Dispute Resolution Hotline

January 05, 2023

TRIBUNAL'S DISCRETION IN DETERMINING ARBITRAL PROCEDURE: SINGAPORE COURT OF APPEAL REFUSES TO INTERVENE

- When multiple interpretations of the arbitral procedure agreed between the parties are possible, the court will not revisit a tribunal's decision to adopt a particular interpretation. However, a court may intervene if a tribunal incorrectly interprets the agreed arbitral procedure (i.e., in a manner which cannot be a "*possible view*").
- The ground for setting aside an award under Article 34(2)(a)(iv) of the UNCITRAL Model law is not available when the agreed arbitral procedure conflicts with a mandatory provision of the UNCITRAL Model Law.
- An award may not be set aside on the ground that reasonable opportunity to be heard was not provided to a party if: (i) the parties had reasonable notice of the tribunal's chain of reasoning; and (ii) such chain of reasoning had sufficient nexus to the parties' arguments.
- In India, courts usually give deference to interpretations undertaken by arbitral tribunals on the parties' agreement. Further, Indian courts have held that principles of natural justice are met when the tribunal grants an opportunity to the parties to comment on evidence introduced behind such party's back.

SYNOPSIS

In *Lao Holdings NV v. Government of the Lao People's Democratic Republic*[1] ("Lao Holdings"), the Singapore Court of Appeal ("**SCA**") followed the principle of minimal judicial intervention at the enforcement stage and affirmed the decision of the Singapore International Commercial Court ("**SICC**") to not set aside two investment awards. The SCA deferred to the interpretation undertaken by the arbitral tribunals of the agreed arbitral procedure between the parties after finding that such interpretation was a tenable interpretation of such procedure. It also refused to set aside the awards on the ground that principles of natural justice were violated by finding that the parties had been granted an opportunity to respond to chain of reasoning adopted by the tribunal in the arbitration proceedings.

FACTUAL BACKGROUND

Lao Holdings NV, incorporated in the Netherlands, along with its wholly-owned subsidiary Sanum Investments Limited, incorporated in the People's Republic of China ("**Investors**"), undertook the development of hotels, casinos and clubs in the Lao People's Democratic Republic ("**State**"). In late 2011, disputes arose between the parties and the Investors commenced two arbitration proceedings, seated in Singapore, against the State pursuant to two bilateral investment treaties (i.e., the Laos-Netherlands BIT and the Laos-China BIT, collectively "**BITs**") under the ICSID Additional Facility Rules and the UNCITRAL Rules respectively. In these arbitration proceedings, the Investors alleged that officials of the State reneged on their commitments to the Investors and undertook several arbitrary and discriminatory actions, including the imposition of an 80% tax on casino revenues.

However, in 2014, two days before the merits hearing were scheduled in the arbitrations, the parties entered into a 'Settlement Deed' ('**Deed**'), governed by New York law, which was passed by both the arbitral tribunals ("**Tribunals**") as consent orders. The Deed provided that the arbitration proceedings may be reinstated if there is a material breach of the Deed by the State. Section 34 of the Deed also set out that if the arbitrations are reinstated, the Parties would not be permitted to add any new claims or evidence or seek any new reliefs in the arbitration.

In 2017, pursuant to an application by the Investor, the Tribunals reinstated the arbitration proceedings on the ground that the State had materially breached the Deed. In these revived arbitration proceedings, the State applied to introduce additional evidence ("**Application**") to prove the illegal activities undertaken by the Investors. The Investors argued that this Application violated the agreed upon arbitral procedure set out under Section 34 of the Deed wherein the Tribunals do not have discretion to introduce new evidence. On the other hand, the State argued that the Tribunals retained a residual discretion under the BITs to admit such evidence despite Section 34 of the Deed along with a broad and inherent power to consider additional evidence which is relevant and material to their awards. The Tribunals allowed the State to introduce such evidence on the ground that they retained residual discretion to depart from Section 34 of the Deed if compelling circumstances were shown to exist. The Tribunals also allowed the Investors to introduce additional evidence to address and rebut new evidence introduced by the State.

The Tribunals also passed awards ("**Awards**") whereby they dismissed the Investors' claims with costs. In these Awards, the Tribunals set out the standard of proof to prove corruption as "clear and convincing evidence". However, the Tribunals held that even if this standard is not met, the Investors' claim may be dismissed for being in bad faith if corruption is proven through a lower standard of "balance of probabilities". Applying this lower standard of proof, the Tribunals made several findings against the Investors whereby they found that officials of the Investors engaged in

Research Papers

New Age of Franchising
June 20, 2025

Life Sciences 2025
June 11, 2025

The Tour d'Horizon of Data Law Implications of Digital Twins
May 29, 2025

Research Articles

2025 Watchlist: Life Sciences Sector India
April 04, 2025

Re-Evaluating Press Note 3 Of 2020: Should India's Land Borders Still Define Foreign Investment Boundaries?
February 04, 2025

INDIA 2025: The Emerging Powerhouse for Private Equity and M&A Deals
January 15, 2025

Audio

CCI's Deal Value Test
February 22, 2025

Securities Market Regulator's Continued Quest Against "Unfiltered" Financial Advice
December 18, 2024

Digital Lending - Part 1 - What's New with NBFC P2Ps
November 19, 2024

NDA Connect

Connect with us at events, conferences and seminars.

NDA Hotline

Click here to view Hotline archives.

Video

Vyapak Desai speaking on the danger of deepfakes | Legally Speaking with Tarun Nangia | NewsX
April 01, 2025

illegal conduct such as bribery. Accordingly, the Tribunals dismissed the claims in the arbitration.

Subsequently, the Investors applied to the Singapore High Court to set aside the Awards. In July 2020, the set aside proceedings were transferred to the SICC.

JUDGMENT OF THE SINGAPORE INTERNATIONAL COMMERCIAL COURT

The Investors applied to the SICC to set aside the Awards on, *inter alia,* the following grounds under the UNCITRAL Model Law ("**Model Law**") and the Singapore International Arbitration Act ("**IAA**"):

i. The arbitral procedure was not in accordance with the parties' express agreement under Article 34(2)(a)(iv) of the Model Law; and

ii. The Investors were not afforded a reasonable opportunity to be heard under Article 34(2)(a)(ii) of the Model Law and/or Section 24(b) of the IAA.

On the first issue, the SICC held that under Section 42 of the Deed (the dispute resolution procedure), the parties had submitted the question of interpretation of Section 34 of the Deed to the Tribunals. Accordingly, the SICC held that it could not *de novo* review the Tribunals' interpretation of Section 34 of the Deed. Moreover, the SICC held that the Tribunals also had the jurisdiction to decide the construction of Section 34 of the Deed as part of their overall jurisdiction under the BITs.

In addition, the SICC also made certain hypothetical "fall back" findings. It held that even if it had the jurisdiction to review the Tribunals' interpretation of Section 34, it was not persuaded that it should undertake such a review in the present case, considering that the Deed was governed by New York Law. Since findings of a foreign law are treated as findings of fact under Singapore law, the SICC held that the Tribunals' findings on New York law would be final and binding as findings of fact. The SICC went further and held that even if it had to interpret Section 34 of the Deed, it would have found that the Tribunals had the residual power to admit additional evidence in exceptional circumstances. It also held that the Deed did not seek to and could not override the terms of (i) institutional rules and (ii) BITs that grant Tribunals the power to determine their own procedure, including admissibility of evidence. The SICC also held that Tribunals in investor-State arbitrations have the duty to consider evidence which indicates possible corruption even if the Deed would have otherwise precluded the admission of such evidence.

Further, the SICC held that the Investors waived any failure by the Tribunals to comply with agreed arbitral procedure. Lastly, it held that in any case, the Investors had not demonstrated "necessary prejudice" caused by non-compliance with the agreed procedure such that the Awards should be set aside. The SICC observed that even in the absence of additional evidence admitted by the Tribunals, they would not "*reasonably have arrived at a different overall result*".

On the second issue, the SICC held that the Investors had the opportunity to address all claims made by the State, including the issue on the applicable standard of proof. Accordingly, the SICC found that the Tribunals had granted a reasonable opportunity to be heard to the Investors.

JUDGMENT OF THE SINGAPORE COURT OF APPEAL

The Investors appealed the decision of the SICC to the SCA on the following two grounds under Article 34(2)(a)(iv) and 34(2)(a)(ii) Model Law and Section 24(b) of the IAA:

i. The Tribunals could not have admitted additional evidence pursuant to the prohibition under Section 34 of the Deed; and

ii. The Tribunals breached the principles of natural justice by arriving at findings that the Investor was not given an opportunity to address.

Discretion to Determine Arbitral Procedure

At the outset, the SCA noted that while considering an application to set aside an award, the "*court does not re-evaluate the evidence or revisit the merits of the tribunal's application of the agreed procedures*". Relying on *AMZ v. AXX,*[2] the SCA held that in such applications, the court has to:

i. identify the agreed procedure;

ii. determine if the tribunal adhered to such procedure;

iii. if the tribunal did not adhere to the agreed procedure, determine if the tribunal's decision would have been reasonably different if it had compiled with the agreed procedure; and

iv. determine if the party seeking to set aside the award had raised an objection on this ground during the arbitration proceedings.

The SCA held that when multiple interpretations of the arbitral procedure are possible, the court will not revisit a tribunal's decision to adopt a particular interpretation. However, it held that a court may intervene if a tribunal incorrectly interprets the agreed arbitral procedure, i.e., in a manner which cannot be a "*possible view*". The SCA further noted that the ground for setting aside an award under Article 34(2)(a)(iv) of the Model law is not available when the agreed procedure conflicts with a mandatory provision of the Model Law (a provision which parties cannot derogate from), such as Article 18 which mandates procedural fairness in the arbitration proceedings.

The SCA found that, in the present case, the Tribunals had interpreted Section 34 of the Deed while reaching a finding that they have residual power to allow introduction of new evidence. It held that the Tribunals' interpretation of Section 34 of the Deed was a tenable interpretation considering the context in which Section 34 of the Deed was agreed to as well as the applicable arbitral rules which granted power to the Tribunals to determine the arbitral procedure. Accordingly, it held that the SICC or the SCA cannot then revisit the content of the interpretation taken by the Tribunals. In *obiter dicta*, the SCA opined that it agreed with the interpretation undertaken by the Tribunals in the present case.

Compliance with Principles of Natural Justice

Vaibhav Parikh, Partner, Nishith Desai Associate on Tech, M&A, and Ease of Doing Business
March 19, 2025

SIAC 2025 Rules: Key changes & Implications
February 18, 2025

The Investors challenged the Awards on the ground that the Tribunals reached a finding that the Investors' claims could be dismissed for being in "bad faith" if corruption could be proven on a lower standard of proof without giving the Investors a chance to address this issue. The SCA dismissed this challenge.

Relying on *BZW and another v BZW*,[3] the SCA held that a fair hearing is provided in accordance with principles of natural justice when the parties have reasonable notice of the Tribunal's chain of reasoning and such chain of reasoning has sufficient nexus to the parties' arguments. Accordingly, in the present case, it held that the Investors had reasonable notice of the Tribunals' reasoning while setting out such a standard, and such reasoning had sufficient nexus to the defense set out by the State. Therefore, the Tribunal held that the Investors had been accorded an opportunity to be heard and the Awards cannot be set aside on this ground.

NDA OPINION

The *Lao Holdings* decision adopts a pro-arbitration approach by giving deference to decisions of arbitral tribunals on the agreed arbitral procedure, and minimizing judicial interference in arbitration proceedings. This case is also fundamental in highlighting that principle of the party autonomy is not absolute in international arbitration. The SICC's decision - albeit in the alternative - propounds reasonable restrictions to the principle of party autonomy such as the tribunal's duty to consider evidence of corruption.

Similarly, Indian courts have also generally given deference to a tribunal's interpretation of the parties' agreements,[4] even though they have not directly dealt with a similar factual pattern as *Lao Holdings*.[5] Under Section 19 of the Indian Arbitration and Conciliation Act, 1996 ("**Arbitration Act**"), arbitral tribunals have the power to determine arbitral procedure in the absence of any express agreement by the parties. Indian courts have held that courts should review a tribunal's interpretation of the parties' agreement only when the tribunal's reasoning is "*totally perverse*" or "*patently illegal*".[6] In *Delhi Airport Metro Express (P) Ltd. v. DMRC*,[7] like the SICC and SCA in *Lao Holdings*,[8] the Indian Supreme Court ("**SC**") has held that courts must follow a policy of minimal judicial interference which is embedded under Section 5 of the Arbitration Act. The SC in *Antrix Corpn. Ltd. v. Devas Multimedia Pvt. Ltd.*[9] relied upon its earlier decision in *Sudarshan Trading Co. v. Govt. of Kerala*,[10] to hold:

> "*once there is no dispute as to the contract, the interpretation thereof is for the arbitrator and not the courts, and the court cannot substitute its own decision for that taken by the learned arbitrator.*"[11]

Further, Indian courts have held that an award may not be set aside on the principles of natural justice if reasonable opportunity to be heard/ present its case has been granted to a party.[12] In *Ssangyong Engineering and Construction Company Limited v. NHAI*,[13] the SC held that as long as a party to the arbitration proceeding has had the opportunity to comment on materials taken into account by the tribunal behind its back, such party would be said to have been able to present its case.[14]

These decisions reflect the approach taken by Singaporean and Indian courts to limit the grounds under which awards may be challenged and set aside. Unlike the Singaporean courts, Indian courts have not yet held that arbitral tribunals have a duty to consider evidence of corruption even if there exists an agreement to the contrary between the parties. Even in Singapore, it remains to be seen what this duty to consider evidence of corruption entails and whether awards may be set aside if tribunals fail to consider such evidence. Moreover, since the SICC's finding was made in the context of tribunals deciding upon investment arbitration disputes, it remains to be seen whether courts will impose a similar duty to consider evidence of corruption (despite an agreement by the parties to the contrary) upon tribunals in international commercial arbitrations.

– Ansh Desai, Ritika Bansal & Ashish Kabra

(The authors would like to acknowledge and thank Shruti Dhonde (student, Maharashtra National Law University) for her contribution to this hotline.)

You can direct your queries or comments to the authors

---

[1] [2022] SGCA(I) 9.

[2] [2016] 1 SLR 549, ¶102.

[3] [2022] 1 SLR 1080, ¶60(b).

[4] *Antrix Corpn. Ltd. v. Devas Multimedia Pvt. Ltd.*, (2014) 11 SCC 560; *M.P. Housing Board v. Progressive Writers & Publishers*, (2009) 5 SCC 678; *Akbarally's v. Indian Oil Corporation*, (2016) 1 Arb LR 41.

[5] [2022] SGCA(I) 9.

[6] *M.P. Housing Board v. Progressive Writers & Publishers*, (2009) 5 SCC 678, ¶30.

[7] (2022) 1 SCC 131, ¶28.

[8] [2022] SGCA(I) 9, ¶¶69, 60.

[9] (2014) 11 SCC 560.

[10] (1989) 2 SCC 38, ¶¶ 30, 31, 35, 36.

[11] *Antrix Corpn. Ltd. v. Devas Multimedia Pvt. Ltd.*, (2014) 11 SCC 560, ¶22.

[12] Arbitration and Conciliation Act, 1996, Sec. 34(2)(iii).

[13] (2019) 15 SCC 131.

[14] *Ssangyong Engineering and Construction Company Limited v. NHAI*, (2019) 15 SCC 131, ¶52.
