IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC(I) 11

Originating Summons No 2 of 2020

Between

CEB

… *Plaintiff*

And

CEC

… *Defendant*

Originating Summons No 3 of 2020

Between

CED

… *Plaintiff*

And

CEE

… *Defendant*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]

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v
CEC and another matter

[2020] SGHC(I) 11

Singapore International Commercial Court — Originating Summonses Nos 2 and 3 of 2020
Simon Thorley IJ
6 April 2020

4 May 2020 Judgment reserved.

Simon Thorley IJ:

Introduction

1 On 12 March 2019, the plaintiff in each of these actions issued an originating summons seeking an order that the final award rendered by the sole arbitrator ("the Arbitrator") in two arbitrations should each be set aside.

2 For convenience, I shall refer to SIC/OS 2/2020 as "the CEC Action" and to SIC/OS 3/2020 as "the CEE Action". I shall also refer to the defendants in the CEC Action and the CEE Action as "CEC" and "CEE" respectively.

3 The Originating Summons in the CEC Action seeks to set aside the award of the Arbitrator in the arbitration between the plaintiff and CEC (which I shall refer to as "the CEC Award" and "the CEC Arbitration"). The Originating Summons in the CEE Action seeks to set aside the award of the Arbitrator in

the arbitration between the plaintiff and CEE (which I shall refer to as "the CEE Award" and "the CEE Arbitration").

4 The two arbitrations were heard together by the Arbitrator and, although he gave two awards, the same issues arose and his reasoning and conclusions were to the same effect. Both Originating Summonses seek identical relief, namely the setting aside of the awards, and the two grounds raised are likewise identical. The defendants each relied upon affidavits that are in substance the same and are now represented by the same Singapore solicitors. Only one set of written submissions was served by those solicitors on behalf of both defendants. At the oral hearing the parties agreed that only one judgment should be prepared in respect of both Originating Summonses.

5 The Originating Summonses were originally issued in the Singapore High Court and were transferred to the Singapore International Commercial Court by order dated 25 February 2020.

6 The plaintiff in both actions is a company organised under the laws of India and has its registered office in Mumbai, India.

7 CEC is a company organised under the laws of the UAE and has its registered address in Dubai, UAE. CEE is also a company organised under the laws of the UAE and has its registered address in Sharjah, UAE.

The CEE Action

8 I shall first consider the Originating Summons in the CEE Action.

Background facts

9 In November 2015, the plaintiff and CEE entered into four contracts for the sale by the plaintiff and the purchase by CEE of palm oil and canola oil. Having supplied the goods, the plaintiff raised invoices against CEE for payment of a total value of US$25,391,499. The payment under each contract was due in April 2016. CEE failed to make any payment by the due date. The plaintiff and CEE then agreed to an extension of the due date to July 2016.

10 In the meantime, in June 2016, the plaintiff and CEE entered into six more contracts, this time for the sale and purchase of castor oil. The delivery dates under these contracts were initially in December 2016 and January 2017 but were subsequently extended until March 2017. CEE however continued to fail to make any payment for the outstanding sums due in respect of the initial four contracts and, on 31 March 2017, the plaintiff unilaterally cancelled the later six contracts on the ground that CEE had failed to pay the sums due under the initial four contracts.

11 CEE contended that it was not open to the plaintiff to cancel the six contracts and that the plaintiff was in breach of contract in failing to supply the goods by the agreed date. The purchase price of the castor oil due under the six contracts was US$31,955,000. By the date of the alleged breach by the plaintiff, the value of that amount of castor oil had risen to US$57,050,000 so that CEE claimed that its direct loss as a result of the non-delivery was US$25,095,000.

Background to the dispute

12 Rather than litigate in the courts, the parties entered into an arbitration agreement on 2 November 2017 which provided that the parties' dispute was to be resolved by arbitration conducted in accordance with the Arbitration and

Conciliation Act, 1996 (India) ("the 1996 Indian Act"), the seat and venue of the arbitration was to be Singapore and the arbitration was to be governed by and construed in accordance with the laws of India. By agreement between the parties, the Arbitrator was appointed as the sole arbitrator.

13 The plaintiff commenced the CEE Arbitration by a Notice of Arbitration dated 6 November 2017 and served its Statement of Claim on 30 January 2018. In response, CEE filed its Written Statement and Counterclaim on 14 February 2018.

14 In addition to its claim for the sums due under the four initial contracts, the plaintiff also claimed interest on those sums together with the sum of US$150,000 in respect of certain consequential losses and US$50,000 for litigation expenses.

15 For its part, CEE counterclaimed for the alleged loss of US$25,095,000 arising from the plaintiff's failure to deliver the castor oil due on the outstanding six contracts together with interest on that sum. CEE also counterclaimed for an alleged consequential loss of opportunity to proceed with its plans for producing sebacic acid, a derivative of castor oil.

16 Following a hearing in Singapore on 20 and 21 September 2018, the Arbitrator issued the CEE Award dated 4 December 2018 which, it is common ground, was received by the parties on 13 December 2018. In para 63 of the CEE Award, the Arbitrator found in favour of the plaintiff in respect of payments due under the first four contracts in the sum of US$25,391,499. However, whilst he recorded in para 57 of the CEE Award that the plaintiff claimed the sum of US$150,000 in respect of consequential losses, he made no finding in relation thereto.

17 On the counterclaim, the Arbitrator concluded that each of the six contracts for castor oil was a distinct and independent contract from the other five and also from the initial four contracts such that non-performance of one contract did not give the plaintiff the right to repudiate any of the other contracts. He therefore held that the plaintiff was in breach of contract in terminating the six contracts for the supply of castor oil. He however rejected CEE's claim in relation to the alleged loss of opportunity to produce sebacic acid (see paras 70–71 of the CEE Award).

18 In para 74 of the CEE Award, the Arbitrator expressed his conclusions:

> 74. **I AWARD and DIRECT that:**
>
> *1) The sum of* ***USD 25,391,499.00 IN FAVOR OF THE CLAIMANT*** *for the goods supplied by it to the Respondent.*
>
> *2) The sum of* ***USD 25,095,000.00 IN FAVOR OF THE RESPONDENT for*** *the losses incurred due to cancellation of the Castor Oil Contracts by the Claimant which can be set off by the Respondent against amount payable by the Respondent to the Claimant.*
>
> *3) The Counter Claim of Respondent is* ***Rejected*** *to the extent of consequential loss incurred due to opportunity loss.*
>
> *4)* ***Interest @ 2.57 % per annum*** *to the Claimant i.e. Total USD 20159.00 on the net amount of the Award i.e. after adjusting the liabilities of the Parties to each other as declared in para 1 & 2 of this Award*
>
> …

19 The upshot therefore was that the net sum due to the plaintiff was US$316,658 rather than the US$25,391,499 that was owing in relation to the initial four contracts.

The Originating Summons in the CEE Action

20 The Originating Summons in the CEE Action was issued on 12 March 2019, within the three-month period provided for in s 34(3) of the 1996 Indian Act and also in Art 34(3) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"), which is given the force of law in Singapore pursuant to s 3 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). The grounds on which the plaintiff seeks to have the CEE Award set aside are contained in para 22 of the affidavit of one of the plaintiff's Indian solicitors which reads as follows:

> 22. The Plaintiff Company is relies [*sic*] on a number of grounds in support of its Application to set aside the Award, which are as follows:
>
> (a) The Award is in breach of the rules of natural justice in that the Tribunal failed to consider the Plaintiff's Company pleaded issue of consequential losses (estimated at USD 150,000). At paragraph 57 of the Award, the Tribunal listed the Plaintiff Company's claim for consequential losses as an issue in the Arbitration but failed to address it, either by allowing or dismissing the claim, whether in whole or in part.
>
> (b) The Award is in conflict with the public policy of the State in that the Arbitral Tribunal decision in respect of the Defendant Company's counterclaim is flawed in law.
>
> (c) The Award is in breach of public policy of the State in that the result of the Award is so manifestly unjust that it shocks the conscience of the court. Allowing the Defendant Company's counterclaim (i.e. for the Plaintiff Company's apparent breach of the Castor Oil Contracts) allowed the Defendant Company received [*sic*] the benefit of the goods in the Palm Oil and Canola Oil Contracts for the price of USD 316,658 (being the difference in the award to the Plaintiff Company for the goods supplied (with interest) *less* the set-off sum awarded to the Defendant Company). This is in stark contrast to the invoiced cost of the goods of USD 25,391,499.00 (not inclusive of late payment interest). The invoiced sum was not disputed by the Defendant Company and forms part of the Award. This was a

> substantial and unconscionable windfall obtained by the Defendant Company.
>
> [emphasis in original]

21 In substance therefore two issues arise, the first pertaining to the failure of the Arbitrator to address the issue relating to the plaintiff's alleged consequential loss, and the second based upon an alleged breach of public policy in respect of the holding that the plaintiff could not unilaterally cancel the six contracts.

The CEC Action

Background facts

22 The background facts of the CEC Action are similar to but not precisely the same as those in the CEE Action. The issues that arise are however the same. I shall therefore recite the facts briefly.

23 Between September 2015 and July 2016, the plaintiff and CEC entered into 25 contracts for the sale and purchase of various commodities including castor oil. The plaintiff duly supplied goods against 22 of the 25 contracts between October 2015 and May 2016 and raised invoices against CEC for payment of a total value of US$83,477.017.01. The payment under each of the 22 contracts was due and payable sometime between May 2016 and October 2016.

24 However, CEC failed to make the payments when they were due. The parties then agreed to several extensions of the payment due dates. On 24 February 2017, CEC made a part payment of US$300,000 to the plaintiff but failed to make any further payments. The outstanding sum was therefore US$83,177,017.01.

25 The remaining three of the 25 contracts were for castor oil and were due to be shipped in February 2017. On 31 March 2017, the plaintiff unilaterally cancelled these three contracts on the ground that it had not received any further payment beyond the US$300,000 paid in relation to the earlier contracts. CEC counterclaimed against the plaintiff for losses allegedly suffered due to the plaintiff's unilateral cancellation of the three contracts.

26 The parties entered into an arbitration agreement on 2 November 2017. The substance of the agreement was the same as that in the CEE Arbitration.

27 The plaintiff commenced the CEC Arbitration by a Notice of Arbitration dated 6 November 2017 and served its Statement of Claim on 30 January 2018. Again the plaintiff sought payment of the outstanding sums in addition to interest, together with US$250,000 for consequential losses and US$50,000 for litigation expenses.

28 In response, CEC filed its Written Statement and Counterclaim both dated 7 February 2018. In this case the counterclaim was for US$11,900,000 representing the increase in value of the castor oil due to be delivered pursuant to the three outstanding contracts.

29 The CEC Arbitration was heard at the same hearing as the CEE Arbitration in Singapore on 20 and 21 September 2018. The Arbitrator issued the CEC Award on 3 December 2018. Again, it is common ground that the CEC Award was received by the parties on 13 December 2018. In para 60 of the CEC Award, the Arbitrator found in favour of the plaintiff in respect of the sums due under the first 22 contracts for US$83,177,017.01. However, whilst he recorded in para 52 of the CEC Award that the plaintiff claimed the sum of US$250,000 in respect of consequential losses, he again made no finding in relation thereto.

30 On the counterclaim, in para 67 of the CEC Award the Arbitrator concluded that each of the 25 contracts was a distinct and independent contract from the others such that non-performance of one contract did not give rise to a right in the plaintiff to repudiate any of the other contracts. He therefore held that the plaintiff was in breach of contract in terminating the three contracts for the supply of castor oil and awarded CEC the sum of US$11,900,000 on the counterclaim.

31 In para 70 of the CEC Award the Arbitrator expressed his conclusions:

> 70. **I, AWARD AND DIRECT that:-**
>
> > *1. I,* ***AWARD USD 83,177,017.01 IN FAVOR OF THE CLAIMANT*** *for the goods supplied by it to the Respondent plus Interest @ 2.3166 % which is LIBOR of the average due date of the payment plus 1%…amounting to USD 4,565,534.35 totaling to USD 87,742,551.37.*
> >
> > *2. I also allow counter claim/setoff of sum of* ***USD 11,900,000.00 IN FAVOR OF THE RESPONDENT*** *for the losses incurred due to cancellation of the Castor Oil Contracts by the Claimant plus Interest @ 2.14% p.a. amounting to USD 433,629.39, total to USD 12,333,629.40.*
> >
> > *3.* ***ALLOWED*** *Interest as per para no. 1 & 2 of this Award in favor of the Claimant and Respondent.*
> >
> > *…*

The Originating Summons

32 The Originating Summons in the CEC Action was also issued on 12 March 2019, within the three-month period provided for in s 34 of the 1996 Indian Act and Art 34(3) of the Model Law. The grounds on which the plaintiff seeks to have the award set aside are contained in para 21 of another affidavit of the same Indian solicitor as in [20] above. They are in virtually identical terms to those set out in para 22 of the affidavit in the CEE Action quoted in [20] above. The same two issues thus arise.

Procedure on both the Originating Summonses

33 As indicated above, CEE and CEC appointed the same solicitors and the Originating Summonses then proceeded together as one. Following the service of written submissions, there was a hearing via a video-link on 6 April 2020.

The structure of the arbitration agreements

34 The arbitration agreements were in similar form. In particular, the jurisdiction and proper law clauses were practically identical. The relevant clauses in the arbitration agreement between the plaintiff and CEE provided as follows:

> A. The parties hereby agree that the Disputes shall be resolved by binding arbitration. The arbitration shall be conducted in accordance with the Indian Arbitration Act of 1996 (herein after referred as "Act")
>
> B. The arbitral tribunal shall consist of sole arbitrator and the seat of the arbitration shall be Singapore. The Arbitration shall be governed by and construed in accordance with the laws of India. The Language of the arbitration shall be English.

35 Clauses of this nature do require careful analysis in order to ensure that one focusses on the correct law in relation to the issues that arise. The seat of both arbitrations is Singapore, yet the arbitration agreements provide for the arbitrations to be "conducted in accordance with the Indian Arbitration Act" and also that the arbitration "shall be governed by and construed in accordance with the laws of India".

36 In the normal case no distinction is drawn between the law of the seat of the arbitration and either the substantive law of the arbitration or the law that is to govern the way in which the arbitration is to be conducted.

37 But clauses similar to the present do arise and one such clause was considered by the English court in *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48 ("*Union of India*"). That case concerned an arbitration clause that stated:

> … The arbitration shall be conducted in accordance with the procedure provided in the Indian Arbitration Act of 1940 or any reenactment or modification thereof … The seat of the arbitration proceedings shall be London, United Kingdom …

38 In that case, Saville J (as he then was) held (at 51) that:

> … it seems to me that by their agreement the parties have chosen English law as the law to govern their arbitration proceedings, while contractually importing from the Indian Act those provisions of that Act which are concerned with the internal conduct of their arbitration and which are not inconsistent with the choice of English arbitral procedural law.

39 In reaching this conclusion, Saville J reasoned that the phrase "conducted in accordance with the procedure provided in the Indian Arbitration Act" referred to the "internal conduct of the arbitration as opposed to the external supervision of the arbitration by the Courts"; he placed emphasis on the word "conducted" as being "more apt to describe the way in which the parties and the tribunal are to carry on their proceedings rather than the supervision of those proceedings by the Indian courts". Saville J also opined that this interpretation gave the word "seat" its ordinary meaning, *ie*, indicating the parties' "choice of London as the legal place for the arbitration". In other words, London was to be the seat of the arbitration, with English law being both the *lex arbitri* and the procedural law, subject to the relevant provisions of the Indian arbitration statute applying by contractual incorporation to govern the internal conduct of the arbitration. Under this interpretation, there was no bifurcation of the *lex arbitri* and procedural law.

40 An alternative, albeit more complicated, possible interpretation of such a clause is that parties have chosen not merely to have the arbitration conducted in accordance with the procedure of a different legal system from the arbitration law of the seat but also that the arbitration should be decided in accordance with the laws of that system. A reference in the arbitration agreement to the laws of a state other than the seat may constitute evidence of the choice of a foreign procedural law (see Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("Born") at p 1618). However, as Born notes (at p 1605), the practice of selecting a foreign procedural law is "extremely unusual" and "introduces serious complexity, uncertainty and risks into the arbitral proceeding".

41 The arbitration agreements in this case are not identical to that in *Union of India* in that they do not contain the same express distinction between the seat and the conduct of the arbitration. Clause A expressly relates to the conduct of the arbitration (as in *Union of India*) but Clause B, whilst defining the seat of the arbitration to be Singapore, goes on to state that the arbitration shall be governed by the laws of India. It is thus arguable that the parties have in fact chosen the more complicated route considered in [40] above.

42 The parties did not address me on this question and I do not consider that a decision either way would affect the outcome in these cases. The Arbitrator applied Indian procedural law to determine the rights of the parties and was not invited by either party to apply the procedural law of Singapore. Before me, it has not been submitted by the plaintiff that the conclusion reached by the Arbitrator was not one that was open to him had he applied the procedural law of Singapore. My attention was not drawn to any fundamental distinction between the laws of the two countries such as to require a different decision on the facts of these cases under one set of laws rather than the other.

43 Equally, it is not disputed that the question of whether the awards are to be set aside is truly an "external" matter which is to be decided under the law of the seat of the arbitration, which is Singapore law. The fact that the originating summonses to set aside the awards were issued in the Singapore courts is consistent with this and no objection has been taken by either defendant to this course.

Applicable principles

44 There was no dispute as to the overriding legal principles applicable to applications to set aside arbitral awards under Singapore law. In paras 20–21 of its written submissions, the plaintiff expressed the position as follows:

> 20. The Courts are generally circumspect in interfering with decisions made by the arbitral tribunal. It is trite law that there is no right of appeal from arbitral awards and, according to s 19B of the IAA, arbitral awards are final and binding in nature. The underpinning policy is that excessive curial intervention goes against the notion of party autonomy and freedom to choose their adjudicators by way of an arbitration agreement.
>
> 21. Nonetheless, the Court may intervene by setting aside an arbitral award in specific circumstances. In the present applications, the Plaintiff submits that the Arbitral Awards may be set aside on the following grounds:
>
> > (1) Breach of natural justice under s 24(b) of the IAA; and
> >
> > (2) Breach of public policy under Art 34(2)(b)(ii) of Model Law.

Breach of natural justice

45 So far as concerns breach of natural justice, s 24(*b*) of the IAA allows the court to set aside an award if a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced. Section 24 reads as follows:

> **Court may set aside award**
>
> **24.** Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if –
>
> (*a*) the making of the award was induced or affected by fraud or corruption; or
>
> (*b*) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.

46 Both parties referred me to the Court of Appeal decision in *AKN and another v ALC and others and other appeals* [2015] 3 SLR 488 ("*AKN*"). At [46] the Court of Appeal stated:

> To fail to consider an important issue that has been pleaded in an arbitration is a breach of natural justice because in such a case, the arbitrator would not have brought his mind to bear on an important aspect of the dispute before him. Consideration of the pleaded issues is an essential feature of the rule of natural justice that is encapsulated in the Latin adage, *audi alteram partem* …

47 In the Court of Appeal's decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee"*) at [29], the Court of Appeal, citing *John Holland Pty Ltd v Toyo Engineering Corp (Japan)* [2001] 1 SLR(R) 443, identified the following four factors as having to be established by a party challenging an arbitral award on the basis of a breach of natural justice:

(a) which rule of natural justice was breached;

(b) how it was breached;

(c) in what way the breach was connected to the making of the award; and

(d) how the breach prejudiced its rights.

Breach of public policy

48 Article 34(2)(*b*)(ii) of the Model Law allows the court to set aside an award if the award is in conflict with the public policy of Singapore. Article 34 (so far as relevant) reads as follows:

> Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> …
>
> (*b*) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.

49 It is settled law that an award may only be set aside on the ground that it is in conflict with the public policy of Singapore in exceptional cases. The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [59] made it clear that:

> … it should only operate in instances where the upholding of an arbitral award would 'shock the conscience' … or is 'clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public' … or where it violates the forum's most basic notion of morality and justice …

50 These are strong words which give effect to the underlying objective that it is only in circumstances where the effect of an award comes into conflict with accepted norms of public decency, behaviour, morality and/or justice that the court should intervene. This will seldom be the case in commercial disputes.

51 In *BAZ v BBA and others and other matters* [2018] SGHC 275, the High Court held at [159] that the balancing exercise is between, on the one hand, the policy of enforcing arbitral awards and the judicial policy of minimal curial intervention and, on the other hand, any countervailing policy that, if violated, would shock the conscience or result in one of the other instances set out in the quotation at [49] above. The High Court further held that:

> In determining whether the balance tilts towards the countervailing public policy, it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation.

52 Overall it is always necessary to bear in mind the observations of the Court of Appeal in [37] of *AKN* ([46] *supra*)*:*

> A critical foundational principle in arbitration is that the parties choose their adjudicators. Central to this is the notion of party autonomy. Just as the parties enjoy many of the benefits of party autonomy, so too must they accept the consequences of the choices they have made. *The courts do not and must not interfere in the merits of an arbitral award and, in the process, bail out parties who have made choices that they might come to regret, or offer them a second chance to canvass the merits of their respective cases*. This important proscription is reflected in the policy of minimal curial intervention in arbitral proceedings, a mainstay of the Model Law and the IAA (see *BLC v BLB* [2014] 4 SLR 79 ("*BLC*") at [51]-[53]). [emphasis added]

Breach of natural justice in these awards

53 The complaint is a simple one. In para 57 of the CEE Award and para 52 of the CEC Award, the Arbitrator identified one of the issues that arose for decision to be whether the claimant (*ie*, the plaintiff) could prove that it was entitled to the consequential loss claimed. Yet, in neither case did he expressly decide that issue. There was no suggestion that the point was abandoned by the plaintiff but the way in which the issue arose during the hearing is not entirely clear.

54 In respect of the CEE Arbitration, the defendants contended before me that the issue of consequential loss had been raised at the oral hearing but was disposed of on the spot by the Arbitrator. This was attested to by the affidavit filed by the defendants in respect of the CEE Action, at para 16, which states:

> The issue of consequential loss, while not expressly set out in the Award, had been duly considered and addressed by the Tribunal at the hearing. … The arguments made by the Plaintiff at the hearing did not satisfy Section 73 of the Indian Contract Act to warrant relief. The Tribunal found that the loss did not naturally arise but instead was indirect loss. As a result of this, the Plaintiff was not awarded relief for its claim on consequential losses. Thus, the point remains that this was an issue which was considered by the Tribunal, and for that reason, the Plaintiff's contentions on this issue are baseless.

55 In response, the plaintiff's counsel contended that the references in the CEE Award to s 73 of the Indian Contract Act, 1872 (India) are references to CEE's claim for consequential losses, and not the plaintiff's claim for consequential losses. Based on this, the plaintiff's counsel submitted that the Arbitrator clearly did not have regard to the plaintiff's claim for consequential losses.

56 In the case of the CEC Action, the defendants' supporting affidavit did not contain an equivalent paragraph and there was a suggestion in the defendants' written submissions before me that the issue of the plaintiff's consequential loss had not been argued before the Arbitrator in that case. However, the written arguments before the Arbitrator were not adduced in evidence before me and both parties consented to the matter being adjudicated upon without sight of those written arguments.

57 In these uncertain circumstances, the most favourable position for the plaintiff is to proceed on the basis that the failure of the Arbitrator to rule on this point was an oversight on his part and this is what I propose to do.

58 The facts of these cases therefore fall squarely within the observations in [46] of *AKN* ([46] *supra*) and meet the first three of the four criteria set out in [29] of *Soh Beng Tee* ([47] *supra*). I also consider that since the breach deprived the plaintiff of the opportunity of having its claim considered and potentially allowed, its rights had been prejudiced by the breach.

59 It remains therefore to consider the question of whether, even if all the four criteria set out in *Soh Beng Tee* are met, I should exercise my discretion not to set aside the awards. In common with many arbitration rules, s 33(4) of the 1996 Indian Act contains the following provision:

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

60 It was therefore open to the plaintiff to invoke this provision in both arbitrations but it did not and counsel for the plaintiff was unable to assist me as to why this was not done.

61 The attitude that courts should take in such circumstances was considered in *BLC and others v BLB and another* [2014] 4 SLR 79 ("*BLC*"), a case concerning Art 33(3) of the Model Law which echoes s 33(4) of the 1996 Indian Act. In [109]–[116] the Court of Appeal said this:

> 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 illustrates, in stark relief, this point. The Respondents' entire counterclaim was valued at approximately RM220m. The Respondents then attempted to set aside the *entire* award on the basis that the arbitrator failed to consider a counterclaim of about RM6m, 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* [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.
>
> [emphasis in original in italics; emphasis added in bold italics]

62 The parties did not develop the argument further before me and I shall therefore exercise my discretion in this case on the basis that the plaintiff's failure to invoke s 33(4) of the 1996 Indian Act is not fatal to its case but that it is a factor which may be taken into account in weighing the balance between

the principle of minimal curial intervention on the one hand and the desire to avoid a breach of natural justice on the other.

63 On the facts of these cases, I have concluded that the balance falls heavily on the side of the principle of minimal curial intervention. First, not only was no application made under s 33(4) of the 1996 Indian Act, no reasons have been given for not doing so. There is no getting away from the fact that to grant the plaintiff the relief it seeks would be to extend the 30-day period provided for in s 33(4). I consider that such a *de facto* extension should not lightly be given where no good reasons are given for the failure to act within that period. Secondly, the value of the omitted matter in contrast to the claim in both arbitrations is even starker than in *BLC*. Counsel for the defendants calculated that the plaintiff's consequential loss claims constituted less than 0.3% of the overall claim by the plaintiff in the CEC Arbitration and less than 0.6% of the overall claim by the plaintiff in the CEE Arbitration.

64 In these circumstances it would be wholly disproportionate to remit the matter back to the Arbitrator, much less set aside the awards. Where the breach of natural justice is in relation to such a small percentage of the claim, it is even more incumbent on the party seeking relief from the court to adopt the quicker and cheaper course of requesting the tribunal to issue an additional award. This aspect of the plaintiff's application therefore fails.

65 Somewhat to my surprise, during the oral submissions, counsel for the plaintiff stated that if I were to find against the plaintiff on the second issue regarding public policy, he would not be asking me to remit the issue in relation to consequential losses to the Arbitrator even if I found in the plaintiff's favour on that point. He did not however abandon the point. Had I considered that the correct exercise of my discretion on this aspect of the case was in the plaintiff's

favour, I would have given the plaintiff the opportunity to elect whether or not this issue should be remitted.

Conflict with public policy in these awards

66 The consequences of the Arbitrator's findings in both cases are striking, the more so in the case of the CEE Action. In that action, the plaintiff was owed over US$25m in respect of goods already delivered under the initial four contracts. The time for payment had been extended until July 2016 but the sums had still not been paid by 31 March 2017 when the plaintiff cancelled the later six contracts which had been entered into in June 2016.

67 The consequence of the Arbitrator's finding that all of these contracts were separate contracts, so that the cancellation of the later six was in breach of each of those contracts, meant that the plaintiff was liable for the loss caused by those breaches. On the facts of the CEE Action, this meant that the sums owing for a long time under the initial four contracts were, in substance, wiped out.

68 Whilst the outcome in the CEC Action is somewhat less striking the principle is the same. By cancelling the three contracts where delivery had not been made, the plaintiff was unable to recover the full amount due under the contracts where delivery had been made.

69 The plaintiff contends that it was entitled to cancel the later contracts on the ground of anticipatory breach based on the repeated failure of either defendant to pay all the sums due by the relevant dates. The Arbitrator held, as a matter of Indian contract law, that the plaintiff could not rescind those contracts as he found that the contracts were all separate contracts and the breach of one did not entitle the plaintiff unilaterally to cancel the others.

70 The normal case of anticipatory breach is where one party has evinced a clear intention that it will not perform its obligations under a given contract and the other party then cancels that contract. The plaintiff referred me to the Court of Appeal decision in *The "STX Mumbai" and another matter* [2015] 5 SLR 1. The legal issue being considered in that case was whether the doctrine of anticipatory breach extended to contracts which had already been executed as well as those still to be executed by the aggrieved party. At [47] Andrew Phang Boon Leong JA said this:

> Returning to the current issue (*viz*, that it is just and fair for the doctrine of anticipatory breach to apply not only to executory contracts but also to executed contracts), it is important to reiterate the point that permitting the doctrine of anticipatory breach to apply to executed contracts as well does not entail any compromise in principle as it can (as explained above at [45]) be justified on the basis of a separate implied promise (albeit of a somewhat different character from that used to rationalise an anticipatory breach of an executory contract). However, the purpose and principle underlying both types of implied promises remain the same: they serve to ensure not only that there is a just and fair result but also that the contract concerned is not rendered an exercise in futility. *Indeed, what is a key consideration, in our view, relates to the conduct of the defendant. If the defendant has evinced a clear intention that it will not perform its obligations under* ***the contract****, then it is only just and fair that the plaintiff be permitted, in law, to rescind* ***the contract*** (if it so chooses) and/or claim damages on the basis of an anticipatory breach of contract – regardless of whether the contract is executed or executory. Although the factual scenarios in both these last-mentioned situations are literally different, there is, in substance, no difference whatsoever when each situation is examined at a deeper level and compared with each other. [emphasis in original omitted; emphasis added in italics and bold italics]

71 This statement of law does not relate to separate contracts and the Arbitrator has held that all these contracts were separate contracts. The plaintiff referred me to no authority which considers the question of the right of a party to one contract to rescind another contract because of a clear intention on the

part of the other party not to perform the first contract. Things might have been different had the plaintiff included in the later contracts in the CEE Action an express clause to the effect that failure to pay timeously under the earlier contracts entitled it to cancel the later ones but there was no such clause. The plaintiff however elected in June 2016 to enter into the six further contracts on standard terms and conditions which did not contain such a clause.

72 Equally, the Arbitrator's finding that each contract was a separate contract rules out the possibility that there was an implied term permitting cancellation. It makes no difference whether such a finding was made under Indian law or Singapore law. The conclusion was open to the Arbitrator under either law and is not one which the court will review on an application to set aside the award. The comments by the Court of Appeal in [37] of *AKN* ([46] *supra*) cited in [52] above are directly applicable.

73 The plaintiff does not however seek to set aside the awards solely on the basis that the Arbitrator's findings were wrong in law, it seeks to do so also on the basis that the outcome of those findings is such that to enforce the awards would be in breach of the public policy of Singapore.

74 The plaintiff puts its case in paras 47–48 of its written submissions in the following way:

> 47. It is submitted that, in allowing the counterclaims of [CEC] and [CEE], the Arbitral Awards were in breach of the public policy of Singapore. ***The Tribunal erred in law by allowing the counterclaims of [CEC] and [CEE] because it had failed to consider that [CEC] and [CEE] had committed anticipatory breaches of the new contracts***.
>
> 48. The Award is in breach of public policy of the State in that ***the result of the Award is so manifestly unjust that it shocks the conscience of the Court.*** Allowing the Defendants' Companies' counterclaims allows them to receive the benefit of

> the goods (from 22 out of 25 contracts) for the price of USD 76,142,552.36 (being the difference in award for the goods supplied (with interest) *less* the set-off sum awarded to the Plaintiff) – of which, the Defendant has only paid USD 300,000 to-date. This is in stark contrast to the invoiced cost of the goods of USD 84,177,017.01 (not inclusive of late payment interest). For the avoidance of doubt, the invoiced sum was not disputed by the Defendant and forms part of the Award. ***This was a substantial and unconscionable windfall obtained by the Defendants.***
>
> [emphasis in original in italics; emphasis added in bold italics]

75 As to para 47, it will be apparent from the foregoing that I do not accept that the Arbitrator erred in law by failing to consider the question of anticipatory breach. Since he had found that the contracts were separate contracts, it was a necessary conclusion that the failure by one party to perform one of the contracts (*ie*, by failing to pay the sum due under that contract) did not amount to anticipatory breach of each of the other contracts thereby entitling the other party to rescind them. In any event, this is irrelevant. Even if the Arbitrator erred in law, this is not a ground for setting aside the awards. An essential aspect of the principle of minimal curial intervention is that "there is no right of recourse to the courts where an arbitrator has simply made an error of law and/or fact" (*per* Andrew Phang Boon Leong JA in *BLC* ([61] *supra*) at [53]).

76 The plaintiff's case on this issue therefore boils down to this: the result of the awards is, in financial terms, so disproportionate and gives each defendant such a financial advantage that the result "shocks the conscience" of the court. I regret that it does not shock my conscience. The plaintiff took a risk in extending credit to the defendants as it did not insert a clause in the original contracts requiring payment before shipment. In respect of the CEE Action, the plaintiff entered into the later contracts in the knowledge that payments were overdue and that CEE was in financial difficulties yet it did not insert clauses either requiring payment before shipment or providing that failure to pay for the

earlier contracts would entitle it to cancel the later contracts. In respect of both cases, the plaintiff cancelled the outstanding contracts taking the risk that the consequent breach would be held not to be a justifiable breach and, no doubt, sold the castor oil due under those contracts at the elevated price available in 2017 which was not available at the time of the contracts.

77 In short, the plaintiff made certain commercial decisions which turned out to be disadvantageous. This is part and parcel of normal trading. There is nothing which "shocks the conscience" about this. The outcome in the CEE Action is, I accept, stark but this cannot turn a bad commercial deal into one that shocks the conscience. This ground for setting aside the award therefore also fails in both actions.

Conclusion

78 The plaintiff is not entitled to have the CEE Award or CEC Award set aside on either of the grounds relied upon. The Originating Summonses will therefore be dismissed. The plaintiff will pay each of the defendant's costs, to be assessed if not agreed.

Simon Thorley
International Judge

Andre Darius Jumabhoy and Low Ying Ning Elaine (Peter Low & Choo LLC) for the plaintiff;
Bazul Ashhab bin Abdul Kader, Prakaash s/o Paniar Silvam, Tanya Thomas Vadaketh and Tay Lin Qian (Oon & Bazul LLP) for the defendants.