Wrong composition of seat and wrong composition of arbitral tribunal is ground for refusing enforcement- establishing prejudice not required; significance and consequences of seat; determination of seat et. al.

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ST Group Co Ltd and others v. Sanum Investments Limited and Anr

Court: Supreme Court of Singapore (Court of Appeal) | **Case Number**: Civil Appeal No 113 and 114 of 2018 | **Citation**: [2019] SGCA 65 | **Bench**: Sundaresh Menon CJ, Judith Prakash JA & Quentin Loh JJ | **Date**: 18 November 2019

Article 36 Model Law and Section 31 International Arbitration Act of Singapore provide for the "[G]rounds for refusing recognition or enforcement," one of which is a case where composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement [Art. 36 (1) (a) (iv)].

What if a wrong determination of seat is made, and what if the tribunal was composed of three members whilst it should have been one? Is demonstration of prejudice necessary to resist enforcement on this ground? These principal questions were examined by the Court of Appeal of Singapore, which is the upper-division of Singapore's Supreme Court ("CoA").

A. The background

Sanum Investments Limited, a company organised in Macau, had a joint venture with Laos-based ST groups ("the Laos Parties"). Different parties from both sides executed multiple agreements for the joint venture's business collaboration in the gaming and entertainment industry. A 'Master Agreement' was executed, which provided for a multi-tiered dispute resolution structure at the end of which was arbitration: –

> … If one of the Parties is unsatisfied with the results of the above procedure, the Parties shall mediate and, if necessary, **arbitrate such dispute using an internationally recognized mediation/arbitration company in Macau, SAR PRC**. (emphasis added)

The Master Agreement had envisaged sub-agreements. One such sub-agreement was called the 'Participation Agreement,' which provided for arbitration at the Singapore International Arbitration Centre ("SIAC") under SIAC Rules.

In 2015, Sanum commenced arbitration under the SIAC Rules seeking damages for breaches of the various agreements. The Laos Parties objected, but SIAC determined that *prima facie* a valid arbitration agreement under the SIAC Rules existed. The Laos Parties did not participate further. SIAC appointed a three-member tribunal.

The tribunal made an award in August 2016. It determined, *inter alia*, that the Participation Agreement amplified and supplemented the dispute resolution procedure set out in the Master Agreement and that Singapore should be the seat of arbitration. On merits, the Tribunal awarded Sanum damages.

Sanum obtained leave of the court (made by an Assistant Registrar) to enforce the award in Singapore ("Leave Order"). The Laos Parties challenged the Leave Order, which eventually came before a judge in the High Court.

The High Court considered various issues but, relevant to this update, it held that the dispute arose solely under the Master Agreement; the seat of arbitration was Macau and not Singapore, SIAC wrongly

assumed jurisdiction and wrongly appointed a three-member tribunal, but the award could be enforced since the Laos Parties failed to demonstrate prejudice.

B. The CoA's decision

The CoA set out at paragraphs 43 to 45 all the issues. It said it was unnecessary to deal with all of the issues and focussed on the following: under which agreement the dispute arose; who were the actual parties to the Master Agreement; were the right seat and composition of tribunal chosen; if Singapore was not the seat of arbitration and the tribunal wrongly appointed, could those be grounds not to recognise the award in Singapore; did waiver and estoppel apply; was the dispute resolution clause a valid arbitration clause to begin with?[1]

B1. The dispute arose under the Master Agreement

On the facts and construction of the agreements, the CoA upheld the High Court's finding that the dispute arose under the Master Agreement and had nothing to do with the Participation Agreement. [for reasoning, see paras 47 to 53 of the judgment].

B2. What was the seat of arbitration under the Master Agreement (which stated, "arbitrate such dispute using an internationally recognized … arbitration company in Macau")?

The High Court had set out three possible interpretations of this clause. It concluded that the best one was to say that parties agreed to "arbitrate such dispute, using an internationally recognised arbitration company, in Macau."[2] Following this it was held that the arbitral seat was Macau. The CoA affirmed that conclusion.

First, the CoA noted that this interpretation requires only a minor amendment of the contractual phrase, viz, insertion of one comma after the word "dispute" and another comma after the word "company." Also, it is one of the principles that the interpretation which does the least violence to the language of the clause is to be preferred.

Second, the CoA also found "evidence to suggest that Sanum's counsel in the arbitration proceedings had repeatedly expressed the view that the seat of the arbitration conducted by the SIAC was to be Macau."

Third, again turning to interpretation, the CoA noted that the chosen interpretation was the "most natural interpretation of the wording in the arbitration agreement and also accords with what the parties intended."

(a) Neither Singapore nor SIAC are mentioned in the clause.

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[1] The CoA posed an additional question to the parties: is the arbitration clause valid? The basis of this question was the arbitration clause of the Master Agreement which had provided determination by the court and then arbitration. The CoA noted the parties' respective position but did not answer since the question required to be answered as per the law of Laos (the governing law). The CoA said it did not have any evidence under the laws of Laos, and a decision could not be made under the presumption that the law was same as Singaporean law.

[2] The other two interpretations were:

One, "Parties shall arbitrate such dispute using an internationally recognised arbitration company geographically located in Macau." The High Court said "this interpretation would give rise to "practical difficulties," in the sense that no "internationally recognised mediation/arbitration company" appears to have a geographical presence in Macau. To accept [this interpretation] would thus contravene the principle of effective interpretation." In the CoA's view the High Court was right to reject it.

Two, "parties shall arbitrate such dispute using an international arbitration company recognised in Macau." This interpretation "required the court to change the word 'internationally' to 'international' and move the word 'recognised.' As so re-worded, the clause means that the party shall choose an arbitration company offering international arbitration and which is a company that is 'recognised' in Macau." This too was rejected, among others, because the interpretation chosen did 'least violence' to the language of the agreement.

(b) There is no connection at all between the Master Agreement and Singapore. If the Master Agreement is read on its own without reference to the Participation Agreement, the only geographical location mentioned is Macau and in an arbitration clause when the word "arbitration" is juxtaposed with the words "in [place name]," the natural interpretation is that the place so-named is to be the seat of the arbitration rather than simply a venue.

B3. Was the composition of the tribunal in accordance with the agreement?

The CoA held it was not: The Master Agreement was silent on composition. Under the SIAC Rules,[3] a sole arbitrator had to be appointed by default. While the Registrar of SIAC had the discretion to choose a three-member tribunal under Clause 6.1 of SIAC Rules[4] if he felt the need, the three-member tribunal was chosen not because that discretion was exercised, but on the mistaken premise that Participation Agreement was applicable, hence the tribunal had erroneous composition.

B4. What was the effect on enforcement of wrong seat and wrong composition of the tribunal?

The court addressed a preliminary point of waiver and estoppel premised on Article 4 of Model Law[5] and the Singapore High Court's decision in *Rakna Arakshaka Lanka Ltd.* v. *Avant Garde Maritime Services (Pte) Ltd*., [2019] 4 SLR 995. It held that neither applied since:-

(a) The Laos Parties did not proceed with the arbitration, as required by Article 4. The HC's decision in *Rakna* was confined to a situation of 'active remedy' like set-aside proceeding and not 'passive remedy' like enforcement.

(b) Anyway, Rakna's HC decision was overturned on appeal in *Rakna Arakshaka Lanka Ltd* v *Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131). The Court of Appeal held that a party who objected to the tribunal's jurisdiction but did not participate in the arbitration proceedings would still be able to rely on that objection in setting aside or enforcement proceedings taken after the issue of the final award.

Then the CoA considered the substantive question which is, "whether the errors in choice of seat and composition of the Tribunal in themselves provide a reason for the court to refuse recognition of the award or whether in addition prejudice as a result of these errors must be shown."

Firstly, the CoA noted that the High Court described the wrong choice of seat and wrong composition of the tribunal as "procedural irregularities." The High Court also noted that the importance of the seat was diminished where the court was asked to enforce an award rather than to set it aside. But the CoA disagreed: "w*ith respect, we take a different view as to the importance of seat*". (emphasis added)

Secondly, the CoA then examined the significance of choice of seat:-

(a) It noted that "choice of seat carries with it the national law under whose auspices the arbitration shall be conducted." Further, arbitration is built on autonomy and the Model Law recognises party autonomy by providing that they are free to agree on the place of arbitration. It cited a

[3] As this was, at least putatively, based on Sanum's selection of the SIAC as the 'internationally recognised arbitration company' to resolve the Dispute.

[4] 6.1- A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.

[5] Article 4 of Model Law: A party who knows that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and ***yet proceeds with the arbitration*** without stating his objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object [emphasis added in judgment].

passage from Gary Born's commentary on the significant legal consequences which results from the choice of seat.

(b) It further noted that in addition to the external relationship with national courts, the law of the seat is also vital in governing significant issues relating to the conduct of an international arbitration and the validity and finality of the award resulting from the proceedings.

(c) It noted two Singapore cases, one that recognised "a Singapore court only has the power to set aside an arbitration award if that arbitration was seated in Singapore,"[6] and the other which held that "an agreement to arbitrate gives rise to a negative obligation not to set aside or otherwise actively attack an arbitral award in jurisdictions other than the seat of the arbitration."[7]

Thirdly, it posed a potential argument and answered it. It might be argued that, the CoA noted, it makes no difference whether an arbitration is seated in one Model Law jurisdiction or another since Article 34 of the Model Law which specifies the grounds of setting aside an award may be the same in both jurisdictions. Rejecting this potential argument, the CoA noted that each jurisdiction may augment or reduce the grounds, and parties may have more or fewer options to rely on in their efforts to set aside an award (for instance, Singapore provided two additional grounds).[8] This is something that the CoA said is of prime importance to the parties and might have played a part in the choice of seat.

Fourthly, the CoA noted the different approach of national courts [citing Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (5th ed., Wolters Kluwer 2016) at p 56].[9] For example, it noted that the English courts have gone further than many others in their recognition of the importance of a choice of seat in an arbitration [citing *A* v. *B* [2007] 1 Lloyd's Rep 237, where held seat is akin to analogous jurisdiction].

Fifthly, it said party autonomy is of central importance to the legitimacy and binding nature of an arbitral award.

Lastly, bearing party autonomy in mind and the legal consequences of different choices of the seat, the CoA held that when parties make a choice as part of their arbitration agreement, courts must give the same full effect. In its view, therefore, "once an arbitration is wrongly seated, in the absence of waiver of the wrong seat, any award that ensues should not be recognised and enforced by other jurisdictions because such award had not been obtained in accordance with the parties' arbitration agreement."

The judgement can be accessed here.

[NOTE: In addition, in this case under Art 36(1)(a)(i) of the Model Law or Art V(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958) 330 UNTS 38 (entered into force 7 June 1959, accession by Singapore 21 August 1986) (the 'New York Convention'), recognition of an arbitration award can be refused when the "agreement is not valid under the law to which the parties have subjected it."]

[6] *PT Garuda Indonesia* v. *Birgen Air* [2002] 1 SLR(R) 401.
[7] *Hilton International Manage (Maldives) Pvt. Ltd.* v *Sun Travels & Tours Pvt. Ltd* [2018] SGHC 56.
[8] Referring to Article 24, International Arbitration Act (Cap 143, 2002 Rev Ed) ("IAA").
[9] Because of differing standards under national law for the annulment of arbitral awards, this can have significant consequences … absent contrary agreement, English courts will subject the arbitrators' decision to a measure of substantive review, while courts in Switzerland, France and UNCITRAL Model Law jurisdictions will not. Similarly, there are some nations where the parties can exclude any local judicial review in certain international arbitrations (e.g., in Belgium, Switzerland and Sweden), while other states permit limiting judicial review.