BLC and others *v* BLB and another
[2014] SGCA 40

Case Number	: Civil Appeal No 135 of 2013
Decision Date	: 30 July 2014
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Chenthil Kumar Kumarasingam and Aston Lai (Quahe Woo & Palmer LLC) for the appellants; Hri Kumar Nair SC, Teo Chun-Wei Benedict, Low Yunhui James and Lau Chee Chong (Drew & Napier LLC) for the respondents.
Parties	: BLC and others — BLB and another

Arbitration – Recourse against award – Setting aside

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2013] 4 SLR 1169.]

30 July 2014 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 The present appeal arose out of the decision of the High Court judge ("the Judge") to set aside part of an arbitral award in *BLB and another v BLC and others* [2013] 4 SLR 1169 ("the Judgment") on the ground of a breach of natural justice.

2 The central question raised in this appeal is a factual one, *ie*, whether the Judge was correct in finding that the sole arbitrator had not addressed his mind to one of the respondents' counterclaims ("the Disputed Counterclaim") and thereby failed to deal with an essential issue in the dispute.

3 We acknowledge that whether an arbitrator has addressed his mind to an issue may not always be clear cut and will invariably depend entirely on the facts. However, in looking at the relevant facts, the court must be extremely careful not to do more than is necessary, bearing in mind the principle of minimal curial intervention as well as the salutary reminder that the *substantive merits* of the arbitral proceedings are *beyond* the remit of the court (see also below at [51]–[53]).

4 In this regard, it is important not to underestimate the ingenuity of counsel who seek to launch backdoor appeals or, worse still, completely reinvent their client's cases with the benefit of hindsight in the guise of a challenge based on an alleged breach of natural justice. The latter is a simple – yet profoundly important – point in so far as the present appeal is concerned. The courts must be wary of a party who accuses an arbitrator of failing to consider and deal with an issue that was never before him in the first place.

5 The Judgment also raised some interesting questions in relation to the operation of Art 33(3) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") and the power of remission under Art 34(4) which we will consider briefly after we have dealt with the main question at hand.

Background

6 The background has been set out comprehensively in the Judgment (at [4]–[30]). For the purposes of this appeal, it is only necessary to highlight the following facts.

The parties

7 The first appellant owns a group of companies which produces and sells piping components. The second and third appellants belong to this particular group of companies. The second respondent is a company involved in the automotive industry in Malaysia. The first respondent was a wholly owned subsidiary of the second respondent prior to the joint venture between the parties. For the purposes of this appeal, we shall refer to all the appellants and respondents as the "Appellants" and "Respondents" respectively, unless the context requires otherwise.

The joint venture

8 Following negotiations between the parties in 2002, the Appellants agreed with the second respondent to form a commercial joint venture. The plan was for the Appellants to transfer their business operations in Malaysia including an industrial plant which manufactured pipe components (which we shall refer to as "goods") to the first respondent in exchange for a minority stake in the first respondent. In this way, the first respondent was to become the parties' joint venture vehicle and the industrial plant would effectively be operated by the second respondent who would continue to retain a majority stake in the first respondent. It was also agreed that the Appellants would continue to purchase goods from the joint venture.

9 The commercial deal was drawn up in a Heads of Agreement ("HOA") but was further documented in, *inter alia*, the following agreements entered into between 2003 and 2005: (i) the Asset Sale Agreement ("the ASA"); (ii) the Shareholders Agreement ("the SA"); (iii) the Business Operations Agreement ("the BOA") and (iv) the Licence Agreement ("the LA").

10 The following terms of these agreements are of particular relevance in the context of the present appeal:

(a) Under cl 5.2.1 of the ASA, the Appellants were to transfer various assets to the Respondents.

(b) Under cl 5.7 of the BOA, the Respondents were to issue an invoice for any goods sold and delivered to the Appellants who would then be under a contractual obligation to pay these invoices in full.

(c) Under cl 4.1 of the LA, the Appellants granted the first respondent a licence to use the Appellants' trademark on the goods it manufactured and the first respondent undertook to manufacture these goods in accordance with the Appellants' quality standards. It is common ground that goods which did not meet these quality standards were deemed to be defective goods.

11 The joint venture commenced on June 2005 after the Respondents took over operations of the plant.

12 Unfortunately, problems started to surface almost immediately after the joint venture agreements were concluded. Between July and December 2005, the Respondents were unable to fulfil

several of the Appellants' orders for the joint venture's goods, both in terms of the stipulated deadlines and the quality of these goods. The Appellants subsequently notified the Respondents of alleged breaches of the BOA and LA by virtue of these delays and the defects in the goods received.

13 Between 7 November 2005 and 17 January 2007, the Appellants issued ten "debit notes" pursuant to which the Appellants sought rectification costs against the Respondents for goods which they had already paid for delivered but which turned out to be defective. Notwithstanding the issue of these debit notes, the Appellants continued to order more goods from the Respondents.

14 The relationship continued to sour and on or about 13 February 2007, the Respondents wrote to the Appellants to demand the sum of RM4,653,604.78 for goods sold and delivered. On 14 February 2007, the Appellants denied that this amount was owed. On 28 February 2007, the Respondents wrote to the Appellants, reiterating their demand.

15 Separately, on or about 13 February 2007, the Respondents wrote to the Appellants to demand the transfer to them of bank balances amounting to RM22,185.88. On or about 14 February 2007, the Appellants denied their obligation to transfer this sum. On or about 15 March 2007, the Respondents reiterated their demand for the transfer of the above sum but this time stated that the Appellants were obliged to do so under the terms of the ASA.

The arbitration

16 On 30 May 2007, the Appellants commenced arbitration proceedings against the Respondents in respect of disputes arising from the BOA and the LA (the parties referred to this arbitration as "the BOA Arbitration").

17 On 25 June 2007, the Appellants commenced separate arbitration proceedings against the Respondents in respect of disputes arising from the SA (the parties referred to this arbitration as "the SA Arbitration"). The parties agreed that both arbitrations would be heard by the same arbitrator.

18 In the BOA Arbitration, the Appellants claimed that the Respondents had breached several terms of the BOA and the LA. Amongst other things, the Appellants claimed that the Respondents had breached cl 4.1 of the LA by manufacturing goods which were not in accordance with the applicable quality standards (thereby rendering them defective). Arising from these defects, the Appellants claimed rectification costs.

19 In response, the Respondents claimed in the BOA Arbitration, *inter alia*, that the Appellants had:

(a) induced the Respondents to enter the joint venture through misrepresentations;

(b) acted in a manner inconsistent with the aim and object of the joint venture; and

(c) induced a breach of the BOA and the LA and/or caused loss and damage to the Respondents.

20 Arising from these allegations, the Respondents counterclaimed for various amounts, including the sum of RM5,838,956.00. The Disputed Counterclaim relates to this RM5,838,956.00, which purportedly consisted of:

(a) the RM22,185.88 of bank balances (see above at [15]);

(b) the RM4,653,604.78 for goods delivered up till 13 February 2007 (see above at [14]); and

(c) receivables for additional goods delivered after 13 February 2007.

21 At the end of the evidential phase of the hearing, the arbitrator directed that the parties submit an agreed framework of issues to be tried ("list of issues"), failing which, each party was to submit its own list of issues. The parties were unable to agree a common list of issues and eventually opted for the separate lists.

The award

22 The arbitrator found in favour of the Appellants in respect of some of their claims in the BOA Arbitration but dismissed all of their claims in the SA Arbitration and all of the Respondents' counterclaims in both the BOA Arbitration and the SA Arbitration. For our purposes, we will only focus on the arbitrator's decision relating to the BOA Arbitration.

23 The arbitrator commenced the award by summarising the gist of the dispute. At para 1.3.3(l) of the award, he noted that the Respondents were alleging, *inter alia*, that the Appellants had failed to pay the Respondents for the goods it had purchased. He also noted at para 1.5.1(f) of the award that the Respondents' financial controller (who had given evidence concerning the Disputed Counterclaim) was presented by the Respondents as a factual witness.

24 Next, the arbitrator proceeded at para 1.8.1 of award to identify the issues which arose as a result of the Appellants' claim in the BOA Arbitration:

> Against that factual and contractual backdrop, [the Appellants *submit*] , *and I accept as a convenient framework*, that the issues which arise from [the Appellants'] claims in the BOA Arbitration are as set out in the following paragraphs…
>
> Issue 1: whether [the firstrespondent] breached Clause 5.4.1 of the BOA.
>
> Issue 2: whether [the first respondent] breached Clause 5.4.3 of the BOA.
>
> Issue 3: if the Tribunal finds in favour of the [Appellants] on Issue 1 and Issue 2, whether [the first respondent's] breach of clause 5.4.3 contributed to its breach of clause 5.4.1 of the BOA; and if so, whether [the first appellant are] entitled to claim consequential losses…
>
> Issue 4: whether [the first respondent] breached clause 4.1 of the LA and if so, whether [the first appellant is] entitled to recover costs of US$43,108.69 and €424,168.33 which [the first appellant] incurred to rectify defective products supplied by [the first respondent].
>
> [emphasis added]

25 The arbitrator then sought to identify the issues which arose as a result of the Respondents' counterclaim in the BOA Arbitration at para 1.9.1 of the award:

> [*The Appellants submit*], *and I accept as a convenient framework*, that the issues which arise from [Respondents'] counterclaims in the BOA Arbitration are as set out in the following paragraphs.
>
> Issue 11: whether it is the HOA which continues to bind [the Appellants] and [the Respondents]

with the ASA, SA, BOA, LA… being merely supplemental or collateral.

Issue 12: whether [the Appellants] made the representations set out in the Respondents' Statement of Issues to be Tried dated 26 August 2009 in order to induce [the second respondent] to enter into the joint venture, and if so, whether the terms and conditions in the HOA are based on such representations.

Issue 13: whether [the Appellants] performed their obligations under the joint venture pursuant to the representations or the terms of the various agreements or whether there were misrepresentations. …

Issue 14: whether [the Appellants] systematically acted in a manner to frustrate the joint venture or to the detriment of [the Respondents].

Issue 15: if the Tribunal finds in favour of the Respondents on Issue [14], whether the HOA, SA, BOA, ASA and LA are terminated.

Issue 16: if the Tribunal finds in favour of [the first respondent] in the BOA Arbitration, whether [the first respondent is] entitled to claim any or all of the following amounts:

(i) loss of profits amounting to RM26,352,000

(ii) impairment loss amounting to RM69,901,122.

(iii) the amount of RM5,838,956 said to be due and owing; and

(iv) retrenchment costs amounting to RM780,956.

[The arbitrator went on to list out Issues #17 to Issues #19]

[emphasis added]

26 As can be seen from [24]–[25] above, the arbitrator did not expressly identify two issues relating to the Disputed Counterclaim which featured in paras 15 and 15.1 of the Respondents' list of issues (but which did not feature in the Appellants' list of issues) as issues to be decided in the BOA Arbitration. Paras 15 and 15.1 of the Respondents' list of issues read as follows:

15. Whether [the Appellants are] indebted to [the first respondent] for goods sold and delivered by [the first respondent to them];

15.1 Whether the defects in the goods so delivered are the responsibility of [the Appellants] or [the first respondent];

27 The arbitrator did, however, set out the Disputed Counterclaim as one of the remedies sought by the Respondents as Issue #16(iii). We note, parenthetically, that it was clear from the manner in which the arbitrator had framed Issue #16 that he was of the view that the Respondents would *not* be entitled to any of the amounts that were the subject of counterclaims in the BOA Arbitration (including the Disputed Counterclaim) if the Appellants succeeded on Issue #1 to Issue #4 *and* the Respondents failed in its counterclaims.

28 Having identified the issues which he had to determine, the arbitrator proceeded to deal with the substantive merits of the dispute.

29 The arbitrator first found for the Appellants in so far as Issue #1 and Issue #2 were concerned. In other words, he was satisfied that the Respondents had breached cll 5.4.1 and 5.4.3 of the BOA. The arbitrator then considered whether the Respondents had breached cl 4.1 of the LA in producing goods which were defective (he dealt with this as Issue #3 even though it was listed in his list of issues as Issue #4):

> **Issue #3: whether [the first respondent] breached the LA in delivering poor quality products**
>
> …
>
> 3.3.1 [The Appellants claim] that the products delivered by [the first respondent] fell short of these quality standards.
>
> …
>
> 3.3.3 Clause 4.1 of the LA provides that:
>
> …
>
> 3.3.5 [The first respondent alleges] that [the Appellants] had "no proper outgoing quality standard", that there was only "a semblance of quality standards" when [the Respondents] took over, and that the proper quality standard were established only in the meeting of December 2006 after [the Respondents] took over.
>
> …
>
> 3.3.7 [The first respondent does] not seriously deny that there were quality lapses…
>
> …
>
> 3.3.9 I accept [the Appellants'] submissions and reject [the first respondent's] submissions. I find that [the first respondent] was in breach of clause 4.1 of the LA in that it failed to manufacture the products in accordance with the contractually applicable standards.
>
> 3.3.10 As a result of [the first respondent's] breach, [the Appellants] undertook rectification works in Germany, incurring total expenditure of US$43,108.69 and €424,168.33. This is evidenced by debit notes which remained unpaid. I find that [the Appellants are] entitled to recover these amounts.

30 The arbitrator then turned to consider the Respondents' counterclaims in the BOA Arbitration. First, he held that the Respondents' claim for misrepresentation failed (Issue #12). Next, at paras 5.3 to 5.6 of the award, the arbitrator proceeded to consider the other counterclaims, as follows:

> **5.3 Issue #13: whether [the Appellants] performed [their] obligations under the joint venture agreements.**
>
> 5.3.1 [The Respondents claim] that [the Appellants] breached [their] obligations under the joint venture agreements in the following manner:
>
> …

5.3.2. I am not satisfied on the balance of probabilities that [the Appellants] breached the joint venture agreements… .

5.4 Issue #14: whether [the Appellants] systemically acted in a manner to frustrate the joint venture

5.4.1 In the light of my findings in the section immediately above, I am not satisfied on the balance of probabilities that [the Respondents have] made out this issue.

5.5 **Issue #15 to 18**

5.5.1 In light of my findings on Issue #14, these issues [including Issue #16] do not arise.

The setting aside application

31 On 19 October 2012, the Respondents applied to set aside the *entire* award on three alternate bases:

(a) that the arbitrator failed to deal with the Disputed Counterclaim because he had extensively adopted the Appellants' list of issues over the Respondents' list, thus breaching the rules of natural justice contrary to s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA");

(b) that the arbitrator had failed to exercise the authority conferred on him to determine the Disputed Counterclaim, contrary to Art 34(2)(*a*)(iii) of the Model Law; and

(c) that the arbitrator had made gross or egregious errors in the award and this conflicted with public policy and was contrary to Art 34(2)(*b*)(ii) of the Model Law.

32 New counsel were instructed by both sides for the purposes of the setting aside application.

The decision below

33 The Judge agreed with the Respondents that the arbitrator had failed to deal with the Disputed Counterclaim because it was likely that he had extensively adopted the Appellants' list of issues and that there therefore had been a denial of natural justice. We set out at [34]–[41] below a summary of the Judgment.

34 The Judge first found that it was "common ground" that the defective goods which were the subject of the Appellants' claim under cl 4.1 of the LA (which the Judge referred to as "Group A Goods") were different from the goods that were the subject of the Disputed Counterclaim (which the Judge referred to as "Group B Goods"):

(a) The Group A Goods were received and paid for by the Appellants. They were the subject of ten debit notes issued by the Appellants who were seeking to claim rectification costs for these goods on the basis that they were defective.

(b) The Group B Goods, on the other hand, were received but were not paid for by the Respondents. Further, since they were not the subject of any debit notes and any claim for rectification works, there were no allegations that the Group B Goods were defective.

(see the Judgment at [16], [38] and [58]).

35 Next, the Judge observed that the arbitrator did not expressly find that the Respondents were not entitled to the Disputed Counterclaim because the defects in the goods resulted in an abatement in their price. In fact, no mention at all was made by the arbitrator of any defects in relation to the Group B Goods (see the Judgment at [63]).

36 According to the Judge, the basis of the arbitrator's decision was that the Respondents had breached their obligations under cll 5.4.1 and 5.4.3 of the BOA and cl 4.1 of the LA. The Appellants were accordingly entitled to recover for loss of profits and to recover rectification costs in respect of defective goods supplied by the Respondents. The arbitrator also held that the Respondents had failed to either establish that the Appellants had breached their obligations under the joint venture agreements (*ie*, Issue #13), or that the Appellants had acted in a manner to frustrate the joint venture (*ie*, Issue #14). Having ruled against the Respondents on liability in respect of Issue #13 and Issue #14, the arbitrator considered that the remedies and reliefs sought in Issue #16 (including the sum that constituted the Disputed Counterclaim) did not arise for determination (see the Judgment at [30]).

37 The Judge then concluded that since the question of liability for payment of the Group B Goods (*ie*, the Disputed Counterclaim) was unrelated to Issue #13 and Issue #14 as framed by the arbitrator, there was no logical corollary between the arbitrator's findings and the Disputed Counterclaim. It therefore could not be inferred from the face of the award that the arbitrator had actually (albeit implicitly) considered and dismissed the Disputed Counterclaim (see the Judgment at [85]).

38 In the Judge's view, this was a case where it had slipped the arbitrator's notice that the Disputed Counterclaim was a claim that had to be dealt with independently of his findings on the other issues. The Judge then surmised that it was highly likely that this slip had occurred "because the [arbitrator] extensively adopted [the Appellants'] list of issues to be determined …" (see the Judgment at [63], [64] and [85]).

39 By failing to consider the Disputed Counterclaim, the arbitrator failed to apply his mind to the critical issues and arguments in the dispute (see the Judgment at [88]). There was therefore a breach of natural justice under s 24(*b*) of the IAA and the Respondents had suffered prejudice as a result (see the Judgment at [93]). The Judge also went on to find that, in the circumstances, recourse was also available under Art 34(2)(*a*)(iii) since the arbitrator failed to exercise the authority granted to him by the parties and the doctrine of *intra petitia* "clearly applied" (see the Judgment at [99]). The Judge found it unnecessary to deal with the challenge under Art 34(2)(*b*)(ii) of the Model Law but expressed doubts that this ground was applicable (see the Judgment at [100]).

40 In the circumstances, the Judge set aside the arbitrator's finding in Issue #16 that related to the Disputed Counterclaim and "considered it appropriate to remit the Dispute Counterclaim… and costs thereof to a new tribunal (which is to be constituted) for determination" (see Judgment at [101] and [102]).

41 The Judge then went on to make the following observation at [103] of the Judgment:

> I note, parenthetically, that this would have been the type of case that Art 33(3) of the Model Law would have been intended to provide redress for. Art 33(3) permits parties to request (within a specified time period) the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. It is to be hoped that parties in future cases

of a similar nature would first attempt to avail themselves of any available opportunities to seek redress from the tribunal itself, before turning to the courts (assuming of course that this is possible in the circumstances).

The arguments on appeal

42 Counsel for the Appellants, Mr Chenthil Kumarasingam ("Mr Kumarasingam"), conceded that the ten debit notes issued by the Appellants only related to the goods identified by the Judge as the "Group A Goods". However, he contended that this was legally irrelevant in the Respondents' setting aside application since the parties themselves had not distinguished between the two types of goods (*ie*, Group A Goods and Group B Goods) in the arbitration in so far as allegations of defectiveness were concerned.

43 In addition, Mr Kumarasingam pointed out that it was in fact the Respondents' *own* case in the arbitration that the issue of payment for the goods (in general and not only in relation to goods which the parties now categorise as Group B Goods) was directly linked to the issue of who was responsible for the defects in the goods produced by the Respondents. It therefore did not lie in the Respondents' mouth to now argue that the arbitrator had not considered the Disputed Counterclaim.

44 In any event, Mr Kumarasingam submitted that the arbitrator *did* in fact consider the Disputed Counterclaim and that there was no breach of natural justice. According to him, this was, at the very worst, a case of an error of fact and/or law on the part of the arbitrator for which no recourse to the courts was available.

45 Counsel for the Respondents, Mr Hri Kumar SC ("Mr Kumar"), submitted that the Judge's decision should be upheld because according to Mr Kumar, the Appellants' *only* defence against the Disputed Counterclaim in the arbitration was that they did not accept the quantum payable on the "Group B Goods" which they had left to the arbitrator to determine. Once the quantum was determined, the Appellants merely sought to set off this amount against their other claims in the arbitration.

46 Contrary to the position taken by Mr Kumarasingam which we have summarised at [42] and [43] above, Mr Kumar *repeatedly* submitted that it was neither party's case in the arbitration that the Appellants should be relieved of their obligations to pay for the Group B Goods if the Respondents were found responsible for the defects in goods. To make good this assertion, Mr Kumar stressed that the debit notes issued by the Appellants only related to the Group A Goods. On that basis, he asserted that the Appellants' list of issues (which did *not* contain the issues set out in paras 15 and 15.1 of the Respondents' list of issues (see above at [26])) was wrong and misleading in so far as it suggested that this was the case.

47 Whilst Mr Kumar conceded that the term "Group A Goods" and "Group B Goods" *did not appear anywhere in* (i) the pleadings, (ii) the lists of issues and (iii) written submissions ("the source documents"), he asserted that the distinction between the two groups of goods *was clear* when the source documents were read in their proper context. This assertion formed an essential plank in the Respondents' case that the Judge was right to find that there was no logical corollary between the arbitrator's (i) findings on the various issues and (ii) the conclusion that the Disputed Counterclaim did not arise.

48 Accordingly, Mr Kumar argued that the Judge was correct in the circumstances to adopt the Respondents' case theory that the arbitrator had extensively adopted the Appellants' list of issues (which, as we have already observed (see above at [26] and [46]), did *not* contain the issues set out

in paras 15 and 15.1 of the Respondents' list of issues) instead of considering both parties' lists of issues and that this had led to his failure to deal with the substantive merits of the Disputed Counterclaim.

49 Finally, Mr Kumar urged us to uphold the Judge's decision because he said that it would otherwise mean that, as a matter of substance, the Appellants would have obtained the Group B Goods free of charge and that would be an extremely unfair result.

50 Before proceeding further, we should point out that the Respondents' arguments on natural justice and Art 34(2)(*a*)(iii) of the Model Law stand and fall together and we therefore do not propose to consider Art 34(2)(*a*)(iii) separately. Further, the Respondents (correctly, in our view) did not seek to rely on the public policy ground in Art 34(2)(*b*)(ii) to set aside the award in the present appeal and so we need not say any more about this particular issue.

The relevant legal principles

51 It is now axiomatic that there will be minimal curial intervention in arbitral proceedings. As the Judge acknowledged at [67] of the Judgment, citing our decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") (at [65(c)]), the principle of minimal curial intervention flows from "the need to encourage finality in the arbitral process as well as the deemed acceptance by the parties to an arbitration of the attendant risks of having only a very limited right of recourse to the courts".

52 A "very limited right of recourse to the courts" is statutorily available where there has been a denial of natural justice – in the context of this appeal, when an arbitrator does not consider one party's case and thereby fails to deal with an essential issue in the dispute.

53 In considering whether an arbitrator has addressed his mind to an issue, however, the court must be wary of its natural inclination to be drawn to the various arguments in relation to the substantive merits of the underlying dispute between the parties. In the context of a setting aside application, it is crucial for the courts to recognise that these substantive merits are *beyond* its remit notwithstanding its natural inclinations. Put simply, there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact. *A fortiori*, the courts should guard against attempts by a disgruntled party to fault an arbitrator for failing to consider arguments or points which were never before him. The setting aside application is not to be abused by a party who, with the benefit of hindsight, wished he had pleaded or presented his case in a different way before the arbitrator.

The issues

54 In our view, the main issue in this appeal, *viz*, whether the Judge was correct in finding that the sole arbitrator had not addressed his mind to the Disputed Counterclaim and thereby failed to deal with an essential issue in the dispute can be answered by considering the following two sub-issues:

(a) What was the Respondents' case with respect to the Disputed Counterclaim in the arbitration? ("Issue 1")

(b) In the light of Issue 1, can it be said that the arbitrator had not addressed his mind to the Disputed Counterclaim? ("Issue 2")

Our decision

Issue 1

55 In our view, Mr Kumar's repeated assertions that the Appellants' debit notes only related to the Group A Goods but not the Group B Goods served, with respect, to confuse rather than clarify matters. Stripped to its core, the Respondents' *entire* case rested on the premise that it was *common ground* before the arbitrator that there was *no allegation whatsoever* in the arbitral proceedings that the so-called Group B Goods were *defective*.

56 After reviewing the relevant source materials, it is clear, in our view, that this was *not* the case. On the contrary, we are satisfied that it was not only the Appellants' case but *also* (and more importantly) *the Respondents' own case* that the issue as to whether the Appellants were liable for the Disputed Counterclaim was *directly linked* to the *issue* of *defectiveness* in the goods (in general and not only in relation to the so-called Group B Goods). We shall explain our conclusion with reference to:

(a) the parties' pleadings (see below at [57]–[65]);

(b) the parties' lists of issues (see below at [66]–[72]); and

(c) the parties' written submissions before the arbitrator (see below at [73]–[81]).

The pleadings

57 We commence our analysis with the parties' pleadings.

(A) The BOA Arbitration pleadings

58 The foundational document of the Respondents' case in relation to the Disputed Counterclaim is their Defence and Counterclaim in the BOA Arbitration ("the BOA Counterclaim"). Paras 57 to 63 of the BOA Counterclaim read as follows:

> 57. By a letter of demand dated 13 February 2007, [the Respondents] demanded from [the Appellants] the sum of RM4,653,604.78 due and owing by [the Appellants] to [the Respondents] for the good [*sic*] supplied by [the Respondents] to [the Appellants].
>
> 58. By a letter dated 14 February 2007 from [the Appellants] to [the Respondents], [the Appellants] sought to set off an amount of RM4,653,604.78 purportedly due from the Respondents]to [the Appellants] in terms of receivables.
>
> …
>
> 60. Todate, the sum of RM5,816,770.25 is still due and owing by [the Appellants] to [the Respondents].
>
> 61. When [the Respondents] and [the Appellants] commenced the joint venture… the accounts of [the Respondents] showed that it had total cash in the amount of RM22,186.00 in its banks which were all held in the name of [the Appellants]. [the Appellants were] to withdraw these monies and pay the same to [the Respondents]. However todate, [the Appellants have] failed to pay to [the Respondents] the amount of RM22,186.00.
>
> …

63. By reason of the acts and/or the breaches by [the Appellants], [the Respondents have] suffered loss and damages.

Particulars

…

Amounts owing as at 31 January 2008

5,838,956.00

59 The Appellants' response to paras 57 to 63 of the BOA Counterclaim cited above can be found in their Reply to Defence and Defence to Counterclaim in the BOA Arbitration ("the BOA Defence to Counterclaim") at paras 44 to 49:

44. Referring to paragraph 57 [of the BOA Counterclaim], [the Appellants admit] that a Notice of Demand for RM4,653,604.78 was sent to [the Appellants]…

45. Referring to paragraph 58 [of the BOA Counterclaim], [the Appellants contend] that it did on 14.2.2007 write to [the Respondents] and disputed that there is an outstanding amount of RM4,653,604.78 due from [the Appellants] to [the Respondents]. [The Respondents were] *inter alia* informed that the cost for defective products supplied have not been taken into consideration in calculating the amount purportedly owed by [the Appellants]. [The Respondents were] also informed that subject to [the Appellants] receiving satisfactory clarification with regard to the debit notes for the defective products and the verification exercise that [the Appellants were] undertaking at the time in respect of products purchased from [the Respondents], an amount of RM224,630.00 was due and owing by [the Respondents] to [the Appellants] after setting off [the Respondents'] purported claim against receivables.

…

47. [The Appellants] categorically [deny] paragraph 60 [of the BOA Counterclaim] and contends that it is embarrassed by [the Respondents'] pleading which lacks any particulars. [The Appellants refer] to paragraph 57 where [the Respondents] alleged that only an amount of RM4,653,604.78 is purportedly due and owing pursuant to the letter of demand. [The Appellants put the Respondents] to strict proof of paragraph 60 [of the BOA Counterclaim].

…

49. [The Appellants] categorically [deny] paragraph 62 and 63 [of the BOA Counterclaim] and puts [the Respondents] to strict proof. [The Appellants contend] that any loss or damage suffered by [the Respondents are] owing to [their] own fundamental breaches of the BOA and/or the LA… [The Appellants contend] that [the Respondents] *continuously supplied* [*the Appellants*] *with* ***defective*** *products* and sought to blame [the Appellants] for all [their] shortcomings in relation to productivity, compliance with quality standards as contained in the LA… That [the Respondents have] persistently failed to comply with quality standards has been admitted by [the Respondents] in e-mail exchanges which [the Appellants] will refer to at the hearing of this arbitration. Consequently, [the Appellants] are not obliged to pay for *such* ***defective*** *goods*.

[emphasis added in italics and bold italics]

We pause to observe that para 49 of the Appellants' BOA Defence to Counterclaim was not cited in the Judgment.

60 The Respondents' response to paras 44 to 49 of the BOA Defence to Counterclaim cited above can be found in their Reply to Defence to the Counterclaim in the BOA Arbitration ("the BOA Reply to Defence to Counterclaim") at para 30:

> 30. Paragraphs 43 to 49 of the Amended Reply to Defence and Defence to Counterclaim are denied. [The Appellants were] in control of the plant and the production of the goods and are liable for any defects in the goods, which is an afterthought concocted by them.

61 It is clear from the face of the pleadings in the BOA Arbitration that the parties had joined issue to the effect that the claim for the amounts stated in para 63 of the BOA Counterclaim (*which includes the entire Disputed Counterclaim*) (see above at [58]) depended on who was responsible for the alleged *defects* in goods which had been "continuously supplied" (see, in particular, para 49 of BOA Defence to Counterclaim (reproduced above at [59]) and para 30 of the BOA Reply to Defence to the Counterclaim (reproduced above at [60])). Put simply, on the face of the pleadings, the allegations of defects in goods went further than the goods which the debit notes related to (*ie*, what the parties now characterise as Group A Goods). They included allegations of defectiveness against the goods which were "continuously supplied" by the Respondents to the Appellants. This, in our view, would include the Group B Goods.

(B) The SA Arbitration pleadings

62 Even though the Disputed Counterclaim formed part of the Respondents' counterclaim in the BOA Arbitration, the Respondents *themselves* referred to it in the SA Arbitration. In the SA Arbitration Defence and Counterclaim ("SA Counterclaim") at para 44.5, the Respondents referred to the sum which comprised the Disputed Counterclaim under the heading "Breach of the HOA and the SA, as follows":

> 44.5. The [Appellants] have refused to pay for the *goods supplied* by [the Respondents] to [the Appellants] to the amount of approximately RM5.8 million which has resulted [in] losses in [the Respondents] due to having to provide for bad debts. [emphasis added]

63 The Appellants' response to the Respondents' allegations that RM5.8 million were owed for goods delivered (*ie*, the RM5,838,956 which comprised the Disputed Counterclaim) can be found in the Reply to Defence and Defence to Counterclaim in the SA Arbitration ("SA Defence to Counterclaim") at para 44:

> 44. … In reply to paragraph 44.5, [the Appellants contend] that [the Respondents] have *refused to pay for the goods supplied as* ***they*** *were* ***defective*** . [emphasis added in italics and bold italics]

In other words, the Appellants claimed that they did not have to pay RM5,838,956 for the goods supplied because these goods were *defective*.

64 At para 28 of the Reply to Defence to the Counterclaim in the SA Arbitration, the Respondents responded to para 44 of the SA Defence to Counterclaim (as they did in the BOA Arbitration pleadings (see above at [60])) by contending that it was the Respondents and not the Appellants who were responsible for the defect in these goods:

28. With regard to [paragraph 44] of the Reply to Defence and Defence to Counterclaim… [the Appellants'] complaint that the goods were defective was only later when [the Respondents] sought for payment. *The allegation that the Goods were defective is an afterthought and concocted by* [*the Appellants*] *so as not to pay for the goods supplied by* [*the Respondents*] *to the detriment of* [*the Respondents*]. [The Appellants were] in control of the plant and the production of the goods and are liable for *any* defects in the goods and consequently for the unjustified termination of the LA. [emphasis added]

65 Again, it is clear from the pleadings the SA Arbitration that the parties had joined issue to the effect that the obligation to pay the RM5,838,956 (*ie*, the Disputed Counterclaim) for goods delivered (*ie*, what the Judge referred to as the *Group B* Goods) was related to the question of who was responsible for the *defects* in goods produced *in general*.

The framework of issues

66 We next consider the respective parties' lists of issues.

(A) The Respondents' list of issues

67 As already noted above (at [26]), the Respondents' list of issues phrased the issues relating to the Disputed Counterclaim in the following manner:

15. Whether [the Appellants are] indebted to [the Respondents] for *goods sold and delivered* by [the Respondents] to [them];

15.1 Whether the *defects* in the goods *s o delivered* are the responsibility of [the Appellants] or [the Respondents];

…

18. If the Tribunal finds in favour of [the Respondents] in [the BOA Arbitration] whether [the Respondents are] entitled to claim:

…

18.3 the sum owing by [the Appellants] to [the Respondents] of RM 5,838,956.00; …

…

[emphasis added]

We note, parenthetically, that there was no separate paragraph in the Respondents' list of issues dealing with the bank balance of RM22,185.88.

68 Mr Kumar conceded that, on its face, paras 15, 15.1 and 18 of the Respondents' list of issues, when read together, *expressly linked* the issue of *defects* of goods to the Appellants' obligation to pay for the entire Disputed Counterclaim (which we would add, includes the RM22,185.88 bank balance which had *nothing* to do with the goods sold and delivered). He explained that it was drafted in this manner because the Appellants' only reason for not paying for the Group B Goods was that they had not been paid the amounts due on the debit notes (which related to the Group A Goods). Notwithstanding the way the list of issues was drafted, he argued that, read in its proper context, it

was clear that the issue of the defectiveness of goods in general was not meant to be linked to the issue of payment for the Group B Goods and that the counterclaim for the Group B Goods was a complete stand-alone issue.

69 With respect, we are at a loss to understand how the argument just made in the preceding paragraph could pass muster based on *any reasonable reading* of paras 15, 15.1 and 18. Mr Kumar's concession that this issue was poorly drafted was, with respect, neither here nor there. In fact, contrary to it being "poorly drafted", the manner in which paras 15, 15.1 and 18 were drafted is *entirely consistent* with the *Respondents' own* case in both the BOA and the SA Arbitration that the issue of the alleged *defects* in the goods and the liability for the Group B Goods were inextricably linked (see above at [60] and [64]).

70 We should also point out that *nowhere* in the Respondents' list of issues (or in their pleadings for that matter) is cl 5.2 of the BOA and cl 5.2.1 of the ASA (the terms of which are summarised above at [10(a)] and [10(b)]) referred to as the contractual basis for the Disputed Counterclaim.

(B) The Appellants' list of issues

71 The salient parts of the Appellants' list of issues read as follows:

> 1. Whether [the Respondents] breached clause 5.4.1 of the BOA in that [they] failed to deliver the products ordered by [the Appellants] within 8 weeks from the date of expiry of the 2-month Notice Period…
>
> 2. Whether [the Respondents] breached clause 5.4.3 of the BOA in that [they] failed to hold a minimum raw material inventory…
>
> > 2.1 Whether [the Respondents] were required to hold a minimum raw material inventory of 40% on a per line item basis.
>
> 3. Whether [the Respondents'] breach of clause 5.4.3 of the BOA contributed to the breach of [their] undertaking in clause 5.4.1 of the BOA…
>
> 4. Whether [the Respondents] breached clause 4.1 of the LA in that [they] failed to deliver the products in accordance with the standards set out therein.
>
> …
>
> 7. If the Tribunal finds in favour of [the Respondents] in in [the BOA Arbitration], whether [the Respondents are] entitled to claim any of the following:
>
> …
>
> 7.3 the amount of RM5,838,956.00 purportedly due and owing;
>
> …

72 Mr Kumar submits, and we agree, that the Appellants' list of issues was drafted in such a manner as to suggest that the success of all of the Respondents' counterclaims in the BOA Arbitration (including the Disputed Counterclaim) depended on whether the arbitrator was satisfied that the Respondents were in *breach* of the BOA and the LA. In other words, according to the Appellants' list of issues, the Respondents would *not* be entitled to the Disputed Counterclaim if the arbitrator found

that they were in *breach* of the BOA and the LA. This was entirely consistent with the Appellants' pleaded case as described in para 49 of the BOA Defence to Counterclaim (reproduced above at [59]) (and to a lesser extent at para 44 of the SA Defence to Counterclaim (reproduced above at [63])).

Written submissions before the arbitrator

73 Finally we turn to the written submissions of the parties before the arbitrator.

(A) The Respondents' written submissions

74 In their written submissions, the Respondents referred to the Disputed Counterclaim under the heading "*Defective* Goods" [emphasis added]:

> **16. *Defective* Goods**
>
> 16.1 [The Appellants] maliciously claimed that the *goods supplied* by [the Respondents] were defective and on that pretext refused to pay for the *goods supplied* by [the Respondents].
>
> 16.2 In fact, the goods supplied by [the Respondents] to [the Appellants] were those that were manufactured by [the Appellants themselves and left in store.
>
> …
>
> 16.8 [The Respondents' Group Financial Controller] in paragraph 15.3 of her witness statement highlighted that the amount owed by [the Appellants] as at 31 January 2008 is RM5,838,956.00 which is reflected as "receivables" in [the Respondents'] audited accounts as at as at [*sic*] 31 January 2008… The amount owed by [the Appellants] pursuant to trade is RM5,816,770 as seen at note 13 under "an affiliate" at page 2979 (supporting documents and invoices appear at RBD vol 8 pages 2193 to 2232). The amount owed by [the Appellants] from cash and bank balances is RM22,185.88…
>
> 16.9 We respectfully submit that the defects in the goods are not the responsibility of [the Respondents]. Quality is the obligation of [the Appellants]. [The Respondents] ought to be reimbursed by [the Appellants] for the *goods supplied*.
>
> [emphasis added in italics and bold italics]

75 A couple of significant points are apparent on the face of the Respondents' written submissions. First, there is no express statement that the liability to pay for the so-called Group B Goods derive from invoices or from cl 5.2 of the BOA. Secondly, the Respondents, consistently with their approach in their pleadings and their list of issues already discussed above, *explicitly linked* the obligation of the Appellants to pay for the (undistinguished) "goods supplied" with the question of whether these (undistinguished) "goods supplied" were *defective*. Thirdly, cl 5.7 of the BOA and cl 5.2.1 of the ASA are not referred to as the legal basis for Disputed Counterclaim. We would add a further observation to the effect that paras 16.1, 16.2 and 16.9 of the Respondents' written submissions were not discussed in the Judgment.

(B) The Appellants' written submissions

76 Mr Kumar submits (and the Judge found) that the only paragraph in the Appellants' written submissions dealing with the receivables in relation to the Group B Goods was para 363, which reads

as follows:

> 363. As regards the receivables amounting to RM5,838,956.00, we say that the amount has not been proven. If at all the Tribunal were minded to accept [the Respondents' Group Financial Controller's] explanation under cross-examination – that the figure is based on the audited accounts, though no breakdown is provided – we respectfully submit that this amount should be set-off against any amounts that the Tribunal may award to [the Appellants].

77 On that basis, Mr Kumar maintained (and the Judge found) that the Respondents' case was simply that the *quantum* of the disputed Counterclaim has not been proved. We do *not*, however, think that this accurately describes the Respondents' case in their written submissions. Let us elaborate.

78 First of all, the paragraph cited (*viz*, para 363, above at [76]) appeared under the *heading*, "The BOA Arbitration – damages claimed by [the Respondents]", in which are also to be found (in *addition to* para 363) paras 357 and 358 of the *Appellants'* written submissions, as follows:

> **The BOA Arbitration – damages claimed by [the Respondents]**
>
> 357. Now as regards [the Respondents'] Re-amended Defence and Counterclaim, it needs to be pointed out that [the Respondents'] basis for seeking relief under the BOA Arbitration is ambiguous. [The Respondents have] prayed for several heads of damage, but the Re-amended Defence and Counterclaim *do not clearly disclose an action for breach of contract or for misrepresentation*. …
>
> 358. *Notwithstanding the above*, we will examine each head of damage as has been prayed for, for what it is worth, and make our submission accordingly.
>
> …
>
> 363. As regards the receivables amounting to RM5,838,956.00, we say that the amount has not been proven. If at all the Tribunal were minded to accept [the Respondents' Group Financial Controller's] explanation under cross-examination – that the figure is based on the audited accounts, though no breakdown is provided we respectfully submit that this amount should be set-off against any amounts that the Tribunal may award to [the Appellants].
>
> [emphasis added]

On the face the Appellants' submissions, therefore, the argument that the *quantum* was not proven was merely a *fall back* argument to their primary argument under this heading to the effect that the Respondents' pleadings did not even disclose a proper cause of action for the various heads of damage in the first place (including the Disputed Counterclaim).

79 Further, we also see strength in the Appellants' suggestion to the effect that the Respondents' pleadings were muddled; in particular, in the BOA Counterclaim, the Respondents appeared to identify the legal basis of the Disputed Counterclaim as arising from either a breach of contract or misrepresentation (see above at [19]). Yet, cl 5.7 of the BOA and cl 5.2.1 of the ASA were not referred to in these submissions.

80 In addition, and more importantly, para 363 has to be read in the light of the Appellants' submissions that the goods delivered to it were *defective*:

[The Respondents'] breach of the LA

Poor quality of products supplied

…

117. … [the Respondents were] in *continuous breach* of clause 4.1 of the LA and failed to manufacture the products in accordance with the standards set out therein. According to [one of the Appellants' main witness of fact], [the joint venture] faced quality issues almost right from the beginning when [the Respondents] took over management. Initially, he said the problems were manageable but it *got worse as time went by*.

…

123. As a result of [the Respondents'] breach, [the Appellants have] had to undertake expensive rectification works in Germany, in particular, cleaning, grinding, blasting, pickling, rounding and marking the defective products.

124. [The Appellants have] spent a total of US$43,108.69 and €424,168.33 for the rectification works in respect of the defective products supplied by [the Respondents]. In this respect, [the Appellants have] issued [the Respondents] a total of 10 debit notes from 7.11.2005 – 17.1.2007. The debit notes remain unsatisfied to date.

[emphasis added]

81 We recognise that, read in isolation, the submission cited in the preceding paragraph could be construed to relate only to the Group A Goods since the claim for rectification costs pursuant to the debit notes are mentioned but no mention is made of goods which were delivered but not the subject of any debit notes (*ie*, the Group B Goods). However, in the light of the pleadings and the lists of issues, it is abundantly clear to us that the allegations of *defectiveness*, which constituted a "continuous breach" of cl 4.1 of the LA, were directed at *all* goods supplied. In any event, even if this was not the case, there is no denying that the fact it was the Respondents' *own* case that the issue of payment for the Group B Goods was *tied or linked to* the issue of who was responsible for the defect of goods in general.

Conclusions on Issue 1

82 To conclude on Issue 1, for the reasons set out above, contrary to the repeated refrain of Mr Kumar during the oral submissions that it was neither parties' case that if there are defective goods the Respondents should not receive payment for the Group B Goods, we agree with Mr Kumrasingam that this was *precisely* the case that the *Respondents* themselves ran.

83 Before we proceed to consider Issue 2, two observations are apposite. First, in the setting aside application, the Respondents now state that the contractual basis of the Disputed Counterclaim was cl 5.7 of the BOA (in relation to the Group B Goods) and cl 5.2.1 of the ASA (in relation to the RM22,158.88 bank balances). This was, presumably, to bolster their argument that the arbitrator's basis for the Disputed Counterclaim was clearly far removed from the rest of the issues in the arbitration. These two provisions, however, did not appear once in the source documents. In short, the Respondents have attempted to recharacterise and clarify their (with respect, confusing and muddled) case in the setting aside application.

84 Secondly, the Respondents now argue that the Appellants' list of issues was wrong and misleading because it failed to characterise the Disputed Counterclaim as a stand-alone issue. These arguments have been made notwithstanding the fact that this is what their *own* list of issues (based on any reasonable reading) suggests. Accordingly, the Respondents' blatant attempt to rely on this recharacterised case and to pin the blame on the Appellants ought to be rejected. Put simply, the Respondents are seeking to put forward the case they wished they had put forward before the arbitrator and not the case which was actually run in the arbitral proceedings themselves.

Issue 2

The relevant principles

85 We next turn to consider whether the arbitrator did in fact deal with the Disputed Counterclaim in the light of our findings on Issue 1. In this regard, the observations of this court in *Soh Beng Tee* (at [65(f)]) are apposite:

> ... It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.

86 The English decisions of *Atkins Limited v The Secretary of State for Transport* [2013] EWHC 139 (TCC) ("*Aktins*") and *Zermalt Holdings SA v Nu-Life Upholstery Repairs Ltd* [1985] 2 EGLR 14 ("*Zermalt*") (which were referred to by Chan Seng Onn J in the Singapore High Court decision of *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [44] and [45]) are consistent with our local jurisprudence in relation to the "generous approach" which the court ought to take in reviewing arbitral awards for breaches. In short, the court is not required to carry out a hypercritical or excessively syntactical analysis of what the arbitrator has written (see *Atkins* at [36]). Nor should the court approach an award with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards, with the objective of upsetting or frustrating the process of arbitration. Rather, the award should be read in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it (see, for example, *Zermalt* at 14).

The Respondents' submissions

87 Aside from his argument that it was common ground that no allegations of defectiveness were made against the Group B Goods (which we have held above to be incorrect), Mr Kumar relies heavily on the following "gaps" in the award to support his case theory that the arbitrator must have adopted the Appellants' list of issues over the Respondents' list of issues without actually considering the issues stated therein and which resulted in the arbitrator failing to consider the Disputed Counterclaim:

(a) the absence of para 15 of the Respondents' list of issues (but for obvious reasons following our discussion on Issue 1, not para 15.1) in the arbitrators' list of issues for determination;

(b) the express statements from the arbitrator at para 1.9.1 of the award that he accepted the Appellants' list of issues "as a convenient framework" to consider the Respondents' counterclaims;

(c) the lack of any discussion of the legal basis of the payment for the Group B Goods or

whether the quantum of the Disputed Counterclaim had been proved; and

(d) the apparent logical disconnect in the arbitrator's conclusion that he did not have to consider the Disputed Counterclaim because of his conclusions on what the Respondents now say are unrelated issues.

The arbitrator addressed his mind to the Disputed Counterclaim

88 Looking at the award as a whole and having regard to the source documents, it is clear, in our view, that the arbitrator *did* in fact address his mind to the Disputed Counterclaim and did, in fact, render a decision in respect of that particular claim. Let us elaborate.

89 First, the arbitrator noted at the start of the award that (i) the Respondents were alleging that the Appellants failed to pay Respondents for the goods it purchased (see para 1.3.3(l)); and (ii) that the Respondents' Group Financial Controller (who gave evidence concerning the claim for the Disputed Counterclaim) was a witness of fact (see para 1.5.1(f)). We should add, parenthetically, that there was evidence before us that the arbitrator had personally noted down where the invoices for (what the parties now characterise as) the Group B Goods could be found in the Respondents' bundle of documents. Although this is not by itself determinative, this clearly suggested that the arbitrator had the Disputed Counterclaim in mind (at least during the hearing).

90 Secondly, the Respondents' case theory that the arbitrator had simply adopted the Appellants' list of issues without any consideration of the Respondents' list of issues is simply not borne out on a closer analysis of the Appellants', Respondents', as well as the arbitrator's lists of issues. In fact, the Judge acknowledged this at [25] of the Judgment.

91 All four issues identified by the arbitrator as relating to the Appellants' claim in the BOA Arbitration (Issue #1 to Issue #4 which has been reproduced at [24] above) appeared in both parties' separate lists of issues. This was notwithstanding his comment at para 1.8.1 that he had adopted the Appellants' list of issues as a convenient framework. More importantly for our purposes, of the nine issues identified by the arbitrator as relating to the Respondents' counterclaim in the BOA Arbitration (Issue #11 to Issue #19), only one featured exclusively in the Appellants' list of issues and four featured in both parties' lists of issues. The remaining four issues featured only in the Respondents' list of issues (and were adopted almost *verbatim* by the arbitrator). These were:

(a) whether the Appellants had made misrepresentations in order to induce the Respondents to enter into the joint venture (identified by the arbitrator as Issue #12);

(b) whether the Appellants performed their obligations under the joint venture (identified by the arbitrator as Issue #13);

(c) whether the Appellants acted in a manner to frustrate the joint venture (identified by the arbitrator as Issue #14); and

(d) if the arbitrator finds in favour of the Respondents on Issue #14, whether the HOA, SA, BOA, ASA and LA are terminated (identified by the arbitrator as Issue #15).

92 This suggests to us that, instead of blindly adopting the Appellants' list of issues, the arbitrator had read and carefully considered both lists of issues before identifying the live issues before him. This was notwithstanding his remarks at para 1.9.1 of the award which could be narrowly (and incorrectly) construed as suggesting that he only had regard to the Appellants' list of issues.

The arbitrator determined the Disputed Counterclaim on the Respondents' own case

93 Thirdly, in view of our conclusion on Issue 1, there was no real need for the arbitrator to expressly identify the legal basis of the Disputed Counterclaim if he took the view (as he plainly must have) that the question as to who was responsible for the alleged *defects* in the goods *in general* was *directly linked to* the issue of payment for *any* goods delivered. Hence, when the arbitrator found that the Respondents were in breach of cl 4.1 of the LA, he had *also* (and simultaneously) determined *the Disputed Counterclaim* on *the Respondents' own case*.

94 We recognise that, on a strict and literal reading of the paras 5.3 to 5.5 of the award (reproduced above at [30]), the arbitrator appeared to have concluded that the Disputed Counterclaim did not arise solely because of his findings in relation to Issue #13 and Issue #14 (and not because of any allegations of defects in the goods). This was, in fact, the way in which the Judge construed the award and this was the construction which Mr Kumar had urged us to adopt.

95 In our view, the Judge's reading of the award can be attributed to her starting premise: that it was common ground that there were no allegations whatsoever of defectiveness in relation to the Group B Goods. However, as already explained in detail above, this premise was, with respect, erroneous. While it may be common ground before us (and the Judge) that there were no allegations whatsoever of defectiveness in relation to the Group B Goods this was, strictly speaking, irrelevant. As demonstrated above, it appeared to be common ground before the arbitrator that the issue of payment for the goods which were the subject of the Disputed Counterclaim (*ie*, the Group B Goods) were inextricably linked to the issues of responsibility for the *defectiveness* in the goods (in *general*).

96 In any event, this literal reading of the award is difficult to reconcile with the Judge's own observations (at [48] of the Judgment, and which were echoed in the Respondents' submissions before us). As the Judge pointed out, the manner in which the arbitrator had framed the issues suggests that he thought that the Respondents would not be entitled to the amounts counterclaimed (including the Disputed Counterclaim) if they were in *breach* of the BOA *and the LA*.

97 We would add that the arbitrator's decision that the Respondents had not made out their counterclaim for misrepresentation (Issue #12) (see above at [30]) *must have been relevant* to his conclusion that he did not have to consider the remedies for the counterclaims. This was the case, *notwithstanding* his failure to expressly state that Issue #16 was related to his conclusion on Issue #12. We therefore do not think that para 5.5.1 of the award (see above at [30]) should be read literally. Put simply, an award cannot be read like a statute; the ratio of the award ought to be distilled from a reading of the entire award and not of isolated parts. Although we acknowledge that para 5.5.1 could have been better phrased, the arbitrator could not, in our view, have meant that all of the counterclaims were determined based *solely* on his decision with regard to Issue #13 and Issue #14.

98 In the circumstances, there was plainly no breach of natural justice in this situation; nor can it be said that the arbitrator failed to apply his mind to the critical issues and arguments in the dispute. In the circumstances, we would allow the appeal.

In any event, there was no breach of natural justice even taking the Respondents' case at its highest

99 However, *assuming* (for the sake of argument) we take the Respondents' case at its highest and accept that (i) it was common ground before the arbitrator that the issue of defective goods was not linked to the issue of payment for the Group B Goods and (ii) that the arbitrator had in fact

determined that the Disputed Counterclaim did not arise because of his findings on Issue #13 and Issue #14, we are *still* of the view that the appeal ought nevertheless to succeed. Let us elaborate.

100 Based on his version of the parties' case before the arbitrator, Mr Kumar attempted to make out a case before us that the arbitrator had got the decision wrong and that the practical result of the arbitrator's decision was that the Appellants had managed to obtain the (non-defective) Group B Goods gratis, having taken delivery but not having paid for them. However, it will be recalled that we had observed above at [52] that this court can only interfere with the arbitral award if there has been *a denial of natural justice*. It bears repeating that this court cannot interfere if there has, instead, been an error (even a serious error) of law and/or fact on the part of the arbitrator. Put simply, the *substantive merits* of the arbitral award are *outside* the remit of this court.

101 Taking the Respondents' case at its highest, the arbitrator came to the conclusion that he did not have to address the substantive merits of the Disputed Counterclaim because he thought it was a relief sought pursuant to the Respondents' claims that the Appellants acted in a manner to frustrate the joint venture (Issue #13) and had acted in breach of certain (objectively unrelated) terms of the joint venture agreement (Issue #14). In other words, and as the Judge herself observed, it had slipped the arbitrator's notice that the Disputed Counterclaim was actually an independent and distinct claim that had to be dealt with independently of his findings on Issue #13 and Issue #14.

102 As we have already mentioned, we are of the view that the arbitrator had read and considered both parties' list of issues and so we do not accept the Respondents' case theory that the arbitrator had blindly adopted the Appellants' list of issues over the Respondents' list of issues. In such a situation, even if the arbitrator decided (erroneously) that the resolution of the issues as set out (only) in the Appellants' list of issues would resolve all disputes between the parties, the error alleged by the Respondents went merely to the *substantive merits* of the arbitrator's decision as it consisted in the arbitrator conflating issues of law and/or fact which he ought not to have done. Put simply, even taking the Respondents' case *at its highest*, the result is that the arbitrator had misunderstood the arguments presented to him and had erroneously assumed that the Disputed Counterclaim, as a remedy, arose out of a different and completely unrelated contractual right. Whilst this may be a serious error of law and/or fact, it does *not* follow that the Respondents' were denied natural justice.

Further observations

103 As mentioned above (at [5]), the Judgment raised some interesting questions in relation to the operation of Art 33(3) and the power of remission under Art 34(4). Both merit some brief consideration.

Art 33(3) of the Model Law

104 We had mentioned previously that the Judge suggested in her concluding remarks (at [103] of the Judgment) that this case would be the type of case that Art 33(3) of the Model Law was intended to provide redress for. Article 33(3) of the Model Law states, as follows:

> **Article 33. Correction and interpretation of award; additional award**
>
> ...
>
> (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but *omitted* from the award. If the

arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

[emphasis added]

105 The Judge observed that she hoped that parties in future cases of a similar nature would first attempt to avail themselves of any available opportunities to seek redress from the tribunal itself, before turning to the courts if it was possible in the circumstances. Three observations are apposite in this regard.

106 First, Art 33(3) is a non-mandatory provision *in the sense* that parties can agree between themselves that Art 33(3) does not apply to their arbitration. The Judge's observation was therefore only relevant to a situation where parties have not opted out of the application of Art 33(3).

107 Secondly, it is clear from the wording of Art 33(3) of the Model Law that the provision can only be invoked if the arbitrator *omitted* to make a determination on a claim which had been presented to it. Article 33(3) thus deals with a situation where the tribunal acted *infra petita* and did not entirely fulfil its mandate (see Dr Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd ed, 2010) at [6-112]).

108 However, even on the Judge's own analysis, the arbitrator had *not* entirely omitted to deal with the Disputed Counterclaim. Rather, in the Judge's view, this was a situation in which the arbitrator had breached the rules of natural justice by failing to consider the Respondents' case on the Disputed Counterclaim, such failure being most likely due to his extensive adoption of the Appellants' list of issues. As a result, the arbitrator *had determined* the Disputed Counterclaim, albeit without addressing its substantive merits after assuming (wrongly) that it was a relief sought pursuant to unrelated claims by the Respondents. In such a situation, it is, with respect, doubtful that Art 33(3) could have been invoked to cure the breach of natural justice.

109 Thirdly, assuming for the sake of argument that Art 33(3) could have been invoked, a further question arises. It is clear that the Model Law supports the principle of minimal curial intervention. To this end, as long as the parties do not agree otherwise, the Model Law provides *via* Art 33(3) a mechanism for a party to seek redress from the arbitrator first before turning to the courts when he believes that the arbitrator had omitted to deal with a stand-alone claim presented to him. In such circumstances, should a party be entitled to ignore Art 33(3) and instead apply to set aside the entire award under Art 34, knowing that the court may in appropriate circumstances fall back on its powers to remit part of the award back to the tribunal under Art 34(4) if it decides that setting aside the entire award is not the appropriate remedy?

110 On the one hand, it is arguable that a party ought to be penalised if he does not invoke Art 33(3) before invoking Art 34 (assuming that the relevant circumstances permitted recourse to Art 33(3)). If not, Art 33(3) would be rendered toothless and moribund as there is simply no incentive for a disgruntled party to invoke it. If a party is not penalised for relying on Art 34 without first invoking Art 33(3), this could potentially be seen as an abuse of the setting aside process under Art 34 of the Model Law, particularly in situations where the party is alleging that the tribunal had failed to deal with a relatively minor claim in the light of that party's entire claim.

111 The present case itself illustrates, in stark relief, this point. The Respondents' entire counterclaim was valued at approximately RM220 million. The Respondents then attempted to set aside the *entire* award on the basis that the arbitrator failed to consider a counterclaim of about RM6 million, which was *less than 3%* of the total amount claimed. In fact, it was only during oral

submissions before the Judge that the Respondents conceded that the Judge could set aside only the part of the award which dealt with the Disputed Counterclaim (presumably under Art 34(4) of the Model Law (which we will address in a moment)).

112 To this end, Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009), suggest (at p 64) that:

> … there is a provision in Model Law, art. 33(3), for an application to the arbitrators to make an additional award on claims presented to them but omitted from the award, and if no such application is made then the court might refuse to lend its assistance [by setting aside the award] on the basis of the waiver principle. …

113 In fact, this is the position under the English Arbitration Act 1996 (c 23) (UK) ("1996 UK Act"). Under s 57 of the 1996 UK Act, which is similar to Art 33(3) of the Model Law, in the absence of any agreement to the contrary, an English tribunal can make an additional award in respect of a claim presented to it but which was not dealt with in the award. Further, an English award can be set aside under s 68 of the 1996 UK Act on grounds similar to those set out in Art 34 of the Model Law. However, s 70(2) of the 1996 UK Act expressly states that an application to set aside an award under s 68 of the 1996 UK Act may not be brought if the applicant has not first exhausted the recourse under s 57. This is the case even if the applicant might think that the award is unsalvageable (see the English High Court decision of *Sinclair v Woods of Winchester Ltd and another* [2005] EWHC 1631 (QB) at [38]). We would observe that even though there is no equivalent of s 70(2) of the 1996 UK Act in the Model Law, the premise behind s 70(2) of the 1996 UK Act is consistent with the principle of minimal curial intervention which has been endorsed by our courts.

114 On the other hand, we recognise that Art 33(3) merely states that a party "may request" the tribunal to make an additional award for claims presented to it but which were omitted from the award. In other words, based on the literal language of Art 33(3) itself, it could be argued that a party is not *obliged* to invoke it.

115 Further, the drafters of the Model Law appeared to have envisaged that remission under Art 34(4) of the Model Law (set out below at [118]) provided an alternative means from Art 33(3) of avoiding the setting aside of the entire award when the tribunal omitted to deal with points which could be separated from points already dealt with in the award (see Fourth Secretariat Note in Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation, 1994) at p 897).

116 It is possible to reconcile these two seemingly opposed positions (set out above at [110]–[113] and [114]–[115], respectively) by recognising that whilst a party is not obliged to invoke Art 33(3), he takes the risk that the court would not, in a setting aside application, exercise its discretion to set aside any part of the award or invoke the powers of remission under Art 34(4) of the Model Law. However, as this question was not before this court and we did not have the benefit of parties' argument on this, this question will have to be definitively resolved on a future occasion when it is necessary to do so.

117 Before leaving this last mentioned point, we should mention that we asked Mr Kumar in oral submissions why the Respondents did not invoke Art 33(3) in the present proceedings, especially since the Respondents took the position that *all* the evidence was already before the arbitrator and it was simply a question of reading the submissions and making a decision on whether the quantum of the Disputed Counterclaim was proven. To be fair to Mr Kumar, this was not an objection raised by

the Appellants and we thus appreciate that he was dealing with this point *ex tempore*. In future cases, however, the applicant's reasons for failing to resort to Art 33(3) (where applicable) might have an impact upon whether the courts will exercise its discretion to set aside an award under Art 34 of the Model Law.

Art 34(4) of the Model Law

118 Finally, we turn briefly to the Judge's holding at [101] of the Judgment that it was "appropriate to remit the Disputed Counterclaim for the [receivables] and costs thereof to a new tribunal (which is to be constituted) for determination". Although the Judge did not state the legal basis of her power to do so, the only explicable basis was Art 34(4) of the Model Law, which states as follows:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give *the arbitral tribunal* an opportunity to *resume the arbitral proceedings* or to *take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside*. [emphasis added]

119 In our view, even assuming that the case was an appropriate one for remission because it concerned a stand-alone issue, the clear language of Art 34(4) does not, with respect, permit the remission of the award (without more) to a newly constituted tribunal. It has been observed in Blackaby *et al*, *Redfern and Hunter on International Arbitration*, (OUP, 5th ed, 2009) (at [10.34]) that Art 34(4) is in fact "an equivalent provision to that of remitting the award to the tribunal for *reconsideration*" [emphasis added]. That the matter must be remitted to the same tribunal is also supported by Art 32(3) of the Model Law which provides that the mandate of an arbitral tribunal terminates, *inter alia*, on the issuance of the final award, subject only to the provision of Art 33 *and Art 34(4)*.

120 We would thus respectfully disagree with the Judge to the extent that she had assumed that the court had the power to remit part of an award back to a *new tribunal* without more. Although the issue was not strictly before us, it was arguable that if the arbitrator had indeed failed to consider and determine the Disputed Counterclaim because of a pure oversight, then one course of action open to the Judge would have been to remit the award back to the arbitrator under Art 34(4). If this was done, then assuming the Respondents were not planning to challenge the arbitrator's ability to determine the Disputed Counterclaim (and we see no obvious reason why they would), it was only if the arbitrator himself decided to withdraw (for example, because he felt that it was improper or impossible for him to continue to sit as the arbitrator) that the parties would need to appoint a substitute arbitrator in accordance with the relevant provisions of the Model Law and the applicable procedural rules.

Conclusion

121 For the reasons set out above, we allow the appeal with costs. The usual consequential orders will follow.

Copyright © Government of Singapore.