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Interpreting contracts under Singapore law in international arbitration — The sequel

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Interpreting Contracts under Singapore Law in International Arbitration — The Sequel

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by Darius Chan

Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration provides in relevant part that, "*if the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request … the court … to decide the matter*". One question that arises is, to the extent issues of evidence arise, what rules of evidence should the court apply when "*decid[ing] the matter*"? Does the Court apply national rules of evidence, or does the Court apply the same rules of evidence, if any, that the tribunal was obliged to apply? This thorny question reared its head recently in a Singapore High Court decision of *BQP v BQQ* [2018] SGHC 55, which follows an earlier discussion by a different Judge in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] SGHC 93.

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Background

By way of background, subject to various exceptions and as a general rule under *English* law, pre-contractual negotiations, such as prior drafts of contracts, are inadmissible to interpret a contract. At least where *Singapore litigation proceedings* are concerned, the issue of whether pre-contractual negotiations are admissible in evidence to construe written agreements, and if so, the applicable limits or safeguards (the "admissibility issue"), remains an unsettled question.

The Singapore Court of Appeal has held that extrinsic evidence (including pre-contractual negotiations) to interpret a contract is admissible under Singapore law only if it is "*relevant, reasonably available to all the contracting parties and relates to a clear or obvious context*" (*Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27 (hereinafter called the "*Zurich* criteria")).

Subsequently, the Court of Appeal formulated specific court pleading requirements to ensure that the *Zurich* criteria are met (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43), namely:

1. Parties who contend that the factual matrix is relevant to the construction of the contract must plead with specificity each fact of the factual matrix that they wish to rely on in support of their construction of the contract;
2. The factual circumstances in which the facts in paragraph 1 above were known to both or all the relevant parties must also be pleaded with sufficient particularity;
3. Parties should in their pleadings specify the effect which such facts will have on their contended construction; and
4. The obligation of the parties to disclose evidence would be limited by the extent to which the evidence is relevant to the facts pleaded in paragraphs 1 and 2.

In 2015, the Singapore Court of Appeal (eg, *Xia Zhengyan v Geng Changqing* [2015] SGCA 22 and other cases) sounded the caution that the admissibility issue is still an open question under Singapore law. Reliance on prior drafts of contracts should not be permitted as a matter of course. At a minimum, the *Zurich* criteria must still be met.

In the 2015 High Court decision of *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd*, [2] the Judge opined, by way of *dicta*, that a dispute over how a contract is to be construed must yield the same final determination whether the contract is construed by a Court or in arbitration. The Judge's observation did not sit comfortably with Singapore's Evidence Act, which provides expressly in Section 2 that certain parts of the Evidence Act do not apply to "*proceedings before an arbitrator*". The Judge's observation also does not sit well with institutional rules which typically provide that an arbitral tribunal can determine whether to apply strict rules of evidence to determine the admissibility of evidence. For instance, the current SIAC Rule 19.2 expressly provides that evidence need not be admissible in law. On appeal, the Singapore Court of Appeal did not deal with the *dicta* of the High Court.

The *dicta* of the High Court in *HSBC Trustee* also raises questions concerning whether, and if so how, arbitral

tribunals ought to apply the Court's caution in *Xia Zhengyan v Geng Changqing*[3] when considering whether to admit or rely on pre-contractual negotiations. Is extrinsic evidence admissible in *international arbitrations* where the underlying contract is governed by Singapore law? If an arbitral tribunal finds jurisdiction by construing a contractual provision in a certain manner by relying on prior drafts of the relevant contract, is the tribunal's decision on jurisdiction susceptible to challenge? In *BQP v BQQ*, the Court was confronted with these issues.

Facts

In *BQP v BQQ*,[4] the arbitral tribunal, after admitting and relying on evidence of prior drafts and negotiations in construing a certain contractual provision, found that the tribunal enjoyed jurisdiction.

The plaintiff applied before the Singapore Courts to challenge the tribunal's jurisdiction ruling under Section 10 of Singapore's International Arbitration Act read with Article 16(3) of the Model Law. After meticulously analysing the evidence (including extrinsic evidence) that had been adduced before the tribunal, the Singapore High Court agreed with the tribunal's interpretation, and dismissed the plaintiff's challenge.

The Plaintiff applied for leave to appeal, contending *inter alia* that the issues surrounding admissibility of pre-contractual negotiations were questions of importance or questions of general principle to be decided for the first time. The Court refused, holding that the Singapore Court of Appeal had already decided that rules concerning admissibility of evidence are rules of *evidence* or *procedural* law (which generally would not bind arbitral tribunals), and not a matter of substantive law.

In essence, the Court held that national rules concerning admissibility of evidence, including the *Zurich* criteria, are procedural in nature, and do not bind international arbitration tribunals. The Judge made the following observations:

1. There is a specific provision in Singapore's Evidence Act that precludes the Act's applicability to "*proceedings before an arbitrator*".
2. Parties resort to international arbitration precisely because they wish to avoid national laws shackling their quest for a speedy, commercial and practical outcome to their dispute, and preclude the application of laws and procedures which may be alien to them.
3. To the extent parties may have agreed to institutional arbitration, many institutional rules give the tribunal broad discretion to decide on the admissibility, relevance, materiality and weight of evidence offered.

Discussion

The Court in *BQP v BQQ*[5] had meticulously reviewed the evidence (including extrinsic evidence) adduced before the tribunal before eventually reaching the same interpretation of the relevant contract as the tribunal.

This can be understood as an exercise where the Court was simply applying rules of contractual interpretation (found in the law of contract) against the body of evidence that had already been adduced before the tribunal.

Separate from the issue of whether a *tribunal* was bound to apply national rules concerning admissibility of evidence (which the Court in *BQP v BQQ* ruled in the negative), it is not evident whether there was any argument questioning whether the *Court* itself was bound to apply national rules concerning admissibility of evidence in an Article 16(3) application. Yet, at the same time, the Court in *BQP v BQQ* (at para 123) stated that the *Zurich* criteria (which according to the Court was a rule of evidence) had, in fact, been met. Whilst this may have been a statement made out of prudence, it provokes the vexed question: what if the *Zurich* criteria had *not* been met? In those circumstances, would the Court exclude certain extrinsic evidence which had been adduced before the Tribunal?

A possible argument would be that it should not matter whether the Zurich *criteria* had been met — the Court should *not* revisit a tribunal's decisions concerning admissibility of evidence because that would effectively frustrate the parties' expectation (or agreement) that the tribunal has wide discretion to deal with issues of evidence and procedure unfettered by national rules of evidence and procedure. In the context of an Article 16(3) or Article 34(2)(a) application, whether the *Zurich* criteria had been met may well be an academic question. Practically speaking, to the extent the Court disagrees with the tribunal's reliance on a certain piece of evidence that had already been adduced before the tribunal, the Court can simply assign limited *weight* to that evidence, rather than revisit a tribunal's decision on *admissibility*.

Be that as it may, one can imagine scenarios where national rules of evidence may, in fact, be relevant.

Under Singapore law, in applications under Article 16(3) or Article 34(2)(a) of the Model Law, parties are not precluded from advancing new arguments that were not previously advanced before the Tribunal (see, for instance, the *dicta* in *Tan Poh Leng Stanley v Tang Boon Jek Jeffrey* [2000] SGHC 260). It is also the position under Singapore law that parties may adduce new evidence for the purposes of an Article 16(3) application (*Government of the Lao People's Democratic Republic v Sanum Investments Ltd* [2015] SGHC 15) or an Article 34(2)(a) application (*AQZ v ARA* [2015] SGHC 49). In determining whether new evidence could be adduced, the Singapore High Court in *Sanum* had applied what the Court called a "*modified Ladd v Marshall* test" which, in fact, stems from national rules of evidence.

Imagine further an Article 16(3) or Article 34(2)(a) application where the applicant seeks to introduce a new argument based on interpreting a contract using new extrinsic evidence (such as prior drafts of contracts). In this scenario, can an objection based on the *Zurich* criteria be sustained in relation to the new evidence sought to be adduced? Perhaps more practically, would the caution in *Xia Zhengyan v Geng Changqing* [6] (namely, reliance on prior drafts of contracts should not be permitted as a matter of course) apply in this scenario? A possible argument would be that the Court *can* decide the issue of admissibility by applying national rules of evidence when there has been no prior decision on admissibility by the tribunal.

Given the steady stream of arbitration cases flowing through the Singapore Courts, one might not have to wait

long before the Court has to grapple with these issues again.

Endnotes

1.	[2015] SGHC 93
2.	[2015] SGHC 93
3.	[2015] SGCA 22
4.	[2018] SGHC 55
5.	[2018] SGHC 55
6.	[2015] SGCA 22

Tags: ADMISSIBILITY OF EXTRINSIC EVIDENCE, CONTRACTUAL INTERPRETATION, DE NOVO REVIEW, INTERPRETATION OF CONTRACTS IN ARBITRATION

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