SUPREME COURT OF SINGAPORE

20 June 2019

Case summary

BXS v BXT

[2019] SGHC(I) 10

Decision of Anselmo Reyes IJ

Outcome: SICC strikes out application to set aside arbitral award for being out of time under the non-extendable three-month time limit in Article 34(3) of the Model Law.

Background

1 This case arose out of an award issued in a Singapore-seated arbitration ("the Award") under the auspices of the Singapore International Arbitration Centre ("SIAC"). The Award dealt with the liability of the Defendant to indemnify the Plaintiff for tax paid to the Thai authorities, under the terms of a sale and purchase agreement ("SPA") between the two. The Defendant applied for the arbitration to be conducted by a sole arbitrator under rule 5 of the 2016 edition of the SIAC Rules. The arbitration eventually proceeded with a sole arbitrator.

2 In the Award issued on 12 June 2018, the arbitrator found in favour of the Defendant and awarded it US$647,112.51 in costs, as well as interest.

3 In late August 2018, the Plaintiff initiated proceedings in the Thai court to set aside the Award. On 9 November 2018 it applied to the Singapore court to set aside the Award. The Plaintiff alleged that the composition of the tribunal or arbitral procedure was contrary to the arbitration agreement, that the Award dealt with matters outside the terms of submission to arbitration, and that the Award was contrary to public policy. The Defendant applied to strike out the Plaintiff's setting aside application on the ground that this was out of time under Article 34(3) of the Model Law. Article 34(3) provides that an application for setting aside "may not be made after three months have elapsed from the date on which the party making that application had received the award".

The Court's decision

4 The Court began by dealing with the substantive grounds for setting aside. It concluded that none of the grounds were made out.

5 First, there was no merit to the Plaintiff's contention that having a sole arbitrator rather than three arbitrators conduct the arbitration was contrary to the parties' arbitration agreement and thus open to challenge under Article 34(2)(*a*)(iv) of the Model Law. Clause 19 of the SPA stipulated for three arbitrators. It also provided for arbitration under the SIAC Rules. As parties did not specify which edition of the SIAC Rules were to apply, the edition in force at the time of commencement of the arbitration applied. These were the 2016 Rules, which provided for the possibility of an Expedited Procedure with a sole arbitrator unless the parties agreed otherwise. The issue was therefore whether the stipulation for three arbitrators in Clause 19 excluded the application of the Expedited Procedure. The Court found that it did not do so: If parties wished to insist on having three arbitrators whatever the SIAC Rules provided for, they had to signal such intention much more clearly, such as by expressly stating that the parties agreed, in all instances, to the appointment of three arbitrators. Since they had not done so,

the Expedited Procedure with a sole arbitrator was not contrary to the arbitration agreement (at **[13]**).

6 Second, the Award was not one that dealt with matters outside the scope of submission within the meaning of Article 34(2)(*a*)(iii) of the Model Law. The Plaintiff contended that the arbitrator applied her own notion of Thai law to interpret the SPA. However, the Court disagreed because the arbitrator had made careful as opposed to merely superficial reference to Thai law. She had considered the expert evidence adduced by both the Plaintiff and the Defendant and preferred the latter's. The gravamen of the Plaintiff's complaint was that it did not agree with the way the arbitrator applied Thai law, but this was not a ground for setting aside the Award (at **[15]–[16]**). The Plaintiff also contended that the arbitrator exceeded her mandate by awarding costs despite these not being pleaded, and awarding a quantum of costs beyond that permitted under Thai law. The Court again disagreed. The Defendant had properly pleaded costs as part of the relief sought. Further, the Plaintiff had not submitted during the arbitration that Thai law imposed limits on the amount of legal costs that could be awarded by the arbitrator. To the contrary, the Plaintiff had expressly agreed with the Defendant that the arbitrator should determine costs applying Singapore law. There was thus no basis for now alleging that this was a ground for setting aside (at **[19]–[22]**).

7 Third, the Award was not contrary to public policy under Article 34(2)(*b*)(ii) of the Model Law. The Plaintiff's arguments on public policy relied on the same reasons as those cited for the other two grounds, and following the Court's rejection of those reasons the public policy argument failed too (at **[24]**).

8 Turning then to the Defendant's striking out application, the Court held that the time limit of three months under Article 34(3) was a mandatory one that it had no power to extend. This was the case despite its general power to extend time under s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) and paragraph 7 of the First Schedule to the same, because Article 34(3) was a "written law relating to limitation" to which the power to extend time did not apply. As the Plaintiff had brought its application nearly two months out of time, its setting aside application should be struck out regardless of its merits. (at **[37]–[41]**).

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.