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Interpreting Contracts under Singapore Law in International Arbitration: HSBC Trustee v Lucky Realty Co

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In a series of cases since 2008, the Singapore Court of Appeal (Singapore's highest court) has been articulating the contours of a contextual approach to contractual interpretation. Under this contextual approach, the Singapore courts "*must ascertain, based on all the relevant objective evidence, the intention of the parties at the time they entered into the contract*". In doing so the court can have regard to evidence beyond the contract itself, viz, extrinsic evidence.

The different types of extrinsic evidence can be divided into four categories, namely, evidence of :
(a) circumstances surrounding the contract;
(b) subjective intentions of the parties;
(c) parties' pre-contractual negotiations; and
(d) parties' post-contractual conduct.

As the Singapore Court of Appeal has observed, civil law jurisdictions and transnational conventions typically allow contracts to be proven by any means, including all the four categories named above.

However, the Singapore Court of Appeal has held that extrinsic evidence is admissible 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 pleading requirements to ensure that the *Zurich* criteria are met (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] SGCA 43).

Do international arbitration tribunals have to apply the *Zurich* criteria when interpreting Singapore-law governed contracts?

Readers would be aware that international arbitrations very frequently do not adopt the rules of evidence of its seat or a particular jurisdiction. Neither do international arbitrations typically adopt detailed prescriptive rules in relation to the admissibility of evidence. Instead, the IBA Rules on the Taking of Evidence in International Arbitration are increasingly used by arbitrators in Procedural Order Number 1 as guidelines which the tribunal is not necessarily bound by. The IBA Rules gives a tribunal wide discretion to exclude evidence which lacks "*sufficient relevance to the case or materiality to its outcome*". Arbitral rules similarly give the tribunal wide discretion in determining the relevance, materiality and admissibility of evidence. For instance:

(a) The UNCITRAL Arbitration Rules simply provide that "*the arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered*"; and
(b) The SIAC Arbitration Rules go further in providing that "*the Tribunal shall determine the relevance, materiality and admissibility of all evidence.* ***Evidence need not be admissible in law***" (emphasis added).

If the *Zurich* criteria form part of the law of contract, a tribunal would be expected to apply those criteria as part of the law of contract. Conversely, if the *Zurich* criteria form part of the law of evidence, a tribunal would not be constrained by the *Zurich* criteria. This is all the more so for SIAC tribunals, where the SIAC Arbitration Rules expressly provide that "*evidence need not be admissible in law*".

The Singapore High Court considered this issue (*HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd* [2015] SGHC 93). The decision in *HSBC Trustee* may have the effect of constraining international arbitration tribunals to apply, as part of the law of contract, the *Zurich* criteria when interpreting contracts governed by Singapore law. The High Court's reasoning on each of the four categories of extrinsic evidence are discussed below.

First, in relation to evidence on circumstances surrounding the contract, the High Court reasoned that the law of evidence admits this type of evidence "*without restriction*" and the law of contract then accepts all of the evidence to be a legitimate aid to construction. Later in the same judgment, the High Court stated that, as a matter of the law of contract, this type of evidence is a permissible aid to construction if it satisfies the *Zurich* criteria. On this reasoning, the *Zurich* criteria appears to form part of contract law.

Secondly, in relation to evidence on subjective intentions of the parties, the High Court reasoned that both the law of evidence and the law of contract permit such evidence only if there is latent ambiguity in the contract. A latent ambiguity is one which becomes apparent only when the language is applied to the factual situation. In so finding, the High Court cited *Sembcorp Marine* which, in turn, cited certain English contract textbooks.

On a proper reading of *Sembcorp Marine*, however, the textbooks were arguably cited in the context where the Court of Appeal was reviewing not so much rules of contract, but the applicable rules of evidence within a section of the judgment focusing on the Evidence Act. That English contract textbooks may discuss rules of evidence is not unexpected. As *HSBC Trustee* recognised, in the context of English law, the law of contract and the law of evidence are both primarily common law and can therefore evolve together, virtually without any need to draw a distinction between the two, in the same judicial decisions (or textbooks).

Thirdly, in relation to parties' pre-contractual negotiations and post-contractual conduct, the High Court found that the *Zurich* criteria applied, but did not expressly state whether the criteria operated by way of the law of contract or evidence or both. However, the High Court expressed the view that a dispute over how a contract is to be construed must yield the same final judicial determination whether the contract is construed in litigation "*or even in arbitration*".

The High Court's reasoning may be supported by an extra-judicial writing in 2010 by VK Rajah JA who delivered the judgment in Zurich in 2008. Judge of Appeal Rajah expressed his view that "*the admissibility of extrinsic evidence for the purposes of contractual interpretation is a substantive question*" and that "*the main area of substantive law controlling the subject is the law*

of contract".

However, any doubt as to the status of the *Zurich* criteria appears to have been settled by *Sembcorp Marine* in 2013. Writing for the Court of Appeal in Sembcorp Marine, Chief Justice Menon emphasized that the admissibility of extrinsic evidence generally is governed by the rules of evidence and not by the rules of contractual interpretation (which are governed by the substantive law of contract). The rules governing the admissibility of extrinsic evidence in Singapore (in court litigation) are primarily statutory in the form of the Evidence Act and secondarily in the common law. The province of the Evidence Act is the treatment of evidence, and this is conceptually independent and distinct from rules of contractual construction. While the rules of evidence under the Evidence Act may indirectly affect the application of specific rules of contractual interpretation, they do not directly prescribe how a contract should be interpreted and construed.

Specifically, the *Zurich* criteria were re-cast by Chief Justice Menon along the following lines: "*under s 94(f) [of the Evidence Act], extrinsic evidence which was relevant and reasonably available to all the contracting parties and which would go towards establishing the relevant context of the contract would be admissible*".

It is arguable that the *Zurich* criteria form part of the law of the evidence, and not simultaneously or otherwise the law of contract. Once the rules of evidence (whether articulated in terms of the Evidence Act or the *Zurich* criteria) are applied to determine whether certain extrinsic evidence is admissible, the *Zurich* criteria do not resurface under the law of contract. The rules of admissibility of extrinsic evidence do not form part of the law of contract. International arbitration tribunals are therefore not necessarily bound by those rules.

This in turn begs two related questions.

Does this create a structural problem where a contract governed by Singapore law would be interpreted differently, depending on whether the matter is heard by way of litigation or arbitration? Ultimately the practical difference may be more apparent than real. Even if certain types of extrinsic evidence may be more readily admissible in arbitration, the weight placed on such evidence may be limited.

If that is the case, should tribunals readily admit extrinsic evidence? The Singapore Court of Appeal formulated the *Zurich* criteria (and related pleadings requirements) to avoid the time and cost arising from a "*tsunami*" of materials parties may seek to discover and adduce in the common law adversarial process.

Whether this "tsunami" has engulfed tribunals, and whether it contributes to delays and costs in international arbitration, may require an empirical study in its own right. Anecdotally, there has been no suggestion that SIAC arbitrations have been bogged down by virtue of the fact that the SIAC Rules permit evidence not admissible in law.

Nevertheless, even if the *Zurich* criteria may not bind arbitral tribunals, readers—especially those who have had to wade through long Redfern schedules requesting all manner of extrinsic evidence—may find it helpful if tribunals were to bear the rationale of the *Zurich* criteria in mind and critically evaluate the relevance, proportionality and materiality of those requests.

The author would like to thank Asst Professor Goh Yihan for his comments. All errors are the author's alone.

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This entry was posted on Wednesday, May 25th, 2016 at 1:05 am and is filed under Interpretation of Contracts, Singapore, Singapore Court of Appeal
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