SINGAPORE INSTITUTE OF ARBITRATORS
NEWSLETTER
MICA (P) 134/10/2011 **NOVEMBER** 2011 **ISSUE** NO. 3

THE PRESIDENT'S COLUMN

I am delighted to be writing my first message as President following the AGM in August this year.

Thank you for the privilege of electing me as your President for the 2011-2013 term.

Johnny Tan

The first order of business is to acknowledge the tremendous debt I and the Institute owe Immediate Past President Johnny Tan. He stepped down after 4 years of excellent stewardship of the Institute from 2007-2011.

During his term as President, the Institute has seen its membership grow from 600 to nearly 800, a growth of over 30%. The current membership profile extends well beyond Singapore to some 23 countries.

He has overseen many key initiatives in this period. The Institute's Commercial Arbitration Symposium, launched in 2009 is now in its 3rd year. Scheme arbitrations are in place for the Council for Private Education (CPE), the Council for Estate Agents (CEA), as well as sports arbitration.

His vision has reached well beyond Singapore, having established an impressive regional footprint for the Institute. This has included collaboration with other arbitral institutions through the Regional Arbitration Institutes Forum, as well as training programs in Vietnam and Cambodia.

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ANNOUNCEMENTS UPDATES & UPCOMING EVENTS

1. SIArb 30th Annual Dinner on **16 November 2011** at Pan Pacific Hotel, Singapore
2. International Entry Course (IEC) on **25 & 26 November 2011** and **2 December 2011** at Maxwell Chambers

NEW MEMBERS

The Institute extends a warm welcome to the following new members:

Fellows

1. Kenneth Jerald Pereira
2. Derek Nelson
3. Hazel Galimba Guiling

Members

1. Tan Ee Yang
2. Holger Fabian Ganninger

Associate Members

1. Mark William Shigelu Smith
2. Ong Ching Pau

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New Council

The 2011 AGM also saw the election of the following new office bearers and Council members - Anil Changaroth as Treasurer, and Chan Leng Sun, Raymond Chan and Naresh Mahtani to Council.

With my election as President, my prior position as Vice President fell vacant. I proposed, and the Council unanimously elected, Chan Leng Sun for the vacant post of Vice President for the balance of the term to 2012.

The election of Chan Leng Sun as Vice President led to a vacancy on the Council, which in accordance with the Constitution, was filled by Chia Ho Choon, who was one of the candidates for election at the August AGM.

The new Council is now complete with the co-opting of Ng Ming Fai, who had also offered himself for election in August.

So I am delighted to present you the new Council for 2011:

Mr Mohan R Pillay	President
Mr Chan Leng Sun, SC	Vice-President
Mr Andrew Chan	Honorary Secretary
Mr. Anil Changaroth	Honorary Treasurer
Mr Johnny Tan Cheng Hye PBM	Immediate Past President
Ms Audrey Perez	Council Member
Mr Chia Ho Choon	Council Member
Mr Ganesh Chandru	Council Member
Mr Naresh Mahtani	Council Member
Mr Ng Ming Fai (co-opted)	Council Member
Mr Raymond Chan	Council Member
Mr Tay Yu-Jin	Council Member

Theme & Focus

My focus as President is to broaden the Institute's reach and appeal, given its unique position in the Singapore arbitration industry as the national arbitral body.

There are 3 important aspects to this.

First, to reach out to the needs and interests of specialist segments of the arbitration community such as infrastructure & construction, IT & technology, and shipping, offshore & marine.

Secondly, to broaden our appeal by delivering greater value to our members through networking forums, professional development programs, and exploring the prospect of an annual or bi-annual arbitration conference.

Finally, to expand the regional footprint established by Johnny Tan in the last 4 years by seeking out more opportunities to collaborate with regional bodies.

Committees

As part of implementing these plans and the ongoing activities of the Institute, the Council has established the following Committees:

Continuing Professional Development Committee
Chairman : Mr Naresh Mahtani

Education and Training Committee
Chairman : Mr Chan Leng Sun, SC

Publications Committee
Chairman : Mr Ganesh Chandru

Website Committee
Chairman : Mr Ng Ming Fai

Activities Committee
Chairman : Mr Chia Ho Choon

Scheme Arbitration Committee
Chairman : Mr Andrew Chan

External Relations Committee
Chairman : Mr Johnny Tan Cheng Hye PBM

Arbitration Bar Committee
Chairman : Mr Tay Yu-Jin

Special Focus Committee
Chairman : Ms Audrey Perez

Panel Arbitrators Committee
Chairman : Mr Raymond Chan

If you are interested in participating in the work of any of these Committees, please do visit our website which will guide you on how you can go about expressing your interest.

Annual Dinner – 16 November 2011
This year's Annual Dinner commemorates the Institute's 30th Anniversary. Since its inception in 1981, the Institute has played a pivotal role in the professional development of arbitration in Singapore, and the region.

We have the privilege of Judge of Appeal Justice V. K. Rajah joining us that evening as our Guest of Honour.

I hope you will be able to join us for what promises to be an entertaining evening, as we celebrate the contributions of SIArb and its members over the last 3 decades.

Mohan R Pillay
President

Case Law Development

By Dr. Philip Chan

Introduction

There have been two recent cases where the parties successfully applied to the Singapore courts to set aside the arbitral award. Appeals were filed against these judgments, and the two appeal decisions have gained international attention.

In the first case, CRW Joint Operation, the Court of Appeal affirmed the High Court's decision setting aside an arbitral award on the ground that the arbitral tribunal had exceeded its powers.

The second case, AJU v AJT concerned an award which was set aside on the ground of public policy by the High Court. This decision was reversed by the Court of Appeal which set out the approach to be taken by a Singapore court when faced with a challenge against the validity and/or enforcement of an arbitral award.

Cases

CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33 [Chao Hick Tin JA, Andrew Phang Boon Leong JA and V K Rajah JA]

Background

PT Perusahaan Gas Negara (Persero) ("PGN") engaged CRW Joint Operation ("CRW") to construct a pipeline in Indonesia. The contract adopted the standard provisions of the 1999 FIDIC Red Book ("the 1999 FIDIC Conditions of Contract"), with some modifications. A dispute arose which was referred to a Dispute Adjudication Board ("DAB") in accordance with the 1999 FIDIC Conditions of Contract. PGN disputed part of the DAB decision and issued a Notice of Dissatisfaction ("NOD"), making the DAB decision binding but not final. CRW referred to arbitration the issue of whether PGN had to comply with the DAB decision. The tribunal made an award in favour of CRW.

PGN successfully challenged the award on the basis that the arbitral tribunal had exceeded its powers under the 1999 FIDIC Conditions of Contract. The High Court held that the tribunal (a) had addressed an issue that should have first been referred to a DAB (the issue of whether PGN was obliged to immediately comply with a DAB decision); and (b) had wrongly failed to review the merits of the DAB decision. The High Court set aside the Final Award pursuant to Art 34(2)(a)(iii) of the Model Law, relying on the specific ground that the Majority Members of the arbitral tribunal had exceeded their jurisdiction. The Court of Appeal upheld the High Court decision.

Issues before the Court of Appeal

The Court of Appeal considered the following questions:

- Was the Final Award issued in accordance with sub-clause 20.6 of the 1999 FIDIC Conditions of Contract? (This was referred to as "Issue 3")
- If the answer to Issue 3 was "No": (i) did the Majority Members act in excess of their jurisdiction ("Issue 4"); and (ii) was there a breach of the rules of natural justice at the Arbitral Hearing? ("Issue 5")
- If the answer to Issue 4 and/or Issue 5 was "yes", should the court exercise its residual discretion to refuse to set aside the Final Award? (This was referred to as "Issue 6")

Scope of court's discretion to set aside arbitral award

Before embarking on its analysis, the Court of Appeal set out the scope of the court's discretionary power to set aside arbitral awards.

The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Art 34 of the Model Law and s 24 of the IAA.

The court observed that as declared in Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] 3 SLR(R) 86 ("Soh Beng Tee"), the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.

However, the court noted that it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings. [26]

The court observed that while the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily

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prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories: -

- First, an award may be challenged on jurisdictional grounds (ie, the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the arbitral tribunal).
- Second, an award may be challenged on procedural grounds (eg, failure to give proper notice of the appointment of an arbitrator), and,
- Third, the award may be challenged on substantive grounds (eg, breach of the public policy of the place of arbitration). [27]

Application of Art 34(2)(a)(iii)

In respect of the application of Article 34(2)(a)(iii) of the Model Law, the court held that Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it.

Second, it must be noted that a failure by an arbitral tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute.

Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law. It applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute. [31 to 33]

Application of Art 24(b)

The court held that Section 24(b) of the IAA provides that notwithstanding Art 34(1) of the Model Law, an arbitral award can be set aside if a breach of the rules of natural justice occurred in connection with the making of the award, by which the rights of any party have been prejudiced. In this regard, Art 18 of the Model Law provides that the parties to an arbitration shall be treated with equality and each party shall be given a full opportunity of presenting his case.

The Court of Appeal observed that courts must not blindly and/or mechanically apply the rules of natural justice so as to require every conclusion that the arbitrator intends to make to be put to or raised with the parties. A mere failure by an arbitrator to act as efficiently as he might or a minor divergence from the procedural rules established by the parties is not of itself sufficient to justify a remedy for breach of the rules of natural justice. An arbitrator is perfectly entitled to adhere to procedural rules agreed to by the parties or adopted by the arbitrator himself within his powers.

The court held that to set aside an arbitral award under s 24(b) of the IAA, the court has to be satisfied, first, that the arbitral tribunal breached a rule of natural justice in making the arbitral award. Second, and more importantly, the court must then be satisfied that the breach of natural justice caused actual or real prejudice to the party challenging the award. In other words, the breach of the rules of natural justice must have actually altered the final outcome of the arbitral proceedings in some meaningful way before curial intervention is warranted. Where the same result could or would ultimately have ensued even if the arbitrator had acted properly, there would be no basis for setting aside the arbitral award in question.

Court's findings

Was the Final Award issued in accordance with sub-clause 20.6 of the 1999 FIDIC Conditions of Contract? (Issue 3)

The Court of Appeal held that the Final Award was not issued in accordance with sub-clause 20.6 of the 1999 FIDIC Conditions of Contract. This was because "…a reference to arbitration under sub-cl 20.6 of the 1999 FIDIC Conditions of Contract in respect of a binding but non-final DAB decision is clearly in the form of a rehearing so that the entirety of the parties' dispute(s) can finally be resolved afresh." [66]

The court then observed that, "…it [was] difficult to understand why the Majority Members [of the arbitral tribunal] ignored the clear language of sub-cl 20.6 of the 1999 FIDIC Conditions of Contract to "finally [settle]" the dispute between the parties and instead abruptly enforced the Adjudicator's decision (by way of the Final Award) without reviewing the merits of that decision. What the Majority Members ought to have done, in accordance with the [terms of reference] (and, in particular, sub-cl 20.6 of the 1999 FIDIC Conditions of Contract), was to make an interim award in favour of CRW for the amount assessed by the Adjudicator (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a final award." [79]

Did the Majority Members act in excess of their jurisdiction? (Issue 4); and Was there a breach of the rules of natural justice at the Arbitral Hearing? (Issue 5)

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The Court of Appeal held that the failure of the Majority Members to consider the merits of the Adjudicator's decision before making the Final Award meant that they exceeded their jurisdiction in making that award. Further, it meant that PGN had to pay the sum awarded by the Adjudicator whilst being deprived of its contractual right to have the Adjudicator's decision reviewed unless it incurred additional time and costs in commencing fresh arbitration proceedings (assuming such an option were legally feasible). The court held that PGN suffered real prejudice as a result of the decision of the Majority Members.

As regards the issue of natural justice, the Court of Appeal held that, "…PGN was entitled to be accorded a proper opportunity to comprehensively present its case on the Adjudicator's decision, with all the relevant submissions and evidence, at a subsequent hearing before the Arbitral Tribunal. However, it was denied the opportunity as the Majority Members summarily made the Final award without considering the merits of the real dispute between the parties." [94]

Should the court exercise its residual discretion to refuse to set aside the Final Award? (Issues 6)

The Court of Appeal had to decide in the first instance whether it had the residual discretion to refuse to set aside the Final Award.

First, the court recognised that the ability to establish one of the grounds for setting aside an arbitral award does not bring about a mandatory annulment of the award. It observed and agreed at paragraph 97: "…the learned author of International Commercial Arbitration states (at p2563) that although the court is not mandatorily required to annul an arbitral award where one or more of the grounds specified in Art 34(2) of the Model Law (and/or s24 of the IAA) applies, in many cases, the existence of any one of these grounds will be "sufficiently serious [for] the annulment of the award [to] be virtually automatic…."

The Court of Appeal continued that, "…the court may, in its discretion, decline to set aside an arbitral award even though one of the prescribed grounds for setting aside has been made out. However … the court ought to exercise this residual discretion only if no prejudice has been sustained by the aggrieved party." [100]

The court concluded that in the present case the aggrieved party had suffered real prejudice as a result of the Majority Members acting in excess of their jurisdiction and also in breach of the rules of natural justice. In the circumstances, the court held that there was simply no basis for the court to invoke its residual discretion to refuse to set aside the Final award.

AJU v AJT [2011] SGCA 41 [Chan Sek Keong CJ, Andrew Phang Boon Leong JA and V K Rajah JA]

This was an appeal against a decision of the High Court setting aside an interim award on the ground that the Interim Award was contrary to the public policy of Singapore.

The issues before the Court of Appeal were identified as:

(a) whether the Judge was correct to go behind the Interim Award and reopen the Tribunal's finding that an agreement terminating the arbitration (the "Concluding Agreement") was valid and enforceable; and

(b) in any event, whether the Judge was correct in finding that the Concluding Agreement was illegal.

The factual background

The dispute arose out of a 2003 agreement for the staging of a tennis tournament in Bangkok (the "Contract"), which provided for UNCITRAL arbitration in Singapore. The Respondent was not originally a party to the Contract, but was subsequently assigned the rights of one of the parties.

Arbitration under the agreement was commenced in 2006. Shortly after, the Appellant made a complaint of fraud against O, P and Q, (the original counterparty and others related to but not including the Respondent) to the relevant Thai prosecution authorities. The alleged fraud was a representation that the Appellant could organise the tournament for 5 years. In fact, the rights were only owned for 3 years.

The Concluding Agreement was signed between the Appellant, O, P and Q, in 2008. Under this, the Respondent would terminate the arbitration and the Appellant would (i) pay the Respondent an amount in settlement, and (ii) withdraw the charges against O, P and Q. The Appellant took steps to comply with its obligations, but the Respondent refused to terminate the arbitration. It argued that, although the Thai prosecuting authorities had consequently issued a Non-Prosecution Order concerning O, P and Q, this was insufficient because there was still the possibility that the proceedings could be reopened.

The Appellant applied to the Tribunal for an order to terminate the arbitration on the grounds that the claims were fully and finally settled. The Respondents opposed the application on the grounds that the Concluding Agreement was intended to stifle the prosecution of a non-compoundable criminal offence, and was illegal. The Tribunal held that the Concluding Agreement was valid, and terminated the arbitration.

Two regimes, one approach

The IAA provides separate regimes for, respectively, the enforcement of foreign arbitral awards (i.e. arbitral awards made in States other than the State in which they are sought to be enforced) and the setting aside of "award[s]" as defined in s 2(1) of the IAA (i.e. international arbitration awards made by Tribunals in Singapore ("IAA Awards")). [30]

The Court noted that "both the setting aside regime and the enforcement regime provide for "the public policy" of Singapore as a basis on which an IAA Award may be set aside … and a foreign arbitral award denied enforcement …." [34] It held that this concept of public policy is the same for both regimes, "because the legislative purpose of the IAA is to treat all IAA awards as having an international focus." [37]

The Court of Appeal accepted the less interventionist approach used by Colman J in Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd and Others [1999] QB 740 and rejected the alternative (more interventionist) approach used in Soleimany v Soleimany [1999] QB 785. It held that the approach in Westacre "is consonant with the legislative policy of the IAA of giving primacy to the autonomy of arbitral proceedings and upholding the finality of arbitral awards (whether foreign arbitral awards or IAA awards)." [60]

In particular, the Court relied on certain points outlined by Colman J as follows:

"(v) If the court concluded that the arbitration agreement conferred jurisdiction to determine whether the underlying contract was illegal, and by the award the arbitrators determined that it was not illegal, prima facie the court would enforce the resulting award. (vi) If the party against whom the award was made then sought to challenge enforcement of the award on the grounds that, on the basis of facts not placed before the arbitrators, the contract was indeed illegal, the enforcement court would have to consider whether the public policy against the enforcement of illegal contracts outweighed the countervailing public policy in support of the finality of awards in general and of awards in respect of the same issue in particular." [42]

"[I]t is necessary to take into account the importance of sustaining the finality of international arbitration awards in a jurisdiction which is the venue of more international arbitrations than anywhere else in the world. I have already referred to the developing jurisprudence on the separability of arbitration agreements [from their underlying contracts] in the context of allegations of illegality…." [43]

Application of relevant legal principles

In applying the relevant principles, the Court of Appeal held that it was "entitled to assume that the members of the Tribunal had adequate knowledge of Singapore law. … given that: (a) the parties selected arbitration by the SIAC (an equally competent international body); (b) the Tribunal consisted of experienced members of the local Bar; and (c) the Tribunal decided the issue of illegality according to Singapore law." [61]

The Court of Appeal further held that, "…the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality." It reasoned that "… since the law applied by the Tribunal was Singapore law, the question that arises is whether, if a Singapore court disagrees with the Tribunal's finding that the Concluding Agreement is not illegal under Singapore law, the court's supervisory power extends to correcting the Tribunal's decision on this issue of illegality." [62]

On the other hand, the Court of Appeal also cautioned that, "…this conclusion does not mean that in every case where illegality in the underlying contract is invoked, the court is entitled to reopen the arbitral tribunal's finding that the underlying contract is not illegal." [63]

However, on the facts of the case, s 19B(1) of the IAA "… calls for the court to give deference to the factual findings of the Tribunal. The policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public policy objections to arbitral awards are concerned, even though, in the case of IAA awards, the seat of the arbitration is Singapore and the governing law of the arbitration is Singapore law. …" [65] The Court of Appeal observed that the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them.

The Court of Appeal concluded that, "…limiting the application of the public policy objection in Art 34(2)(b)(ii) of the Model Law to findings of law made by an arbitral tribunal – to the exclusion of findings of fact (save for some exceptions) – would be consistent with the legislative objective of the IAA that, as far as possible, the international arbitration regime should exist as an autonomous system of private dispute resolution to meet the needs of the international business community. Further, such an approach would also be fair to both the successful party and the losing party in an arbitration…." [69]

Accordingly, the appeal was allowed.

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Dallah -v- Pakistan

the 'inconvenient truth' about multi-jurisdictional enforcement of international arbitral awards

By Calvin Chan*

It is a trite observation that the conflicting decisions of the UK Supreme Court and Paris Court of Appeal regarding the validity of the award in Dallah v Pakistan have attracted their share of attention and controversy within the international arbitration community. In particular, reactions to the UK Supreme Court's refusal in November 2010,[1] to enforce the award (issued by an ICC tribunal sitting in Paris) against the state of Pakistan on jurisdictional grounds under French law, seen in light of the appellate French decision of February 2011 which applied the same legal standards in upholding the award, have been divided.

The key issues arising out of the Dallah decisions raise some of the most difficult questions faced today by courts, arbitrators and parties in international arbitration, and, it is safe to say, convergence and harmonisation among national courts and even scholars remain some distance away. They include complex questions surrounding third party involvement in arbitration (including but not limited to issues that arise where a claimant, having signed an arbitration clause with a state enterprise, wishes to bring the sovereign into the dispute), as well as the degree of deference that enforcing courts can or perhaps should grant to the jurisdictional decisions of arbitral tribunals under the 'kompetenz-kompetenz' principle. It is therefore not possible, and nor is it the aim of this article, to conduct a review and analysis of these issues within its brief confines.

Instead, this discussion will be limited to what may, for some, be termed an 'inconvenient truth' that is amply illustrated by the Dallah decisions. Namely, that if one accepts the premise of these decisions, it may be possible for an international arbitral award under the New York Convention, to meet a different fate when presented for enforcement in different legal systems. While such a result may (understandably) be to the dismay of commentators and practitioners wishing for a uniform enforcement result in whichever jurisdiction an award 'lands', the enforcement framework of the New York Convention does not expressly assure a universal result.

The Salient Facts

The salient facts in Dallah, for purposes of this discussion, are: in 2001, an arbitral tribunal constituted under the ICC arbitration rules and seated in Paris, comprising three internationally eminent jurists, found that the state of Pakistan was a party to an agreement, containing an ICC arbitration clause, and to the subsequent arbitration, between Dallah Real Estate and Tourism Holding Company ("Dallah") and a trust that had been set up by the government of Pakistan to house Pakistani pilgrims in Saudi Arabia. The trust ceased to exist three months after the agreement was signed. Even though Pakistan did not sign the agreement, the tribunal decided in a partial award on jurisdiction that Pakistan was bound by the agreement to arbitrate, and therefore that it had jurisdiction to determine Dallah's claim against Pakistan. Pakistan did not participate in the arbitration, except to maintain a jurisdictional objection. After finding in a second partial award that Pakistan was liable for terminating the agreement at issue, the tribunal ultimately awarded Dallah monetary damages and legal costs in a third and final award.

Dallah then moved to enforce the final award against Pakistan, first in England and subsequently at the French seat. Pakistan challenged enforcement, by resisting enforcement in England and applying to set aside all three awards in France. Proceedings in both jurisdictions ran their course through various levels of the court system. This culminated in what has been described as a "pathological"[2] outcome, with the UK Supreme Court and the French Court of Appeal both purportedly applying the same 'common intention' test under French law[3] to analyse the Pakistani government's actions, but then arriving at diametrically-opposed conclusions on the arbitral tribunal's jurisdiction regarding Pakistan, and by extension on the validity of the award rendered against Pakistan.

The Possibility for Inconsistent Results in Multi-Jurisdiction Award Enforcement

Perhaps, it would have been less of an affront to the sensibilities of critics of the UK Supreme Court decision, if both jurisdictions had decided the same way. Reality, unfortunately, seldom meets aspirational goals. Much of the discomfort, it seems, with the UK Supreme Court's decision (when contrasted with the French appellate decision) resides in its tension with perceived objectives of judicial economy, comity, consistency, and finality. If only the UK Supreme Court had stayed the proceedings for a few months and awaited the French decision, there would not have been the awkward tension resulting from the courts of two influential arbitral jurisdictions issuing inconsistent decisions on virtually the same issue!

The frisson ensuing from the Dallah saga was exacerbated by the relative closeness in time of the two decisions. Discomfort, however, recedes with time. The fundamental issue is whether or not conflicting decisions by different legal systems where an international award is presented for enforcement, however discomforting or regrettable, can be accommodated within the framework of the New York Convention. The logic of the Dallah saga suggests that the answer is "yes." Applications to set aside and applications to enforce are separate and independent proceedings under the New York Convention. Indeed, one of the principal aims, and achievements, of the New York Convention was to eliminate the "double exequatur" requirement of the 1927 Geneva Convention which preceded it. In other words, the New York Convention eliminated the need to obtain a declaration of enforceability of an award in its country of origin before it could be executed elsewhere.

Some courts in France and some also in the United States have held that an award which has been set aside at the seat of arbitration can still be successfully enforced in another jurisdiction.[4] Why then, when the converse occurs, in which an international award that is refused enforcement in one jurisdiction but has been upheld at the seat of arbitration, should this be said to potentially cause injustice to the award victor?

The New York Convention grants the losing party rights to challenge the award on certain narrow grounds - Pakistan as the putative award defendant was entitled under the Convention, as it did, to both resist enforcement wherever the award was enforced, as well as to apply to set aside the award at the seat. Further, although Pakistan succeeded in resisting enforcement in the UK, Dallah's options in seeking recognition and satisfaction of the award under the New York Convention do not end there. There are conceivably other Convention countries where Dallah may potentially proceed to enforce the award in its favour. If so, this would require Pakistan to persuade the courts in such Convention states of its case for resisting enforcement (as it did in the UK), notwithstanding the award being upheld at its French seat.[5]

While presumptive validity is accorded to foreign arbitral awards under the New York Convention and it is unquestionably important that enforcement courts adopt the requisite "pro-enforcement" bias under the Convention by applying universally understood criteria for determining award challenges, it is nevertheless instructive to note that the Convention does not provide a unitary system for award enforcement. It is still up to the courts of a Convention state wherever an international award is presented for enforcement to assess whether or not it meets the standard of recognition in that country. In other words, while the New York Convention does strive to achieve a certain degree of uniformity, its principles and standards are to be practically applied by the courts of whichever jurisdiction a party chooses to enforce the award. The Convention does not explicitly guarantee or mandate uniform enforcement results throughout all Convention states -- an award may be effective only to the extent that it is recognised by the courts of the Convention state(s) where it is presented for enforcement.

It is debatable as to whether or not the UK Dallah decision properly applied French law in its independent investigation of the arbitral tribunal's jurisdictional decision, which ultimately reflects the as yet unsettled relationship between contractual and jurisdictional bases for arbitral authority, as adjudged by different legal systems. This comparative debate will no doubt live on in many arbitration seminars and articles in the future. What can be said, however, is that jurisdictional determinations often are highly fact-sensitive, and as shown by the Dallah saga, can implicate issues which necessarily require a nuanced appreciation in each case of the legal tradition and jurisprudential philosophy[6] that inform judicial perspective in each legal system. It should therefore not be intellectually inconceivable that two highly respected courts of different legal traditions, both applying the same legal standards in a reasoned and methodical manner, could nevertheless arrive at conflicting conclusions. Having willingly commenced enforcement actions in both the UK and France, Dallah as the enforcing party subjected the award to the scrutiny of courts in both legal systems. As with any other party wishing to enforce an award in more than one legal system, it arguably should have dawned on Dallah that there could be the prospect of inconsistent findings by the courts before which it sought enforcement.

It is also debatable as to whether or not the English courts should have stayed enforcement proceedings in England. Some critics of the Supreme Court decision have focused on its refusal to stay proceedings, in circumstances where a French court was deciding on the very same issue and it was common ground that French arbitration law was to be applied, as being contrary to principles of comity and further as being contrary to the New York Convention. Such latter criticism would appear to be principally founded upon Article VI of the New York Convention, which provides that jurisdictions where enforcement is sought may, "if it considers it proper", adjourn or suspend enforcement in light of an action to set aside at the seat of enforcement. However, the operative word is "may", and not "shall". While the UK decision does raise appropriate questions of precedence and judicial restraint in multi-jurisdictional post-award litigation, under the Convention there was no requirement on the Supreme Court to have stayed enforcement proceedings; the Convention merely permits the enforcement court to exercise its discretion to do so.

Conclusion

The conflicting outcomes of the Dallah decisions in the UK and France highlight the distinct possibility that courts in different enforcement jurisdictions can arrive at very different conclusions, even when applying presumably the same legal standards and tests to an identical set of facts. The Dallah saga vividly illustrates the point that a party seeking to enforce an award in multiple jurisdictions will necessarily have to examine what may be varying national case law and judicial attitudes, as there is no explicit guarantee under the New York Convention of a uniform enforcement experience.

Calvin Chan

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* Calvin Chan is an attorney in the Singapore office of Skadden, Arps, Slate, Meagher & Flom, specialising in international arbitration. The views expressed in this article are solely those of the author, do not constitute legal advice and do not represent those of Skadden or its clients.

1 Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan [2010] 3 W.L.R. 1472 (3 November 2010).

2 Gary Born and Michal Jorek, "Dallah and the New York Convention" (7 April 2011), accessible online at http://kluwerarbitrationblog.com/blog/2011/04/07/dallah-and-the-new-york-convention/

3 French law, being the law of the seat of arbitration, was applied because the agreement did not specify the governing law of the arbitration clause.

4 This article does not address this (potentially more controversial) issue of whether an award, which is annulled or set aside by the courts of the seat of arbitration, may be enforced in other New York Convention jurisdictions.

5 At the time of publication, it is unclear whether Pakistan will appeal the Court of Appeal decision to the French Cour de Cassation, the highest court in France.

6 Legal tradition and jurisprudential philosophy, used in this sense, have nothing to do with local quirks, peculiarities or whims that are contrary to the international consensus.

Seminar - "The Dallah Debate"

Date	Event	Speakers	Chairperson
26 July 2011	The Dallah Debate	Mr. Peter Leaver QC and Professor Emmanuel Gaillard	Attorney-General Mr. Sundaresh Menon

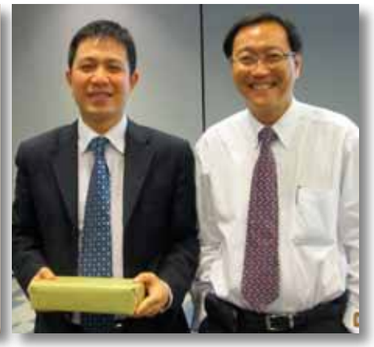
In Dallah v Pakistan, the court of the place of enforcement (UK Supreme Court) and the court of the seat of arbitration (Paris Court of Appeal) applied French law to the same facts but arrived at different conclusions. This ignited a debate within the international arbitration community on a broad range of topics, including the reasons for and implications of this difference, on the principle of competence-competence as well as the enforcement of awards under the New York Convention.

The SIArb hosted a panel discussion entitled the 'The Dallah Debate and its Implications' which was presided over by Attorney-General Mr. Sundaresh Menon. The speakers, Mr. Peter Leaver QC and Professor Emmanuel Gaillard addressed the issues that arose out of these judgments in a lively debate which was intellectually stimulating. Arbitration practitioners from Singapore and the region were present in large numbers.

Seminar on "Mandatory Rules in International Arbitration – The Case of Vietnam"







Date	Event	Speaker	Chairperson
4 August 2011	Mandatory Rules in International Arbitration – The Case of Vietnam	Dr Hop Dang	Mr. Calvin Chan

Dr Hop Dang delivered an engaging presentation that focussed on the mandatory rules of Vietnamese law that applied to arbitrations taking place in Singapore or Vietnam which arose out of projects or contracts relating to Vietnam. He provided relevant examples from his own experience of cases in which he was involved and discussed, among other things, aspects of Vietnamese law relating to corporate officers' capacity to sign contracts, the arbitrability of disputes and the liability of a company's branch office. Dr Dang concluded by providing some interesting observations on the application of mandatory rules by arbitral tribunals.

30TH ANNUAL GENERAL MEETING / MEMBERS' NITE

Date	Event
11 August 2011	30TH ANNUAL GENERAL MEETING / MEMBERS' NITE

Seminar on "Conflicts of Interest in International Arbitration"




Date	Event	Speakers	Chairperson
1 September 2011	Conflicts of Interest in International Arbitration	Mr David Williams QC, Mr Bernard Hanotiau and Mr Makhdoom Ali Khan	Mr Michael Hwang SC

On 1 September 2011, SIArb hosted an eminent panel of speakers to discuss the issue of Conflicts of Interest in International Arbitration.

Mr. David Williams began with a discussion of the principles of the IBA Guidelines on Conflicts of Interest in International Arbitration, before proceeding to focus on some recent cases.

Mr. Michael Hwang provided some keen insights into the conflicts regime in Singapore, while Mr. Bernard Hanotiou pertinently referred to the cultural differences between the approach of European and US lawyers to the issue and also highlighted the distinction between independence and impartiality. Mr. Makhdoom Ali Khan drew on his personal experiences to offer his views on the constantly evolving nature of independence and impartiality of arbitrators. The discussions continued at the reception after the talk.

SIARB COMMERCIAL ARBITRATION SYMPOSIUM 2011

Date	Event
20 September 2011	SIARB COMMERCIAL ARBITRATION SYMPOSIUM 2011

Seminar on "CEA Arbitration Scheme – the SIArb set"

Date	Event	Speakers	Chairperson
6 October 2011	CEA Arbitration Scheme – the SIArb set	Mr Raymond Chan and Mr Eric Chew	Mr Andrew Chan

On 6 October 2011, SIArb hosted a seminar on arbitration under the new Council of Estate Agents ("CEA") dispute resolution scheme. The speakers were Mr Raymond Chan, Mr Eric Chew and Mr Andrew Chan (who also chaired the session).

Following the introduction of the Estate Agents Act 2010, the Estate Agents (Dispute Resolution Schemes) Regulations 2011 and the Estate Agents (Disciplinary Proceedings) Regulations 2011, the CEA implemented an extensive new dispute resolution scheme to manage consumer complaints, and SIArb was appointed as one of the dispute resolution providers under the scheme. The speakers gave a broad overview of the scheme's complaints process before focussing on arbitration under the SIArb-CEA Arbitration Rules.

The talk was well attended by estate agents, and provided a useful and enlightening insight into the new dispute resolution framework for real estate matters.

Publisher

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32 Maxwell Road #02-07, Maxwell Chambers, Singapore 069115
Tel: (65) 6372 3931 / 32 Fax: (65) 6327 1938

Printed by Ngai Heng Book Binder Pte Ltd.