

INTERNATIONAL ARBITRATION UPDATE

PERJURY AND SUPPRESSION OF DOCUMENTS IN INTERNATIONAL ARBITRATION

Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd
[2009] SGHC 231

Executive Summary

Where a party seeks to set aside an international arbitral award on the grounds that it was procured by perjury and/or the suppression of documents, it must show that the suppressed evidence could *not* have been discovered or produced despite reasonable diligence at the arbitration. The applicant must also show that such evidence would have been so decisive that it would have prompted the arbitrator to rule in its favour.

Background

The applicant (the "**Applicant**") contracted to purchase from the respondent (the "**Respondent**") 40,000 mt of iron ore fines (the "**Cargo**"). The contract contained an arbitration clause which provided that any disputes arising under the contract would be submitted to arbitration in Singapore under the rules of the Singapore International Arbitration Centre (the "**SIAC**").

A dispute arose between the parties and it was duly referred to the SIAC for arbitration. At the arbitration, the Respondent contended that the Applicant had refused to take delivery of the Cargo because of a sudden drop in the price of iron ore. The Respondent also submitted that it had mitigated its losses by selling the Cargo to third parties in India at prices substantially lower than the contract price payable by the Applicant. The Respondent therefore claimed from the Applicant the difference between the contract price and the price at which it had sold the Cargo.

The Applicant argued that it was not liable to the Respondent who was in repudiatory breach of the contract as it did not have the Cargo ready for loading by the date stipulated in the contract for doing so.

The arbitrator (the "**Arbitrator**") awarded the Respondent damages based on the difference in prices, plus interest.

The application to set aside the Award

The Applicant then applied to the Singapore High Court to set aside the arbitral award (the "**Award**") on the grounds that the Respondent had, at the arbitration, falsified testimony relating to the amount of the Cargo it

had sold to the Indian third parties in mitigation of its losses and had suppressed documents in order to perpetrate such falsehood.

The Applicant sought the following orders:

- (a) a declaration that the Award had been procured by fraud and/or in a manner contrary to the public policy of Singapore; and
- (b) the setting aside of the Award pursuant to section 24(a) of the International Arbitration Act (the “**Act**”) and Article 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (the “**UNCITRAL Model Law**”).

The High Court’s decision

The court dismissed the application.

The application to set aside the Award was made on the basis that the evidence and documents which had been suppressed by the Respondent would have affected the Award in two ways: first, that the same raised serious doubts as to whether the Respondent had had sufficient cargo to fulfil the contract, and second, in relation to the quantification of damages.

The court found on the facts that the Respondent’s failure to disclose the new evidence and documents would not have affected the Arbitrator’s decision on the Respondent’s ability to deliver the Cargo.

As to the quantification of damages, the court found that the date of the breach was the relevant date for determining the amount of damages payable. The Respondent had therefore not misled the Arbitrator in this regard – the facts and documents which it had failed to disclose were not relevant to that exercise.

The court also gave the following guidance on perjury and suppression of documents in the context of setting aside arbitral awards:

- (a) Section 24(a) of the Act provides that the High Court may set aside an arbitral award if the making of the award was induced or affected by fraud or corruption. Article 34(2)(b)(ii) of the UNCITRAL Model Law states that an arbitral award may be set aside if the court finds that the award conflicts with the public policy of the state. The existence of fraud would therefore constitute a ground for setting aside an arbitral award on the grounds of being against public policy.
- (b) Perjury and the suppression of documents “*may be considered fraudulent or akin to fraud*” and thus justify the setting aside of an arbitral award. To obtain relief, an applicant “*must show that the reprehensible conduct or fraud had caused it substantial injustice in that the same procured or substantially impacted the making of the award*”.

- (c) An arbitral award may be set aside on the basis of perjury and/or suppression of documents in circumstances which include the following:
- (i) if the fraud alleged is the shape of perjury, the applicant must prove that its new evidence could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings;
 - (ii) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party;
 - (iii) if the fraud was in the shape of non-disclosure of a material document, the document must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant; and
 - (iv) negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting aside of the award and for that purpose, the non-disclosure must be deliberate and aimed at deceiving the arbitrator.

Comment

This case underscores how difficult it may be to set aside or challenge an award made under the Act. It is consistent with the Singapore courts' objective of supporting, and not displacing, the arbitral process. The court will be slow to interfere with the conduct and outcomes of international arbitrations. Of particular note is the court's finding that proving fraud or unconscionable conduct on the part of the winning party is insufficient to secure relief. The applicant must effectively show that, but for such conduct, the result would have been different.

If you would like more information about this update or wish to discuss how it may potentially affect you or your business, please feel free to contact any member of our **International Arbitration Group** or:

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- London Court of International Arbitration
- American Arbitration Association
- International Chamber of Commerce
- China International Economic & Trade Arbitration Commission
- Hong Kong International Arbitration Centre
- Kuala Lumpur Regional Centre for Arbitration
- Singapore Chamber of Maritime Arbitration
- Singapore Institute of Arbitrators
- Singapore Institute of Architects
- UNCITRAL Rules arbitrations
- Other *ad hoc* arbitrations

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