PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA
[2005] SGHC 197

Case Number : OM 8/2004

Decision Date : 20 October 2005

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Prakash Mulani, Aftab A Khan and Alvin Chang (M and A Law Corporation) for the applicant; Joseph Ang (Tan Kok Quan Partnership) for the respondent

Parties : PT Asuransi Jasa Indonesia (Persero) — Dexia Bank SA

Arbitration – Award – Recourse against award – Setting aside – Arbitral award allegedly in conflict with previous award on same issue – Whether award in conflict with law that arbitral awards final and binding necessarily in conflict with public policy also – Whether award dealing with issues not falling within terms of submission to arbitration – Whether award should be set aside – Section 19B International Arbitration Act (Cap 143A, 2002 Rev Ed), Art 34(2) UNCITRAL Model Law on International Commercial Arbitration

Arbitration – Award – Recourse against award – Setting aside – Arbitral tribunal making award determining preliminary issues – Only written submissions considered in determining preliminary issues – Whether failure to conduct oral hearing amounting to breach of natural justice in relation to right to be heard and to present case fully

Background

1 The applicant, PT Asuransi Jasa Indonesia, has come before the court to obtain, *inter alia*, the following orders:

(a) that the arbitration award dated 5 December 2003 ("the Award") in an arbitration in Singapore entitled Case No ARB 005 of 2002 ("the Arbitration"), ordering that the Arbitration be dismissed on the basis that the arbitral tribunal had no jurisdiction to entertain the proceedings, be set aside;

(b) that the preliminary issues/objections raised by Dexia Bank SA, the respondent, be dismissed; and

(c) that the Arbitration be remitted back to the arbitral tribunal for hearing.

The Arbitration was not the first arbitral proceedings that had taken place between the applicant and the respondent. There had been previous proceedings and a previous award and, to put it simply, the basis of the challenge to the Award was an alleged conflict between it and the outcome of the previous proceedings.

2 The applicant is a state-owned entity of the Republic of Indonesia. It guaranteed notes valued at approximately US$288m issued by four special-purpose vehicles (collectively "the Rekasaran Group"), one of which was Rekasaran BI Ltd, a Cayman Islands-incorporated company ("the Issuer"). The respondent, a bank, was one of the holders of notes issued by the Issuer ("BI Notes").

3 The applicant took steps in 2000 ("the Restructuring Scheme") to restructure its obligations to all holders of notes issued by members of the Rekasaran Group ("the Noteholders"), including the respondent. The essence of the Restructuring Scheme was as follows:

(a) the notes would be replaced by equivalent notes ("the MCP Notes") of Mega Caspian

Petroleum ("MCP"), an entity registered in the British Virgin Islands;

(b) the MCP Notes would be secured by shares owned by MCP in Central Asia Petroleum ("CAP"), a company registered in the British Virgin Islands that owned oil fields in the Republic of Kazakhstan; and

(c) in return, the applicant would be released from its guarantee.

4 The Restructuring Scheme was approved by a majority of the Noteholders who attended a Noteholders' meeting held on 29 February 2000 ("the February 2000 meeting").

5 The respondent, however, together with a few other holders of BI Notes, opposed the Restructuring Scheme. To enforce recovery under the BI Notes, the respondent commenced arbitration proceedings in the Singapore International Arbitration Centre ("SIAC") by way of Arbitration No 23 of 2001 ("the Previous Arbitration"). Those proceedings were issued against the Issuer as the borrower under the BI Notes and against the applicant as the guarantor of the Issuer's liabilities. The respondent contended that the Issuer and the applicant were still liable to it and that it was not bound by the Restructuring Scheme because:

(a) there was nothing in the documentation of the notes that allowed a joint Noteholders' meeting of all five note issues;

(b) the nature of the business transacted at the February 2000 meeting was allegedly not properly notified to the Noteholders;

(c) there was allegedly no quorum for the February 2000 meeting; and

(d) the requisite majority was allegedly not achieved at the February 2000 meeting.

The notice of arbitration leading to the Previous Arbitration was issued in March 2001.

6 In the course of the Previous Arbitration, the tribunal ("the Previous Tribunal") dealt with and considered the following issues:

(a) whether any obligation arose under the BI Notes to make payment to the respondent;

(b) whether the obligations under the BI Notes were restructured pursuant to the February 2000 meeting; and

(c) whether, by reason of sovereign immunity, the applicant could not be brought before the Previous Tribunal.

7 The Previous Arbitration was heard on 7 June 2001. In October 2001, the Previous Tribunal issued an award granting the respondent's claim ("the Previous Award") and ordering the Issuer and the applicant to pay the respondent a sum in excess of US$8.6m.

8 In the meantime, the Issuer had convened a further meeting of holders of BI Notes alone to ratify the resolutions passed at the February 2000 meeting. On 19 April 2001, the Issuer gave notice that it intended to call a meeting for the purpose of passing, *inter alia*, the following resolutions:

(a) that the resolutions passed at the February 2000 meeting be ratified;

(b) that the BI Notes be exchanged for MCP Notes;

(c) that the applicant be released from its obligations under the guarantee; and

(d) that the respondent and certain other parties cease their arbitration actions against the Issuer and the applicant and lift an injunction that they had obtained against these parties from the Singapore court.

9 The ratification meeting was first held on 18 May 2001. Only one Noteholder, PT Bhakti Investama ("PT Bhakti"), attended it. PT Bhakti held US$46m of the BI Notes (amounting to 46% of the BI Notes issuance). This was insufficient to form a quorum under the relevant documentation which specified a quorum of one or more persons holding BI Notes of not less than two-thirds in nominal value of the BI Notes outstanding. The ratification meeting was thus adjourned.

10 The adjourned meeting was held on 4 June 2001 ("the June 2001 meeting"). Once again, only PT Bhakti attended it. As this was an adjourned meeting, however, PT Bhakti's attendance was sufficient to constitute the quorum. The documentation provided that persons holding not less than one-third in nominal amount of the BI Notes outstanding would constitute the quorum at an adjourned meeting. Upon a vote being taken, PT Bhakti voted to approve the resolutions put before the meeting. In August 2001, the Previous Tribunal was sent a note of the June 2001 meeting. This note was actually the minutes of the meeting and contained the names of the persons who attended the meeting and the resolutions passed at the meeting. The note was accompanied by a cover sheet addressed to one of the arbitrators and which simply described the contents of the note without more.

11 The respondent did not attend the June 2001 meeting. Through counsel, the respondent had objected to the proposed ratification meeting on the grounds that it would allegedly be in violation of an injunction obtained by certain BI Noteholders in the High Court of Singapore and also that the Restructuring Scheme itself was in violation of the terms of the BI Notes. The injunction had been obtained on the basis of an allegation that contractual terms relating to meetings of holders of the BI Notes had not been complied with in respect of the February 2000 meeting.

12 On 25 July 2001, the applicant made an application to this court to discharge the injunction so as to allow the holders of the BI Notes to proceed with the Restructuring Scheme. Although the application to discharge the injunction was not granted, the court on 27 September 2001 observed that the Issuer was not precluded from taking steps that might render the BI Notes void or ineffective as long as such steps were taken in accordance with the governing documentation. The court also stated that it made no finding on the issue of the validity or effectiveness of the ratification meeting. The respondent continued to dispute the validity of the June 2001 meeting and the resolutions passed on that date.

Proceedings in the present arbitration

13 On 10 January 2002, the applicant issued a notice of arbitration against the respondent and three other holders of the BI Notes, *ie*, those noteholders who had obtained the injunction in Singapore. By this notice the applicant sought, as against all the other four parties including the respondent, a declaration that:

(a) the June 2001 meeting was valid and binding on all holders of the BI Notes including the respondent; and

(b) the Restructuring Scheme was valid and binding on all the holders of the BI Notes including the respondent.

As a result of this notice, the Arbitration was commenced and, on 10 October 2002, the SIAC appointed a three-man arbitration tribunal ("the Tribunal") comprising Mr V K Rajah, as chairman, Mr Roderick Martin and Mr Gabriel Peter.

14 A preliminary meeting was held on 12 November 2002. On the respondent's application, the Tribunal ordered that the following issues be tried as preliminary jurisdictional issues:

(a) whether the Tribunal had jurisdiction to entertain the Arbitration in the light of the history of the Previous Arbitration; and

(b) whether the divestment by MCP of its shares in CAP would prevent the applicant from proceeding with the Arbitration.

The Tribunal gave directions on the filing and service of written submissions by both parties. The Tribunal also ordered that oral submissions be heard on 11 February 2003.

15 For some reason, the submissions were not presented by the original deadlines and no hearing took place on 11 February 2003. Instead, on 30 July 2003, the respondent made further allegations to the effect that the arbitration proceedings were allegedly "moot" and ought to be discontinued because the respondent had disposed of its holdings in the BI Notes. On 20 August 2003, the Tribunal directed the applicant to respond to these allegations. In September 2003, both parties filed their written submissions on the new allegations. In October 2003, the Tribunal gave further directions in relation to the submissions on the preliminary objections. These were filed by the respondent on 23 October 2003 and by the applicant on 17 November 2003.

16 To the great surprise of the applicant, the Tribunal issued an award determining the preliminary issues on 5 December 2003 without calling for an oral hearing. It is this award that the applicant seeks to set aside.

The Award and the Previous Award

17 In the Award, the Tribunal set out the following issues as determinative of the preliminary questions relating to jurisdiction:

5 ISSUES

5.1 Whether the claim against the respondent is moot now that the respondent has disposed of its [BI] Notes.

5.2 Whether the divesting of MCP's shares in CAP prevents the [applicant] from proceeding in these proceedings.

5.3 Whether the Tribunal has jurisdiction to entertain the present proceedings in the light of the history of the earlier proceedings of the parties.

18 On the first and second issues, the Tribunal found in favour of the applicant. On the third issue, the Tribunal found against the applicant. Following from this finding, the Tribunal held at para 8.1 of the Award:

As the [applicant] has failed on the third issue, it is the decision of this Tribunal that the Respondent succeeds on the preliminary question of jurisdiction and the [applicant's] action is hereby dismissed.

The Tribunal also made consequential orders that the costs of the Arbitration and the respondent's costs be taxed by the registrar of the SIAC and be paid by the applicant to the respondent.

19 To understand the arguments presented before me on the Originating Motion to set aside the Award, it is necessary to have some knowledge of the findings of the Previous Tribunal as contained in the Previous Award. The most relevant parts of the Previous Award read as follows:

2.3 The first respondent [i.e. the Issuer] is not represented and has taken no part in the arbitral proceedings.

2.4 The second respondent [i.e. the applicant] is not represented and has not appeared at the arbitral hearings but, as discussed in more detail below, sent a lengthy letter to the SIAC and the Chairman on 23 May 2001. The letter expressed the view that the Tribunal ought to refuse to hear the proceedings on the ground of sovereign immunity and also argued that the second respondent was entitled to the defence of sovereign immunity. This letter was signed by Dhulkifli Zaman Khan, Consultant/Attorney.

2.5 After the hearing on Thursday 7 June 2001 referred to in paragraphs 9.4 et seq below the Tribunal was forwarded what purported to be a note of the Rekasaran BI Limited noteholders' meeting of 4 June 2001 signed and made on 5 June 2001 …

The Tribunal finds that this documentation is irrelevant to the issues requiring determination in this arbitration.

3.1 The claim before the Tribunal arises out of the respondents' default under the terms of certain notes issued by the Rekasaran and guaranteed by Jasindo under the terms of a US$100 million debt issuance program in 1997 (the "Rekasaran BI Notes"). The respondents have not challenged the actual defaults they are claimed to have committed under the various contracts.

3.2 It appears that the respondents' only two possible defences to the claim are first that the default was cured by a purported "exchange offer" for the Rekasaran BI Notes which purportedly would have entailed a release of Jasindo's guarantee of the Rekasaran BI Notes. It was argued by the [applicant] in SIAC ARB 47/2000 that this "exchange offer" was not approved by the requisite majority of noteholders, was not put to a vote in accordance with the terms and conditions of the Rekasaran BI Notes, and as such is null and void. This "defence" is discussed below. The Tribunal has decided to consider it even though it has not been raised specifically in these proceedings.

3.3 The second possible defence raised in the letter of 23 May 2001 to the SIAC and the Tribunal, is that Jasindo is immune from these proceedings pursuant to the United Kingdom State Immunity Act of 1978 …

The challenges mounted by the applicant

20 The grounds of the application are four-fold. They are that:

(a) the Award is in conflict with the public policy of Singapore, thus leading to a breach of

Art 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") which has been made a part of Singapore law by the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act");

(b) the Award deals with disputes or issues not contemplated by, or, alternatively, not falling within, the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of Art 34(2)(a)(iii) of the Model Law;

(c) a breach of natural justice under s 24(*b*) of the Act has occurred in connection with the making of the Award by which the rights of the applicant have been prejudiced; and

(d) the applicant was not given a full opportunity to present its case and/or was otherwise unable to present its case, thus leading to a breach of Arts 34(2)(a)(ii) and 18 of the Model Law.

I will deal with each ground in turn.

The public policy ground

21 The applicant's case in relation to this ground is that certain findings in the Award which the applicant termed "critical findings" were directly contrary to the findings made by the Previous Tribunal in the Previous Award and, to that extent, the critical findings were in conflict with the public policy of Singapore that findings in arbitral awards are "final and binding". In other words, the Award had ignored the findings made by the Previous Tribunal and as such ought to be set aside.

22 The findings in the Award that the applicant identified as "critical findings" are the following:

(a) the statement in para 7.23 of the Award that it was clear from the Previous Award that the applicant chose not to participate in the Previous Arbitration;

(b) the statement in para 7.23 of the Award that the June 2001 meeting would have been directly relevant for the Previous Tribunal to consider because the Previous Tribunal had found that the February 2000 meeting had been improperly convened and the applicant's position was that the June 2001 meeting was to ratify the resolutions passed at the February 2000 meeting; and

(c) the finding in para 7.28 of the Award that the applicant was estopped from raising the issue of the June 2001 meeting as this was an issue which might have been and should have been brought forward as part of the Previous Arbitration but was not brought forward by the applicant.

23 The applicant acknowledged in its submissions that in order to set aside the Award on the ground that it was in conflict with the public policy of Singapore, it had, as prescribed by Choo Han Teck J in *John Holland Pty Ltd v Toyo Engineering Corp* [2001] 2 SLR 262 ("*John Holland*"), to first identify the public policy and then show which part of the Award conflicted with it. In this respect, the applicant submitted that the public policy that was breached by the Award was that set out in s 19B of the Act. This reads:

(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied on by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of

competent jurisdiction.

(2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not vary, amend, correct, review, add or revoke the award.

24 The applicant further submitted that the Tribunal by its critical findings had in effect varied, amended, corrected or reviewed that part of the Previous Award that related to the critical findings and had thereby failed to give effect to the final and binding nature of the Previous Award. This was because comparing paras 2.3, 2.4 and 2.5 of the Previous Award with the Tribunal's findings in paras 7.23 and 7.27 of the Award, there were clear inconsistencies between the two.

25 Firstly, the Previous Tribunal had expressly stated in the Previous Award that after the hearing on 7 June 2001, it had been handed a note about the June 2001 meeting. The Previous Tribunal then expressly found that this note was irrelevant to the issues requiring its determination. This finding must be given due deference as part of the final and binding Previous Award and was conclusive between the parties, *ie*, the applicant and the respondent. Despite this, however, the Tribunal had chosen to make a completely contradictory finding when it ruled that the issue of the June 2001 meeting was directly relevant for the Previous Tribunal to consider. The applicant submitted that the Tribunal had no right to overrule the Previous Tribunal's decision and, by doing so, had varied or amended the Previous Award contrary to s 19B of the Act.

26 Secondly, having found that the issue of the validity of the June 2001 meeting was relevant to the Previous Tribunal, the Tribunal considered whether the applicant could and should have raised that issue before the Previous Tribunal. The Tribunal had then gone on to find as a matter of fact that the applicant ought to have raised the issue before the Previous Tribunal but that because it had failed to formally participate in the Previous Arbitration, it had failed to raise the said issue. This finding that the applicant had failed to participate in the proceedings had conflicted with that of the Previous Tribunal which had specifically distinguished the positions taken by the applicant and the Issuer in the Previous Arbitration. The Previous Tribunal found in para 2.3 of the Previous Award that the Issuer had not taken any part in the arbitral proceedings but, in para 2.4, it noted that whilst the applicant had not appeared at the arbitral proceedings, it had sent a lengthy letter to the SIAC and the chairman of the Tribunal. It had also acknowledged in para 2.5 of the Previous Award that a note of the meeting of June 2001 had been forwarded to the Previous Tribunal.

27 The applicant further submitted that the findings of the Tribunal were repugnant and directly contrary to the findings made by the Previous Tribunal, and thereby again in breach of s 19B of the Act. Further, the Tribunal purported to interpret the Previous Award in a manner that was so repugnant to the obvious and clear findings of the Previous Tribunal as to make a mockery of the effect of the Previous Award. The applicant said that such findings were clearly against public policy that required the findings made in arbitration proceedings to be final and binding between the parties.

28 The respondent submitted that there was no basis for the applicant's contention that the Award was contrary to public policy. Relying also on the principle set out in *John Holland* ([23] *supra*), it stated that no particular public policy had been identified other than the reference to the fact that findings made in arbitration proceedings must be final and binding pursuant to s 19B of the Act. Finality of arbitration was, however, a matter of law and not public policy. Also, the applicant's contention was no different from that in *John Holland* where the contention was that there had been a fundamental irregularity in respect of the law, which contention was rejected as a ground on which the Award could be set aside.

29 Having considered the arguments, I find myself in agreement with the contention that the attack on the Award as being contrary to the Previous Award is an attack that has its foundation in a dissatisfaction with the way in which the legal principles encapsulated in s 19B of the Act seem to have been ignored, rather than an attack founded on the ground of public policy. Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, *ie*, the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy. If I were to make such a holding, it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal. Further, in the context of this case, whilst it is obviously not desirable to have conflicting arbitral decisions existing on the very same dispute between the same parties, I do not see any public policy implication in such a state of affairs existing between private parties, nor has the applicant identified any such implication. The applicant was content to state that because the Award appeared to disregard s 19B of the Act, it was against public policy without substantiating any public policy that the section had been enacted to implement.

30 From my perspective, the purpose of s 19B(1) is to make it clear and beyond dispute that each party to an international arbitration is bound by the award made by the tribunal and cannot challenge it except on the limited grounds set out in the Act and the Model Law. This means that even if the tribunal has made a mistake of fact or of law, there is no recourse against that decision and the parties are bound by it. The finality given to an award by s 19B(1) also ensures that such award would be enforceable by the successful party as, generally speaking, enforcement of judgments or awards can only be carried out when the same are final and not provisional or subject to appeal. The corollary to an award being final and binding on a party is that that party cannot reopen the same issue in further arbitration or court proceedings. The provisions of the Act also provide avenues by which parties may ensure that a binding decision rendered by one arbitral tribunal is not subsequently contradicted by another decision made by a second tribunal. If the same issue is dealt with for a second time in further arbitration proceedings, then the second set of proceedings may be considered to be in breach of s 19B(1). If that is the case, then the remedy for the aggrieved party is either to challenge the jurisdiction of the second tribunal, or to obtain an injunction against the continuation of the second set of proceedings. If the second tribunal deals with the challenge to its jurisdiction by ruling that it has jurisdiction, then that ruling can be challenged in court under the provisions of Art 16(3) of the Model Law. On the other hand, if the second tribunal rules that it has no jurisdiction because the issue in question had been finally decided by a prior arbitration between the same parties, then the aggrieved party can try to have that ruling set aside on one of the grounds set out in Art 34 of the Model Law (apart from the public policy ground) or in s 24 of the Act.

Beyond the scope of submission to arbitration

31 The applicant submitted that the original submission to the Arbitration contained only the question of the validity of the June 2001 meeting. In hearing the respondent's objections on jurisdiction as a preliminary issue, the Tribunal had chosen to consider two issues which were determinative of the objection to jurisdiction, namely:

(a) whether the validity of the June 2001 meeting was relevant to the issues that required determination at the Previous Arbitration; and

(b) whether the applicant had raised the issue with the Previous Tribunal.

32 The applicant accepted that these issues were relevant considerations for the application of the principle of estoppel. It argued, however, that both the issues had already been decided by the Previous Tribunal in that:

(a) the Previous Tribunal had determined that the validity of the June 2001 meeting was "irrelevant to the issues requiring determination" in the Previous Arbitration; and

(b) whilst the applicant had sought to raise the validity issue through its note of 5 June 2001 to the Previous Tribunal, the Previous Tribunal had declined to consider the note.

In these circumstances, the Tribunal could not make its own findings on the said issues or replace the findings of the Previous Tribunal with its own. Such issues were beyond the scope of the Arbitration as they had already been decided on in the Previous Arbitration and were factual findings that were binding on parties, pursuant to s 19B of the Act. As such, the Tribunal did not have the jurisdiction to make any finding on these issues.

33 The applicant added that the respondent had not sought a finding on the issue of the relevance of the June 2001 meeting as it was aware of the decision of the Previous Tribunal on this issue. As such, the respondent did not rebut the applicant's submissions that the Previous Tribunal had already ruled on the issue of relevance and found the June 2001 meeting to be irrelevant to the issues in the Previous Arbitration. The applicant said that it had expressly raised this argument in the course of the proceedings in the present arbitration and the respondent had not rebutted it or even commented on the issue of relevance. Hence, there being no dispute on the issue of relevance, there was no basis for the Tribunal to consider it.

34 In response, the respondent pointed out that under r 26 of the SIAC Rules (2nd Ed, 22nd October 1997), the Present Tribunal had the power to rule on its own jurisdiction and it had dealt with the respondent's preliminary objection on jurisdiction pursuant to this rule. The finding by the Present Tribunal as to whether the applicant had raised the issue of the June 2001 meeting was integral to the determination on jurisdiction as a preliminary issue. In the same way, the finding on the relevance of the issue to the Previous Tribunal was necessary in the determination of whether the applicant could and should have raised such an issue at the Previous Tribunal. The respondent also said that it had made submissions on the issue of relevance to the Tribunal. It pointed to the submissions that it had placed before the Tribunal in October 2003 in which it had said that although the question of the validity of the resolutions passed at the June 2001 meeting was not decided in the Previous Arbitration, that was not dispositive of the application of issue estoppel. Instead, what was dispositive was that it could not be gainsaid that that issue was one which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at that time. Further, the applicant had had every opportunity to bring that issue forward before the Previous Tribunal.

35 In my view, it cannot be gainsaid that the Tribunal had the power to determine its own jurisdiction under the SIAC Rules which in this respect reflect Art 16(1) of the Model Law. The question before me is whether in determining that jurisdiction, the Tribunal had the power to decide issues that had already been decided by the Previous Tribunal. In my judgment, it did not. If in the course of determining its jurisdiction, the Tribunal encountered an issue that had already been decided by the Previous Tribunal, it had no authority to determine that issue afresh, but, because the parties themselves were bound by the decision of the Previous Tribunal on that issue, the Tribunal had also to consider itself bound by that decision and proceed on such basis. The question that next arises is whether in determining that it had no jurisdiction, the Tribunal in fact re-decided any issue

that had already been decided by the Previous Tribunal.

36 As would be apparent from the earlier discussion, the applicant's position was that two issues that had already been decided by the Previous Tribunal were decided again by the Tribunal. These were the issues of the participation of the applicant in the Previous Arbitration and the relevance of the June 2001 meeting to the Previous Arbitration.

37 As regards the first of these, the Tribunal made two references to the issue. In para 7.23 of the Award, the Tribunal said "it is clear from the Previous Award that the [applicant] chose not to participate in the Previous Arbitration". Next, in para 7.27 of the Award, the Tribunal repeated that "it is clearly stated … in the Previous Award … that the [applicant] did not participate in the Previous Arbitration for reasons best known to [it]". The importance of that finding is that it was part of the Tribunal's reason for rejecting the assertion of the applicant that it had attempted to raise the issue of the June 2001 meeting before the Previous Arbitration.

38 In my opinion, however, although the Tribunal had quoted paras 2.3 and 2.4 of the Previous Award in the Award, it had for some reason drawn the wrong conclusion from these paragraphs. Paragraph 2.3 of the Previous Award stated that the Issuer had taken no part in the Previous Arbitration, whereas para 2.4 stated that the applicant was not represented and had not appeared at the hearings of the Previous Arbitration but had sent a lengthy letter to the Previous Tribunal giving reasons why the Previous Tribunal ought not to hear the Previous Arbitration. For a party to an arbitration proceeding to participate in that proceeding, it is not necessary for the party to be represented or to appear in person at the hearings of the tribunal. If the party communicates with the tribunal on any matter relating to the proceedings including the issue of whether the tribunal has jurisdiction to hear the arbitration, such communications would be regarded as participation, albeit limited participation, in the proceedings. In this case, the Previous Tribunal, in para 2.4 of the Previous Award, was careful to indicate the manner in which the applicant had been involved in the Arbitration and, in contrast to the statement it made in relation to the Issuer, did not conclude that the applicant had taken no part in the Previous Arbitration. Its view was, as para 2.4 of the Previous Award made clear, that the applicant had participated to a limited extent in the Previous Arbitration. Thus, in making the blanket statement that the applicant had chosen not to participate in the Previous Arbitration, the Tribunal was coming to a conclusion that was contrary to the considered opinion of the Previous Tribunal. It was not entitled to come to such a contrary conclusion.

39 The Tribunal found in para 7.23 that the meeting of June 2001 "would have been directly relevant for the Previous Tribunal to consider". This holding supported its subsequent conclusion that the applicant should have raised the issue of the June 2001 meeting before the Previous Arbitration and, since it did not, it was estopped from raising it before the Tribunal and thus the Tribunal had no jurisdiction to consider the validity of the June 2001 meeting. The Previous Tribunal had stated in para 2.5 of the Previous Award that it found that documentation purporting to be a note of the June 2001 meeting was irrelevant to the issues requiring determination in the Previous Arbitration. The applicant said that this finding meant that the validity of the June 2001 meeting was not relevant to the Previous Arbitration. The respondent replied that what the Previous Tribunal had decided was that it was the "note" that was not relevant to the Previous Arbitration, and the Previous Tribunal had made no finding as to whether the validity of the June 2001 meeting was relevant to its determination. The applicant's rejoinder was that such an interpretation of the language used by the Previous Tribunal meant that the Previous Tribunal did not read or understand the contents of the note and as such only commented on the physical document. The applicant said that it could not, however, be seriously alleged that the Previous Tribunal did not understand the purport of the note as the same plainly referred to ratification of the February 2000 meeting and the Restructuring Scheme and further, later in the Previous Award, the Previous Tribunal made express reference to

Resolution 2(F) passed at the June 2001 meeting. If indeed the Previous Tribunal had only ruled on the irrelevance of the physical document as compared to the irrelevance of its contents, the question that arose was why there was a need to rule on the relevance or otherwise of the physical document.

40 In my judgment, in stating that the note of the June 2001 meeting was irrelevant to the issues requiring determination in the Previous Arbitration, the Previous Tribunal must have been aware of the contents of the note (for the reasons given by the applicant) and was stating that what had been effected at the June 2001 meeting was not relevant to the issues before it. It is perfectly understandable why the Previous Tribunal should have taken that stand. The Previous Arbitration commenced in March 2001 and the main issue to be determined there was whether the February 2000 meeting had been properly convened and, as a consequence, whether the resolutions passed at the February 2000 meeting were valid and binding on the Noteholders. The respondent filed evidence before the Previous Tribunal in support of its claim in April and May 2001 and filed submissions on 1 June 2001 and on 6 June 2001. The applicant sent its letter claiming sovereign immunity on 23 May 2001. By the date of the hearing on 7 June 2001, the issues before the Previous Tribunal were as stated in those submissions and the letter. No other issues were raised at the hearing or thereafter. Although it sent the Previous Tribunal the note, the applicant did not formally raise the resolutions passed at the June 2001 meeting as an answer to the respondent's contention that the resolutions passed at the February 2000 meeting did not bind it. Accordingly, the issue of the effect of the June 2001 meeting on the earlier meeting was not before the Previous Tribunal for determination and that was all that the Previous Tribunal was saying when it found that the documentation was irrelevant to the issues requiring determination by it. The Previous Tribunal was not stating that the issue had been raised nor was it stating that the issue could not have been raised.

41 In this connection, the exact wording of the Tribunal's finding is important. The Tribunal did not say that the June 2001 meeting was relevant to the issues before the Previous Tribunal as the same had been formulated by the parties. What the Tribunal said was that the June 2001 meeting "would have been directly relevant", *ie*, it would have been relevant for the Previous Tribunal's consideration had it been raised by the applicant as an issue. The Tribunal was also saying that by simply sending a note of the meeting to the Previous Tribunal without any accompanying submission or representation, the applicant had not put the effect of the June 2001 meeting in issue. In my judgment, therefore, this second finding of the Tribunal did not contradict the finding of the Previous Tribunal. Whilst it may be argued (though I express no concluded opinion on this) that the Tribunal was wrong to find that the June 2001 meeting would have been relevant to the considerations of the Previous Tribunal had it been raised because this was, arguably, an issue which was not within the jurisdiction of the Previous Tribunal to determine, such a wrong finding on the part of the Tribunal would not be a ground for setting aside the Award. This is not an appeal and, pursuant to the provisions of the Act, errors of law or fact made by the Tribunal do not entitle the court to set aside the Award.

42 Moving back to my conclusion on the first issue, although I have found that it was not within the jurisdiction of the Tribunal to conclude that the applicant did not participate in the Previous Arbitration, this does not mean that the Award should be set aside. According to Art 34(2)(a)(iii) of the Model Law, if an award contains decisions on matters beyond the scope of the submission to arbitration, if the decisions on matters submitted on 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. Reading the Award as a whole, it is clear to me that the Tribunal's holding in para 7.28 of the Award, that the applicant was estopped from raising the issue of the June 2001 meeting in the Arbitration because that was an issue which might have been, and should have been, brought forward as part of the Previous Arbitration and the applicant did not do so, was not

dependent on its finding that the applicant did not participate in the Previous Arbitration. Its holding that the applicant did not participate in the Previous Arbitration was only part of its reason for concluding that the applicant did not raise the June 2001 meeting issue as it was fully aware of the manner in which the note had been sent to the Previous Tribunal and of the contents of the note. Thus, in para 7.23 of the Award the Tribunal stated: "The Statement of Case in its present form should have been submitted by the [applicant] to the Previous Tribunal. This the [applicant] clearly did not do." Accordingly, I can only set aside the finding that the applicant did not participate in the Previous Arbitration. This means that the finding of estoppel cannot be challenged on this ground.

Natural justice and lack of an opportunity to present case

43 The applicant submitted on the last two grounds together in the light of the overlap in reasoning and I will do the same.

44 The applicant's case on this ground was that the rule of natural justice, "*audi alteram partem*", which provides that any party in any action must be given a right to be heard and to present its case fully, had been breached. Its submission was that the Tribunal did not afford the applicant the fullest opportunity to put its case forward or to correct prejudicial statements, and that the Tribunal had misconstrued the applicant's position and/or arguments and had also ignored irrefutable facts and arguments put forth, thereby denying the applicant a fair hearing. In this respect, the applicant drew my attention to *dicta* found in various cases relating to the duty of an arbitral tribunal to ensure fairness in arbitration hearings. Not all of these were relevant. The applicant cited various passages from *Mahon v Air New Zealand Ltd* [1984] AC 808 relating to the necessity of a person making a finding to base his decision on evidence with probative value, and to inform a person who will be adversely affected by such finding, so that that person is not deprived of an opportunity to adduce additional material of probative value to try to prevent the finding being made. In my judgment, those passages are irrelevant as the case involved a tribunal exercising investigative jurisdiction and the Privy Council's comments have to be read in the light of what is required when such a specialised exercise is taking place. Those comments are not relevant to the ordinary arbitration proceeding.

45 The applicant also cited *dicta* from two cases involving arbitrations. First, it relied on the following passage from the judgment of Bingham J (as he then was) in *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14:

> I fully accept and understand the difficulties in which an expert finds himself when acting as an arbitrator. There is an unavoidable inclination to rely on one's own expertise and in respect of general matters that is not only not objectionable but is desirable and a very large part of the reason why an arbitrator with expert qualifications is chosen. Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. If he is to any extent relying on his own personal experience in a specific way then that again is something that he should mention so that it can be explored. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance …

46 Second, in *The Owners of the MV Myron v Tradax Export SA* [1970] 1 QB 527 ("*The Myron*"), Donaldson J said (at 535):

> Normally, both parties are aware of the issues, the arguments and the evidence available for consideration and no problem arises. If, however, the arbitrators have the slightest grounds for wondering whether one of the parties has fully appreciated what is being put against him or whether he might reasonably wish to supplement his evidence or argument in the light of what has been submitted by the other party, it is their duty to take appropriate steps to resolve these doubts. This would normally be done by one of the arbitrators writing to the party concerned summarising the case against him and inquiring whether in the light of the summary he wished to add anything by way of evidence or argument.

47 The applicant argued that in coming to its rulings on the critical findings, the Tribunal did not consider the evidence of the Previous Award, the submissions of the applicant or even the concessions of the respondent. It issued the Award and made rulings on the critical findings which caught the applicant totally by surprise as the applicant was not even aware that the Tribunal considered it had to make a decision on the critical findings. This was so, as the respondent never in its submissions made issue of matters leading to the critical findings and, although the applicant did tender evidence and submissions on the said issues, these were never rebutted by the respondent. Hence, the applicant said it was well entitled to believe that the matters relating to the critical findings were not even in dispute.

48 The respondent pointed out that the complaint that the applicant was not given an opportunity to present its case or correct prejudicial statements was based on the assertion that the Tribunal did not give the applicant an opportunity to rebut its finding that the applicant did not participate in the Previous Arbitration, and its rejection of the applicant's contention that it had attempted to raise the issue of the June 2001 meeting at the Previous Arbitration. The respondent contended that that complaint was completely misconceived. First, the Tribunal did afford the applicant an opportunity and the applicant did, by its second written submissions, make extensive submissions on these issues. Second, having afforded the applicant an opportunity to make submissions, there was no obligation on the Tribunal's part to invite the applicant to "rebut the findings" or "fully present its case to be heard".

49 The *dicta* that the applicant cited to me in support of its case that there had been a breach of natural justice explained the principles well but did not lay down any new principles. In my view, in its submissions, the applicant was over- interpreting what had been said by the court in the two cases cited above. Some of the applicant's complaints indicated that what the applicant was really questioning was the merit of the findings made by the Tribunal. However justified such questions may be, I am not at liberty to consider them. As the supervising court, my role is to supervise the procedure leading to, and not the merits of, the decision.

50 The evidence in this case was plain that the applicant had been given a full opportunity to present its case on the jurisdictional issue. There was no evidence that the Tribunal had any ground for wondering whether the applicant fully appreciated what was being put against it (to use the phraseology of *The Myron* ([46] *supra*)), and, since the applicant had copies of all submissions made by the respondent, such a thought would never even have crossed the collective mind of the Tribunal. Whilst the Tribunal in this case did, as I have explained above, make an issue of a point that was never raised by either party, to wit, the applicant's purported non-participation in the Previous Arbitration, that finding was not determinative of its final conclusion, and therefore any breach of natural justice that might have occurred because the Tribunal did not notify the applicant that it considered this to be a point in issue did not prejudice the applicant. In *John Holland* ([23] *supra*), the

court held that to succeed under s 24(*b*) of the Act, an applicant had to establish how the breach of natural justice was connected with the making of the award and how such breach had prejudiced the rights of the party concerned. I am satisfied that there is no substance in the applicant's complaints of there having been a breach of natural justice in relation to the right of the applicant to be heard and to present its case fully.

51 The applicant made another complaint and that related to the direction given in the first preliminary meeting before the Tribunal, that after the parties filed their written submissions in respect of the issues as to jurisdiction, there would be oral submissions. In the event, the Tribunal never called for oral submissions to be made by the parties' respective counsel. Instead, the Tribunal went ahead unilaterally and issued the Award without consulting the parties, and more crucially, without having given the benefit to the parties of addressing the issues which were "live" in the Tribunal's mind when deciding the Award. I see no merit in this submission.

52 The preliminary meeting was held in November 2002. The directions given at that meeting contemplated that both parties would file their submissions at least by the end of December 2002 so that they would be ready for the hearing of the oral submissions on the appointed date in February 2003. As events turned out, neither party had filed any submissions by that date and the intended hearing could not go on. Thus, the parties' own conduct had rendered the earlier directions completely ineffective. When further directions were given in August 2003 and in October 2003 for the filing of submissions by both parties, there was no direction that there would be a hearing thereafter at which oral submissions would be made. It is also notable that neither party asked for an oral hearing. If the applicant was concerned that the Tribunal might misunderstand its position or that of the respondent, it could have asked for an oral hearing. It did not do so. The applicant could not have taken it for granted that there was to be an oral hearing without any request for the same being required since the direction in November 2002 had appointed a specific date for the oral hearing. That date was long past and it was not reasonable to assume that the Tribunal still considered, in the altered circumstances, that an oral hearing would be of assistance. In these circumstances, the applicant is not entitled now to complain that it was not given the chance to orally address any concerns that the Tribunal might have had after reading the submissions of both parties.

Conclusion

53 The applicant has not made out any of the grounds in its motion. The motion must therefore be dismissed with costs.