L W Infrastructure Pte Ltd *v* Lim Chin San Contractors Pte Ltd
[2013] SGHC 264

Case Number : Originating Summons No 29 of 2013

Decision Date : 29 November 2013

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Tan Liam Beng, Soh Chun York and Eng Cia Ai (Drew & Napier LLC) for the plaintiff; Chia Swee Chye (Samuel Seow Law Corporation) for the defendant.

Parties : L W Infrastructure Pte Ltd — Lim Chin San Contractors Pte Ltd

Arbitration – Award

29 November 2013 Judgment reserved.

Belinda Ang Saw Ean J:

Introduction

1 This is the latest instalment in a long-running dispute between a main contractor and its sub-contractor in relation to the construction of an industrial building at 31 Toh Guan Road East ("the Project"). The present application *vide* Originating Summons No 29 of 2013 ("OS 29/2013") raises interesting questions about the point or stage at which an arbitral tribunal becomes *functus officio* or ceases to have jurisdiction in an arbitration. The thrust of the present debate relates to what happens to the arbitration after an arbitral award has been set aside.

2 OS 29/2013 was filed after the Court of Appeal affirmed the setting aside of an additional award for pre-award interest ("the Additional Award") issued by a sole arbitrator ("the Tribunal") pursuant to s 43(4) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") on the ground that it had been made in breach of the rules of natural justice, the Tribunal having failed to give the unsuccessful party an opportunity to reply or make submissions on the issue. Full reasons for the setting aside of the Additional Award are reported in the decision of the Court of Appeal in *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2013] 1 SLR 125 ("*L W Infrastructure CA*").

3 In bringing OS 29/2013 for, *inter alia*, the determination of three questions of law, the plaintiff, L W Infrastructure Pte Ltd ("LWI"), essentially seeks a declaration that the Tribunal retains jurisdiction to issue yet another additional award for pre-award interest under s 43(4) of the Act following the setting aside of the Additional Award. This application followed the Tribunal's refusal to issue such an award on the basis that it had no power to do so, having become *functus officio* upon the issuance of the Additional Award.

4 LWI's present application is brought under s 45 of the Act. Subsequently, two other provisions, namely s 36 and s 21(9) of the Act, were introduced. The defendant, Lim Chin San Contractors Pte Ltd ("LCSC"), opposes this application in its entirety. LCSC's position is that LWI's application is fundamentally misconceived as none of the statutory provisions apply to this case.

Background to OS 29/2013

Events leading up to the setting aside of the Additional Award.

5 LWI, the main contractor for the Project, appointed LCSC as its sub-contractor under a sub-contract which contained an arbitration clause. Subsequently, various disputes arising out of the sub-contract were referred to arbitration. On 29 June 2010, the Tribunal rendered an award ("the Final Award") in which LWI was awarded the sum of $341,391.10 "with simple interest at the rate of 5.33% p.a. from the date of this Award". On 15 July 2010, a supplementary award was issued to correct certain typographical errors in the Final Award.

6 Being dissatisfied with the Tribunal's decision, LWI filed an appeal on various questions of law by way of Originating Summons No 759 of 2010 ("OS 759/2010"). LCSC filed a cross-appeal by way of Originating Summons No 769 of 2010. On 5 July 2011, the High Court dismissed LCSC's appeal and substantially allowed LWI's appeal. On 21 September 2011, following the Orders of Court handed down by the High Court, the Tribunal rendered another supplementary award ("the Supplementary Award"), in which LWI was awarded the sum of $603,608.90 with "simple interest at the rate of 5.33% p.a. on the sum of S$603,608.90 from the date of this Supplementary Award" (*ie*, post-award interest).

7 After reviewing the Supplementary Award, LWI was of the view that the Tribunal had omitted to award pre-award interest on the sum, and requested the Tribunal to grant an additional award for pre-award interest by way of a written request dated 17 October 2011 ("the First Request"). Three days passed. The other party, LCSC, did not respond to the request. On 20 October 2011, the Tribunal then rendered the Additional Award providing for pre-award interest in favour of LWI.

8 Subsequently, LCSC successfully applied to the High Court under Originating Summons No 988 of 2011 ("OS 988/2011") to set aside the Additional Award on the ground that it had been made in breach of the rules of natural justice. The High Court however declined to declare the Additional Award a nullity on the basis that the court did not have an inherent or residual discretion to make a declaration as to the validity of an arbitral award outside the express statutory grounds for setting aside.

9 LWI appealed the decision to set aside the Additional Award and LCSC cross-appealed against the decision not to declare the Additional Award a nullity. On 18 October 2012, in *L W Infrastructure CA*, the Court of Appeal upheld the High Court's decision to set aside the Additional Award as well as not to declare the Additional Award a nullity. The Court of Appeal in *L W Infrastructure CA* declined to remit the matter to the Tribunal, stating as follows (at [93]):

> By reason of the matters aforesaid, we affirm the decision of the Judge setting aside the Additional Award. In the course of the arguments, we invited submissions on whether and if so what consequential orders we should make in this event. Counsel for the parties had different views. Mr Tan for [LWI] suggested that the proper course would be for us to remit the matter to the Arbitrator. Mr Chia Swee Chye Kelvin ("Mr Chia") for [LCSC] did not agree that this would be appropriate in the circumstances. Mr Chia contended that (a) it was doubtful whether the court had a power to remit at all in such circumstances; (b) the only relief sought was for the Additional Award to be set aside and once that was done, it was up to [LWI] to attempt to revive its application, and if they did so, [LCSC] would contend that this was impermissible because it would fall outside the statutory time limits provided in the Act for an application to be made under s 43(4) of the Act; and (c) even if these hurdles could be overcome, [LCSC] might have objections to the matter being returned to the Arbitrator in all the circumstances. ***These points were not fully argued before us. Furthermore, the only issue before us was whether the order setting aside the Additional Award should be affirmed. Accordingly, we***

confine ourselves to this and make no special consequential orders. [emphasis added]

Events after the setting aside of the Additional Award

10 Taking the position that the setting aside of the Additional Award returned the arbitral proceedings to the state that existed up to the moment immediately preceding the making of the Additional Award and by way of a letter dated 31 October 2012 ("the Revival Request"), LWI wrote to the Tribunal reiterating its request made on 17 October 2011 for an additional award of pre-award interest to be issued. The parties exchanged several rounds of submissions in the form of letters.

11 LCSC marshalled the points foreshadowed in *L W Infrastructure CA* at [93] (extracted above at [9]) to oppose first LWI's Revival Request and thereafter OS 29/2013. Its main contention was that the Tribunal was *functus officio* as the time for making the additional award had expired. LCSC pointed out that under s 43(5) of the Act, the Tribunal was required to issue an additional award within 60 days of LWI's request. According to LCSC, after these 60 days had elapsed (on 16 December 2011), the Tribunal was *functus officio* with the result that he could no longer issue an additional award, nor extend the 60 day period pursuant to s 43(6) of the Act.

12 On 14 December 2012, the Tribunal wrote to the parties stating that: (a) the setting aside of the Additional Award did not revive his jurisdiction; and (b) in any case, the last day for him to make an additional award was 16 December 2011, 60 days after his receipt of the First Request (*ie*, 17 October 2011). The pertinent extracts of the Tribunal's letter dated 14 December 2012 are as follows:

> 15. … I am of the view that upon setting aside of the Additional Award, and in the absence of the parties' agreement or an express order from the Court to revive my jurisdiction, I am *functus officio*.
>
> 16. Even if I am wrong and my jurisdiction survives the setting aside, s 43(5) of [the Act] obliges me to make the additional award within 60 days of the receipt of such request. As the request for the Additional Award was received on 17 October 2011, unless extended pursuant to s 43(6), the last day to make the additional award was 16 December 2011. Upon the expiry of date for making the additional award, I am *functus officio*.

The Tribunal also declined, on the same basis, LWI's application for an extension of the time to issue an additional award:

> 17. Although s 43(6) permits an arbitrator to extend time within which to make the additional award, in my view this must be done before the expiry of the 60 day [sic] provided in s 43(5). Once the 60 day time limit has lapsed, the arbitrator is *functus officio* and would have no power to extend his own jurisdiction.

The present application

13 Disagreeing with the Tribunal's view, LWI brought the present application in OS 29/2013. LWI's original application proceeded on two bases:

> (a) LWI applied for this court's determination of three questions of law under s 45 of the Act, *viz*:
>
> > (i) whether, upon the setting aside of the Additional Award, the proceedings are returned to the state that existed up to the moment immediately preceding the making of

the Additional Award, with the result that the Tribunal remains seized of the reference;

(ii) whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to issue an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request; and

(iii) whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to extend time for the purposes of issuing an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request.

(b) Further and/or alternatively, LWI applied for the time allowed for the Tribunal's issuance of the additional award pursuant to the First Request to be extended for such period of time as this court deems fit pursuant to s 36 of the Act.

14 The aforesaid application was heard by this court on 16 April 2013, after which I reserved judgment. On 18 April 2013, LWI filed Summons No 2051 of 2013 ("SUM 2051/2013") for "leave to amend the title of these proceedings, as stated in OS 29/2013" in order to introduce another basis for its application, *viz*, s 21(9) of the Act. SUM 2051/2013 was heard on 26 July 2013. LWI's explanation for seeking the amendment was that it had always been its intention to rely on s 21(9) of the Act in OS 29/2013, and that the original reference to s 29 in the heading of OS 29/2013 was a typographical error. I allowed LWI's application to amend in SUM 2051/2013, leaving LCSC's submissions on the relevance and merits of s 21(9) to be considered as part of its substantive objections to OS 29/2013.

The issues

15 The issues which arise for this court's determination in OS 29/2013 may be summarised as follows:

(a) whether LWI is entitled to apply under s 45 of the Act for the court to determine questions of law arising in the course of the reference ("the Threshold Issue");

(b) if the Threshold Issue is answered in the affirmative:

(i) whether, upon the setting aside of the Additional Award, the proceedings are returned to the state that existed up to the moment immediately preceding the making of the Additional Award, with the result that the Tribunal remains seized of the reference ("Issue 1(a)");

(ii) whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to issue an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request ("Issue 1(b)"); and

(iii) whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to extend time for the purposes of issuing an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request ("Issue 1(c)");

(c) whether the time allowed for the Tribunal's issuance of an additional award pursuant to the First Request ought to be extended under s 36 of the Act ("Issue 2"); and

(d) whether LWI was entitled to apply to the Court under s 21(9) of the Act to decide on a plea as a preliminary issue that the Tribunal has jurisdiction ("Issue 3").

Threshold Issue: applicability of s 45 of the Act

16 The relevant provisions of s 45 of the Act, which governs the determination of preliminary points of law, are as follows:

> **45**.—(1) Unless otherwise agreed by the parties, the Court may, on the application of a party to the arbitral proceedings who has given notice to the other parties, determine any question of law arising in the course of the proceedings which the Court is satisfied substantially affects the rights of one or more of the parties.
>
> (2) The Court shall not consider an application under this section unless —
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> (*a*) it is made with the agreement of all parties to the proceedings; or
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> (*b*) it is made with the permission of the arbitral tribunal and the Court is satisfied that —
>
> (i) the determination of the question is likely to produce substantial savings in costs; and
>
> (ii) the application is made without delay.
>
> …

17 LWI's position is that its application is premised on the parties' purported agreement, in the arbitration clause, "that either party may apply to the High Court to determine any question of law arising in the course of the reference". The relevant clause is Art 5.5 of the articles of agreement between LWI and LCSC ("the Articles of Agreement") which states:

> The parties hereby agree and consent that pursuant to sections 28 and 29 of the Arbitration Act (Cap 10, 1985 Ed), that either party
>
> may appeal to the High Court on any question of law arising out of an award made in an arbitration under this Arbitration Agreement ["the First Limb"] and
>
> may apply to the High Court to determine any question of law arising in the course of the reference ["the Second Limb"]
>
> and the parties agree that the High Court shall have jurisdiction to determine any question of law

Sections 28 and 29 of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the Old Act"), which were referred to in Art 5.5, are the predecessors of ss 45 and 49 of the Act.

18 As noted by LCSC, LWI's application cannot be based on the First Limb of Art 5.5 as:

(a) OS 29/2013 was expressly made pursuant to s 45 of the Act and not s 49 thereof (which deals with appeals against an award); and

(b) the Tribunal's decision that he is *functus officio* is not an award for the purposes of the Act: see *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [66] for

the proposition that the definition of "award" in the Act does not include a negative determination of jurisdiction as it is not a decision on the substance of the dispute.

19 I agree with LCSC that the First Limb is not applicable. As regards LCSC's objection (b) in the preceding paragraph, the Tribunal's opinion that it was *functus officio* was not an award within the meaning of s 2 of the Act (see [31] below for the relevant extract of s 2). In relation to the Second Limb and s 45 of the Act, LCSC raised three threshold objections:

(a) that the questions of law did not arise "in the course of the [arbitral] proceedings" (in the words of s 45(1) of the Act) or "in the course of the reference" (in the words of Art 5.5 of the Articles of Agreement and s 29(1) of the Old Act) ("the First Threshold Objection");

(b) that the said application under s 45 of the Act was filed out of time under O 69, r 4 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Second Threshold Objection"); and

(c) that LWI is abusing the s 45 process in bringing the said application ("the Third Threshold Objection").

20 In my view, the Second and Third Threshold Questions are of secondary importance. Of greater interest and significance is LCSC's First Threshold Objection, *viz*, that the questions of law posed by LWI did not arise "in the course of the [arbitral] proceedings" (in the words of s 45(1) of the Act) or "in the course of the reference" (in the words of Art 5.5 of the Articles of Agreement and s 29(1) of the Old Act).

21 I propose to address the First Threshold Objection in some detail since the issue of whether the questions of law as formulated by LWI arose "in the course of the [arbitral] proceedings" (in the words of s 45(1) of the Act) is inextricably intertwined with the central question of what happens to the arbitral proceedings after the setting aside of an award. This in turn involves consideration of the broad and interlinked doctrines of *res judicata* and *functus officio*. A resolution of these related and overlapping matters will resolve OS 29/2013.

The First Threshold Objection

22 LCSC argued that the questions of law framed by LWI in OS 29/2013 were in fact extraneous to the entire arbitration for the following reasons:

(a) Having made the Supplementary Award on 21 September 2011 which dealt with all the substantive issues and claims, the Tribunal became *functus officio* as it is trite law that a Tribunal "becomes *functus officio* upon making the final award": para 20.116 of *Halsbury's Laws of Singapore* vol 1(2) (LexisNexis, 2011 Reissue) ("*Halsbury's*") at p 134.

(b) It is provided in s 44(2) of the Act that "[e]xcept as provided in section 43, upon any award being made, including an award made in accordance with section 33, the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award."

(c) Section 43(5) of the Act expressly provides that any additional award shall be made "within 60 days of the receipt of such request [for an additional award]". There is no dispute that 60 days from the First Request is 16 December 2011.

(d) Whilst the 60 day period within which to issue an additional award may be extended by the Tribunal under s 43(6) of the Act, this power was never invoked by either party before the expiry

of the time limit on 16 December 2011. Accordingly, the deadline for any additional award to be made by the Tribunal remained at 16 December 2011.

(e) Upon the expiry of the deadline of 16 December 2011, the Tribunal became *functus officio*, if he was not already *functus* on 21 September 2011.

(f) The alleged questions of law having arisen only on 14 December 2012, nearly one year after the above deadline of 16 December 2011, it cannot be said that the said issues arose "in the course of the [arbitral] proceedings" or "in the course of the reference". Those questions, therefore, cannot be the subject of an application under s 45 of the Act.

23 I preface my analysis with a few preliminary observations. It is not all that clear, notwithstanding LWI's choice of the word "revive" (in relation to the Tribunal's jurisdiction), that it has accepted the general proposition that the Tribunal became *functus officio* after the Additional Award was issued. Indeed, it is well accepted that where there has been a breach of the rules of natural justice on the part of an arbitral tribunal in the course of making an award, the tribunal retains no jurisdiction to repair that breach: see, generally, *Five Ocean Salvage Ltd v Wenzhou Timber Group* [2012] 1 Lloyd's Rep 289 ("*Five Oceans*"). The only recourse in respect of such a breach is an application to set aside the arbitral award (as was the case in the proceedings culminating in *L W Infrastructure CA*).

24 It must be borne in mind that the Court of Appeal in *L W Infrastructure CA* chose to set aside the Additional Award but did not make any consequential orders (see above at [9]). Remittance was not in fact a relief sought at the outset by LWI in its appeal. The question which now arises is what happens to the arbitration after an award has been set aside (as opposed to being set aside *and* remitted to the arbitral tribunal for reconsideration). I note that the court's jurisdiction in the first place to remit (whether under the Act or under its inherent jurisdiction) is not a matter which is before me in this case. It is plain that this matter ought to be left to a more appropriate forum to be considered.

25 The effect on an arbitral award of an order for setting aside is clear – the award in question has no legal effect on the parties to the arbitration. It is, however, less clear what happens to the arbitral *proceedings* after the award has been set aside. LWI argues that the consequence should be that the arbitration reverts to the state that existed up to the moment immediately preceding the issuance of the said award. LCSC advanced the converse position, arguing that the tribunal would be *functus officio* and would not be able to resume jurisdiction over the matters dealt with in the award unless those matters were remitted to the tribunal for reconsideration. The pivotal issue, therefore, is the effect of a setting aside of the award on the tribunal's jurisdiction to deal with the matters covered in the award.

26 In my view, LCSC's argument relating to the expiry of the time limit of 60 days to issue an additional award under s 43(5) is of considerably less significance. If in fact the Tribunal was *functus officio* after issuing the Additional Award and his jurisdiction was not "revived" when the Additional Award was set aside, the issue of the time limit would be moot (as the Tribunal would not have jurisdiction to deal with the matter in the first place). Given the potential conclusion reached in relation to the First Threshold Objection that there is no automatic "revival" of the Tribunal's jurisdiction following the setting aside of the Additional Award, the issue of the time limit would also be moot.

27 In light of this, the real issue on the facts is whether the Tribunal's jurisdiction to deal with the issue of pre-award interest expired after he dealt with it in the Additional Award (thereby bringing an

end to the arbitral proceedings), or whether his jurisdiction was in fact resumed or "revived" when the Additional Award was set aside. I will consider this issue in detail following an overview of the *functus officio* doctrine in both the historical context and the present legislative regime. Given the dearth of local case law on the issue of what happens to the arbitration after an arbitral award has been set aside, I have attempted to approach this matter from first principles and with the assistance of case law from other jurisdictions.

Functus officio in arbitration

28 The expression "*functus officio*" is Latin for "a task performed" and, in the arbitral context, "describes or implies the point at which an arbitrator has exhausted or concluded all that he or she had jurisdiction to deal with": *Martin Dawes v Treasures & Son Ltd* [2011] 2 All ER (Comm) 569 ("*Dawes*") at [27], *per* Akenhead J. In a similar vein, Andrew Ang J noted in *Anwar Siraj and another v Teo Hee Lai Building Construction Pte Ltd* [2007] 2 SLR(R) 500 at [45] that the arbitral proceedings are concluded when an award is made and published (*ie*, when the arbitral tribunal gives notice to the parties that the award is ready for collection). Thereafter, the tribunal is *functus officio*.

29 Historically, an arbitral tribunal lost its capacity to act after it had rendered its final award. In the terminology used in common law jurisdictions, the tribunal became "*functus officio*" – it had completed its mandate by making an award with *res judicata* effect. The *functus officio* doctrine is a time-honoured one, and is one of the methods by which the law gives practical effect to the principle of finality. Another is the *res judicata* doctrine, which provides that once a decision has been given in respect of a dispute, the parties are bound by that decision and cannot re-litigate the same dispute.

30 Notwithstanding its long history, the *functus officio* doctrine has not been exempt from criticism, particularly for its rigidity and potential harshness in application. In the words of Posner J of the US Court of Appeals (Seventh Circuit) in *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, AFL-CIO, CLC, Local 182B v Excelsior Foundry Co*, 56 F 3d 844 (7th Cir 1995) at 846:

> The doctrine [of *functus officio*] originated in the bad old days when judges were hostile to arbitration and ingenious in hamstringing it. … Today, riddled with exceptions, it is hanging on by its fingernails … The doctrine is based on the analogy of a judge who resigns from his office and, having done so, naturally cannot rule on a request to reconsider or amend his decision. … The flaw in the analogy is that the judge's resignation does not deprive litigants of an opportunity to seek reconsideration of his decisions. Motions to reconsider are simply redirected to another judge. If the "resignation" of the arbitrator from the case, in accordance with the doctrine of functus officio, disables him from considering a motion for reconsideration, clarification, amendment, or other modification, there is nobody to whom the parties can turn. The result would be a gap in the system of arbitral justice that would make very little sense that we can see.

31 In the Singapore context, the Act and the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") expressly encapsulate the *functus officio* doctrine, whilst concurrently mitigating its potential severity by prescribing exceptional circumstances in which a tribunal may exercise authority after making a final award. The legislative starting point of our enquiry is s 44 of the Act, which provides that an arbitral award under the Act shall be final and binding on the parties and on any person claiming through the parties or under them:

> **Effect of award**
>
> **44**.—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement shall be

final and binding on the parties and on any person claiming through or under them and may be relied upon 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 section 43, upon an award being made, including an award made in accordance with section 33, *the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award*.

…

[emphasis added]

In s 2(1) of the Act, "award" is defined as follows:

'award' means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award.

Section 33 of the Act further empowers an arbitral tribunal to make more than one award on various substantive matters at different points of time during the proceedings:

33.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may make more than one award at different points in time during the proceedings on different aspects of the matters to be determined.

(2) The arbitral tribunal may, in particular, make an award relating to —

(*a*) an issue affecting the whole claim; or

(*b*) a part only of the claim, counter-claim or cross-claim, which is submitted to the tribunal for decision.

(3) If the arbitral tribunal makes an award under this section, it shall specify in its award, the issue, or claim or part of a claim, which is the subject-matter of the award.

…

32 As a general proposition, once an arbitral tribunal issues a final award (including as to costs), the tribunal is rendered *functus officio* and cannot review the issues decided in the award. Likewise, where an arbitral tribunal issues an award in relation to certain limited substantive issues, the issues determined by that award are finally disposed of, and neither the tribunal nor the parties can reopen the issues decided in the award. The latter concept has often been described as "partial" *functus officio*. In the latter respect, with the introduction in 2001 of s 44(1) of the Act (cited above at [31]) and its legislative counterpart, s 19(B)(1) of the IAA, all arbitral awards, including interim awards, are "final and binding" on the parties.

33 As noted above (at [31]), there are certain exceptions to the general principle of *functus officio*. In this respect, the exceptions in s 43 of the Act provide as follows:

43.—(1) A party may, within 30 days of the receipt of the award, unless another period of time has been agreed upon by the parties —

(*a*) upon notice to the other parties, request the arbitral tribunal to correct in the award

any error in computation, any clerical or typographical error, or other error of similar nature; and

(*b*) upon notice to the other parties, request the arbitral tribunal to give an interpretation of a specific point or part of the award, if such request is also agreed to by the other parties.

(2) If the arbitral tribunal considers the request in subsection (1) to be justified, the tribunal shall make such correction or give such interpretation within 30 days of the receipt of the request and such interpretation shall form part of the award.

(3) The arbitral tribunal may correct any error of the type referred to in subsection (1)(*a*) or give an interpretation referred to in subsection (1)(*b*), on its own initiative, within 30 days of the date of the award.

(4) ***Unless otherwise agreed by the parties, a party may, within 30 days of receipt of the award and upon notice to the other party, request the arbitral tribunal to make an additional award as to claims presented during the arbitral proceedings but omitted from the award.***

(5) ***If the arbitral tribunal considers the request in subsection (4) to be justified, the tribunal shall make the additional award within 60 days of the receipt of such request.***

(6) The arbitral tribunal may, if necessary, extend the period of time within which it shall make a correction, interpretation or an additional award under this section.

…

[emphasis added]

Therefore, notwithstanding the general position that an arbitral tribunal is *functus officio* in respect of issues determined in an award, ss 43(4), 43(5) and 43(6) of the Act nevertheless *retain jurisdiction* for the tribunal to issue an additional award as to claims presented during the arbitral proceedings and purported to be covered by the award but omitted for some reason from the actual award.

34 In the context of an application for the setting aside, s 48(3) of the Act also allows for the revival (so to speak) of the arbitral tribunal's jurisdiction where the court suspends proceedings for setting aside an award in order to allow the tribunal to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside an award:

48. …

(3) When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period of time as it may determine, to allow the arbitral tribunal to resume the arbitral proceedings or take such other action as may eliminate the grounds for setting aside an award.

Similarly, on appeal to the court on a question of law arising out of an award, the court may remit the award to the arbitral tribunal under s 49(8)(*c*) of the Act, in whole or in part, thereby also "reviving" the tribunal's jurisdiction to deal with the remitted matters. As the English High Court observed in

Dawes (at [27]), "the final and last award in any given arbitration will usually signal the point [at which the arbitrator ceases to have any jurisdiction], *although it can be revived if an award is remitted to the arbitrator*" [emphasis added].

35 In summary, therefore, a tribunal is generally *functus officio* in respect of the issues covered in an arbitral award, subject only to the operation of the "exceptions" embodied in ss 43(4), 43(5) and 43(6) of the Act and the extent to which the tribunal's jurisdiction is revived by court order. It is this last-mentioned "exception" which forms the crux of the present dispute.

The effect of an order for setting aside

36 LWI's solicitors submitted, citing the English Court of Appeal authority of *Hussmann (Europe) Ltd v Pharaon (formerly trading as Al Ameen Development & Trade Establishment)* [2003] EWCA Civ 266 ("*Hussmann v Pharaon*") that "[f]ollowing the setting aside of an arbitral award, the proceedings return to the state that existed up to the moment immediately preceding the making of the award. The tribunal's jurisdiction is revived." LWI cited the following passage from *Hussmann v Pharaon* (*per* Rix LJ) in support for this proposition:

> 79 … Both *Mustill and Boyd, The Law and Practice of Commercial Arbitration in England*, 2nd ed, 1989, and *Thomas, Appeals from Arbitration Awards* (1994) ***contemplate that in principle a setting aside means that the arbitration reverts to the position it was in before the Tribunal published his award so that the Tribunal is not functus officio ; but both also seem to allow that there is some authority to suggest that the setting aside of an award may bring the Tribunal's jurisdiction to an end*** . Thus *Mustill and Boyd* at 565 say:
>
> > 'As regards setting-aside, it is clear that the effect of an order is to deprive the award of all legal effect, so that the position is the same as if the award had never been made. It is much less clear what happens to the arbitration after the award has been set aside. Logically, the consequence should be that the arbitration reverts to the position in which it stood immediately before the Tribunal published his award; i.e. that he is not yet functus officio and remains seized of the reference …
> >
> > Another possible view is that the setting-aside of the award frustrates the entire arbitral process, and that the dispute falls back on the inherent jurisdiction of the Court. This proposition is not theoretically sound …
> >
> > It appears that so far as the courts have given any consideration to the consequences of setting aside, they have assumed that the Order not only annuls the award, but also desseizes the Tribunal of the reference, so that the whole of the arbitral process has to be recommenced. The dispute is, however, still susceptible of arbitration, albeit with a freshly constituted tribunal …'
>
> 8 0 *Thomas* at 8.11.2–4 is to similar effect. Both text-books refer to Stockport Metropolitan Borough Council v O'Reilly [1983] 2 Ll Rep 70, but in our judgment this decision is not inconsistent with the logical principle preferred by the authors of those text-books.
>
> [emphasis added in bold italics]

LWI also cited *Halsbury's* vol 1(2) at para 20.116, footnote 6, which stated that "[w]here an invalid award is set aside or declared to be of no effect, the jurisdiction of the tribunal is not exhausted with the effect that the tribunal is allowed to make a further award: [*Hussmann v Pharaon*]."

37 Before commencing an analysis of *Hussmann v Pharaon* and the principles propounded in it, I think it helpful to consider the somewhat analogous situation where a court orders the remittance of certain issues to the arbitral tribunal for reconsideration.

The effect of an order for remitter

38 In *Alvaro v Temple* [2009] WASC 205 at [68] ("*Alvaro v Temple*"), the Supreme Court of Western Australia cited the English Court of Appeal case of *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") (No 1)* [1985] 2 Lloyd's Rep 410 ("*Vimeira (No 1)*") for the proposition that an order for remitter revives the jurisdiction of the original tribunal to the extent that the order, on its proper construction, so provides. The facts of *Vimeira (No 1)* are instructive.

39 The saga involved a ship damaged on entering the port of Ghent. The shipowners initially commenced arbitral proceedings against the charterers for damage suffered by the ship when entering the dock pursuant to the orders of the charterers. The arbitral tribunal issued an interim order holding the charterers liable to the owners. In *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira")* [1984] 2 Lloyd's Rep 66 ("*Vimeira*"), the court ordered the award to be remitted to the tribunal for consideration on the ground that the tribunal had made its decision on the basis of an issue (*viz*, that of the alleged tightness of the turning circle at the entrance to the dock) which had not been raised in the arbitration. The court ordered that the award be remitted for reconsideration in light of the court's judgment and on the basis of the issues as they stood at the end of the arbitration. Those issues did not include the issue regarding the turning circle, but it was expressly stated in the court's judgment that it would be open to the owners to apply to the tribunal for leave to amend their points of claim to raise that issue. Before the tribunal the second time, the owners did not seek to raise the issue of the turning circle, but sought leave to amend their pleadings to raise yet another issue (*viz*, the presence of submerged concrete blocks in the vicinity of the dock). The issue of the tribunal's jurisdiction to hear this issue was disputed and the matter came before the court again in *Vimeira (No 1)*. The court held (at 411) that:

> … the arbitration tribunal becomes functus officio upon the making of the award; and ***the effect of … remission is to revive their jurisdiction. But their jurisdiction is, in our judgment, not necessarily revived in its entirety. The extent to which it is revived will depend upon the order of the Court.*** Where, for example, an award is remitted to an arbitrator to reconsider one of the matters referred, the Court may, by its order for remission, expressly or impliedly restrict the revival of the arbitrator's jurisdiction … in respect of that particular matter. Likewise, where an award is remitted for the arbitrator to reconsider a particular aspect of a matter referred, then the Court may, expressly or impliedly, restrict the revival of the arbitrator's jurisdiction to the reconsideration of that particular aspect. So, for example, where an award is remitted for an arbitrator to correct an admitted mistake in his award, his jurisdiction will generally only be revived so far as is necessary for him to make that correction, but no more. [emphasis added]

On the facts, the court found that the jurisdiction of the tribunal was revived only to the extent necessary to enable it to proceed to the making of its interim award on the issues raised before it, subject to one exception, that it had jurisdiction to entertain an application by the owners for leave to amend their pleadings to include the issue of the turning circle, and, if leave to amend were granted, to hear and determine that issue. Only to that extent was the tribunal's jurisdiction revived.

40 The owners subsequently applied to the court for a wider remission to enable it to raise the issue of the submerged concrete blocks, but the application was refused (in *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") (No 2)* [1985] 2 Lloyd's Rep 377 ("*Vimeira (No 2)*")). Back before the tribunal again, the owners proposed an amendment with a passing connection with the issue of the

turning circle. On yet further application to the court, it was said that the amendment would raise a new case and was outside the tribunal's jurisdiction. The court agreed that the tribunal had no jurisdiction to allow the amendment (in *Interbulk Ltd v Aiden Shipping Co Ltd (The "Vimeira") (No 3)* [1986] 2 Lloyd's Rep 75 ("*Vimeira (No 3)*")).

41 The Supreme Court of New South Wales in *Mark Blake Builder Pty Ltd v Davis* (unreported) (NSW 9403294) ("*Mark Blake v Davis*") discussed the consequences of setting aside *and* remission in light of the *Vimeira* saga and other case authorities. As the court opined (at 19):

> Thus in the end the extent of the arbitrator's jurisdiction turns upon the Court's order – to what extent was the arbitrator's jurisdiction expressly or impliedly revived? … Depending on the terms of the order, it may be necessary to look to the court's reasons in order to decide the extent of revival … But ***the arbitrator does not have jurisdiction going beyond what is necessary to give effect to the order of the court*** . [emphasis added]

On the facts, an interim award had been set aside *and* remitted to the arbitral tribunal for reconsideration. The remittance order was interpreted restrictively by the court in *Mark Blake v Davis*, and a subsequent award was deemed a nullity on the basis that the tribunal was not entitled to reopen findings in respect of certain issues which had not been expressly remitted.

42 I make a few observations in light of the above cases. It is clear that an order for remitter must be scrutinised with care and where an award is remitted for an arbitral tribunal to correct a mistake or address an issue, such an order will generally only revive the tribunal's jurisdiction so far as is necessary for it to make that correction or address that issue (as evidenced by the court's restrictive interpretation of the order for remitter in the *Vimeira* cases). There is no general entitlement on the part of the tribunal to revisit issues and decisions *carte blanche*. I note that the *ratio* of *Vimeira (No 1)* is confined to orders for remitter and does not strictly extend to orders for setting aside. However, by way of an analogy, it would appear rather odd to me if the setting aside of an award automatically revives, without more, the tribunal's jurisdiction to reopen and decide all issues dealt with in the award. This is especially given the restrictive construction of the order for remitter in *Mark Blake v Davis* where the award in question had been *both* set aside *and* remitted.

Awards made within power vs awards made beyond power

43 In my judgment, the effect of an order setting aside an arbitral award would depend on the dichotomy between awards made within power and those made beyond power, as well as the extent to which the arbitral tribunal is conferred jurisdiction over the dispute by an underlying agreement to arbitrate.

44 In this respect, the decision of the Supreme Court of New South Wales in *ABB Service Pty Ltd v Pyrmont Light Rail Company Ltd* [2010] NSWSC 831 ("*ABB*") is illuminating. There, the court held that an arbitral tribunal did not have the power to make its original order as to the process of determining the quantum of costs payable and accordingly was not *functus officio* when a second costs order adopting and amending the original order was made. (The court, however, declined to intervene with the original costs order as it considered such action to be beyond the scope of the application before it.)

45 The court in *ABB* noted (at [66] and [67]) that in the curial context, a decision maker does not become *functus officio* where the decision or proceeding in question is a "nullity" because in those circumstances the case has never been tried according to law. In those circumstances, it is open to the court to retrace its steps and conduct a hearing according to law without the intervention of a

higher court. By analogy, the court in *ABB* reasoned (at [69]) that if an arbitral award was "beyond power and a nullity", there would have been no valid determination in the first place and the tribunal would not be *functus officio* in relation to the matter. On the facts, the power of the tribunal to make orders as to costs was limited by legislation to either settling the amount of the costs itself or arranging for the assessment of those costs under specific cost assessment processes. As the tribunal's original costs order provided for a modified and inconsistent assessment process without including provision for the costs ultimately to be settled by the tribunal, it was made beyond the tribunal's power and the award was thus *ultra vires*. The issue of costs *vis-à-vis* the parties being outstanding, the tribunal had the power (and, indeed, the obligation) to issue the amended orders disposing of the matter.

46 In the present case, the Additional Award was an award which the Tribunal had the power to make, notwithstanding the fact that it was subsequently set aside on grounds of a breach of the rules of natural justice. Where an arbitral award is made "within power" but is subsequently set aside because of a procedural irregularity (for instance, where the award has been made in breach of the rules of natural justice or where the award is contrary to public policy) ("Situation 1"), the arbitral tribunal would not subsequently have the jurisdiction to revisit the issues covered in the award. That is because such an award remains valid and binding on the parties until it is set aside and rendered invalid by the court. In particular, it is noteworthy that where there has been a breach of the rules of natural justice on the part of an arbitral tribunal in the course of making an arbitral award, the tribunal retains no jurisdiction to repair that breach and the only recourse in respect of such a breach is an application to set aside the arbitral award: see *Five Oceans* (cited above at [23]).

47 In Situation 1, the tribunal would have made a final award for better or for worse and would remain *functus officio* with respect to the issues covered in that award. If the award is *the* final award in that it disposes of all the issues to be determined, it would bring an end to the arbitral proceedings. The fact that the award is subsequently deemed irregular and set aside on that ground does not automatically "revive" the arbitral proceedings. It simply means that the award has ceased to have legal effect on the parties to the arbitration. At that point, it would be up to the party who had opposed the setting aside application to recommence arbitral proceedings before a newly constituted tribunal (whether comprising the same or different arbitrator(s)), assuming that the underlying arbitration agreement is still valid and subsisting and there is no operative time bar.

48 Similarly, where an arbitral award is "beyond power" in the sense that the tribunal *lacks jurisdiction* to deal with the dispute altogether (for instance, where there is no valid agreement to arbitrate, where a party to the arbitration agreement was under some incapacity or where the arbitral tribunal has not been properly appointed) ("Situation 2"), that would clearly be the end of the enquiry and the tribunal would obviously not be vested with jurisdiction to deal with the matter merely because the award has been set aside by the court.

49 Where, however, an arbitral award is "beyond power" or *ultra vires* in the sense that the tribunal did *not* have the power to issue the award in the form that it did, but nevertheless *had jurisdiction* under the arbitration agreement to decide the underlying issues *vis-à-vis* the parties ("Situation 3") (as was the case in *ABB* as well as *Hussmann v Pharaon* (see below at [52] to [58])), those issues would remain open for the determination of the tribunal in a subsequent award, having never been validly determined in the first place. In such a situation, the tribunal must exercise or complete its mandate to decide all outstanding issues between the parties to the arbitration. In those circumstances, the jurisdiction of the tribunal cannot accurately be said to have been "revived" following the setting aside of the award issued *ultra vires*. On the contrary, it had never been validly exercised in the first place (with the result that the tribunal had never become *functus officio*). Such cases can be expected to be rare and represent the exception rather than the norm (as

demonstrated by the rather unusual circumstances of *Hussmann v Pharaon* (see below at [52] to [58])). I also observe, apropos, that such cases are to be distinguished from those merely involving errors of law, in relation to which an appeal is more appropriate under the Act (and against which, of course, there is no recourse under the IAA).

50 In my view, the above approach provides a principled basis for determining the status of arbitral proceedings after an award has been set aside. It also has the benefit of explaining the decision of *Hussmann v Pharaon*, which is the leading authority on which LWI has essentially pitched its case.

51 Before moving on to the facts of *Hussmann v Pharaon*, I note, parenthetically, that "nullity" in the above context (*ie*, as a reference to the *effect* of setting aside on an award) is used in a slightly different context than in *L W Infrastructure CA*. There, the Court of Appeal was basically asked to circumvent the express provisions for setting aside contained in ss 48 and 49(8) of the Act by declaring the Additional Award a "nullity" on the basis that it was not a valid award under s 43(4) of the Act. The Court of Appeal unsurprisingly declined to do so, holding that in the absence of a specific provision in the legislation, it did not have the jurisdiction to make a declaration as to the validity of the Additional Award. This was especially since *L W Infrastructure CA* was clearly a case involving a procedural irregularity. In other words, the Court of Appeal was not referring to the word "nullity" as a term of art at all.

Analysis of Hussmann v Pharaon

52 The facts of *Hussmann v Pharaon* were adeptly and succinctly explained in the subsequent but unrelated case of *Internaut Shipping GmbH, Sphinx Navigation Limited of Liberia v Fercometal Sarl* [2003] EWCA Civ 812 ("*Internaut v Fercometal*"), as follows. Hussmann (Europe) Ltd ("Hussmann") claimed arbitration against its contract partner, Mr Pharaon trading as Al Ameen Development and Trade Establishment ("the Establishment"), a business name registered in Saudi Arabia. Since the contract, Mr Pharaon had incorporated his business under a very similar name, *viz*, Al Ameen Development & Trade Co ("the Company"), which led to substantial confusion. Hussmann's claim to arbitration and pleadings both defined the respondent in terms which were a mixture of the Establishment and the Company. The English Court of Appeal had to construe this definition and held that it was a reference to the Establishment: after all, that had been the name of the contract party. In the course of the arbitration, however, Hussmann received advice from a Saudi Arabian lawyer that the Establishment had been deleted from the register (which it had) and had ceased to exist (which it had not, since Mr Pharaon of course continued to exist). This advice led Hussmann to desire to clarify the status of the respondent in the arbitration and to seek to amend its pleadings to make it clear that the respondent was indeed Mr Pharaon (trading as the Establishment). The respondent, however, who was also a counterclaimant for a sum larger than the claim against it, opposed the application, insisting that it was the Company and requesting an award in the name of the Company. The arbitral tribunal refused the amendment and made its first award in the name of the Company ("the First Award"). Thomas J held in *Hussmann (Europe) Ltd v Al Ameen Development & Trade Co* [2000] 2 Lloyd's Rep 83 that the tribunal had been in error in treating the Company as the respondent. Mr Pharaon (the Establishment) then sought to enforce the First Award in his own name. The matter returned to court, and in a second judgment Thomas J held that the First Award had to be set aside as having been made without jurisdiction. An order was then drawn up holding that the First Award was "of no effect". The reference thereafter reverted to the arbitral tribunal, who made a second award ("the Second Award"), this time in favour of Mr Pharaon (the Establishment). The matter then returned a third time to court, with Hussmann attacking the Second Award as having been made without jurisdiction on the ground that the arbitral tribunal had become *functus officio* after making the First Award. On this occasion Mr Michael Brindle QC, sitting as a deputy High Court judge, held that the Second Award was valid. It was this third judgment which went on appeal to the

English Court of Appeal, and was upheld there.

53 The English Court of Appeal ultimately addressed two issues: (a) who was respondent to the arbitration; and (b) was the arbitral tribunal *functus officio*? As to the first issue, the court found that the Establishment was Hussmann's contract partner and there was therefore a strong inference that Hussmann intended to make the Establishment the respondent to its application for arbitration and to the reference. As the arbitration had started as one against Mr Pharaon, that position never changed. As to the second issue, the court first observed that there did not appear to be any difference of principle between an order of setting aside and a declaration of no effect (only the latter had been handed down). The court then opined as follows (at [83]):

> If, in the present case, the arbitrators had merely made an award as to their jurisdiction (to make an award against or in favour of the Company), but had not entered on the merits, we do not see how it could possibly be argued that the setting aside of that award, or its being declared of no effect, could deprive the arbitrators of jurisdiction to make a final award on the merits, if they were in a position to do so. We do not consider that the present situation, where they have gone on to make an award on the merits … alters the principle. *A valid final award on the merits will of course exhaust the arbitrators' jurisdiction, subject to any remission from the courts; but we can see no good reason in principle why an invalid final award*, ***in excess of jurisdiction*** *, should lead to the same result, when once that award has been declared of no effect by the courts*. [emphasis in the original omitted; emphasis added in italics and bold italics]

The court accordingly dismissed Hussmann's appeal.

54 LCSC contends that *Hussmann v Pharaon* should be distinguished, and that its *ratio decidendi* should be confined to a case where the original award is set aside on the ground of excess of jurisdiction. Such an interpretation is not entirely untenable. A plain reading of the relevant parts of the court's decision (see the preceding paragraph) yields only the limited proposition that an invalid final award on the merits, made in excess of jurisdiction, does not necessarily exhaust the arbitral tribunal's jurisdiction. It is clear that *Hussmann v Pharaon* does not attempt to cast a wider net. It does not, for example, purport to set out the position where an award is set aside for procedural irregularities such as on the ground of a breach of the rules of natural justice. In fact, the English Court of Appeal explicitly recognised that there are instances where, because of the misconduct of arbitrators, the court has decided to set aside and not remit an award, thereby indicating their intention that the parties should pursue their dispute before new arbitrators (at [80]).

55 I further note that alleged breaches of natural justice can take numerous and diverse forms. I would accordingly be very wary to assume that in all successful applications for setting aside on such grounds, the jurisdiction of the arbitral tribunal is automatically revived. Even the English position, by way of example, does not appear to support such an assumption. Under s 68(3) of the Arbitration Act 1996 (c 23) ("the English Act"), which deals with challenges on the ground of serious irregularity (somewhat akin to challenges on the ground of breach of natural justice), the court can set aside an award if it is satisfied that "it would be inappropriate to remit the matters in question to the tribunal for reconsideration". Remittance of the relevant matters to the same tribunal for reconsideration (much less remittance of the award *carte blanche*) is by no means inevitable or automatic.

56 It is also telling that, upon an application under s 67 of the English Act, which deals with challenges to substantive jurisdiction (under which the challenge to the Second Award in *Hussmann v Pharaon* was brought), the court has no express power to remit an award to the arbitral tribunal. In contrast, remission is intended to be the preferred remedy following successful applications under ss 68 (dealing with challenges on the ground of serious irregularity) and 69 (dealing with appeals on

questions of law) of the English Act. In respect of applications under ss 68 and 69, an English court is prohibited by ss 68(3) and 69(7) respectively to exercise its powers to set aside or to declare an award to be of no effect unless it is satisfied that "it would be inappropriate to remit the matters in question to the tribunal for reconsideration". This was acknowledged in *Hussmann v Pharaon* (at [82])

> It is true that there is no express power to remit under section 67(3) (compare section 68(3)(a)). However, on the basis of the principle which we have preferred, there would appear to be no need of such a power: the arbitration merely carries on or revives as necessary.

57 In my opinion, it is highly probable that the result in *Hussmann v Pharaon* can be confined even further to its peculiar facts. There, the attempt by the respondent to identify itself with the Company was opposed by the claimant, Hussmann. Nevertheless, the arbitral tribunal was misled by the confusion into making the First Award in the name of the Company. That could not be said to be a "mere misnomer" so allowing the First Award to be enforced (by amendment) in the name of Mr Pharaon. Thereafter, the First Award turned out to be a nullity as the Company was found never to have been a party to the reference. Rather, the arbitration had in fact been commenced against Mr Pharaon (the Establishment) as respondent, and this had never changed (see *Hussmann v Pharaon* at [75]):

> We accept the submission, as Mr Brindle did below, that if the reference began life with Mr Pharaon as a respondent to it, that position never changed. Hussmann always pursued an award against its contract party. It never submitted that Mr Pharaon, if he had become a respondent to the reference, abandoned his role in the arbitration, or resigned from it (if indeed he could do so unilaterally), or abandoned or withdrew his counterclaim. There was no submission before the tribunal at the time of the submissions leading to the second award… . Nor is there any sign in the third judgment that such an argument was raised before Mr Brindle.

On the facts, whilst the arbitration had in fact been commenced by Hussmann against Mr Pharaon (the Establishment), the arbitral tribunal had failed to discharge its mandate to decide the relevant issues *vis-à-vis* these parties (the correct parties to the arbitration). In my judgment, therefore, *Hussmann v Pharaon* falls within Situation 3 (as defined above at [49]), *viz*, that the First Award was issued "beyond power" (having been made *vis-à-vis* the wrong parties), but the arbitral tribunal nevertheless had jurisdiction under the arbitration agreement to decide the issue (*vis-à-vis* the correct parties). It was therefore obvious that the tribunal retained the power to make the Second Award.

58 In my view, as an English court has no express power under the legislation to remit the relevant issues to the arbitral tribunal after a successful challenge to substantive jurisdiction under s 67 of the English Act (see above at [56]), the result in *Hussmann v Pharaon* could well have been a practical way of overcoming this particular "handicap". I surmise (though this is perhaps somewhat speculative) that s 67 of the English Act was perhaps intended to deal with cases falling under Situation 2 (described above at [48]), *viz*, where an arbitral award has been issued "beyond power" in the sense that the tribunal *lacks jurisdiction* to deal with the dispute (or discrete issues in the award). In that sense, it is not surprising that there is no express power to remit under s 67 of the English Act, since in such situations the tribunal would not have the jurisdiction to carry on to deal with the dispute or the relevant matters. However, the situation in *Hussmann v Pharaon* was different (and, indeed, highly unusual).

59 The somewhat similar but unrelated case of *Internaut v Fercometal* is also instructive. This case related to a claim for demurrage under a voyage charter of a vessel. The charter was made between Fercometal Sarl ("Fercometal") as charterer and "Sphinx Navigation [registered owner], c/o

Internaut Shipping [disponent owner]", but the charterparty form was signed as "owner" by Internaut Shipping GmbH ("Internaut") without qualification. Internaut started arbitral proceedings as owner against Fercometal on the demurrage claim, but the points of claim as subsequently served by its lawyers were in the name of Sphinx Navigation Limited of Liberia ("Sphinx"). The courts had to decide as a preliminary issue the party or parties to the charter and to the arbitration. The English Court of Appeal unanimously upheld the Commercial Court ruling that: (a) the signature on the face of a charterparty is determinative as to the "owner" for the purposes of the contract; and (b) Internaut, but not Sphinx, was a party to the charter and the original arbitration. It further held that the arbitral tribunal could not permit the points of claim to be amended by substituting Internaut for Sphinx. The court accordingly held the arbitration to be a nullity so far as it was conducted in Sphinx's name, but that it survived in respect of Internaut. The future conduct of the arbitration was a matter for the arbitral tribunal to determine. In particular, Rix LJ held (at [88] and [90]):

> Once the decision has been taken that the identification (and acceptance) of Sphinx as the arbitrating party goes beyond a case of mere misnomer, then it seems to me that the consequence must be that the further conduct of the arbitration in the name of a claimant who was never in truth a party to the charterparty or to the arbitration agreement was a nullity, and it is for this court to say so. ***Sphinx therefore never had any possible role to play in the arbitration*** , and cannot ratify what has been done in its name. The arbitrators, in declining to deal with Internaut's (and/or Sphinx's) application to amend and/or join Internaut, showed a proper caution**. *However, it has been established that the arbitration was in fact invoked and commenced by and on behalf of Internaut. Such an arbitration is valid, and has not been concluded. It is therefore still in being. It survives the wreckage of Internaut's nest. Thus the second arbitration invoked by Internaut in December 2000 may well not be needed.*** That, however, depends on what happens to the original arbitration. It is possible, although I am not to be taken in any way as suggesting that that would be a sound course, that Fercometal may raise arguments before the tribunal which would echo arguments canvassed in Hussmann. If so, those would be for the arbitrators to deal with. The status of the third arbitrator will also have to be considered.
>
> I am somewhat reluctant to come to these conclusions because they have the consequence that all that has occurred in the arbitration to date may have been wasted, and the parties have in effect to start again. It seems to me, nevertheless, that that is the necessary, proper, and ultimately safest course. ***Now that Internaut has been shown to be the correct party as owner under the charterparty, the dispute between the parties, if it is to proceed, can emerge in its proper light; the issues in the arbitration can now be formulated with clarity; disclosure, if it has not already taken place, will proceed on a sound footing; and the arbitrators will for the first time be afforded a proper view of the dispute*** . In the meantime, of course, a lot of effort has been wasted, although it may be that some of what has been done, albeit formally ineffective, will not have been worthless. …
>
> [emphasis added]

Though no arbitral award was issued on the facts of *Internaut v Fercometal* (the court had considered the matter as a preliminary question), it may be surmised that any award potentially issued as between Sphinx and Fercometal would be "beyond power" and a "nullity", even though the arbitration commenced in the name of the right party (*ie*, Internaut) might still survive. This brings the case squarely within Situation 3 as defined above (at [49]).

60 I note too that even if the result in *Hussmann v Pharaon* (*viz*, that an arbitral tribunal's jurisdiction to decide the issues in an award is "revived" following the setting aside of the award) is of

general application and is *not* confined to Situation 3 cases (as defined above at [49], it is unclear to me whether such a result should be followed in Singapore. As noted in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 2 SLR(R) 273 (at [37]), the scheme under the Model Law (and, presumably, the Act) is quite different from the English regime. For a start, the Model Law regime appears to be less explicitly supportive of remission than the regime under the English Act.

61 I note that there is Australian authority to the effect that "if an award is ordered to be wholly set aside, then absent any other indication in the order, the award is deprived of all legal effect, the arbitrator reverts to his status immediately before the award was determined, the arbitrator is no longer *functus officio*, and the arbitrator remains seized of the reference" [emphasis added]: the court in *Alvaro v Temple* (at [69]) on the earlier case of *Re Scibilia & Lejo Holdings Pty Ltd Arbitration* [1985] 1 Qd R 94 ("*Scibilia*"). I note, however, that the court in *Scibilia* had relied on the very same quote from *Mustill and Boyd* which was cited in *Hussmann v Pharaon* (extracted above at [36]) for this proposition without undertaking any analysis of its own. Moreover, the court in *Alvaro v Temple* subsequently noted (at [70]) that "if there is any concern about the effect of setting aside on its own, and if it is intended that the matter be returned to the original arbitrator to be dealt with, it may be prudent, in addition, to order remitter expressly".

62 I observe that the academic authorities, where they consider at all the effects of a successful challenge, propound the view that an arbitral tribunal generally remains *functus officio* after the setting aside of a final award. In such a scenario, it appears that, assuming the arbitration agreement is still effective, the party losing the challenge would have to commence new arbitration proceedings and resubmit the dispute to arbitration. For example, in Nigel Blackaby, Constantine Partasides, *et al*, *Redfern and Hunter on International Arbitration* (Oxford University Press, 2009) at p 617, it is stated that:

> If the award has been set aside for procedural defects (for example, lack of due process) the party who won the arbitration but lost the challenge is still in an unenviable position. The arbitration agreement will usually (but not always) still be effective. ***Providing the claim is not time-barred, the dispute must be submitted to arbitration and the process started over again*** **.** This is a daunting prospect for even the most resilient claimant. [emphasis added]

In Julian D M Lew, Loukas A Mistelis, *et al*, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) at pp 679-681, similar views were expressed:

> After the award has been set aside the main question is whether the parties are still bound by the arbitration agreement or whether the ousted jurisdiction of state courts is revived. If a court decided that the arbitration agreement is invalid the parties are no longer bound by it. If, however, the award has been challenged on any procedural, jurisdictional or substantive grounds the situation is different. In such circumstances the question is whether or not a new arbitration can be started. …
>
> If an award is set aside for reasons other than invalidity of the arbitration agreement, the agreement would survive the award and the parties would still be bound to have their disputes settled by arbitration. Often it will be a case of remission of the matter or it may be a new arbitration before a new tribunal.

In Michael Mcilwrath and John Savage, *International Arbitration and Mediation: A Practical Guide* (Kluwer Law International, 2010) at p 327, it was stated:

> A successful challenge will usually result in the award being 'set aside', 'vacated', or 'annulled',

and therefore ceasing to exist, at least within the jurisdiction of the court setting it aside. This effectively means the clock goes back to before the arbitration began.

In Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) at pp 2698-2699, the author stated:

> A further issue is what the effect of an annulment decision is on the parties' arbitration agreement and the arbitral tribunal. With regard to the former, the annulment of an award should have no effect on the parties' underlying agreement to arbitrate. That agreement subsists even if an arbitral tribunal engaged in procedural misconduct or manifestly misapplied the law.
>
> ***With regard to the effect of annulment on the arbitrators, the short answer will generally be that the tribunal is* functus officio *and an annulment does not change this or bring the tribunal back into legal existence*** . Unusually, the Swiss Law on Private International Law and Swiss Cantonal Concordat provide that, when an award is annulled, it is remitted to the former arbitral tribunal for further proceedings. This is not usually advisable, however, and ***in most jurisdictions a new tribunal must be constituted.*** [emphasis added]

63 In my view, therefore, the relevant legal proposition stated in *Halsbury's* at para 20.116 (quoted above at [36]) on the authority of *Hussmann v Pharaon* is not sound as a proposition of general principle. As I observed (see above at [43]), the effect of an order setting aside an arbitral award would depend on whether the award in question was made within power or beyond power and, further, whether the tribunal had jurisdiction over the dispute or matter by virtue of an underlying agreement to arbitrate.

Application of the law to the facts

64 I now turn to the relevant facts. As mentioned above (at [6]), the Supplementary Award rendered on 21 September 2011 had been issued following certain Orders of Court handed down by the High Court in OS 759/2010. It is to be recalled that the Tribunal had previously rendered the Final Award in favour of LCSC. Upon LWI's successful appeal on questions of law against the Final Order, the High Court had ordered *inter alia* the following matters to be remitted to the Tribunal for reconsideration pursuant to s 49(8)(*c*) of the Act:

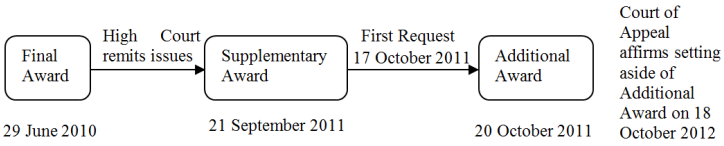
(a) whether LWI was entitled to liquidated damages for a specified period; and

(b) the costs of the arbitration.

The High Court's orders therefore had the effect of either extending or reviving the jurisdiction of the Tribunal to decide the above issues. Such jurisdiction would clearly have included the Tribunal's jurisdiction to grant both post- and pre-award interest on the sums awarded, though this was not explicitly stated.

65 In the Supplementary Award, the Tribunal found that LWI was entitled to liquidated damages in the amount of $945,000 and ordered LCSC to pay LWI the sum of $603,608.90 taking into account the sum of $341,391.10 previously awarded to LCSC in the Final Award. The Tribunal also ordered LCSC to pay LWI "simple interest at the rate of 5.33% p.a. on the sum of S$603,608.90 from the date of this Supplementary Award". Costs were to be fully borne by LCSC. As seen from the foregoing, it is clear that the Supplementary Award was fully intended by the Tribunal to deal with all remaining outstanding matters following the remittance.

66 It is therefore clear that the Supplementary Award was intended to be a "final" award disposing of all outstanding matters in the arbitration. This was, of course, subject to the relevant provisions of s 43 of the Act preserving the Tribunal's powers to – in the circumstances and within the time limits specified – correct any computational, clerical or typographical error in the Supplementary Award, give an interpretation of a specific point of the Supplementary Award or make an additional award as to claims presented during the arbitral proceedings but omitted from the Supplementary Award. This residual power was in fact exercised by the Tribunal within the prescribed time limit (of 60 days from the issuance of the First Request) when it issued the Additional Award on 20 October 2011 awarding pre-award interest in favour of LWI (albeit without hearing LCSC). Upon the issuance of the Additional Award, the Tribunal had decided all the issues to be decided and, in my judgment, *the arbitral proceedings accordingly came to an end on 20 October 2011*. At this point, the Tribunal became *functus officio* with respect to the issues decided. However, unbeknownst to the Tribunal at the time, LCSC was to bring a successful challenge to his decision in the Additional Award, which culminated in the Court of Appeal's affirmation of the setting aside of the Additional Award on 18 October 2012. For ease of reference, the relevant chain of events is summarised in the following diagram:



67 For the reasons set out above (at [65] and [66]), I find that the Tribunal's jurisdiction to deal with LWI's claim for pre-award interest expired when he issued the Additional Award on 20 October 2011 (thereby deciding all the issues to be decided). The arbitral proceedings accordingly came to an end at that point. Moreover, the Tribunal's jurisdiction to deal with the relevant issue was not automatically "revived" when the Additional Award was set aside on the ground of a breach of the rules of natural justice. In particular, it is pertinent that the Court of Appeal in *L W Infrastructure CA* had declined to remit LWI's claim for pre-award interest to the Tribunal for re-consideration as the relevant arguments had not been fully canvassed (see above at [9] and [24])).

68 Whilst not strictly before me, I observe that if the arbitration agreement is still subsisting and there is no operative time bar, it would be up to LWI to restart arbitral proceedings before a newly constituted tribunal (whether comprising the same or a different arbitrator). As the Additional Award dealing with the issue of pre-award interest has been set aside, the issue would presumably be an open question between the parties, which LWI can attempt to resubmit to arbitration.

Conclusion on the First Threshold Objection

69 For the reasons set out above, the Tribunal's jurisdiction to deal with LWI's claim for pre-award interest expired when he issued the Additional Award and this jurisdiction was not subsequently "revived" when the Additional Award was set aside on the ground of a breach of the rules of natural justice. In light of my conclusion, the questions of law referred by LWI cannot be said to have arisen "in the course of the [arbitral] proceedings" or "in the course of the reference". Section 45 of the Act is therefore not applicable to the present case. I therefore dismiss LWI's application under s 45 of the Act.

The Second and Third Threshold Objections

70 Given my conclusion in relation to the First Threshold Objection, I do not think it necessary to deal with the LCSC's Second and Third Threshold objections, *viz*, that the said application under s 45

of the Act was filed out of time and that LWI is abusing the s 45 process in bringing the said application.

71 However, in deference to counsel's arguments, I nevertheless provide brief answers to the questions of law as formulated by LWI.

Issue 1(a): Whether, upon the setting aside of the Additional Award, the proceedings are returned to the state that existed up to the moment immediately preceding the making of the Additional Award, with the result that the Tribunal remains seized of the reference

72 It is clear from the foregoing analysis that this question must be answered in the negative. As noted, the Tribunal's jurisdiction to deal with LWI's claim for pre-award interest expired when it issued the Additional Award and there is moreover no persuasive authority for the proposition that this jurisdiction was subsequently "revived" when the Additional Award was set aside on the ground of a breach of the rules of natural justice.

Issue 1(b): Whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to issue an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request

73 As noted above (at [26] and [66]), the Tribunal had in fact exercised its residual power under s 43(5) of the Act to make an additional award as to pre-award interest within the prescribed time limit of 60 days from the issuance of the First Request. At this point (*ie*, 20 October 2011), its jurisdiction to deal with the issue expired and was not to be subsequently "revived". The 60 day time limit to issue an additional award thereafter simply became irrelevant.

Issue 1(c): Whether, regardless of the on-going proceedings in OS 988/2011, the Tribunal's jurisdiction to extend time for the purposes of issuing an additional award pursuant to the First Request had lapsed on 16 December 2011, 60 days after the Tribunal's receipt of the First Request

74 Given my finding that the Tribunal's jurisdiction to deal with the issue of pre-award interest had been terminated permanently upon its issuance of the Additional Award, this particular issue has been rendered nugatory (see above at [26]).

Issue 2: Whether the time allowed for the Tribunal's issuance of an additional award pursuant to the First Request ought to be extended under s 36 of the Act

75 Given my finding that the Tribunal's jurisdiction to deal with the issue of pre-award interest had in fact expired upon its issuance of the Additional Award (and was not to be subsequently "revived"), Issue 2 is irrelevant.

76 I therefore dismiss LWI's application under s 36 of the Act.

Issue 3: Whether LWI was entitled to rely on s 21(9) of the Act to apply to the Court to decide on a plea as a preliminary issue that the Tribunal has jurisdiction

77 As noted above (at [14]), I allowed LWI's application in SUM 2051/2013 for "leave to amend the title of these proceedings, as stated in OS 29/2013" in order to introduce another basis for their application, *viz* s 21(9) of the Act. Section 21(9) states:

21.

...

(9) If the arbitral tribunal rules —

(*a*) on a plea as a preliminary question that it has jurisdiction; or

(*b*) on a plea at any stage of the arbitral proceedings that it has no jurisdiction,

any party may, within 30 days after having received notice of that ruling, apply to the Court to decide the matter.

78 Given my finding that the arbitral proceedings had in fact terminated when the Tribunal issued the Additional Award, the Tribunal's letter dated 14 December 2012 (extracted above at [12]) stating that it lacked jurisdiction is neither a ruling "on a plea as a preliminary question that it has jurisdiction" nor a ruling on "a plea at any stage of the arbitral proceedings that it has no jurisdiction". Accordingly, it was not open to LWI to apply to the Court under s 21(9) of the Act to decide the issue of the Tribunal's jurisdiction.

79 In any case, SUM 2051/2013 was a futile application as the Tribunal's jurisdiction to deal with the issue of pre-award interest had in fact expired permanently on the issuance of the Additional Award.

Conclusion

80 For the foregoing reasons, I dismiss the present application under OS 29/2013 in its entirety with costs.

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