SQUIRE PATTON BOGGS

Clarity on Law Governing Arbitration Agreements

The Singapore High Court has recently reversed its earlier decision in *FirstLink Investments Corporate Limited v. GT Payment Pte Limited*on the issue of determining the governing law of an arbitration agreement.

In the decision of *BCY v. BCZ*, the Singapore High Court was required to determine if an arbitration agreement had been entered into before the underlying contract had been executed, but after it had been negotiated. The dispute arose from the arbitral tribunal's ruling that it had jurisdiction to hear claims arising out of the underlying contract.

The High Court was required to determine the governing law of the arbitration agreement in order to decide if the arbitral tribunal had jurisdiction on the matter. In doing so, it relied on the English case of *Sulamérica Cia Nacional de Seguros SA v. Enesa Engelharia SA*. The *Sulamerica* decision established that the law governing the arbitration agreement is the law governing the underlying contract and not the law of the seat of arbitration. It went on to establish a three-step test to determine the governing law of an arbitration agreement: (1) the parties' express choice; (2) the implied choice of the parties as inferred from their intentions at the time of contracting; or (3) the system of law with which the arbitration agreement has the closest and most real connection.

The Singapore High Court had ignored the decision in *Sulamerica* while pronouncing its judgment in *FirstLink*, and until recently the position was that the law of the seat of arbitration would determine the arbitration agreement and not the law governing the underlying contract. The position in *FirstLink* was wholly based on the *doctrine of severability*, a theoretical understanding that the arbitration agreement is severable from its main contract. In its reasoning in *BCY v. BCZ*, the High Court held that the doctrine of severability is to be applied only in situations where the parties' intend for the arbitration clause to survive, even if the main contract is ineffective. It clarified that this doctrine does not imply that the arbitration clause is separate from the underlying contract in all respects once the main contract is executed, as this does not match commercial reality. The Court also emphasised that the doctrine suggests that the arbitration agreement is *severable* and not in fact *separate*.

The Singapore High Court in *BCY v. BCZ* upheld the three-step test as set out in the *Sulamerica* decision and held that in the absence of any indication to the contrary, parties are assumed to have intended their entire relationship to be governed by the same legal system, and the proper law of the main contract is likely to govern the arbitration agreement. Accordingly, on the facts of *BCY v. BCZ*, the law governing the arbitration agreement was held to be the law governing the main contract, i.e. New York law, as the arbitration agreement was intended to be a part of the main contract and did not stand independent of it. Further, the Court stated that "*the governing law of the main contract should only be displaced if the consequences of choosing it as the governing law of the arbitration agreement would negate the arbitration agreement even though the parties have themselves evinced a clear intention to be bound to arbitrate their disputes.*"

The decision clarifies the position on Singapore law with respect to parties that negotiate contracts on the basis of dispute resolution by Singapore seated arbitration. However, it is a decision in the first instance like that of *FirstLink* and the Court of Appeal's decision on this issue, which is yet to be delivered, will be binding authority.

Contacts

Biswajit Chatterjee
Partner, Corporate
Co-chair, India Practice
T +65 6922 8664
E biswajit.chatterjee@squirepb.com

Anandee Banerji
Associate
T +65 6922 8677
E anadee.banerji@squirepb.com