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Courts Will
Generally Defer to
Tribunals'
Interpretation of the
Parties' Agreed
Arbitral Procedure

*Lao Holdings NV and another
v Government of the Lao
People's Democratic Republic*
[2022] SGCA(I) 9

13 December 2022

LEGAL
UPDATE

In this Update

In *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2022] SGCA(I) 9, the Court of Appeal upheld the Singapore International Commercial Court's decision and refused to set aside two investor-state arbitral awards. The arbitral tribunals had interpreted a procedural agreement to mean that they still retained a residual discretion to admit new evidence, which they exercised.

Cavinder Bull S.C., Directors Gerui Lim and Tan Yuan Kheng, Associate Director Regina Lim and Senior Associate Tan Sih Si acted successfully for the Government of the Lao People's Democratic Republic in this appeal.

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INTRODUCTION

In *Lao Holdings NV and another v Government of the Lao People's Democratic Republic* [2022] SGCA(l) 9, the Court of Appeal upheld the Singapore International Commercial Court's ("**SICC**") decision and refused to set aside two Bilateral Investment Treaty ("**BIT**") arbitral awards (collectively, the "**BIT Awards**"). The Court of Appeal held that where the scope of the parties' agreement on arbitral procedure was disputed, the arbitral tribunals (the "**BIT Tribunals**") were entitled to adopt a construction that was open on the text. The investors' primary complaint – which was premised on *their* interpretation of the procedural agreement which the BIT Tribunals had considered and disagreed with – failed.

Cavinder Bull S.C., Directors Gerui Lim and Tan Yuan Kheng, Associate Director Regina Lim and Senior Associate Tan Sih Si acted successfully for the Government of the Lao People's Democratic Republic ("**GOL**") (*ie* Respondent).

This appeal also followed another recent decision by the Court of Appeal, where it orally dismissed a related appeal by the same investors against the SICC's decision in *Sanum Investments Ltd and another v Government of the Lao People's Democratic Republic and others and another matter* [2022] SGHC(l) 9. This case involved the investors' challenge to an award made in an SIAC arbitration against GOL, San Marco Capital Partners LLC ("**SM**") and Kelly Gass ("**KG**"). In that case, GOL, SM and KG had successfully invoked the defence of collateral or issue estoppel to defeat the investors' claims. The SICC held that an award that was based on *res judicata* principles was not for that reason contrary to public policy, nor would it give rise to a breach of natural justice. Our earlier update on this SICC decision may be accessed [here](#).

Directors Gerui Lim and Tan Yuan Kheng, Associate Director Regina Lim and Senior Associate Tan Sih Si acted successfully for GOL, SM and KG in this related appeal.

BACKGROUND

In *Lao Holdings NV v Government of the Lao People's Democratic Republic and another matter* [2021] SGHC(l) 10, the SICC declined to set aside two BIT Awards. Amongst other things, the SICC held that arbitral tribunals have a duty to consider, and admit where necessary, evidence of illegality, bribery and corruption even if this is contrary to a prior agreement between the parties not to add any new claims or evidence, nor to seek any additional reliefs. Our earlier update on this SICC decision may be accessed [here](#).

The Appellants filed an appeal against the SICC's refusal to set aside the BIT Awards. Relying on Article 34(2)(a)(iv) and Article 34(2)(a)(ii) of the UNCITRAL Model Law on International Commercial Arbitration and/or s 24(b) of the International Arbitration Act, the Appellants mounted the following two grounds of appeal:

- (a) There was a breach of the parties' agreed arbitral procedure when the arbitral tribunals admitted new evidence; and
- (b) There had been a failure to grant the Appellants a reasonable opportunity to present their case in response to the Respondent's defence of bad faith.

THE COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the Appellants' appeal against the SICC's decision.

KEYPOINT

As a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction was open on the text of the agreement.

With regard to the Appellants' first ground of appeal, the Court of Appeal clarified that, as a general rule, the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement. On the facts, the Court of Appeal held that the BIT Tribunals' construction of the agreed arbitral procedure in the present case (i.e., Section 34 of the Settlement Deed) was open on the text of the agreement, having regard to the context in which Section 34 was agreed upon. In particular, the Court of Appeal noted that the BIT Tribunals found that the preclusive operation of Section 34 did not extend to displacing entirely the BIT Tribunals' powers to receive new evidence and that that was a finding about the limits of the operation of Section 34. In making that finding, the BIT Tribunals construed what the parties had agreed, and their construction was informed by the text of Section 34 and by the arbitral rules applicable to each of the arbitrations.

Therefore, the BIT Tribunals had discharged their duty of construction and there was no basis upon which to properly revisit the exercise of that arbitral function. The Court of Appeal also added that it was in any event of the view that the construction adopted by the BIT Tribunals allowing for a discretionary reception of additional evidence in limited circumstances was correct.

KEYPOINT

The Court of Appeal also held that there was no breach of natural justice arising by reason of the arbitral tribunals' findings on the Respondent's defence of bad faith.

As for the Appellants' second ground of appeal, the Court of Appeal agreed with the SICC that there was no breach of natural justice. The Court of Appeal held that it was clear that the Respondent did plead the defence of bad faith as a distinct ground for the denial of treaty relief. While it was an aspect of the "unclean hands" doctrine, it was one of the two stated reasons for which a party would have "unclean hands". The Appellants also had the opportunity to address and did address the arbitral tribunals on the standard of proof to be applied.

COMMENTARY

The Court of Appeal in this Judgment has reiterated the well-settled principle that arbitral awards are not to be set aside for errors of fact or law. In considering an application to set aside an award for a breach of agreed procedure under Article 34(2)(a)(iv), the supervising court will identify "the agreed procedure" and determine whether the tribunal has failed to adhere to it. However, in so doing, the supervising court will not re-evaluate the evidence or revisit the merits of the tribunal's application of the agreed procedures.

Consequently, even where there might be more than one construction and the court might think a construction other than that chosen by the tribunal is to be preferred, the court generally will not substitute its own preferred construction for the tribunal's. Where, however, a tribunal adopts and acts upon a construction of a term providing for an agreed procedure which is simply not open on any view of the text, then the tribunal cannot be said to have adhered to the agreed procedure. It is only in such a case that it is open to the supervising court to determine the content of the agreed arbitral procedure.

For instance, the Court of Appeal noted that if a tribunal's construction of the agreed procedure results in a serious breach of the rules of natural justice, then in the ordinary course, such a construction would not be open to the tribunal to make.

The Court of Appeal further clarified that the ground of non-adherence to an agreed arbitral procedure as a basis for setting aside an award under Article 34(2)(a)(iv) is not available where the agreed procedure conflicts with a provision of the Model Law from which the parties cannot derogate. For instance, Article 18 provides that "[t]he parties shall be treated with

equality and each party shall be given a full opportunity of presenting his case". The fundamental rule of procedural fairness reflected in Article 18 and Article 34(2)(a)(ii) and Article 36 will displace a procedural agreement to the contrary or require that it be construed and applied consistently with that rule. In such an event, a reading down of broad language used by parties in the agreement on procedure may be required.

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