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Singapore decision offers guidance for exempted entities on the operation of certain exemptions in the Securities and Futures (Licensing and Conduct of Business) Regulations

The Singapore High Court has held that it has the inherent jurisdiction to reconsider issues of illegality pertaining to a contract even though the arbitral tribunal may have already determined that the contract in question was not illegal.

The court may therefore in an application to set aside an arbitral award on the basis of the alleged illegality, examine afresh the facts of the case and determine the issue of illegality accordingly.

In its judgment on *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155 on 22 June, the High Court also found that if the purpose of the corporate finance advice provided is to put a particular company in such a position that it may qualify subsequently to make an offer of securities to the public, such advice would not be considered to be specifically given for the making of any offer of securities to the public.

Accordingly, such advice would not contravene the relevant exemptions set out in paragraph 7 of the Second Schedule to the Securities and Futures (Licensing and Conduct of Business) Regulations (the **Regulations**) promulgated under the Securities and Futures Act (**SFA**).

Background to the judgment

The plaintiff is a company incorporated in Australia and the defendant is a Singapore company providing corporate finance advice. The defendant did not hold a capital market services licence and carried on business as an exempt corporate finance advisor under the terms of the SFA. The plaintiff and defendant entered into a consultancy service agreement, where the defendant would advise on and manage the plaintiff's attempt to secure a listing in Singapore.

A payment dispute subsequently arose between the parties which was subsequently referred to arbitration in accordance with the agreement. A dispute resolution paragraph in the agreement stated that the seat of arbitration was to be in Singapore, with Singapore law being the governing law of the agreement. An award was eventually made in the defendant's favour in all material aspects.

The plaintiff applied to the High Court for an order that the award be set aside pursuant to Article 34(2)(b) of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Singapore by virtue of section 3 of the International Arbitration Act. The plaintiff claimed that the award offends the public policy of Singapore as it upholds a contract (i.e. the agreement) which is allegedly illegal under the provisions of the SFA.

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The issues before the High Court were:

- Whether the arbitrator erroneously concluded that the agreement was not illegal under the SFA;
- If the arbitrator had erred in his conclusion, whether the illegality was of such a nature that allowing the enforcement of the award would conflict with the public policy of Singapore.

The High Court's decision

The alleged illegality

The High Court held that it had an inherent jurisdiction to reconsider the issue of illegality even if an arbitral tribunal had determined that the contract in question was not illegal.

The plaintiff contended that the agreement was void for illegality because the advice by the defendant was specifically provided for the purpose of a listing in Singapore and therefore was proscribed by section 82 of the SFA.

Section 82 of the SFA states that no person shall carry out business in any regulated activity without a capital markets services licence unless he comes within the categories of specified persons in the Third Schedule to the SFA. In section 2 of the SFA, "*regulated activity*" is defined as an activity specified in the Second Schedule to the SFA and includes amongst other activities, "*advising on corporate finance*".

It was not disputed that the defendant did not hold a capital markets services licence. However, the defendant contended that it was exempt from the requirement to hold a capital markets services licence because it and the advice it gave to the plaintiff fell within paragraphs 7(1)(b), (c) or (d) of the Second Schedule to the Regulations which exempted the defendant from the requirement to hold a capital markets services licence to advise on corporate finance.

Interpretation of paragraph 7 of the Second Schedule to the Regulations

The High Court recognised that one of the objectives of the SFA was to allow for diversity of service providers in the capital markets services sector while at the same time protecting the investing public. Therefore, the SFA ensured that there were areas within the regime in which boutique firms could operate. The High Court found that the phrase "*specifically given for the making of any offer of securities to the public*" (as set out in paragraph 7(1)(c) of the Second Schedule to the Regulations) ought to be interpreted In light of the said objective.

Much of the advice given by the defendant was directed at considering how the plaintiff could be put into a to apply for a listing. However, the High Court found amongst other things, that while the advice rendered by the defendant set out the steps which had to be taken if the plaintiff wanted an initial public offering (**IPO**) in Singapore, **that advice related generally to the matters necessary to have a successful IPO and did not directly relate to an immediate or actually impending offer of share to the public**.

The High Court also observed that the Agreement envisaged that if the work carried out by the defendant under the agreement resulted in the need or desire to raise funds from the public, other duly qualified professionals would be engaged to conduct the public offering. **This was perceived as a positive indication that the defendant was aware of the limitations on its ability to advise and desired to make it clear to the plaintiff that it could not look to it for advisory services relating to a public offering**.

Accordingly, the High Court found that the advice given by the defendant under the agreement was not specifically given for the making of any offer of securities to the public and held that there was no illegality involved in the agreement or in the way that it was implemented.

As the first issue was decided against the plaintiff, the High Court found that there was no need to consider the second issue relating to the public policy of Singapore.

Comment

This decision expressly recognised that despite an arbitrator's finding that a certain contract was not illegal, the Court has the inherent jurisdiction to examine the facts of the case afresh in determining whether to set aside an arbitral award on the basis of alleged illegality.

The High Court also reiterated in this case the comments made in ***PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA*** [2007] 1 SLR(R) 597, where the Court of Appeal stated that a conflict with public policy will only be found in

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instances where the upholding of an arbitral award would "*shock the conscience*" or is "*clearly injurious to the public*" or where it violates Singapore's "*most basic notion[s] of morality and justice*".

This reinforces the difficulty that a party faces in applying to the Singapore Courts to set aside an arbitral award which is in line with its' position to minimise curial intervention in international arbitrations.

Separately and of significance is the clarification by the High Court on the interpretation of paragraph 7 of the Second Schedule to the Regulations. This is significant as it is the first reported judicial interpretation on the scope and parameters of paragraph 7 of the Second Schedule to the Regulations and offers guidance on how to keep within the parameters of the same. This is extremely helpful in light of the increasing number of exempted entities carrying out business in Singapore.

If you would like more information about this decision or if you would like to discuss the possible implications that this decision may have on you or your business, please contact the following:-

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