LLOYD'S MARITIME AND COMMERCIAL LAW QUARTERLY

ARBITRATION WITHOUT PAROL?

BQP v BQQ

1. Introduction

One of the long-proclaimed benefits of commercial arbitration over court litigation is that what are often termed "the strict rules of evidence" do not apply. As long ago as 1864, in *The Matter of an Arbitration between Thomas William Brook, F & A Delcomyn and FJ Badart Freres*,[1] Byles (of *Bills*) J said he "should be sorry that anything decided here should give any countenance to the notion that mercantile arbitrators are bound by the strict rules of evidence, or that a non-observance of them will afford grounds for setting aside an award". The Arbitration Act 1996, s.34(1) states that it "shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter", and the rules of arbitration institutions routinely provide that the tribunal need not apply the "strict rules of evidence" and are to determine all issues of admissibility of evidence.[2] The "strict"[3] rules of evidence are rather less easily discerned in Commercial Court litigation now. While there remain some differences between court and arbitration procedure, for example in the taking of evidence of foreign law,[4] there has been a considerable convergence in approach in the 150 years since Byles J's observation.

However, *BQP v BQQ*,[5] a recent Singapore decision by a rightly respected judge, has indicated a rather striking, and with respect surprising, consequence of the different evidential regimes in court and arbitral proceedings: that the parol evidence rule, which precludes access to pre-contractual negotiations or post-contractual conduct for the purposes of ascertaining the meaning of contracts, may be one of those "strict rules of evidence" whose writ does not run in the Alsatia of arbitration.[6] What led the court to this conclusion?

1. (1864) 16 CB (NS) 403, 418; 143 ER 1184, 1190.
2. Eg, the London Court of International Arbitration Rules 2014, Art.22.1; the SIAC Rules 2013, Rule 16.2; The Hong Kong International Arbitration Centre Administered Arbitration Rules 2013, Art.22.2.
3. Or, indeed, any.
4. See David Foxton, "Foreign Law in Domestic Courts" (2017) 29 Sing Ac LJ 194.
5. [2018] SGHC 55 (Quentin Loh J) (hereafter "*BQP*").
6. *Cf Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478, 488.

2. *BQP v* BPP

BQP v BPP involved a jurisdictional challenge to an award of the Singapore International Arbitration Centre ("SIAC"), brought under s.10 of the (Singapore) International Arbitration Act ("IAA").[7] The challenge failed, and the decision is noteworthy, not for the reasons why it did so, but for the reasons the court gave in refusing permission to appeal, and rejecting the argument that the case raised an issue of general principle, to be decided for the first time, on which the decision of a higher tribunal would be to the public advantage.[8] The "issue of general principle" which the putative appellant raised was whether the parol evidence rule remained a principle of Singapore contract law, an issue on which recent Singapore decisions had left room for debate.[9] The key to the judge's conclusion that it did not might be thought to raise an issue of general principle itself. The parol evidence rule in Singapore is to be found not primarily in the common law but in ss 93 and 94 of the (Singapore) Evidence Act ("EA").[10] Section 93 provides that, "when the terms of a contract … have been reduced by or by consent of the parties to the form of a document … no evidence shall be given in proof of the terms of such contract". Section 94 provides in respect of a contract reduced into writing that "no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms" save for a series of defined exceptions. However, EA, s.2(1) provides that "Parts I, II and III"—which include the parol evidence provisions—"shall apply to all judicial proceedings in or before any court, *but not to* affidavits presented to any court or officer nor to *proceedings before an arbitrator*".[11]

This feature of Singapore law found itself allied in *BQP* with a significant body of doctrinal writing by commentators on international arbitration, to which the judge drew the parties' attention, debating whether international commercial arbitrators were, or should be, free from some of the rules governing the ascertainment of contractual intention which would apply if the same governing law were being applied in court.[12] The judge held that the EA prescribed only rules of evidence, and not rules of contractual construction, following statements to this effect by the Singapore Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Ltd*.[13] However, the parol evidence rule—at least to the extent that it precludes reference to pre-contractual negotiations—was a rule of evidence, and one which the EA stipulated should not apply to arbitral proceedings. Through this application of the EA, the judge found that arbitrators applying Singapore law were not obliged to apply the parol evidence rule.

7. CAP 143A, 2002 Rev Ed.

8. One of the criteria for granting permission to appeal to the Singapore Court of Appeal under IAA, s.10(4), applying the criteria in *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR 862, [16].

9. Eg, in *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732; *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193; and *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design and Construction Pte Ltd* [2008] 3 SLR(R) 1029.

10. CAP 97 (2002 Rev Ed).

11. Emphasis added.

12. In particular, and in favour of the view that the parol evidence rule should be characterised as an evidentiary rule and not a substantive rule in international arbitration, Jeffrey Waineymer, *Procedure and Evidence in International Arbitration* (Wolters Kluwer, 2012), [10.16] and Peter Ostendorf, "The exclusionary rule of English law and its proper characterisation in the conflict of laws" (2015) 11(1) JIPL 163, 172.

13. *BQP*, [122] citing *Sembcorp Marine* [2013] 4 SLR 193, [39–40].

The judge also regarded it as of "equal importance" that the parties had contracted for arbitration under the SIAC rules, which provided that it was for the tribunal to determine the admissibility of all evidence, including evidence not admissible in law.[14] Finally, he noted that some of the concerns expressed as to the consequences of removing the parol evidence rule in court proceedings—for example, the fear of extensive disclosure and evidence about pre-contractual negotiations—would not apply in arbitration, given the tribunal's power to control disclosure through measures such as the application of the International Bar Association Rules on the Taking of Evidence in International Arbitration.[15] For these reasons, the judge held that there was no arguable issue of law in the case, as to the scope of the parol evidence rule, and he refused permission to appeal.

3. The Evidence Act

The EA derives from the Indian Evidence Act 1872,[16] drafted by the Victorian jurist Sir James Fitzjames Stephen, a codification of the common law of evidence which was adopted, and remains in force, in India, Singapore, Malaysia, Pakistan, Bangladesh, Burma, Brunei, parts of Africa and the West Indies. The parol evidence rule was treated as one of a number of rules determining how particular facts might be proved, and presumably it was for that reason that Stephen captured it in this Act, rather than in the Indian Contract Act of the same year.[17] Stephen himself was conscious of the overlap between the law of evidence and the law of contract when drafting the Evidence Act, and strove to keep the two separate.[18] However, the provisions addressing the parol evidence rule necessarily crossed the taxonomic divide. As VK Rajah SC, a former judge of the Singapore Court of Appeal, has noted, the parol evidence rule is a "substantive question, despite … the parol evidence rule's misleading location in the scheme of" the EA.[19] It is treated as a question for the *lex causae* for the purposes of common law conflict of laws categorisation.[20]

Those jurisdictions which adopted the Indian Evidence Act faced a risk of the ossification of their rules of contractual interpretation, as the emphasis moved from a process of literal to contextual interpretation of contracts. However, through "pragmatic" interpretation of the various Evidence Acts, this risk has largely been overcome.[21] This has been achieved in some jurisdictions by ignoring the Evidence Act altogether,[22] and in others, by creative

14. *BQP*, [127] referring to the SIAC Rules 2013, Rule 16.2.

15. *BQP*, [129].

16. See JD Heydon, "The Origins of the Indian Evidence Act" (2010) 10(1) OUCLJ 1.

17. Sir Frederick Pollock, *The Indian Contract Act with A Commentary, Critical and Explanatory*, 2nd edn (Sweet & Maxwell, 1909) 52 observes: "The Act does not deal with the kind of proof generally required to establish the facts constituting a contract. In British India, the law on that subject is codified in the Evidence Act, I of 1872".

18. Sir James Stephen, *A Digest of the Law of Evidence* (Macmillan & Co, 1932), xviii.

19. VK Rajah SC, "Redrawing the Boundaries of Contractual Interpretation" (2010) 22 Sing Ac LJ 513, 520. See also Richard Jacobs QC, "Liability Insurance in International Arbitration" (2004) 20 Arb Int 269, 283, noting "it is unfortunate that rules of contractual interpretation sometimes masquerade as evidential rules".

20. *St Pierre v South American Stores (Gath & Chaves) Ltd* [1937] 1 All ER 206, 209–210.

21. On this see Goh Yihan, "Contractual Interpretation in Indian Evidence Act Jurisdictions: Compatibility with Modern Contextual Approach" (2013) 13 OUCLJ 17.

22. Eg, the Malaysian Federal Court in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 MLJ 597.

interpretation of its terms. It is this latter approach which has been followed in Singapore, where it has involved a distinction between the use of parol evidence to vary, add to or subtract from the terms of the contract (which is not permitted), and the use of that evidence to *interpret* the contract (which is). As the matter was explained by the Singapore Court of Appeal in *Sembcorp Marine*,[23] the EA "only governs the admissibility of evidence" and "is not concerned with and so does not prescribe rules of contractual construction". However, to the extent that the EA involves any limitations on the materials to which a court may have regard in the process of construing a contract,[24] the fact that the EA firmly consigns those limitations to the realm of procedure raises the potential for differential application of those rules between court and arbitration.

One possible answer to this conundrum is EA, s.2(2), which provides that "all rules of evidence not contained in any written law, so far as such rules are inconsistent with any of the provisions of this Act, are repealed". It might be argued that this left in place the common law parol evidence rule, to the extent that it was not inconsistent with the statement of that rule in the Act, which continues to apply in arbitration.[25] This was the solution identified by Vinodh Coomaraswamy J in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd*[26] when considering whether the parol evidence rule applied in interlocutory court proceedings to which the relevant provisions of the EA do not apply. Alternatively, where the contract in the arbitration is one governed by Singapore law as a matter of express or implied choice, it might be possible to argue that the parties should be taken to have made the contract subject to those provisions of Singapore law which would have determined its meaning before a Singapore court, including the parol evidence rule.

As noted above, the judge regarded it as a factor of "equal importance" in reaching his conclusion that the parties had chosen to arbitrate under the SIAC Rules, which provided that the tribunal would determine the admissibility of all evidence and that evidence need not be admissible in law.[27] As the judge noted, there are many provisions in arbitration institution rules to similar effect.[28] If the judge's characterisation of the parol evidence rule for the purposes of such provisions in arbitration institution rules is correct, then the significance of the decision in *BQP* extends far beyond Indian Evidence Act jurisdictions.

4. Arbitration *doctrine*

The judge referred to extensive commentary on the status of the parol evidence rule in arbitration, some of which asserted an entitlement on the part of an international arbitration

23. *Sembcorp* [2013] 4 SLR 193, [40].

24. Which it is acknowledged remains an open issue under Singapore law: Goh Yihan, "The case for departing from the exclusionary rule against prior negotiations in the interpretation of contracts in Singapore" (2013) 25 Sing Ac LJ 182.

25. *Cf* the reliance in *Pan Atlantic Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501; [1994] 2 Lloyd's Rep 427 on the Marine Insurance Act 1906, s.91(2) ("The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance") to preserve a requirement of inducement in the 1906 Act.

26. [2015] 3 SLR 855, [55–57].

27. *BQP*, [17].

28. In addition to those in *supra*, fn.2, see also the UNCITRAL Arbitration Rules 2010, Art.17.4 and the American Arbitration Association International Dispute Resolution Procedures 2014, Art.20.6.

tribunal to interpret contracts governed by, say, English law, without applying the parol evidence rule.[29] Yves Derains has observed that:[30]

"The interpretation of contracts is one of the areas in which international commercial arbitrators are most inclined to disengage from national laws in order to resort to general principles of law."

This is one of a number of areas where it has been suggested that international arbitration tribunals are able to apply legal doctrines or principles which do not derive from the proper law of the contract under consideration, but more general and, as it is sometimes put, transnational legal principles, and in which the arbitrators' control of procedure and the parties' choice of *lex causae* may come into conflict.

Another such area is the so-called "group of companies" doctrine. This is a principle resorted to by some international arbitration tribunals to allow recovery when the arbitration agreement is entered into by one company in a corporate group but the relief is required by another company. The doctrine, which is applied without regard to the issue of whether such recovery is possible under the law governing the parties' substantive rights, originated in the ICC arbitration award in *Dow Chemical v Isover-Saint-Gobain*.[31] However, the blurring of the divide between substance and procedure inherent in the doctrine received short shrift in the English Commercial Court in *Peterson Farms Inc v C&M Farming*,[32] Langley J observing that "The identification of the parties to an agreement is a question of substantive not procedural law"[33] and that there was no basis for the tribunal to apply anything other than the governing law of the arbitration agreement when determining who could claim under it. Of the tribunal's application of the "group of companies" doctrine, he observed "the 'law' the tribunal derived from its approach was not the proper law of the Agreement nor even the law of the chosen place of the arbitration but, in effect, the group of companies' doctrine itself".[34]

A third area where a similar conflict is seen is in the choice of the law the tribunal should apply when determining whether someone is in fact a party to the arbitration agreement in question, even though a non-signatory. Some commentators and arbitration awards support the view that this issue should be determined by transnational and international principles rather than through the application of a particular system of national law.[35] For example, Sigvard Jarvin has suggested that "the traditional approach to the problem that the arbitrators take is done without reference to any particular law … The existence of an intention to be bound to an arbitration agreement is demonstrated without reference to a

29. See *supra*, fn.12; and also Carol Mulcahy, "What does it mean? Contractual interpretation in International Commercial Arbitration" (2015) 9 *Dispute Resolution International* 15.

30. ICC Case No.2291 of 1975 [1976] JDI 989. See also ICC Case No.7626 of 1995 (1997) XXII YB Comm Arb 132.

31. ICC Case No.4131 of 1982 Interim Award of 23 September 1982, reported in P Sanders (ed.), *Yearbook of Commercial Arbitration* 1984, Vol. IX 131, upheld by the Paris Cour d'Appel, 21 October 1983 (1984) Rev Arb 98. See generally Stavros L Brekoulakis, *Third Parties in International Commercial Arbitration* (OUP, 2013), [5.59].

32. [2004] EWHC 121 (Comm); [2004] 1 Lloyd's Rep 603.

33. *Ibid*, [45]

34. *Ibid*, [47].

35. Eg, *Award in ICC Case No. 8385*, in JJ Arnaldez, Y Derains & D Hascher (eds), *Collection of ICC Arbitral Awards 1996–2000* (2003) 474.

particular law … [and] arbitrators often also refer to good faith and usages of international business as a source of law".[36]

5. Analysis

One of the difficulties with the suggestion that arbitrators can apply "general principles of law" rather than the *lex causae* is that, however transnational or delocalised an arbitration may be, it may well come into contact with a national legal system which will not approach the issues in the same way. If the issue is jurisdictional, then in respect of an arbitration in England and Wales there is a right on the part of the unsuccessful party to re-argue the issue *de novo* under the Arbitration Act 1996, s.67 before a court.[37] That court will apply the parol rule of evidence to an English law contract, *lex causae* principles to determine whether a non-signatory is bound by an agreement, and when determining whether damages can be recovered by or on behalf of a non-signatory. Similarly, a court asked to enforce an arbitration award will need to satisfy itself that the tribunal had jurisdiction. If an attempt is made to enforce an arbitration award in England, the English court will need to be satisfied that the tribunal had jurisdiction over the dispute under the law governing the arbitration agreement, and will make its own *de novo* determination of that issue.[38] On this basis, in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan*,[39] the English courts refused to enforce an arbitration award in which the tribunal's assertion of jurisdiction over one party was premised not on any applicable national system of law, but on "transnational general principles and usages reflecting the fundamental requirements of justice in international trade and the concept of good faith in business". *BQP* is a rare example of the concept of "arbitration law" surviving, not only inside the rarefied air of international arbitration, but in the traditionally more hostile atmosphere of municipal court proceedings.

This leads to another of the curiosities of *BQP*. The hearing came before the court on a jurisdictional challenge under IAA, s.10. In Singapore, as in England and Wales, that challenge takes place by way of a re-hearing in court, a context in which "the tribunal's own view of its jurisdiction has no legal or evidential value".[40] The hearing before Loh J, therefore, was a hearing in court, not "proceedings before an arbitrator", and it is therefore not clear why the re-arguing of the jurisdictional issue engaged EA, s.2(1) at all. This potential mismatch between the approach which a court would follow when interpreting a contract to determine whether the arbitrators had jurisdiction, and that which (on the judge's view) the arbitration tribunal would be entitled to follow, is one problem with the judge's

36. S Jarvin, "The Group of Companies Doctrine", *The Arbitration Agreement—Its Multifold Critical Aspects* 181, ASA Spec Series No.8, 1994. See also W Park, "Non-Signatories and the New York Convention" (2008) 2(1) *Dispute Resolution International* 84.

37. For a recent re-statement of the principle of *de novo* review under s.67 challenges, see *GPF GP Sarl v Republic of Poland* [2018] EWHC 409 (Comm), [64–72].

38. Arbitration Act 1996, s.103(2)(b).

39. [2010] UKSC 46; [2010] 2 Lloyd's Rep 691; [2011] 1 AC 763.

40. *First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and another appeal* [2014] 1 SLR 372, [162–163]. See also *AQZ v ARA* [2015] SGHC 49, [49].

analysis. As Vinodh Coomaraswamy J observed in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd*,[41] "a dispute over how a contract is to be construed must yield the same final judicial determination whether the contract is construed at trial in an action (to which Pt II of the Evidence Act does apply) or whether it is construed on a summary judgment application … or even in arbitration (to all of which Pt II of the Evidence Act does not apply)".

There are other curiosities which follow from the approach in *BQP*. In asymmetric arbitration clauses, which give one party the right, but not the obligation, to refer a dispute to arbitration, the electing party would have the right not simply to determine the forum in which the dispute would be resolved, but the applicability (or otherwise) of the parol evidence rule.[42] Indeed, on the basis of many institutional rules, that choice would be given to the arbitrators, who are given the power to determine whether or not the strict rules of evidence apply (and therefore could, presumably, choose to apply the parol evidence rule, EA, s.2(1) notwithstanding). This is the position under the SIAC Rules, Rule 16.2 considered by the judge, and indeed under all of the institutional rules referred to be him.

The judge supported his conclusion on the basis that "parties resort to arbitration, especially in the context of international trade and commerce, *precisely* because they wish to avoid the national laws of countries shackling their quest for a speedy, commercial and practical outcome to their dispute, and preclude the application of laws and procedures which may be alien to them".[43] However, at least in a jurisdictional dispute, the very question for the arbitration tribunal, and the court, is whether both parties *have* chosen to arbitrate and in the process given up their right to have their dispute determined in court. At that threshold level, the judge's rationale for allowing arbitration tribunals to disapply the parol evidence rule is questionable, and it seems equally improbable that an arbitration tribunal should apply the parol evidence rule when ruling on issues of contractual construction on an issue going to their jurisdiction, but dispense with it when construing the same contract for non-jurisdictional purposes.

Finally, there are other principles of substantive law which use concepts or vocabulary more commonly associated with the rules of evidence. For example, in English law, rectification requires a heightened standard of proof—"irrefragable"—before the parties' agreement will be rewritten,[44] and under New York law a heightened standard of proof—one of reasonable certainty—is required to recover consequential loss of profit following a breach of contract.[45] Are these, too, "evidential" rules which an arbitration tribunal is free to apply, or ignore, in the exercise of its discretion to determine whether to apply the strict rules of evidence? The answer, instinctively, is "no"; but, if so, the distinction between those cases and the parol evidence rule is not altogether easy to discern.

41. [2015] 3 SLR 855, [57]. Vinodh Coomaraswamy J is nothing but consistent. As an arbitrator he had applied the parol evidence rule in a case which was later the subject of an unsuccessful application for an appeal on a point of law arising from its application, without anyone suggesting the dispute was actually about a point of evidence: *Healthcare Supply Chain (Pte) Ltd v Roche Diagnostics Asia Pacific Pte Ltd* [2011] SGHC 63.

42. On asymmetrical arbitration clauses see David Joseph QC, *Jurisdiction and Arbitration Agreements*, 3.rd edn (Sweet & Maxwell, 2015), [4.31].

43. *BQP*, [126].

44. *Joscelyne v Nissen* [1970] 2 QB 86, 98.

45. *Kenford v County of Erie* (1986) 67 NY 2d 257, 261 (NY).

6. Conclusion

The reaction to *BQP* may reveal a divide between those who see the case as an unintended, and unwelcome, consequence of nineteenth-century codification, and those who regard it as an important judicial recognition that the autonomy and universality of the arbitration process are not limited to issues of procedure, or the right to be wrong, but also extend to the right to disapply some aspects of the law governing the parties' transaction. It will be apparent that the author of this note is in the former camp. Vinodh Coomaraswamy J in *HSBC Trustee (Singapore) Ltd v Lucky Realty Co Pte Ltd*[46] observed that one consequence of the EA was that "our law of evidence is less flexible than our law of contract … [and] the principles of both bodies cannot develop or evolve in parallel through judicial decision in the same way". Singapore is a jurisdiction which rightly prides itself both on the predictability of its contract law and on its respect for the autonomy of international commercial arbitration.[47] On an issue in which these two organising principles of Singapore law might be seen to conflict, it will be interesting to see which proves the stronger.

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