Kluwer Arbitration Blog

Singapore Court of Appeal: Sanum Investments Limited v The Government of the Lao People's Democratic Republic

Jordan Tan (Clifford Chance Asia) · Monday, April 25th, 2016

On 4 April 2016, the Singapore Court of Appeal heard an appeal from Sanum Investments Limited ("**Sanum**") (a Macanese company) against the High Court's decision holding that an arbitral tribunal hearing Sanum's claim against Laos for expropriation under the China-Laos bilateral investment treaty (the "**BIT**") had no jurisdiction. The issue of the tribunal's jurisdiction turns on (1) whether the BIT covers Macau (the "**First Question**") and (2) whether Sanum's claim which involves a dispute over whether there is expropriation falls within the scope of Article 8 of the BIT which refers to a "*dispute involving the amount of compensation for expropriation*" being referred to arbitration (the "**Second Question**").

The tribunal answered both questions in the affirmative and found that it had jurisdiction, while the High Court took the opposite position. In addition, as regards the First Question, the High Court permitted Laos to admit further evidence not adduced before the tribunal, namely, two diplomatic notes (the "**Notes**") exchanged between Laos and China after the award had been rendered demonstrating that China's position was that the BIT did not cover Macau. The High Court took the view that the Notes constituted a subsequent agreement to interpret the BIT and was material which supported a finding that the BIT did not cover Macau. Sanum appealed.

This case has wide-ranging ramifications and will serve as persuasive authority to future tribunals/courts considering similar issues in four respects.

First, what deference should a domestic court give to an arbitral tribunal on questions of international law?

Second, *procedurally and evidentially*, what standard of review does a domestic court apply as regards a tribunal's decision under section 10 of Singapore's International Arbitration Act ("**IAA**"), what is the standard of proof as regards treaty matters, and what are the guiding principles on admissibility of evidence including further evidence produced after an award had been rendered?

Third, what constitutes a subsequent agreement to interpret a treaty within the meaning of Article 31 of the Vienna Convention on the Law of Treaties ("**VCLT**") thus serving as an aid to interpretation?

Fourth, is the arbitration route under Article 8 (reflected in many "first generation" Chinese BITs)

reserved only for disputes relating to the *amount of compensation* for expropriation?

This post seeks to highlight various possible answers to the above questions. It should be noted that the Court's final decision and reasoning will only be known when it delivers its written judgment.

The Coram and the Amici Curiae

The importance of this case is reflected in the fact that the Chief Justice designated five judges (instead of the usual three) to hear the appeal: Sundaresh Menon CJ and Quentin Loh J were eminent arbitration practitioners; Chao Hick Tin JA is a former Attorney-General who represented Singapore before the International Court of Justice in the Pedra Branca dispute. Andrew Phang Boon Leong JA was an eminent academic and is an experienced appellate judge; Prakash J has delivered many decisions on arbitration which have become *locus classicus*.

The Chief Justice also appointed (for the very first time) *two amici curiae*: Professor Locknie Hsu is a full professor at the Singapore Management University and an expert in trade law; Mr Christopher Thomas QC is a Senior Principal Research Fellow at the National University of Singapore's Centre for International Law and is an eminent arbitrator.

Issue One: Should domestic courts give deference to international arbitrators?

Sanum argued that domestic courts should show deference to tribunals comprised of eminent arbitrators, especially where Singapore had not been chosen as the seat by the parties but so designated by the tribunal. Although no reference was made to Mr Todd Weiler's and Mr Tai-Heng Cheng's critique of the High Court decision in the Global Arbitration Review, this submission to some extent echoed that critique. The Court noted in queries that (1) an application was being made under s 10 of the IAA and the Court had to perform its duty pursuant to that legislation; (2) the history underpinning s 10 of the IAA and Article 16 of the UNCITRAL Model Law suggested that the Court was to act as a control as supervisory court; and (3) nonetheless if the tribunal's *reasoning* is persuasive, the force of the reasoning might persuade the Court to agree with the tribunal.

The author would add that in the present case, the eminence of the judges and the assistance of *amici curiae* may have to be weighed against such a critique.

Issue Two: What is the appropriate procedural/evidential position at the appellate hearing?

Three evidential/procedural concepts were discussed in the round at the hearing which the author suggests might be helpful to consider separately.

First, *standard of proof* relates to the extent to which a party advancing a position must prove it. As regards matters under an international treaty, Mr Thomas QC observed that while tribunals do not usually explicitly espouse the standard, to the extent that they do, they espouse the "*balance of probabilities*" standard.

Second, *standard of review* refers to the extent to which a Court may review the tribunal's decision (whether *afresh* or more limitedly). Professor Hsu explained that although s 10 of the IAA refers to an "*appeal*" which traditionally suggests a more limited standard, the history of that provision demonstrated that the standard was in fact *de novo*. There might not be a need to make a threshold finding that there was an error of law or fact for Court intervention.

Third, *admissibility* of evidence refers to the material which may be put before the Court. Mr Thomas QC explained that generally tribunals admit most evidence but distinguish evidence of questionable provenance by ascribing them lesser weight. As for admissibility of *further* evidence after an award had been rendered, it was posited that although there may be no strict rule, the principles for admission of further evidence for an appeal (which require a party to explain why such further evidence could not have been adduced earlier and to show the evidence is credible) may be guiding principles. Further, the "critical date" doctrine may "*overlay*" such principles to make it more difficult to admit further evidence after an award had been rendered.

Issue Three: Do the Notes constitute a subsequent agreement to interpret?

Sanum argued that given that China had reasserted sovereignty over Macau, Article 29 of the VCLT made it clear that "*unless a different intention…is otherwise established, a treaty is binding upon each party in respect of its* ***entire territory***" (emphasis added) and that Laos had failed to otherwise displace this "*default position*" or "*presumption*". Sanum argued that the Notes did not constitute a subsequent agreement to interpret within the meaning of Article 31 of the VCLT so as to support Laos' position. Mr Thomas QC observed that the purported subsequent agreement went towards the *scope* of the BIT in contrast to a classic case in which the subsequent agreement would go towards the interpretation of a term in the treaty.

Laos submitted that the Notes were a subsequent agreement to interpret the term "*Contracting Parties*" in the BIT. The Court queried the fact that in the authority referred to by Laos, the court was grappling with the interpretation of an actual term on the issue of geographical scope of the treaty. Laos further argued that even if the Notes did not fall within Article 31 of the VCLT, it would go towards what is "*otherwise established*" under Article 29.

It was noted in Mr Thomas QC's concluding remarks that Article 29 should not be read independently of Article 31.

Issue Four: Does the dispute fall within Article 8?

As regards the Second Question, Sanum argued that its claim which required a consideration of whether there is expropriation fell within Article 8 despite it only referring to a "*dispute involving the amount of compensation for expropriation*" being referred to arbitration because Article 4 defined as legitimate, expropriation which, amongst other things is given "*appropriate and effective compensation*", making both issues of expropriation and compensation "*inseparable*".

Laos argued that an interpretation to give effect to the qualifying terms "*involving the amount of compensation*" is to be preferred and that Article 8 would cover situations such as where the *fact* of expropriation is undeniable and the sole dispute is over compensation.

This author would highlight another possible answer, bearing in mind the *structure* of Article 8. Article 8 exhorts parties to settle the dispute, and that if it is not settled to either litigate the dispute in a domestic court or "*if a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months*" (emphasis added) to refer the dispute to arbitration. It may be said that the arbitration route is reserved for situations where the parties can settle part of the dispute insofar as they agree that there has been expropriation but where the only outstanding dispute which cannot be settled is the amount of compensation.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Monday, April 25th, 2016 at 12:10 pm and is filed under Evidence, Expropriation, Investment Arbitration, Singapore, Singapore Court of Appeal, VCLT
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.