CHANGAROTH CHAMBERS LLC

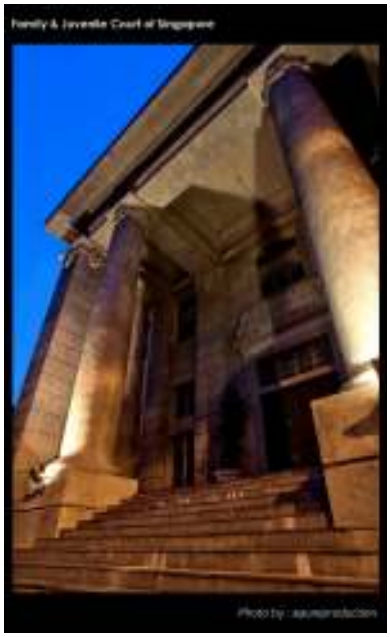
Issue No. 5 of 2016
October

MEDIATION: ENFORCEABILITY OF CHINESE JUDICIAL SETTLEMENTS IN SINGAPORE

Shi Wen Yue v Shi Minjiu and another [2016] SGHCR 8

In Summary

This Singapore High Court decision of 19 July 2016 has shown that a mediation paper or judicial settlement made in Chinese proceedings pursuant to a settlement could be enforced in the Singapore courts not as a foreign judgement based on the application of laws of China, but an agreement under the common law.



Facts

In Suit No 671 of 2015 ("S 671/2015"), the Plaintiff filed the present suit in Singapore to enforce the Mediation Paper as a China judgment in Singapore and applied for summary judgment. The Defendants also filed for a retrial in China to set aside the Mediation Paper.

The matter was initially pursued in China. The Plaintiff brought proceedings against the Defendants to claim for the repayment of a loan amounting to RMB 9,300,000 in the Zhou Shan City Court. The court ordered the Defendants to pay to the Plaintiff the sum claimed including interest.

On the Defendant's appeal, parties were sent for mediation. An agreement was reached and the Zhou Shan City Intermediate Court issued a mediation paper recording the terms of agreement ("the Mediation Paper"). However, the Defendants defaulted on payment and the Plaintiff commenced enforcement proceedings in China. Later on, the Plaintiff commenced proceedings in Singapore as well.

Issues

The Plaintiff's position before the Assistant Registrar was that the Mediation Paper was a final and conclusive judgment under Chinese law enforceable in Singapore. Even if it was not a judgment, it was still enforceable as there was no dispute over there being such a loan between the parties and there was no defence in in respect of the sums owed. The Plaintiff submitted that there were no triable issues in this case.

On the other hand, the Defendants argued that the Mediation Paper was not a judgment under Chinese law but was only an agreement. Further, they submitted that under the terms of the Mediation Paper and Chinese law, the sums could only be enforced in China and not in Singapore.

Decision of the Assistant Registrar

The Assistant Registrar granted summary judgment in favour of the Plaintiff, to enforce a Mediation Paper in Singapore not as a foreign judgment but as an agreement because the Defendants did not have a viable defence to the claim. The Defendant appealed on the basis of there being triable issues.

Defendant's Appeal

On appeal, the Defendants argued the following triable issues: whether the Mediation Paper was a judgment; whether the Mediation Paper could be enforced overseas concurrently; and whether the Mediation Paper was liable to be set aside.

Decision of the High Court

The Court found that there were triable issues and allowed the appeal.

Whether the Mediation Paper was a Judgement

The Mediation Paper is a judgement governed by the law of the foreign country where an official act occurs which determines whether that official act constitutes a final and conclusive judgment (i.e. Chinese law).

In this respect, proof of foreign law is needed. While raw foreign sources are technically admissible, a court is not obliged to place any weight on raw sources and it is preferable that expert opinions are provided wherever possible. Expert witnesses have to be tested and cross-examined before the Court could determine the facts. Additionally, Order 92 Rule 1 of the Rules of Court (Cap. 322, R5, 2014Rev Ed) provides that only a court interpreter or a person qualified to translate should offer a translation of a document not in the English language. The Assistant Registrar is not qualified to offer his own translation.

Whether the Mediation Paper Could Be Enforced Outside of China

A final and conclusive foreign judgment rendered by a court of competent jurisdiction, which was also a judgment for a definite sum of money, was enforceable in Singapore. Unless, it was procured by fraud or its enforcement would be contrary to public policy or the proceedings in which it was obtained were contrary to natural justice.

Whether the Mediation Paper was Liable to Be Set Aside

The impact of a retrial or setting aside of the Mediation Paper was contingent on the finding of whether it was a judgment or otherwise. Given that it was held that whether the Mediation Paper was a judgment was a triable issue, the issue of whether the Mediation Paper was liable to be set aside was also a triable issue that could not be determined summarily.

View

This case establishes the enforceability of an agreement commonly used to resolve disputes between parties in China (i.e. Mediation Papers), in Singapore. Such developments enforces Singapore's position as a regional dispute resolution hub and seeks to foster better relations between Chinese businessmen and their Singapore counterparts.

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LAW: INVESTOR-STATE ARBITRATION – STANDARD OF REVIEW OF AN ARBITRAL TRIBUNAL'S JURISDICTIONAL AWARD IN AN INVESTOR-STATE ARBITRATION

Sanum investments Ltd v Government of the Lao People's Democratic Republic
[2016] SGCA 57

In Summary

This Singapore Court of Appeal decision of 29 September 2016 is the first of its kind as it is in relation to a dispute arising out of a *bilateral investment treaty* ("***BIT***"), that was the subject of an investor-state arbitration. The Court in reviewing the arbitral tribunal's jurisdictional award found that a *de novo* standard of review applied and that no special deference was warranted in an investor-state arbitration context.

Facts

The Appellant, Sanum Investments Limited ("**Sanum**") is a company incorporated in Macau and invested in the gaming and hospitality industry in Laos. The Appellant alleged that the Respondent, the Lao government, imposed unfair and discriminatory taxes against the Appellant. As a result, the Appellant commenced arbitration proceedings under *UNCITRAL Arbitration Rules*, pursuant to the *1993 Bilateral Investment Treaty* between the People's Republic of China ("**the PRC**") and the Lao People's Democratic Republic (the "***PRC-Laos BIT***") for expropriation.

The arbitral tribunal's initial preliminary award of upholding its jurisdiction ("**the Award**") was disputed by the Respondent, who then commenced challenge proceedings before the High Court of Singapore, the seat of the arbitration, under *Section 10(3)(a)* of the *Singapore International Arbitration Act* ("**the *IAA***").

On 20 January 2015, the High Court granted the Respondent's application and found that the arbitral tribunal did not have the jurisdiction to arbitrate the present dispute on the following basis:

a. As the Respondent was allowed to admit two *Notes Verbales* into evidence ("***the 2014 NVs***") which reflected the views of the Laotian Ministry of Foreign Affairs ("**the Lao MFA**") and the PRC Embassy, both of which concurred that the *PRC-Laos BIT* did not apply to Macau, the trial judge among other factors, found that the *PRC-Laos BIT* was not applicable to Macau (despite the fact that the *2014 NVs* post-dated the Award); and

b. Further, the subject matter of the dispute fell outside the scope of *Article 8(3)* (which was the dispute resolution clause) of the *PRC-Laos BIT*, which the trial judge found should be given a restrictive rather than expansive interpretation.

Issues

The Appellant appealed against the decision of the trial judge and the main issue to be decided was whether the trial judge was correct in finding that the arbitral tribunal did not have jurisdiction under the *PRC-Laos* BIT to hear the claims brought by the Appellant.

However, the Court of Appeal ("**the Court**") had to decide on two preliminary issues, and they were whether the interpretation and application of the *PRC-Laos BIT* are justiciable matters before the Singapore Courts, and whether the Court should adopt a more deferential standard of jurisdictional review in the case of an investor-state arbitration concerning the application of principles of public international law.

The Court also had to decide whether two further *NVs* ("**the *2015 NVs***") should be admitted into evidence, after the Respondent sought to admit as evidence the 2015 NVs by way of Summons. These consist of a *NV* sent from the Lao MFA requesting the PRC MFA to confirm that the *2014 NV* is authentic, and a *NV* sent from the PRC MFA confirming that the *2014 PRC NV* had been sent with the authorisation of the PRC MFA.

Holding of the Court of Appeal

A rare Court of Appeal panel of five judges was constituted to hear the appeal, who unanimously reversed the High Court's decision and held that the arbitral tribunal had jurisdiction to adjudicate the dispute.

With regard to the preliminary issue, the Court held that the interpretation and application of the *PRC-Laos BIT* are justiciable and that the review of jurisdiction in a case of an investor-state arbitration should be undertaken *de novo*.

Preliminary Issue – Whether the interpretation and application of the PRC-Laos BIT are justiciable matters

The Court decided that the High Court was competent to consider issues of interpretation and application of the *PRC-Laos BIT*, and was in fact obliged to do so. This was because the parties had deisgnated Singapore as the seat of the arbitration. A necessary consequence of this was that the *IAA* applied to govern the arbitration and this required the High Court to consider issues such as jurisdiction of the arbitral tribunal.

Preliminary Issue – What is the standard of review that should be applied

For this issue, the Court affirmed its decision in *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 that a review on jurisdiction should be undertaken *de novo* (meaning a reviewing court's decision of a matter anew, giving no deference to a lower court's finding) and endorsed the observations that "*the tribunal's own view of its jurisdiction has no legal or evidential value before a court that has to determine that question*" and that "*the court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal*".

Whether the 2015 NVs should be Admitted into Evidence

It is trite law that in order to admit further evidence before the Court of Appeal when it considers the substantive appeal, three conditions must be satisfied as laid down in *Ladd v Marshall* [1954] 1 WLR 1489, and they are:

a. The evidence could not have been obtained with reasonable diligence for use in the lower court;

b. The evidence would probably have an important influence on the result of the case; and

c. The evidence must be apparently credible.

The Court found the first condition to be satisfied, since the evidence was from a non-party that was under no legal obligation to provide the necessary evidence. As such, the court would be more inclined to allow the new evidence to be admitted. Also, substantial amount of time would have been required to obtain the *2015 NVs* given that the normal channels of diplomatic consultation and communication would have to be followed.

As for the second condition, the *2015 NVs* could plausibly have an important influence on the resolution of the case. Given that the Appellant challenged the authenticity of the *2014 NVs* in the Court below, the *2015 NVs* would have put this matter to rest. However, the Court emphasised that insomuch as the *2015 NVs* confirmed the authenticity of the *2014 NVs*, their materiality would depend on the materiality of the *2014 NVs*.

With regard to the third condition, the Court found that the *2015 NVs* are apparently credible given that they represent formal diplomatic correspondence issued by the MFAs of two sovereign States bearing their respective official seals.

In the premises, the Court allowed the *2015 NVs* to be admitted into evidence.

Whether the Arbitral Tribunal has Jurisdiction under the PRC-Laos BIT to Hear the Claims Brought by the Appellant

In deciding whether the Tribunal had the jurisdiction to hear the Appellant's claims, the Court had to answer the following two questions in the affirmative:

a. Whether the *PRC-Laos BIT* applies to Macau; and

b. Whether the arbitral tribunal had subject-matter jurisdiction over the Appellant's expropriation claims.

Whether the PRC-Laos BIT Applies to Macau

In this regard, the *Moving Treaty Frontier Rule* ("*the MTF Rule*") as reflected in *Art 15* of the *Vienna Convention on Succession of States in respect of Treaties* ("*VCST*") and *Art 29* of the *Vienna Convention on the Law of Treaties* ("*VCLT*") presumptively provided for the automatic extension of a treaty to a new territory as and when it became as part of the State, but could be displaced by proof of certain specified matters. Taking these two provisions together, the *PRC-Laos BIT* would by operation of law apply to Macau unless one of the exceptions as provided in the *VCST* or *VCLT* is established.

In this case, the exception that the Court thought relevant and looked into was whether "*an intention appears from the PRC-Laos BIT, or is otherwise established, that the BIT does not apply in respect of the entire territory of the PRC*".

With regard to whether "*an intention appears from the PRC-Laos BIT*", it was decided that nothing in the text, the objects and the purposes

of the *PRC-Laos BIT* that pointed to an intention to displace the MTF Rule such that it would lead to the conclusion that the BIT did not apply to Macau. This favoured the conclusion that the presumptive effect of the MTF Rule had not been displaced.

With regard as to whether an intention was "*otherwise established*", the Court adopted the standard of satisfaction on a balance of probabilities and found that the following evidence – the *1987 PRC-Portugal Joint Declaration,* the *1999 United Nation Secretary-General Note* and the *2001 World Trade Organization Policy Report* – and also the PRC's experience with respect to Hong Kong did not contain sufficient proof to show that it was "*otherwise established*" that the PRC-Laos BIT did not apply to Macau.

As for the *2014 NVs*, the Court decided that in this present case, it ought to take into account the international law principle of the "*critical date*" doctrine as this matter engages question of public international law. The "*critical date*" is the date on which the dispute had crystallised (i.e. when arbitration proceedings were initiated) and the said doctrine provides that any evidence which comes into being after the "*critical date*" should be treated with special care when assessing its weight or relevance (and is not automatically inadmissible).

With this in mind, the Court then observed that the *2014 NVs* formed evidence that post-dated the critical date of the dispute (i.e 14th August 2012, when arbitration proceedings were initiated). The Court then stated that evidence which came into being after the "*critical date*", was self-serving and intended by the party putting it forward to improve its position in the arbitration bears little, if any, weight.

In this case, the Court did not put any evidentiary weight on the *2014 NVs* due to the following 3 main reasons:

a. The only stated justification in the *2014 PRC NV* to support the view that the *PRC-Laos BIT* was inapplicable to Macau was the PRC's internal legislation in relation to Macau, which was held to be irrelevant as *Art 27* of the *VCLT* states that the internal laws of a State cannot use invoked to justify the non-performance of a treaty;

b. Laos could not invoke the operation of the PRC's internal laws in order to justify Laos' position that it was not bound to arbitrate the claim brought by the Appellant; and

c. The *2014 NVs* did not evidence a "subsequent agreement" or "subsequent practice" which should be taken into account when interpreting a treaty, and doing so would amount to effecting a retroactive amendment of the *PRC-Laos BIT*, which was not permissible.

For completeness, in the circumstances, while the *2015 NVs* was held to be admissible, it did not have any bearing on the dispute as the decision of the Court did not turn on the authenticity of the *2014 NVs*.

Given all the points above, the Court concluded that *PRC-Laos BIT* applied to Macau as the *MTF rule*, which presumptively provided for the automatic extension of a treaty to a new territory as and when it became as part of the State, applied and the evidence adduced in this dispute did not displace this presumption.

Whether the Arbitral Tribuanal has subject-matter jurisdiction over the Appellant's claims

The Court looked at the *PRC-Laos BIT* and pointed that the main controversy is in relation to the words "*dispute involving the amount of compensation for expropriation" in Art 8(3)* of the *PRC-Laos BIT* – i.e. whether any claims which *includes* a dispute over the amount of compensation for expropriation may be submitted to arbitration ("the Broad interpretation") or whether recourse to arbitration may be had in limited circumstances where *the only issue in dispute* is the amount of compensation for expropriation ("the Narrow interpretation").

The Court considered the ordinary meaning and the context surrounding *Art 8(3)* of the *PRC-Laos BIT* and decided that the Broad interpretation should apply because (a) the issues of quantum and liability for expropriation cannot be segregated and therefore not possible for the issue of quantum to be submitted to the arbitral tribunal, and (b) the "fork-in-the-road provision" of the *PRC-Laos BIT* (which requires a party to make an election as to how and where it will pursue its remedy) would render investor protection under *Art 8(3)* illusory as the State may choose not to submit the liability dispute to the national courts, and therefore no opportunity for the investor to commence arbitration for the question of quantum.

The Court also held that the Broad Interpretation was in line with the object and purpose of the *PRC-Laos BIT*, which was the promotion of investment and protection of investors, but based on the principles of mutual respect for sovereignty.

Concluding Views

This case provides an indication as to how the Singapore Courts would treat disputes vis-à-vis investor-state arbitration, which involves the interpretation on various international and bilateral treaties and also other public international law doctrines. The Court clearly showed that there is no difference (and will not show any deference) between the way investor-state arbitration and commercial arbitration are treated by the Singapore Courts with regard to jurisdictional issues of the arbitral tribunal, and the Singapore Courts would not shy away from treating questions of law pertaining to international law as a matter of law (and not proved as facts like in proving the content of foreign law) if required to do so.

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***Allplus Holdings Pte Ltd and others v Phoon Wui Nyen (Pan Weiyuan)* [2016] SGHC 144**

This High Court Case of 22 July 2016 considered the redefined test for whether certain sums payable on breach of contract were penal and therefore unenforceable, as set out in the English Supreme Court case of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis (Consumers' Association intervening)* [2015] UKSC 67 (see CC – Newsletter Issue 1 of 2016 – January), however the High Court stated that this test has not yet been considered by the Singapore Court of Appeal and the law of penalties as it currently stands in Singapore remains that in the English case of *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1914] UKHL 1, as applied in the Singapore Court of Appeal case of *Xia Zhengyan v Geng Changqing* [2015] SGCA 22.

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If you would like more information on this or any other area of law, you may wish to contact us.

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