

## ARBITRATION: WHETHER ENFORCEMENT ORDER SHOULD BE SET ASIDE ON THE BASIS OF ARBITRATOR EXCEEDING ITS JURISDICTION DUE TO ERROR IN RESPECT OF GOVERNING LAW

*Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd [2017] SGHC 199*

### IN SUMMARY

This Singapore High Court decision of 14 August 2017 discussed the issue of whether an Arbitrator's error in decision with respect to the governing law would cause it to exceed its jurisdiction, and therefore forms a basis for the Arbitral Award and Enforcement Order to be set aside under *Article 34(2)(a)(iii)* of the *Model Law*.

### FACTS

The Plaintiff (Quanzhou Sanhong Trading Limited Liability Co Ltd) entered into a contract to purchase corn from the Defendant (ADM Asia-Pacific Trading Pte Ltd). Subsequently a dispute arose between parties in relation to the quality of the corn and the dispute was referred to arbitration in Beijing, under the China International Economic and Trade Arbitration Commission ("CIETAC") Arbitration Rules.

The Arbitral Tribunal rendered its award in favour of the Plaintiff for the sum of US\$ 772,957.41 and the Plaintiff subsequently obtained an order of court granting it leave to enforce the Award against the Defendant ("the Enforcement Order").

The Defendant then filed an application to set aside the Enforcement Order on the basis that the Award contained a decision on a matter beyond the scope of the submission to arbitration (*Section 31(2)(d)* of the *International Arbitration Act* ("IAA") and/or that enforcing the Award would be contrary to the public policy of Singapore (*Section 31(4)(b)* of the IAA. In the meantime, the Defendant's application to set aside the Award in Beijing was dismissed.

### THE DECISION OF THE ASSISTANT REGISTRAR

The application to set aside the Enforcement Order was first heard before an Assistant Registrar of the Singapore, whereby the Learned Assistant Registrar dismissed the Defendant's said application.

The Defendant then appealed against the Assistant Registrar's decision to a Judge in the Singapore High Court.

## **ISSUES BEFORE THE SINGAPORE HIGH COURT**

The Singapore High Court had to decide on the following 2 issues:

- (a) Whether the Arbitral Tribunal acted in excess of its jurisdiction if it erred in deciding the issue with respect to the governing law; and
- (b) Whether enforcement of the Award would be contrary to the public policy of Singapore.

## **HOLDING OF THE SINGAPORE HIGH COURT**

The Singapore High Court upheld the decision of the Learned Assistant Registrar and concluded that the Arbitral Tribunal did not exceed its jurisdiction if it made an error as to the governing law of the contract.

Therefore, the appeal by the Defendant was dismissed.

## **Whether the Tribunal Acted in Excess of its Jurisdiction**

### ***The Applicable Provisions***

*Section 31(2)(d) of the IAA provides that the Court may refuse enforcement of a foreign award if “the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration.”.*

*Section 31(2)(d) of the IAA is similar to Article 34(2)(a)(iii) of the Model Law, which applies where the Arbitral Tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it.*

### ***Errors of Law or Fact Does Not Warrant Setting Aside of Award***

Errors of law or fact are not sufficient to warrant setting aside an arbitral award under *Article 34(2)(a)(iii) of the Model Law*. If an issue is firmly within the scope of submission to arbitration, it cannot be taken outside the scope of submission to arbitration simply because the Arbitral Tribunal came to a wrong, or even manifestly wrong, conclusion on it. These principles are equally applicable to *Section 31(2)(d) of the IAA*.

### ***Application of Law to the Facts***

In the present case, it was undisputed that the governing law of the Contract was an issue that was firmly within the scope of submission to the arbitral tribunal (i.e. the Defendant's case was that the Contract was governed by English Law whereas the Plaintiff argued that the governing law was the law of the People's Republic of China (“PRC”).

The tribunal had decided that one section of the Contract was governed by English Law and that the rest of the Contract was governed by PRC law.

As a matter of principle, there is no basis to justify the Defendant's submissions that where the relevant issue is related to the governing law, an error by an Arbitral Tribunal would cause it to exceed its jurisdiction because it would have disregarded the parties' express agreement as to governing law.

The law is well established that an Arbitral Tribunal does not exceed its jurisdiction just because it comes to a wrong conclusion on an issue that was within the scope of submission to arbitration. There is no reason why an issue to governing law should be treated differently from other issues submitted to arbitration.

Therefore, the Defendant was not entitled to rely on *Section 31(2)(d)* of the IAA to set aside the Enforcement Order.

### **Whether Enforcement of the Award Would Be Contrary to the Public Policy of Singapore**

The Court decided that since the Arbitral Tribunal had not exceeded its jurisdiction, it followed that the Defendant's case based on *Section 31(4)(b)* of the IAA (i.e. enforcement of the award would be contrary to the public policy of Singapore) also failed.

### **Concluding Views**

*This case provides a useful reminder on two main points.*

*First, the Singapore Courts will be slow to intervene with Arbitration Proceedings and Awards unless there are clear reasons/grounds to justify such an act.*

*Second, when entering into contractual agreements, parties are advised to pay close attention to arbitration agreements and be mindful of terms, one of it is the governing law of the contract. In this regard, this case clearly shows that in an international transaction, the interplay of jurisdictions and applicable laws could sometime give rise to questions of applicability, in the sense that some laws may be imposed to different parts of the contract (e.g. parties, transactions and interpretation of the contract). Therefore, it is important to have all of these clearly set out to minimise any possible disputes in this matter.*

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## ARBITRATION: SETTING ASIDE OF A DOMESTIC ARBITRATION AWARD UNDER THE ARBITRATION ACT

**BNX v BOE [2017] SGHC 289**

### IN SUMMARY

This Singapore High Court decision of 21 November 2017 discussed issues relating to the setting aside of an Arbitration Award, namely on the grounds of the Arbitral Tribunal acting in excess of its jurisdiction, breach of the rules of natural justice, and award being contrary to public policy.

### FACTS

In December 2013, the Plaintiff acquired from the Defendant a business in Singapore. The Plaintiff claims that the Defendant fraudulently misrepresented to it that the public are permitted to patronise certain facilities which comprise part of the business (which the Plaintiff only discovered for the first time sometime in July 2014). In fact, the Urban Redevelopment Authority (“URA”) had imposed a condition which restricted the use of these facilities to customers and staff of the business. The Defendant denied any wrongdoing.

The parties' rights and obligations with respect to the acquisition are governed by a detailed sale and purchase agreement (“the SPA”). The SPA also contains an arbitration agreement which provides for disputes under the SPA to be resolved by arbitration in Singapore under the ICC rules before a panel of three arbitrators.

The Plaintiff initiated an arbitration against the Defendant claiming that the Defendant was guilty of fraudulent misrepresentation and breach of warranty in relation to the SPA. The Arbitral Tribunal delivered its final Award in June 2016 dismissing the Plaintiff's claim in its entirety.

In August 2016, the Plaintiff applied under *Section 48* of the *Arbitration Act* (“AA”) to set aside the award, relying on 3 grounds:

- (a) The Arbitral Tribunal exceeded its jurisdiction by deciding matters that were not before it;
- (b) There was a breach of natural justice which deprived the Plaintiff of a fair hearing; and
- (c) The Award is contrary to public policy.

## **BACKGROUND TO THE DISPUTE**

Before setting out the holding of the Court, it is critical to note the background to the dispute.

In 2008, the Defendant acquired a 99-year lease of a parcel of land in Singapore by way of a head grant from the Singapore government. The Defendant intended to build a mixed-use development, in which a business would be housed and operated, and sought planning permission from URA for four mutually-exclusive uses, in particular "Use A" and "Use B". The head lease required no less than 25% of the development's maximum permissible gross floor area ("GFA") to be attributed to Use A and no less than 60% of the GFA to be attributed to Use B. In July 2009, URA granted the initial written permission and the construction commenced in late 2010 and concluded in October 2013.

The Defendant's plans initially attributed less than the minimum 25% of the GFA to Use A. In 2010, the URA eventually agreed to attribute these facilities to Use A if the Defendant would undertake that they would be for the sole use of customers or staff and not open to public, to which the Defendant agreed and gave the corresponding undertakings. The Plaintiff was only aware of these restrictions in July 2014, after the SPA was concluded and operations commenced at the premises.

## **HOLDING OF THE SINGAPORE HIGH COURT**

Based on the 3 grounds (issues) raised by the Plaintiff (as set out above), The Singapore High Court held that:

- (a) On the jurisdiction issue, the Court dismissed the Plaintiff's application to set aside the award under *Section 48(1)(a)(iv)* of the AA and held that the Arbitral Tribunal did not exceed its jurisdiction – all the contentions raised by the Plaintiff with respect to this issue were either not decided at all or were well within the Arbitral Tribunal's jurisdiction;
- (b) On the breach of natural justice issue, the Court held that the Plaintiff was not denied a fair hearing – the Plaintiff had reasonable notice of the case that it had to meet and there was no lack of opportunity to cross-examine the project architects' representatives; and
- (c) On the public policy issue, the SPA was a contract that was not entered into with the object of committing an illegal act and therefore not contrary to public policy.

## **First Ground: Tribunal Acting in Excess of its Jurisdiction**

The Plaintiff argued that the Arbitral Tribunal exceeded its jurisdiction by deciding issues that the parties did not submit to it for decision. In this regard, instead of confining itself to determining the five issues submitted it, the Arbitral Tribunal made findings on the policy of the URA which turned out to be the foundation of the award, in particular three findings:

- (a) The URA policy and the meaning of its use restriction were open to interpretation;
- (b) The project architects advised the Defendant that it was reasonable to permit members of the public to use the facilities; and

- (c) The Defendant honestly believed that acting on the advice was not a breach of the Defendant's undertaking or of the URA's use restriction.

The Plaintiff's case was the these 3 findings did not arise from either party's statement of case and were not pleaded or set out in the Defendant's opening submissions.

### **The Law**

The Court noted that *Section 48(1)(a)(iv)* of the AA is identical to *Article 34(2)(a)(iii)* of the Model Law, and reiterated that the two step analysis for setting aside an award on the ground that the Arbitral Tribunal exceeded its jurisdictions are:

- (a) The Court must identify what matters were within the scope of the submission to the Arbitral Tribunal; and
- (b) The Court must ascertain whether the award confined itself to those matters or whether it strayed into areas outside the scope of the submission to Arbitration.

Also, while the Arbitral Tribunal's jurisdiction is demarcated by the submission to arbitration, it must not be approached too narrowly.

### **Application to Law to Facts**

The Court firstly observed that the first two issues which the Plaintiff complained of were not within the submission to arbitration were not actually decided by the Arbitral Tribunal, and were in fact all assumed in the Plaintiff's favour. Therefore, the Arbitral Tribunal did not exceed its jurisdiction in this regard.

Further, the Court also found that the issues were within the submission to arbitration. The Arbitral Tribunal had to determine two issues ancillary to the Plaintiff's submissions to the arbitration, which by their very nature as ancillary issues, were also within the scope of the submissions.

In addition, the Plaintiff was put on notice that these issues would be raised before the Arbitral Tribunal as the Defendant had set out its position with respect to these issues in the Statement of Defence with the Defendant's Witness Statements giving the relevant evidence.

For all these reasons, all these issues were either not decided at all or were well within the Arbitral Tribunal's jurisdiction (being either raised in the Plaintiff's submission to arbitration or ancillary to such an issue) and therefore did not go beyond the Arbitral Tribunal's jurisdiction.

### **Second Ground: Breach of Rules of Natural Justice**

The second ground on which the Plaintiff submitted that the award must be set aside is that the Tribunal breached the rules of natural justice, pursuant to *Section 48(1)(a)(vii)* of the AA. The Plaintiff had to show (a) which rule of natural justice was breached, (b) how that 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.

In this regard, the Plaintiff argued that the Arbitral Tribunal had breached the fair hearing

rule as the Plaintiff had no notice that the URA's policy would be an important issue in the arbitration and was not given the opportunity to be heard on what this policy is. Also, the Plaintiff also claimed that the Arbitral Tribunal had erred in admitting and giving weight to hearsay evidence (i.e. the evidence from the Defendant on what the project architects had advised the Defendant in relation to the URA policies should not be admitted for being hearsay).

### **No Breach of Fair Hearing Rule**

The Court found that there was no breach of the fair hearing rule as the Arbitral Tribunal made no decision as to what URA's policy was and the Arbitral Tribunal made no finding as to whether the project architects' advice was correct.

### **Hearsay Rule Does Not Apply**

The Court also found that the Arbitral Tribunal did not breach the hearsay rule due to the following reasons:

- (a) The hearsay rule does not apply in arbitration; and
- (b) Not every out of court statement falls within the hearsay rule at common law, and a statement is inadmissible only if adduced to prove the truth of the fact set out in the statement, but not adduced to show that the statement was made (in the present case, the statements by the project architects was adduced only to show the Defendant's state of mind and not the truth of the statement).

In the circumstances, there was no breach of the rules of natural justice that would warrant the setting aside of the Award.

### **Third Ground: Award Being Contrary to Public Policy**

The third and final ground which the Plaintiff says justifies setting aside the Award is the that award is contrary to public policy, pursuant to Section 48(1)(b)(ii) of the AA. To this end, the Court reiterated the law with respect to public policy, and they are as follows:

- (a) The Court is empowered to decide for itself what the public policy of Singapore is (but setting aside is not legitimate where the court and the tribunal disagree not on the principles of law which ought to be applied but on the underlying facts to which those principles should be applied and if this is the case, the court must defer to the tribunal;
- (b) The party who wishes to set aside an award on the ground that it is contrary to public policy must establish two things – it must first identify the rule or principle of public policy to which the award is allegedly contrary and then ascertain the part of the award conflicting with the public policy; and
- (c) An award will be set aside for being contrary to public policy if it offends "*fundamental notions and principles of justice*" – this will only be satisfied if upholding the award would "*shock the conscience*", "*clearly injurious to the public good*", and would violate the "*most basic notion of morality and justice*".

### **Admission and Consideration of Hearsay Evidence**

The Court stated that it is unclear why admitting

and relying on hearsay evidence amount to a breach of public policy. In any case, the Arbitral Tribunal neither admitted nor relied on hearsay evidence in reaching its decision.

### **URA's Policy**

The Court stated that a reading of the Tribunal's Award makes it apparent that it did not make any findings as to the effect of the URA's policy and use restriction. The Arbitral Tribunal's finding on this issued centred only on 2 issues, namely how the Defendant subjectively understood URA's policy and use restriction in light of the professional advice from the project architects, and whether a reasonable person would have understood the advice in the same way.

As such, there was no basis for the Plaintiff to argue that the Arbitral Tribunal made any findings that are contrary to public policy.

### **Illegality of Sale and Purchase Agreement**

There was nothing suggest that the parties entered into the SPA for the purpose of violating the URA's use restriction, and therefore, the Court rejected the Plaintiff's submission that the SPA was a contract that the parties entered into with the object of committing an illegal act.

In summary, the Plaintiff has failed to satisfy any of the grounds that it relies on for setting aside the award under Section 48 of the AA, and therefore, the Plaintiff's application is dismissed.

### **Concluding Views**

*This case serves as a reminder that the Court will not take any application for setting aside of an Arbitral Award lightly, and that any claims/allegations in support of an application to set aside an Arbitral Award must be substantiated by evidence. An Arbitral Award is final and binding on parties and the setting aside application should not be seen by parties as a way to out whenever an Award has been made against them and/or not in their favour.*

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## THE MEDIATION ACT IN SINGAPORE

### *Updates on the Mediation Act 2017 and the Key Provisions*

#### INTRODUCTION

Since our last write-up in Issue 1 of 2017 (January) of our Newsletters, the *Mediation Act* and its supplementary legislation the *Mediation Rules* has come into effect as of 1<sup>st</sup> November 2017.

The enactment of the *Mediation Act* is part of a series of measures to enhance Singapore's International Commercial Mediation services and to further promote the resolution of disputes by Mediation. It is hoped that the new *Mediation Act* strengthens the groundwork for administration of mediated settlements conducted in Singapore.

#### APPLICATION AND SCOPE OF THE MEDIATION ACT

Pursuant to *Section 6*, the *Mediation Act* applies to any mediation conducted under a mediation agreement where:

- (a) The mediation is wholly or partly conducted in Singapore – e.g. on skype where one party is within Singapore; or
- (b) The agreement provides that the *Mediation Act* or the law of Singapore is to apply to the mediation – this means that international agreements where the agreement to mediate provides that Singapore Law of the *Mediation Act* applies.

However, as described in *Section 6(2)*, the *Mediation Act* does not apply to any mediation or conciliation proceedings, process, scheme or framework conducted under, or provided by or

under, any written law. This essentially means that Mediations conducted by the Courts (e.g. Court-annexed Mediations such as those conducted in the State Courts Centre for Dispute Resolution and the State Courts Case Management Conference (for Simplified trials), and Community Mediation are not covered by the *Mediation Act*.

It should also be noted that the *Mediation Act* does not legislate Mediation Standards and any Accreditation Issues.

#### KEY PROVISIONS

The paragraphs below further expands the discussion on the key provisions, that was already raised in on our write-up in Issue 1 of 2017 (January).

#### Confidentiality And Admissibility

Prior to the *Mediation Act*, confidentiality and admissibility of any communication during a Mediation is governed by common law privilege and confidentiality, contractual protections (confidentiality clauses in the Settlement Agreement with equitable remedies for breach of confidence), and the without prejudice rule. In all the above instances, the Mediator does not own the privilege and can be called to provide evidence if parties agree.

With the *Mediation Act*, the confidentiality and admissibility rules are now codified, in particular in *Sections 9 to 11* of the *Act*.

Section 9 provides the restrictions on disclosure for any mediation communication relating to a mediation to any third party to the mediation. This means that mediation communication is protected (i.e. anything that is said or done, documents prepared for the mediation, information provided in the course of or for the purpose of mediation). This includes all agreement to mediate and the settlement agreement itself.

Section 9(2) sets out the exceptions in which any mediation communications can be disclosed to third parties, and this includes, *inter alia*, disclosure made with the consent of parties (does not include the mediator) and make of statements (if it is something that the mediator said, then parties cannot unilaterally waive the confidentiality of the mediator and must seek the mediator's consent), disclosure necessary to minimise danger of injury to any person and/or disclosure is required under an order of court or any written law.

Section 10 provides that any mediation communication is not to be admitted in evidence in any court, arbitral or disciplinary proceedings except with the leave of court or an arbitral tribunal and Section 11 gives power to the court and the arbitral tribunal to grant leave for the mediation communication to be disclosed. This includes for the purposes of enforcement or dispute with regard to the settlement agreement, establishing or disputing a complaint of professional misconduct against the mediator or other professionals in mediation, or any other purpose as the court or arbitral tribunal considers justifiable.

## Enforceability of Settlements

Prior to the *Mediation Act*, enforceability of settlements may be encapsulated in an Order of Court if there are pending legal proceedings. However, there is no such recourse for breach of a pre-writ of summons mediated settlement agreement and any enforcement of such settlement agreements would have to be based on a claim for breach of contract.

Section 12 of the *Mediation Act* now provides that where a mediated settlement agreement has been made in a mediation in relation to a dispute for which no proceedings have been commenced in court, any party of the agreement may, with the consent of all parties to that agreement, apply to a court to record the agreement as an order of court.

However, the limitation to this provision is that the mediated settlement agreement can only be recorded as an order of court if:

- (a) The mediation is administered by a designated mediation service provider or conducted by a certified mediator – designated mediation service providers only includes mediation conducted under the auspices of the Singapore International Mediation Centre, Singapore Mediation Centre, Tripartite Alliance for Dispute Management and World Intellectual Property Organisation Arbitration, and certified mediator is defined as any mediator which has been certified by the Singapore International Mediation Institute ("SIMI") as a Level 4 Mediator;

- (b) Agreement is in writing and signed by or on behalf of all parties to the agreement; and
- (c) The agreement contains such information as may be prescribed.

Therefore, it seems that the requirements for any mediated settlement agreement to be recorded as an order of court is very narrow and parties have to ensure that the requirements are strictly met to avoid any difficulties in having the settlement agreements recorded as an order of court.

### Stay fo Court Proceedings

Prior to the *Mediation Act*, there is no automatic stay of court proceedings in favour of Mediation, and that any application for stay is a matter of discretion by the court.

However, with Section 8 of the *Mediation Act*, if there is a clause to mediate in a mediation agreement and any party to the mediation agreement commences court proceedings, the other party can now apply to the Court for a stay of the Court proceedings. This bring mediation clauses to the same level as arbitration clauses.

*If you would like more information on this or any other area of law, you may wish to contact us.*

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### Concluding Remarks

*In general, it is the writers' view that the new Mediation Act 2017 is a welcome change in the Mediation landscape in Singapore, and it helps to promote Mediation as another appropriate dispute resolution mechanism. Novel changes such as the enforceability of settlements as provided in Section 12 provides certain mediations an accelerated enforcement mechanism for their settlement terms, and this will definitely made mediation more attractive.*

*However, as discussed above, there are certain provisions that may be problematic and/or very narrow in scope and it remains to be seen whether such provisions will affect the efficacy of the intended purpose of the Mediation Act.*

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