The Principle of Minimal Curial Intervention in Arbitrations seated in Singapore:
***Republic of India v Vedanta Resources plc* [2021] 2 SLR 354**

I. Executive summary

The principle of minimal curial intervention – meaning that the courts will rarely interfere with an arbitral award – is an essential feature of Singapore's arbitration law under the International Arbitration Act (the "**IAA**"), which largely adopts the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**"). In keeping with this principle, Singapore courts are extremely reluctant to intervene in the conduct and outcomes of arbitral proceedings, outside of the avenues permitted by the Model Law or the IAA. And while dissatisfied parties may nonetheless attempt to devise creative tactics to get around this principle, the case of *Republic of India v Vedanta Resources plc* [2021] 2 SLR 354 demonstrates that the courts are both highly sensitive to and extremely critical of any attempts to do so.

In this case, the Singapore Court of Appeal ("**CA**") rejected an attempt at a backdoor appeal against the decision of an arbitral tribunal, holding that intervention cannot be justified even on the basis of an error pertaining to the *lex arbitri* (i.e. the law of the place where the arbitration is to take place). It also made clear that issuing declaratory judgments in respect of issues before an arbitral tribunal would only be appropriate under an extraordinarily narrow set of circumstances, especially if it was clear that such a judgment was being sought in order to pressure the tribunal to amend its decision in some way. Any attempt to do either would be regarded as improper and vexatious, and constitute an abuse of the processes of the court.

II. Material facts

The Republic of India ("**India**") was engaged in two investment treaty arbitrations, one with Vedanta Resources plc ("**Vedanta**") which was seated (i.e., located) in Singapore (the "**Vedanta Arbitration**"), as well as another arbitration with a third party ("**Cairn Group**") seated in the Netherlands (the "**Cairn Arbitration**"). These separate but related arbitrations were conducted pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law 1976 ("**the UNCITRAL Rules**").

Concerned about the risk of inconsistent findings as between these two arbitrations, India sought to implement a regime of cross-disclosure of documents between the two proceedings, and to this end initially proposed application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the "**UNCITRAL Transparency Rules**"). However, as Vedanta was not agreeable, India then filed an application effectively requesting the tribunal in the Vedanta Arbitration ("**the Vedanta Tribunal**") to implement the rules.

After hearing both parties on this issue and considering the UNCITRAL Rules; the Agreement Between the Government of the Republic of India and the Government of the United Kingdom of Great Britain and Northern Ireland for the Promotion and Protection of Investments (14 March 1994) (the "**India-UK BIT**"), and public international law; and the law of the seat – i.e. Singapore law – the Vedanta Tribunal concluded that there was no general obligation of confidentiality under the UNCITRAL Rules and the India-UK BIT.

As for Singapore law, the Vedanta Tribunal found that an implied obligation of confidentiality did apply in every arbitration governed by Singapore procedural law, per *AAY and others v AAZ* [2011] 1 SLR 1093 ("***AAY***"). However, this was subject to several exceptions, one of which being where the public interest or interests of justice required disclosure. It thus used this public interest exception as the basis for issuing Procedural Order No 3 ("**VPO 3**"), which set out a cross-disclosure regime under which either of the parties could apply to it for the disclosure of any specific, identified document to the arbitration with the Cairn Group.

Following the issuance of VPO 3, India made two applications to the Vedanta Tribunal for the disclosure of documents from the Vedanta Arbitration into the Cairn Arbitration. However, the Vedanta Tribunal only partially allowed one application ("**VPO 6**"), and rejected the other ("**VPO 7**"). Dissatisfied with this result, India applied to the High Court ("**HC**") for:

- A declaration that documents disclosed or generated in the Vedanta Arbitration were not confidential or private; and
- A declaration that India's disclosure in the Cairn Arbitration of documents disclosed or generated in the Vedanta Arbitration would not be in breach of any obligation of confidentiality or privacy.

In the course of the proceedings, India gave the HC an undertaking ("**the Undertaking**") that if the declarations were granted, it would not unilaterally bypass the Vedanta Tribunal to make cross-disclosure of the relevant documents, but would instead rely on the declarations to request the Vedanta Tribunal to reconsider and revise the VPOs. In response, Vedanta relied on the Model Law and argued that India's application was an abuse of process, as the courts had no power to intervene in an arbitration in relation to matters that came within the Vedanta Tribunal's domain.

The HC rejected Vedanta's preliminary objections that India's application was an abuse of process. While 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", the HC held that the issue of confidentiality was not governed by the Model Law (i.e., matters of procedure in arbitration), but by substantive Singapore law. Additionally, as the VPOs were procedural in nature, they did not give rise to an issue estoppel.[1] Thus, the declaratory relief sought by India did not engage a matter governed by the Model Law, and did not amount to inviting the court to intervene in the arbitration. Consequently, the HC held that India's application did not constitute an abuse of process.

However, the HC nonetheless declined to grant the declarations, holding that it was well within the power of the Vedanta Tribunal to decide and possibly develop the scope of the law of confidentiality under Singapore's common law of arbitration. The Vedanta Tribunal had indeed been asked to do precisely this by India, and heard submissions from both parties before coming to its decision. The principle of minimal curial intervention therefore weighed heavily against granting the declarations. Additionally, as Singapore law was only one of three sources of law which the Vedanta Tribunal considered when creating the cross-disclosure regime in VPO 3, a declaration in India's favor would not necessarily persuade the Vedanta Tribunal to reconsider its decision. India subsequently appealed against the HC's decision in refusing to exercise its discretion to grant the declaratory relief sought.

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[1] An issue estoppel arises when one court or tribunal has made a decision or finding on a particular issue, and other courts are thus prevented from subsequently reconsidering that same issue.

III. Issues on Appeal

Before the CA, India and Vedanta both made submissions on the basis that the courts had the discretion to issue the declarations. However, the CA declined to do so. Further, its decision was not based on the issue of discretion, but because it found India's application to be an abuse of process. In coming to this conclusion, the CA first considered and rejected two arguments which India had made.

A. India's Arguments

(1) Impermissible development of the lex arbitri

First, a recurring theme in India's submissions was that the Vedanta Tribunal had acted in excess of its jurisdiction in issuing VPO 3. India submitted that, in issuing VPO 3 and creating this regime as an exception to the general duty of confidentiality under Singapore law, the Vedanta Tribunal had impermissibly developed the *lex arbitri*. As the *lex arbitri* was an "external framework of rules imposed by the arbitral seat", it was not open to the Vedanta Tribunal to consider if it ought to be changed simply because it might not have been well-suited to investment treaty arbitrations. Additionally, neither party had asked the Vedanta Tribunal to do so.

However, the CA held that the court could not intervene simply because the Vedanta Tribunal's decision pertained to the *lex arbitri*. This would be inconsistent with the well-established principle that errors of law made by the tribunal are "final and binding on the parties and may not be appealed against or set aside by a court", except in the specific situations prescribed under the IAA and/or the Model Law. This would be true even where the alleged mistake pertains to the *lex arbitri*.

The CA held that the argument that neither party had asked the Vedanta Tribunal to develop the *lex arbitri* was also disingenuous and artificial. In the context of a real dispute, a tribunal is entitled to decide what it regards as the correct legal position based on its understanding and interpretation of the law, as long as the issue is before it and both parties have the opportunity to address the tribunal. Otherwise, it would be at an impasse every time it is faced with a lacuna (i.e. gap) in the law, a situation incompatible with the reality and the demands of arbitration as a dispute resolution procedure.

In any event, there was no question of the Vedanta Tribunal purportedly "developing" the *lex arbitri*. Arbitral tribunals operate outside the doctrine of *stare decisis*, meaning that their decisions do not bind other courts or tribunals. The VPOs issued by the Vedanta Tribunal therefore did not bear any precedential value.

Finally, the CA also noted that VPO 3 had been made pursuant to India's own application. In this regard, not only did India not raise any complaint at the time of its issuance that VPO 3 had been decided in excess of the Vedanta Tribunal's jurisdiction or power, it had even relied on VPO 3 and applied for the two cross-disclosure orders pursuant to which VPOs 6 and 7 were eventually issued. It was therefore unsustainable for India to suggest that the Vedanta Tribunal had acted in excess of its jurisdiction in issuing the VPOs.

(2) The Court's power to issue declaratory judgments

India's second argument was that the courts could issue a declaratory judgment on the question of confidentiality. While 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", neither the IAA nor Model Law made any provision for confidentiality, which instead applied as a substantive rule of the common law. It argued that the courts could therefore issue a declaratory judgment on the question of whether the confidentiality obligation in *AAY* extended to investment treaty arbitrations, pursuant to its "power to grant all reliefs and remedies at law and in equity".

The CA also rejected this argument. While the Model Law did not explicitly provide for the issue of confidentiality, in this context, confidentiality was not a "discrete and standalone issue". Rather, it arose in the context of disclosure, a procedural issue. The CA reiterated the principle that an arbitrator is "master of his own procedure". This was consistent with Article 19(2) of the Model Law, which allows an arbitral tribunal to "conduct the arbitration in such manner as it considers appropriate", unless parties have agreed on points of procedure. The question of confidentiality in this context remained within the scope of the arbitral procedure, and was not within the purview of the courts.

B. The CA's further findings

Not only did the CA reject India's arguments, it also provided several additional reasons as to why India's application could not be allowed.

(1) India's application was an attempt at a backdoor appeal

The CA held that India's application was essentially a backdoor appeal against the VPOs. The two declarations as sought by India directly contradicted the Vedanta Tribunal's express finding in VPO 3 that "in every arbitration governed by Singapore procedural law there is an implied obligation of confidentiality", and its refusal to disclose the specific documents in VPOs 6 and 7 which India had named in its prayer for the declarations. Granting them would have effectively amounted to a ruling that the Tribunal was wrong, and would have effectively overruled the Tribunal's finding on the question of law in VPO 3, and its decision on the facts in VPOs 6 and 7. This was improper because India had no right of appeal, as it itself acknowledged at the hearing below.

(2) Granting India's application would amount to unwarranted judicial interference

The CA stated that even if India's application was merely for an advisory opinion and not a backdoor appeal, it would still amount to unwarranted judicial interference in the arbitral process. India's Undertaking not to bypass the Vedanta Tribunal and instead only ask it to reconsider the VPOs, itself revealed that the purpose of seeking the declarations was to "put pressure on the Vedanta Tribunal" to do so. The Tribunal would be hard pressed to ignore the declarations, which amounted to final declarations by the court as to India's rights in relation to the documents.

(3) Courts will not grant advisory opinion on hypothetical questions

The CA held that courts will not answer hypothetical questions merely because a party to the proceedings would like the court to set down the law on the point. India also could not legitimise its conduct by tying the question to the facts, because it would make the application an impermissible attempt to relitigate the issue which the Vedanta Tribunal had already determined. India's undertaking not to do anything other than bring the answer back to the Vedanta Tribunal

for its consideration, revealed that its attempts to tie the question to the facts was a sham. In granting what amounted to an advisory opinion, the court would be effectively acting as *amicus* to the Vedanta Tribunal, leaving the court in an untenable situation of giving its view to the Tribunal in the hope that it would be given some consideration, with the distinct possibility that the Tribunal might not be persuaded to reconsider its position, or decide to ignore the court's view altogether.

(4) Violation of the principle of minimal curial intervention
Regardless of whether India's application was a backdoor appeal or a request for an advisory opinion, the CA held it was in any case a blatant violation of the principle of minimal curial intervention. The Vedanta Tribunal was the master of its own procedure, and had already decided on India's applications for cross-disclosure. Granting the declarations would effectively allow any party who was dissatisfied with an arbitral tribunal's decision on a procedural matter to invite the court to rule on the matter, and to use that ruling to persuade the tribunal to reconsider its decision. Furthermore, while it was open to the parties to agree that no general obligation of confidentiality applied to their arbitration by incorporating the UNCITRAL Transparency Rules, it would offend against the principle of party autonomy for the court to impose those rules on the parties, absent such an agreement. Finally, as the disclosure orders were interlocutory in nature, India could in theory ask the Vedanta Tribunal to reconsider its decisions in the VPOs as many times as it wanted, until the Tribunal issued its final award. But it simply could not invite the *court* to intervene by issuing a declaration, which it could use as a "persuasive tool" to persuade the Vedanta Tribunal to do so.

(5) India's application was an abuse of process
Finally, the CA held that India's application itself was an abuse of process. The Vedanta Tribunal was entitled to determine the dispute which India had placed before it, a determination which India itself later relied on. As the VPOs pertained to a procedural matter, and none of the avenues of recourse in the IAA or Model Law applied, there was no legitimate basis for the court to intervene, and India's application was thus without foundation. Additionally, India's application was vexatious, as it amounted to a relitigation of issues which it had been placed before the Vedanta Tribunal, as well as improper, because it would require the court to render an advisory opinion and in doing so, violate the principle of minimal curial intervention. India's attempts to circumvent these difficulties by tying the declarations to the facts and offering its Undertaking were a sham, aimed at disguising the true nature and purpose of its application.

IV. Lessons Learnt

This decision reaffirms the Singapore courts' strong commitment to the principle of minimal curial intervention, and its dim view of attempts to circumvent it. Parties in the midst of arbitrations should accordingly think twice about any attempt to seek to use court processes to alter the outcome thereof.

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