The Legal 500 & The In-House Lawyer

Hot Topic | International Arbitration (4th edition)

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Hot Topics – Singapore

Introduction

Singapore has, in recent years, been playing a prominent role in international arbitration and has matured to be a leading arbitration hub in Asia and in the world. As a reputable seat for both commercial and investment treaty arbitrations, Singapore was ranked in 2018 as the most preferred seat in international arbitration in Asia and the third most preferred seat worldwide just after London and Paris.[1] The legal developments in Singapore relating to international arbitration therefore assume great significance, and would be of particular interest to the arbitral community.

A particular space to watch is the jurisprudence from the Singapore courts concerning investment treaty arbitrations. The first investment treaty arbitration case that came before

the Singapore courts is *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*[2] ("***Sanum***") where the courts grappled with the application of the moving treaty frontiers rule in state succession and the interpretation of fork-in-the-road clauses. The next occasion for the Singapore courts to hear an investment treaty case was in *Kingdom of Lesotho v Swissbourgh Diamond Mines (Pty) Limited*[3] ("***Lesotho***") where difficult and novel issues of public international law, treaty interpretation and international investment law arose in the context of the shuttering of a specially constituted tribunal known as the South African Development Community ("**SADC Tribunal**"), which was established to hear disputes concerning breaches of the SADC treaty. What is of note is that the underlying investments and disputes in *Sanum* and *Lesotho* had no connection with Singapore, other than Singapore being chosen as the seat of arbitration. A third setting aside application in the context of an investor-state arbitration is on the horizon, as evident from the recent dismissal of an application by a Queen's Counsel for ad-hoc admission to defend the setting aside application of an investor-state award; the setting aside application has also been transferred to be heard by the Singapore International Commercial Court ("**SICC**").[4]

In addition, the Singapore courts often deal with challenges to an arbitral tribunal's jurisdiction under s 10(3) of the International Arbitration Act ("**IAA**") and Art 16(3) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") where the tribunal has ruled on a preliminary plea that it has (or does not have) jurisdiction. This has generated a number of interesting decisions, including that of the Singapore Court of Appeal in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd*[5] ("***Rakna***") where the Court had to answer the question as to whether a non-participating party to an arbitration could lose its right to raise jurisdictional challenges in setting aside proceedings before the seat court if it has failed to earlier avail itself of the recourse under s 10(3) of the IAA and Art 16(3) of the Model Law. In *BNA v BNB and another*[6] ("***BNA***"), the Singapore Court of Appeal disagreed with the Singapore High Court's interpretation of an arbitration clause, and found that the parties had chosen Shanghai instead of Singapore as the seat of arbitration, which therefore meant that the jurisdictional issues were for the People's Republic of China ("**PRC**") court, as the seat court, to decide.

Apart from case law developments, another topic which has generated a lot of interest and discussion pertains to the proposed amendments to the IAA to further improve the arbitration regime in Singapore. The ongoing review of the arbitration legislation demonstrates how Singapore, as a preferred arbitral seat, is not content to rest on its laurels, and is constantly looking to improve itself so as to maintain its attractiveness as an arbitral seat.

- *Investment treaty arbitrations – Sanum* and *Lesotho*

A number of investment treaty arbitrations which have no connection to Singapore other than being seated in Singapore, have come before the Singapore courts, and the Singapore courts have had the opportunity to tackle complex, novel and interesting issues of public international law, treaty interpretation and international investment law.

Sanum concerned an application under s 10(3)(a) of the IAA against a positive jurisdictional ruling of the tribunal, in favour of the Macanese investor, in an arbitration brought against the Government of Laos, under the PRC-Laos bilateral investment treaty ("**PRC-Laos BIT**"). While the High Court set aside the positive jurisdictional ruling of the tribunal, the 5-judge Court of Appeal, who appointed 2 *amicus curiae*, adopted a *de novo* approach[7], and decided to reverse the decision of the High Court and uphold the jurisdiction of the tribunal.

The key question before the Court of Appeal is whether the PRC-Laos BIT applied to Macau SAR by reason of the moving treaty frontiers rule, and whether any of its exceptions applied, namely "*whether a different intention appears from the treaty or is otherwise established*". The Court of Appeal did not find that the treaty text displaced the presumption, and neither did the other evidence, including the 1987 PRC-Portugal Joint Declaration and the 1999 Note from PRC to the UN Secretary-General. Interestingly, after the tribunal's positive jurisdictional ruling, Laos had produced before the Singapore courts Notes Verbales exchanged in 2014 between the Laotian Ministry of Foreign Affairs and the PRC Embassy in Vientiane which stated that the PRC-Laos BIT was not applicable to Macau SAR. Adopting the "*critical date doctrine*" under international law i.e. evidence generated after the dispute has arisen cannot be used by the disputing party to improve its position, the Court of Appeal found that Notes Verbales should not be accorded any weight, as they contradicted the pre-critical date doctrine position, and also did not amount to a subsequent agreement or practice, as that would amount to a retroactive amendment of the PRC-Laos BIT. This aspect of the decision has been cited with approval by international tribunals sitting in investor-treaty arbitrations, in particular those concerning disputes arising out of the annexation of Crimea by Russia.

In interpreting the fork-in-the-road clause in Art 8(3) of the PRC-Laos BIT which provides for "*a dispute involving the amount of compensation for expropriation*" to be submitted to international arbitration[8], the Court of Appeal in *Sanum* adopted a broad interpretation, and found that the clause was wide enough to cover an expropriation dispute, as issues of quantum and liability for expropriation were incapable of segregation.

Lesotho, on the other hand, concerned an application by the Kingdom of Lesotho to set aside a partial final award on jurisdiction and liability rendered by a tribunal seated in Singapore under the auspices of the Permanent Court of Arbitration ("**PCA**") in favour of the South African investors. The investors had been granted prospecting and mining leases in Lesotho, which were subsequently expropriated by the implementation of various measures in Lesotho. This led to proceedings commenced against Lesotho for wrongful expropriation before the SADC Tribunal, which was shuttered while the proceedings were pending, as a result of resolutions passed by SADC States, without there being an alternative forum provided to hear these pending proceedings.[9] The investors thus commenced the PCA arbitration against Lesotho arguing breaches of various obligations under the SADC treaty and its associated protocols, by Lesotho participating in the shuttering of the SADC Tribunal without providing an alternative forum to hear the pending proceedings. The PCA tribunal found that it had jurisdiction to hear and determine the claim, that Lesotho had breached its obligations under the SADC treaty and its associated protocols, and directed the parties to constitute a new tribunal to hear the investors' expropriation claim. The Singapore High Court and Court of Appeal set aside the

award under Art 34(2)(a)(iii) of the Model Law, on the basis that the SADC tribunal did not have jurisdiction to hear and determine the claim, *albeit* on slightly different analysis and reasoning.

Similar to *Sanum*, the 5-judge Court of Appeal appointed two *amicus curiae*, and elucidated on various important principles in public international law and international investment law, some of which are highlighted below.

First, the Court of Appeal held that an "investment" can consist both of the primary right to exploit the investment and the secondary right to seek remedies to vindicate the primary right.[10] In connection with this, the Court of Appeal ventured to observe that the rights associated with an investment need not even be in existence at the time the original investment was made, endorsing a dynamic view of investment treaties.[11]

Second, the Court of Appeal was of the view that to qualify as an "investment", there was a need to satisfy the requirement of a "*territorial nexus*" i.e. for the investment to be made or located within the territory of the host States. In the context of a bundle of rights, those rights must exist and be enforceable under the domestic laws of the host State because, in the Court of Appeal's view, "*it is generally not sufficient for a right to exist only extraterritorially or on the international law plane unless that right is within the State's sole control or the State has expressly undertaken to guarantee that specific right*".[12] Consequently, the investors' right to bring a claim before the SADC Tribunal was not a protected investment, as it existed on the international law plane and its assurance was dependent on the consent of SADC member states, and not Lesotho alone.[13]

Third, on an issue of temporal jurisdiction, the Court of Appeal embarked on an analysis of the SADC treaty and its associated protocols to come to the conclusion that they did not create an independent basis of jurisdiction over investment disputes.[14] This potentially has implications for the interpretation of the SADC treaty and its associated protocols in other proceedings involving these instruments.

The Singapore courts have demonstrated in *Sanum* and *Lesotho* that they are ready to confront complex, difficult and varied issues of public international law, treaty interpretation and international investment law, and lead the way in the jurisprudence in this field, which would only further cement its position as an arbitral seat for investment arbitrations. As mentioned, a third investor-state case is on the horizon for the Singapore courts, this time, before the SICC.[15]

- *Rakna – choice of remedies*

In *Rakna*, arbitration proceedings under the Rules of the Singapore International Arbitration Centre ("**SIAC**") were commenced by Avant Garde Maritime Services (Pte) Ltd ("**AGMS**"), a Sri Lanka-incorporated company providing maritime security services, against Rakna Arakshaka

Lanka Ltd ("**RALL**"), a Sri Lanka-incorporated company specialising in providing security and risk management services, for breach of various agreements. The arbitral tribunal ruled on its jurisdiction in a preliminary ruling, but no challenge under s 10(3) of the IAA and Art 16(3) of the Model Law was filed by RALL. [16] Although RALL had also written to the SIAC seeking multiple extensions of time to respond to the Notice of Arbitration,[17] RALL neither participated in the arbitral proceedings nor submitted any post-hearing written submissions or submissions on costs.[18] After the arbitral tribunal issued a final award in favour of AGMS,[19] RALL instituted proceedings in the Singapore High Court to set aside the award on, amongst other things, jurisdictional grounds[20]. The High Court held that RALL's failure to challenge the tribunal's preliminary ruling on jurisdiction within 30 days amounted to an abuse of process, and prevented RALL from subsequently applying to set aside the award on jurisdictional grounds, due to the preclusive effect of s 10(3) of the IAA and Art 16(3) of the Model Law.

On appeal, the Court of Appeal disagreed with the High Court, and found that the preclusive effect did not extend to a respondent who failed in its jurisdictional objection and then does not participate in the arbitral proceedings and has not contributed to any wastage of costs, or the incurring of any additional costs that could have been prevented by a timely application under s 10(3) of the IAA and Art 16(3) of the Model Law.[21] As the Court of Appeal found that RALL did not participate in the arbitration proceedings, RALL was entitled to avail itself of all the remedies, including raising the jurisdictional objections at the setting aside stage.[22] The Court of Appeal eventually decided to set aside the final award pursuant to Art 34(2)(a)(iii) of the Model Law because it contained a "*decision on matters beyond the scope of the submission to arbitration*".[23] The Court of Appeal observed that as there was an agreement which had effected a settlement and resolved the dispute between the parties, there was no longer a dispute for the tribunal to deal with and the tribunal had no jurisdiction to conduct the arbitral proceedings.

While this decision represents an important pronouncement on the preclusive effect of a failure to resort to the early mechanism under Art 16(3) of the Model Law (or its equivalent) to ventilate jurisdictional objections, questions remain as to the precise contours of when a respondent can be said to justifiably not to participate in the arbitration proceedings, and to be still entitled to raise the jurisdictional objections when it comes to setting aside of the award, and whether this same reasoning applies to resisting enforcement of the award. One would certainly have in mind the decision of the Singapore Court of Appeal in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal*[24] where the Court of Appeal distinguished between the "*active remedy*" of setting aside the award and "*passive remedy*" of resisting enforcement of the award, and rejected the submission that Art 16(3) was a mandatory route that must be followed. The fact that a party had not raised a timely challenge to the preliminary award on jurisdiction did not therefore prevent it from subsequently exercising its passive remedy to challenge the enforcement, and it was also found on the facts that the party in question did not waive its right to challenge the jurisdiction despite participating in the proceedings, as the party had always maintained its jurisdictional objections in the arbitral proceedings.

In this context, of note are also two SICC decisions, namely that of Roger Giles IJ in *BXY and others v BXX and others****[25]***, which decided that the 30-day time limit in s 10(3) of the IAA and Art 16(3) of the Model was absolute, and that the Court has no inherent power to extend that time, similar to the finding of Reyes IJ in *BXS v BXT*[26] that the three-month time limit in Art 34 of the Model Law was absolute.

- *BNA – determining the proper law of an arbitration agreement*

In *BNA*, an application was brought by the plaintiff under s 10(3) of the IAA challenging a preliminary positive jurisdictional ruling of the tribunal in an arbitration administered by the SIAC. The arbitration agreement in question formed a part of the underlying contract, which was governed by the laws of the PRC. The arbitration clause provided that "*the disputes shall be finally submitted to the Singapore International Arbitration Centre (SIAC) for arbitration in Shanghai, which will be conducted in accordance with its Arbitration Rules*".[27]

Before the High Court, the plaintiff contended that the tribunal lacked jurisdiction as the arbitration clause was invalid under PRC law. Under PRC law, foreign arbitral institutions are prohibited from administering arbitrations of domestic disputes and PRC-seated arbitrations.

In determining the validity of the arbitration clause, the High Court had to first consider the proper law of the arbitration agreement, and endorsed the three-stage inquiry laid down by the English Court of Appeal in *Sulamérica*[28]. While PRC law was the governing law of the underlying contract, there was no express choice of law for the arbitration agreement. As to the implied choice of law, the High Court noted that as the arbitration agreement would be invalid under PRC law, that may indicate the parties' contrary intention to apply that law, and the High Court thus undertook an analysis as to whether the law of the sear of the arbitration would instead apply.

The High Court concluded that Singapore was the seat of arbitration notwithstanding the reference to "Shanghai" in the arbitration clause. This was due to the parties' express choice of SIAC Rules 2013 for the conduct of the arbitration, by which the parties had clearly manifested their intention to have Singapore as the seat[29], as r 18.1 of the SIAC Rules 2013 provided that in the absence of an agreement to the contrary, the seat of any arbitration under the SIAC Rules 2013 would be Singapore.[30] In construing the arbitration clause, the High Court had rejected both the "effective interpretation" principle and the "validation principle"[31], preferring instead to adopt general principles of construction of contracts. Following from this, the High Court found that the proper law of the arbitration agreement was the law of the seat, which was Singapore law[32], and that the arbitration agreement thus had its closest and most real connection with Singapore.[33] As the arbitration agreement was valid under Singapore law, the High Court upheld the jurisdiction of the tribunal.

The High Court decision was reversed by the Singapore Court of Appeal. While written grounds have not yet been issued, it was reported that the Court of Appeal, in its oral grounds, has "*quashed a ruling that affirmed a SIAC tribunal's jurisdiction to hear a case under a clause providing for 'arbitration in Shanghai' – concluding that the Chinese city was clearly intended as the seat for the dispute*".[34] It was reported that Sundaresh Menon CJ had opined that the High Court was wrong in concluding that Shanghai was not the seat and simply the venue for the hearing; thus, any questions related to the jurisdiction of the tribunal was for the PRC court, and not the Singapore courts.[35] It remains to be seen when the written grounds of decision are issued, as to whether the Court of Appeal disagreed with the other analysis and reasoning of the High Court.

- *Proposed amendments to the IAA*

Apart from case law developments, another topic which has generated a lot of interest and discussion pertains to the proposed amendments to the IAA to further improve the arbitration regime in Singapore.

In a public consultation initiated by the Singapore Ministry of Law from 26 June 2019 to 21 August 2019[36], the Ministry proposed certain amendments to the IAA, namely:

- the introduction of a default mode of appointment of arbitrators in multi-party situations;
- allowing parties to, by agreement, request the arbitrator or arbitrators to decide on jurisdiction at the preliminary stage;
- a provision recognising that an arbitral tribunal and the High Court have powers to enforce obligations of confidentiality in an arbitration;
- allowing a party to the arbitral proceedings to appeal to the High Court on a question of law arising out of an award made in the proceedings, provided parties have agreed to opt in to this mechanism;

Of particular significance is the proposal to allow a party to appeal to the High Court on a question of law arising out of an arbitral award, provided that parties have agreed to opt in to this mechanism. As pointed out by Sundaresh Menon CJ, this proposed amendment has many considerable advantages, including promoting efficiency in the arbitral process,[37] accountability of arbitrators and enhancing "*the legitimacy of the arbitral regime as a whole*".[38] It would further stimulate and lead to the development of a cohesive body of arbitral case law[39]; reduce ambiguity, which in turn "*enhances certainty, lowers the costs of doing business, and reduces the risk of similar disputes occurring*".[40] Having "*judicial recourse to correct obvious errors of law would in fact strengthen users' confidence in arbitration*".[41] As seeking judicial recourse on a point of law is available only if the parties have agreed in writing to opt-in to this mechanism, this proposed amendment strikes a balance between party autonomy and promoting efficiency and certainty in arbitration.

Drawing from the experience of s 69 in the UK Arbitration Act, this proposed amendment envisages that a party may appeal on a question of law arising out of an award only upon notice to the other parties and the arbitral tribunal and with the leave of the High Court. Leave to appeal may be granted only if the High Court is satisfied that: "(*a) the determination of the question will substantially affect the rights of one or more of the parties; (b) the question is one that the arbitral tribunal was asked to determine; (c) on the basis of the findings of fact in the award – the decision of the arbitral tribunal is obviously wrong; or the question is one of general public importance and the decision of the arbitral tribunal is at least open to serious doubt; and (d) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the High Court to determine the question*".[42] It is evident that judicial recourse on a point of law is available only in certain limited circumstances, and this proposed amendment has the necessary safeguards to deter parties from pursuing unnecessary litigation, thereby undermining the finality of arbitral awards.

It remains to be seen whether the High Court would be given the power to go a step further, in a situation where the parties do not appeal on a particular question of law, and the High Court decides, of its own motion, to intervene where there is a manifest error in law in the arbitral award. It appears that the general sentiment is that this may be going one step too far.

The ongoing review of the arbitration legislation demonstrates how Singapore, as a preferred arbitral seat, is not content to rest on its laurels, and is constantly looking to improve itself so as to maintain its attractiveness as an arbitral seat.

Conclusion

The expanding jurisprudence in international commercial and investment arbitration from the Singapore courts is certainly not going to slow down, especially with Singapore's growing popularity as an arbitral seat. Of late, these decisions are also being generated from the SICC, which include an international panel of judges, with both common law and civil law background, and this would no doubt add an international dimension to the jurisprudence, which will continue to contribute significantly to the development of international arbitration globally.

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[1] SIAC, '*SIAC is Most Preferred Arbitral Institution in Asia and 3rd in the World*', 10 May 2018, available at <http://www.siac.org.sg/69-siac-news/568-siac-is-most-preferred-arbitral-institution-in-asia-and-3rd-in-the-world> (accessed 29 October 2019).

[2] [2016] 5 SLR 536.

[3] [2019] 1 SLR 263.

[4] *Re Matthew Gearing QC* [2019] SGHC 249 at [5]; The SICC is a division of the Singapore High Court, and part of the Supreme Court of Singapore, designed to deal with transnational commercial disputes. The SICC panel of judges comprise the Singapore High Court judges as well as an international panel of judges, with common law and civil law background. See Singapore International Commercial Court, '*Judges*', available at <https://www.sicc.gov.sg/about-the-sicc/judges> (accessed 29 October 2019).

[5] [2019] 2 SLR 131.

[6] [2019] SGHC 142.

[7] *Sanum* at [40]–[41].

[8] See *Sanum* at [150]–[152].

[9] *Lesotho* at [26].

[10] *Lesotho* at [120], [124].

[11] *Lesotho* at [128].

[12] *Lesotho* at [137].

[13] *Lesotho* at [112]–[113]; [138]–[139]; [163].

[14] *Lesotho* at [146], [151], [153]–[156].

[15] Supra note 4.

[16] *Rakna* at [32].

[17] *Rakna* at [11]–[15].

[18] *Rakna* at [27].

[19] *Rakna* at [28].

[20] *Rakna* at [30]–[32].

[21] *Rakna* at [77].

[22] *Rakna* at [75]–[77].

[23] *Rakna* at [84].

[24] [2014] 1 SLR 372 at [68], [125]–[132].

[25] [2019] 4 SLR 413 at [89].

[26] [2019] 4 SLR 390 at [41].

[27] *BNA* at [3].

[28] *Sulamérica Cia Nacional de Seguros SA and others v Enesa Engenharia SA and others* [2013] 1 WLR 102, endorsed in earlier decisions of the Singapore courts in *BCY v BCZ* [2017] 3 SLR 357 and *BMO v BMP* [2017] SGHC 127.

[29] *BNA* at [109].

[30] *BNA* at [104].

[31] *BNA* at [45], [48], [51], [53], [62]

[32] *BNA* at [111].

[33] *BNA* at [119].

[34] Tom Jones, '*No Singapore seat for Chinese dispute, rules appeal court*', Global Arbitration Review 22 October 2019, available at https://globalarbitrationreview.com/article/1209769/no-singapore-seat-for-chinese-dispute-rules-appeal-court?utm_source=10%2f22%2f19-20%3a06%3a56-673 (accessed 29 October 2019) ("**GAR Report**").

[35] GAR Report.

[36] Ministry of Law, '*Consultation Paper – Proposed amendments to the International Arbitration Act ("IAA")*', available at https://app.mlaw.gov.sg/news/public-consultations/public-consultation-on-international-arbitration-act (accessed 29 October 2019).

[37] The Honourable Chief Justice Sundaresh Menon, The Singapore Chamber of Maritime Arbitration '10th Anniversary Keynote Address – *The Race to Relevance*' 4 October 2019, available at https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon–keynote-address-delivered-at-the-singapore-chamber-of-maritime-arbitration-10th-anniversary (accessed 29 October 2019) ("**Keynote Address**").

[38] Keynote Address at [26].

[39] Keynote Address at [18]–[22].

[40] Keynote Address at [22].

[41] Keynote Address at [23].

[42] Appendix A, Ministry of Law, '*Consultation Paper – Proposed amendments to the*

International Arbitration Act ("IAA")', available at https://app.mlaw.gov.sg/news/public-consultations/public-consultation-on-international-arbitration-act (accessed 21 October 2019).