Cut, Paste, and Overruled! SICC Voids Retired Indian Judge's Award for Arbitrator I?m?Partiality

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Recently, the Singapore International Commercial Court ("**SICC**") in *DJO v. DJP & Others* set aside an award authored by retired Indian judges that it deemed to have copied and pasted portions of another arbitral award. The SICC reasoned its decision on the basis that the copy and pasting reflected the arbitrators' partiality and their being influenced by arguments extraneous to the arbitration at hand. This article unravels the rationale for the SICC's judgement in this peculiar case and explores its implications on international commercial arbitration for seat courts across jurisdictions worldwide.

Brief Facts

The Claimant, DJO, was the Respondent in the Arbitration. The Defendants / Claimants in the Arbitration are a consortium of two Indian companies and one Japanese company ("**Consortium X**"), formed to tender for a contract with DJO relating to the Western Dedicated Freight Corridors. DJO and Consortium X entered a contract in August 2017, incorporating the International Federation of Consulting Engineers Conditions of Contract and providing for disputes to be resolved by arbitration seated in Singapore, in accordance with the ICC Arbitration Rules 2021 ("**ICC Rules**"). The substantive contract was to be governed by Indian law.

In January 2017, the Indian Ministry of Labour issued a Notification increasing the minimum wages payable to workmen. More than three years later, in March

2020, Consortium X sought an adjustment for additional labour costs due to the Notification. After the processes set out in the contract were unsuccessfully exhausted and attempts at an amicable settlement and a claim before the Dispute Adjudication Board were unsuccessful, arbitration commenced between Consortium X and DJO ("**the Arbitration**"). The three-member arbitral tribunal constituted of three eminent retired Indian judges ("**the Tribunal**"). Judges A and B were nominated by each party. Judge C was nominated by Judges A and B and approved by the ICC.

Simultaneously, two other arbitrations took place relating to the effect of the Notification on contracts relating to the Eastern Dedicated Freight Corridor. Judge C was appointed as arbitrator in these other arbitrations as well. The hearings in these arbitrations had substantially concluded before the hearings began in the Arbitration between DJO and Consortium X. Crucially, while the Arbitration was seated in Singapore and conducted according to the ICC Rules, the other two arbitrations were seated in India and conducted in accordance with the rules of arbitration of the International Centre for Alternative Dispute Resolution, New Delhi. Accordingly, the *lex arbitri* for the two other arbitrations was the Indian Arbitration & Conciliation Act, 1996.

Arbitrator Bias and Copied Portions of Arbitral Awards

DJO submitted that 278 out of 451 paragraphs of the final award passed in the Arbitration ("**the Award**") were substantially reproduced from an award in one of the two other arbitrations. Consortium X accepted that 212 paragraphs of the Award were taken, but disagreed with the degree of reproduction. The SICC viewed it unnecessary to resolve the dispute as to which paragraphs were copied– the parties' agreement on this point was enough to show that Judge C heavily relied upon, and applied, his knowledge of the other two arbitrations in the present Arbitration.

The SICC noted several problems in the Award passed in the Arbitration *vis-à-vis* that passed in the two other arbitrations. The Tribunal referred to submissions from the other arbitrations in the Award, which were never made by the parties to the Arbitration. The Tribunal attributed arguments which were never raised by the parties to them, including relying upon authorities which were never drawn to the Tribunal's attention. The Tribunal also failed to appreciate the difference in the wording with the contracts in the other arbitrations and DJO/Consortium X's contract, referring to provisions which were not found in the contract between DJO and Consortium X. To the SICC, this clearly demonstration that the Tribunal drew upon the submissions made in the other arbitrations, rather than deciding solely based on that made in the Arbitration.

Applicable Legal Principles

Based on parties' submissions, the SICC considered the plausibility of setting aside the impugned Award based on three provisions. *First*, Article 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**") was considered, which allows for an arbitral award to be set aside due to non-compliance with the parties' agreed upon arbitral procedure. *Second*, Article 34(2)(b)(ii) of the Model Law was considered, as it allows for an award to be set aside upon contravention of the public policy of Singapore. *Third*, the SICC considered whether Section 24(b) of Singapore's International Arbitration Act, 1994 ("**IAA**") was attracted, as it allows an award to be set aside due to a breach of principles of natural justice that prejudices parties' rights.

The SICC also recalled legal principles applicable to the parties' chosen arbitral procedure, i.e. the ICC Rules. For example, Article 11 of the Rules provides for the impartiality and independence of the arbitrators and towards all the parties involved in the arbitration. Article 22 deals with the conduct of arbitration and casts duties upon the arbitral tribunal to, *inter alia*, conduct the arbitration in an expeditious manner with due cognizance to the dispute's complexity (Article 22(1)) and act fairly and impartially, hearing each party's case (Article 22(4)).

The SICC also referred to Section III of the ICC's 2021 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration ("**the Note**"), which deals with arbitrators' impartiality and independence. Specifically, Paragraph 27 of the Note enunciates the requirement for arbitrators to consider relevant circumstances, including if they acted in a case involving one of the parties or their affiliates, or acted as an arbitrator in a related case.

Holding on Legal Principles

First, the SICC clarified that the Tribunal's application of the incorrect *lex arbitri* to determine interests and costs was insufficient to set aside the Award. The Award referred to Sections 31(7) and 31A of the Indian Arbitration & Conciliation Act 1996, rather than any reference to Singaporean law. Yet, the SICC noted that its doubt on the Tribunal's independence of thought was caused not by its error of law (which is irrelevant to a setting aside application), but its reliance on the reasoning of the other awards.

Second, DJO contended that the Award should be set aside on account of non-compliance with the agreed arbitral procedure under Article 34(2)(a)(iv) of the Model Law. It was contended that Article 32(2) of the ICC Rules provide that the Tribunal should give the reasons for its decision in an award, and the Tribunal in the present case had not done that by virtue of their copy-and-pasting. The SICC considered it unnecessary to consider these submissions, as the argument in effect concerned the Tribunal's failure to independently and impartially consider the arguments in the Arbitration, which relates to the field of natural justice.

Third, the SICC considered whether the principles of natural justice had been violated. It reiterated the intrinsic nature of such principles (including the right to a fair hearing and the rule against bias) in the appointment of arbitrators under Articles 11 and 22 of the ICC Rules. Recalling a slew of judgments, it also

acknowledged the high threshold and exceptional nature of application of principles of natural justice. DJO made 4 submissions in this regard. First, that the rule against bias precludes an arbitrator from pre-judging a case, and the use of knowledge obtained from unrelated arbitration proceedings constitutes impermissible pre-judging. A necessary antecedent question was whether the Tribunal *applied its mind to the issues in an independent, impartial and fair manner?* The Court referred to *CNQ v. CNR*, where the High Court stated that the test is whether a reasonable observer, upon due consideration of the relevant facts, suspects that the decision maker reached a conclusion even before the parties' submissions. In DJO's case, the test of a hypothetical fair-minded, reasonable person inevitably yielded the apprehension of pre-judgement. The Award attributed submissions made in an earlier arbitration to the counsels in the present case, indubitably striking at the mantle of an impartial, independent mind. Thus, the Court inferred a very real apprehension of bias, meeting the threshold for violation of principles of natural justice. Second, DJO argued they had not been granted a fair hearing or a fair, independent, and impartial decision. The SICC responded that when a tribunal draws heavily from submissions from a previous case and fails to provide the parties with an opportunity to address them, a fair hearing is not granted. DJO's third and fourth grounds concerned the right to a fair hearing. As sub-sets of the second ground, the Court found no need to address them separately.

Ultimately, it concluded that the Award was liable to be set aside due to the breach of natural justice. However, it acknowledged that the mere fact of copying is insufficient to vitiate an arbitral award. Here, it was set aside because the reproduction was not with a view to hide the origin of the copied work but was merely to minimize the work of the Tribunal in writing the award, which ultimately violated the principles of natural justice.

Fourth, DJO alleged the Award contravened the public policy of Singapore (Article 34(2)(b)(ii) of the Model Law). The SICC acknowledged the exceptional nature of the public policy ground for setting aside arbitral awards, and the high threshold established by previous jurisprudence. It stated that since the finding on the contravention of principles of natural justice could set aside the arbitral award,

this would render a public policy assessment unnecessary. However, the Court rejected the blanket assertion that all forms of plagiarism would fundamentally be contrary to public policy.

Implications

By considering the Model Law and ICC Rules, the SICC's judgment has the potential to shape the interpretation of seat courts' powers across the globe. In this regard, the judgment has several favourable implications.

For instance, the judgement crucially maintains the high threshold that has and ought to characterize the public policy ground of setting aside arbitral awards. While most jurisdictions allow for arbitral awards to be set aside upon contravention of public policy, an overly broad scope of application could grant Courts a *carte blanche* to disregard foreign-seated arbitral awards unfavourable to a local party. The reiteration of the exceptional nature of the public policy ground for setting aside arbitral awards is paramount in this regard.

Further, the SICC clearly laid down which nature of copying is prohibited, rather than universally disallowing it in any form. It held that a degree of dishonest intention and concealment is intrinsic to the phrase "plagiarism", whereas in the case at hand, the copy-and-pasting was merely to minimise the Tribunal's work, rather than to conceal work's origin; the Tribunal may have considered this to be fit owing to the conspicuous similarity in legal questions. It rightly noted that merely copying cannot render an arbitral award liable to be set aside. Rather, in the case at hand, the award was set aside as its anomalies that reflected a violation of the principles of natural justice. This differentiation is particularly relevant, since Courts worldwide often reproduce paragraphs of judgements and scholarly work which recall the jurisprudence on a subject, albeit with due attribution to the sources. In any case, reproduction made in good faith, to expedite proceedings on identical matters, ought not to be prohibited in all forms.

The SICC rightfully assessed the copy-and-pasting on its impacts on the parties rather than laying down a universal rule.

The SICC also reinforced the principle of minimal curial intervention in arbitral awards. At one juncture, for example, it acknowledged that a crucial factual difference across the arbitrations was the length of the delay between the Notification and the time when Consortium X raised the issue of adjustment in the main Arbitration. DJO contended that the Tribunal's failure to focus on this factual peculiarity itself undermined the Award's validity. However, the SICC deemed this claim unnecessary to rule upon, insofar as deciding it would entail reviewing the substantive merits of the Tribunal's findings, thereby exceeding the jurisdiction of a seat court. The SICC's restraint in not re-entering the substantive merits of the dispute even while recognising an error regarding the same demonstrates a solid commitment to upholding the finality of arbitral awards, improving the certainty and efficacy of this mode of dispute resolution. By choosing to base its analysis on the principles of natural justice instead of the Tribunal's application of the incorrect *lex arbitri* or its finding on facts, the SICC has strengthened established principles regarding the limited role of seat courts in an arbitral award. This has positive implications for international commercial arbitration, which benefits from party autonomy and respecting private arbitral tribunals' findings while limiting deference to domestic judicial systems.

That said, the Court's method of clubbing certain issues together may lead to uncertainty regarding its precedential value for other jurisdictions following the Model Law.

First, the Court's non-consideration of the alleged public policy aspects of the breach of principles of natural justice has undesirable implications. It is true that Section 24(b) of the IAA explicitly provides natural justice as a ground to set aside an arbitral award, and thus there was no need to rely on any other provision to set aside the present Award. However, this judgment is a missed opportunity to acknowledge the nexus between the principles of natural justice and public policy under the Model Law itself. Although the public policy ground has a high

threshold, the judgment's superficial engagement with the threshold by itself and the absence of delineating its scope makes its precedential value for other Model Law jurisdictions unclear. More prominently, by not discussing whether "public policy" under the Model Law encompasses natural justice, the ground could be rendered an inoperable remedy.

Second, the Court's refusal to consider DJO's argument that the Award be set aside due to non-compliance with the agreed-upon arbitral procedure means that there is now little clarity on whether copied arbitral awards violate the ICC Rules of Arbitration, specifically, Article 32(2). There is also little clarity on whether a tribunal copying and pasting portions of an award such would violate Article 34(2)(a)(iv) of the Model Law, under which this argument was brought. This has repercussions for non-Singaporean seated arbitrations that choose to be governed by the ICC Rules, as well as other jurisdictions following the Model Law.

It is interesting to note, however, that the SICC did cite the ICC Rules' provisions on arbitrator bias and impartiality at the beginning of its judgment (as aforementioned). This could mean that the SICC intended to suggest copying portions of another award violates the ICC Rules insofar as it reflects a pre-existing prejudice on the arbitrators' part. However, in the absence of an explicit finding to the same it is difficult to draw this implication, especially considering that a violation of these Rules was not the reason why the Award was ultimately set aside.

Conclusion

While the SICC's judgement does strengthen key tenets of the role of seat courts international commercial arbitration, its complete implications for other Model Law jurisdictions remain unclear. As arbitration grows more popular as a dispute resolution mechanism for complex transnational commercial disputes, high degrees of similarity between ongoing arbitrations involving common arbitrators

is to be expected, and copied arbitral awards may not be the only issue to face seat courts going forward. That being said, despite the seemingly egregious nature of reproduction in the case at hand, the SICC carefully treaded the line between criticism of the Award and the risk of a blanket prohibition of copying portions of arbitral awards. Thus, from the observations on the powers of the seat court, the principles of natural justice, and procedural impropriety, the SICC's judgment is a landmark decision in navigating these challenges in the future.