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# Setting aside an award over the mis-application of a choice of law clause: Quarella SpA v Scelta Marble Australia Pty Ltd [2012] SGHC 166

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# Setting aside an award over the mis-application of a choice of law clause

***Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166**

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In *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] SGHC 166, the High Court of Singapore (*per* Prakash J) rejected an application to set aside two related arbitration awards. The ground for setting aside was an alleged misinterpretation of a choice of law clause by the tribunal. In rejecting the application, the High Court demonstrated its unwillingness to set aside an award when the tribunal has considered and respected the choice of law clause (regardless of the interpretation the tribunal ultimately preferred). Notably, the High Court did not close the door on instances where the tribunal may have failed to apply the choice of law clause or expressly refused to apply such a clause.

## Facts

Quarella is an Italian manufacturer and exporter of composite stone products. Scelta is an Australian company which supplies composite stone products in Australia. Quarella and Scelta entered into an agreement for the distribution of Quarella's products in Australia ("the Agreement"). The relevant clauses read as follows:

> Clause 25
> This Agreement shall be governed by the Uniform Law for International Sales under the United Nations Convention of April 11, 1980 (Vienna) and where not applicable by Italian law.
>
> Clause 26
> Any dispute which might arise shall be decided by arbitration to be carried out in Singapore in English according to the rules of the International Chamber of Commerce in Paris.

The parties submitted a dispute to ICC arbitration before a sole arbitrator in Singapore. In doing so, both parties had initially considered Italian law to govern the dispute, but Quarella changed its stand before the hearing of the arbitration and took the stand that the Uniform

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Law for International Sales under the United Nations Convention of April 11, 1980 ("CISG") applied. As a result, the tribunal heard and considered three preliminary issues:

(a) whether arguments that the CISG applied should be heard at such a late stage;

(b) whether Clause 25 of the Agreement was modified by mutual agreement so that the CISG did not apply; and

(c) whether Clause 25 of the Agreement should be interpreted as a direct choice of the substantive rules of the CISG by the parties so that the CISG applied even if the conditions for the application of the CISG stated in the CISG were not met.

The tribunal then considered whether the CISG, according to its own internal criteria, applied to the Agreement. The tribunal ultimately concluded that Italian law governed the dispute and issued two awards (on merits and costs respectively) in Scelta's favour. Quarella brought an application to set aside the two awards under Art 34(2)(a)(iv) and (iii) of the Model Law.

## Holding and Comment

*Art 34(2)(a)(iv) of the Model Law*

Quarella argued that the arbitral procedure was not in accordance with the parties' agreement because the tribunal had failed to comply with Art 17 of the ICC Rules which allows parties the liberty of agreeing upon the rules of law to be applied.

The High Court rejected this argument. It held that this was not a case whether there had been a failure to apply the choice of law clause or an express refusal to apply the said clause. To the contrary, the reasoning adopted in the award showed that the tribunal had respected the choice of law clause, engaged the choice of law clause seriously and interpreted the choice of law clause. In the Court's view, the tribunal's approach was unimpeachable.

*Art 34(2)(a)(iii) of the Model Law*

Quarella also argued that the tribunal had exceeded the scope of submission to arbitration when it applied Italian law instead of the CISG. The Court similarly rejected this argument by holding that this was not a case where the arbitral tribunal had improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. Quarella's disagreement with the tribunal's interpretation of the choice of law clause does not fall within the ambit of Art 34(2)(a)(iii) of the Model Law.

Two observations can be made. First, just as courts would be slow to review awards due to purported mistakes of law or fact made by tribunals (such as the construction of substantive contractual clauses), courts would similarly be slow to review awards due to purported mistakes in the construction of the choice of law clause. This is to be contrasted with the exceptional situation where the tribunal had not respected or engaged the choice of law clause at all (*eg*, disregarding or ignoring the parties' choice of law clause). The High Court did not dismiss the possibility of reviewing awards which fall into this latter category.

Second, subject to any arbitral rules and the *lex arbitri*, parties can expressly pick the CISG as the applicable rules of law governing a contract, even if the CISG does not apply on its own accord. If parties were to do so, it is also generally possible for them to pick a national law to govern issues that the CISG does not address (*eg*, capacity of the parties, assignment, set-off,

statute of limitation, penalty clauses). This appeared to be the interpretation that Quarella had wanted the tribunal to adopt.

The difficulty with Clause 25 however is the ambiguity in the key phrase that the tribunal had identified: “and where not applicable by Italian law”. The tribunal observed that Quarella had not identified the criteria to decide when the CISG does not apply and Italian law applies. Specifically, this phrase does not appear to suggest that (i) the CISG would apply, regardless of whether it is applicable according to its own criteria; and (ii) Italian law would govern in relation to specific issues that the CISG does not address.