute resolution is well-established in Maldives. Courts in Maldives had recognised arbitration agreements prior to the enactment of the Maldives Arbitration Act in 2013. This was done as an application of the well-established doctrinal rule - pacta sunt servanda, ie, the rule that "agreements must be kept." The use of dispute resolution clauses where arbitration is the preferred method is now very common following the enactment of the Arbitration Act in 2013. This upward trend is expected to continue. Many high-profile precedent-setting matters in the jurisdiction, involving both public and private litigants, have been settled through international arbitration in international and regional hubs such as Singapore, Malaysia, Dubai, and London.

The Maldives International Arbitration Centre (MIAC) opened to the public in 2020. Owing to the nascent nature of local arbitration in Maldives, referrals to the MIAC are expected to be relatively low; however, numbers on this have yet to be published. The MIAC has been leading an active charge in increasing engagement and awareness of arbitration in Maldives, including initiatives to engage and train the judiciary on the principles of international arbitration.

1.2 Impact of COVID-19

The number of referrals to the MIAC has yet to be published. It is therefore difficult to determine with any degree of certainty, how, if at all, the COVID-19 pandemic has impacted the use of the international arbitrations seated in Maldives.

However, there has been an increase in the use of foreign-seated international arbitrations during the pandemic. Parties in Maldives have preferred to arbitrate at the Singapore International Arbitration Center (SIAC) where the impacts of the pandemic are perceived to be less than on the courts of Maldives.

This increase may, however, be an incidental observation. It is no surprise that the pandemic has caused otherwise well-functioning relationships between large commercial actors unexpectedly to turn acrimonious. As has been observed before, these actors have shown a preference for arbitration. The underlying agreements in these disputes are usually well-negotiated commercial agreements and these agreements more commonly contain an arbitration clause. The resulting effect is therefore a marked increase in the use of international arbitration for dispute resolution.

1.3 Key Industries

Arbitration agreements are prevalent in agreements used in the following industries: construction and real estate, aviation, and hospitality.

Disputes in the construction and real estate industry, and the aviation industry, tend to be referred more commonly to international arbitration, as disputes in these industries tend to be technically complex and often require experts with experience in the industry to come up with sensible solutions. The industries' inherent trust in their own expertise over that of those with a legal background is quite possibly the main driving force behind these referrals.

As for the hospitality industry, Maldives attracts high-profile multi-national hoteliers who are well-acquainted with international arbitration. The

multi-national nature of these corporations sits well with international arbitration. Clients in the industry tend to prefer arbitration as it is often viewed (arguably correctly) as resulting in far more sensible outcomes than local litigation. As a result, most of the hotel management, hotel operation, or related lease agreements currently being drawn up tend to prefer arbitration as a method of dispute resolution.

Finally, with the MIAC opening its doors to the public, the use of arbitration agreements in agreements of key government agencies and state-owned entities is increasingly being seen. It is expected that more of this will be seen in the future.

1.4 Arbitral Institutions

Since the establishment of the MIAC, pursuant to the Arbitration Act of Maldives (Law No 10/2013) (the Arbitration Act), it has been the only institution in Maldives for both domestic and international arbitration. The number of referrals to this institution has not been published.

Actors in Maldives have preferred to refer matters to the Singapore International Arbitration Centre because it is the regional hub of arbitration with the closest proximity to Maldives.

1.5 National Courts

The Arbitration Act identifies the High Court of Maldives as the court that has jurisdiction over matters related to arbitration, namely:

- determining whether the arbitral tribunal is exceeding the scope of its authority regarding arbitrations seated in Maldives;
- issuing orders for interim measures in support of arbitration proceedings, irrespective of whether the arbitration is foreign-seated or seated in Maldives;
- issuing orders to set aside an interim measure issued by a tribunal regarding arbitrations seated in Maldives; and
- issuing orders to set aside an arbitral award rendered in arbitrations seated in the Maldives.

The High Court of Maldives has established procedural rules relating to the foregoing matters.

The Arbitration Act stipulates that an application for the enforcement of an award in Maldives shall be made to the "relevant court". In Hilton International Manage (Maldives) Pvt Ltd v Sun Travel and Tours Private Limited (High Court Case No 2017/HC-A/91), the High Court confirmed that the relevant court for the enforcement of an award is the Civil Court.

The Arbitration Act notes that a "competent court" has the power to recognise and enforce a tribunal-issued interim measure. By extension of the principle in the Hilton case, the competent court should be the Civil Court, although this proposition has not yet been tested.

2. GOVERNING LEGISLATION

2.1 Governing Law

The national law governing arbitration in Maldives is the Arbitration Act (Law No 10/2013). The act is not a word-for-word adoption of the UNCITRAL Model Law. It does, however, closely mirror the Model Law and establishes a framework which is largely in line with the Model Law. Most provisions in the Model Law are adopted word-for-word, but some provisions are modified in order to take into account the local context.

2.2 Changes to National Law

There have been no changes to the Arbitration Act in the past year, but amendments to the current legislation in the coming year are expected to be made, based on recent developments.

There are cases presently pending before the courts which are expected to result in precedents that interpret provisions of the Arbitration Act, which might change the present interpretation of certain provisions relating to the stay of proceedings in favour of arbitrations and the recognition and enforcement of arbitral awards.

3. THE ARBITRATION AGREEMENT

3.1 Enforceability

The arbitration agreement is to be in writing.

In "writing" in this context means a record of its content in written form, even if the agreement is initially concluded orally, or by other means, or if a record exists in a form that is acceptable as evidence.

As such, an arbitration agreement may be recorded in electronic communications, or confirmed where one party states that an arbitration agreement exists in communications and the other party does not deny its existence, or if a contract contains a clause referring disputes to arbitration.

3.2 Arbitrability

The Arbitration Act does not identify specific disputes that are non-arbitrable but notes that, if another legislation carves out certain commercial disputes as not arbitrable, or if another legislation states that certain commercial disputes shall be subject to the mandatory jurisdiction of a court, these matters will not be arbitrable.

Generally, Maldivian courts tend to follow principles of international arbitration adopted by other well-regarded jurisdictions, especially England and Wales. As per the position of England and Wales, albeit untested locally, it would be safe to assume that criminal matters, family law matters, insolvency proceedings, employment disputes, and tax disputes will not be arbitrable in Maldives.

3.3 National Courts' Approach

The national courts will enforce the arbitration agreement as long as the legal requirements of an arbitration agreement under the Arbitration Act are satisfied.

The Arbitration Act provides that, if an action brought to a court in a matter which is the subject of an arbitration agreement, the court shall order a stay of legal proceedings and refer the matter to arbitration if two conditions are satisfied, which are:

- if a request for referral is made in the Respondent's first statement of a defence to a claim; and
- if the arbitration agreement is not null and void or inoperative or not capable of being performed.

However, the Arbitration Act provides that the foregoing is not applicable if the seat of arbitration under an arbitration agreement is not Maldives.

The High Court has, through case law, issued guidance on this point on how a court may approach such a matter in relation to foreign-seated arbitrations. The requirement to make a request for the referral to arbitration in the first statement of defence was treated as an estoppel against subsequent requests to referrals after a party submits to the jurisdiction of the court. However, this estoppel only applies to arbitra-

tions seated in Maldives. The Court found that a party may not be estopped from requesting a referral to arbitration after having failed to raise this in the first statement of defence in relation to a foreign-seated arbitration.

This leaves the question of when the estoppel would be effective against a party requesting referral to arbitration in foreign-seated arbitrations. This is untested, but it surely seems unreasonable to expect the estoppel to disapply completely, particularly if the request for arbitration comes much later in a litigation.

3.4 Validity

The Arbitration Act recognises the doctrine of separability. It provides that an arbitration clause shall be treated as an agreement independent of other terms of a contract and that if an arbitral tribunal determines that an agreement containing an arbitration clause is null and void or partially invalid, it shall not entail ipso jure the invalidity of the arbitration clause.

4. THE ARBITRAL TRIBUNAL

4.1 Limits on Selection

There are no limits on the parties' autonomy to select arbitrators. Parties are free to determine whether one or more arbitrators shall be appointed.

An uneven number of arbitrators shall be appointed if parties intend to have more than one arbitrator, in which case each party shall appoint one arbitrator and these two arbitrators shall unanimously agree on the third arbitrator.

Priority is given to the parties' agreement on the procedure of appointing the arbitrator or arbitrators.

4.2 Default Procedures

Where parties fail to agree on the number of arbitrators, the default position in the Act is to determine the number based on the value of the dispute.

Disputes involving a sum equivalent to or more than MVR1.5 million will result in a panel of three arbitrators. A sole arbitrator will be appointed for disputes involving a sum of less than MVR1.5 million.

The MIAC has the power to appoint the arbitrator under the following circumstances:

- if the parties fail to appoint their arbitrators within 30 days of the referral to arbitration;
- if a party to the dispute requests another party to the dispute to appoint an arbitrator and, within 30 days of that request, the party fails to appoint an arbitrator to represent that party;
- if the two arbitrators fail to agree on the appointment of the third arbitrator within 30 days of their appointment; and/or
- if the parties are unable to agree on the sole arbitrator and the parties make a request to the MIAC to appoint the arbitrator.

The MIAC, in appointing an arbitrator or arbitrators, shall have due regard to the following:

- the competence required of the arbitrator;
- the qualifications required by the arbitrator;
- the independence and impartiality required to resolve a dispute submitted to arbitration;
- in the circumstance where one arbitrator is appointed, if the parties to the dispute are of different nationalities, appointing an arbitrator of a nationality other than those of the parties.

4.3 Court Intervention

There are no provisions in the Arbitration Act that allow for judicial intervention in the selection of

arbitrators. However, this is not to say that judicial intervention may not happen where parties request such an intervention, but this proposition has not been tested.

4.4 Challenge and Removal of Arbitrators

Circumstances for Removal

An arbitrator who has been appointed under this Act shall be challenged and removed from the post only under the following four circumstances:

- if circumstances exist that give rise to justifiable doubts as to his or her impartiality or independence;
- if he or she does not possess the necessary qualifications required of an arbitrator to that dispute;
- if there are unreasonable delays by the arbitrator in the discharge of his or her duties;
- if the arbitrator fails to discharge his or her duties properly.

Procedure for Removal

The parties may decide on a procedure for the challenging and removal of an arbitrator. If the parties fail to agree, the party who wishes to challenge and remove an arbitrator shall submit a challenge to the arbitral tribunal within 15 days of the constitution of the arbitral tribunal or 15 days from the day the party becomes aware of a circumstance where an arbitrator may be challenged or removed.

Where an arbitral tribunal receives a statement of challenge, the challenged arbitrator may withdraw from office or, if the other party or parties to the dispute agree, he or she may be removed from office. If the other party does not accept the challenge, a decision on his or her removal shall be made by the arbitral tribunal. This applies if the arbitral tribunal consists of three or more arbitrators. If the tribunal consists of a sole arbitrator, the determination on a challenge shall be made by the MIAC.

If a challenge is submitted and a decision is made not to remove the arbitrator from office, the arbitral tribunal shall notify the challenging party of its decision within 30 days and the challenging party may appeal this decision to the MIAC. The parties to the dispute may agree that a decision on such an appeal made by the MIAC shall be final. Until a decision is made by the MIAC, the challenged arbitrator may continue to discharge the duties of his or her office.

If an arbitrator withdraws from office when a challenge is made against him or her, it shall not amount to an admission to the subject-matter of the challenge.

4.5 Arbitrator Requirements

According to the Arbitration Act, when a person is approached in connection with his or her possible appointment as an arbitrator, he or she shall disclose to the requesting party any circumstances likely to give rise to any doubts as to his or her impartiality or independence and shall recuse himself or herself from accepting the appointment. If, after the appointment, there is reason to believe that he or she may not be able to discharge his or her duties with impartiality and independence, the circumstances shall be disclosed to the party that appointed the arbitrator and the arbitrator shall then recuse himself or herself from the position, after informing the rest of the arbitral tribunal if the tribunal consists of more than one arbitrator.

The Arbitration Act further provides that arbitrators shall maintain ethical conduct in accordance with the standards set out in the Bangalore Principles of Judicial Conduct.

5. JURISDICTION

5.1 Matters Excluded from Arbitration

The Arbitration Act of Maldives does not identify specific disputes that will be excluded from arbitration, but notes that if another legislation sets out that certain commercial disputes are not arbitrable or that certain commercial disputes shall be subject to the mandatory jurisdiction of the court, these matters shall be excluded from arbitration, or if another legislation sets out that certain matters can be subject to arbitration in accordance with procedures set out in that specific legislation, these matters shall be excluded from arbitration unless the procedures in the legislation are fulfilled.

As Maldivian courts tend to follow principles of international arbitration adopted by other legal jurisdictions, especially England and Wales, it is safe to assume that non-arbitrable disputes in England and Wales would not be arbitrable in Maldives either.

5.2 Challenges to Jurisdiction

The arbitral tribunal constituted in accordance with the Arbitration Act has the power to rule on its own jurisdiction with respect to the dispute submitted to arbitration, including the power to rule on any objections with respect to the existence or validity of the arbitration agreement and on any objections to the jurisdiction of the arbitral tribunal to preside over the matter in dispute. The principle of competence-competence is enshrined in the Arbitration Act itself.

If a party raises a plea claimant that the arbitral tribunal is exceeding the scope of its authority, the arbitral tribunal has the discretion to suspend proceedings related to the dispute and rule on the plea. The arbitral tribunal may also continue the proceedings and include a ruling on the plea in the award issued.

5.3 Circumstances for Court Intervention

Jurisdiction of the Tribunal

The Arbitration Act does not provide any circumstance where a court may address issues of jurisdiction of an arbitral tribunal as a preliminary question. It may, however, look at this following the final arbitral award as a ground to set aside the award or as a ground for refusing enforcement of an award.

The Scope of Authority of the Tribunal

Where an arbitral tribunal has ruled as a preliminary question that it has not exceeded its jurisdiction, any party not satisfied with the ruling shall have the discretion to submit the matter to a court of law for review within 30 days of the tribunal's ruling.

The Court's Attitude/Approach to Intervention

There are cases currently pending before the courts which might give an initial indicator on this. At present, it is difficult to comment on this as these matters have not yet been widely tested in the Maldivian courts.

5.4 Timing of Challenge

A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than within the time given for the submission of the respondent's statement of defence. A party is not precluded or restricted from raising such a plea by the fact that he or she has appointed or participated in the appointment of an arbitrator.

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised by a party to the dispute at the time of occurrence of the matter alleged to be beyond the scope of its authority. Where the arbitral tribunal rules on this as a preliminary question, parties may submit it to a court of law for review within 30 days from that ruling.

5.5 Standard of Judicial Review for Jurisdiction/Admissibility

Due to the nascent nature of arbitration in Maldives, a standard of judicial review for questions of admissibility and jurisdiction has not yet been established.

A sensible and likely view is that such matters would be determined in the same way that appellate divisions of the local courts dispense with appeals in local litigation. If this view is correct, a judicial review for questions of admissibility and jurisdiction would be on a deferential basis.

5.6 Breach of Arbitration Agreement

The approach of the courts in Maldives is to uphold any agreement that calls for dispute resolution through alternative methods. Prior to the enactment of the Arbitration Act in 2013, the courts recognised arbitration agreements as an application of the doctrinal rule – pacta sunt servanda, ie, the rule that agreements must be kept. The position has now been written into statute under the Arbitration Agreement.

Courts uphold arbitration agreements and dismiss court proceedings commenced in breach of an arbitration agreement, as is clearly evident from the established precedents.

5.7 Third Parties

As a general rule, the privity of an arbitration agreement will prevent arbitrators from allowing a joinder of parties who have not signed the arbitration agreement.

The Arbitration Act does not provide any circumstances where the arbitral tribunal may assume jurisdiction over individuals or entities that are neither party to an arbitration agreement nor signatories to the contract containing the arbitration agreement.

Joinder of a party to an arbitration for convenience with parties opposing that joinder has yet to take place in Maldives. It is, of course, possible for joinders or consolidation to take place with unanimous party consent. All of this is presently untested and positions relating to this will develop as cases arise and questions land before the court for determination.

6. PRELIMINARY AND INTERIM RELIEF

6.1 Types of Relief

Unless otherwise agreed by the parties to a dispute subject to arbitration, the arbitral tribunal has the power, at the request of a party, to grant interim measures. Any such interim measures become binding once they are recognised and enforced by a competent court, ie, the Civil Court.

Types of Relief

The arbitral tribunal has the power to make an order at any time prior to the issuance of the award, in order to ensure the following:

- to maintain or restore the status quo of the relationship between the parties to the dispute submitted for arbitration, pending determination of the dispute;
- to prevent an action that is likely to cause or prejudice the arbitral process itself;
- to provide a means of preserving assets out of which a subsequent award may be satisfied; and/or
- to preserve evidence that may be relevant and material to the resolution of the dispute.

The arbitral tribunal also has the power to grant an ex parte order for interim measures, if an application is made by the party and if notifying the other party will frustrate the purpose of the interim measures.

Conditions to be Satisfied

Parties requesting an interim measure must satisfy the arbitral tribunal of the following conditions:

- if it results in the damages provided by the Arbitral Award not being paid, in the event that the measure is not ordered;
- if the harm that is likely to result if the measure is not granted substantially outweighs the harm to the party against whom the measure is directed; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim (this shall not be reason enough to necessitate the arbitral tribunal determining the merit of the dispute in that manner).

The arbitral tribunal can determine the extent to which these conditions apply.

6.2 Role of Courts

Once an arbitral tribunal issues an interim measure, the parties shall make an application to the competent court, ie, the Civil Court, to recognise and enforce the interim measure. An order for recognition and enforcement of an interim measure shall be issued by the competent court after considering the appropriate factors which are not detailed in the act and which has yet to be tested in the Court.

A good starting point for this is to consider whether conditions for granting such an interim measure were appropriately met and whether there are any grounds for refusing the recognition and enforcement of such a measure under the Act. Following that consideration, given the wide discretion under the Act, it is likely that a court will consider all circumstances of the case in making this determination.

The Arbitration Act specifically provides that provisions in the Act relating to the recognition and enforcement of interim measures and provisions relating to grounds for refusal of enforcement do not apply to any such measures or/awards rendered in foreign-seated arbitration. This poses the question as to whether interim measures issued in a foreign-seated arbitration can be recognised and enforced by the Civil Court. The likely answer is that those measures can be recognised and enforced, following the general trend of cases which have answered indirectly related questions and cases which are similar to the ones posed. This precise question has yet to be tested in the Maldivian courts.

6.3 Security for Costs

Provision of Security

The arbitral tribunal has the power to require the party requesting an interim measure to provide appropriate security. The arbitral tribunal shall issue such an order without security only if it considers obtaining security inappropriate and unnecessary.

Provision of security is a deposit paid to the arbitral tribunal of an adequate amount by the party requesting an interim measure for costs that the party against whom the interim measure is directed may incur or damages that may be awarded to that party. This can be in the form of a guarantee issued from an institution acceptable to the arbitral tribunal.

Costs and Damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party, if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award these costs and damages at any point during the proceedings.

7. PROCEDURE

7.1 Governing Rules

The MIAC has published its own rules of arbitration to govern the procedure of arbitration in Maldives which reflect similar provisions in the Arbitration Act.

7.2 Procedural Steps

Parties are free to determine the procedure to be followed by the arbitral tribunal in the conduct of the proceedings. If parties are unable to come to an agreement, the arbitral tribunal has the power to determine the procedure to be followed in conducting proceedings, including the power to determine the rules of admissibility, relevance, and the weight that is to be given to the evidence presented.

The Arbitration Act covers most of the procedural steps of arbitration proceedings, including the commencement of arbitration, the arbitration procedure, the appointment and composition of the arbitral tribunal, and the powers of the arbitral tribunal. The MIAC Rules have incorporated almost exactly the same provisions as those stipulated in the Arbitration Act.

7.3 Powers and Duties of Arbitrators

The arbitral tribunal has the following powers:

- to decide on the merits of the case;
- to decide on the enforceability and validity of the arbitration agreement;
- to decide on the arbitrability of the dispute;
- to decide on its own jurisdiction and authority;
- to decide on the conduct of the proceedings and rules of procedure, where there is no agreement among the parties;
- to decide on the admissibility of evidence, and to determine its relevance, materiality and weight;
- to issue orders for interim relief; and
- to determine the place, language, and governing law of arbitration, where there is no agreement among the parties.

The arbitrator has a duty to treat the parties with equality and fairness and to give full opportunity to the parties to present their case. The arbitrator also has the duty to remain independent and impartial throughout the arbitration and has an ongoing obligation to disclose any circumstances that may call their independence or impartiality into question.

7.4 Legal Representatives

Appearance at Arbitral Proceedings

There are no requirements or qualifications for representatives in arbitral proceedings in the Arbitration Act. There are no restrictions as to the nationality and qualification of the representatives. In fact, parties are free to appoint an authorised person with no formal legal training to appear on their behalf. There is no restriction on the arguments an authorised person may present at the arbitral proceedings.

Appearance at Court Proceedings Related to Arbitration

The Bar Council of Maldives (BCM) issues licences to practitioners which enable them to appear as counsel at court. The licences are graded, with the basic licence allowing appearances at the Civil Court level. An enhanced licence will be required in order for a practitioner to appear at the High Court and the Supreme Court – which will be issued based on the lawyer's experience.

Unlicensed persons are not allowed to appear as legal counsel, but they may appear as a party representative. A party representative will be unlikely to raise arguments in relation to points of law but may speak on factual points.

Lawyers admitted in foreign jurisdictions will have to apply for leave from the BCM, which

may be granted after appropriate vetting from the BCM.

8. EVIDENCE

8.1 Collection and Submission of Evidence

Parties are to submit all supporting or relevant documents or add a reference to a document with the statement of claim and statement of defence. Parties must also submit all the written evidence and a summary of all other evidence they wish to present for consideration by the arbitral tribunal.

The arbitral tribunal may determine whether to have hearings for the presentation or whether proceedings are to be conducted on the basis of documents and other materials.

In the event that parties decide to hold oral hearings, the arbitral tribunal shall determine the procedure for the parties to be given opportunities for oral arguments, presentation of evidence, rebuttals, and cross-examination of evidence. Where parties wish to conduct proceedings on the basis of documents and other materials, the arbitral tribunal will determine a procedure on how the hearings should be conducted (if at all).

The arbitral tribunal may also appoint one or more experts or direct one or more parties to produce a report on a specific issue to be determined by the arbitral tribunal, ie, to provide a specific piece of information, a specific document, to give access to a place, or to facilitate the examination of documents.

Unless otherwise agreed by the parties or if one of the parties so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or oral report, participate in a hearing where the parties have an opportunity to put questions to him or her and/or to present additional evidence.

There are no procedures on discovery, disclosure, and privilege in the Arbitration Act and the MIAC Rules. However, guidance could be sought from the IBA Rules on the Taking of Evidence in International Arbitration, as the arbitral tribunal has the power to determine the rules of procedure where parties are unable to agree on them.

8.2 Rules of Evidence

There are no rules of evidence recognised in Maldives that apply to arbitral proceedings. However, the arbitral tribunal has the power to determine the rules of procedure where parties are unable to come to an agreement, and may use established evidential rules such as the IBA Rules on the Taking of Evidence in International Arbitration as a guide to govern their arbitration in terms of taking evidence.

There are evidential standards that apply to litigation in local courts. Neither the Arbitration Act nor case law has extended these to arbitrations. This is, however, an untested point and one on which developments can be expected as questions are put before the courts.

8.3 Powers of Compulsion

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court (ie, the High Court) assistance in taking evidence. Evidence should be taken according to the procedures of the court.

9. CONFIDENTIALITY

9.1 Extent of Confidentiality

Arbitrations are implicitly confidential as per the Arbitration Act, which stipulates that, unless otherwise agreed by the parties to a dispute, all

information, records, evidence, and the Arbitral Award shall be confidential and must not be disclosed to any third party, except in the following two circumstances:

- with the agreement and consent of the parties; and
- to the extent required to review a matter related to an arbitral award duly submitted to a court or other institution; in reviewing a matter related to an ongoing or completed arbitration and in making a determination, the court will undertake measures to keep documents and information related to the dispute confidential.

So far, the court has not sealed the court file, or heard matters in closed proceedings and redacted/anonymised judgments relating to arbitral proceedings. This approach seems to be an implicit extension of the exception in the second circumstance described above to the general cover of confidentiality under the Act.

However, this been raised in the Supreme Court on one occasion, pursuant to which the court, prior to making a finding on this point, agreed to hear the proceedings in a closed manner and to discontinue the normal process of streaming the hearing live online. Prior to the court making a finding, and as a first point in the closed hearing in question, all parties involved agreed to waive confidentiality. The court thereafter opened proceedings and restored the streaming of the proceedings live online.

The question on the extent of the extension of the confidentiality of arbitration proceedings to related court proceedings therefore remains unanswered. While an implied extension has been seen, as observed in the foregoing, no direct question on confidentiality has been addressed in the courts to date.

10. THE AWARD

10.1 Legal Requirements

In an arbitral proceeding with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed between the parties, by a majority of all its members.

The following requirements need to be fulfilled in an arbitral award.

- The arbitral award shall be in writing and shall be signed by the arbitrator or arbitrators constituting the arbitral tribunal. In an arbitration with more than one arbitrator, the signatures of the arbitrators forming the majority decision by the arbitral tribunal shall suffice. If in an arbitration with more than one arbitrator and if the award lacks a signature of an arbitrator, the reasons for omitting the signature must be stated.
- The award shall state the decision and reasons upon which it is based, unless the parties have agreed that no reasons are to be given or it is an award given pursuant to a settlement.
- The award shall state its date and the place of arbitration. The award shall be deemed to have been made at that place.
- After the award is made, a copy shall be delivered to each party.

There are no time limits on the delivery of the award.

10.2 Types of Remedies

There are no limits on the types of remedies that an arbitral tribunal may award, except for the requirement that the award should not result in any form of illegality.

10.3 Recovering Interest and Legal Costs

The principle of cost-shifting to the losing party is not recognised in local litigation and, as such, the principle is not applied in the Arbitration Act. However, the tribunal has appropriate discretion which may allow for such cost-shifting to take place.

The cost of arbitration, including the arbitrators' fees and all other fees and expenses, is to be borne by the parties, shared among the parties as agreed by those parties as a first port of call. In the event that there is no such agreement, the arbitral tribunal will decide on how the costs are to be shared among the parties. The arbitral tribunal is therefore free to follow cost-shifting, cost-apportionment, or equal costs-sharing approaches.

11. REVIEW OF AN AWARD

11.1 Grounds for Appeal

A party to the arbitration may make an application to a court to set aside an award. Any such application must be made to the High Court.

An arbitral award may be set aside by the court in one of the following instances:

- The party making the application furnishes proof that:
  - (a) a party to the arbitration agreement was under an incapacity that prevented him or her from entering into an agreement;
  - (b) a party to the arbitration agreement was under an incapacity as defined in law;
  - (c) the arbitration agreement is not valid under the Maldivian law to which the parties are subject;
  - (d) the party making the application was not given proper notice of the appointment of the arbitrator;
  - (e) a party was not given adequate opportunity to present his or her case;
  - (f) the award deals with a dispute that was not presented during the proceedings;
  - (g) the award contains decisions on matters beyond the scope of the submission;
  - (h) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties; or
  - (i) it is found that the arbitrator is found guilty of corruption or fraud while the proceedings were ongoing.
- The court finds that:
  - (a) the subject-matter of the dispute is not capable of settlement by arbitration under Maldivian law; or
  - (b) the award contravenes public policy.

Any such application should be made within three months from the date of the award or the date of the correction of an award.

11.2 Excluding/Expanding the Scope of Appeal

The High Court, in setting aside an arbitral award, will as a first point look at the grounds allowed by the Arbitration Act. The Act is silent as to whether parties may exclude or expand the scope of an appeal. It is, however, likely that parties can by unanimous consent exclude or expand the scope of appeal. Nevertheless, this is not a question that has been tested in the courts yet, and therefore taking a definitive stance on this is difficult at present.

11.3 Standard of Judicial Review

A standard of judicial review for questions of admissibility and jurisdiction has not yet been established. Currently, the prevailing view is that an application to set aside an arbitral award would be looked at in the same way that a standard appeal in litigation is reviewed. Given this

view, the standard of judicial review is likely to be on a deferential basis.

12. ENFORCEMENT OF AN AWARD

12.1 New York Convention

Maldives became a member state of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 2019. Maldives has not made any reservations with respect to this treaty.

The Convention has not yet been ratified through an act of parliament, as required under Article 93 of the Maldives' Constitution. However, the Arbitration Act provides that the foreign arbitral awards made in accordance with the Act shall be recognised and enforced in Maldives, and the Act largely mirrors the positions under the Convention.

12.2 Enforcement Procedure

A request for the enforcement of an award in Maldives must be made to the relevant court, which is the Civil Court, as established in the case of Hilton International Manage (Maldives) Pvt Ltd v Sun Travel and Tours Private Limited (High Court Case No 2017/HC-A/91).

The party requesting the enforcement must submit an original or an attested copy of the award, along with a translation of the award if the award is not in Dhivehi, the national language of Maldives.

Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused by the court in one of the following instances.

- At the request of the party against whom the award is invoked, if the party proves that:
  - (a) a party to the arbitration agreement was under an incapacity that prevented him or her from entering into an agreement;
  - (b) a party to the arbitration agreement was under an incapacity as defined in law;
  - (c) the arbitration agreement is not valid under the Maldivian law to which the parties are subject;
  - (d) the party making the application was not given proper notice of the appointment of the arbitrator;
  - (e) a party was not given adequate opportunity to present his or her case;
  - (f) the award deals with a dispute that was not presented during the proceedings;
  - (g) the award contains decisions on matters beyond the scope of submission;
  - (h) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties; or
  - (i) it is found that the arbitrator was found guilty of corruption or fraud while the proceedings were ongoing.
- If the court finds that:
  - (a) the subject-matter of the dispute is not capable of settlement by arbitration under Maldivian law; or
  - (b) the award is in conflict with the public policy of Maldives.

If an application to set aside an award is made in a court, the court has the power to halt the application made for the recognition and enforcement of an arbitral award.

12.3 Approach of the Courts

To date, the courts have largely taken a pragmatic approach in recognising and enforcing arbitral awards. Unless a convincing argument is made for the courts not to recognise an arbitral award, courts will generally recognise and enforce an arbitral award in Maldives.

The test for the breach of public policy is expected to be set at a high threshold (as the courts do in local litigation). Therefore, the courts are expected to use this ground only rarely to refuse recognition and enforcement. There are matters presently pending before the courts that will add further clarity to the courts' approach in such matters. At present, the aforementioned views are those prevailing.

13. MISCELLANEOUS

13.1 Class-Action or Group Arbitration

The Maldivian legal framework does not allow for class-action arbitration or group arbitration.

13.2 Ethical Codes

According to the Arbitration Act, a person acting as an arbitrator shall maintain ethical conduct in accordance with the standards set out in the Bangalore Principles of Judicial Conduct.

As the Maldives is still establishing its arbitration framework, it is understood that reliance would be placed on ethical codes and guidelines such as the IBA Rules on Conflict of Interest.

Regarding legal professionals, the Legal Profession Act of Maldives and related regulations and guidance published from the Bar Council of Maldives will be relevant. Additionally, foreign lawyers seeking temporary admission to appear in Maldives will also, unsurprisingly, be bound by standards set by the regulator in their home jurisdiction.

13.3 Third-Party Funding

The Arbitration Act is silent on third-party funders for arbitration. There are no rules or restrictions on third-party funders.

Third-party funders are not commonly used in litigation and so it is unlikely that they will be used in arbitration in the near future. This is primarily because litigation funders are not present in Maldives. This, of course, presents a market gap for any funding parties that may be interested in arbitration and litigation in Maldives. Furthermore, there are no restrictions on parties seeking litigation/arbitration funding from funders based in other jurisdictions.

13.4 Consolidation

The Arbitration Act and the MIAC Rules do not provide for consolidation of arbitral proceedings. The fact of the Arbitration Act and the rules being silent on this point does not preclude this action if the parties unanimously agree.

Whether a tribunal could seek to do this for convenience, where one or more parties oppose it, is a question that has yet to be answered, as such a matter has yet to be addressed in court. It is unlikely to be available in instances where the parties are opposed to consolidation. The Act generally gives credence to the fundamental principle of party autonomy and the courts are likely to approach such questions with doctrines of privity of contract squarely in the forefront of their minds, based on their approaches to such matters in local litigation.

13.5 Third Parties

The Arbitration Act is silent on whether third parties can be bound by an arbitration agreement or award. This is a matter that has yet to be dealt with in court proceedings. However, if the courts' approach to such matters in local litigation is taken as a guide, the privity of an arbitration agreement is likely to prevent third parties (including foreign third parties) from being bound by an arbitration agreement or award to which they are not a party.

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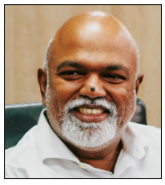
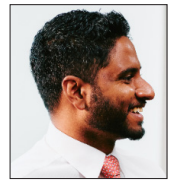
AUTHORS



Mohamed Shahdy Anwar is the managing partner at S&A Lawyers LLP. He is a market-leading arbitration practitioner and is involved in all major arbitrations in Maldives. He is the chairman of the Maldives International Arbitration Centre and a Fellow of the Chartered Institute of Arbitrators. Shahdy's practice is truly international; he acts as counsel and local counsel in arbitrations held in various seats. He has received many accolades and recognition for his practice over the years, and for his calm approach to complex matters.



Zain Shaheed is the head of the litigation and arbitration practice at S&A Lawyers LLP. He contributes years of experience and knowledge, having practised both in London and New York in white-shoe firms. He is well acquainted with a wide range of proceedings, including those under the International Chamber of Commerce (ICC), the International Centre for Settlement of Investment Disputes (ISCID), the United Nations Commission on International Trade Law (UNCITRAL), the London Court of International Arbitration (LCIA), the Singapore International Arbitration Centre (SIAC), and the Dubai International Arbitration Centre (DIAC) rules.

Juni Latheef is a lead associate at S&A Lawyers LLP. Juni is an organised, efficient, and pragmatic lawyer with a keen eye for detail. She benefits from a common-sense approach and an inquisitive and fresh perspective on matters. She is presently undergoing training for accelerated membership at the Chartered Institute of Arbitrators, and she is well versed in proceedings under the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and the Singapore International Arbitration Centre (SIAC) rules.

S&A Lawyers LLP

#02-01 Millennia Tower
10 Ameer Ahmed Magu
20026, Male'
Republic of Maldives

Tel: +960 30 132 00
Email: info@sandalawyers.com
Web: www.sandalawyers.com

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Trends and Developments

Contributed by:
Mohamed Shahdy Anwar, Zain Shaheed and Juni Latheef
S&A Lawyers LLP see p.26

Judicial Engagement in Arbitration and the Enforcement of Arbitral Awards in Maldives – Trends and Developments

As a result of what has been perceived as an arduous, slow, and sometimes inequitable local court system, international actors have for some years now elected to insert arbitration agreements into agreements with public and private local parties. This has led to a growing interest in arbitration in Maldives' legal sphere, with a number of high-profile arbitrations relating to subject-matter in Maldives being conducted in regional hubs such as Singapore.

Some recent decisions in Maldives will be examined as follows, relating to:

- interim measures in support of foreign-seated arbitrations;
- recognition of arbitration agreements and dismissal of court proceedings in favour of foreign-seated arbitrations; and
- recognition and enforcement of arbitral awards rendered in foreign-seated arbitrations.

Some important cases that are presently pending will be considered, which will have implications for arbitrations seated in Maldives and for foreign-seated arbitrations with a nexus to Maldives.

Key Recent Decisions in Maldives

Interim measures in support of foreign-seated arbitrations: Jumeirah Management Services (Maldives) Private Limited v SPH Private Limited (High Court Case No 2020/HC-A/165 appealed at the Supreme Court in the case of 2020/SC-A/101).

The High Court Orders and Supreme Court reversal

In the first application of its kind, on application by Jumeirah Management Services (the Applicant) the High Court granted three interim orders: a prohibitory injunction, a freezing injunction, and a preservation order, in support of an ongoing foreign-seated arbitration in Singapore. These orders were reversed on appeal to the Supreme Court.

Essential facts

The Applicant commenced arbitration proceedings in the Singapore International Arbitration Centre (SIAC), impugning the propriety of an immediate termination of a hotel-management agreement by SPH Pvt Ltd (the Respondent).

The Applicant shortly thereafter applied to the High Court, requesting interim measures to protect its position. Notwithstanding the referral to arbitration, the Respondent had continued to act on the termination notice in ways which would arguably prejudice the Applicant's ability to obtain the relief sought at the arbitration.

The time-drift

The Applicant made an application for urgent orders that needed to be considered, in the High Court in June 2020. At first, the High Court's registrar refused to accept the application, noting that the Court's procedural rules in relation to the conduct of matters dealing with interim measures in support of foreign arbitrations had not been published. This decision was appealed to

the High Court Judge's Bench and the Bench decided to accept the filing and hear the matters in question. These events were the first element of the time-drift that would affect the urgent application for interim relief.

The Respondent then raised a procedural objection to the progression of the application on the same grounds. This was the second element of time-drift that affected the matter.

By this time, the parties had run through the pre-arbitral steps under the agreement. The Applicant therefore withdrew the first arbitration application in Singapore (which was apparently filed under exigent circumstances, on an exceptional basis, without having completed the pre-arbitral steps) and consequently withdrew the first injunction application in Maldives. Shortly thereafter, a second arbitration application was filed in Singapore, along with a second injunction in Maldives.

The Respondent once again raised a procedural objection - this time noting that the Applicant's actions in withdrawing and re-filing matters were an abuse of process. This was the third element of time-drift which affected the application.

Following months of deliberations regarding procedural quarrels which further exacerbated the time-delays, and after having rejected all of the Respondent's procedural objections, the High Court issued the interim orders in question in November 2020 – some five months after the initial application was filed.

The High Court orders in support of the Singapore-seated arbitration were welcome moves from a jurisdiction which had been taking active steps to join the international arbitration fold. The positivity of this step was, however, short-lived.

The appeal

The Respondent then appealed to the Supreme Court to overturn these interim orders and obtained a stay of execution on the High Court interim orders, which, again, was another element of the recurrent time-delay which affected this application.

The Respondent argued that the High Court did not have jurisdiction to issue the orders in question, noting that the procedural rules which would govern the conduct of these matters had not been published by the High Court and also noting that the High Court had erred in its application of the relevant test, ie, the "balance of convenience" test.

The Supreme Court issued an order to quash the High Court orders in March 2021 – some nine months after the initial application was filed.

In applying the balance of convenience test, the Supreme Court accepted that their review had to be based on the evidence presented to the High Court at the time of the High Court proceedings. The Supreme Court noted that all fresh evidence adduced in the Supreme Court proceedings would be disregarded.

In reaching their decision to overturn the High Court orders, however, the Supreme Court noted that the Respondent had made extensive expenditures to rebrand the resort, which had now tipped the balance of convenience in favour of the Respondent.

Ultimately, the Supreme Court correctly found that it was now impossible to enforce the orders in question, given the extent of delay and resulting change of circumstances in the intervening period between the termination notice and the Supreme Court judgment.

What is clear from the outcome of this application is that the time-drift that pervaded this matter, largely due to inherent delays and weaknesses in the local litigation framework which had been further prolonged by the unexpected COVID-19 pandemic-related delays and related court closures, had prejudiced the Applicant.

In several ways, the lack of procedural rules and framework at the High Court level for applications for interim orders in support of foreign-seated arbitrations had triggered a time-drift which ultimately denied the Applicant a swift and speedy review of their request. A different outcome may well have resulted had delays not been allowed to set in.

The positive conclusion from this is the High Court's response to the issues that arose in this application. The High Court has now published the requisite procedural framework and procedural rules which parties should follow in applications for interim relief in support of foreign-seated arbitrations. This is a much-welcomed step and one which should enable parties to ensure a timely and efficient review of their applications for interim measures in support of foreign-seated arbitrations.

Recognition of arbitration agreements and dismissal of court proceedings in favour of foreign-seated arbitrations: Ahmed Ibrahim Didi v Olhuveli Laamu Holdings (High Court Case No 2016/HC-A/31).

The essential facts

Ahmed Ibrahim Didi (the Claimant) filed a claim at the Civil Court to nullify a shareholders' resolution to sell all assets of Olhuveli Laamu Holdings (the Respondent), including the leasehold rights to a tourist resort island.

After filing the first statement of defence in which the Respondent failed to raise any points relating to an arbitration agreement, the Respondent in subsequent pleadings noted that the articles of association of the company contained an arbitration agreement. They requested that the court dismiss the claim so that the dispute could be settled through arbitration.

At first instance, the Civil Court dismissed the claim to recognise the arbitration agreement contained in the articles of association.

The appeal

The Claimant appealed the first-instance decision, noting, inter alia, that the dismissal contravened section 15 of the Arbitration Act.

Section 15 reads in pertinent part as follows: "(a) If an action is brought to a court in a matter which is the subject of an arbitration agreement, and if the following two conditions are satisfied, the court shall order a stay of legal proceedings and refer the matter to arbitration.

(1) If the respondent so requests to resolve the matter through arbitration, in the first statement of defence to a claim; and

(2) If the court has not found that the agreement is null, void, inoperative or not capable of being performed".

The Claimant noted that the Respondent had failed to direct the court to the arbitration agreement as required under section 15 (a) (1) of the Arbitration Act in their first statement of defence.

The outcome

The High Court, however, correctly observed that section 4 of the Arbitration Act disapplies certain sections, including section 15, to proceedings where the seat of the arbitration is not Maldives. They went on to observe that the arbitration agreement in question had not identified a seat. Nevertheless, the court did not see

that this omission naturally led to an immediate assumption that the seat ought to be Maldives.

The High Court should be commended on an excellent purposive reading of sections that are peculiarly worded. A rather limited view of the collective effect of sections 4 and 15 was put forward, which was correctly disregarded.

The Claimant had taken the narrow view that, pursuant to section 4, necessary referrals to arbitrations by the courts pursuant to section 15 were exclusively in relation to arbitration agreements where the seat is Maldives. They argued that courts did not have jurisdiction to make such referrals in relation to foreign-seated arbitration agreements. This argument draws an arbitrary distinction and is an unnecessarily limited reading of the sections, and one which confuses the purposes of the sections.

The High Court effectively regarded section 15 as an estoppel on referring matters to arbitration. Parties who fail to highlight the existence of an arbitration agreement in the first set of pleadings are estopped from subsequently making a request to refer to arbitration. The High Court considered this estoppel to extend only to cases in which Maldives is the seat. For matters involving an arbitration agreement where the seat is not Maldives, failure to highlight the existence of an arbitration in the first pleadings would not estop a party from subsequently requesting referral to arbitration.

This decision demonstrates the High Court's readiness and willingness to construe provisions in such a way that will lead to sensible outcomes in which party autonomy is given credence and arbitration agreements are properly recognised and enforced. It also demonstrates a keenness to recognise international arbitration agreements and is a demonstrable commitment in the jurisdiction to allow parties to settle disputes through arbitration.

This is a welcome decision and one which builds confidence in the High Court's ability to render effective judgments on questions relating to international arbitration.

Recognition and enforcement of arbitral awards rendered in foreign-seated arbitrations: Avista Asset Management v Muthaafushi Orient Investments Limited (MOIL) (Civil Court Case No 716/Cv-C/2021).

The essential facts

Avista Asset Management (the Claimant) and MOIL (the Respondent) agreed to the expedited procedure under the SIAC rules, following which an arbitration award was rendered in favour of the Claimant.

The Claimant applied for enforcement of the arbitral award in Maldives.

The Respondents raised issues at the initial hearing regarding the form of the arbitral award, noting that the award did not set a period of time within which payment is to be made to the Claimant, nor did it set a payment schedule for the award amount.

This may seem to be a strange point to make for litigants who are not from Maldives. In the local context, however, this initially appeared to be a point which perplexed the court. The court held three hearings to dispense this point. This is because orders to pay in Maldives rarely amount to a single lump-sum (and almost never involve a large sum). The orders are often made with a payment deadline and are usually made with a payment schedule. Applications for enforcement are usually followed by a litigant's failure to meet a payment deadline.

In this instance, however, the arbitral award neither referred to a specific date by which payment was due, nor set out a payment schedule.

The questions before the court as the court viewed it were (i) whether the award was unenforceable owing to the lack of a payment deadline/payment schedule, or (ii) whether setting a payment schedule and payment deadline would be considered a new finding at the enforcement stage which varied the arbitral award.

The finding

In a relatively swift recognition and enforcement of an arbitral award, the Civil Court found that the award was enforceable. The Court rejected arguments from both parties that the setting of a payment deadline and payment schedule would be a new finding that varied the arbitral award. Instead, the Court correctly treated the arbitral award with the same weight and force as a court judgment in the local jurisdiction, as it should do under the New York Convention (to which Maldives is a signatory). As such, the Court correctly found that it was within the Court's mandate to set a reasonable payment timeline and procedure for payment of the arbitral award.

This is a notable move for a jurisdiction that has in the past struggled to find efficient and quick resolutions to matters. This case marks a notable change, where the court's openness to enforce awards rendered in foreign-seated arbitrations swiftly and efficiently has been observed. This, as others have previously noted, is a welcome change, which shows an openness in the jurisdiction that will only improve as the system becomes more proficient with matters involving international arbitration.

Important Cases Presently Pending before the Courts

Hilton International Manage (Maldives) Pvt Ltd v Sun Travel and Tours Pvt Ltd

An arbitral award in favour of Hilton (the Claimant) was rendered in a Singapore-seated arbitration under the International Chamber of Commerce ICC rules in 2015. Following recognition of the award in the courts of Singapore, the Claimant began its efforts to enforce the arbitral award in Maldives.

The Claimant's first filing was dismissed, and the Civil Court ordered the Claimant to file the claim at the High Court, based on a view that the "relevant court" under the Arbitration Act was the High Court and therefore recognition of the arbitral award from the High Court was a pre-requisite to commencing enforcement proceedings.

Once the claim was filed, however, the High Court found that it was not necessary for the High Court to issue a recognition order of an arbitral award prior to enforcement and also found that the relevant court for the specific purpose of enforcement of awards should be the Civil Court.

Upon what was now the third filing of a request to enforce the award, the Civil Court took the unorthodox view to dismiss the enforcement proceedings until the conclusion of a parallel fraud claim made by Sun Travel and Tours (the Respondent) in the Civil Court (despite there being no stay of execution of the arbitral award).

This parallel claim at first instance went in favour of the Respondent, but was subsequently quashed and dismissed at the High Court. The High Court found that the Civil Court had erred in the substantive conclusions in the fraud claim and also found it unnecessary for the High Court

to re-litigate a matter that had already been fully litigated in the Singapore arbitration.

The High Court also correctly found that the enforcement of an arbitral award should not be halted due to a related parallel proceeding unless the court in question had issued a stay of execution of the arbitral award.

The most recent and now fourth attempt to enforce the arbitral award was filed in August 2020. The judge presiding over the matter took a welcome and positive step to issue an order to freeze all of the Respondent's bank accounts.

The Respondent appealed the freezing order, arguing that the Civil Court had erred in failing to issue a recognition order prior to taking an enforcement step. This is notwithstanding the state obligation under the New York Convention to treat arbitral awards rendered in arbitrations seated in signatory states with the same weight and force as an order from a court in the local jurisdiction. The High Court rejected the appeal. The Respondent appealed to the Supreme Court. This appeal is now pending before the Supreme Court. The outcome of this appeal will have wide ramifications for the enforcement of international arbitral awards in Maldives. This case is therefore one which the arbitration community in Maldives will follow closely.

On the matter of enforcement, however, given that there has been no stay of execution, the judge has issued an order for the funds in the Respondent's bank accounts to be brought into court. Further enforcement steps are expected. It is obviously welcome news that this now hugely delayed enforcement matter is being allowed to progress.

Any further delays on this should be a cause for concern for the arbitration community in Maldives and will likely be a source of embarrassment for Maldives. The swift conclusion of this matter is now something that the arbitration community in Maldives will welcome.

Conclusion

Owing to the nascent nature of arbitration in Maldives, there are notable points of procedural weakness which can all be viewed as teething issues in a jurisdiction that is beginning to adopt arbitration as an alternative means of dispute resolution. These weaknesses result in delays in the issuance of interim measures in support of ongoing arbitration proceedings, difficulties in the swift recognition of arbitration agreements, and unexpected quirks in the enforcement proceedings of arbitral awards.

The courts have, however, in recent times been taking positive steps to address these issues and are demonstrating an openness and keenness to adopt, support, and promote arbitration as an alternative form of dispute resolution. This can largely be attributed to the concerted efforts of the MIAC and the Maldives arbitration community to propel arbitration forward in Maldives. It is also a clear recognition from the courts that, ultimately, arbitration improves access to justice and works to ease the workloads of an already strained and stretched judiciary with limited resources.

The overall conclusion is that Maldives will be opening up further to arbitration. The present positivity within the judiciary towards arbitration will only improve – with arbitration likely set to become the main form of dispute resolution in commercial disputes in Maldives in the near future. The upward trend on referrals to arbitration will continue to increase exponentially as time progresses. The future of arbitration in Maldives therefore looks bright!

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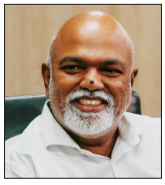

Mohamed Shahdy Anwar is the managing partner at S&A Lawyers LLP. He is a market-leading arbitration practitioner and is involved in all major arbitrations in Maldives. He is the chairman of the Maldives International Arbitration Centre and a Fellow of the Chartered Institute of Arbitrators. Shahdy's practice is truly international; he acts as counsel and local counsel in arbitrations held in various seats. He has received many accolades and recognition for his practice over the years, and for his calm approach to complex matters.

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Contributed by: *Mohamed Shahdy Anwar, Zain Shaheed and Juni Latheef,* ***S&A Lawyers LLP***

Juni Latheef is a lead associate at S&A Lawyers LLP. Juni is an organised, efficient, and pragmatic lawyer with a keen eye for detail. She benefits from a common-sense approach and an inquisitive and fresh perspective on matters. She is presently undergoing training for accelerated membership at the Chartered Institute of Arbitrators, and she is well versed in proceedings under the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL) and the Singapore International Arbitration Centre (SIAC) rules.

S&A Lawyers LLP

#02-01 Millennia Tower
10 Ameer Ahmed Magu
20026, Male'
Republic of Maldives

Tel: +960 30 132 00
Email: info@sandalawyers.com
Web: www.sandalawyers.com

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