IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 185

Originating Summons No. 747 of 2017

Between

BSM

… *Plaintiff*

And

BSN

… *Defendant*

Originating Summons No. 748 of 2017

Between

BSM

… *Plaintiff*

And

BSP

… *Defendant*

GROUNDS OF DECISION

[Arbitration] — [award] — [UNCITRAL Model Law] —[Article 34(4)]
[Arbitration] — [award] — [recourse against award] — [setting aside] — [Article 34(2)(a)(ii)&(iv)]
[Arbitration] — [award] — [setting aside] — [breach of natural justice] — [s24(b) International Arbitration Act (cap 143A, 2002 Rev Ed)]

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29 January, 25 June, 13 July, 14 November 2018; 8 February 2019

13 August 2019

Belinda Ang Saw Ean J:

Introduction

1 The applicant, BSM, in both Originating Summons No 747/2017 ("OS 747") and Originating Summons No 748/2017 ("OS 748"), wanted to set aside two separate but related arbitral awards produced on 19 May 2017 by a sole arbitrator ("the Tribunal"). The first award, the BSP Award, was in favour of BSP, the respondent in OS 748 who commenced arbitration proceedings against BSM in Singapore on 20 April 2015 ("the BSP Arbitration"). The second award, the BSN Award, was issued in favour of BSN, the respondent in OS 747 who commenced arbitration proceedings against BSM in Singapore on the same date ("the BSN Arbitration"). BSP and BSN are collectively referred to hereafter as "the Companies". The BSP Award and the BSN Award are collectively referred to hereafter as the "Awards".

2 In OS 747 and OS 748, BSM relied on two grounds to set aside the Awards:

(a) First, a breach of natural justice in the making of the Awards by which BSM's rights have been prejudiced under s 24(*b*) of the International Arbitration Act (Cap 143A, 2002 Rev Ed)("IAA").

(b) Second, BSM was unable to present its case within the meaning of Art 34(2)(*a*)(*ii*) of the UNICITRAL Model Law on International Commercial Arbitration ("the Model Law") as set out in the First Schedule of the IAA.

3 In respect of the BSP Award alone, there is an additional ground, namely, the Tribunal's failure to adhere to the arbitral procedure agreed by the parties contrary to Art 34(2)(*a*)(*iv*) of the Model Law.[1] The non-adherence to the agreed arbitral procedure relates to the apportionment of the costs of arbitration pursuant to Article 13.4 of the Equipment Purchase Contract.

4 Counsel for BSM, Mr Daniel Chia ("Mr Chia"), informed the court (and rightly so) that he would be advancing BSM's two strongest points at the hearing which were the wasted costs and the limitation of liability issues. As Mr Chia explained, if this court was not minded to set aside the Awards on his two strongest points, there would be no advantage and, hence, little need to proceed with the last three points in BSM's written submissions, namely, on the apportionment of arbitration costs, indemnity costs and legal costs.

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1 BSM's Written Submissions dated 22 January 2018, para 7.

Consequently, as foreshadowed, the Art 34(2)(*a*)(*iv*) ground relating to the apportionment of the costs of the BSP Arbitration was not pursued.

5 On wasted costs, Mr Chia explained that, in the context of the instant case, wasted costs were occasioned by the Companies' last minute amendments to their respective statements of claim that rendered prior work done by BSM to defend the Companies' initial case unnecessary. The complaint is that the Tribunal did not deal with the issue of wasted costs raised before it in the Awards. On the limitation of liability issue, Mr Chia said that the Tribunal did not cap the damages awarded in accordance with the relevant contractual provisions. For these two discreet complaints, BSM relied on s 24(*b*) of the IAA and Art 34(2)(*a*)(*ii*) of Model Law as the grounds to set aside the Awards.

6 As the relevant principles underlying the application of s 24(*b*) of the IAA and Art 34(2)(*a*)(*ii*) and Art 34(2)(*a*)(*iv*) are settled, the approach here is to elaborate, when necessary, on the applicable principles in the course of this written decision. Suffice it to say for now that this court has to decide whether the complaints are genuinely about the Tribunal's failure to ensure that essential issues are dealt with as opposed to a veiled complaint that the Tribunal did not deal with every argument raised. As a matter of law, the Tribunal is not obliged to deal with each point made by a party; what matters is the resolution of an issue either expressly or implicitly (see for example *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 ("*TMM Division*") at [72] and [77]). As in this case, the court has to also consider whether the various arguments raised relate to the substantive merits of the underlying dispute between the parties. This is an important consideration because substantive merits are beyond the court's remit, especially, where a tribunal has made an error of law and/or fact.

Events leading to the commencement of arbitration proceedings and the issuance of the Awards

7 On or about 20 June 2014, pursuant to the Equipment Purchase Contract entered into between BSM and BSP, BSP delivered to BSM the third shipment of the telecommunications equipment. On or about the same time and pursuant to the Technical Service Contract entered into between BSM and BSN, BSN provided to BSM technical services like testing and commissioning of the equipment supplied. In July 2014, BSP invoiced BSM for the equipment sold with 11 August 2014 as the due date for payment. The invoiced amount was USD 7,995,096.93. For the services rendered, BSN, in August 2014, invoiced BSM the sum of USD 1,953,065.15 with 18 August 2014 as the due date for payment. BSM did not settle the invoices on the due dates or at all.

8 In the BSP Arbitration, BSP claimed that BSM had breached the Equipment Purchase Contract by failing to make payment in the sum of USD 7,995,096.93 for the equipment it had delivered. In the BSN Arbitration, BSN claimed that BSM had breached the Technical Service Contract by failing to make payment in the sum of USD 1,953,065.15 for the services rendered under the said contract. BSM in turn made several counterclaims against the Companies. BSM's counterclaims related to breach of confidentiality of the Equipment Purchase Contract and the Technical Service Contract and for defamation. The counterclaims are not the subject matter of the setting aside applications.

9 BSM as respondent in the arbitration proceedings denied the claims made by BSP and BSN respectively. In brief, after the third shipment to BSM, issues arose about the suitability of the equipment. BSM took the position that BSP had not delivered the network equipment in accordance with the terms of

the Equipment Purchase Contract and that the network equipment had not passed the final acceptance tests as prescribed under the Technical Services Contract. The Equipment Purchase Contract and the Technical Services Contract are collectively referred to hereafter as "the Contracts".

10 One year after the commencement of the arbitration proceedings, on the Saturday before the week of the oral hearing in May 2016, the Companies in their written opening submissions brought up, for the first time, a claim for repudiatory breach of contract. On the final day of the oral hearing, 27 May 2016, the Companies applied to the Tribunal for leave to amend their respective statements of claim to introduce a claim for repudiatory breach. The Tribunal granted the Companies leave to amend their earlier claims for non-payment of invoices to a claim for damages for repudiatory breach of the Contracts. The amendment also increased the amounts claimed. BSM was also granted leave to amend its defence and counterclaim which it did. As a consequence of this last minute amendments, BSM claimed that it should be awarded costs thrown away which arose from its abandoned defence against the Companies' initial case of breach of contract (hereafter referred to as the "Wasted Costs Issue"). At the end of the oral hearing, the Tribunal made the order that the costs of these amendments be reserved.

11 In its amended defence in the BSP Arbitration, BSM stated that liability for damages, if any, are limited by Articles 11.2.4 and 11.6 of the Equipment Purchase Contract. In the amended defence in the BSN Arbitration, BSM relied on the limitation of liability provision in Articles 9.1.6 of the Technical Service Contract. The limitation of liability defences raised by BSP and BSN respectively are collectively referred to hereafter as the "Limitation Issue".

12 At the conclusion of the arbitration proceedings, the Tribunal found, amongst other things, that the Companies' respective claims for damages arising from BSM's repudiation of the respective contracts had been established. In addition, the Tribunal did not limit the damages recoverable. The Tribunal found for BSM on its counterclaims. On the issue of costs, the Tribunal found in favour of the Companies for the main claim but also awarded some costs to BSM for succeeding in its counterclaims and in defending the Companies' application challenging the Tribunal's jurisdiction in relation to BSM's counterclaims.

13 The relevant aspects of the arbitrations will be discussed in greater detail below when analysing the issues brought up in the setting aside applications.

Wasted Costs Issue

14 As alluded to earlier, the debate on the Wasted Costs Issue was whether or not the Tribunal having reserved costs on 27 May 2016 dealt with the issue of the costs of the amendments in the Awards. It is clear from the transcripts of the arbitral proceedings that the Tribunal was informed by BSM of the serious costs consequences that would flow from BSM's change of focus to argue a repudiation case at the eleventh hour and from the applications to amend the statements of claim made on 27 May 2016. BSM's counsel, Mr C (name anonymised), at the arbitration submitted that the Companies be ordered to pay costs as a condition of the tribunal allowing the amendment. The Tribunal allowed the application to amend but reserved costs:[2]

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[2] Transcripts of BSP Arbitration dated 27 May 2016 at p 128.

> Arbitrator: Shall we do it this way: if I give you leave and I then give you liberty to file an amended defence and counterclaim, how much time would you need for that?
>
> .....
>
> Mr C: Sir, you remember my earlier submission, that we would request that if the amendment were to be allowed, there ought to be cost consequences, but I appreciate you may have considered that already.
>
> Arbitrator: Yes. What I will do, as far as that is concerned, is reserve costs.

Did the Tribunal rule on the Wasted Costs Issue?

15 Mr Chia submitted that the Tribunal committed a breach of natural justice in that it did not deal with the Wasted Costs Issue in the Awards. BSM had submitted in its closing submissions to the Tribunal that due to the last minute amendment by the Companies to amend their claim to that of a repudiation case, "the vast majority of the time and money [BSM] invested into its defence … were wasted both in terms of its preparation concerning the factual case it was required to meet as well as the legal principles governing those facts".[3] BSM then argued that it should be awarded wasted costs in any event, regardless of the outcome of the case. In short, from its arguments, BSM was seeking, in my view, costs of the application to amend and the costs thrown away by reason of the amendments. As to the specific quantum, BSM subsumed its claim for wasted costs with its overall submission on costs in the arbitrations. In the setting aside applications, BSM put forward the sum of S$498,465.90 for wasted costs.

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[3] BSM's Closing Submissions in BSP Arbitration at para 227.

16 Mr Lok Vi Ming SC ("Mr Lok") who was counsel for the Companies in the arbitrations and before this court, argued before the Tribunal that if the Companies succeeded in the arbitrations, they should get the costs of the application to amend the respective statements of claim.[4] Mr Lok's reasoning was that the plea of repudiation did not change the evidential aspect of either the damages claim or BSM's defence. No new evidence was adduced by either party in respect of the new case on repudiation. Mr Lok reminded the Tribunal that it had permitted the amendments only because both sides confirmed that they did not need to introduce additional evidence or even recall witnesses. In the Companies' Response Closing Submissions, Mr Lok maintained that BSM should not be awarded wasted costs in respect of the amendments to the statements of claim. And if the Tribunal was minded to award costs, only minimal costs of not more than $10,000 should be awarded to BSM.[5]

17 The Tribunal recited the parties' submissions on the Wasted Costs Issue at paragraphs 14.3(a)(vii) and 14.8 in the BSP Award and paragraphs 14.2(a)(vii), 14.3(c) and 14.6 in BSN Award. Mr Lok argued in the present setting aside applications that the Tribunal had good reasons for making the costs award: (a) the Companies had succeeded in the bulk of the claims, and (b) that BSM had claimed an excessive amount as costs thrown away. Mr Lok further argued that "just because the [Tribunal] did not refer to the issue of costs thrown away in his 'Analysis and Decision' section … [did] not mean that he did not consider [BSM]'s arguments on this issue…".[6]

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4 BSP's Closing Submissions in BSP Arbitration at para 213.

5 BSP's Response Closing Submissions in BSP Arbitration at para 162.

6 Companies' Written Submissions dated 22 January 2018 at paras 68 and 70.

18 Turning to the Tribunal's analysis and decision, the Tribunal, amongst other things, noted the parties' agreement to apply the general principle in Singapore-seated international arbitrations that costs follow the event. The Tribunal in paragraph 14.12 referred to the Companies' costs figure amounting to S$434,066.97 which is the exact amount of costs that the Companies had claimed. The figure does not include the sum of S$10,000 as costs of and occasioned by the amendment that the Companies was prepared to pay if ordered.

19 From the face of the Awards, I accepted that the Tribunal in the costs award had in mind only the main claim and counterclaim and, having ruled largely in the Companies' favour, applied the general principle of costs to follow the event. In my view, costs reserved would encompass costs of the application to amend and costs thrown away by reason of the amendments. Accordingly, the Tribunal's costs award did not cover the costs that were reserved. Such an omission could be considered under Art 34(4) of the Model Law and parties were invited to submit on this provision.

Art 34(4) of the Model Law

20 Article 34(4) of the Model Law provides as follows:

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

21 On Art 34(4), Mr Lok and Mr Chia were in agreement that this court has the jurisdiction, when so requested by a party, to suspend the setting aside

applications and remit the Wasted Costs Issue to the Tribunal to resume the arbitration proceedings and "eliminate the grounds for setting aside". When the Tribunal had addressed this issue, the setting aside applications would resume and this court would then decide on whether to allow the setting aside of the Awards or dismiss the applications. As regards the remission on the Waste Costs Issue, at the adjourned hearing, the Companies made the application to suspend the hearing of the setting aside applications under the Art 34(4). On 14 November 2018, the applications to set aside the Awards were adjourned and the Wasted Costs Issue was remitted to the Tribunal.

22 For completeness, I will briefly refer to the legal principles and mechanics of Art 34(4) in the context of a setting aside application. I begin with the nature of the remission under Art 34(4). The Court of Appeal in *AKN v ALC* [2016] 1 SLR 966 ("*AKN v ALC*") held that a remission under Art 34(4) is an alternative to setting aside (at [33]). As such, the court has no power to remit an award *after* it had been set aside. Article 34(4) is a curative option that is available in circumstances where the omission or defect in the award may possibly be cured to avoid setting aside the award (at [34]). The UNCITRAL Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration (UN Doc A-CN 9-264) recorded the following in relation to Art 34(4) of the Model Law:

> Paragraph (4) envisages a procedure which is similar to the 'remission' known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, *it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.*
>
> Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. *The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose*

> *continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such "remission" turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36(2), would the Court resume the setting aside proceedings and set aside the award.*
>
> [Emphasis added]

23 The effect of remission is to confirm jurisdiction on the same tribunal in order for it to consider the matter remitted. This discretionary power to remit is not without limit. Firstly, a party would have to request the court to suspend the hearing of the setting aside application. Secondly, the court has to be satisfied that the circumstances of the case warrant a remission in order to give the same tribunal an opportunity to take steps as may be required to eliminate the grounds for setting aside (see *AKN v ALC* at [25]). Thirdly, on the plain reading of Art 34(4), the court hearing the setting aside application may remit discreet issues which constitutes *a* ground for setting aside the arbitral award back to the same tribunal. *JVL Agro Industries Ltd v Agritrade International Pte Ltd* [2016] 4 SLR 768 ("*JVL Agro*") is an example of a remission under Art 34(4) of Model Law. In *JVL Agro*, the applicant argued that the arbitral tribunal had decided on a point that was never advanced by the other party. Thus, the purpose of the remission to the same tribunal was for the tribunal to consider whether it was necessary or desirable to receive further evidence or submissions.

24 If a remission is made, the setting aside application would have to be adjourned for a period of time to enable the same tribunal to take steps to eliminate the ground for the setting aside application. The court would resume the setting aside proceedings and decide whether to grant or dismiss the

application after the tribunal renders an additional award within the time period stipulated by the court.

The Additional Awards

25 On 21 November 2018, Mr Lok notified the Tribunal in writing of the remission made on 14 November 2018. On 23 November 2018, the Tribunal asked for a copy of this court's orders in relation to the remission. On 25 November 2018, Mr Lok explained to the Tribunal that the parties had not extracted the order of court and instead provided the Tribunal with the background leading to the remission.

26 The Tribunal issued two Additional Awards in January 2019. The Tribunal first considered the parties' respective submissions on the Wasted Costs Issue and it then embarked on a detailed examination of the costs claimed by BSM. The Tribunal provided a breakdown of the amendments made to BSM's pleadings as a result of the Companies' last minute change to a repudiation case. The Tribunal went on to consider whether the amendments were commensurate with the amount of costs that BSM was claiming. Having examined BSM's case in detail against what transpired in the arbitral proceedings as a result of the Companies' amendments to the respective statements of claim, the Tribunal was not persuaded by BSM's submissions on the Wasted Costs Issue. The Tribunal disagreed with BSM that "the vast majority of the time and money [BSM] invested into its defence … were wasted, both in terms of its preparation concerning the factual case it was required to meet as well as the legal principle governing those acts." The Tribunal found

"no basis for awarding [BSM] any of the costs it seeks as wasted costs"[7] and applied the costs follow the event principle (a principle which is also reflected in Article 13.4 of the Equipment Purchase Contract). It is apparent from the Tribunal's holdings that the Tribunal did not even think that BSM should get any costs of amendment let alone costs thrown away.

27 The adjourned hearing of the setting aside applications was on 8 February 2019. In light of the Additional Awards, the Companies' written submissions of 4 February 2019 urged this court to dismiss the applications to set aside on the Wasted Costs Issue. On BSM's earlier argument that "[h]ad the Tribunal truly considered the issue of costs thrown away, he could not have awarded the Companies the full costs it sought in respect of the repudiation claim…"[8], the Tribunal in the Additional Award was clearly not persuaded by BSM's argument. BSM's counsel had no further submissions to make on this matter on 8 February 2019.

Conclusion on the Wasted Costs Issue

28 I agreed with Mr Lok that BSM did not make out its case based on breach of natural justice in relation to the Wasted Costs Issue. BSM's concerns on the Wasted Costs Issue had been remedied by the Tribunal in the Additional Awards. Unfortunately for BSM, the Tribunal was not with BSM on the issue of costs thrown away for the reasons given in the Additional Awards and it is beyond this court's remit to review the merits of the Tribunal's decision.

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7 Additional Awards at para 2.13(b).

8 BSM's Written Submissions dated 22 January 2018 at paragraph 91.

Limitation Issue

29 The other material complaint on breach of s 24(*b*) of IAA and Art 34(2)(*a*)(*ii*) is related to the Tribunal's findings on the Limitation Issue in the Awards. BSM contended that the Tribunal did not properly address BSM's submissions for a variety of reasons such as having misunderstood BSM's point and thus wrongly concluded that there was a concession when there was none and furthermore, the Tribunal ignored BSM's other submissions. The contentions described touch on and overlap aspects of the right to be heard as an aspect of the rules of natural justice under s 24(*b*) of IAA and aspect of the right to present a party's case within the meaning of Art 34(2)(*a*)(*ii*) (see *ADG v ADI* [2014] SGHC 73 at [118] and *Government of the republic of Philippines v Philippine International Air Terminals Co, Inc* [2007] 1 SLR (R) 278 at [18]). Thus, both limbs of the submissions are dealt with together here.

30 In the context of the grounds relied upon under s 24(*b*) and Art 34(2)(*a*)(*ii*), the Tribunal's findings on the Limitation Issue raise several duties of the Tribunal. As Chan Seng Onn J succinctly characterised the notion of natural justice in *TMM Division*, the query here is whether there is: (a) a duty not to look beyond submissions; (b) a duty to deal with every argument presented; and (c) a duty to attempt to understand submissions. The scope and extent of the alleged duties are discussed in *TMM Division*. *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 sets out the extent of when departure from the evidence and submissions before the arbitral tribunal is said to have breached the requirements of natural justice. This can happen if the arbitral tribunal decided a case on a ground not raised or contemplated by the parties (see *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491 at [30]). As Chan J observed in *TMM Division*, the

more surprising the decision and the arbitral tribunal's reasoning, the more likely it is that the arbitral tribunal has "crossed the permissible discretionary decision-making into the forbidden territory of impermissible breach of natural justice" (at [60]). Chan J, however, rightly pointed out at [65] that if a premise that is not argued is one that flows reasonably from an argued premise, the arbitral tribunal would be well within permissible territory in that the arbitral tribunal would be inferring a related premise from one that is place before it.

31 An arbitral tribunal is not obliged to deal with every argument presented. In other words, the arbitral tribunal is not required to deal with each point made by a party. As Chan J observed in *TMM Division*, what the arbitral tribunal has to do is to ensure that the essential issues are dealt with (at [73]). Continuing at [77], Chan J said that an issue need not be addressed expressly in an award; it may be resolved impliedly. Furthermore, an issue may be resolved without going through all the arguments and evidence.

32 Finally, on the question whether natural justice requires the arbitral tribunal to attempt to understand the submissions, the inquiry is whether the award in question reflects the fact that the arbitral tribunal had applied its mind to the critical issues and arguments (*AQU v AQV* [2015] SGHC 26 at [30] – [35]). If the arbitral tribunal had done that but got it wrong on the factual findings and/or law, there is no recourse available. As Chan J remarked in *TMM Division* (at [96]), the right to be heard cannot be elevated to a duty to attempt to understand a party's submissions.

The Tribunal's findings in the BSP Award (OS 748)

33 BSM's contention is that the Tribunal had "totally failed" to consider its submissions that other clauses in the Equipment Purchase Contract supported

its interpretation of Article 11.6. In particular, BSM argued that the Tribunal failed to consider its submissions that Article 4.9 of the Equipment Purchase Contract supports its interpretation that Article 11.6 which limited its liabilities survives the termination of the contract. As such, the damages BSP can claim from BSM for repudiating the Equipment Purchase Contract is contractually limited by Article 11.6. BSM also argued that the Tribunal failed to consider its detailed submission on the law relating to how limitation clauses would survive termination and the law of penalties.

34 By way of background, BSM argued in the BSP Arbitration that it could rely on Articles 11.2.4 and 11.6 of the Equipment Purchase Contract to limit its liability under the said contract. Article 11.2.4 of the Equipment Purchase Contract provides:

> If the buyer demands a return of goods because of the responsibilities of the buyer, the buyer shall pay 3% (THREE PERCENT) of the value of the returned goods to the seller as liquidated damages.

35 Article 11.6 of the Equipment Purchase Contract provides:

> If liquidated damages stipulated in its contract cannot compensate for the loss, the defaulting party shall take the liability for damage in accordance with the law. In any event, the maximum total liquidated compensation paid by one party to another is 10% (TEN PERCENT) of the contract value.

36 BSM said that as the buyer, it had demanded that the equipment delivered by BSP in the third shipment be returned. This can be found at paragraphs 100B of BSM's Statement of Defence and Counterclaim (Re-amended 6 June 2016) whereby it stated that[9]

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9 BSM's 1st Affidavit in OS 748, Exhibit LV-3 at Tab 16.

> The equipment which [BSP] had initially supplied to [BSM] has now been returned to [BSP] pursuant to [BSM"s] *demand* for the return of the goods. As a consequence, Article 11, and in particular Article 11.2.4 of the Equipment Purchase Contract applies in the event that it is determined that [BSM] has breached the Equipment Purchase Contract (which is denied) …
>
> [Emphasis added]

37 In BSP's Statement of Reply and Defence to Counterclaim (Amendment No. 2), BSP argued that BSM had never "demanded" the return of the equipment.[10] In the parties' respective closing submissions, BSP argued that BSM did not elect to claim liquidated damages from BSM under Article 11.2.4.[11]

38 Given the parties' respective arguments on Article 11.6, BSM's contention is that its liability was limited to only 10% of the contract value. It argued that Article 11.6 would survive the termination of the contract. It cited the House of Lords' decision in *Photo Production Ltd v Securicor Ltd* [1980] 2 WLR 283 ("*Photo Production*") in support of its proposition.

39 BSP, on the other hand, argued that Article 11.6 of the Equipment Purchase Contract did not survive the termination of the contract. This argument was premised on Article 15.4 of the Equipment Purchase Contract which dealt with the issue of damages in the event the said contract was terminated. Article 15.4 of the Equipment Purchase Contract provides:

> After this contract is altered or terminated, neither party needs to fulfil the original contract. However, if one party suffers from losses due to contract alteration or termination, except for

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10 BSM's 1st Affidavit in OS 748, Exhibit LV-3 at Tab 17 para 19B(a).

11 BSM's 1st Affidavit in OS 748, Exhibit LV-3, Tab 18 para 89.

> liabilities that can be relieved in accordance with law, the party who is responsible for the losses shall compensate the other party for the losses.

40 From the parties' arguments narrated in the BSP Award, it is clear that both BSM and BSP had the opportunity to argue whether Article 11.2.4 and Article 11.6 of the Equipment Purchase Contract were applicable in limiting the damages recoverable from BSM.

41 Turning now to consider the Tribunal's decision, the Tribunal first noted the relevant provisions of the Equipment Purchase Contract at paragraphs 8.1 to 8.3 of the BSP Award. The Tribunal then reproduced the parties' submissions on the Limitation Issue in the BSP Arbitration at paragraphs 8.4 to 8.7 before giving his decision and analysis at paragraphs 8.8 to 8.13.

42 On Article 11.2.4, the Tribunal made a factual finding that first, "[t]he simple answer is that [BSM] has not so demanded. … [BSM's] purported tender of the Equipment in paragraph 100 of the [Statement of Defence and Counterclaim (Re-amended 6 June 2016)] … constitutes no more than an offer to [BSP] to collect the Equipment remaining in [a named country]".[12] The Tribunal then found that BSM could also not rely on Article 11.2.4 *after* the Equipment Purchase Contract had been terminated. On this, the Tribunal found that Article 11.2.4 did not survive the termination of the contract. To further bolster this position, the Tribunal held that it was not possible to read Article 11.2.4 in conjunction with Article 15.4 of the Equipment Purchase Contract.

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12 BSP Award at para 8.10(a).

43 On Article 11.6 of the Equipment Purchase Contract, the Tribunal found that it could not be read in conjunction with Article 15.4 and thus rejected the position argued by BSM. The Tribunal came to this finding by interpreting the words of the contract according to what was argued by the parties. Finally, the Tribunal concluded that the quantum of damages claimed by BSP in the BSP Arbitration was not contractually limited.

44 Plainly, from the narration above on the Limitation Issue in the BSP Arbitration, both parties made arguments on the interpretation and application of the articles in question and the Tribunal came to its findings after considering the parties' arguments.

45 There is no merit in BSM's argument that there was a breach of natural justice when the Tribunal made a finding that BSM's tender for the return of the equipment constituted an "offer". BSM argued that there was a breach of natural justice because BSM was not afforded the chance to argue against the case that its tender was merely an "offer" as opposed to a "demand". As shown above, BSM made the positive case that it made a "demand" for the return of the equipment while BSP argued that there was no such demand but there was an agreement for such a return. On this matter, the Tribunal clearly found that there was no such demand but merely an offer to be one that reasonably flowed from the parties' submissions. Furthermore, the Tribunal gave cogent reasons and explanation for this decision. Insofar as BSM was arguing that the Tribunal should only be confined to a binary finding of the existence or non-existence of a "demand" and no other, such an argument impermissibly invites the court to review merits of the decision. It is of course trite law that the court will not review the merits since mistake of fact or law made by the Tribunal is not a

ground to set aside an award. There is therefore no recourse for BSM even if this court disagrees with the Tribunal's reasoning.

46 Finally, there is no basis for BSM's argument that the Tribunal failed to consider the decision of *Photo Production* which it cited in its submissions and if the Tribunal had considered that authority, he would have come to a different conclusion and its findings would make "commercial sense". I found this argument to be nothing more than a thinly veiled argument by BSM for this court to consider the merits of the Tribunal's decision. Furthermore, just because the Tribunal did not cite BSM's legal authority in his final award does not mean that the Tribunal did not consider BSM's arguments. The crux of the matter was whether the Tribunal had considered the parties' arguments and made a finding that a reasonable litigant could have foreseen. Here, the Tribunal, in my view, had clearly done so and there was no breach of natural justice.

The Tribunal's findings in the BSN Award (OS 747)

47 In relation to the BSN Arbitration, BSM argued that there was a breach of natural justice when the Tribunal found that Article 9.1.6 did not survive termination of the Technical Service Contract and that the said article could not be read in conjunction with Article 13.4 of the said contract. BSM argued that the Tribunal had disregarded BSM's submissions on Articles 9.1.6 and 13.4 of the Technical Service Contract and found in favour of BSN.

48 Articles 9.1.6 and 13.4 of the Technical Service Contract provide as follows:

> **Article 9.1.6**
>
> If liquidated damages stipulated in this contract cannot compensate for the loss, the defaulting party shall take the liability for damage in accordance with the law. In any event, except liability for payment of the buyer, the aggregate sum of liability for damage shall not exceed ten per cent (10%) of the total sum of the contract.
>
> **Article 13.4**
>
> After the contract terminates, the buyer shall pay the undue payable amount to the service provider in advance.

49 In the BSN Arbitration, BSM argued that Article 9.1.6 of the Technical Service Contract operated to limit BSM's liability. Similar to BSM's arguments on the Limitation Issue in the BSP Arbitration, BSM provided its argument on the proper construction of Article 9.1.6 and cited the House of Lords' decision in *Photo Production* in support of its proposition.

50 BSN on the other hand argued that Article 9.1.6 which appears under the umbrella of Article 9 entitled "Liability for Breach of Contract and Claims" would not limit liability to claims for damages arising from a repudiation of the contract because it did not survive the termination of the contract.

51 Both sides therefore had the opportunity to argue whether and how Article 9.1.4 and Article 13.4 of the Technical Service Contract would apply in limiting the damages recoverable from BSM.

52 Turning now to the Tribunal's decision, the Tribunal considered the Limitation Issue in Part VIII of the BSN Award. The Tribunal first reproduced the relevant articles of the Technical Service Contract at paragraphs 8.1 to 8.3 and proceeded to reproduce the parties' respective arguments in the arbitration

at paragraphs 8.4 to 8.5. The Tribunal's decision and analysis is at paragraphs 8.6 to 8.9.

53 On Article 9.1.6 and Article 13.4 of the Technical Service Contract, the Tribunal at paragraph 8.7 of the BSN Award found that Article 9.1.6 would not limit BSM's liability.

54 The Tribunal stated:

> (a) [i]t is clear from the heading to Article 9 of the Technical Service Contract which refers to "*Liability for Breach of Contract and Claims*" and the heading to Article 13 of the Technical Service Contract which refers to "*Transfer, Alteration and Termination of the Contract*", that these provisions apply to entirely different factual scenarios: Article 9 of the Technical Service Contract does not address any circumstance of termination or discontinuation of the Technical Service Contract. It follows that Article 9 of the Technical Service Contract is based on the premise that the Technical Service Contract continues to exist and is not terminated. Once the Technical Service Contract is terminated, Article 13 of the Technical Service Contract applies.
>
> (b) as neither Article 9 of the Technical Service Contract nor, for that matter, Article 9.1.6 of the Technical Service Contract, contain a reference to Article 13.4 if the Technical Service Contract, it is evident that both provisions are to be read separately from and independently of each other and not in conjunction. Hence, Article 9.1.6 of the Technical Service Contract cannot and does not apply in the event the Technical Service Contract is terminated.

55 The Tribunal then held that "as only Article 13 of the Technical Service Contract applies in the event the Technical Service Contract is terminated and not Article 9.1.6 of the Technical Service Contract, [the Tribunal] conclude[s]

that [BSM's] liability is not limited by Article 9.1.6 of the Technical Service Contract in any manner whatsoever".[13]

56 In summary, from the above narration of the BSN Arbitration, there is no basis to set aside the BSN Award on ground of breach of natural justice under s24(*b*) or under Art 34(2)(*a*)(*ii*). The Tribunal had clearly considered the arguments raised by both parties on Article 9.1.6 and Article 13.4. Both parties made arguments on the interpretation and application of these articles and the Tribunal came to its decision after considering their submissions. The Tribunal's findings were one that a reasonable litigant in the shoes of BSM and BSN could have foreseen and the conclusion reached by the Tribunal was a conclusion that reasonably flowed from the parties' arguments in relation to the respective articles. Consequently, I rejected the Limitation Issue raised in relation to the BSN Award. In any case, there is no recourse for BSM even if this court disagrees with the Tribunal's reasoning on the Limitation Issue.

Article 13.4 of the Equipment Purchase Contract on apportionment of costs

57 As mentioned in [3] and [4] above, the non-adherence to an agreed arbitral procedure as a ground under Art 34(2)(*a*)(*iv*) of Model Law would not be pursued given the outcomes above on the Wasted Costs Issue and the Limitation Issue. Nevertheless, it is worth making the following comments to show that this particular ground is also hopeless.

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13 BSM's 1st Affidavit in OS 747, Exhibit LV-1 at para 8.8.

58 In OS 748, BSM argued that the Tribunal had breached the agreed arbitral procedure when it departed from Article 13.4 of the Equipment Purchase Contract by not awarding BSM a portion of the "*costs of the arbitration*".

59 Generally, there must be a material breach of the agreed procedure serious enough to justify the exercise of the court's discretion to set aside an award. This will often, though not invariably, require proof of actual prejudice (*i.e.,* where the procedural breach complained of could reasonably be said to have altered the final outcome of the arbitral proceedings in some meaningful way) (*Coal & Oil v GHCL* [2015] 3 SLR 154 at [51]).

60 Article 13.4 of the Equipment Purchase Contract provides as follows:

> At the end of the arbitration process, the arbitration charges shall be shouldered by the losing side. If both of the parties lose to some extent, they shall shoulder the arbitration charges according to the corresponding proportion, unless the arbitration result stipulates otherwise.

61 In the BSP Arbitration, BSM argued that subject to Article 13.4 of the Equipment Purchase Contract, the Tribunal's discretion to award costs in the BSP Arbitration was unfettered. BSM then argued that the phrase "*arbitration charges*" in Article 13.4 of the Equipment Purchase Contract referred to the "*costs of the arbitration*" as described under Rule 31 of the SIAC Rules (5th Edition, 1 April 2013) ("SIAC Rules"), and not to the parties' legal and other costs. Therefore, the phrase "*arbitration charges*" connotes the amounts imposed by the SIAC as an institution for administering the arbitration, as opposed to the professional fees of counsel and expert witnesses which are incurred by each of the parties.

62 BSM argued that the Tribunal should generally accept the principle that the successful party be awarded its reasonable costs. As to the costs of the arbitration, BSM claims that BSP is liable to pay all the costs of the arbitration including BSM's share.

63 BSP on the other hand argued that the Tribunal has jurisdiction to determine the costs of the arbitration and how these costs were to be apportioned. BSP also argued that it is trite law that only reasonable costs are recoverable.

64 The Tribunal addressed the issue of costs in Part XIV of the BSP Award. The Tribunal first reproduced Article 13.4 of the Equipment Purchase Contract at paragraph 14.1 before summarising the parties' respective submissions on costs at paragraphs 14.2 to 14.10. The Tribunal's decision and analysis is at paragraphs 14.11 to 14.20.

65 In relation to Article 13.4 of the Equipment Purchase Contract, the Tribunal held that first, it was empowered and required under Rule 31.1 of the SIAC Rules to specify in the final award the costs of the arbitration and decide which parties shall bear these costs and in what proportion they shall be borne by the parties. The Tribunal then noted Article 13.4 of the Equipment Purchase Contract and held that this article was "in line with the general principle in Singapore-seated international arbitrations that costs follow the event".

66 From the above, it is clear that the Tribunal did consider BSM's arguments on Article 13.4 of the Equipment Purchase Contract but ultimately disagreed with BSM. The Tribunal took a wider reading of Article 13.4 of the Equipment Purchase Contract and held that the article preserved its discretion

to award and apportion costs following the event. BSM's insistence that as both parties had lost to some extent and so the Tribunal should have apportioned the costs of the arbitration between the parties instead of awarding them in BSP's favour, would have been an attempt by BSM to have this court consider the merits of the Tribunal's findings. This is impermissible as the same reasons explained in this written decision.

67 BSM's complaints that it was not afforded the opportunity to argue on Article 13.4 of the Equipment Purchase Contract was contradictory to the facts and are wholly unfounded. As explained above, BSM did make submission on this issue.

68 Finally, BSM's argument that the Tribunal's findings were not within the reasonable contemplation of the parties was misconstrued. BSM did highlight Article 13.4 of the Equipment Purchase Contract in its Closing Submissions and the parties did argue that the Tribunal's discretion to award costs was unfettered. As such, the Tribunal had taken a reading of Article 13.4 of the Equipment Purchase Contract to be in line with its unfettered discretion. This conclusion reasonably flowed from the parties' arguments.

69 There was no basis for the contention that the Tribunal's decision did not follow the agreed arbitral procedure found in Article 13.4 of the Equipment Purchase Contract. As Mr Lok pointed out, there was no failure on the part of the Tribunal to abide by the agreed arbitral procedure, in particular to the apportionment of costs in the BSP Arbitration as provided for under Article 13.4 of the Equipment Purchase Contract. Conclusion.

Conclusion

70 For all the reasons stated above, this court dismissed OS 747 and OS 748. BSM was ordered to pay the Companies' costs in the sum of $28,000, inclusive of disbursements for both OS 747 and 748.

Belinda Ang Saw Ean
Judge

Mr Daniel Chia, Mr Leonard Chew and Mr Ker Yanguang (Morgan Lewis Stamford LLC) for the applicant;
Mr Lok Vi Ming S.C., Mr Joseph Lee, Mr Tang Jin Sheng and Ms Natalie Joy Huang (LVM Law Chambers LLC) for the first Respondent.