Singapore High Court Finds that an Arbitral Tribunal is Empowered to Disregard the Parol Evidence Rule

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The Singapore High Court in BQP v BQQ [2018] SGHC 55 (judgment rendered on 14 March 2018) (the "Judgment") dismissed a challenge against an arbitration tribunal's award on jurisdiction and in so doing confirmed that where parties have agreed that the tribunal shall determine the relevance, materiality, and admissibility of all evidence, the tribunal would be entitled to disapply traditional common law evidentiary rules on the admissibility of parol evidence in contractual interpretation. The broader significance of this decision is that where parties have agreed to institutional rules which empower the tribunal to determine the admissibility of evidence (such as Rule 16.2 of the SIAC Rules 2013 which was in issue in this case), the parties should appreciate that the tribunal may even disapply established rules of evidence relating to the interpretation of contracts i.e. doctrines which may be perceived as part and parcel of contractual interpretation.

The decision in BQP v BQQ

In *BQP v BQQ*, BQQ commenced SIAC arbitration against BQP and its nominee company, alleging breaches of contract in relation to an agreement for the supply of round logs. BQP argued that on its proper construction, that agreement had been superseded by a subsequent agreement providing for BANI arbitration, and challenged the tribunal's jurisdiction on this ground. BQP failed in its jurisdictional challenge before the tribunal and appealed to the Singapore High Court pursuant to s 10 of Singapore's International Arbitration Act. The High Court (Quentin Loh J) dismissed BQP's appeal and refused to grant leave to further appeal to the Singapore Court of Appeal.

The High Court made the following observations:

1. First, S.2(1) of the Singapore Evidence Act (Cap 97.) expressly provides that Parts I, II and III shall not apply to proceedings before an arbitrator – this includes the rules relating to the admission of parol evidence to interpret an agreement. The Judge took the view that this was "unsurprising". One major rationale for resort to arbitration was to avoid the national laws of countries shackling the parties' quest for expeditious and practical dispute resolution. The Judge opined that to a businessman from a civil law country, concepts like the parol evidence rule do not make much sense (see Judgment at [126]). Indeed, the authors also note that the general prohibition on evidence of pre-contractual negotiations was also memorably excoriated by common law judges such as Lord Nicholls, who in his extrajudicial writing criticized the prohibition as "perverse" for tending to withhold from the adjudicator's consideration "the best

evidence of all" of the parties' intentions (see Donald Nicholls, My kingdom for a horse: the meaning of words [2005] LQR 577, p.583).

2. Second, the SIAC Rules 2013 (which governed the arbitration in question) provided that "The Tribunal shall determine the relevance, materiality, and admissibility of all evidence. Evidence need not be admissible in law". This, in the learned Judge's view, made it clear that evidential questions of admissibility, relevance and materiality were therefore clearly "within the sole province of the tribunal".

3. Third, the High Court took the view that the question of whether evidential rules relating to contractual interpretation was to be classified as a question of evidence or procedural law to be left to the arbitrator or a question of contract law which governs the substantive rights of the parties has been settled by the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193 in favour of the former. It should be noted that this issue is not settled in all jurisdictions – for instance, Julian D.M. Lew, Loukas A. Mistelis & Stefan M. Kröll (citing New York law) have described the parol evidence rule as lying "in the grey zone between substance and procedure" (Comparative International Commercial Arbitration (The Hague: Kluwer Law International, 2003), p. 558).

Implications beyond Singapore-seated arbitrations

1. Interpretation of other arbitral rules: The High Court's observations are not limited to Singapore seated arbitrations or arbitrations under the auspices of the SIAC Rules. The Court specifically noted at [128] of the Judgment that other arbitral institutions have a rule similar to the SIAC rule under consideration, naming: the LCIA Rules, the UNCITRAL Arbitration Rules, the HKIAC Rules, the AAA procedures, and the Korean Arbitration Act. The Court additionally noted, in that same paragraph, that even though the ICC Rules do not contain a similar provision, it is generally accepted that the tribunal has the inherent power to decide such evidential issues.

2. Interpretation of the IBA Rules: Further, the High Court's observations should apply with equal force when interpreting and applying the IBA Rules on the Taking of Evidence in International Arbitration 2010 ("IBA Rules"). The IBA Rules were referred to with approval by the High Court at [130] of the Judgment as rendering invalid floodgates concerns about admitting evidence of pre and post-contractual conduct in contractual interpretation.
a. As with the institutional rules discussed above, the IBA Rules provide at Article 9.1 that "The Arbitral Tribunal shall determine the admissibility, relevance, materiality and weight of evidence". Constraints on this broad discretion are contained in Article 9.2, which provides that the tribunal "shall, at the request of a Party or on its own motion, exclude from evidence or production any Document, statement, oral testimony or inspection for any of the following reasons".

b. Conspicuously, these "reasons" do not include the situation where a domestic rule of evidence proscribes the admission of that document. Indeed, their operation turns largely on the tribunal's exercise of discretion, since several reasons can only be relied on to exclude evidence if the Tribunal determines that reason to be compelling (see Articles 9.2(e) to (g)). This is unsurprising. As the drafters stated in the Commentary to the the 2010 IBA Rules, the Rules were intended to fill the intentional gaps in arbitral rules of procedure and thereby minimize conflicts between the parties as to how the case should proceed – "particularly…when the parties come from different legal backgrounds and cultures".

c. As discussed above, the High Court echoed the drafters' concern that international arbitration should be unshackled by the individual quirks of national rules of procedure. The decision in BQP v BPP therefore should therefore provide comfort and confirmation that the IBA Rules will be applied so as to realise this shared objective.

Takeaways

The key takeaway from this decision is that parties must be careful to appreciate that agreeing to institutional rules which empower the tribunal to decide admissibility of evidence may extend to allowing the tribunal to disapply (or conversely, to apply) evidential rules which might ordinarily be perceived as part of the substantive contractual principles, for example, the parol evidence rule in this case.

That being said, parties may welcome the opportunity to circumvent the eccentricities of the applicable national law simply by careful selection of the appropriate institutional rules. *BQP v BPP* provides parties with some ammunition to avoid results such as that reached in *Azpetrol Oil Services Group B.V. v Republic of Azerbaijan* (ICSID Case No. ARB/06/15) ("Azpetrol"), where the ICSID tribunal held it was precluded by English contract law from considering evidence of prior negotiations and post-contractual conduct in construing an English law-governed contract (see Azpetrol at [72], [90]).

It may be that because this issue of the application of domestic rules of evidence was not substantially argued before the tribunal that this result was obtained. If one, however, considered Rule 34(1) in Chapter 4 of the ICSID Convention Arbitration Rules which provides that "the Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value", this issue could actually have been ventilated even further had more extensive submissions on the point been made. Indeed, the relevant arbitral rule in the *Azpetrol* decision is largely similar to those considered in *BQP v BPP*,
and with the benefit of the reasoning in the latter decision, a tribunal deciding *Azpetrol* today might reach a different result.

Finally, disapplying domestic rules of evidence in the arbitral arena is unlikely to leave tribunals in a procedural no-man's land. As the authors of Evidence in Investor-State Arbitration found, tribunals display a reasonably consistent practice of drawing inferences, using presumptions and excluding evidence on familiar principles such as privilege, confidentiality or public policy. The decision in *BQP v BPP* will continue to further the trend of tribunals applying autonomous principles of admissibility of evidence rather than exhibiting complete deference to national laws of evidence.

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