Dispute Resolution

Application for Declaratory Relief for Arbitral Proceedings Held to be Abuse of Process

Introduction

In *Republic of India v Vedanta Resources plc* [2021] SGCA 50, the Court of Appeal considered whether a party in an arbitration, who puts a question of law to a tribunal in an investment treaty arbitration and receives an answer which it does not like, can put the same question before a Singapore court (as the seat court) by way of an application for declaratory relief?

While the High Court Judge answered the question in the affirmative (albeit deciding against exercising his discretion to grant the declaratory relief), the Court of Appeal answered the same question in the negative. The Court of Appeal found the application to be an abuse of process on several levels, which we examine below.

The respondent was successfully represented by Andre Yeap SC, Kelvin Poon, Matthew Koh, and Alyssa Leong of Rajah & Tann Singapore LLP.

Background

The appellant was the Republic of India ("**India**") and the respondent was Vedanta Resources Plc ("**Vedanta**"), a company incorporated in the United Kingdom. India and Vedanta were parties to a Singapore-seated investment treaty arbitration commenced by Vedanta against India ("**Vedanta Arbitration**").

Another investment treaty arbitration relevant to the present appeal was an arbitration seated in the Netherlands commenced against India ("**Cairn Arbitration**"). The Vedanta Arbitration and the Cairn Arbitration were separate but related arbitrations arising from a set of tax assessment orders issued by India in 2015. As a result of these assessments, both Vedanta and Cairn had commenced separate arbitrations against India under the India-UK bilateral investment treaty ("**India-UK BIT**").

Given the potential overlap and risk of inconsistent findings between the Cairn Arbitration and the Vedanta Arbitration, India had sought to implement a regime to permit cross-disclosure of documents between the two arbitrations.

India had applied to the Vedanta Tribunal to implement the UNCITRAL Transparency Rules. Having considered the parties' submissions, the Vedanta Tribunal rendered its decision on the appropriate cross-disclosure regime in Procedural Order No 3 ("**PO3**"). In developing the cross-disclosure regime,

the Vedanta Tribunal considered three sources of law: (a) the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ("**UNCITRAL Rules**"); (b) the India-UK BIT and public international law; and (c) the law of the seat, i.e., Singapore law.

In relation to the first two sources, the Vedanta Tribunal concluded that there was no general duty of confidentiality imposed, although "there [was] a recognised public interest in investment treaty arbitrations and … an interest in allowing greater transparency of such proceedings".

In relation to Singapore law, the Vedanta Tribunal found that an implied obligation of confidentiality applied in every arbitration governed by Singapore procedural law, subject to several exceptions, including where public interest and the interest of justice required disclosure.

India subsequently applied to disclose certain documents, and the Vedanta Tribunal made procedural orders further to PO3 rejecting these applications (collectively, "**VPOs**").

India thereafter applied to the Singapore High Court in OS 980, seeking the following declarations:

1. a declaration that documents disclosed or generated in the Vedanta Arbitration are not confidential or private; and

2. a declaration that disclosure of documents disclosed or generated in the Vedanta Arbitration by India in the Cairn Arbitration would not be in breach of any obligation of confidentiality or privacy.

At first instance, the Judge had dismissed Vedanta's objection that the application amounted to an abuse of process and a collateral attack on the VPOs. However, the Judge had declined to exercise his discretion to grant the declarations sought by India and therefore dismissed OS 980, resulting in India's appeal. In the course of its arguments, India had offered its undertaking to the Court that it would not bypass the Vedanta Tribunal but would instead only ask the Vedanta Tribunal to reconsider its position on the VPOs ("**the Undertaking**").

Decision of the Court of Appeal

The Court of Appeal dismissed India's appeal.

Relevance of *lex arbitri*

India had argued that the Vedanta Tribunal had no "power to develop the *lex arbitri*", that the authoritative pronouncement of the *lex arbitri* must come from the court, and that the Singapore Court should declare that there is no general duty of confidentiality under Singapore's *lex arbitri* for investment treaty arbitrations.

The Court of Appeal found that there was absolutely no legitimate legal basis to invoke the jurisdiction of the seat court to ask for the declaratory relief by the mere fact that the Vedanta Tribunal's decision pertained to the *lex arbitri*. It agreed with Vedanta that even if the Vedanta Tribunal had erred in finding that confidentiality applied to Singapore-seated investment treaty arbitrations, this was an error of law insufficient to warrant curial intervention. The fact that the error related to the *lex arbitri* made no difference as it is trite that an error of law is insufficient to justify curial intervention.

No basis to seek declaratory relief

The Court of Appeal held that India had no basis to seek the declaratory relief with respect to the VPOs, absent a challenge against an arbitral award based on the grounds provided for in the International Arbitration Act ("**IAA**") and/or the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") – for example, a claim that the tribunal acted in excess of jurisdiction, in breach of natural justice, or contrary to public policy. To put it another way, there was no proper cause or matter that could be supported by OS 980.

In this respect, India had sought to justify curial intervention on this basis:

- Article 5 of the Model Law provided that "[in] matters governed by this Law, no court shall intervene except where so provided in this Law".
- As neither the IAA nor the Model Law made any provision for confidentiality, it was not a matter "governed by this Law" within the meaning of Article 5 of the Model Law, with the result that the Court was not constrained by Article 5 of the Model Law and could grant the declarations sought by India.

India's argument was rejected by the Court of Appeal as the issue of confidentiality was an integral and anterior question which served to guide the determination of the extent to which the Vedanta Tribunal should order cross-disclosure. On the contrary, the Court of Appeal agreed with Vedanta's submission that the declarations sought by India, if granted, would effectively overrule the Vedanta Tribunal's decision in the VPOs.

Abuse of process

The Court of Appeal observed that OS 980 was effectively a backdoor appeal against the VPOs dismissing India's disclosure applications and an attempt to relitigate questions already considered and determined by the Vedanta Tribunal, which gradually morphed into an attempt to seek an advisory opinion from the Court in order to put pressure on the Vedanta Tribunal, and that either way, the purpose of OS 980 was "manifestly improper."

The Court of Appeal went on state that regardless of whether OS 980 was a backdoor appeal or an attempt to extract an abstract ruling to put pressure on the Vedanta Tribunal, the granting of the declarations sought would infringe the principle of minimal curial intervention. Since the Vedanta Tribunal was the master of its own procedure, it would be inappropriate for the Court to intervene in its

decision. Moreover, for the Court to entertain applications such as the present would mean that whenever a party was dissatisfied with a tribunal's decision on a procedural matter which the party claims is not covered by existing case law, it could invite the Court to rule on the procedural matter in order for such a ruling to be used as a tool to persuade the tribunal to reconsider its decision. This would be a violation of the principle of minimal curial intervention at the highest level.

Nor could the Undertaking (that the declarations would only be used to ask the Vedanta Tribunal to reconsider its decision) minimise the anticipated judicial interference. In contrast, the giving of the Undertaking was particularly criticised as the Court found its existence was "the clearest indication that the granting of the declarations would amount to unwarranted judicial interference in the arbitral process".

The above analysis revealed that the application in OS 980, and the present appeal by extension, were ultimately an abuse of the process of the court on several levels. In the first place, there was no legitimate basis for India to invoke the Court's jurisdiction. Furthermore, the application was in substance an attempt to obtain an abstract ruling of law from the Court in order to place pressure on the Vedanta Tribunal, as well as a backdoor appeal against the VPOs, which made the purpose of the application improper. The Court dismissed the appeal accordingly.

Concluding Words

The decision illustrates how strongly the principle of minimal curial intervention is upheld under Singapore law, reinforcing parties' assurance that once they choose to resolve their dispute through arbitration, they will not find the arbitral process easily sidelined by curial intervention. The Court of Appeal emphasised that the appellant had been unable to bring itself within any of the avenues of recourse provided for in the IAA and/or Model Law, and thus there was no legitimate basis for the Court to intervene.

It is also worth highlighting that, despite the appellant's attempt to minimise the significance of the declaratory relief by way of the Undertaking, the Court of Appeal refused to sanction the giving of the Undertaking as a means of justifying the grant of the declarations as a "persuasive tool". This indicates that the Court takes a broad view of what constitutes curial intervention.

For queries on the decision or on arbitration in general, please feel free to approach the team below.

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