SICC Finds, on Novel Issue, that Arbitral Tribunal's Unilateral Correction to Award Did Not Enlarge Three-month Timeframe to Set Aside Award

It is well-established that a party who wishes to set aside a Singapore arbitral award *must* file its application within three months from the date of receipt of the award (**Three-month Time Bar**). The Three-month Time Bar is strict and cannot be extended by the Singapore Court. An exception arises where a party makes a request to the tribunal which falls in substance within the scope of Articles 33(1) and 33(3) of the UNCITRAL Model Law on International Commercial Arbitration (**Model Law**), i.e., a request to correct the award, interpret the award, or issue an additional award; such a request has the effect of deferring the Three-month Time Bar, which then commences from "*the date on which that request had been disposed of by the arbitral tribunal*" (Article 34(3) of the Model Law). But what of corrections under Article 33(2) of the Model Law, issued by the tribunal "*on its own initiative*" and not pursuant to a party's request?

In *DBX and another v DBZ* [2023] SGHC(I) 18, the Singapore International Commercial Court (**SICC**) held that such unilateral corrections do not have the same effect on the Three-month Time Bar. The SICC thus declined to set aside two Singapore International Arbitration Centre (**SIAC**) awards on the basis that the application, which was brought *within* three months from the date of receipt of the tribunal's corrections but *beyond* three months from the date of receipt of the award, was time-barred.

While this alone was fatal to the application, the SICC in any event found no substantive grounds to set aside the awards under Article 34(2) of the Model Law, rejecting the applicants' arguments that: (a) one of the arbitration agreements was not valid; (b) they had no notice of the arbitrations; or (c) the awards were in conflict with Singapore public policy by virtue of illegality under Hong Kong law.

Our Partner Monica Chong Wan Yee, Senior Associate Leau Jun Li (Phoebe) and Associates Wong Chun Mun and Foo Hsien Weng acted for the successful respondent before the SICC. The team representing the same party in the underlying arbitrations was also led by our Partner Monica Chong Wan Yee.

Background

In 2017, one of the applicants in the setting-aside application (**ACo**) obtained a margin financing facility (**Facility**) from the respondent (**RCo**) on terms set out in a Margin Facility Letter (**Facility Letter**). The Facility Letter expressly incorporated RCo's Terms and Conditions for Trading Accounts (**Terms**), which included a clause providing for the arbitration of disputes under the 2013 UNCITRAL Arbitration Rules (**UNCITRAL Rules**) at the "*sole option… and… absolute discretion*" of RCo (**Arbitration Clause**). The Facility Letter was subject to the rules of the Singapore Stock Exchange and the Terms were governed by Singapore law.

The Facility Letter, along with an Account Opening Form, were signed by the other applicant (**A**), who also executed a personal guarantee (**Guarantee**) for ACo's obligations under the Facility. The Guarantee provided for the arbitration of disputes under the Arbitration Rules of the SIAC (**SIAC Rules**) and was governed by Singapore law. In addition, A signed a Client Information Statement which indicated ACo's "*Registered Address*" in the BVI (**BVI Address**), ACo's "*Correspondence Address*" in Hong Kong (**HK Address**), and ACo's email address at xxx@163.com (**163 Email Address**). Each of these documents (i.e., the Facility Letter, Guarantee, Account Opening Form, and Client Information Statement) were in English.

Following ACo's default on repayment, RCo commenced two Singapore-seated arbitrations respectively against A (to enforce the Guarantee) and ACo (pursuant to the Terms). Neither A nor ACo participated in the arbitrations, despite repeated efforts by RCo, the SIAC, and/or the tribunal to provide notice throughout the proceedings (of which RCo kept detailed record in its service logs).

On 18 February 2023, the tribunal rendered a final award against A and another final award against ACo (**Awards**). Owing to a transposition error, the Awards were initially sent by the SIAC on 21 February 2023 to xxx@136.com rather than the 163 Email Address. Realising this, on 6 March 2023, RCo's lawyers transmitted the Awards and the SIAC's covering letters to the 163 Email Address, and delivered the same by courier to A and ACo at the BVI Address which was received on 10 March 2023.

In addition, on 28 February 2023, the SIAC also arranged for the Awards to be couriered to A and ACo: (a) at the BVI Address, which was received on 14 March 2023; and (b) at the HK Address.

On 19 March 2023, the tribunal of its own accord issued Corrections to the Awards to rectify the applicable goods and services tax rate. On 20 March 2023, the SIAC sent the Corrections to both A and ACo at the 163 Email Address (with no delivery failure message). Concurrently, RCo's lawyers couriered hard copies of the Corrections to ACo at the BVI Address which was received on 24 March 2023. Later, on 15 May 2023, the SIAC also sent the final award against A and the corresponding Correction by registered post to A at ACo's HK Address, and couriered hard copies of the ACo Correction to ACo at its BVI Address with delivery on 22 May 2023.

On 19 June 2023, A and ACo filed a single application to set aside "[the Awards] *(as subsequently corrected on 19 March 2023) … received by* [A and ACo] *on 20 March 2023*", on the following grounds:

(a) The Arbitration Clause was not valid because: (i) it was in English (which was not A and ACo's preferred language); and (ii) the Terms and/or the Arbitration Clause were not properly incorporated into the Letter (Article 34(2)(a)(i) of the Model Law);

(b) A and ACo, "*to the best of* [A's] *knowledge*", did not receive notice of the arbitrations and could not in any event understand such notices which were in English. A was also based in Saipan (and not Hong Kong or the BVI) at the material time (Article 34(2)(a)(ii) of the Model Law); and

(c) The Awards infringed Singapore's public policy, as RCo's provision of the Facility was allegedly illegal under Hong Kong law (Article 34(2)(b)(ii) of the Model Law).

The SICC's Decision

The SICC dismissed A and Aco's application to set aside the Awards.

The application was made out of time

Before the SICC, A and ACo contended that the reference to an award under Article 34(3) of the Model Law meant "*the award* ***as corrected***" because, among other things, the UNCITRAL Rules (Article 38(3)) and the SIAC Rules (Rule 33.1), which governed the two arbitrations, provide that a correction shall form part of the award. Here, "*the award as corrected*" was received on 20 March 2023; the application was filed on 19 June 2023, within three months of that date of receipt, and was therefore not time-barred.

The SICC disagreed:

(a) First, references in the UNCITRAL Rules and SIAC Rules that a correction constitutes a part of the award do not alter the deadline for recourse against the award. Because a tribunal's jurisdiction ceases after rendering its final award, and a correction necessarily postdates the final award, these provisions in the rules merely operate to prevent the correction from becoming *ultra vires* / a nullity. The ultimate status of an award depends not on the arbitration rules but on national law (which, for *Singapore* awards, would mean the Model Law as incorporated in the International Arbitration Act 1994).

(b) Second, references to an "award" in the Model Law do not mean "*the award as corrected*". The Model Law itself supports the conceptual distinction between an award and a correction: e.g., in the context of Article 33 of the Model Law which permits the making of requests to the tribunal "*within thirty days of receipt of the award*", an "award" cannot mean "*the award as corrected*", or this would enable an infinite cycle of requests to the tribunal for correction, interpretation, or an additional award.

(c) Third, the interpretation which RCo submitted was the correct one (i.e., where a tribunal initiates a correction under Article 33(2) of the Model Law, the Three-month Time Bar runs from the (earlier) date of receipt of the award) would cause no injustice to potential challengers: a correction under Article 33(2) of the Model Law is limited to "*errors in computation, any clerical or typographical errors or any errors of similar nature*" and is usually uncontroversial; even if issued after the commencement of the three-month timeframe, such a correction is unlikely to impede or vary a decision to challenge the award and a dissatisfied party would in any event have at least two months to formulate its challenge.

In this case, while the Corrections were received by A and ACo on 20 March 2023, the Awards were received much earlier, on 6 March 2023, *via* email. The SICC accepted that the 163 Email Address was a functional email since, among other things, it was the vehicle through which RCo received the Corrections, listed as ACo's email address in the Client Information Statement, and used by A in correspondence with RCo. Accordingly, the application which was filed on 19 June 2023 (more than three months after 6 March 2023) was time-barred.

Arbitration clause was not invalid under Singapore law

The SICC rejected A and ACo's argument that, because RCo allegedly failed to furnish a copy of the Terms or bring the Terms to their attention, they had no knowledge of the Terms and/or were deprived of an opportunity to "*truly*" read the Terms, with the result that the Arbitration Clause was not validly incorporated into the Facility Letter. The SICC reasoned that:

(a) In general, a party (such as A / ACo) who signs a contract is deemed to have actual knowledge of the contents of the same and is bound by all its terms even if he has not read them. That is so even if the contract incorporates terms in a separate document, and the contracting party(s) had no knowledge of what those terms were at the time of contracting.

(b) A contracting party (such as RCo) is also not obliged to draw particular attention to an arbitration clause incorporated by reference or ensure that the other party has actual knowledge of the same. This would be oppressive on contracting parties and risks stifling future arbitrations. It was, at any rate, commonplace and entirely reasonable for agreements such as the Facility to contain arbitration clauses, and for the Facility to be subjected to RCo's standard Terms.

(c) Whether an arbitration agreement was validly incorporated is a matter of contractual interpretation and turns on the parties' **objective** intentions (*c.f.* their knowledge of the same). The same test applies even if the arbitration agreement was asymmetrical (i.e., expressed to be at the option / discretion of only one party), with no additional need for attention to be drawn specifically to the relevant clause.

(d) A's assertion that she did not read, speak, or write English was furthermore unbelievable. This was contradicted by, among other things, A's execution of the Facility Letter, Guarantee, Account Opening Form, and Client Information Statement in English.

Applicants had actual or alternatively, deemed, notice of the arbitrations

The SICC found that A and ACo had actual knowledge of the arbitrations, reasoning that:

(a) It is generally sufficient that the Notice of Arbitration is served on a party at its registered address, on an operative email address, and/or through a method of communication specified in the contract.

(b) The Notice of Arbitration was sent to ACo by: (i) email to the 163 Email Address; (ii) courier delivery to the BVI Address (ACo's registered address); and (iii) hand and post to the HK Address (ACo's correspondence address). Likewise for A, the Notice of Arbitration was served on A by hand and post to the ACo HK Address and email to the 163 Email Address. RCo was furthermore able to adduce proof of the functionality of these modes of service, including that in the course of administering the Facility, A used the 163 Email Address to correspond with RCo, and ACo received at its HK Address monthly statements for the Facility.

(c) RCo continued to provide notice to A and ACo throughout the arbitrations, by, for instance, the transmission of pleadings, written submissions, other filings, and various correspondence to the 163 Email Address and to the HK Address. The SICC noted that, based on the service logs annexed to the Awards, there were no fewer than 153 occasions of such service on A, and no fewer than 122 occasions for ACo.

(d) Alternatively, A and ACo had deemed notice of the arbitrations. Both the Facility Letter and Guarantee provided that communications made in the manner specified would be deemed as received, and service of the Notices of Arbitration on A and ACo was carried out in accordance with these deeming provisions. While it was possible for A and ACo to rebut any presumption of receipt by introducing evidence of non-receipt, no such evidence was adduced beyond A and ACo's bare denials of notice, which were insufficient. It was moreover irrelevant (for the purpose of determining if a party had notice of an arbitration) that A claimed not to read or write English, since the Facility Letter and Guarantee provided that the arbitrations would be conducted in English.

Awards did not conflict with Singapore public policy

It was A and ACo's case that RCo's provision of the Facility without a licence contravened the Hong Kong Securities and Futures Ordinance (**SFO**) and the regulations thereunder, and the Awards, if not set aside, would undermine international comity.

Both RCo and A / ACo adduced competing expert reports on the alleged illegality under Hong Kong law. RCo's expert took the view that RCo was not obliged to be licensed under the SFO or comply with any of the rules / codes / guidelines thereunder. The SICC ultimately preferred the evidence of RCo's expert, noting

(among other things) that A / ACo's expert may lack the necessary qualifications and also could not be regarded as an independent expert.

Even assuming that the provision of the Facility was illegal under Hong Kong law, that did not inevitably mean that the Awards were contrary to Singapore public policy. The SICC emphasised that a mere finding of "*illegality of some kind under the foreign law is not enough*"; the public policy ground under Article 34(2)(b)(ii) of the Model Law is a narrow one and requires an applicant to show egregious circumstances which violate the most basic notion of morality and justice. A and ACo had not even shown that the alleged illegality (i.e., unlicensed provision by RCo of the Facility) would taint the transaction or render it unenforceable under Hong Kong law.

Key Takeaways

The SICC's decision on non-enlargement of the Three-month Time Bar following an Article 33(2) of the Model Law correction promotes certainty, since parties are not typically forewarned of such corrections (*c.f.* corrections made pursuant to a request). A party dissatisfied with an arbitral award in respect of which no request under Articles 33(1) or 33(3) of the Model Law was made should study the award for possible recourse and file any setting aside application within three months from the date of its receipt of the award. That Three-month Time Bar would remain even if an Article 33(2) of the Model Law correction is subsequently issued.

To pre-empt post-award challenges under Article 34(2)(a)(ii) of the Model Law, a claimant faced with a non-participating respondent in an arbitration should keep scrupulous records of its attempts to provide notice of the proceedings (as RCo did in this case). It is generally sufficient for the respondent to be notified through its registered address, an operative email address, or an agreed method of communication; the more comprehensive the attempts at notification, the more compelling the evidence / explanation required from the absent respondent to prove non-receipt.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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