

Case Comment

**SETTING ASIDE ARBITRAL AWARDS IN SINGAPORE:
APPLICATION OF TRITE PRINCIPLES TO
NOVEL QUESTIONS**

Gokul Patnaik v Nine Rivers Capital Ltd [2021] 3 SLR 22

[2021] SAL Prac 18

Can an arbitral award grant relief that was provided for in a contract that is separate from the contract in which the arbitration agreement was contained? Will an arbitrator's refusal of amendments to arbitral pleadings constitute a breach of the rules of natural justice? Is Singapore's public policy breached upon an allegation that the relief granted in an arbitral award contravenes a foreign law? This article examines the Singapore International Commercial Court's application of trite legal principles towards these novel factual questions.

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I. Introduction

1 The theoretical principles regarding the setting aside an arbitral award in Singapore under the International Arbitration Act¹ ("IAA") are well established. Nonetheless, the Singapore

1 Cap 143A, 2002 Rev Ed.

courts have seen a slew of setting-aside applications in recent years, which suggests that the practical application of these principles to actual cases may not be as straightforward as parties may hope for.

2 One such case is the recent decision in *Gokul Patnaik v Nine Rivers Capital Ltd*² (“*Nine Rivers*”), where the Singapore International Commercial Court (“SICC”) dismissed the plaintiff’s application to set aside a Singapore International Arbitration Centre arbitration award for approximately INR1.329bn (“Award”).

II. Background facts

A. Relationship between the parties³

3 By way of a share subscription and shareholders agreement in 2010 (“SSSA”), various parties (including the plaintiff and the defendant) entered into an investment agreement in respect of an Indian-incorporated company (“Company”).

4 The key terms of the SSSA were that:

(a) the defendant would invest INR300m in the Company, by subscribing to certain securities in the Company;

(b) the parties to the SSSA would take all actions necessary to cause an initial public offering of certain shares in the Company or seek a sale to a third party to change control of the Company, by a certain date (“Qualified Exit”); and

(c) if the Qualified Exit was not accomplished by the stipulated date, the defendant had the right to exercise certain options which would essentially secure the defendant’s exit from the Company.

2 [2021] 3 SLR 22.

3 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [4]–[17].

5 The Qualified Exit did not occur by the stipulated date, which led to the parties reaching another agreement encapsulated within a sale and purchase agreement in 2014 (“2014 SPA”). In short, the 2014 SPA required an existing shareholder in the Company (“Shareholder”) to purchase the securities owned by the defendant.

6 However, the Shareholder did not perform the aforesaid purchase. Pursuant to further negotiations, the parties agreed to various amendments to the 2014 SPA via an addendum in 2015 (“2015 Amendment”). This included making one Ramesh Vangal (“Vangal”) an additional purchaser of the securities owned by the defendant.

7 The Shareholder and Vangal did not complete the purchase of the securities in accordance with the 2014 SPA and the 2015 Amendment. As a result, the defendant sent a Put Option Notice pursuant to the SSSA, calling upon the plaintiff and the Shareholder to purchase the investor securities for INR1.329bn (“Put Option Price”), as provided for in the SSSA.

B. Arbitration proceedings⁴

8 The plaintiff and the Shareholder did not comply with the Put Option Notice. The defendant eventually commenced arbitration pursuant to the arbitration agreement in the 2014 SPA (“Arbitration Agreement”), seeking, *inter alia*, payment of the Put Option Price.

9 The Arbitration Agreement provided that “[i]n the event a dispute arises out of or in relation to or in connection with the interpretation or implementation of this Agreement, the Parties ... may ... refer the dispute to binding arbitration”.

10 The tribunal found, *inter alia*, that the plaintiff and the Shareholder were jointly and severally required to purchase the investor securities pursuant to the Put Option Notice and at the Put Option Price.

4 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [18]–[22].

C. Setting-aside proceedings⁵

11 The plaintiff applied to set aside the Award in the Singapore courts pursuant to the IAA, on the following grounds:

(a) the Award contained decisions on matters beyond the scope of submissions to the Arbitration, as the disputes therein were not arbitrable under the 2014 SPA and hence beyond the tribunal’s jurisdiction (“Jurisdiction Ground”);

(b) there was a breach of the rules of natural justice in connection with the making of the Award, as the tribunal did not allow the plaintiff’s (respondent in the arbitration) application to amend its statement of defence (“Amendment Application”) to incorporate certain submissions (“Natural Justice Ground”); and

(c) the Award was in conflict with the public policy of India, because the relief granted therein (*ie*, performance of the Put Option) contravened Indian law. Accordingly, it would be a breach of international comity and thus against Singapore public policy if the Award was allowed to stand (“Public Policy Ground”).

12 In support of the Public Policy Ground, the plaintiff also filed an expert affidavit on Indian law (“Expert Affidavit”), which the defendant applied to strike out.

III. The judgment

13 As will be discussed below, the SICC dismissed the setting-aside application entirely and struck out the Expert Affidavit.

A. The tribunal had jurisdiction to make the Award

14 In dismissing the Jurisdiction Ground, the SICC held that “the Arbitration Agreement covered all the matters forming the

5 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [23]–[36].

claim which formed the findings against [the plaintiff] in the Award”.⁶

15 The SICC adopted the two-stage enquiry set out by the Singapore Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*.⁷ In short, the SICC examined the following:

- (a) first, what matters were within the scope of submission to the tribunal; and
- (b) second, whether the Award involved such matters or whether the Award involved matters outside the scope of submission to the Arbitration.

16 The SICC also found it necessary to identify the relief claimed and granted in the Award, which the plaintiff contended was outside the tribunal’s jurisdiction.⁸ In this regard, the court considered the following matters:

- (a) the scope of the Arbitration Agreement under which the dispute was adjudicated;⁹ and
- (b) the pleadings filed by the parties in the Arbitration.¹⁰

17 The SICC agreed with the tribunal that the Arbitration Agreement was “widely drawn to cover disputes arising ‘out of or in relation to or in connection with the interpretation or implementation of’ the 2014 SPA”.¹¹

18 Further, the SICC found it clear, from the defendant’s pleadings in the Arbitration, that the claim in the Arbitration arose from breaches under the SPA.¹² In particular, the defendant had pleaded and the tribunal found that:

6 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [84].

7 [2007] 1 SLR(R) 597. See also *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [48] and [63].

8 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [64].

9 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [49], referring to the Court of Appeal case of *BBA v BAZ* [2020] 2 SLR 453 at [39].

10 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [50], referring to the Court of Appeal case of *PT Prima International Development v Kempinski Hotels SA* [2012] 4 SLR 98 at [33].

11 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [83].

12 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [75] and [84].

- (a) Vangal and the Shareholder failed to meet their obligations under the 2014 SPA and 2015 Amendment, which amounted to a “default” under the 2014 SPA;
- (b) as such, the defendant was entitled by the express terms of the 2014 SPA to exercise other rights and remedies under the SSSA; and
- (c) the aforesaid rights and remedies included the right to exercise the Put Option under the SSSA.

19 Accordingly, the SICC held that the tribunal had jurisdiction to deal with the claim made by the defendant in the Arbitration and grant the relief given in the Award, *ie*, performance of the Put Option.¹³

B. No breach of natural justice in the making of the Award

20 The objection under the Natural Justice Ground also failed, as the SICC held that the tribunal’s decision to disallow the Amendment Application was “evidently a case management matter well within [the tribunal’s] discretion and cannot be challenged”.¹⁴

21 Following the guidance provided in an earlier SICC case of *CEB v CEC*,¹⁵ the SICC found that the plaintiff was required to show the following matters:

- (a) which rule of natural justice was breached;
- (b) how the aforesaid rule was breached;
- (c) in what way the breach was connected to the making of the Award; and
- (d) how the breach prejudiced the plaintiff’s rights.

22 At the outset, the SICC stressed that the problem with the plaintiff’s contention was that “he has found it difficult to

13 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [87].

14 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [124].

15 [2020] 4 SLR 183. See also *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [109] and [118].

articulate a case as to the rule of natural justice which is engaged”. In this regard, the plaintiff’s affidavits merely explained the “breach of natural justice” as being the fact that the tribunal had not allowed the Amendment Application.¹⁶

23 The SICC further rejected the plaintiff’s oral submissions at the hearing, *ie*, he had been deprived of the right to a fair hearing because those key pleadings were not allowed to be brought into the Arbitration proceedings via the Amendment Application.¹⁷

24 In particular, the SICC examined how the Amendment Application was made by the plaintiff and handled by the tribunal:¹⁸

(a) the Amendment Application was made on the first day of the Arbitration hearing;

(b) the tribunal allowed one out of three amendments sought, on the basis that the disallowed amendments should have been raised in the statement of defence and allowing them to be raised at this stage would cause prejudice to the defendant, because the defendant would be unable to adduce evidence to rebut the new arguments made or it would cause an unnecessary adjournment to the proceedings; and

(c) the parties in the Arbitration (including the plaintiff) were allowed to ventilate their submissions on the Amendment Application fully, both in writing and orally.

25 Given the above, the SICC held that “it is impossible to say that the [tribunal] did not give [the plaintiff] a fair hearing on the question of whether he should be allowed to amend his pleadings shortly before the hearing”. In other words, the Natural Justice Ground was essentially a challenge to the tribunal’s decision not

16 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [119].

17 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [120].

18 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [121]–[123].

to allow the amendment; it was not a challenge to the fairness of the tribunal's hearing of the Amendment Application.¹⁹

26 The plaintiff also submitted that he was deprived of an opportunity to rely on an "important and essential issue", *ie*, if the amendments had been allowed, the defendant would have the burden of showing that the rights under the 2014 SPA were valid and enforceable. This submission was rejected by the SICC, which held that this was a failure by the plaintiff to plead those issues at the correct time, rather than a breach of natural justice.²⁰

C. Award was not contrary to public policy of Singapore

27 Finally, the SICC dismissed the Public Policy Ground on the primary basis that the tribunal's findings as to the legality of "the nature of the transactions under the 2014 SPA, the 2015 Amendment and the SSSA" were findings of fact.²¹

28 The SICC clarified that even if the tribunal's findings were findings of law, they would be findings of Indian law which the tribunal made after hearing submissions from Indian lawyers. Since the relevant agreements in this case were governed by Indian law, then so far as the Singapore court was concerned, the tribunal's findings of Indian law were findings of fact as to a foreign law.²²

29 Accordingly, and as held by the Court of Appeal in *AJU v AJT*²³ ("*AJU*"), a finding of fact by an arbitrator is final and binding on the court in the absence of vitiating factors such as fraud or breach of natural justice. There were no such vitiating factors in this case, hence the SICC should not reopen the tribunal's findings.²⁴

19 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [121].

20 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [125]–[126].

21 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [187].

22 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [188].

23 [2011] 4 SLR 739.

24 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [187].

30 The SICC also noted that *per* the Court of Appeal’s decision in *AJU*, an award may be set aside on public policy objections if there was an erroneous finding of law by an arbitrator. For example, if an arbitrator decides that a contract governed by Singapore law is illegal but also decides that it is not against Singapore public policy to enforce that contract in Singapore, such finding could be an erroneous finding of law which would be set aside on the grounds of public policy. However, that was not the case here. The tribunal had decided that the relevant contracts were not illegal under a foreign law, *ie*, Indian law, and accordingly, there was no issue of Singapore law which was engaged and no finding of law which the SICC could set aside.²⁵

31 Separately, the SICC opined that even if it were open for the court to consider the issue of Indian law afresh, the court would not do so here, because the public policy of sustaining international awards on the facts of this case outweighs the public policy of discouraging international commercial transactions which breach a country’s foreign exchange regulations.²⁶

32 Lastly, albeit in *obiter*, the SICC noted that “[the plaintiff had] thus not cited any authority for the proposition that a contract which is illegal in another foreign state necessarily leads to a breach of international comity, and thus Singapore public policy”. On the contrary, the established case authorities have made clear that the public policy ground is a narrow ground, such that “the relevant question [was] whether the illegality in the foreign state would demonstrate sufficiently egregious circumstances that would ‘shock the conscience’ or violate the most basic notions of morality and justice so as to amount to a breach of Singapore public policy”. Accordingly, even if the SSSA and the 2014 SPA were found to be illegal under Indian law, this, without more, would not satisfy the Public Policy Ground.²⁷

25 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [189]–[191].

26 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [192].

27 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [203]–[206].

33 In view of the above reasons, the SICC also struck out the Expert Affidavit because it was not relevant to decide any issue in this setting-aside application.²⁸

IV. Significance of the case

34 Given the multiple contentions raised by the plaintiff in this case, the SICC's decision in *Nine Rivers* provides a useful summary of how the Singapore courts would approach challenges towards arbitral awards on the grounds of (a) jurisdiction of an arbitrator, (b) breach of the rules of natural justice and (c) breach of Singapore public policy.

35 More importantly, this case provides valuable guidance to parties and lawyers on the following matters.

36 *First*, where parties have entered into multiple related contracts, and each contract contains a different dispute resolution clause, a widely drawn arbitration agreement in the later contract may cover disputes involving the exercise of rights in the earlier contract. Commercial parties should thus obtain proper legal advice on the wording of a contract's dispute resolution clause (and any other matters referred to therein) before entering into the contract.

37 In this regard, and where a dispute arises, parties should also state clearly, in their correspondence with each other and in the arbitration pleadings, the exact contractual clause(s) and factual circumstances which they are relying on in their pursuit of the claim.

38 *Second*, if a party wishes to rely on a breach of the rules of natural justice when applying to set aside an arbitral award or resisting enforcement of the same, he should, *inter alia*, expressly and unequivocally identify the exact rule that he alleges to have been breached.

28 *Gokul Patnaik v Nine Rivers Capital Ltd* [2021] 3 SLR 22 at [208].

39 Further, parties should assess the real nature of their complaints to see if they were indeed deprived of a fair hearing by an arbitrator *versus* being merely unsatisfied with a decision of the arbitrator. Doing so at an early stage would help narrow down the issues in contention in such setting-aside applications and, in turn, save time and costs for parties involved in such applications.

40 *Third*, objections on the grounds of Singapore public policy should only be raised if the objecting party can demonstrate an erroneous finding of law by the arbitrator. This is more likely to occur where the underlying contract is governed by Singapore law, and the arbitrator had made certain findings on the public policy of Singapore. In such situations, the Singapore court is unlikely to abrogate its judicial powers to an arbitrator to decide what the public policy of Singapore is. Findings of foreign law, especially if made by an arbitrator pursuant to submissions from foreign counsel, are likely to constitute as findings of fact which are insufficient for such objections.

41 In view of Singapore's growing reputation as an international dispute resolution hub, and the public policy of upholding international arbitral awards save in exceptional circumstances, parties should also examine the governing law of the underlying contract and scrutinise the analysis undertaken by the arbitrator in his award, before rushing to invoke objections on the grounds of Singapore public policy.