Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd
/High Court of Singapore/
(Case brief)

Introduction.

1. **The plaintiff**, Triulzi Cesare SRL ("Triulzi"), a company incorporated in Italy, is in the business of, inter alia, manufacturing and producing horizontal and vertical washing machines for glass sheets.
The defendant, Xinyi Group (Glass) Company Limited ("Xinyi"), a company incorporated in Hong Kong, is in the business of manufacturing and selling, inter alia, float glass products, solar glass products, automobile glass products and other associated products in the People's Republic of China.
2. Triulzi and Xinyi entered into three contracts on 17 November 2009 for Xinyi's purchase of Triulzi's washing machines. (…)
3. Disputes arose between the parties that led to Xinyi commencing an arbitration in the International Court of Arbitration of the International Chamber of Commerce ("ICC") vide Case No. 18848/CYK) ("the Arbitration"). The sole arbitrator, Mr Woo Tchi Chu ("the Tribunal"), was appointed by the end of September 2012. The Arbitration was governed by the ICC Rules of Arbitration 2012 ("the ICC Rules 2012").
4. On 12 August 2013, the Tribunal issued a final award dated 12 August 2013 ("the Award") which was forwarded to the parties by the ICC Secretariat on 19 August 2013. The Tribunal allowed Xinyi's claim and dismissed Triulzi's counterclaim.
5. Triulzi filed Originating Summons No 1114 of 2013 ("OS 1114/2013") on 18 November 2013 to set aside the Award under Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration 1985 ("the Model Law"), as set out in the First Schedule to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), and s 24(b) of the IAA.

Gist of the underlying dispute in the Arbitration
Xinyi's case

7. By cl 15 of each contract, upon the installation of each washing machine at Xinyi's premises, an acceptance test would be conducted by both parties in accordance with the technical specifications. This involved an 8-hour uninterrupted test with different sizes of glass sheets. If the installed machine failed the acceptance test, Xinyi could then cancel the respective contract and Triulzi would have to refund Xinyi the purchase price. Triulzi was allowed to make modifications to the machine twice but the acceptance period must not extend beyond 70 days.
8. **A**s stated in the Award, was that sometime during July 2010, the first washing machine was delivered to and installed at Xinyi's facility by Triulzi pursuant to the first contract. The machine was found to be faulty on several occasions and it underwent modifications. Despite all that, the machine still failed to meet the technical specifications stipulated in the first contract. Stains were found on the glass sheets after being washed in the machine. An acceptance test was carried out from 7 to 12 May 2011 and the machine failed the acceptance test. In or around May 2011, Xinyi cancelled the first contract by asking Triulzi to take back the machine.
9. On or around 15 February 2011, the second washing machine was delivered to and installed at Xinyi's facility by Triulzi pursuant to the second contract. Xinyi informed Triulzi that the machine also failed to meet the technical specifications stipulated in the second contract. Xinyi cancelled the second contract on 8 June 2011.
10. On or around 5 March 2011, Xinyi paid 10% of the purchase price of the third washing machine pursuant to the third contract. In view of the defects found in the second machine, Triulzi was requested,

on or around 25 April 2011, to conduct a detailed factory inspection of the third machine before delivering it to Xinyi's facility. Triulzi did not respond to this request and did not deliver the third machine to Xinyi. Thereafter, Xinyi cancelled the third contract on or around 8 June 2011.

11. In the Arbitration, Xinyi claimed for a **refund of the purchase price paid under all three contracts as well as damages**.

Triulzi's Case

12. Triulzi's Answer and Counterclaim in the Arbitration was that the first washing machine was fully operational by late December 2010 or early January 2011. Triulzi alleged that the first machine's faulty performance was due to the dirty and dusty environment of Xinyi's premises where it was installed and the lack of proper maintenance of the machine by Xinyi. Furthermore, the stains on the glass sheets were not caused by the first machine but from another machine which processed the glass sheets in the manufacturing process. According to Triulzi, all issues with the first machine were resolved by March 2011. Xinyi did not reject the first machine and did not ask Triulzi to take the machine back.

13. As regards the second washing machine, Triulzi's position was that its technician could not properly install and test the second machine as Xinyi failed to provide the necessary facilities for proper testing. However, the second machine was thereafter found to be operational during the technician's second visit. Despite the fact that the first and second washing machines were properly installed and functional, Xinyi failed to make full payment of the purchase price for both machines.

14 Triulzi also claimed that the third machine was never delivered because of Xinyi's stated intention to reject the delivery of the machine in a letter dated 8 June 2011 to Triulzi.

15. Triulzi therefore counterclaimed for the balance of the purchase price owing under the first two contracts and specific performance of the third contract.

(…)

Relevant legal principles

51. On the other hand, Article 34(2)(*a*)(iv) of the Model Law is *not* engaged if the non-observance of either an agreed procedure (Art 19(1)) or the minimum procedural requirements of Art 18 is *not* due to circumstances attributable to the arbitral tribunal but is derived from the applicant's own doing.

54. It cannot be the case that any breach of an agreed arbitral procedure, even that of a technical provision or minor formality, will invariably result in an award being set aside (*materiality* of the procedural requirements).

55 In *Compagnie des Bauxites de Guinee v Hammermills, Inc* 1992 WL 122712 (DDC, 1992) ("*Hammermills*"), an application was brought under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") as a defence to the confirmation of an award on, *inter alia*, the ground that the arbitral tribunal had breached the agreed ICC procedure when rendering its award. The complaint was that the arbitral tribunal had inserted into the award the amount of the legal costs to be assessed against a party after the draft award had been approved by the ICC Court. Although the United States District Court held that this did not amount to a breach of the ICC procedure, it also observed at [5] that:

…

The Court does not believe that section 1(d) of Article V [of the New York Convention] was intended, as CBG argues, to permit reviewing courts to police every procedural ruling made by the Arbitrator and to set aside the award if *any* violation of ICC procedures is found. Such an interpretation would directly conflict with the "pro-enforcement" bias of the [New York] Convention and its intention to remove obstacles to confirmation of arbitral awards. … Rather, the Court believes that a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation worked substantial prejudice to the complaining party. … [emphasis in original]

ISSUE 1: Breach of an agreed arbitral procedure

Issue 1A: Award was not in accordance with Art 18 within the meaning of Art 34(2)(a)(iv)

106. the purpose of Art 18 above is about protecting a party from the arbitral tribunal's conduct. It is certainly not intended to protect a party from its own "failures or strategic choices".
107. Article 18 of the Model Law in full: The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.
108. A breach of Art 18 may give rise to a ground for setting aside an award under Art 34(2)(*a*)(iv).
109. There is no exact content of Art 18 (it depends upon situation).
110. Triulzi was not treated equally compared with Xinyi.
111. Triulzi disadvantage was occasioned by its own doing. It was not established why Triulzi needed four weeks to inspect and another four weeks to prepare the expert report when Xinyi took four hours to inspect the two washing machines
112. the term "equality" = applying *similar* standards to all parties throughout the arbitral process; NOT the exact same amount of time afforded in relation to the production of an expert report.
113. German decision by the Oberlandesgericht Celle: *8 Sch 3/01* (2 October 2001) - the mere fact that there was some "inequality" as a result of the fact that it was more convenient for the applicant, who understood Russian, to participate in the arbitration does not amount to a violation of Art 18.
114. Amount of time to be afforded to a party cannot be based solely on the amount of time afforded to the other party + conduct of the parties; stage of the arbitral proceedings is also important.
115. Tribunal granted 10 (additional days) based on - Triulzi's submission that it only wanted to inspect the two machines at Xinyi's facility; Xinyi's expert took four hours to inspect the machines; Triulzi's inspection should "not extend to other units in the same premises or other premises" ; extension of time to file an expert witness statement was being sought very close to the evidentiary hearing dates in April; urgency/expeditiousness requirment.
116. The Tribunal is only required to ensure that both Triulzi and Xinyi had an opportunity to submit expert evidence and not to ensure that both Triulzi and Xinyi made full and best use of such an opportunity. Triulzi cannot complain of its own failure to make use of the opportunity given to it by the Tribunal.

ISSUE 2: Breach of natural justice

Criticisms of the Tribunal's procedural orders and directions

117. Mr Tan argues tribunal's procedural orders and directions that were said to have effectively denied Triulzi a reasonable opportunity to present its own expert evidence.

Mr Tan also argues that, as a result of such procedural orders and directions, Triulzi was treated unequally as compared with Xinyi

The three procedural orders and directions are:

(a) The direction on 5 April 2013 for Triulzi to file its expert witness statement by 4pm on 15 April

2013;
(b) The direction on 16 April 2013 refusing Triulzi's application to vacate the hearing dates; and
(c) The refusal to admit Dr Piombo's Report on 25 April 2013.
118. Triulzi's challenge is effectively against the procedural orders and directions made in the course of the arbitral proceedings rather than a challenge to the making of the Award.
Triulzi's difficulty resides in establishing that Triulzi's complaints arise from circumstances attributable to the Tribunal, or that the circumstances were not a result of Triulzi's own failures or choices (tactical or otherwise)

Trulz's arguments,
119. Ten days too short for expert report, court refused to vacate the days, Dr. Piombor's last day report was not accepted.
120. Violetion of the right to be heard (art 18 ML) thus seting aside grounds under the 34(2)(*a*)(ii) ML and 24(*b*) IAA
121.-122. 34(2)(*a*)(ii) ML and 24(*b*) IAA
123. Both parties drew no no distinction between the right to be heard as an aspect of the rules of natural justice under s 24 (*b*) of the IAA and as an aspect of being able to be heard within the meaning of Article 34(2)(*a*)(ii).
124. "full opportunity" (art 18 ML) = "reasonable opportunity" = principles of natural justice 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the ML.
125. content of the fair hearing rule can vary greatly from case to case. "Sugar Australia" case "It is important what evidence and fact arbitrator used for his reasoning. Procedural fairness requires only that a party be given 'a reasonable opportunity to present his case' and not that the tribunal ensure 'that a party takes the best advantage of the opportunity to which he is entitled"
126. Triulzi has to establish that

I. it was denied a reasonable opportunity to present its case,
II. this denial bore upon the adverse decision or in other words that it was prejudiced as a result,
III. Tribunal's procedural orders and decisions were not a matter of case management, but a breach of natural justice.
IV. Triulzi's complaints - circumstances attributable to the Tribunal, or were Triulzi's own failures or choices (tactical or otherwise).

Case management powers of the Tribunal

127. Tribunal's discretion to determine procedure, in the absence of agreement between the parties.
128. ICC Rules - Tribunal broad and flexible case management powers.
129. Flexible authority fo the Tribunal to deal with evidence under Art 9(1) of the IBA Rules (adopted by parties).
130. "*Anwar Siraj*" case "Tribunal is the master of his own procedure so long as what he is doing is not manifestly unfair or contrary to natural justice"
131. "*Soh Beng Tee*" case the arbitral tribunal's case management powers are not without limits it is subject to the rules of natural justice which includes the right to be heard (reasonable opportunity), + other competing factors such as conduct the arbitration in an expeditious and cost-effective manner.
132. Supervisory role of the court over the Tribunal's exercise of his case management powers should therefore be "exercised with a light hand"
133. "*Grand Pacific"* case – the court was not entitled to interfere with a case management decision, which was fully within the discretion of the [arbitral tribunal] to make.
134. "*Grand Pacific"* case – "the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process."(though not so radical that the public policy grounds under Article 34(2)(b)(ii) are engaged).
135. With the above mentioned in minde the question is wheter tribunal's procedural decisions (to file its expert witness statement in limited time) were a breach of natural justice.

136. Taken into consideration actors influenced the decision of the tribunal (bunal's duty was to proceed with the conduct of the arbitration fairly and expeditiously, Tribunal was required to render its final award six months from the Terms of Reference) the Tribunal had, within its case management discretion, acted fairly and was entitled to conclude that proper case management of the Arbitration required the April hearing to go ahead.
137. Triulzi's predicament was created by its own doing and it did not matter whether this was due to a mishap, mistake or misunderstanding that it had an agreement with Xinyi. The fact of the matter is that Xinyi had in hand Dr Bao's Report on 1 April 2013 but Triulzi, on the other hand, despite having the same amount of time as Xinyi, was without an expert witness statement.
138. Tribunals actions was adecuate the information and requests the Triulzi's provided (scope of expert investigation, no mentioning of the visa requirments vor expert etc.).
139. Tribunal had to make the PO's with balanceing the interests of both parties.
140. Triulzi was aware of the scheduled dates (2 April 2013) of the hearings (fixed since 11 December 2012). expert evidence issue rose on 2 April 2013 (there were 3 weeks still left), + 10 days were granted by the Tribunal.
141. Triulzi's complaints are misconceived. It is not for the supervising court to interfere in an entirely legitimate case management decision, and one which was necessary in the light of the matters set out above.

The direction on 16 April 2013 refusing Triulzi's application to vacate the hearing dates

142. ten days to file an expert's report was too short - Triulzi invited the Tribunal to reconsider its decision not to vacate the April hearing dates.
143. Triulzi informed the Tribunal that its choice of expert was not available (+ visa procedure) so it was not given a meaningful opportunity to file an expert report.
144. Triulzi's inability to engage an expert is not a basis for finding that 10 days did not constitute a reasonable opportunity to file its expert report.
145. Triulzi's - 10 days are too short for communicating Xinyi to ensure that the washing machines were available for inspection and prepare the report on impact of the environmental conditions, the adequacy of Xinyi's maintenance of the machines and the interpretation of technical terms (broder scope then initialy).
146. Triulzi's stated position in April 2013 was very different from the one it is taking in OS 1114/2013 (it wanted its expert to inspect the two machines only and to file an expert statement on this).
147. Tribunal was *not told* by Triulzi that it needed its expert not only for the inspection of the two machines, but also for the environment of the facility and Xinyi's maintenance regime.
148. It is also noteworthy that the issue relating to the interpretation of technical terms (broader scope), was only brought up at the hearing by its factual witness (that is whay T did not include it in initial request).
149. "*BLC v BLB" case* - court should reject Triulzi's attempts to re-package the original arguments.
150. For the above reasons, in my view, the Tribunal's refusal to vacate the April hearing dates and to go ahead with the April hearing was a proper and legitimate case management decision.
151. The right of each party to be heard does not mean to sacrifice all efficiency (see *Holtzmann and Neuhaus* at p 551).
152. "a reasonable opportunity to present his case" and not "that a party takes the best advantage of the opportunity to which he is entitled".

The decision refusing the admission of Dr Piombo's Report on 25 April 2013

153. The argument that the tribunal's refusal to admit Dr Piombo's Report was a breach of natural justice is baseless - Report was made on the last day of the hearing and without any compelling reasons.
154. Dr Piombo was not at the hearing to take the stand meant.
155. Triulzi's tactical ploy to adjourn the hearing.
156. Tribunal is deserving no criticism in not admitting Dr Piombo's Report.

Conclusion on Triulzi's right to be heard

157. For the reasons given above, I reject Triulzi's criticisms of the conduct of the Tribunal. Triulzi was not denied a reasonable opportunity to file an expert witness statement and the Tribunal had also exercised his case management powers reasonably and properly. I find that Triulzi's application to set aside the arbitral

award under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law must fail.

Prejudice

158. For the sake of completeness, I will comment on the issue of prejudice on the assumption that there was a breach of a natural justice.

159. No prejudice even if there would be established a breach of natural justice. Its application to set aside the arbitral award under s 24(*b*) of the IAA and Art 34(2)(*a*)(ii) of the Model Law would have failed on this basis as well.

ISSUE 3: Breach of public policy

160 On Issue 3, Mr Tan submits that the Tribunal was obliged to apply as the governing law of the contracts the CISG which is an international treaty that Singapore has signed and ratified. He argues that the Award which failed to apply the CISG is in conflict with Singapore's public policy. I proceed to deal with this final ground of setting aside raised by Triulzi.

161 During the CMC on 11 December 2012, a preliminary issue as to the applicable law to the three contracts was tabled for determination. According to the minutes of the CMC, the Tribunal heard oral submissions from both parties and decided that the governing law for all three contracts was to be Singapore law. Mr Tan argues that the Tribunal did not apply the CISG. He did not identify the relevant Articles in the CISG that ought to have been applied by the Tribunal. I do not follow Mr Tan's point that the Tribunal did not apply CISG. First, as I understand it, there is domestic legislation in the form of the Sale of Goods (United Nations Convention) Act (Cap 283A, 2013 Rev Ed) ("International Sale of Goods Act") giving effect to the CISG and when the Tribunal decided that the governing law was Singapore law, the Tribunal would be referring to the common law and statutes in force in Singapore, including the International Sale of Goods Act. Secondly, I observe from para [111] of the Award that the Tribunal had actually made reference to the CISG and, contrary to Mr Tan's contention that the Tribunal did not apply the CISG, the Tribunal applied Art 35 of the CISG as to the requisite burden of proof. Even if there were other relevant Articles of the CISG that should have been applied, Mr Tan did not identify them. In any event, even if the Tribunal did not consider other Articles of the CISG when it ought to, **it has simply made an error of law** and an error of law does not engage the public policy ground in Art 34(2)(b)(ii) of the Model Law (see PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2007] 1 SLR(R) 597 ("PT Asuransi") at [57]).

162. I move on to Triulzi's other argument that the failure of the Tribunal to apply the CISG violates Singapore's policy of upholding international obligations (since it has ratified the CISG) and should therefore be set aside pursuant to Art 34(2)(b)(ii) of the Model Law. Art 34(2)(b)(ii) allows the court to set aside the award if "the award is in conflict with the public policy" of Singapore. In PT Asuransi, the Court of Appeal explained the operation of this ground of setting aside at [59]:

Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see Downer Connect ([58] supra) at [136]), or is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" (see Deutsche Schachbau v Shell International Petroleum Co Ltd [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA) 508 F 2d 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentaryby Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):

In discussing the term "public policy", it was understood that it was not equivalent to the political stance

or international policies of a State but comprised the fundamental notions and principles of justice ... It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, **covered fundamental principles of law and justice in substantive as well as procedural respects**. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. [emphasis added]

It cannot be said that the Tribunal's failure to apply the CISG "would shock the conscience". It is also neither "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" nor does it violate Singapore's "most basic notion of morality and justice."

163. Furthermore, what Triulzi is essentially saying is that upholding the Award amounts to a breach of Singapore's international obligations and this has to fall within the domain of Singapore's public policy in the wide sense. But this is contrary to the view of the Court of Appeal in PT Asuransi that "public policy" in Art 34(2)(b)(ii) of the Model Law refers to Singapore's public policy in the narrow sense. Singapore has honoured its obligations as a signatory to the CISG by passing domestic legislation giving legal effect to the CISG. It is not surprising that Mr Tan cannot point to any legal basis that engages Singapore's international public policy to require this particular Tribunal or other arbitral tribunals, private institutions that are not bound by the CISG, to apply the CISG. Arbitral tribunals are first and foremost bound by the agreement of the parties which includes the agreed institutional rules. In this case, Art 21(1) of the ICC Rules 2012 provides that:

Article 21: Applicable Rules of Law

(1) The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate. [emphasis added]

164. Given that there is no choice of law agreement in any of the three contracts, it is therefore clearly within the Tribunal's powers, **granted to it by mutual consent of the parties**, to determine Singapore law to be the governing law of the contract. There is no strict obligation on the Tribunal to apply the CISG and it is entitled to prefer another rule of law which it "determines to be appropriate". Triulzi, by agreeing to apply the ICC Rules, also agreed to have its dispute resolved in accordance with this rule of law determined by the Tribunal. It cannot complain about the rule of law chosen by the Tribunal even if it disagrees with the Tribunal's choice since it has agreed to be bound by the Tribunal's choice.

165 For these reasons, Triulzi's application to set aside the award under Art 34(2)(b)(ii) also fails.