Kluwer Arbitration Blog

Singapore Court Reviews Investment Arbitral Tribunal's Decision On Jurisdiction: What Standard Should Apply As to Evidence?

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In what marks the first time where a Singapore court reviews an investment arbitral tribunal's jurisdiction, the High Court held in *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 that, contrary to the tribunal's findings, the Agreement between the Government of the Lao People's Democratic Republic ("Laos") and the Government of the People's Republic of China ("PRC") Concerning the Encouragement and Reciprocal Protection of Investment dated 31 January 1993 (the "Treaty") did not apply to the Macau Special Administrative Region of China ("Macau"), where Sanum Investments Limited ("Defendant") is incorporated.

The arbitral tribunal was comprised of Professor Bernard Hanotiau, Dr. Andrés Rigo Sureda (President) and Professor Brigitte Stern (the "Tribunal"). Singapore was designated as the seat of the arbitration. In its award on jurisdiction dated 13 December 2013, the Tribunal found that the Treaty did apply to Macau.

The Plaintiff commenced proceedings to refer the issue of jurisdiction to the Singapore High Court under s. 10 of the IAA on 10 January 2014. Subsequently, the Plaintiff sought to introduce two diplomatic letters (the "Two Letters") – one dated 7 January 2014 sent from the Laotian Ministry of Foreign Affairs to the PRC Embassy in Laos and the other dated 9 January 2014 sent as a reply from the PRC Embassy in Laos. Importantly, the Two Letters were not before the Tribunal and were produced for the first time in the court proceedings.

For the purposes of this post, the authors will only focus on an issue arising from the High Court's admission of the Two Letters, namely, the ruling on evidence in a s. 10 of the IAA *de novo* review and the adequate standard of deference to be provided to an arbitral tribunal.

First, the High Court Judge does not clarify whether a full review applies when dealing with facts. It is uncontested that Article 16(3) of the Model Law affords parties the right to request a national court to review an arbitral decision on jurisdiction. Generally, it has been held that in such a case a court's jurisdiction is *de novo*, but it is unclear whether this would allow the court to conduct a full rehearing in law as well as in fact, without any deference being paid to the tribunal. In *PT Tugu Pratama Indonesia v Magma Nusantara Ltd* [2003] 4 SLR(R) 257, the Singapore courts have held

that parties are allowed to bring forward new legal arguments and thus, at least with regard to questions of law, it is clear that a full review applies. Unfortunately, the High Court in the present case did not make its position clear as to the approach to be adopted when dealing with facts. On the one hand, by admitting the new evidence, the Judge seemed to have adopted a *de novo* review standard; on the other hand however, the reasoning through which he arrived at this conclusion raises serious doubts as to the firmness of his solution.

This leads to the second point in respect to the appropriate factors the courts are to consider when ruling on evidence. In the present case, the Defendant maintained that the *Ladd v Marshall* [1954] EWCA Civ 1 test was applicable in respect to the admission of the Two Letters and, further, that the Plaintiff did not satisfy this test. The test sets out a three-pronged approach:

• *first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;*
• *second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;*
• *thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.*

The Judge initially noted that the test did not (strictly) apply in the present case. He noted that, when reviewing a jurisdictional decision of an arbitral tribunal pursuant to s.10 of the IAA, it does not exercise an appellate function and therefore escapes the obligation imposed by s.37(4) of the Supreme Court of Judicature Act to apply the *Ladd v Marshall* test.

However, subsequently the Judge re-introduced the Ladd v Marshall conditions (albeit relaxing the first condition) after applying the Court of Appeal's decision in *Lassiter Ann Masters v To Keng Lam* ([2004] 2 SLR(R) 392, ("*Lassiter*"). The first limb of the test now provided that:

• *the party seeking to admit the evidence demonstrates sufficiently strong reasons why the evidence was not adduced at the arbitration hearing.*

The analogy with *Lassiter* is, however, flawed as this case concerned an appeal from a registrar's assessment of damages to a judge in chambers and the Court of Appeal's reasoning in that case was based on the fact that the function of the registrar was one of administrative convenience, *"to save the time of the judge"* (Lassiter, para. 20). This reason is however not applicable to a court's review of an investment arbitral tribunal's decision on jurisdiction and, thus, the test is not transposable to a case like the present. Indeed, the Judge does not provide any reasons as to why the test should be applied and why its first limb should be relaxed in this case.

The Judge's approach stands in stark contrast with the *de novo* jurisdiction that the court possesses when reviewing jurisdictional findings of arbitral tribunals. The sole raison d'être of the test in *Ladd v Marshall* is to allow fresh evidence to be adduced in a case on which judgment has already been delivered. It is thus directly linked to the appellate process. By applying the test, even in a relaxed version, to a review of an arbitral tribunal's decision on jurisdiction, the High Court seems to indicate that it exercises an appellate function and does not carry out a complete rehearing.

If the *Ladd v Marshall* test is undesirable as a standard of review – which for the reasons set out above it probably is – this begs the question what the appropriate standard for admitting new evidence under a s.10 *de novo* review should be. Clearly there must be some principles or factors which guide the judge in exercising its broad discretion.

Central Trading & Exports Ltd v Fioralba Shipping Co [2014] EWHC 2397 (Comm) is a case under s. 67 of the UK Arbitration Act 1996 which permits a party to challenge an arbitral tribunal's decision on jurisdiction. Based on previous case law, Males J reasoned that the court exercises its full discretion with the overall objective of establishing fairness between the parties. To this end, the national court's rules of procedure on evidence and the parties' failure to comply with the tribunal's procedural orders (if applicable) should be taken into account.

In our opinion, the above approach is correct in principle. Applying his reasoning to our present context, the following factors could be considered when ruling on evidence with respect to a jurisdictional challenge of an investment treaty award:

• the procedural rules on evidence of the court in the seat jurisdiction;
• the parties' choice as to the applicable evidentiary rules in the arbitration proceedings;
• the conduct of the parties during the arbitral proceedings; and
• whether the admission or refusal of evidence would result in a party being treated unfairly.

Finally, it should be noted that the discretion of the court functions as a safeguard against any potential dilatory or abusive tactics and thus, should a party intentionally withhold evidence during the arbitral proceedings for strategic purposes and that party subsequently lodge an application for review before a court, it is hoped that the court would sanction the party for knowingly withholding evidence by making an order for costs.

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