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Dispute Resolution Update

Singapore Court: setting aside a portion of an arbitral award (BAZ v BBA)

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BAZ v BBA and others and other matters [2018] SGHC 275

This arbitration analysis examines the Singapore High Court's decision in BAZ v BBA and the implications of having a portion of an international arbitration award set aside as being contrary to a country's public policy on the rest of the award and on the parties to the award.

What are the practical implications of this case?

The case of *BAZ v BBA* is a rare example of a successful application to set aside a portion of a Singapore-seated international arbitration award on the basis that the award is contrary to public policy in Singapore. In this instance, a group of minors successfully set aside an award made against them on the basis that the underlying agreement violated the protection of minors under Singapore law and the common law. This was the case even though both the underlying agreement and the arbitration agreement were governed by Indian law.

The decision also addresses the issue of whether an award is severable between multiple respondents. In other words, in the event where a single award is made against several different parties, and one of those parties is successful in setting aside the award solely against that party, is that award enforceable against the remaining parties nonetheless or does it fail in toto? The Singapore High Court followed the Hong Kong court's position and held that awards were severable as between parties.

While the case examines a number of issues pertaining to breaches of natural justice, whether the tribunal had exceed its scope of jurisdiction, and whether a decision of the Indian courts constituted issue estoppel as against the sellers' arguments to set aside the award, this note shall focus on the issues relating to public policy as a grounds for setting aside as well as the matter of severability.

What was the background?

This case involved the consolidated hearing of three applications regarding a Singapore international arbitration award made in the excess of S$720m (the award). For convenience, the relevant parties to the proceedings can be divided into three groups:

- the buyer
- the sellers
- the minors (a sub-set of the sellers)

The underlying agreement was a share purchase and share subscription agreement (SPSSA) under which the buyer purchased shares in an Indian company (C) that were held by the sellers (and minors). The minors were only three to eight years old at the time of the SPSSA and eight and twelve years old at the time of the arbitration. The award provided that the sellers and the minors were jointly and severally liable to the buyers.

The arbitration arose out of the sellers' concealment of a September 2004 internal report called the self-assessment report (SAR) on the improper regulatory transgressions and practices involving false data for submissions to regulatory agencies in several countries

(particularly in the US). Notwithstanding the buyer's knowledge of the US investigation, it said that the concealing of the SAR constituted concealing of the genesis, nature and severity of the investigations, which constituted fraud by the sellers on the buyer under Indian law. While the buyer did not seek rescission of the SPSSA, it sought damages that would put it in the same position as if the sellers' representation were true (paras [5], [11] and [12]).

The majority of the tribunal found that the sellers were liable for fraudulently misrepresenting or concealing from the buyer the genesis, nature and severity of C's regulatory problems. The majority held that the buyer would not have bought the shares had it known of the SAR and was entitled to damages insofar as the buyer did not seek rescission (para [13]).

What did the court decide?

The Singapore High Court upheld the recognition and enforcement of the award as against the sellers. However, the judge also held that recognising and enforcing the award against the minors would be a violation of the public policy of Singapore and therefore ought to be set aside pursuant to Article 34(2)(b)(ii) of the UN Commission on International Trade Law Model Law (UNCITRAL Model Law), as incorporated into Singapore law by the International Arbitration Act 1994 (Cap. 143A). The Singapore High Court also held that the award could be severed such that it remained enforceable against the sellers even though it had been set aside as against the minors.

The governing law of the arbitration

The SPSSA is governed by Indian law. The arbitration agreement is a clause within the SPSSA but does not expressly provide for the law governing the arbitration agreement or the arbitration itself. Nonetheless, the Singapore High Court held that the implied choice of law of the arbitration agreement was Indian law in the absence of any contrary intention of the parties, applying *BCY v BCZ* [2017] 3 SLR 357. As such, relevant aspects of Indian law would have to be adduced in evidence as facts for the court's determination in the setting aside proceedings.

However, as the award was made in an arbitration seated in Singapore, Singapore law would govern the court's determination as to whether the award should be set aside based on the International Arbitration Act 1994, s 24 and Article 34 of the UNCITRAL Model Law as the law of the country where the award was made.

Interestingly, the learned judge rejected the argument that Singapore law might still have some relevance to the construction of the arbitration agreement on the basis that Indian law stipulates that the law of the seat should govern the interpretation of an arbitration agreement. Instead, the court held that the determination of the governing law of an arbitration agreement is a matter for Singapore law, being that of the curial court which is adjudicating the current setting aside and enforcement proceedings.

Public policy of Singapore and not India governs the basis for setting aside

The Singapore court noted that the buyer had made several concessions in the course of oral submissions in this respect. In particular, it had conceded that the minors could not be made liable under Indian law. However, the judge held that given the nature of those concessions touched on Indian law, those did not amount to any agreement to set aside the award by consent. Accordingly, it was necessary for the court to consider the public policy arguments raised under Singapore law (paras [173]–[175]).

Respectfully, this comports entirely with the language in the UNCITRAL Model Law and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1959 (New York Convention) which provides that an award may be refused recognition and enforcement on the basis that it is 'in conflict with the public policy of this state' (Article 34(2)(b)(ii) of the UNCITRAL Model Law) or that it would be 'contrary to the public policy of that country [where recognition and enforcement is sought]'. As such, it ought not to matter that the Indian courts had refused recognition and enforcement of the award against the minors on the basis that it was contrary to Indian public policy unless it was concurrently against Singapore's public policy as well.

Proportionality not a ground of public policy

The minors (who held 0.0015% of the shares in C) as well as a certain minority of the sellers (the so-called nonmanagement sellers (NMS) who held 0.65% of the shares in C) sought to argue that proportionality of damages is an integral part of Singapore public policy and the award should be set aside against them because the total quantum of their joint and several liability was disproportionate to their shareholding. In this respect, the NMS and the minors claimed that it was disproportionate to hold them jointly and severally liable for over S$720m when they only held 0.65% and 0.0015% of C's shares respectively (paras [164] and [170]).

However, the judge held that proportionality of damages did not form part of Singapore public policy. In this respect, the cases cited by the NMS and the minors 'do not elevate the principle of proportionality of damages in and of itself to a fundamental substratal legal principle that applies in all cases' (para [165]).

Instead, the cases relate to domestic court proceedings, the Singapore courts' exercise of discretion in awarding quantum of damages as well as issues of parties' or arbitrators' costs (and not against the award of damages in an arbitral award)—the principle of proportionality 'is a tool to give effect to an underlying policy consideration, and not a public policy in and of itself' (para [167]).

Ultimately, the court held that the fact that the NMS were made jointly and severally liable despite the size of their shareholding 'smacks of an error made by the majority that this court cannot review, rather than a public policy objection' (para [168]). Insofar as the scope of setting aside or the refusal of recognition and enforcement is 'very narrow', the court should not countenance the public policy ground being used as a backdoor appeal.

Protection of minors is a public policy ground warranting setting aside

The award held that the minors were jointly and severally liable with the other defendants in the arbitration for the full extent of the damages, interest, and costs awarded, and did not consider the positions of the minors separately in its deliberations (para [169]).

The Singapore High Court rejected the minors' arguments that their procedural protection had been violated such that it was contrary to Singapore public policy. Specifically, the judge stated that it was not a violation just on the basis that the tribunal did not issue a direction or order that a litigation representative be appointed to represent the minors in the arbitration or invite submissions from the counsel for the respective parties as to whether the minors could be held jointly and severally liable (para [186]).

Nonetheless, the minors' application to set aside the award against them succeeded on the basis that the award violated the substantive protection of minors. In this respect, the court held that 'the principle of protecting the interests of minors in commercial transactions is part of the public policy of Singapore' (para [179]). In coming to her decision, the judge had surveyed the law of contract as regards the legal position of minors in Singapore. The judge had also considered the family law cases and the UN Convention on the Rights of the Child 1992 to be unhelpful or unnecessary (paras [177] and [178]).

The court reasoned at para [180] that to uphold the award against the minors was, in effect, to enforce the SPSSA, which is not a contract falling under any of the exceptions to the general position that contracts do not bind minors. Such enforcement would violate the protection given to minors in contractual relationships under Singapore law. The judge also reasoned that insofar as the award found the minors jointly and severally liable for the fraudulent misrepresentation that induced the counterparty to enter the SPSSA, it is a liability imposed on the minors for the fraudulent misrepresentation of their guardian or principal on matters which the minors had no knowledge of. This had the effect of violating the protection given to a minor under section 35(7) of the Civil Law Act 1909—the provision protects a minor even where the minor made a misrepresentation personally.

And even though proportionality of damages was not part of the public policy of Singapore, enforcing the award against the minors would impose liability for an amount exceeding S$720m. This 'shocks the conscience, and it violates Singapore's most basic notion of justice' (borrowing language from previous Singapore case law as to when a violation of Singapore public policy would cause the court to set aside an award) to find the minors liable under a contract that was entered into when they were only between three to eight years old at the material time (para [180]).

Severability of award between parties

The judge noted that there was no express reference to severability under Article 34(2)(b)(ii) of the UNCITRAL Model Law, unlike that in Article 34(2)(a)(iii) of the UNCITRAL Model Law. Nonetheless, the court held at para [187] that the award was severable 'because the successful public policy challenge only pertains to the minors'. In this respect, the Singapore court followed the Hong Kong court in *JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd* [1992] HKCFI 182 at para [39] (a case on enforcement based on the New York Convention) in holding that the doctrine of severability applies where only part of an award is tainted by a challenge on a public policy ground.

How does this decision fit in with other cases concerning severability?

Article 34(2)(a)(iii) of the UNCITRAL Model Law contemplates the severability of different issues (as opposed to parties) in an arbitral award where they fall outside of the scope of the parties' submission to arbitration. It does not contemplate a scenario of severing parties to an arbitration award. Similarly, the decision in *JJ Agro Industries (P) Ltd (A firm) v Texuna International Ltd*, which the Singapore court had cited in its decision on severability, did not discuss nor contemplate severance between parties to an arbitral award.

This was contra to the situation which the English High Court faced in *Arsanovia Ltd & Ors v Cruz City 1 Mauritius Holdings*, [2012] EWHC 3702 (Comm), [2013] All ER (D) 161 (Feb). in that case, it was argued, and the English court accepted, that as a matter of Indian law, an arbitration award could not be 'bifurcated' such that if the subject matter of an arbitration did not fall within the arbitration agreement or if the dispute concerned a person or persons not party to the arbitration agreement, that dispute could not be arbitrated. In other words, under Indian law, an award against two respondents could not be sustained against one respondent but not another respondent (paras [37] and [46]).

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