

**ADJUDICATION: RAISING OBJECTIONS TO THE ADJUDICATOR'S JURISDICTION OR  
BREACH OF SOP ACT AT THE EARLIEST POSSIBLE OPPORTUNITY**

*Grouteam Pte Ltd v UES Holdings Pte Ltd [2016] SGCA 59*

**In Summary**

This Singapore Court of Appeal decision of 26 October 2016 discussed the issues of whether service of a payment claim outside the stipulated time for service is a ground on which an adjudication determination is liable to be set aside, and at what stage a party who receives a payment claim which it believes to be out of time should make its objection.



**Facts**

The parties entered into a domestic sub-contract on 30 August 2013 (the "Sub-Contract") for the Appellant to carry out certain works, including civil, structural and architectural works for the new pumphouse and station at Singapore Changi Airport.

On 20 April 2015, the appellant served Payment Claim No. 18 on the Respondent. The Respondent did not serve a Payment Response, resulting in the Appellant serving its notice of intention to apply for adjudication, and lodged an adjudication application thereafter.

On the same day it was served with the Notice of Intention, the Respondent submitted its Payment Response No. 18. On 19 June 2015, the Adjudicator made a determination ordering the Respondent to pay S\$ 2,905,683.89 to the Appellant. The Respondent then applied to the High Court to set aside the Adjudication Determination on the following grounds:

- (a) that Payment Claim No. 18 was served out of time, based on Item E in the Preliminaries of the Sub-Contract, which stated that payment claims were to be served within 7 days from the end of each calendar month; and
- (b) that the Notice of Intention and Adjudication Application were served out of time, based on Item A in the Preliminaries of the Sub-Contract incorporating the *Public Sector Standard Conditions of Contract for Construction Works 2008* (6th Ed, December 2008) ("PSSCOC") – under Clause 32 of the PSSCOC, the Respondent had 14 days from its receipt of a payment claim to issue its payment response, and following that the adjudication application could only be lodged after the lapse of the Dispute Settlement Period under Section 13(3)(a) of the SOP Act.

### **Holding of the High Court**

On the first ground, the High Court held that Item E in the Preliminaries of the Sub-Contract did not apply to the service of payment claims, and therefore Payment Claim No. 18 was not served out of time.

On the second ground, the High Court held the PSSCOC governed the timeline for issuing payment responses, meaning that the Notice of Intention and Adjudication Application had been served out of time, and thus the Adjudication Determination was liable to be set aside on this ground.

On the above basis, the Adjudication Determination was set aside.

### **Issues Before the Court of Appeal**

- (a) Whether Payment Claim No. 18 was served out of time; and
- (b) Whether the Adjudication Application was lodged out of time.

### **Holding of the Court of Appeal**

#### **Whether Payment Claim No. 18 was Served out of Time**

On the first issue, the Court of Appeal agreed with the High Court's decision that Item E in the Preliminaries of the Sub-Contract did not apply to the service of payment claims, but Clause E of the Summary of Contract Negotiations ("SOCN") as submitted by the Appellant. As such, Payment Claim No. 18, the Notice of Intention and the Adjudication Application

were all not served out of time.

On the second issue, the Court of Appeal cited the case of *Lee Wee Lick Terence (alias Li Weili Terence) v Chua Say Eng (formerly trading as Weng Fatt Construction Engineering) and another appeal* [2013] 1 SLR 401 ("*Chua Say Eng*") in that where there is no purported payment claim or no service of a purported payment claim, any appointment of an adjudicator by the SMC would be invalid, and any adjudication determination made pursuant to such an appointment would be null and void. However even if the payment claim was held to be validly served, the adjudicator's determination may nonetheless be liable to be set aside if, in the process of making the payment claim or at any stage of the adjudication proceedings, there has been such a breach of a provision of the SOP Act as would warrant the invalidation of the entire proceedings.

The Court of Appeal then considered whether a party may waive an available objection based on an adjudicator's lack of jurisdiction or the other party's breach of a mandatory provision of the SOP Act, and held that it is in line with the legislative purpose of the SOP Act that a party who is not in breach may waive the other party's breach of a mandatory provision of the Act, and that parties may also waive the right to object to an adjudicator's lack of jurisdiction.

The Court of Appeal then considered when parties may be taken to have waived an available objection, and held that parties should not be permitted to argue that an adjudicator lacks jurisdiction or that a breach of a mandatory provision of the SOP Act has occurred if such objections are not raised at the earliest possible opportunity. This would prevent parties from keeping silent at the time a mandatory provision is breached, only to throw up all forms of technical objections at the adjudication.

In this respect, any objection of the type mentioned above should be made before the party who is entitled to raise the objection takes any further step which would be inconsistent with the objection being maintained, and that party is or ought reasonably to be taken to be aware of the grounds for objecting. This is regardless of whether a party has legal advice at the relevant time. One exception to this are breaches of provisions which occur during the adjudication and which are not predicated purely on the acts of the parties (for instance, breach of Section 16(3)(c) of the SOP Act, which provides that an adjudicator shall comply with the rules of natural justice).

Based on the above, the Appeal was allowed .

### **Concluding Views**

*This case is yet another example of the Singapore Court upholding the salutary purposes of the SOP Act by placing an onus on parties to raise any objections to a contravention of a mandatory provision of the SOP Act or lack of the adjudicator's jurisdiction at the earliest possible opportunity. However when exactly this "earliest possible opportunity" arises is not explicitly defined by the Court of Appeal, and leaves some room for uncertainty.*

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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 designated 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 14<sup>th</sup> 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 Tribunal 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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**Issue No. 6 of 2016**  
**November/December**

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**ANIL CHANGAROTH**

FCIArb FSIArb

Advocate and Solicitor of Singapore and  
Solicitor of England and Wales  
Commissioner for Oaths and Notary Public

[anil@changarothchambers.com](mailto:anil@changarothchambers.com)



**REENA RAJAMOHAN**

Associate

Advocate and Solicitor of Singapore

[reena@changarothchambers.com](mailto:reena@changarothchambers.com)



**LIM MUHAMMAD SYAFIQ**

Associate

Advocate and Solicitor of Singapore

[syafiq@changarothchambers.com](mailto:syafiq@changarothchambers.com)

