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A Tale Of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings

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As Professor Luke Nottage and Dr. Jarrod Hepburn have observed in a forthcoming case note,[1)] the most recent ruling in the long-running case of *Philip Morris Asia v Australia* has highlighted the consequences of agreeing to arbitrate in jurisdictions which do not permit appeals in respect of negative jurisdictional rulings.

The case – an investor-state dispute settlement (ISDS) claim against Australia by Philip Morris Asia (PMA) over Australia's prescriptive tobacco packaging law (the Arbitration) – did not get past the jurisdictional phase. PMA, having successfully contended that the seat of the arbitration should be Singapore (a jurisdiction which at the relevant time did not permit judicial review of negative jurisdictional rulings), now finds itself without recourse in the local courts, an outcome which will be most welcome to the Australian government. Had PMA acceded to Australia's preference for a London seat, the case may well have had another chapter.

While Singapore has since revised its International Arbitration Act to expressly permit judicial review of negative jurisdictional rulings, it is notable that Hong Kong has taken the opposite approach; Section 34 of its Arbitration Ordinance expressly provides that negative jurisdictional rulings "are not subject to appeal"

For a respondent State, the finality of Hong Kong's position is clearly preferable to the possibility of extended domestic litigation. Conversely, for investors, the possibility of additional recourse in Singapore or London may be more appealing.

PMA's jurisdictional issue

An early issue in the Arbitration concerned the place of the arbitration. PMA proposed Singapore on the basis of the circumstances of the case, in particular (and amongst others) the suitability of Singapore's law on arbitration, its judiciary's supportive attitude, and its geographical and logistical convenience. (Procedural Order No. 3 dated 26 October 2012 (PO No. 3), paras 14-25) Australia proposed London, highlighting English courts' familiarity with investment arbitration and potential cost savings resulting from the fact that certain of its counsel were based in London. (PO No. 3, paras 26-32)

The Tribunal determined that Singapore would be the place of the arbitration on the basis that it

was a "more natural and logical" choice for a dispute between two parties in Asia and Australia, as well as for reasons of convenience, and the PCA's Host Country Agreement with Singapore (the PCA being the appointing authority in the case). (PO No. 3, paras 33-41)

In December 2015 (following a series of delays and disagreements over issues such as constitution of the tribunal, bifurcation, and a change of counsel for PMA) the Tribunal issued its Award on Jurisdiction and Admissibility, in which it dismissed PMA's claims on jurisdictional grounds. The Tribunal found that PMA restructured its business in 2011 primarily (if not solely) to gain protection under the Hong Kong-Australia BIT in relation to the packaging measures which the dispute concerned (PMA having actually foreseen the dispute). Accordingly PMA's commencement of the Arbitration was found to have constituted an abuse of right (or abuse of process); its claims were inadmissible and the Tribunal was precluded from exercising jurisdiction over the dispute.

Subject to the Tribunal's further award on costs, this essentially marks the end of the long-running case. However, had the Tribunal decided in 2012 that London would be the place of arbitration, the parties may well have found themselves in a very different position (one which PMA could also have avoided by conceding to Australia's preferred seat in 2012).

Under Singapore law – as it applied to the Arbitration – PMA could only challenge decisions of the Tribunal *upholding* jurisdiction; it had no ability to challenge *negative* rulings on jurisdiction before the Singapore courts.[2)] Had the place of the arbitration been London, however, PMA could have challenged the Tribunal's negative decision on jurisdiction under Section 30(2) of the English Arbitration Act 1996.

Appealing negative jurisdictional rulings

The UNCITRAL Model Law provides that a tribunal is able to rule on its own jurisdiction, including on objections to such jurisdiction, as either a preliminary question or in an award on the merits (the principle of "*kompetenz-kompetenz*", Article 16(3) of the Model Law).

Where a tribunal finds that it does have jurisdiction, any party may request that a relevant court review the decision. (Article 16(3) of the Model Law) An award may be set aside if the court finds that the arbitration agreement was invalid (Article 34(2)(a)(i)), or if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of submission. (Article 34(2)(a)(iii))

However, Article 5 of the Model Law provides that courts may only intervene in matters to the extent provided by the Model Law. Read with Article 16(3) – which permits court review of positive jurisdictional rulings only – parties appear to have no right of appeal to the courts where a tribunal finds that it *does not* have jurisdiction over a dispute. This position has been affirmed by the courts in at least three Model Law countries: Germany, Croatia and Singapore. Moreover, a negative ruling on jurisdiction is generally not considered an "award" for the purposes of Article 34, as it is not a decision on the substance of the dispute. Rather, as the Singapore Court of Appeal explained, "it is a decision not to determine the substance of the dispute". [3)] Thus negative jurisdictional rulings cannot be treated as reviewable for the purposes of arbitration laws which more generally provide recourse against or enforcement of awards.

The position under the Model Law, and jurisdictions which have adopted the relevant provisions

without amendment, is therefore that parties to an arbitration seated in those jurisdictions have no right to appeal a negative jurisdictional ruling.

Rationale

In an early draft of the Model Law, Article 16(3) did provide for judicial review of negative jurisdictional rulings. However, this provision was removed from the final version on the basis of a consensus that it would be inappropriate to compel arbitrators who had made a negative jurisdictional ruling to continue the proceedings.[4)]

However, a number of jurisdictions have departed from the Model Law's approach. The main argument for *permitting* court review of negative jurisdictional rulings is that to deny such review fundamentally subverts the purpose of an arbitration agreement. Parties who have selected arbitration in a neutral territory to resolve disputes are instead forced to do so via local litigation instead (ordinarily in the home state of one of the parties – a situation which the parties presumably intended to avoid). Moreover this situation would have been forced upon the parties by the laws of the seat of the arbitration, which often has no connection with the dispute yet is in this way denying the claimant access to the agreed from of justice.

In support of proposed amendments to Singapore's International Arbitration Act, the Singapore Academy of Law also stressed that as a general matter of principle, parties should be equally able to challenge positive and negative rulings on the basis that inequity is just as likely to arise from an erroneous negative jurisdictional ruling as from an erroneous positive jurisdictional ruling. Its report considered that to permit review of positive jurisdictional rulings but not negative is both "unfair and inconsistent".[5)]

International approaches

The approach taken to negative jurisdictional rulings varies across countries that have implemented the Model Law, in whole or in part.

At one end of the spectrum, **England & Wales** specifically allows set-aside challenges to both positive and negative findings by tribunals on jurisdiction under section 30 of the Arbitration Act 1996.

Similarly, the Court of Appeal in **France** has held that the courts' ability to review jurisdictional rulings should not be limited to positive jurisdictional rulings, and equal treatment should be extended to parties aggrieved by negative jurisdictional rulings.[6)]

By contrast to these permissive jurisdictions, the **Hong Kong** Arbitration Ordinance expressly provides that negative rulings on jurisdiction will not be subject to judicial review. Further, Section 34 of the Arbitration Ordinance provides that where a tribunal in Hong Kong finds it has no jurisdiction, the Hong Kong courts must decide the dispute if they have jurisdiction. This is, of course, dependant on there being a sufficient jurisdictional link in order for the courts to do so, thus an international claimant in Hong Kong may find itself entirely without recourse in that jurisdiction.

Prior to 1 June 2012, the position in **Singapore** was consistent with the Model Law (unsurprisingly, Singapore having adopted most of its provisions without modification). However,

following a consultation in 2011 which strongly supported amending the law on negative jurisdictional rulings, the International Arbitration (Amendment) Bill was passed on 9 April 2012, and conferred upon Singapore courts the power to review negative rulings on jurisdiction as of 1 June 2012.

Claims under ICSID Rules

Jurisdictional approaches to this issue are less relevant where ISDS claims are conducted under the ICSID as opposed to the UNCITRAL Rules. Under the ICSID Convention, awards rendered by ICSID tribunals are not subject to judicial review by domestic courts. Article 26 of the ICSID Convention clearly provides that consent to the jurisdiction of ICSID shall (unless otherwise stated) be deemed to be "to the exclusion of any other remedy".[7)]

Accordingly there is no possibility for judicial review of jurisdictional decisions – any challenge to a tribunal's jurisdictional must be made under Article 52 of the ICSID Convention (note, however, that the grounds for challenge differ to those under Article 34 of the Model Law).

Conclusion

As the PMA case demonstrates, when choosing the place of the arbitration, the power of the local courts to review negative jurisdictional rulings may be an important factor to take in to account, and a particularly important factor in investor-State cases where challenges to jurisdiction are relatively common.

Singapore and Hong Kong are both arbitration-friendly, neutral venues, such that decisions between the two may ultimately come down to cultural or culinary preferences. However, State respondents – or investors – facing an ISDS claim may wish to carefully consider the approach of each to appeals against negative jurisdictional rulings.

As jurisdictions continue to revise and clarify their positions on this topic, it is clear that this consideration should be in the minds of counsel advising clients on either side of an ISDS claim.[8)]

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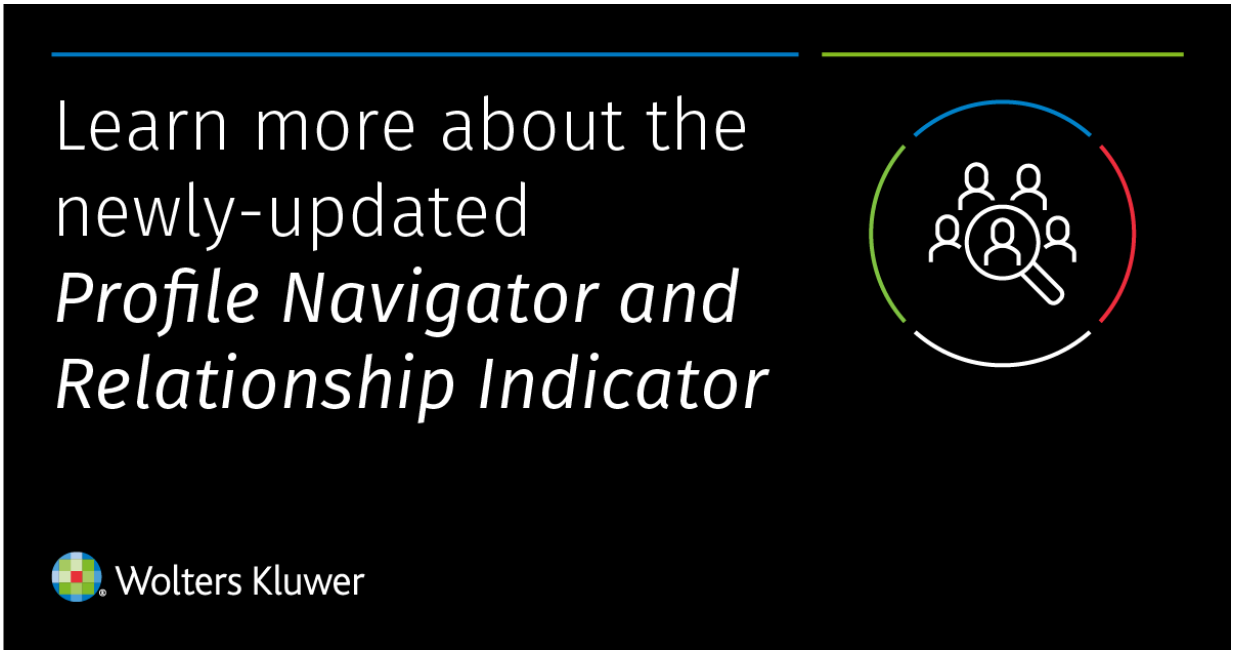

References

?1 Hepburn, J., Nottage, L. (2016), Case Note: Philip Morris Asia v Australia (Forthcoming), Journal of World Investment and Trade

?2 Singapore's International Arbitration (Amendment) Act 2012 amended its International Arbitration Act on 1 June 2012 such that parties are now able to challenge both positive *and* negative decisions on jurisdiction by tribunals (under section 10(3) of the Act). However, these amendments were not retrospective, and thus did not apply to the Arbitration (which PMA commenced before 1 June 2012).

?3 See *PT Asuransi Jasa Idonesia (Persero) v Dexia Bank SA* (2007) 1 SLR 597. A report by the Singapore Academy of Law dated 12 April 2011 confirmed this position, citing Lord Hope's statement in *Premium Nafta Products Limited and others v Fili Shipping Company Limited and others* (2007) UKHL 40 that "if there was no contract to go to arbitration at all an arbitrator's award can have no validity".

?4 See Report of UNCITRAL 18th Session (Vienna, June 198, A/40/17) at para 163.

?5 See the Singapore Academy of Law's Law Reform Committee's Report on the Right to Judicial Review of Negative Jurisdictional Rulings (January 2011).

?6 See *Swiss Oil Corp (Cayman Islands) v Société Petrograb and Republic of. Gabon*, Court of Appeal, Paris, 16 June 1988, XVI (1991) YB Comm. Arb 133

?7 Note that this may not the position where a dispute is determined pursuant to the ICSID Additional Facility.

?8 While the considerations could also be relevant to commercial claims, in that context jurisdictional challenges likely to engage such laws are much more rare.

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