Court of Appeal Clarifies Principles on Jurisdictional Challenge Premised on Absence of Contract

In *COT v COU and others and other appeals* [2023] SGCA 31, a case concerned with three applications to set aside an arbitral award on the premise that there was no concluded contract (and therefore no valid arbitration agreement), and where the absence of the contract was also the substantive issue in dispute in the underlying arbitration, the Singapore Court of Appeal clarified that a seat court hearing such an application need only concern itself with whether the contract existed.

Our Partners Koh Swee Yen SC and Hannah Lee, and Associate Claire Lim represented the appellant in CA/CA 12/2022 before the Court of Appeal.

Our Comments

Where a jurisdictional challenge bleeds into the merits of an arbitral award, which may be the case where there is a challenge to set aside the arbitral award on the premise that there was no concluded contract (and therefore no valid arbitration agreement), a tension arises as to where the seat court should draw the line between a jurisdictional and substantive challenge.

The Court of Appeal in this case took the opportunity to explain where that line should be drawn and why it should be drawn - to ensure that the exercise of the seat court's supervisory jurisdiction is kept within its limited statutory remit. It held that the seat court hearing a setting aside application premised on the absence of a binding contract need only concern itself with whether such a contract *existed*.

The case gives an insight as to what the seat court should take into account in assessing whether such a contract existed, and what may be considered a question of the merits of the case which the seat court should not delve into. In this regard, the Court of Appeal opined that:

- The seat court may consider whether the parties conducted themselves in a manner which shows they considered themselves bound.
- The seat court should not need to engage in a comprehensive interpretation exercise as to the terms of the contract and the parties' liability under those terms.
- While some analysis of the terms may be necessary to ascertain which parties were parties to the contract, the court only needs to determine such terms on a *prima facie* basis for this precise purpose.
- Questions on authority to enter into a contract do not require the seat court's substantive examination of the parties' obligations under the contract.
- The seat court does not need to identify the full scope of the terms and obligations contained in the contract or the parties' liability thereunder, which are questions reserved for the arbitral tribunal.

The case provides considerable guidance where there is a challenge to set aside an arbitral award on the premise that there was no concluded contract (and therefore no valid arbitration agreement), and the factors which the seat court should (or should not) take into account in its analysis.

Background

The claimant (**Claimant**) produced and supplied a type of technologically advanced and high-value industrial product worldwide (**Modules**). The three appellants (who were respondents in the arbitration) were members of the same multinational group of companies (**Group**). The appellant in CA/CA 12/2022 (**Project Company**) was a special purpose vehicle incorporated for the sole purpose of owning and operating an infrastructure project (**Project**). The appellant in CA/CA 15/2022 (**EPC Company**) constructed and commissioned infrastructure projects for the Group. The appellant in CA/CA 13/2022 (**Shareholder Company**) held 99.99% of the shares in both the Project Company and the EPC Company. In late 2016, the Shareholder Company sold the Project Company and the EPC Company. The Group's centralised procurement arm (**Procurement Company**) was not a party to the present proceedings, but owed a debt to the Claimant.

The Modules needed to complete the Project were supplied by the Claimant to the Project Company through a chain of contracts entered into in 2015 and 2016. The Claimant sold the Modules to the Procurement Company pursuant to a "Module Supply Agreement" (**MSA**). The Procurement Company then sold the Modules to the EPC Company, which in turn sold the Modules to the Project Company. By March 2016, the Claimant had not received payment from the Procurement Company for three invoices and indicated that it would suspend all further deliveries of the Modules until full payment for the delivered Modules was received.

Between 15 and 18 March 2016, representatives from the Claimant and the Group negotiated to resolve the issue of the unpaid invoices and delivery of the remaining Modules (**March 2016 Negotiations**). This resulted in a director of the Shareholder Company and the Project Company signing and executing a non-disposal undertaking (**NDU-3**) on 17 March 2016, by which the Shareholder Company agreed not to dispose of its shares in the Project Company until payment for the Modules to the Claimant had been fully settled.

Clause 9 of the NDU-3 (**Clause 9**) stipulated that disputes under the NDU-3 which could not be resolved amicably were to be submitted to arbitration.

On 18 March 2016, the Claimant released the remaining Modules. On 22 March 2016, the EPC Company paid ₴5.06 million to the Procurement Company, which then paid over that sum to the Claimant. Following various part payments made and the return of certain Modules to the Claimant, ₴7.35 million remained due and owing to the Claimant.

In 2017, the Claimant commenced arbitration against the appellants for payment of the outstanding amount of ₴7.35 million. The arbitral tribunal (**Tribunal**) allowed the Claimant's claim, finding that: (a) on 18 March 2016, the parties had entered into a partly written, partly oral "Modules Delivery Agreement, which included NDU-3" (**MDA**) by which the appellants agreed to pay the Claimant all unpaid invoices and the Claimant agreed to then release the remaining Modules to complete the Project; and (b) Clause 9 was a valid arbitration agreement.

The appellants applied to the General Division of the High Court of Singapore (**High Court**) to set aside the arbitral award, contending, among other things, that no contract had been concluded between the parties and that there was therefore no binding arbitration agreement. This, in turn, depended on the existence (or lack of) a contract containing an arbitration agreement.

This update focuses on the Court of Appeal's guidance on the principles governing the determination of a jurisdictional challenge premised on the existence (or lack of) a contract containing an arbitration agreement.

The High Court's Decision

The High Court found that none of the appellants had established any grounds for setting aside the arbitral award and dismissed the appellants' setting-aside applications.

The appellants appealed against the decision of the High Court.

The Court of Appeal's Decision

The Court of Appeal dismissed the appeals.

Standard of review by seat court is de novo

As a starting point, the Court of Appeal noted that, where the party seeking to set aside an arbitral award alleges that no contract was concluded between the parties, the seat court undertakes a *de novo* review.

Acknowledging the tension in determining the line between a jurisdictional and a substantive challenge, the Court of Appeal highlighted that the seat court must recognise the limits of its supervisory role in navigating the thin divide between a merits examination and the (well-established) policy of minimal curial intervention.

The Court of Appeal also observed that the separability principle, which provides that any allegation of invalidity as to the main contract does not impinge on the validity of the arbitration agreement, applies only to questions of contractual validity and not to contractual formation. If the jurisdictional challenge is premised on the absence of a contract and therefore there being no binding arbitration agreement, the separability principle is not engaged.

Principles governing determination of jurisdictional challenge based on absence of arbitration agreement

Following a survey of case law, the Court of Appeal highlighted that a court hearing a setting-aside application based on the absence of a binding contract need only decide whether such a contract existed.

In answering this question, the court may consider whether the parties' conduct showed that they regarded themselves bound. The court need not engage in a comprehensive interpretation exercise as to the terms of the contract and the parties' liability under those terms; that is a question of the merits and a task for the arbitral tribunal. While some analysis of the terms may be necessary to ascertain which parties were parties to the contract, the court only needs to determine such terms on a *prima facie* basis for this precise purpose. Questions of authority to enter into the contract (which is distinct from the authority to enter into an arbitration agreement which is a term of the contract) are likewise circumscribed and do not require the seat court's substantive examination of the parties' obligations under those contracts. In short, the seat court does not need to identify the full scope of the terms and obligations contained in the contract or the parties' liability under those terms, being questions reserved for the tribunal.

Finding on existence of binding contract

Applying established principles for determining whether a binding contract has been concluded between the parties, the Court of Appeal upheld the Tribunal's finding that the MDA constituted a binding contract entered into between the Claimant and the appellants. It noted, among other things, that:

(a) First, the very purpose of the March 2016 Negotiations was to reach an agreement for the Claimant to release the remaining Modules on improved payment terms *beyond* those under the MSA. The resulting agreement was the part-oral, part-written MDA. The signed NDU-3 was intended to operate as an appendage to the MDA as it provided additional assurance that the Claimant would be paid for its outstanding invoices. This was encompassed in the negative covenant contained in clause 2.1 that the Shareholder Company would not dispose an agreed percentage of its shares in the Project Company until all outstanding invoices had been settled in full. The Claimant's release of the Modules immediately following the March 2016 Negotiations was clearly done pursuant to the MDA.

(b) Second, the NDU-3 was an appendage to the MDA, which was why the NDU-3 did not expressly stipulate the Claimant's obligation to release the Modules. Its purpose was merely to supplement the original payment terms as encapsulated in the MSA, given that the Procurement Company was unable to meet its original obligations under the MSA. The very purpose of the NDU-3 was to secure the Claimant's agreement to release the Modules. The Project Company and the EPC Company were ultimately liable for payment of the Modules under the back-to-back contracts. The only reason that the Procurement Company did not pay the outstanding invoices to the Claimant was because payment was not forthcoming from either the Project Company or the EPC Company down the chain.

(c) Third, based on the plain wording of the NDU-3 and the events during the March 2016 Negotiations, it was clear that the parties had reached an agreement that included the NDU-3, and that the NDU-3 was binding on all the appellants. The Shareholder Company was a signatory to the NDU-3 and therefore a party to it. The NDU-3 also expressly mentioned the appellants and even imposed certain rights and obligations on each of them.

In the circumstances, the Court of Appeal held that a binding and enforceable contract was concluded between the parties on 18 March 2016. It found that it was no coincidence that the Claimant released the remaining Modules shortly thereafter. In addition, the EPC Company made part payment of the invoices to the Procurement Company, which in turn paid the Claimant. This was sufficient for the Tribunal to be seized of jurisdiction, and the Court of Appeal dismissed the jurisdictional challenge.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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