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Dispute Resolution Update

Singapore court: failure to call witness no reason to set aside arbitration award

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BVU v BVX [2019] SGHC 69

This arbitration analysis examines the Singapore High Court's decision in BVU v BVX that an arbitration award would not be set aside on the basis of public policy or fraud simply because the successful party had failed to call certain witnesses or to disclose certain internal documents. The court also refused to countenance the use of subpoenas by the unsuccessful party to obtain documents as a means to relitigate the merits of the dispute.

What are the practical implications of the judgment?

This case involves a rare setting-aside application on the basis of public policy or fraud by reason of non-disclosure on the part of the successful party in the arbitration. It serves to re-emphasise that the threshold to set aside an award on the basis of fraud or public policy is a high one, and it provides a helpful case law follow-up to the earlier High Court cases of *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] 3 SLR(R) 871 and *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573. Both of these cases had dealt with the issue of non-disclosure on the part of the successful party.

The court in a setting-aside application will not adjudicate over the arbitration tribunal's refusal to order that witnesses be called for examination or to draw an adverse inference against the party's decision not to disclose documents or lead certain witnesses. The difficulties are further compounded for the unsuccessful party where it seeks to admit fresh evidence or to call witnesses in the setting-aside proceedings when it could have done so in the arbitration.

In this respect, the court provided helpful guidance as to what an applicant seeking to set aside an award on the grounds of fraud would need to establish in order to introduce new evidence to demonstrate fraud in the procurement of the award. Further, a subpoena for documents post-arbitration would be viewed as an impermissible attempt to obtain a second bite of the cherry, if such an application could have been taken out during the course of the arbitration.

What was the background?

The applicant, which was the unsuccessful party in the arbitration, is a supplier of food products. It had entered into a 20-year agreement to supply food to the respondent, a South Korean state-owned enterprise. The agreement required the respondent to use its 'best commercially reasonable efforts' to order and purchase a minimum amount of goods annually and to do so by providing a rolling 12-month forecast of what it needed. The respondent, however, did not submit a rolling forecast, ordered less than the minimum

amount and eventually did not order any goods at all. Instead, it entered into a memorandum of understanding with one of the applicant's competitors and it invited the applicant to participate in a public tender process.

As a result, the applicant commenced arbitration proceedings. Prior to the substantive hearing, the respondent indicated that it would only call one factual witness and would not call three other employees to the stand. Those three individuals had been referred to by the applicant in its statement of claim as being involved in the negotiations for the agreement. The applicant sought unsuccessfully for the tribunal to order the respondent to procure the attendance of the three employees as witnesses in the arbitration.

An award was issued in favour of the respondent, but with a dissenting opinion. The majority held that the wording of the agreement showed there had not been an intention to place an absolute obligation on the respondent to order and purchase a minimum quantity of goods per year. They also considered that the respondent's failure to call its employees involved in the pre-contract negotiations did not change their view of the interpretation of the relevant provisions, but the dissenting arbitrator held that adverse inferences ought to be drawn.

After the award had been rendered, one of the three uncalled witnesses agreed to provide evidence for the applicant as regards his personal view of the facts and circumstances surrounding the making of the agreement, which would go towards showing that the parties' understanding of how the agreement would operate was contrary to the position that the respondent had taken in the arbitration. The employee's affidavit was filed in support of the applicant's setting-aside application and asserted that the respondent had operated in the belief that it could enter directly into negotiated contracts because two exceptions to the relevant South Korean regulations were applicable. Crucially, the position the employee took was not the position the applicant had taken in the arbitration as to why South Korean law permitted a specifically negotiated contract between it and the respondent and did not require a public tender.

After the setting-aside papers were served on the respondent, the applicant procured a Singapore court subpoena for the employee to attend court to produce four categories of documents, which were all essentially the respondent's internal documents pertaining to the public tender requirements. The respondent took out a summons to set aside the subpoena.

What did the court decide?

The Singapore High Court rejected the setting-aside application and upheld the award. It also held that the subpoena issued against the employee ought to be set aside.

Dismissal of the setting-aside application

The court iterated that a high threshold had to be met for an award to be set aside for fraud or a contravention of public policy. Where allegations of fraud were being raised, the applicant had to demonstrate a convincing case through evidence that was 'cogent and strong' – fraud would not be inferred. And where the application related to the failure to call a witness or disclose documents, it had to be shown that dishonesty, rather than human error, had been involved.

The court followed *Dongwoo* and *Swiss Singapore* and held that an applicant had to meet three requirements for the non-disclosure or suppression of evidence to warrant setting aside an award:

- there had been deliberate concealment aimed at deceiving the arbitral tribunal
- there was a causative link between the deliberate concealment and the decision in favour of the concealing party
- there had not been a good reason for the non-disclosure

On the first requirement, the court held that there had been no deliberate concealment aimed at deceiving the tribunal, notwithstanding the respondent's conscious and deliberate decision not to call the employee as a witness and not to disclose its internal documents. The court observed that arbitration proceedings were not Singapore court proceedings: under the International Bar Association's Rules on the Taking of Evidence in International Arbitration, parties did not have the same far-ranging discovery obligations to produce adverse material as they would have in Singapore court litigation. Furthermore, the tribunal had thoroughly considered whether the employee should be called as a witness to the arbitration when the applicant had sought an order for all three employees to be witnesses. The applicant had been unable to persuade the tribunal to secure the employee's attendance because it failed to show the materiality of his evidence, and it was not the case that the respondent had deceived or misled the tribunal as

to the employee's views. Moreover, the applicant had not applied to the tribunal for disclosure of the respondent's internal documents when it could have done so and the court was unpersuaded by the applicant's explanations as to why it had not done so.

On the second requirement, the court held that there was no causative link between the alleged concealment and the decision in favour of the concealing party. It was not persuaded that the employee's evidence, as set out in his affidavit, and the respondent's internal documents showing its subjective views could have made an impact on the tribunal's decision. The determinative threshold issue had been whether, under South Korean law, the respondent was prohibited from making direct purchase orders of the food products from the applicant. That was a question of law and the evidence of the employee, who was not legally trained, pertained to his views on the applicability of certain exceptions under South Korean statutes and regulations. His evidence therefore could not have affected the final outcome of the award.

On the third requirement, the court held that there was good reason for the non-disclosure: it had been legitimate for the respondent not to call the employee or to disclose the internal communications because they would have been legally irrelevant.

Setting aside the subpoena

The parties did not dispute the applicable principles in relation to setting aside subpoenas. The documents sought in the subpoena had to be relevant, material and necessary for the fair disposal of the matter. In this respect, the threshold for setting aside a subpoena was not an easily surmountable one. Nonetheless, that threshold would be met where the documents sought were clearly irrelevant, when the subpoena application was an abuse of process or where the subpoena had been issued for a collateral purpose.

Apart from finding that the documents which the applicant had sought to be subpoenaed were not relevant, the court also found the subpoena to be an abuse of process because the applicant was seeking to reopen the arbitrated dispute through a backdoor appeal on the merits.

The court also held that when new evidence was being introduced to demonstrate fraud at the setting-aside stage, the applicant would have to demonstrate why, at the time of the arbitration, the new evidence was not available or could not have been obtained with reasonable diligence. The court found that the applicant had failed to provide satisfactory explanations as to why, during the arbitration, it could not have applied for disclosure of the respondent's internal documents or sought curial assistance for the production of documents from the employee.

What is the applicable standard for introduction of new evidence to demonstrate fraud at the setting-aside stage?

In setting aside the subpoena, one of the legal propositions cited by the court was that where new evidence was being introduced to demonstrate fraud at the setting-aside stage, the applicant would have to demonstrate why, at the time of the arbitration, the new evidence was not available or could not have been obtained with reasonable diligence. The High Court cited *Double K Oil & Products 1996 Ltd v Neste Oil OYJ* [2009] EWHC 3380 (Comm), [2009] All ER (D) 214 (Dec), which in turn cited *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd and others* [1999] 3 All ER 864, and the court also cited *Chantiers De L'Atlantique S.A. v Gaztransport & Technigaz S.A.S.* [2011] EWHC 3383 (Comm).

That proposition might have to be reconsidered in light of Takhar v Gracefield Developments Ltd and others [2019] UKSC 13, [2019] All ER (D) 94 (Mar), in which the UK Supreme Court unanimously held that where a party alleged an earlier judgment had been obtained by fraud and applied to set it aside, the party did not have to demonstrate that evidence of the fraud could not have been obtained with reasonable diligence before the earlier trial. Nonetheless, such an application would fail if that party deliberately decided not to investigate a suspected fraud or relied on a known one in the earlier proceedings.

It should be noted that had the Singapore High Court adopted the approach in *Takhar*, it would not have changed its decision to uphold the award or to set aside the subpoena. Nevertheless, it might be worth considering whether the nature of arbitration proceedings (in terms of confidentiality, limited disclosure, limited grounds for challenge and entitlement to enforce across the signatory states of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards) supports the continued retention of the reasonable diligence requirement or warrants its removal in setting-aside proceedings.

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