THE ROLE OF NATIONAL COURTS IN INTERNATIONAL ARBITRATION

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International arbitration has long been the preferred method of resolving cross-border disputes. While parties to an arbitration agreement made a conscious decision to exclude court jurisdiction, the role of the national courts in supporting the international arbitration process is critical. Through a discussion of recent investment treaty arbitration cases, this article explores the ways in which courts support the international arbitration process, with a focus on the courts' power to review tribunals' findings on jurisdiction, both positive and negative. It reveals how impactful the choice of the seat of arbitration is as determinative of the law that courts must apply to the arbitration procedure.

I INTRODUCTION

While I was working at the Permanent Court of Arbitration in The Hague in 2013, I served as Tribunal secretary to an international arbitral tribunal in a very interesting case, which is public: *Sanum Investments Ltd v Laos*.[1] It involved a claimant (Sanum Ltd) incorporated in Macao, which, along with Hong Kong, is one of the two special administrative regions of the People's Republic of China. Macao was returned to China by Portugal in 1999 just as Hong Kong was returned to the People's Republic of China by Britain in 1997.

Sanum Ltd had invested in casinos and hotels in Laos. It alleged that the Laotian government had deprived it of the benefits of its investment through discriminatory taxes. It commenced an international arbitration in 2012 against the Laotian government under a bilateral investment treaty

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1 For publicly available documents related to the case, see italaw "Sanum Investments Limited v Lao People's Democratic Republic, UNCITRAL, PCA Case No 2013-13" (14 April 2024) <www.italaw.com>.

concluded between the People's Republic of China and Laos in 1993 (PRC–Laos Treaty),[2] and, notably, not under a treaty concluded between Macao and Laos.[3] The PRC–Laos Treaty provided that disputes "involving the amount of compensation for expropriation" could be settled by international arbitration.[4]

Laos raised several objections to the Tribunal's jurisdiction. For the purposes of this article, I will focus on the following two: first, that the PRC–Laos Treaty did not apply to Macao and therefore did not protect Macanese investors; and second, that the claim was not arbitrable because it was not a "dispute involving the amount of compensation for expropriation": rather it was a dispute over whether an expropriation had occurred at all.[5]

The Tribunal that decided the matter in an Award on Jurisdiction dated 13 December 2013 (Award on Jurisdiction) was composed of three highly experienced international arbitrators and international law experts.[6] They had to determine whether the PRC–Laos Treaty extended to Macao. Under the customary international law rule of moving treaty frontiers (enshrined in art 29 of the Vienna Convention on the Law of Treaties), when a state acquires new territory, its treaty regime

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2 Agreement between the Government of the People's Republic of China and the Government of the Lao People's Democratic Republic Concerning the Encouragement and Reciprocal Protection of Investments 1849 UNTS 128 (signed 31 January 1993, entered into force 1 June 1993) [PRC–Laos Treaty].

3 Pursuant to art 136 of the Basic Law of the Macao Special Administrative Region of the People's Republic of China, Macao may conclude bilateral investment agreements with interested countries. Laos and Macao have never concluded an agreement with investment protection provisions. See UN Trade & Development "International Investment Agreements Navigator: Lao People's Democratic Republic" <www.investmentpolicy.unctad.org> for a list of international investment agreements entered into by Laos.

4 PRC–Laos Treaty, above n 2, art 8(3). The full text is:

> If a dispute involving the amount of compensation for expropriation cannot be settled through negotiation within six months as specified in paragraph 1 of this Article, it may be submitted at the request of either party to an ad hoc arbitral tribunal. The provisions of this paragraph shall not apply if the investor concerned has resorted to the procedure specified in the paragraph 2 of this Article." Paragraph 2 of art 8 refers to submission of the dispute to "the competent court of the Contracting State accepting the investment.

5 See *Sanum Investments Ltd v Government of the Lao People's Democratic Republic (Award on Jurisdiction)* PCA 2013-13, 13 December 2013 at [51]–[79] and [144]–[156].

6 Dr Andrés Rigo Sureda (Presiding Arbitrator), and Professors Bernard Hanotiau and Brigitte Stern (co-arbitrators). Professor Stern was an internationally recognised authority on the law on state succession, having delivered the course *La succession d'Etats* (*State Succession*) at the Hague Academy of International law and subsequently published her work in 2000.

automatically applies to the new territory.[7] That would be the default position unless a different intention appeared from the treaty or was otherwise established.

The case involved complex issues of international law. The Tribunal reached its decision after much briefing, hearing and deliberation.[8] It determined that it had jurisdiction, finding that according to the default customary rule of international law and the facts, the PRC–Laos Treaty extended to Macao,[9] and that Laos had consented to arbitrate claims of expropriation (and not just claims in respect of the amount of compensation for expropriation).[10]

Shortly after the Tribunal issued its Award on Jurisdiction, Laos applied to have it set aside at the courts of the seat of the arbitration, Singapore. Under the International Arbitration Act 1994 (SG), if an arbitral tribunal rules as a preliminary finding that it has jurisdiction, any party may apply to the High Court of Singapore to decide the matter.[11] Accordingly, a judge of the Singapore High Court, sitting alone, decided the matter. He set aside the Award on Jurisdiction.[12] The judge found that on the basis of the facts that were before the Tribunal, the PRC–Laos Treaty did not apply to Macao.[13] In light of this finding, he acknowledged that it was not necessary for him to determine the second jurisdictional issue but he set out his brief views on it nonetheless.[14] He concluded that the text of the Treaty should be given a restrictive meaning and that the Tribunal had no jurisdiction over Sanum Ltd's expropriation claims.[15]

One might ask, how can it be that a national court judge can set aside the jurisdictional findings of an international arbitral tribunal composed of international law experts on complex issues of pure international law? Should the court not have shown some deference?

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7 Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980), art 29 provides: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory."

8 See *Award on Jurisdiction*, above n 5, at [3]–[17] for the procedural history of the case.

9 See [232]–[300] for the Tribunal's analysis on this point.

10 See [322]–[342] for the Tribunal's analysis on this point.

11 Section 10(3)(a) of the International Arbitration Act 1994 (SG) provides that: "If the arbitral tribunal rules … on a plea as a preliminary question that it has jurisdiction … any party may, within 30 days after having received notice of that ruling, apply to the General Division of the High Court to decide the matter."

12 *Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15 [High Court judgment].

13 At [110]–[111].

14 At [112].

15 At [121].

This case brings to the fore the role of the national courts in the international arbitration process in reviewing arbitral tribunals' jurisdictional decisions, and particularly in the international investment arbitration context where such decisions are matters of treaty interpretation under international law for which, arguably, international arbitration tribunals comprised of international law experts are better qualified to have the final word.

The judgment of the Singapore High Court was not the end of the *Sanum Ltd v Laos* case, to which we will return. But before proceeding, it is important first to review some of the fundamental aspects of the international arbitration process and the functions of national courts in support of that process, before focusing specifically on the courts' power to review jurisdictional findings of arbitral tribunals, both positive and negative.

II WHAT IS INTERNATIONAL ARBITRATION?

International arbitration is a process by which disputing parties (which can include individuals, private entities, public entities and sovereign states) agree to submit their dispute to an arbitral tribunal, which the parties have typically played a role in constituting, for final determination according to the law chosen by the parties. The result of the process is a binding award that a party may be compelled to comply with by law. Once a party has agreed to arbitrate, it cannot unilaterally withdraw that agreement.

Most international arbitrations are international commercial arbitrations in the sense that they arise out of commercial contracts between parties from different jurisdictions. Investment treaty arbitration concerns disputes between investors and states arising under international investment treaties.

At the heart of the international arbitration process is the parties' arbitration agreement which will typically be included in the parties' contract. The arbitration agreement will stipulate that the parties agree to finally settle their dispute by arbitration. By doing so, they forfeit the right to submit their dispute to a domestic court. The parties will also usually agree in their arbitration agreement on the seat of arbitration, the governing law of the dispute, the number of arbitrators, any languages that will apply in the process, and often that the arbitration will be administered by an arbitral institution.

In the context of investment treaty arbitration, the agreement to arbitrate is found in the investment treaty concluded between two contracting states in the form of a standing offer by the contracting states to arbitrate disputes with investors of the other state. When an investor commences an arbitration under the treaty, it accepts the state's standing offer and the arbitration agreement is complete.

There are many arbitral institutions in the world, approximately 50 of which are accounted for in the most significant arbitration survey, published every three years by the Queen Mary University of

London.[16] Of these 50 institutions, at least four have been considered market leaders in international commercial arbitration for at least a decade; namely, the International Court of Arbitration of the International Chamber of Commerce headquartered in Paris (ICC), the London Court of International Arbitration (LCIA), the Hong Kong International Arbitration Centre (HKIAC) and the Singapore International Arbitration Centre (SIAC). There are two other centres that lead in relation to investment treaty arbitrations; namely, the International Centre for the Settlement of Investment Disputes (ICSID) based in Washington DC, and the Permanent Court of Arbitration (PCA) headquartered in The Hague. Every year, most of these institutions receive several hundreds of new cases and have cumulative ongoing caseloads well above that.

The international arbitration process holds great appeal for international business. This is primarily because it is possible to enforce an arbitral award in most jurisdictions in the world by virtue of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This makes it far easier to enforce an arbitral award overseas than it is to enforce a national court judgment. The New York Convention is now signed by 172 states and is implemented by national arbitration legislation in most developed jurisdictions.[17]

The New York Convention does two critical things. First, it provides that contracting states shall recognise arbitration agreements.[18] When a court is seized of an action in a matter in respect of which the parties have an arbitration agreement, the court is obliged to refer the parties to arbitration unless it finds that there is no valid arbitration agreement. In most jurisdictions, if the court is prima facie satisfied that an arbitration agreement exists, it will send the parties to arbitration and not take the matter forward themselves. Second, it provides that courts shall enforce arbitral awards unless one of a limited number of grounds for refusing enforcement is made out.[19] In Hong Kong, which has had a long jurisprudential history of firm support for the arbitration process, the approach to enforcement of awards was confirmed by Mimmie Chan J in the 2015 High Court judgment in *KB v S*:[20]

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16 See Queen Mary University of London School of International Arbitration *2021 International Arbitration Survey: Adapting arbitration to a changing world* (8 May 2021) for the previous survey.

17 United Nations Commission on International Trade Law " Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards" <www.uncitral.un.org>.

18 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 330 UNTS 3 (opened for signature 10 June 1958, entered into force 7 June 1959), art II(1) provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

19 Article V(1)(a)–(e) and (2)(a)–(b).

20 *KB v S* [2016] 2 HKC 325 (CFI) at [1]–[2], citing *Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604 (CA); *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD

(a) The approach to the enforcement of arbitral awards should be "as mechanistic as possible" and should be "almost a matter of administrative procedure".
(b) The courts shall not look into the merits of the dispute.
(c) The courts will only refuse enforcement where there is a real risk of prejudice or a material violation of a party's rights.
(d) Even if grounds are made out to refuse enforcement, the court has a discretion nevertheless to enforce the award.

In international arbitration, one measure of a reliable arbitral jurisdiction is that the courts are slow to refuse enforcement of foreign arbitral awards or to set them aside. Court practice is in this regard closely watched.

As already mentioned, an important element of the parties' arbitration agreement is the seat of the arbitration. This is a juridical concept rather than a physical one. If the seat of arbitration is London, that does not mean that the hearings must be in London, although they may well be. It means that the Arbitration Act 1996 (UK) governs the arbitral procedure, the English courts are the supervisory courts responsible for implementing the Arbitration Act in respect of the arbitration and England will be the origin of any award for the purposes of enforcement as a foreign arbitral award under the New York Convention.

Many bilateral investment treaties provide for arbitration under the UNCITRAL Arbitration Rules, a set of procedural rules upon which parties may agree for use in ad hoc arbitrations as well as administered arbitrations.[21] In such case, the proceedings will be governed by the national law at the seat of arbitration. This was the case in the *Sanum Ltd v Laos* arbitration. In such treaty cases, the supervisory role of the courts engages in much the same manner as an international commercial arbitration. Awards will be enforceable under the New York Convention and applications to set aside the award are determined by the courts at the seat of arbitration. All the investment treaty cases referred to in this article are such cases, and thus implicate the supervisory powers of the national courts at the seat.

The arbitration laws of the most sophisticated jurisdictions are based on or owe much to the arbitration model law promulgated by the United Nations Commission on International Trade Law (UNCITRAL) (Model Law),[22] New Zealand included. The Model Law is template arbitration

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1 (CA); *Xiamen Xingjingdi Group Ltd v Eton Properties Ltd* [2009] 4 HKLRD 353 (CA); and *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

21 See United Nations Commission on International Trade Law *UNCITRAL Arbitration Rules* (2021).

22 United Nations Commission on International Trade Law *UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006* (2008) [Model Law].

legislation available to the world at large for adoption and adaption. It reflects international consensus around best arbitration law.

How might an ideal international arbitration process play out? Imagine a New Zealand company exporting wine to a mainland Chinese company. The parties, not wanting to find themselves before either of their respective courts in a dispute, have concluded an arbitration agreement providing for HKIAC arbitration seated in Hong Kong before a sole arbitrator. During the lifetime of the contract, the mainland Chinese party fails to pay some of its bills due to cashflow problems related to the pandemic. The New Zealand company commences arbitration. The HKIAC appoints a sole arbitrator. The arbitration is conducted under an expedited proceeding under the HKIAC arbitration rules, resulting in a final award within six months finding that the mainland Chinese party is liable to pay approximately 70 per cent of the damages sought by the claimant under the contract. The mainland Chinese party is keen to continue doing business with the New Zealand company (and vice versa). It complies with the award and the parties go back to doing business.

Nowhere in that example is there mention of national courts. According to the Model Law, the starting position is one of court non-intervention: "[i]n matters governed by this Law, no court shall intervene except where so provided in this Law".[23] Ideally in international arbitration, one never needs court intervention. The ideal amount is thus as little as possible or only as much as necessary. This recognises the fact that by opting for arbitration, the parties have made a conscious choice to exclude court jurisdiction.

But the truth is that the process only functions because of the possibility – whether that is a threat or a promise – of court intervention. As put by Lord Mustill in 2002, "arbitration cannot flourish unless [judges] are ready and waiting at the door, if only rarely allowed into the room".[24]

III THE ROLE OF THE NATIONAL COURTS IN INTERNATIONAL ARBITRATION

So, when are judges allowed into the room? What role do the national courts play in the international arbitration process?

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23 Article 5. The Model Law adopts two important principles: that of *Kompetenz-kompetenz* and the separability of the arbitration agreement. Under the doctrine of *Kompetenz-kompetenz*, the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

24 David AR Williams and Amokura Kawharu *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, Wellington, 2017) at 71, citing the foreword to OP Malhotra *The Law and Practice of Arbitration and Conciliation* (LexisNexis, New Delhi, 2002).

The roles bestowed on the courts by the Model Law can be divided into two groups. First, there are those roles that are purely supportive of the process. They include:

(a) The appointment, challenge, and termination of the tribunal's mandate. Most of these functions are delegated by the parties to an arbitral institution. It is only in rare cases that a court has to appoint an arbitrator because one party has failed to do so, or decide a challenge to an arbitrator for a lack of independence and impartiality.
(b) Recognising/enforcing and issuing interim relief in support of international arbitration. This can take many forms, whether it be freezing assets, issuing an order to preserve evidence or issuing an antisuit injunction because a party has commenced court proceedings elsewhere in breach of the arbitration agreement.
(c) The taking of evidence. The tribunal has a mandate only over the parties before it. Accordingly, sometimes court assistance is needed to obtain evidence from a third party, whether that be in the form of documents or witness testimony. All of these functions serve to facilitate the process.

Second, there is the court's fundamental supervisory role, as manifested by the following three functions:

(1) As in *Sanum Ltd*, where a tribunal is asked to review the jurisdictional finding of a tribunal after a preliminary ruling on jurisdiction, early on in the arbitration process.
(2) At the end of the arbitration, the courts may be petitioned to set aside the tribunal's award under limited grounds.[25] Those limited grounds include that there is no valid arbitration agreement or the tribunal decided a matter outside of the scope of the parties' agreement.
(3) A party can request that a court refuse to recognise and/or enforce a tribunal's award under limited grounds[26] that mirror the grounds for setting aside and are derived from the New York Convention.[27]

These are the functions of the national courts in support of the international arbitration process and there is no shortage of complexities for every single one of them. As Sir Ivor said in a speech he

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25 See Model Law, above n 22, at art 34.

26 Art 35.

27 At 35:

> Grounds which are to be proven by one party are as follows: lack of capacity of the parties to conclude an arbitration agreement; lack of a valid arbitration agreement; lack of notice of appointment of an arbitrator or of the arbitral proceedings or inability of a party to present its case; the award deals with matters not covered by the submission to arbitration; the composition of the arbitral tribunal or the conduct of arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, to the Model Law. Grounds that a court may consider of its own initiative are as follows: non-arbitrability of the subject-matter of the dispute or violation of public policy (which is to be understood as serious departures from fundamental notions of procedural justice).

gave on judges as lawmakers in 1985: "With such a wide subject matter there is a need to make arbitrary choices".[28] I shall do the same in this article by focusing on the courts' power to review an arbitral tribunal's preliminary findings on jurisdiction or set aside an award for lack of jurisdiction. These are the high-stakes functions of the courts that can bring an end to the arbitration altogether. This is why I have chosen them.

What is the standard of review that the courts must apply when reviewing jurisdictional findings and what level of deference, if any, should they give to the findings of an international arbitral tribunal?

Let us return to the *Sanum Ltd v Laos* case. Sanum Ltd argued before the Singapore High Court that the issues were not justiciable as they only concerned questions of pure international law in respect of a treaty to which Singapore was not a contracting party.[29] The judge rejected this. He found that the case also involved the application of Singaporean law, namely the right of a respondent or a party in the arbitration, in this case Laos, to have the tribunal's ruling on jurisdiction reviewed by the court under the Singaporean International Arbitration Act.[30]

An alternative argument was raised by Sanum Ltd that even if the issue was justiciable, the standard of review was a limited one of deference and respect for the tribunal.[31] The judge disagreed, noting that the standard of review under the Model Law is generally regarded as de novo, entailing a fresh examination of the issues.[32]

Sanum Ltd also argued that the qualifications and expertise of the arbitral tribunal counselled against the adoption by the court of anything other than a limited review of the tribunal's positive jurisdictional finding.[33] The judge held that while he did not doubt the eminence or expertise of the tribunal, this did not mean that a limited standard of review was appropriate.[34] Otherwise, it would mean that there would be a varying standard of review in every application depending on the relative expertise and qualifications of the judge compared to the arbitral tribunal members.[35]

On all of this, the judge must have been right. When it comes to a review of a tribunal's finding on the existence of a valid arbitration agreement, there cannot be any deference to the tribunal's findings. It has to be a de novo review, both legally and factually, because without a valid arbitration

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28 ILM Richardson "Judges as Lawmakers in the 1990s" (1986) 12 Mon LR 35 at 35.

29 High Court judgment, above n 12, at [18(a)].

30 At [24]–[36].

31 At [31].

32 At [32].

33 At [34].

34 At [35].

35 At [35].

agreement, there can be no arbitral tribunal. Therefore, the tribunal cannot be the final determiner of its own jurisdiction. It has to be the court. Otherwise, the tribunal would be pulling itself up by its bootstraps.[36]

Also, while it is tempting to think that respect for the authority and expertise of the arbitral tribunal should manifest in deference to their jurisdictional determinations, this also cannot be right. This is for the reasons given by the judge in that it would be an unprincipled exercise of comparing curricula vitae. But it is also because the existence of a valid arbitration agreement is a question of law and fact. The arbitrators' expertise or eminence is not part of that inquiry. In reality, of course, courts will often follow the jurisdictional determinations of eminent arbitral tribunals. But this should not be understood necessarily as a gesture of deference, but rather as a reflection of the fact that eminent tribunals are likely to produce correct or at least highly persuasive decisions. One might expect eminence and correctness to be positively correlated (subject always to the reality that reasonable minds, indeed brilliant minds, may differ).

Sanum Ltd appealed to the Singapore Court of Appeal. In a judgment dated 29 September 2016, a bench of five, led by the Chief Justice, reversed the findings of the High Court.[37] The Court of Appeal found that the PRC–Laos Treaty did extend to Macao and that Sanum Ltd's expropriation claims were covered by the Treaty.[38] The High Court judgment was overturned, and the Award on Jurisdiction was reinstated.

On the question of whether the Singapore court could properly pronounce on the interpretation and application of the PRC–Laos treaty, the Court of Appeal stated that not only were the courts competent to decide these issues, they were obliged to do so given their role as the supervisory

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36 Dennis Solomon "Deference from National Courts to Tribunals on Issues of Jurisdiction at the Post-award Stage" in Franco Ferrari and Friedrich Jakob Rosenfeld (eds) *Deference in International Commercial Arbitration: The Shared System of Control in International Commercial Arbitration* (Kluwer Law International, The Netherlands, 2023) 93 at 93 at 98. See also Amokura Kawharu "Rehearings of Jurisdiction Issues: A fresh look at the judicial task" (2016) 32 Arb Intl 687; Iris Ng and others "Five Recurring Problems in International Arbitration: The Relationship Between Courts and Arbitral Tribunals" (2020) 8 Indian Journal of Arbitration Law 19; Relja Radović "Arbitral Jurisdictional Regulation in Investment Treaty Arbitration and Domestic Courts" (2021) 12 JIDS 203; and Tolu Obamuroh "Fixing the Bough to Preserve the Cradle: A Call for More Clarity and Uniformity in Enforcement Courts' Review of Arbitral Tribunals' Jurisdictional Determinations" in Julie Bédard and Patrick W Pearsall (eds) *Reflections on International Arbitration: Essays in Honour of Professor George Bermann* (Juris, New York, 2022) 671.

37 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57.

38 At [152].

courts.[39] The Court also confirmed that a de novo review was required and there was no basis for deference to be accorded to the Tribunal's findings. It said:[40]

> … the court should consider the matter afresh. In doing this, it will of course consider what the Tribunal has said because this might well be persuasive. But beyond this, the court is not bound to accept or take into account the arbitral tribunal's findings on the matter.
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> [T]his "does not mean that all that transpired before the Tribunal should be disregarded, necessitating a full re-hearing of all the evidence … it simply means that the court is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities".

What about negative findings of jurisdiction, where a tribunal concludes that it does not have jurisdiction? The Model Law does not, on the face of it, provide for court review of negative jurisdictional findings.[41] At the time of the drafting of the Model Law, whether to include court review of negative findings of jurisdiction was considered but rejected; it was thought inappropriate to compel a tribunal to continue with an arbitration over which the tribunal had determined it had no jurisdiction.[42]

In multiple important jurisdictions around the world, both "Model Law" and "non-Model Law", the legislation departs from the Model Law approach and provides for the review of negative jurisdictional findings by tribunals. Such jurisdictions include Belgium, Canada, England and Wales, France, India, Italy, New Zealand, Northern Ireland, Scotland, Singapore, Sweden, Switzerland and the United States.

But despite what appears to be growing momentum in this direction, the question is not settled across all jurisdictions.[43] There are still important jurisdictions that maintain that there is no court

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39 At [38].

40 At [41] and [43] (emphasis removed).

41 Article 16(3) of the Model Law provides that if the tribunal rules as a preliminary question that it has jurisdiction, any party may ask the court to decide the matter. Article 34(2)(a) applies to the setting aside of awards where a tribunal has assumed jurisdiction.

42 See *Report of the United Nations Commission on International Trade Law* UN Doc A/40/17 (3–21 June 1985) at [163]:

> It was [recognised] that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings.

43 For discussion on the topic, see Johan Paulo Fohlin "A Case for a Right of Appeal from Negative Jurisdictional Rulings in International Arbitrations governed by the UNCITRAL Model Law" (2008) 10 Asian Dispute Review 113; *Report of the Law Reform Committee on Right to Judicial Review of Negative Jurisdictional Rulings* (Singapore Academy of Law, Law Reform Committee, January 2011); and Antony Crockett and

review of negative jurisdictional findings. This is the case of Hong Kong, Germany and the Netherlands.

In two cases seated in The Hague, the issue recently came again to the fore. These were investment treaty cases involving investors with dual nationality suing the state of one of their nationalities. In one case, the tribunal found it had jurisdiction. In the other, the tribunal found it did not. In both cases, the Dutch courts were petitioned by the losing party to set aside the tribunal's jurisdictional findings.

A Bhagat v Egypt

The first case was brought by a dual national of Egypt and Finland, Mr Bhagat.[44] He invested millions in Egypt after winning a government bid for a 30-year mining licence. Not long into operations, he faced serious legal troubles and was sentenced to prison for 15 years under hard labour and had his assets and those of his company and family seized. After three years in prison, he was released and remained in Egypt under a two-year travel ban. Once that was lifted, he left the country, never to return until his death in October 2022. Although the Egyptian authorities lifted the seizure over his personal and family assets, they did not do so with respect to his business assets.

In 2011, Mr Bhagat brought a claim against Egypt under two bilateral investment treaties (BITs) concluded between Egypt and Finland.[45] The 2004 BIT offered protections to investors defined as "any natural person who is a national of either Contracting Party … who invest[s] in the territory of the other Contracting Party".[46]

An issue was whether Mr Bhagat was prohibited by any general principle of international law from bringing a claim against a state of his nationality pursuant to an investment treaty in his private capacity as a dual national.[47]

Daniel Mills "A Tale of Two Cities: An Analysis of Divergent Approaches to Negative Jurisdictional Rulings" (8 November 2016) Kluwer Arbitration Blog <www.arbitrationblog.kluwerarbitration.com>.

44 Publicly available documents in the case are available at italaw "Mohamed Abdel Raouf Bahgat v Egypt (I), PCA Case No 2012-07" (9 July 2024) <www.italaw.com>. For the factual background to the case, see *Bahgat v Egypt (Decision on Jurisdiction)* PCA 2012-07, 30 November 2017 at [81]–[117]; and *Bahgat v Egypt (Final Award)* PCA 2012-07, 23 December 2019 at [92]–[158].

45 The arbitration was commenced pursuant to the Agreement between the Republic of Finland and the Arab Republic of Egypt on Mutual Protection of Investments 1281 UNTS 185 (signed 5 May 1980, entered into force 22 January 1982) [1980 BIT]; and the Agreement between the Government of the Republic of Finland and the Government of the Arab Republic of Egypt on the Promotion and Protection of Investments 2309 UNTS 261 (signed 3 March 2004, entered into force 5 February 2005) [2004 BIT]. The fact that there were two treaties is of no particular relevance to the present discussion.

46 2004 BIT, art 1(3). The 1980 BIT protected "nationals", who were defined in art 2 as individuals who are citizens of Finland/Egypt according to Finnish/Egyptian law.

47 *Decision on Jurisdiction*, above n 44, at [230].

The tribunal found that it had jurisdiction.[48] It held that where an underlying BIT does not clarify whether dual nationals might bring claims, principles of international law on effective nationality might be considered by a tribunal in order to determine its jurisdiction based on the dominant nationality of the claimant-investor.[49] However, developments in international law must yield to the *lex specialis* of the investment treaty.[50] Although some investment treaties expressly prohibit claims by dual nationals, the Finnish/Egyptian BITs did not. Also, while dual nationals are not eligible to invoke ICSID arbitration (which is expressly prohibited under the ICSID Convention), there is no such restriction under the UNCITRAL Arbitration Rules.[51]

Two years later, in December 2019, the *Bhagat v Egypt* tribunal issued a Final Award in Mr Bhagat's favour, holding Egypt liable to him for USD 44 million, interest, and 90 per cent of costs.[52]

The seat of arbitration in *Bhagat v Egypt* was The Hague. Thus, any application for review of the Tribunal's jurisdictional determinations would be to the Dutch courts. In March 2020, Egypt applied to set aside the Tribunal's positive jurisdictional finding. The Dutch courts found that it was reasonable to conclude from the definition of "investor" in the Finnish/Egyptian BITs that dual nationals were not excluded from protection.[53] It upheld the Tribunal's positive finding of jurisdiction.

B García Armas v Venezuela

Meanwhile, around the time Mr Bhagat started his arbitration, another dispute arose.[54] It involved the García Armas family, originally from the Canary Islands in Spain, some of whom had moved to Venezuela in the 1950s and 1960s. There they started working for a food marketing and distribution company which they later acquired. At that time, the company had a rented warehouse, two employees and one van. Over the ensuing 40 years the family business grew until it comprised multiple offices across the country, investments in supermarkets and real estate and a fleet of 170 vans.

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48 At [319].

49 At [231].

50 At [231].

51 At [224]. Article 25(2)(b) of the ICSID Convention provides that "national of another Contracting State" does not include any person who "had the nationality of the Contracting State party to the dispute" on the date the parties consented to arbitration as well as the date on which the request was registered with ICSID: International Centre for Settlement of Investment Disputes *ICSID Convention, Regulations and Rules* (ICSID/15/Rev 3, July 2022).

52 *Final Award*, above n 44, at [618].

53 *Bahgat v Egypt* The Hague DC C-09-591626-HA ZA 20-399, 20 October 2011 at [5.46]–[5.55] (in Dutch).

54 Publicly available documents in the case are available at italaw "Manuel García Armas and others v Bolivarian Republic of Venezuela, PCA Case No 2016-08" (21 April 2023) <www.italaw.com>. For the factual background to the case, see *García Armas v Venezuela (Laudo Sobre Jurisdicción)* PCA 2016-08, 13 December 2019 [*Decision on Jurisdiction*] at [127]–[204] (in Spanish).

In 2009, a sharp drop in oil prices resulted in substantial cuts to the Venezuelan social budget. In the food sector, supply problems arose for the state-owned company dedicated to the distribution of food at subsidised prices. The property and assets owned by the claimants' companies were appropriated by the state and no compensation was paid.

In 2015, the García Armas family commenced arbitration against Venezuela under the Spanish/Venezuelan BIT. In their case, the tribunal held in 2019 that it had no jurisdiction because of the claimants' dual nationality. It found that principles of general international law apply unless expressly derogated from under the *lex specialis* of an investment treaty.[55] While dual nationals were not expressly excluded, they were not expressly included either.[56] Plus, the dispute settlement provisions to be invoked at the choice of the investor listed ICSID arbitration, followed by UNCITRAL Rules arbitration. The tribunal concluded that the order of listing had a hierarchical meaning. Because ICSID arbitration did not allow dual national claims, that limitation must also apply implicitly to UNCITRAL Rules arbitration.[57] The tribunal could not accept that the definition of "investor" could be changed depending on which procedural forum was chosen by the investor. It declined jurisdiction.

Like *Bhagat v Egypt*, the seat of arbitration was The Hague. In March 2020, the García Armas family applied to set aside their tribunal's negative jurisdictional finding. The application was first dealt with by The Hague Court of Appeal. In a judgment dated 19 January 2021, the Court declined to substantively review the tribunal's negative jurisdictional award, finding that the law did not empower it to set aside an award by which a tribunal declined jurisdiction based on the absence of a valid arbitration agreement.[58] This was appealed to the Dutch Supreme Court, which in April 2023 upheld the decision of the Court of Appeal.[59]

Imagine if the Dutch arbitration legislation had allowed the review of negative jurisdictional findings. The outcome for the *García Armas* case may have been very different. The Dutch courts had concluded in *Bhagat v Egypt*, dealing with similar treaty language, that dual nationals were not excluded. They may well have found on a de novo review of the tribunal's jurisdictional decision in *García Armas v Venezuela* that dual nationals were not precluded from protection under the Spanish/Venezuelan BIT, had they enjoyed the mandate to review negative jurisdictional findings.

Not allowing court review of negative findings on jurisdiction has been criticised for some time for several reasons, the principal one being that it is inconsistent to deny the judicial review of negative

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55 At [704].

56 At [706].

57 At [722]–[723].

58 *García Armas v Venezuela* The Hague CA 200.280.055/01, 19 January 2021 (in Dutch).

59 *García Armas v Venezuela* The Netherlands SC 21/01710, 21 April 2023 (in Dutch).

jurisdictional rulings while allowing review of positive rulings. Injustice can just as easily arise where a tribunal makes an erroneous negative jurisdictional ruling than when it makes an erroneous positive jurisdictional ruling. It also does not treat the parties equally: it gives a respondent an opportunity to challenge a positive jurisdictional finding but does not give a claimant an opportunity to challenge a negative jurisdictional finding.

Also, a negative jurisdictional award sends the parties that wanted to arbitrate their dispute back to the courts they intended to avoid in the first place, namely the national court of one of the parties. In a domestic setting, this may not lead to unfairness. But in international cases, this can lead to injustice where one side may suffer for finding itself in a foreign court, whether it be due to factors of inconvenience like unfamiliarity with the legal system, language barriers, travel costs or the inability to have one's legal representatives appear, through to more serious issues like lack of judicial independence, excessive delays including to the point of being a denial of justice, unqualified judges and undeveloped, unclear or unfavourable law.

The downside to no review for negative jurisdictional findings is even more pronounced in investment treaty arbitrations. A claimant's substantive treaty claim is extinguished by a negative jurisdictional ruling. There is no other court before which a claimant can bring a claim against the host state. Whether the claimant has other legal recourse to bring a claim in the host state's domestic courts is another question but is fundamentally unappealing in many cases (and possibly dangerous in some).

IV CONCLUSION

What these cases show first and foremostly is that the choice of seat is critical. The choice of seat determines the legislation that will govern the arbitration. While there is much commonality across the sophisticated jurisdictions, there still exist important differences. Parties must be well advised as to what their choice of seat means. For their part, national courts can only implement and interpret legislation; they cannot change it.

While there is a strong emphasis in international arbitration on non-intervention by the courts, the system depends on the courts' power to intervene to function. The courts' intervention may be purely facilitative – for example, judges ordering the production of relevant documents "into the room" – but it is also supervisory in a fundamental and absolute sense, in that judges have the power to decide that there is no basis for anyone to be "in the room" in the first place. Determining when to exercise that fundamental supervisory power is one of the most challenging aspects of the national courts' role in the international arbitration process, particularly in investment treaty arbitration where the stakes are inevitably high.