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Dispute Resolution Update

Failure to set aside an arbitral award on the basis of a novated expired contract (BXH v BXI)

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Arbitration analysis: What happens to an arbitration clause upon the expiration of the main agreement and where parties continued to perform the contract as if it had not expired? What is the Singapore court's approach where the main contract contains both an arbitration clause and a court jurisdiction clause? Can the appointment of a sole arbitrator in accordance with the arbitration agreement be contrary to the same provision providing for a three person tribunal? Shaun Lee, counsel in the dispute resolution group at Bird & Bird's Singapore office, explains the implications of the Singapore High Court's decision in BXH v BHI.

BXH v BXI [2019] SGHC 141

What are the practical implications of this case? Why is the decision of interest to arbitration, disputes and commercial lawyers?

The case of BXH v BXI is another affirmation of the Singapore court's pro-arbitration and pro-enforcement policy. Nevertheless, the case helpfully deals with the tricky, but not uncommon, situation where parties are in a fixed term contract which subsequently expires but where they continue to conduct themselves as if the contract were still in force. The decision also marks the first decision of a Singapore High Court judge affirming the validity of an arbitration clause even where it otherwise would conflict with a Singapore court jurisdiction clause in the same underlying contract.

Finally, the court reaffirmed the proposition that a departure from the parties' agreed procedure is not a ground for setting aside an award if the departure was the result of the applicant's own conduct, failures or strategic choices.

What was the background?

The plaintiff and the defendant were parties to an SIAC arbitration. The plaintiff was the unsuccessful respondent while the defendant was the successful claimant in the arbitration. The defendant is a wholly-owned subsidiary of a Singapore company (the "**Parent Company**"). The arbitration was founded on an arbitration clause between the plaintiff and the Parent Company (the "**Distributor Agreement**"). The defendant claimed that its substantive rights against the plaintiff and its right to arbitrate any disputes were the result of a series of subsequent assignments and novations of the Distribution Agreement. The plaintiff rejected the tribunal's jurisdiction from the

outset of the arbitration and declined to participate further in the proceedings even after the tribunal found that it had jurisdiction.

The plaintiff's primary argument in the setting aside application was that the tribunal lacked jurisdiction because there was no arbitration agreement between the parties. Its alternative argument was that even if the tribunal had jurisdiction, the composition of the tribunal was not in accordance with the agreement of the parties — the tribunal comprised a sole arbitrator even though the arbitration agreement stipulates that it should comprise three arbitrators.

What did the court decide?

The Singapore High Court recognised the parties' complicated legal relationship — some of the contracts were bipartite, some were tripartite and one was between four parties. The plaintiff's threshold argument was to deny that it was a party to any arbitration agreement with the defendant at all.

In particular, the plaintiff argued that it was not bound by the Parent Company's assignment and novation of the Distributor Agreement to the defendant. The plaintiff argued, amongst other things, that the Distributor Agreement had expired before the parties entered into the novation agreement; and the arbitration clause is invalid in any event because it is inconsistent with a Singapore court exclusive jurisdiction in the Distributorship Agreement.

There was a valid arbitration agreement between the parties.

Even if Distributorship Agreement expired, an implied contract arose which was subject of the novation

The Singapore court held that the Distributorship Agreement had expired before the novation agreement came into force. Nonetheless, the arbitration agreement continued to have contractual force as between the plaintiff and the Parent Company as the arbitration clause survived the expiration of the underlying agreement. The judge held that it is generally presumed that the parties intend a dispute resolution clause to survive the substantive contract ceasing to have contractual force.

In any event, the Singapore court held that an implied contract on the same terms as those in the Distributorship Agreement had arisen between the plaintiff and the Parent Company after the expiration of the Distributorship Agreement. Such an implied contract could arise under Singapore law by way of conduct even thought that intention is never expressed in words. That implied contract was what the Parent Company and the plaintiff then subsequently novated to the defendant. In this respect, the evidence "*puts it beyond doubt*" that the parties (plaintiff and Parent Company, and subsequently, plaintiff and defendant) considered themselves bound by a contract on the terms set out in the Distributorship Agreement. The Judge in fact noted that there was more than conduct in this case to evidence the parties' intention — they expressly affirmed in words that they considered the Distributor Agreement to continue to bind them at various points subsequent to the expiration and to the novation.

In coming to his decision, the Judge acknowledged that the cited case law involved the original parties to the agreement who continued to act as if the agreement remained in force after its expiry. Nonetheless, the defendant stepped into the shoes of the plaintiff's original counterparty (ie the Parent Company) pursuant to a tripartite novation. As such, the issue was whether the plaintiff dealt with the Parent Company (prior to the novation), and later with the defendant (after the novation), consistently with the notion that the Distributor Agreement was still in force.

The Court will read an arbitration agreement with a conflicting court jurisdiction clause in such a manner as to preserve the arbitration agreement

The Judge disagreed that the SIAC arbitration clause and the Singapore court exclusive jurisdiction clause in the Distributorship Agreement gave rise to an "*irreconcilable inconsistency*" which rendered the arbitration clause unworkable. The Singapore court noted that the courts in common law jurisdictions have sought to construe the clauses in such a way as to give effect to both, rather than to disregard entirely one or the other i.e. the *Paul Smith* approach (named

after *Paul Smith Ltd v H&S International Holding Inc* [1991] 2 Lloyd's Rep 127).

As such, and while recognising that the *Paul Smith* approach was "*not perfect*" and "*not entire satisfactory*", the Judge held that the "*only practical…solution*" was to hold that the parties intended to resolve substantive disputes in arbitration and to resolve disputes arising out of any such arbitration in the Singapore courts in the exercise of their supervisory jurisdiction under the court exclusive jurisdiction clause.

The only reported decision in Singapore on such conflicting clauses previously was by an Assistant Registrar in *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHCR 13, which adopted the *Paul Smith* approach. As such, *BXH v BXI* represents the confirmation of the *Paul Smith* approach by a High Court judge for the first time.

Constitution of the tribunal was in accordance with the parties' agreement.

The High Court held that the parties had expressly agreed *in accordance with the express language of the arbitration clause* that if one party failed to nominate an arbitrator within the stipulated time limit, the first-appointed arbitrator shall be the sole arbitrator, which is precisely how the tribunal in the arbitration was constituted.

The Judge rejected the plaintiff's argument that it ought to have been allowed to nominate an arbitrator out of time. The Judge noted that this argument failed on the express language in the arbitration clause for the nomination of the arbitrators and constitution of the tribunal. In this respect, there is "*no principle of general application which justifies construing an arbitration agreement in "a fair and equitable" manner*" as opposed to construing an arbitration agreement like any other contract i.e. by applying a contextual interpretation to the words chosen by the parties to ascertain objectively what the parties intended. As such, there was no basis to construe the agreement to permit a party to nominate an arbitrator out of time so as to change the composition of the tribunal.

The Judge also reaffirmed the position in *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114 that a departure from the parties' agreed procedure is not a ground for setting aside an award if the departure was the result of the applicant's own conduct, failures or strategic choices. He held that this was a case where the plaintiff refused or failed to nominate an arbitrator as a deliberate strategic choice. Having made its choice, the plaintiff cannot now turn around and say that the SIAC or the tribunal should nevertheless have constituted a three-member tribunal.

Comments and Conclusion

On the facts of this case, the High Court's affirmation of the *Paul Smith* approach resolves any potential conflict which arises where a contract contains both an arbitration clause seated in Singapore and a Singapore court jurisdiction clause.

However, it does not appear to address a situation in which a contract contains both a Singapore arbitration clause but where the court jurisdiction clause is that of a *foreign court*. In that situation, it would be difficult to reconcile the court jurisdiction clause as providing for the foreign court to be the curial supervisory court as the Singapore courts ought to be the curial court by virtue of the arbitration being seated in Singapore.

Unfortunately, a contract containing both an exclusive court jurisdiction clause as well as an arbitration clause is not uncommon. Commercial parties who intend to or are keen to arbitrate their disputes often insert a model arbitration clause without realising that it conflicts with a court jurisdiction clause already in their template or standard form contracts. As *BXH v BXI* is on appeal to the Singapore Court of Appeal, it would be interesting to see if the Court of Appeal expresses its views, even in obiter.

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