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Case Comment

WHEN WOULD A REQUEST FOR CORRECTION EXTEND THE TIME LIMIT FOR SETTING ASIDE THE ARBITRAL AWARD?

BRS v BRQ [2020] SGCA 108

[2021] SAL Prac 6

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1 On 29 October 2020, the Singapore Court of Appeal rendered its decision in *BRS v BRQ*[1] ("*BRS v BRQ (CA)*"), clarifying the law on the circumstances in which a request for correction of an arbitral award made under Art 33 of the UNCITRAL Model Law on International Commercial Arbitration[2] (the "Model Law") would trigger an extension of the three-month time limit for bringing an application to set aside the award under Art 34(3) of the Model Law.

1 [2020] SGCA 108.
2 As adopted by the United Nations Commission on International Trade Law on 21 June 1985.

2 *BRS v BRQ (CA)* was a cross-appeal against the Singapore High Court's decision in *BRQ v BRS*.[3] In the proceedings below, the claimants (the "Claimants") and the respondent (the "Respondent") in an arbitration administered under the Arbitration Rules of the Singapore International Arbitration Centre[4] (the "Arbitration") each applied to set aside in part the arbitral award issued in the Arbitration (the "Award") on the grounds of, *inter alia*, breach of natural justice. Both the Claimants' and Respondent's applications were dismissed by the High Court, and the parties each appealed against the High Court's decision. On appeal, the Singapore Court of Appeal dismissed the Respondent's appeal and allowed the Claimants' appeal in part.

3 In dismissing the Respondent's appeal, the Court of Appeal held that the Respondent's application to set aside the Award was *time-barred*. The parties had received the Award on 31 January 2018. However, the Respondent filed its setting-aside application on 22 June 2018, *outside* of the strict three-month time limit stipulated under Art 34(3) of the Model Law to apply to set aside the Award.

4 The Respondent argued that it had made a request to the tribunal under Art 33 of the Model Law to correct the Award, which was dismissed by the tribunal on 23 March 2018. Since Art 34(3) of the Model Law provided that "[a]n 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 or, *if a request had been made under Article 33*, from the date on which that request had been disposed of by the arbitral tribunal" [emphasis added], the Respondent's request under Art 33 of the Model Law had the effect of extending the initial three-month time limit under Art 34(3) of the Model Law.

5 While the High Court accepted the Respondent's argument and found that its application was not time-barred, this finding was *overturned* on appeal. The Singapore Court of

3 [2019] SGHC 260
4 Singapore International Arbitration Centre, *Arbitration Rules* (5th Ed, 1 April 2013).

Appeal considered that the phrase "if a request had been made under Article 33" under Art 34(3) of the Model Law required the *substance* of a request under Art 33 of the Model Law to come within the scope of the relevant Art 33 provision, in order for the request to have the effect of extending the time limit under Art 34(3) of the Model Law.[5] In arriving at this decision, the Court of Appeal considered, among other things, past decisions of the Supreme Court of India and the New Zealand Court of Appeal, as well as the relevant Report of the UNCITRAL Working Group on International Contract Practices.

6 The Court of Appeal recognised that there would be less certainty if only requests that were *in substance* Art 33 requests would qualify to extend the time under Art 34(3) of the Model Law. However, the court also emphasised that Art 33 is an exception to the initial time limit in Art 34(3) of the Model Law, and it would be "incongruous and an abuse" of Arts 33 and 34 if a party could claim that its request for correction comes within Art 33 so long as its terms state that it is made under the relevant provision in Art 33, even though in substance it is clearly nothing of the sort.[6] This would render the specification of the types of requests under Art 33 otiose.[7]

7 Since the purported "corrections" sought by the Respondent under Art 33 of the Model Law were in truth reviews of the tribunal's decision on *substantive* matters, the Court of Appeal held that the three-month time limit under Art 34(3) of the Model Law was *not* extended by the Respondent's request.[8] On this basis, the Court of Appeal found that the Respondent's setting-aside application was time-barred and accordingly dismissed the Respondent's appeal.

8 As for the Claimants' appeal, the Court of Appeal found that there was a breach of natural justice arising from the tribunal's failure to consider any arguments on the issue of whether delays in completion of transmission line works would have postponed

5 *BRS v BRQ* [2020] SGCA 108 at [72].
6 *BRS v BRQ* [2020] SGCA 108 at [68]–[70].
7 *BRS v BRQ* [2020] SGCA 108 at [70].
8 *BRS v BRQ* [2020] SGCA 108 at [73]–[81].

the wet commissioning date of the project in question (which in turn affected the extent of the Respondent's liability to the Claimants), notwithstanding the Claimants' pleadings to this effect. The Court of Appeal held that this fell squarely within the factual scenarios in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd*[9] and *AKN v ALC*[10] where the respective tribunals had failed entirely to consider an important pleaded issue raised by the parties.[11] The Court of Appeal therefore allowed the Claimants' appeal in part, and remitted the issue on transmission line delays to the tribunal for its decision.

9 Following the Court of Appeal's welcome clarification in *BRS v BRQ (CA)*, practitioners are well advised not to assume that a request purportedly made under Art 33 of the Model Law automatically triggers the extension of the initial three-month time limit for bringing an application to set aside an arbitral award under Art 34(3) of the Model Law. A considered assessment should be made taking into account not merely the form, but the *substance* of any request made under Art 33 of the Model Law. In particular, practitioners are discouraged from attempting to force fit requests which are in truth requests for review of the tribunal's decision on *substantive* matters within the ambit of an Art 33 request, simply as a strategic manoeuvre to extend the time limit for commencing a setting-aside application or otherwise.

10 If there is any room for argument as to whether the *substance* of a request under Art 33 of the Model Law comes within the scope of the relevant Art 33 provision, practitioners should, as a matter of caution, advise their clients to commence any application to set aside an award within the *initial* three-month time limit under Art 34(3) of the Model Law. Even if this necessitates the filing of a concurrent application to set aside the award pending the disposal of a request made under Art 33, any additional cost incurred in filing a concurrent setting-aside application must be weighed against the potentially serious consequence of the setting-aside application otherwise being

9 [2010] SGHC 80.
10 [2015] 3 SLR 488.
11 *BRS v BRQ* [2020] SGCA 108 at [106].

time-barred. Moreover, as the Court of Appeal noted, it is not always the case that a concurrent application to set aside an award would have to be made with the making of the Art 33 request as the tribunal may have decided on the request within the initial three-month time limit under Art 34(3) of the Model Law.[12]

12 *BRS v BRQ* [2020] SGCA 108 at [68].