IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC(I) 10

Originating Summons No 1 of 2019 and Summons No 1035 of 2019

Between

BXS

… *Plaintiff*

And

BXT

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside] — [Whether three-month time limit under Article 34(3) extendable by court]

TABLE OF CONTENTS

BXS
v
BXT

[2019] SGHC(I) 10

Singapore International Commercial Court — Originating Summons No 1 of 2019 and Summons No 1035 of 2019
Anselmo Reyes IJ
30 May 2019

20 June 2019 Judgment reserved.

Anselmo Reyes IJ:

Introduction

1 There are two applications before me. First, the Plaintiff has applied to set aside an award dated 12 June 2018 ("the Final Award") in an arbitration between itself and the Defendant. Second, the Defendant has applied to strike out the Plaintiff's setting aside application as an abuse of process. In support of its setting aside application, the Plaintiff relies on three grounds. First, it complains that the Final Award was made by a sole arbitrator, instead of by a tribunal of three arbitrators, contrary to the arbitration agreement. Second, it says that the Final Award deals with matters which are outside the terms of the submission to arbitration. Third, it alleges that the Final Award conflicts with Singapore public policy. In support of its striking out application, the Defendant relies on the ground that the Plaintiff's challenge to the Final Award was

brought long after the expiry of the three-month time limit for recourse against an arbitral award imposed by Article 34(3) of the UNCITRAL Model Law. That provides:

> 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 ...

Most of the Model Law (including Article 34(3)) has the force of law in Singapore by reason of s 3(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). See also O 69A r 2(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), which states that an application to set aside an award under Article 34:

> [M]ay not be made more than 3 months after the later of the following dates:
>
> (*a*) the date on which the plaintiff received the award;
>
> (*b*) if a request is made under Article 33 of the Model Law, the date on which that request is disposed of by the arbitral tribunal.

The Defendant says that I have no power to extend the time limit stipulated in Article 34(3). The Plaintiff accepts that its setting aside application was brought nearly two months out of time. But the Defendant submits that it is entitled to a retrospective extension of the three-month period in Article 34(3) and that I have power to extend that time.

2 Both parties' applications were originally made before the Singapore High Court, but they have since been transferred to the Singapore International Commercial Court. Following a case management conference before me on 22 March 2019, the parties agreed that, in the interests of saving time and cost, the two applications would be heard together.

Background

3 The Plaintiff is a Thai listed company. The Defendant is a Mauritius-registered investment company. On 11 December 2012 the Defendant entered into an Agreement ("the SPA") for the sale of its shares in two companies to certain purchasers. In due course, through novation and merger, the rights and obligations of the purchasers under the SPA came to be vested in the Plaintiff.

4 Under clause 10.1(f) of the SPA, the Plaintiff as purchaser was entitled to an indemnity from the Defendant against tax claims by the Thai tax authority. When the SPA was being negotiated, the parties were aware of a pending case before the Thai Supreme Court between the Thai tax authority and an unrelated company which, depending on its outcome, could trigger the Defendant's liability to indemnify the Plaintiff under the SPA. On 14 October 2014 the Plaintiff notified the Defendant that there was a possibility that the Defendant may have to indemnify the Plaintiff against additional tax pursuant to the indemnity provision in the SPA. On 16 May 2016 the Thai Supreme Court decided the pending case against the taxpayer. Consequently, on 16 June 2016 the Thai tax authority demanded that the Plaintiff pay additional tax of THB 102,550,664 (about S$3,737,280.52 at an exchange rate of THB 1 = S$0.041). The Plaintiff paid the additional tax on 29 July 2016. But, when the Plaintiff sought an indemnity from the Defendant, the latter refused on the ground that, by operation of SPA clause 8.6, its liability under clause 10.1(f) had expired on 11 December 2015. Clause 8.6, entitled "Time limits" provides:

> The liability of the Seller in respect of all Claims shall terminate:
>
> (a) on the third anniversary of the date of this agreement in respect of the Tax Warranties and Claims relating to Tax; and
>
> (b) on the first anniversary of the date of this agreement in respect of all other Claims,
>
> except in respect of any Claim of which notice is given to the Seller as described in this agreement before the relevant date in paragraph (a) and (b) above. The liability of the Seller in respect of any Claim shall in any event terminate if proceedings in respect of it have not been commenced within six months after the giving of notice of that Claim as described in this agreement.

5 There being a dispute as to the Defendant's liability to indemnify under the SPA, on 25 May 2017 the Plaintiff commenced an arbitration under the auspices of the Singapore International Arbitration Centre ("SIAC") against the Defendant pursuant to clause 19 of the SPA. Clause 19, entitled "Disputes" provides:

> Except where the parties have agreed to refer a dispute to the Independent Accounts pursuant to Schedule 4, all disputes arising out of or in connection with this agreement (including a dispute relating to any non-contractual obligations arising out of or in connection with this agreement) shall be exclusively and definitively settled by arbitration pursuant to the rules of the Singapore International Arbitration Centre (the **Rules**), by three arbitrators appointed according to the Rules. The language of the arbitration shall be English. The place of arbitration shall be Singapore. The parties waive any right of application or appeal to any court, insofar as such waiver can validly be made. Nothing contained in this clause shall limit the right of any party to seek from any court of competent jurisdiction, pending appointment of an arbitral tribunal, interim relief in aid of arbitration or to protect or enforce its rights under this agreement.

The Defendant submitted its Response to the Plaintiff's Notice of Arbitration on 6 June 2017. In an Annex to its Response, the Defendant applied for the arbitration to be conducted by a sole arbitrator under the Expedited Procedure

pursuant to Rule 5 of the SIAC Arbitration Rules (6th Ed, 1 August 2016) ("the 2016 Rules"). Rule 5, entitled "Expedited Procedure", provides:

> 5.1 Prior to the constitution of the Tribunal, a party may file an application with the Registrar for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule, provided that any of the following criteria is satisfied:
>
> a. the amount in dispute does not exceed the equivalent amount of S$6,000,000, representing the aggregate of the claim, counterclaim and any defence of set-off;
>
> b. the parties so agree; or
>
> c. in cases of exceptional urgency.
>
> The party applying for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule 5.1 shall, at the same time as it files an application for the proceedings to be conducted in accordance with the Expedited Procedure with the Registrar, send a copy of the application to the other party and shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.
>
> 5.2 Where a party has filed an application with the Registrar under Rule 5.1, and where the President determines, after considering the views of the parties, and having regard to the circumstances of the case, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:
>
> a. the Registrar may abbreviate any time limits under these Rules;
>
> b. the case shall be referred to a sole arbitrator, unless the President determines otherwise;
>
> c. the Tribunal may, in consultation with the parties, decide if the dispute is to be decided on the basis of documentary evidence only, or if a hearing is required for the examination of any witness and expert witness as well as for any oral argument;

> d. the final Award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time for making such final Award; and
>
> e. the Tribunal may state the reasons upon which the final Award is based in summary form, unless the parties have agreed that no reasons are to be given.
>
> 5.3 By agreeing to arbitration under these Rules, the parties agree that, where arbitral proceedings are conducted in accordance with the Expedited Procedure under this Rule 5, the rules and procedures set forth in Rule 5.2 shall apply even in cases where the arbitration agreement contains contrary terms.
>
> …

The Defendant submitted that the Expedited Procedure under a sole arbitrator was warranted as there was only one issue between the parties (namely, whether the Defendant's liability under SPA clause 10.1(f) had lapsed by reason of SPA clause 8.6) and resort to the Expedited Procedure could lead to substantial savings in time and cost. Insofar as a sole arbitrator was concerned, the Defendant noted that the average SIAC fee for a sole arbitrator was S$103,880 (with a maximum limit of S$138,506.66), while the average SIAC fee for a tribunal of three arbitrators was S$271,501.05 (with a maximum of S$223,494.74) or about 6% of the amount in dispute. The Defendant also observed that it would be easier to fix a hearing date and avoid unnecessary delay, if there was only one arbitrator.

6 There was no dispute between the parties that the substantive part of the SPA was governed by Thai law, while the arbitration agreement was governed by Singapore law. Neither was there a dispute between the parties as to Singapore being the seat of the arbitration and the 2016 Rules applying to the arbitration. The Plaintiff was amenable to the adoption of the Expedited Procedure. But the Plaintiff objected to a sole arbitrator being appointed. The

Plaintiff instead submitted to the SIAC that it was important to have a three-member tribunal, including at least one arbitrator who was familiar with Thai law, since the dispute involved a Thai law tax indemnity issue. In support of its position, the Plaintiff stressed that the arbitration agreement in SPA clause 19 expressly provided for a tribunal of three arbitrators. The Plaintiff submitted that, if the Expedited Procedure before a sole arbitrator was followed, the enforceability of any resultant award could be challenged before the Thai court. On 11 July 2017 the SIAC President decided, pursuant to Rules 5.2 and 5.3 of the 2016 Rules, that the arbitration would follow the Expedited Procedure under a sole arbitrator. On 31 July 2017 the Plaintiff's lawyers wrote to the SIAC stating that the Plaintiff would proceed with the arbitration but "under protest".

7 On 22 November 2017 the SIAC President appointed a sole arbitrator ("the Arbitrator"). On 12 June 2018 the Arbitrator issued the Final Award, dismissing the Plaintiff's claim to be indemnified by the Defendant. She ordered that the Plaintiff pay the Defendant's costs of the arbitration in the amount of US$647,112.51 together with simple interest at 5.33% per annum from the date of the Final Award until payment. She also ordered that the Plaintiff pay the SIAC's costs of the arbitration in the total amount of S$117,459.16 (comprising her fees of S$94,488.08 and SIAC's administrative fees and expenses of S$22,971.08).

8 In late August 2018 the Plaintiff initiated proceedings before the Thai Central Intellectual Property and International Trade Court ("CIPITC") to set aside the Arbitrator's Final Award. In response, the Defendant applied to the Singapore court for an injunction to restrain the Plaintiff from continuing with the proceedings before the CIPITC. On 9 November 2018 the Plaintiff applied to the Singapore court to set aside the Final Award. On 25 March 2019 the CIPITC dismissed the Plaintiff's application on the basis that it lacked power to

set aside the Final Award. On the same day, the Singapore court granted a permanent injunction preventing the Plaintiff from proceeding with its CIPITC application or commencing fresh court proceedings in Thailand in connection with disputes arising out of the SPA.

Discussion

9 It will be convenient to proceed by first considering whether the Plaintiff actually has any case for setting aside the Final Award. Thereafter, I will consider whether I should retrospectively extend the time for the Plaintiff to submit its setting aside application or whether the Defendant is right that no extension can be granted and the Plaintiff's application should instead be struck out.

The Plaintiff's setting aside application

Ground 1: Sole arbitrator instead of panel of three arbitrators

10 The Plaintiff argues that it entered into the SPA on the basis that any dispute arising in connection with the SPA would be resolved by three arbitrators. In that way, the Plaintiff says that it had an assurance that there would at least be one arbitrator (namely, the person designated by the Plaintiff) on any tribunal who would have familiarity with Thai law. The SIAC President's decision that the arbitration proceedings should be conducted by a sole arbitrator under the Expedited Procedure disrupted that expectation and meant that, contrary to the express terms of the arbitration agreement, the arbitration proceedings took place in a different manner from that which the Plaintiff had contemplated. The Arbitrator does not possess a qualification in Thai law and has no independent familiarity with Thai law. For this reason, the Plaintiff submits that the Final Award should be set aside by reason of Article

34(2)(*a*)(iv) of the Model Law as set out in the First Schedule to the IAA. This provides that the court may set aside an award if:

> … the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law …

11 In terms of causation, the Plaintiff suggests that the failure to have three arbitrators, with at least one arbitrator having knowledge of Thai law, "could reasonably have made a difference in the outcome of the Final Award". In this connection, the Plaintiff complains that the entire Final Award is "made without reference to Thai law principles". It submits that "the Tribunal had only cursorily referred to Thai law principles" to reach the conclusion that the Tribunal should only resort to the pre-contractual negotiations in a case where the natural and ordinary meaning of words is uncertain and unambiguous. This had the consequence (the Plaintiff contends) that the Tribunal misapplied Thai law. In particular, the Tribunal failed to address the point made by the Plaintiff's Thai law expert evidence at the arbitration that "a decision of the Supreme Court of Thailand would typically take between 5 to 10 years to be determined and, accordingly, parties could not have contemplated that the seller's liability under clause 10.1(f) would have crystallised before 11 December 2015".

12 I am not persuaded that this ground has merit. By SPA clause 19 the parties agreed to the resolution of their disputes by arbitration in accordance with the 2016 Rules. The 2016 Rules (including Rules 5.2 and 5.3) were therefore incorporated by reference into the arbitration agreement in clause 19. By Rule 5.3 the parties accepted that, where arbitral proceedings are conducted in accordance with the Expedited Procedure, Rule 5.2 (which allows the SIAC President to direct that an arbitration use the Expedited Procedure under a sole arbitrator) will be applicable even in cases where the arbitration agreement

contains contrary terms (such as that the Tribunal is to consist of three persons). Thus, the fact that the arbitration was heard by a sole arbitrator under the Expedited Procedure did not contravene the parties' arbitration agreement.

13 The SPA was executed on 11 December 2012. At that time, the SIAC Arbitration Rules (4th Ed, 1 July 2010) ("the 2010 Rules") were in effect. The 2010 Rules did not include Rules 5.3 and 5.4 which now appear in the 2016 Rules. Nor did Rules 5.3 and 5.4 appear in the SIAC Arbitration Rules (5th Ed, 1 April 2013) ("the 2013 Rules"). The Plaintiff argues that the Rules "cannot retrospectively amend the substantive right of the parties [to have three arbitrators] under the Arbitration Agreement". But I am unable to agree. SPA clause 19 did not specify which edition of the SIAC's Rules was to apply. Clause 19 instead simply provided for the resolution of disputes by "arbitration pursuant to the rules of the Singapore International Arbitration Centre". Thus, the SIAC's Rules in force at the time when the arbitration was commenced were applicable. The arbitration was commenced by the Plaintiff's Notice of Arbitration issued in May 2017. For that reason, the 2016 Rules were applicable. Those Rules provide:

> 1.1 Where the parties have agreed to refer their disputes to SIAC for arbitration or to arbitration in accordance with the SIAC Rules, the parties shall be deemed to have agreed that the arbitration shall be conducted pursuant to and administered by SIAC in accordance with these Rules.
>
> 1.2 These Rules shall come into force on 1 August 2016 and, unless otherwise agreed by the parties, shall apply to any arbitration which is commenced on or after that date.

The issue is consequently the extent to which the stipulation for three arbitrators in SPA clause 19 amounts to the parties having agreed to exclude the application

of Rule 5.3. In my view, the words are insufficient to override Rule 5.3. If parties wish to insist on three arbitrators whatever later editions of the SIAC's Rules might provide, they have to signal such intention much more clearly. That might be done (for instance) by expressly stating that the parties agree that in all instances a panel of three arbitrators is to be appointed and, subject to that overriding mandatory requirement, the parties agree to abide by the SIAC's Rules. In other words, to avoid a chicken-and-egg debate as to whether an arbitration agreement trumps or is trumped by a contrary provision (such as Rule 5.3) in some present or future version of the SIAC's Rules, parties need to make it explicit that they are adopting only those provisions of any current or future version of the SIAC's Rules that do not contradict a mandatory requirement stipulated in the parties' arbitration agreement. In using the looser formulation of words in clause 19, the Plaintiff must be taken to have accepted to be bound by whatever modifications might be made to the SIAC's Rules following the date of the SPA, including the introduction of Rule 5.3 to the 2016 Rules.

14 The Plaintiff refers to the judgment of the Shanghai No.1 Intermediate People's Court in *Noble Resources International Pte Ltd v Shanghai Xintai International Trade Co Ltd* (2016) Hu 01 Xie Wai Ren No.1. The court refused to enforce a Singapore award which had been decided by a sole arbitrator under SIAC's Expedited Procedure, because the parties' arbitration agreement expressly provided for three arbitrators. But that was a case on the 2013 Rules which did not include what is now Rule 5.3 of the 2016 Rules. At the time of the case, it was ambiguous whether or not the reference to three arbitrators in the relevant arbitration agreement negated Rule 5.2 in the 2013 Rules. Under the 2016 Rules it has become clear that, absent an explicit provision in an arbitration agreement negating the application of Rule 5.3, the latter has the effect of overriding a stipulation for three arbitrators when the SIAC President

directs that the Expedited Procedure is to be used. I note in passing that, in a similar situation, the Singapore court concluded that, even under the 2013 Rules, the SIAC President was empowered by Rule 5.2 to override a stipulation for three arbitrators and direct that the Expedited Procedure with a sole arbitrator be followed in a given case: *AQZ v ARA* [2015] 2 SLR 972.

15 As for the alleged failure of the Tribunal to apply Thai law, in my view the sole arbitrator made careful (as opposed to merely superficial) reference to Thai law in the Final Award. In paragraph 83 of the Final Award, she pointed out that the parties' Thai law experts agreed that in interpreting the SPA regard may be had to: (1) the natural and ordinary meaning of the words used; (2) the contract as a whole; (3) the factual matrix known by the parties at the time the contract was executed; and (4) pre-contractual negotiations. She observed in paragraph 84 that the parties' Thai law experts only disagreed on the extent to which pre-contractual negotiations were relevant in interpreting a contract. the Plaintiff had submitted that pre-contractual negotiations should always be take into account, while the Defendant took the view that they should only be considered if there was ambiguity in the express words of a contract. The Arbitrator preferred the Defendant's expert evidence. She referred to a dictum of the Supreme Court of Thailand (Judgment No. 2210/2526) in support of her conclusion. She did not find the authority relied on by the Plaintiff's expert (that is, Supreme Court Judgment No. 2003/2356) as persuasive, because in her view it was "not directly on point as it concerned the determination of parties to a contract". Nonetheless, as a check on her factual findings, the Arbitrator specifically looked into the parties' pre-contractual negotiations. See, for example, paragraphs 101 to 110 and 117 of the Final Award. That exercise only reinforced her view that SPA clause 8.6(a) applied to clause 10.1(f) and so limited the extent of the Defendant's indemnity. More particularly, the Arbitrator found as a matter of fact, citing the relevant witness evidence in

support, that the Plaintiff's intention was "indeed for the indemnity at clause 10.1(f) to be unlimited in time but that [the Plaintiff] did not give particular attention to clause 8.6 and its effect".

16 It seems then that what the Plaintiff is really complaining about is that it does not agree with the way in which the Arbitrator applied Thai law to the facts. The Plaintiff, for example, suggests that, because the Thai Supreme Court would normally take five to ten years to determine a case, it must have been that the parties, "applying a Thai lens," envisaged that the Defendant's indemnity would last until at least December 2015. But there does not appear to have been any evidence in the arbitration that, when drafting clauses 8.6 and 10.1(f) of the SPA, the Plaintiff considered, or was even aware of, the length of time that the Thai Supreme Court normally takes to determine a case. Instead, as the Arbitrator found by reference to the factual witness evidence, the Plaintiff simply did not direct its thoughts as to how clause 8.6 might affect clause 10.1(f). The result was that, as the Arbitrator held, "the final text of clause 8.6 and its impact on clause 10.1(f), or the application in time of clause 10.1(f), were not expressly discussed with [the Defendant] during the negotiations of the SPA".

17 In short, the Final Award was consistent with the arbitration agreement in SPA clause 19. The Final Award was likewise consonant with Thai law. The Plaintiff's criticism is essentially that, in its view, the Tribunal came to a wrong conclusion when assessing the factual evidence in light of Thai law. That, however, is not a valid ground for setting aside an arbitral award.

Ground 2: Award not within the terms of submission

18 The Plaintiff submits that the award dealt with matters outside the scope of submission because the Arbitrator: (1) applied "her own notion of Thai law

to interpret the contract" and (2) awarded costs exceeding the permissible amount under the Thai Arbitration Act BE 2545 (2002). The Plaintiff says that it is accordingly entitled to have the Final Award set aside under Article 34(2)(*a*)(iii) of the Model Law. This provision provides that the court may set aside an award which:

> … deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside …

The Plaintiff's submission on the misapplication of substantive Thai law has already been dealt with above. The Arbitrator most certainly did not apply "her own notion of Thai law". I focus here on the Plaintiff's criticisms of the Arbitrator's handling of costs.

19 First, the Plaintiff suggests that the Arbitrator should not have awarded legal fees and expenses because the Defendant did not claim the same in its pleadings. This complaint may be readily dismissed. In paragraph 7.1 of its Response to the Notice of Arbitration, for example, the Defendant expressly seeks the following relief: "(a) an order dismissing the Claimant's claims in their entirety; (b) costs; (c) interests; and (d) any other relief available as the Tribunal deems fit". The request for "costs" plainly included a claim for the Defendant's legal costs and fees incurred in connection with the arbitration.

20 Second, the Plaintiff argues that the Arbitrator should not have awarded the legal fees for eleven lawyers. The Plaintiff suggests that such result was wholly disproportionate. In allowing the costs for eleven lawyers, the Arbitrator said:

> 139. The Tribunal does not consider it inappropriate for the Respondent [the Defendant] to have 11 lawyers working on this arbitration nor was the Respondent required to provide a breakdown of time entries. The Tribunal notes that, in contrast to the Claimant [the Plaintiff], the Respondent staffed lawyers at the associate level to take a leading role in this arbitration, including to conduct all the advocacy at the Hearing, as seen by the breakdown of hours by fee earners in the Respondent's submission on costs. The Tribunal finds both staffing approach[es] perfectly legitimate and the staffing approach chosen by the Respondent cannot be viewed as unreasonable. Further, the Tribunal finds that it was reasonable for the Respondent to incur such legal fees, considering the number of pleadings and procedural matters which arose, as well as the fact that a three-day hearing took place. Lastly, the Tribunal notes that the Claimant's legal counsel fees were in an amount of SGD 798,657.74 (using the Claimant's exchange rate) (USD 594,947.66 at May 16, 2018 exchange rate) while the Respondent's legal counsel fees were lower, THB 18,742,619.26 (USD 583,457.74 at May 16, 2018 exchange rate). This fact further supports the conclusion that the legal fees incurred by the Respondent were reasonable.

There is nothing to reproach the Arbitrator in the way that she assessed the Defendant's legal fees and expenses. In light of the circumstances identified by her, I do not see anything unreasonable or disproportionate in her assessment. That is especially so where the legal costs and fees claimed by the Plaintiff were some US$11,000 more than those claimed by the Defendant. Further, the Plaintiff's own costs submissions (which were made in the arbitration before the Final Award was issued) were based on time recorded by at least eleven different fee earners.

21 Third, although the Plaintiff now says that the total fees and expenses awarded by the Arbitrator were in excess of those permitted under Thai law, in its comments dated 11 May 2018 on the Defendant's costs submissions it took a wholly different position. The Plaintiff there stated:

> 2 The Claimant [the Plaintiff] agrees with the Respondent [the Defendant] on the following points:-
>
> ....
>
> 2.3 The Tribunal is empowered to award costs under Singapore law and the SIAC Rules and may award interest on costs. In awarding costs, the Tribunal will be guided by the general principle that "*costs follow the event*". Notwithstanding, the Tribunal has the discretion to apportion costs as it sees fit.

In the arbitration, the Plaintiff did not submit that Thai law set limits on the amount of legal costs that could be awarded by the Arbitrator. In those premises, there is simply no substance to the Plaintiff's allegation now that the Arbitrator somehow exceeded her mandate by awarding costs that were in excess of that permissible under Thai law. The reality is that the Plaintiff was not contending before the Arbitrator that Thai law applied in relation to costs. On the contrary, the Plaintiff expressly agreed with the Defendant that the Arbitrator should determine costs on the basis of Singapore law.

22 I add that, the arbitration having a Singapore seat and the award of costs being consequently governed by Singapore law and the 2016 Rules, it is difficult to see in any event why alleged limitations on recoverable costs under Thai law should be relevant.

23 This alleged ground for setting aside the Final Award fails.

Ground 3: Contrary to Singapore public policy

24 The Plaintiff says that the Final Award breaches Singapore public policy by reason of the grounds discussed in above. Given that those grounds have been rejected, this alleged public policy basis for setting aside the award also fails.

The Defendant's application: Extension of time or striking out?

25 In light of my rejection of the Plaintiff's grounds for setting aside the Final Award, it follows that there is no merit in its application for an extension of time in which to apply to set aside the Final Award. That application must likewise fail.

26 There remains the Defendant's striking out application. The summons for striking out was taken out on the sole basis that the setting aside application was brought outside of the three-month period for challenging an arbitral award stipulated by Article 34(3). The Final Award having been issued on 12 June 2018, the Plaintiff should have applied to set aside the Final Award by 12 September 2018. It did not so apply until 9 November 2018 and was consequently out of time by nearly two months.

27 The Defendant's case is that I lack jurisdiction even to consider the merits of the Plaintiff's setting aside application, since as a matter of Singapore law (the law of the seat of arbitration), the three-month time limit in Article 34(3) cannot be extended. In support of its case, the Defendant cites *ABC Co v XYZ Co Ltd* [2003] SLR 546 ("*ABC Co*"). There, Judith Prakash J (as she then was) held (at [9]) that the words "may not" in Article 34(3) 'must be interpreted as "cannot" as it is clear that the intention is to limit the time during which an award may be challenged'. She observed that this strict interpretation of Article 34(3) was "supported by material relating to the discussions amongst the drafters of the Model Law" and the result was that "the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court". Prakash J's view was shared by Lee Seiu Kin J in *PT*

Pukuafu Indah and others v Newmont Indonesia Ltd and another [2012] 4 SLR 1157 ("*PT Pukuafu Indah*"). He commented (at [30]):

> … While the word "may" often conveys some measure of discretion in contradistinction to the mandatory "shall", "may not" is clearly mandatory and in the context of Art 34 of the Model Law, imposes a time bar. … The court's powers in relation to international arbitration proceedings are limited to those conferred by the IAA … In the absence of an express provision, the phrase "may not" cannot be read as implicitly enlarging the scope of the court's powers by giving a discretion to extend the time limit. I add that finality is one of the fundamental principles of arbitration, and a definitive time limit for challenging an arbitral award is necessary to ensure the expeditious and effective resolution of parties' disputes.

28 At the substantive hearing, I indicated to counsel on both sides that my concern with *ABC Co* and *PT Pukuafu Indah* was that neither had apparently considered whether s 18 and paragraph 7 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") impacted the three-month time period in Article 34(3). The SCJA (which is primary legislation) provides in s 18(1) that "[t]he High Court shall have such powers as are vested in it by any written law for the time being in force in Singapore. Section 18(2) goes on to state that, "[w]ithout prejudice to the generality of subsection (1), the High Court shall have the powers set out in the First Schedule". Paragraph 7 of the First Schedule to the SCJA then gives the High Court the "[p]ower to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of the time prescribed, but this provision shall be without prejudice to any written law relating to limitation". The question (which neither *ABC Co* nor *PT Pukuafu Indah* address) is whether there is anything in the Model Law, including Article 34(3), as enacted in Singapore that may be regarded as "relating to limitation" (that is, falling within the proviso to paragraph 7 of the

First Schedule to the SCJA) so as to preclude the use of the power in paragraph 7 to extend the three-month time limit in Article 34(3).

29 In response to my concern, the Plaintiff submitted that I should follow the approach of the Malaysian Court of Appeal in *Government of the Lao People's Democratic Republic v Thai-Lao Lignite Co Ltd and another* Civil Appeal No W-02(NCC)-1287-2011 ("*Government of the Lao People's Democratic Republic*"). Section 37(4) of Malaysia's Arbitration Act is in similar terms to Article 34(3), and provides:

> An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award …

The Malaysian Court of Appeal held that it had "an unfettered discretion to grant an extension of time" in respect of s 37(4). The Malaysian Court of Appeal supported this conclusion by reference to paragraph 8 of the Schedule to Malaysia's Courts of Judicature Act 1964 ("MCJA"), which is *in pari materia* to paragraph 7 of the First Schedule to the SCJA. The case is, however, of limited assistance because it likewise does not discuss what is meant by the proviso to paragraph 8 of the Schedule to the MCJA. Presumably, the Malaysian Court of Appeal did not regard s 37(4) as a law relating to limitation. But no explanation is given as to why. It is also worth noting that subsequent Malaysian High Court cases have not followed the decision in Government of the Lao People's Democratic Republic (see, for example, *Kembang Serantau Sdn Bhd v Jeks Engineering Sdn Bhd* [2016] 1 AMR 261; *Triumph City Development Sdn Bhd v Kerajaan Negeri Selangor Darul Ehsan* [2017] 8 AMR 411), such that the status under Malaysian law of the time period in s 37(4) is unclear.

30 Counsel for the Plaintiff also referred me to the decision of Mimmie Chan J *Sun Tian Gang v Hong Kong & China Gas (Jilin)* HCCT 46 of 2015 (21

September 2016) ("*Sun Tian Gang*"). There the judge analysed the time period in Article 34(3) (which has force of law in Hong Kong by s 81 of the Hong Kong Arbitration Ordinance (Cap 609) ("HKAO")) as follows:

> 90. When "may not" as used in Article 34 (3) is read in the context and in conjunction with Article 34 (2), I would agree with Ms Wong that the discretionary element interpreted by the Hong Kong courts to exist in Article 34 (2) is retained in and extended to Article 34 (3), such that the court has a discretion to decide whether or not to permit the application to set aside to be made after the period of 3 months specified. In the context, the phrase "an application for setting aside may not be made after 3 months" means that such application may not be made, without an extension of time or leave being granted by the court in the exercise of its discretion.
>
> 91. The decisions made by the Singapore Court, to which counsel have preferred, that the Singapore Court has no power to extend the time under the Singapore equivalent of Article 34 (3), should be distinguished on the basis that the procedural law, ie Order 69A rule 2(4) of the Rules of the High Court of Singapore 1996 current at the time of ABC v XYZ Co Ltd [2003] 3 SLR(R)546, expressly provided that an application to set aside "shall be made" to the court within 3 months, thereby making the time limit mandatory by way of the applicable domestic rules. By contrast, our Order 73 rule 5 RHC governs the procedures for applications under the Ordinance, and it makes no express reference to the time limit for applications to be made under s 81 of the Cap 609 and Article 34 of the Model Law. Implicitly, the 3 months stated in Article 34 (3) applies. The national law of a Convention state may have its own domestic provisions for extending the time limit under Article 34 (4) in particular circumstances, as apparent from the New Zealand and Malaysian cases cited by counsel. As Ms Wong submitted, this is consistent with the approach referred to in paragraph 83 above.
>
> 92. Since the time limit prescribed under Article 34 (3) is procedural, the court has the jurisdiction and discretion to extend such time, and regulate the proceedings before it.

31 Again, I find *Sun Tian Gang* to be of only limited assistance. It is correct that, when *ABC Co* was decided in 2003, Order 69A r 2(4) of the ROC provided that a setting aside application under Article 34 "shall be made within 3 months" from the date of the receipt of an arbitral award. The wording was amended to

its current form ("may not be made more than 3 months after ... the date on which the plaintiff received the award") in 2016 in order to track the language of Article 34(3) more closely. But I do not think that it is possible to deduce anything from the change of wording from "shall be made within 3 months" to "may not be made more than 3 months". To my mind, the amendment can be regarded as either making the deadline in Order 69A r 2(4) mandatory or permissive, depending on how one understands the expression "may not be made" in Article 34(3). I am unable to infer that the change from "shall be made within 3 months" to "may not be made more than 3 months" meant that the three-month deadline in Order 69A r 2(4) became permissive from having previously been imperative. Further, although Mimmie Chan J refers to the "discretionary element" in Article 34(2) being "retained in and extended to" the use of "may not" in Article 34(3), it is unclear to me why that should be the case. Instead, it seems to me that the discretion conferred by the word "may" in Article 34(2) merely refers to the court's discretion not to set aside an award even where one or more of the conditions in Article 34(2)(*a*)(i) to (iv) or (*b*)(i) to (ii) have been established. The word "may" in Article 34(2) accordingly cannot have any logical bearing on one's understanding of the expression "may not" in Article 34(3). There is the additional problem that Mimmie Chan J appears to be using subsidiary legislation (Order 73 of the Rules of the Hong Kong Court ("RHC")) to construe the extent to which a deadline imposed by primary legislation (Article 34(3) of the Model Law as enacted by s 81 of the HKAO) can be extended. No explanation is given as to why such a mode of interpretation is permissible.

32 In *Astro Nusantara v PT Ayunda Prima Mitra and others* [2018] HKCFA 12 ("*Astro Nusantara*"), the Hong Kong Court of Final Appeal retrospectively extended the time for First Media to set aside an order for the enforcement of a Singapore award. The Plaintiff relied on this case in support

of its contention that the three-month period in Article 34(3) was not absolute. But *Astro Nusantara* involved the setting aside of a Hong Kong court order allowing the Singapore award to be enforced against First Media's assets in Hong Kong. The case does not concern the time limit for setting aside an award in the seat of arbitration. Under Order 73 r 10(6) of the RHC, which is similar to Order 69A r 6(4) of the ROC, a party has 14 days in which to apply to set aside an order for the enforcement of a foreign arbitral award. The Hong Kong court has power to extend the time limit of 14 days in Order 73 r 10(6) of the RHC by virtue of Order 3 r 5 of the RHC. The latter provides:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorized by these rules, or by any judgment, order or direction, to do any act in any proceedings.

Thus, likewise, *Astro Nusantara* cannot be a reliable guide as to whether under Singapore law the time limit of three months in Article 34(3) can be extended.

33 The Plaintiff also referred to the decision of Carr J in *Ali Allawi v The Islamic Republic of Iran* [2019] EWHC 430 (Comm) ("*Ali Allawi*"), which involved an application to set aside an arbitration award pursuant to s 68 of the English Arbitration Act 1996 (c 23) ("1996 UK Act"). Mr Allawi sought an extension of time to bring his setting aside application, as he had failed to submit the same within 28 days of the date of the award as required by ss 70(1) and (3) of the 1996 UK Act. Section 70(1) provides that "[t]he following provisions apply to an application or appeal under section 67, 68 or 69". Section 70(3) provides:

> Any application or appeal must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process.

In deciding whether to grant an extension, the court considered the factors identified by Popplewell J in *Terna Bahrain Holding Company WLL v Bin Kamil Al Shamsi* [2012] EWHC 3283 (Comm) ("*Terna Bahrain*"). Those factors were: (1) the length of delay; (2) whether the party who permitted the time limit to expire and was subsequently delayed did so reasonably in the circumstances; (3) whether the respondent to the application caused or contributed to the delay; (4) whether the respondent would by reason of the delay suffer irremediable prejudice in addition to the mere loss of time if the application were to proceed; (5) whether the arbitration has continued during the period of the delay; (6) the strength of the application; and (7) whether in the broadest sense it would be unfair to the applicant for him to be denied the opportunity of having the application determined. The Plaintiff invited me to apply the same factors here and to extend the time for setting aside in light of such an assessment.

34 But the approach by the English court to the time limit in the 1996 UK Act cannot be a guide to this court's approach to Article 34(3) as a matter of Singapore law. That is because Rule 62.9 of the English Court's Civil Procedure Rules empowers the English court to "vary the period of 28 days fixed by section 70(3) of the [1996 UK Act] for ... (a) challenging the award under section 67 or 68 of the Act ...". Reference should also be made to section 79(1) of the 1996 UK Act which provides that, "[u]nless the parties otherwise agree, the court may by order extend any time limit ... specified in any provision of this Part having effect in default of such agreement". In contrast, Order 69A r 2(4) of the ROC simply mirrors the language of Article 34(3) and states that "an application [to set aside an award] ... may not be made more than 3 months after the ... date on which the plaintiff received the award". Therefore, *Ali Allawi* cannot be a useful guide to the Singapore approach to Article 34(3) insofar as the three-month time limit there is concerned.

35 Section 4(1) of the IAA provides that "[f]or the purposes of interpreting the Model Law, reference may be made to the documents of (a) the United Nations Commission on International Trade Law". The Defendant has drawn my attention to the *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, UNCITRAL 18th Sess, UN Doc A/CN 9/264 (1985) ("the Commentary"). That states in respect of Article 34:

> Sole action for attacking award, paragraph (1)
>
> 1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of Article 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself.

Although the Commentary clearly stresses that the time for setting aside an award is supposed to be "fairly short," I do not think that it is possible to infer one way or the other from the passage in the Commentary whether the "fairly short" period may be extended for good reason.

36 Article 2A(1) of the Model Law provides that "[i]n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith". Article 2A(1) has not been adopted in the IAA. However, the principle there has been followed by Singapore case law (*Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86). But, as has been seen, the practice regarding extensions of time varies across different jurisdictions. In Malaysia, the Court of Appeal has held that the time for setting aside may be extended, but the High

Court has not always followed the Court of Appeal. In Hong Kong, the Court of First Instance in *Sun Tian Gang* has suggested that time may be extended, but its reasoning is problematic. In England (which is not a Model Law jurisdiction), there is a shorter period of only 28 days in which an application to set aside must be brought, but the court is expressly empowered to extend that time for good reason. The Defendant has additionally referred me to cases indicating that in New Zealand the time limit of three months is regarded as absolute and not capable of extension (*Kyburn Investments Ltd v Beca Corporate Holdings Ltd* [2015] NZCA 290; *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* [2014] NZCA 507). It therefore appears that there is no consistent international practice as far as the extension of time for setting aside arbitral awards is concerned.

37 What then should the approach be as far as Singapore law is concerned? The starting point must be to look at the natural and ordinary meaning of the words of Article 34(3). Here I agree with the textual analysis of Article 34(3) in *ABC Co*. While the positive form "may be set aside" connotes permissiveness ("one may set aside, but one does not have to do so"), the negative form ("may not be made") is indicative of absolute prohibition. It is hard to read "may not" as anything other than a mandatory restriction. If one is told that he or she "may not do X," that will usually be understood to mean that one "must not do X" and not that one has an option whether or not to do X. I cannot accept Mimmie Chan J's suggestion that Article 34(3) means that a setting aside application may not be made "without an extension of time or leave being granted by the court in the exercise of its discretion". That seems to me to assume what one is supposed to prove, by reading words into Article 34(3) that are just not there. It follows that, on its face, Article 34(3) appears to impose a mandatory limit. I draw support for my view from the Australian Federal Circuit Court case of *Renouf v RAC Finance (No 2)* [2018] FCCA 182 at [16]. In relation to the words

"may not be brought … more than 2 years after the relevant credit card contract is rescinded or discharged or otherwise comes to an end" found in s 80(1) of the National Credit Code, the court explained:

> "[N]ot" is an adverb of negation … and thus imports a prohibition on the activity concerned, that is, in this case, the making of an application outside of the prescribed time limit. In this case "not" negates "may".

38 The question then is whether Article 34(3) is a "written law relating to limitation" within the terms of the proviso to paragraph 7 of the First Schedule to the SCJA. In *Obegi Melissa and others v Vestwin Trading Pte Ltd and another* [2008] 2 SLR(R) 540, the Court of Appeal considered what constitutes a law "relating to limitation" for the purposes of paragraph 7. The Court of Appeal stated (at [32]):

> … The substance – rather than merely the letter – of the law in question determines whether a statutory provision is a "written law relating to limitation" [within the meaning of paragraph 7 of the First Schedule of the SCJA]. Order 14 r14 is not such a law because it relates to the time limit for taking a particular step in proceedings which have already commenced as opposed to the time limit for commencing litigation based on a cause of action. As Tay J correctly pointed out at [27] of *United Engineers* [[2004] 4 SLR(R) 305]:
>
> > Black's Law Dictionary (7th Ed, 1999) offers one definition of "limitation" to be "[a] statutory period after which a lawsuit or prosecution cannot be brought in court". This definition accords with the purpose of the very wide powers in the said para 7 [*ie*, para. 7 of the First Schedule of the SCJA] to extend or to abridge the time for doing any act or taking any proceeding without affecting the substantive rights conferred by statutes such as the Limitation Act (Cap 163, 1996 Rev Ed). The words in question [*viz*, "written law relating to limitation"] relate to the right of action and not to application (such as O 14 applications) or the steps to be taken within the action.

Thus, whether a law "relates to limitation" depends on whether it extinguishes a right of action or merely imposes a deadline for the taking of a procedural

step. The power to extend time under paragraph 7 of the First Schedule to the SCJA applies to the latter, but not to the former. Paragraph 7 cannot be used to extend a right of action which has been extinguished by a "limitation" in some written law.

39 In *ABC Co*, Prakash J equated an application to set aside an arbitral award with the bringing of a cause of action. She explained (at [19]):

> It is not an accident that O 69A specifies that an application to set aside an award should be made by an originating motion. That is one of the originating processes provided for by the Rules when a party with a cause of action wishes to initiate proceedings to obtain a remedy against another party. Unlike an appeal, it is not a process designed to impugn a pre-existing judicial decision. The fact that in this case the remedy required is the setting aside of an arbitral award does not make the application the equivalent of an appeal. To succeed in the application, new facts which were not (and generally would not have had to be) considered by the arbitral tribunal in coming to its decision will have to be established by the applicant. This is recognised by the amended O 69A r 2(4B) which requires the motion to be accompanied by an affidavit disclosing the supporting evidence. The application is a process whereby relevant facts are established. It is not a process whereby facts are reassessed …

Order 69A has since been amended to specify that an application to set aside an arbitral award should be commenced by way of an originating summons. But this change does not affect Prakash J's analysis, with which I agree. On that basis, Article 34(3) must be a written law "relating to limitation" within the meaning of the proviso in paragraph 7. The power to extend time under paragraph 7 would not therefore apply to the three-month limitation in Article 34(3). Once the three months in which to bring a setting aside application have expired, the right to apply to set aside an award is extinguished and paragraph 7 cannot be used to revive the right that has been lost.

40 I am bolstered in this conclusion by reference to Article 5 of the Model Law as found in the First Schedule to the IAA. That provides: "In matters governed by this Law, no court shall intervene except where so provided in this Law". Article 5 suggests that the provisions of the Model Law (including Article 34(3)) which have given force of law in Singapore by s 3 of the IAA, were meant to be self-contained. A court should only intervene in arbitration-related matters in the limited circumstances authorised by the Model Law. It follows that, the three-month limitation in Article 34(3) having expired, there can be no further scope for me to intervene by extending the time for setting aside the Final Award through the invocation of a power (namely, that conferred by paragraph 7 of the First Schedule to the SCJA) which is extraneous to the Model Law. This conclusion on the nature of the time limit in Article 34(3) is conducive to the finality and conclusiveness of the arbitral process that the Court of Appeal has stressed in *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [29] and *PT Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [140].

41 Accordingly, I lack power to extend the time for applying to set aside the Final Award. The three months stipulated in Article 34(3) having lapsed, the right to apply to set aside an arbitral award is lost and cannot be revived by resorting to the court's power to extend time under paragraph 7 of the First Schedule to the SCJA. It follows that, regardless of its merits, the Plaintiff's setting aside application should be struck out in any event as being out of time.

42 For completeness, I observe that, even if I had reached a different conclusion regarding the power to extend the time under Article 34(3), I would not have granted an extension. Applying the factors identified by the English court in *Ali Allawi* and *Terna Bahrain*, I would have found as follows:

(a) Length of delay: The nearly two months of delay, amounting to more than 60% of the three months allowed by Article 34(3), is significant.

(b) Whether there was good reason for the delay: The Plaintiff says that it mistakenly thought that the Thai court had power to set aside the Final Award. But that is not a good reason. The Plaintiff had the benefit of advice from Thai and Singapore lawyers. Regardless of what it may have thought about the Thai court's power to set aside the Final Award, the Plaintiff does not explain in its affidavit evidence why it chose to apply to set aside a Singapore award before the court of an enforcing state (Thailand), rather than before the court of the seat of arbitration (Singapore).

(c) Whether the Defendant contributed to the delay: It is not contended that the Defendant contributed to the delay.

(d) Whether the Defendant would be prejudiced by an extension of time: The Defendant did not strongly press a case that it would suffer prejudice by the grant of an extension. But a mere lack of prejudice would not by itself justify the grant of an extension. It must first be shown that there is some good reason for an extension. At that stage, in deciding whether or not to grant an extension, the court will have to weigh the prejudice to a plaintiff (the Plaintiff) in refusing an extension against the prejudice to the defendant (the Defendant) in granting an extension. Here, apart from the mistaken belief that the Thai court had the power to set aside the Final Award, the Plaintiff has not put forward any reason, much less good reason, for its delay.

(e) Whether the arbitration has continued during the period of the delay: The arbitration did not take place during the period of delay.

(f) The strength of the application: As analysed above, the Plaintiff's grounds for setting aside the Final Award are untenable.

(g) Whether there would be any unfairness in refusing an extension: There would be no unfairness.

Conclusion

43 For the foregoing reasons, the Defendant's striking out application succeeds. The Plaintiff's application for an extension of time and for the Final Award to be set aside, is dismissed.

44 There will be a direction that, within 14 days of the date of this Judgment, the parties are to put forward directions for dealing with the costs of and occasioned by their respective applications. The parties' proposals are to include directions for the taxation of relevant costs. If the parties cannot agree on directions, they are to submit statements identifying those directions upon which they agree and those directions upon which they disagree with succinct reasons for their disagreement. Upon receipt of the parties' proposals, I will issue directions for dealing with the costs of the parties' applications.

Anselmo Reyes
International Judge

Koh Choon Guan Daniel, Er Hwee Lee Danna Dolly (Yu Huili), Ng Wei Ying (Eldan Law LLP) for the Plaintiff;
Tan Beng Hwee Paul, Pang Yi Ching, Alessa and David Isidore Tan Huang Loong (Rajah & Tann Singapore LLP) for the Defendant.