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The Need to Secure Trust and Accountability in Arbitration: DJO v DJP or the 'Copy and Paste' Case

Aaron Tan Kai Ran (HFW Singapore LLP) and Ryan Baptista · Friday, December 6th, 2024

The judgment of the Singapore International Commercial Court (the "Court") in *DJO v DJP and others* [2024] SGHC(I) 24 ("*DJO*") provides helpful guidance on when an award may be set aside for breach of natural justice. While setting-aside applications do not generally succeed given the well-established principle of minimal curial intervention, the Court undoubtedly reached the right decision in setting aside the award in this case.

Facts

In 2015, DJO was negotiating various contracts for the operation of a network of railway lines in India. DJP, DJQ, and DJR, who were the respondents in the setting-aside application (the "Respondents"), tendered for one of the contracts. On 18 August 2015, the parties entered into a contract (the "Contract") which contained an arbitration clause that provided for disputes to be resolved by arbitration seated in Singapore, commenced under the rules of arbitration of the International Chamber of Commerce ("ICC").

In 2020, the Respondents sought an adjustment of the Contract on account of additional labour costs arising from the Indian Ministry of Labour's increase in minimum wages. DJO rejected the claim for adjustment. Following unfruitful attempts at amicable settlement, DJO commenced an ICC arbitration seated in Singapore on 16 December 2021 (the "Singapore Arbitration").

Concurrently, there were two parallel arbitrations seated in India which arose out of two separate contracts that were in largely similar terms. The first parallel arbitration was commenced by a consortium of two Indian companies against DJO on 18 May 2021, whilst the second parallel arbitration was commenced on 14 October 2021 by a separate consortium of two Indian companies against DJO (collectively, the "Indian Arbitrations"). Across all three arbitrations, similar factual and legal issues arose. Additionally, Judge C was nominated as the presiding arbitrator by the co-arbitrators in the Singapore Arbitration, notwithstanding the fact that he was also appointed as the presiding arbitrator in the Indian Arbitrations.

Following the conclusion of the Singapore Arbitration, it was revealed that the Singapore Arbitration tribunal copied a substantial number of paragraphs from the awards in the Indian Arbitrations (the "Indian Awards") in the process of drafting the award issued in the Singapore

Arbitration (the "Singapore Award"). Subsequently, DJO applied to set aside the Singapore Award on the basis of, among others, a breach of natural justice.

The Court Held That the Singapore Award Should Be Set Aside

The Court held that the underlying issue was whether the tribunal applied its mind to the issues in an independent and impartial manner. In this regard, the Court found that the facts disclosed two separate grounds for finding a breach of natural justice.

The first ground was that the facts disclosed apparent bias on the part of Judge C. In determining whether there was apparent bias, the Court observed that it would assume the mantle of a "fair-minded, informed and reasonable observer" and ask itself whether such person would suspect that the arbitrator approached the matter with a closed mind. On the facts, the hypothetical fair-minded, informed and reasonable observer would "undoubtedly have held such suspicions". Crucially, the Singapore Award "attributed submissions made in the [Indian Arbitrations] – repeated almost verbatim – to counsel in the [Singapore] Arbitration". Hence, the Court found that the assertion of apparent bias against Judge C was well-founded.

The second ground was that DJO was deprived of its right to a fair hearing, which included a right to a fair, independent, and impartial decision. In particular, the Court found that the Singapore Award was "not the independent work of the Tribunal based solely on the material and submissions before them in the Arbitration", and that, in the process of drafting the Singapore Award, the Singapore Arbitration tribunal: (a) drew heavily on facts and arguments in the Indian Arbitrations; (b) did not clearly distinguish between those facts and arguments and those presented in the instant case; and (c) failed to give the parties an opportunity to address the tribunal on the Indian Awards. This deprived the parties of their right to a fair, independent and impartial award.

Commentary

In setting aside the Singapore Award, the Court demonstrated its commitment to safeguarding the legitimacy of international arbitration and highlighted the importance of the role of supervisory courts in upholding standards of natural justice. The Singapore courts have consistently shown that they will not hesitate to set aside awards that are proven to fall below the requisite standards of natural justice. This coincides with growing recognition amongst the arbitration community of the need to enforce minimum standards of conduct. As Chief Justice Sundaresh Menon of the Supreme Court of Singapore noted in his extrajudicial speech at the SIAC Annual India Conference 2024:

> "trust can no longer be taken for granted as an *inherent* feature of arbitration; […] there is a pressing need for all stakeholders in the arbitration community to collectively and proactively act in the endeavour to secure trust in arbitration" [emphasis in original].

That said, Chief Justice Menon's observations raise a discomforting question: are existing safeguards sufficient to dissuade lapses in professional conduct on the part of arbitrators?

Enforcing ethical standards in arbitration requires striking a balance between accountability and confidentiality. The *DJO* decision suggests that this balance may not be sufficiently well-struck. In *DJO*, the name of the errant arbitrator remains shrouded behind the veil of anonymity. At first blush, this might appear sensible, given the importance of confidentiality in arbitration. Yet, confidentiality is a feature of arbitration that exists primarily for the benefit of the *parties* to the dispute. This is clear from sections 22 and 23 of the Singapore International Arbitration Act. As the Singapore Court of Appeal explained in *The Republic of India v Deutsche Telekom AG* [2023] SGCA(I) 4, these provisions establish the default rule that arbitration-related court proceedings are to be heard in private, and that information relating to the proceedings may not be published unless: (a) all *parties* to the proceedings so agree; or (b) the court is satisfied that the information published would not reveal any matter which any *party* "reasonably wishes to remain confidential" or "reasonably wishes to conceal". Therefore, unless the *parties* involved have reasonable objections to disclosure, it is not obvious why the identity of *arbitrators* should also as a rule be protected by confidentiality.

That confidentiality does not generally protect the anonymity of arbitrators seems to be recognised under English law. In *Halliburton Company v Chubb Bermuda Insurance Ltd* [2021] AC 1083, the UK Supreme Court emphasised that the obligations of confidentiality are "designed to protect the privacy of the parties to the arbitration and the evidence led in arbitral hearings". Given the importance of the principle of open justice, the court doubted whether there was "any basis in the public interest for preserving the anonymity of the arbitrators themselves" in a challenge against the award. The court accordingly held that "the protection of [the arbitrator's] reputation is not a sufficient ground for anonymity", and published the arbitrator's name in a decision involving an allegation of apparent bias on the part of the arbitrator.

This is consistent with the general approach taken to publishing judgments in arbitration-related court proceedings under English law, which aims to strike a balance between open justice and confidentiality. In *Manchester City Football Club Ltd v The Football Association Premier League Ltd and others* [2021] EWCA Civ 1110, the English Court of Appeal held that:

> "when considering whether a judgment on an arbitration claim should be published, with or without anonymisation, the court must weigh the factors militating in favour of publicity against the desirability of preserving the confidentiality of the original arbitration and its subject matter".

In this regard, the imperative of open justice, involving the "possibility of public scrutiny as a means by which confidence in the courts can be maintained" is of crucial importance.

As a matter of Singapore law, it is argued that a similar balancing exercise involving public interest considerations should be conducted when considering whether to publish the names of arbitrators whose awards have been set aside due to a breach of natural justice. In cases of arbitrator misconduct, disclosing the names of errant arbitrators may serve the public interest. The significant professional consequences of having an award set aside on the grounds of breach of natural justice would likely serve as an effective deterrent against unethical arbitrator conduct. To be clear, the authors take no firm view on whether the arbitrator's conduct in *DJO* reaches this threshold of severe conduct warranting the disclosure of his name. It may well be possible that the decision to redact his name was the correct one. But this issue did not appear to have been raised for

deliberation by the Court in *DJO*, and the arbitration community can only evaluate whether the correct decision has been taken if the relevant public interest concerns have been ventilated before the Court for its consideration.

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This entry was posted on Friday, December 6th, 2024 at 9:49 am and is filed under Accountability, Anonymity of arbitrators, Apparent bias, arbitrators' conduct, Breach of natural justice, Fair hearing, International arbitration, Scope of Confidentiality, Set aside an international arbitral award, Trust
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