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Is an Arbitration Agreement in a Draft Contract Binding? Perspectives from the courts in Singapore and Switzerland

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Introduction

In *BCY v BCZ* [2016] SGHC 249, the High Court of Singapore found that parties could not be bound by an arbitration agreement that was part of an unexecuted underlying contract. This post examines the analysis taken by the Singapore High Court *vis-à-vis* the Swiss Supreme Court, in a similar fact pattern.

The background to *BCY v BCZ*

BCY v BCZ concerned a proposed sale of shares in a company by the plaintiff to the defendant, subject to the execution of a mutually acceptable Sale and Purchase Agreement (SPA). After seven drafts of the SPA were exchanged, the plaintiff decided not to proceed with its execution. The defendant commenced arbitration proceedings pursuant to the International Chamber of Commerce (ICC) Rules of Arbitration, as provided for in the arbitration agreement of the SPA. The plaintiff objected to the arbitrator's jurisdiction on the basis that there was no valid arbitration agreement (at [24]). The defendant's position was that the arbitration agreement was concluded before the SPA (at [26]–[29]).

The choice-of-law analysis to determine the validity of the arbitration agreement in BCY v BCZ

In determining the validity of the arbitration agreement, the arbitrator relied on the seminal English Court of Appeal decision in *Sulamèrica Cia Nacional de Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638 (*Sulamèrica*) and found New York law (the governing law of the SPA) to govern the arbitration agreement (at [32]). Applying New York law, the arbitrator found the parties had "mutual assent" to be bound by the arbitration agreement, evident from the exchange of subsequent drafts of the SPA containing the same arbitration agreement and from the plaintiff's readiness to sign the sixth draft of the SPA (at [33]).

In its review of the arbitrator's decision, the High Court approved the *Sulamèrica* approach and similarly found New York law to govern the arbitration agreement. In adopting *Sulamèrica*, the High Court rejected the contrary approach taken by the Assistant Registrar in the earlier case of *FirstLink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 (*FirstLink*). In that case, the Assistant Registrar found that, in the absence of contrary indication, in situations of "direct competition" between the law of the main contract and the law of the arbitral seat, it would be presumed that the latter would govern the arbitration agreement (at [16]). In this regard, Chong J was of the view in *BCY v BCZ* that there was no such competition in *FirstLink* because the only explicit reference to the laws of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) did not refer either to the seat of the arbitration (which, according to the SCC Rules, was to be determined by the Board of the SCC) or to the governing law of the main contract (at [54]). Nonetheless, in addressing the competing approaches in *Sulamèrica* and *FirstLink*, the High Court's general findings are worth highlighting.

- 'Free-standing' arbitration agreements are stand-alone arbitration agreements not intended to be a term of any underlying contract. If these agreements do not contain an express choice-of-law, the significance of the arbitral seat indicated in the contract would be considered "overwhelming" and the law of the arbitral seat would most likely govern the arbitration agreement (at [44(a)]).

- Where an arbitration agreement forms part of an underlying contract, the express choice-of-law governing the underlying contract would be a strong indication that the parties intended the same law to govern the arbitration agreement (at [44(b)]). This presumption can be displaced either explicitly or implicitly. In the latter, the presumption will only be displaced if upholding it would negate the arbitration agreement in its entirety. In this regard, choosing an arbitral seat that is different from the law of the underlying contract or a minor inconsistency between the governing law and the main contract would not suffice to displace this presumption (at [72]–[75]).

- The substantive law of the seat of the arbitration is not necessarily more neutral than the governing law of the main contract (at [63]).

- Reference to the law of the seat of the arbitration in articles 34(2)(a)(i) and 36(1)(a)(i) of the UNCITRAL Model Law only arises for consideration in the absence of an express or implied choice-of-law. This brings the discussion back to whether the implied choice-of-law ought to be the law of the main contract *vis-à-vis* the law of the arbitral seat. This reference does not support a presumption in favour of the law of the arbitral seat (at [64]).

Notably, both parties in *BCY v BCZ* acknowledged that there was no material difference between New York and Singapore law on the validity of the arbitration agreement. The analysis of the position under one governing law would therefore be applicable to the other. Interestingly, while both the arbitrator and the High Court of Singapore found the governing law of the arbitration

agreement to be New York law, their analysis led to contrary findings. The High Court found there was no objective evidence of the parties' mutual intention to be bound by the arbitration agreement in the absence of the unexecuted underlying SPA; Chong J's view was based on the premise that a party is well within its rights to make any amendments to the contract, including the arbitration agreement, before it is signed.

Can an arbitration agreement in a draft contract ever be binding?

While, within the factual matrix of this case, the Singapore High Court did not find that the circumstances in which the SPA was negotiated resulted in the formation of a legally binding arbitration agreement, there may well be circumstances in future cases that would reflect parties' intention to be bound by the arbitration agreement independently and/or prior to the underlying contract. In a decision concerning the validity of an arbitration agreement in a draft contract, the Swiss Supreme Court found that the parties had agreed on the arbitration agreement during negotiation of the main contract, despite their not having signed the underlying contract. The parties, in this case, had initially exchanged comments about amending the specified arbitral seat contained in the arbitration agreement of the draft framework contract. However, the original proposed arbitration agreement remained in the draft and was never negotiated nor modified in further changes between parties. The Supreme Court opined that although the exchange of draft contracts containing arbitration agreements would not *per se* bind parties to it, there may well be "additional qualified circumstances" that could confer jurisdiction on the arbitral tribunal. Such circumstances include instances of prior contracts containing the same arbitration agreement, the parties' objective intention to arbitrate their dispute and the exchange of draft contracts establishing their common intention to enter into an arbitration agreement, irrespective of the outcome of the main contract.

The relevant question for future tribunals and courts in similar cases will be to determine whether the circumstances leading to the execution of draft contracts manifests the parties' intention to be bound by the arbitration agreement contained in it, independent and/or prior to the underlying contract. In this regard, if the arbitration agreement is found to be governed by either Singapore or New York law, *BCY v BCZ* would serve to offer guidance on the relevant circumstances where such intention is manifested. To establish this intent, parties would have to show more than mere agreement to the wording of the arbitration agreement, a proposal to include the arbitration agreement or an expression of readiness to sign the draft contract. Further, caution must be taken to ensure there is no 'subject to contract' qualification in the negotiations leading to and beyond the draft contract.

Doctrine of separability analysis in determining the validity of arbitration agreements in draft underlying contracts

In delivering its judgment, the High Court in *BCY v BCZ* was also of the view that there was no need to invoke the doctrine of separability in submitting that an arbitration agreement was

concluded before the execution of the underlying contract (at [60], [61] and [79]). This would be the correct approach in cases where parties do not submit that the governing law of the main contract is applicable to the arbitration agreement. As noted by the High Court, however, the difficulty arises in making both of the above arguments simultaneously (at [70]). In such scenarios, the doctrine of separability offers a tangible way to connect the arbitration agreement to the main contract, despite its seeming autonomy in having been concluded before the underlying contract.

Conclusion

As a final point, it bears nothing that the Singapore courts undertake a *de novo* review of the issue of whether an arbitral tribunal has jurisdiction (*Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] SGCA 57 at [41]-[43]). In comparison, the Swiss Supreme Court can only conduct a restrictive examination of an arbitrator's decision and was, consequently, precluded from reviewing the parties' intent to be bound by the arbitration agreement, in the above mentioned case, once the arbitrator had ruled (positively) on the same.

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