Econ Piling Pte Ltd and another (both formerly trading as Econ-NCC JointVenture) *v* Shanghai Tunnel Engineering Co Ltd
[2010] SGHC 253

Case Number : Originating Summons No 235 of 2009

Decision Date : 26 August 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : P Balachandran (Robert Wang & Woo LLC) for the appellant; Tan Chee Meng SC, Josephine Choo and Lesley Tan (Wong Partnership LLP) for the respondent.

Parties : Econ Piling Pte Ltd and another (both formerly trading as Econ-NCC JointVenture) — Shanghai Tunnel Engineering Co Ltd

Arbitration

Building and construction law

26 August 2010 Judgment reserved.

Judith Prakash J:

Introduction

1 This originating summons is one of two appeals arising out of arbitration proceedings between Shanghai Tunnel Engineering Co Ltd ("STEC") and Econ-NCC Joint Venture ("ENJV") which resulted in a partial award dated 29 December 2008 ("Partial Award") and a correction award dated 28 January 2009 ("Correction Award"). Both parties were dissatisfied with certain aspects of the arbitrator's decision, albeit on different grounds, and therefore agreed pursuant to s 49(3)(*a*) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") to appeal to the court on the questions of law they considered to arise from the decision. This originating summons ("OS 235/2009") is ENJV's appeal and STEC's appeal is encompassed in Originating Summons No 226 of 2009 ("OS 226/2009") (see *Shanghai Tunnel Engineering Co Ltd v Econ-NCC Joint Venture* [2010] SGHC 252).

2 STEC is a Chinese public company which carries out engineering and construction activities. At all material times during its dealings with STEC, ENJV was a joint-venture registered in Singapore as a partnership between a Singapore construction company, Econ Corporation Pte. Ltd (now known as Econ Piling Pte Ltd) ("Econ Piling"), and a Swedish company, NCC International Aktiebolag ("NCCI"). By the time OS 235/2009 was filed, the joint-venture had been terminated. As both sets of proceedings relate to events that occurred during the subsistence of the joint-venture, however, it is convenient to refer to ENJV rather than to the individual partners.

3 The parties were engaged in works relating to the construction of part of the Circle Line of the Mass Rapid Transit System. ENJV was the main contractor employed by the Land Transport Authority ("LTA") and it in turn employed STEC as a sub-contractor for part of the works. The disputes that arose subsequently were, in accordance with the contract, referred to arbitration by a sole arbitrator, Mr George Tan ("the Arbitrator"). STEC was the claimant in the arbitration but ENJV both defended the proceedings and put in a counter-claim.

The Background

4 The main contract between LTA and ENJV was dated 1 August 2002 ("Main Contract"). It was ENJV's task to construct and complete the MRT stations at MacPherson and Upper Paya Lebar as well as the tunnels at this section of the Circle Line ("Main Contract works"). There were 13 phases under the Main Contract. In Phase 3, the basic structure of the rail tunnels should have been completed. The completion date stipulated in the Main Contract for Phase 3 was 31 December 2004.

5 By a Letter of Award dated 5 December 2002 ("LA"), STEC was awarded a sub-contract by ENJV for the bored tunnelling works in Phase 3 of the Main Contract at the price of $20,172,966.00 ("Sub-Contract"). By virtue of cl 2.0 of the LA, the following documents were incorporated into the Sub-Contract:

(a) The LA;

(b) General Terms and Conditions for Domestic Subcontract Work ("GTC"); and

(c) Main Contractor's Programme, referred to in the arbitration proceedings as the "22B3 Programme".

Broadly speaking, the works under the Sub-Contract ("the Sub-Contract works") comprised tunnelling works for both north-bound ("NB") and south-bound ("SB") tunnels, including the installation of precast reinforced concrete segments in strict compliance with, *inter alia*, the 22B3 Programme.

6 The commencement and completion dates for the Sub-Contract works were stipulated at cl 4.0 of the LA as 15 December 2002 and 31 December 2004 respectively. In particular, STEC was to complete the installation of tunnelling works including First Stage Concrete by 16 November 2004. As the issues arising in this appeal relate to the completion of the Sub-Contract works, the clauses in the LA and GTC which are pertinent to completion are reproduced below.

(a) Clause 4.0 of the LA states:

> **4.0 Commencement Date and Completion Date**
>
> The Domestic Subcontract shall commence on **15 December 2002** and shall complete on **31 December 2004**. However, the completion dates for each part or section of the Domestic Subcontract Works shall be in accordance with the Main Contractor's Programme as revised from time to time or as instructed by the Main Contractor.
>
> In particular the Domestic Subcontractor shall complete the installation of the tunnelling works (last segment lining) including First Stage Concrete by **16 Nov 04**. The Domestic Subcontractor shall then demobilize within 2 weeks, all plant, equipment, tools, surplus materials, temporary works out of the tunnels & shafts including cleaning the tunnels and shafts.
>
> In the event of a revision of the Main Contractor's Programme, the original duration of the programmed activity of the Domestic Subcontractor shall not be diminished.

[emphasis in original]

(b) Clause 17.0 of the LA provides for completion, delay and time extension as follows:

17.0 Completion, Delay & Time Extension

The Domestic Subcontractor is fully aware that liquidated damages for the Basic Structure Completion in the Main Contract is $49,000 per day and Completion of the Whole of the Main Contract Works is $66,000 per day.

In the event that the Domestic Subcontractor delays the completion of the tunnelling works beyond the 16 November 2004, the Main Contractor shall retain the following additional sums:

Delay	First 10 Days	Next 10 Days	Final 10 Days
Retention Per Day	$20,000	$30,000	$50,000

The total additional amount retained shall be limited to $1,000,000 after which the Main Contractor reserves the right to terminate the Domestic Subcontract in accordance with clause 14 of the General Terms and Conditions for Domestic Subcontract Work. The Main Contractor shall have the right to recover whatever costs from the Domestic Subcontractor.

The Domestic Subcontractor's attention is also directed [*sic*] Clause 15, 16, 17 and 18 of the General Terms and Conditions for Domestic Subcontract Work.

(c) Clauses 17 and 18 of the GTC impose the following terms for completion:

17 Completion

Should the Domestic Subcontractor fail to complete the Domestic Subcontract Works by the completion date or any extended date or dates as may be granted under this Domestic Subcontract and such delay results in delay to the completion of the Main Contract Works, then the Domestic Subcontractor shall pay or allow to the Main Contractor a sum equivalent to any loss or damage suffered or incurred by the Main Contractor which is attributable to the delay caused by the Domestic Subcontract Works. Such sum or sums shall be deducted or recovered by the Main Contractor from monies due or which may become due to the Domestic Subcontractor under this or any other subcontract.

When the whole of the Domestic Subcontract works have been substantially completed in accordance with the Domestic Subcontract, the Main Contractor shall issue a Certificate of Substantial Completion to the effect that the Domestic Subcontract Works shall be deemed for all purposes of the Domestic Subcontract to have been completed on the day named in the Certificate. The Main Contractor shall not unreasonably delay or withhold the issue of the Certificate of Substantial Completion. The issue of the Certificate of Substantial Completion for the Domestic Subcontract Works shall be on a "Back-to-Back" basis i.e. it shall be subject to the issue of a similar certificate by the Engineer to the Main Contract unless otherwise provided in the Letter of Award.

…

Any Certificate of Substantial Completion issued shall not relieve the Domestic Subcontractor of his obligations under the Domestic Subcontract for the completion of all of the Domestic Subcontract Works relating to or ancillary to that section or part. The Defects Liability shall commence from the date named in the Certificate of Substantial Completion for the whole of the Main Contract Works and not for any section or part thereof unless otherwise provided in the Letter of Award.

18 Rate of Progress

If for any reason which does not entitle the Domestic Subcontractor to an extension of time, the rate of the progress of the Domestic Subcontract Works or any section is [*sic*] at any time in the opinion of the Main Contractor is too slow to ensure completion by the time for completion or any extended time or further extended time, the Main Contractor shall so notify the Domestic Subcontractor in writing and the Domestic Subcontractor shall thereupon take such measures and actions as are necessary and as the Main Contractor may require to expedite progress so as to complete the Domestic Subcontract Works or such section by the time for completion of extended time or further extended time. The Domestic Subcontractor shall not be entitled to claim for any additional payment for taking such measures or actions.

Should the Domestic Subcontractor fail to complete the Domestic Subcontract Works by the completion date or any extended date or dates as may be granted under this Domestic Subcontract and such delay results in delay to the completion of the Main Contract Works, then the Domestic Subcontractor shall pay or allow to the Main Contractor a sum equivalent to any loss or damage suffered or incurred by the Main Contractor which is attributable to the delay caused by the Domestic Subcontract Works. Such sum or sums shall be deducted or recovered by the Main Contractor from monies due or which may become due to the Domestic Subcontractor under this or any other subcontract.

7 Pursuant to cl 9.0 of the LA and Appendix V of the GTC, ENJV was to complete preparatory works before STEC could carry out the boring works. These preparatory works included:

(a) Design and construction of launch shaft;

(b) Construction and preparation of launch shaft surface area for STEC to construct the crane foundation and to assemble the gantry crane; and

(c) Casting of base slab in the launch shaft and removal of temporary struts to enable STEC to lower the tunnel boring machine ("the Machine") cradle into the launch shaft and assemble the Machine cradle and the Machine.

8 Based on the 22B3 programme, the dates for handing over of the SB and NB launch shafts to STEC for commencement of work were 24 April 2003 and 8 May 2003 respectively. Tunnelling works for SB and NB tunnels were to be carried out concurrently. For various reasons, ENJV could not complete the requisite preparatory works according to schedule. The SB launch shaft was handed over to STEC on 27 June 2003 whilst the NB shaft was handed over on 11 August 2003.

9 STEC alleged that the late handover of the launch shafts by ENJV entitled it to 84 days of extension of time. This was disputed by ENJV, which claimed that despite the late handover of the launch shaft, STEC had not commenced installation of its site offices and had not mobilised the necessary labour and resources to commence the Sub-Contract works as at the date of actual handover of the launch shafts. Thus, the late commencement of the Sub-Contract works could not be wholly attributable to the delay in the handover of the launch shafts.

10 On 20 May 2005, STEC gave notice to ENJV of its intention to commence arbitration proceedings pursuant to cl 32 of the GTC. STEC's position was that it was not at fault for failing to meet the contractual deadlines but was entitled to extensions of time while ENJV disputed this and claimed that the delay in the completion of the Sub-Contract works had caused it substantial loss for which STEC should be held liable. There was also a dispute over whether ENJV was entitled to withhold certain monies from STEC.

The arbitration proceedings

11 On 6 December 2005, STEC made an application to the Arbitrator for an interim award to be made summarily in its favour. This application was dismissed on 3 April 2006 by the Arbitrator's interim award ("Interim Award"). Following this decision, STEC re-amended its statement of case and changed its position in relation to the nature of cl 17.0.0 of the LA. It should be noted that the parties had agreed that the Domestic Arbitration Rules of the Singapore International Arbitration Centre (2nd Ed, 1 September 2002) ("SIAC Domestic Rules") should govern the conduct of the proceedings.

12 In its final pleadings ("Final Statement of Claimant's Case") and closing submissions, STEC claimed the following:

(a) $7,101,036.18, being sums due and payable under the Sub-Contract and variation claims;

(b) An extension of time in the duration of 156 days or alternatively 112 days or such duration as determined by the Arbitrator;

(c) $1,347,931.00, being delay-related expenses or such sums as determined by the Arbitrator to be due to STEC as a consequence of the delaying events entitling it to extension of time;

(d) A declaration that the defects liability period ("DLP") commenced on 8 March 2005 or on such date determined by the Arbitrator;

(e) $1,008,648.30 paid out under the demand guarantee pursuant to the 2nd SA;

(f) $166,868.64, being a sum paid to SP Services Ltd on behalf of ENJV; and

(g) Interest and GST on the above claim amounts and costs.

13 In its amended pleading ("Counterclaim"), ENJV made a counterclaim against STEC for the following:

(a) $1,000,000, being liquidated damages pursuant to cl 17.0 of the LA;

(b) $10,682,000, being ENJV's liability to LTA under the Main Contract in respect of STEC's failure to complete the Sub-Contract works on time;

(c) $1,778,150.33 in respect of ENJV's prolongation costs incurred by reason of ENJV's attendance in relation to STEC's execution of Sub-Contract works beyond 31 December 2004;

(d) $303,408.00, being damages arising from STEC's breach of the Sub-Contract for failure to install tunnel lining segments and rings within the construction tolerance specified therein;

(e) $52,955.09, being the reduction in actual quantities of works performed by STEC;

(f) $1,193,143.09, being contra charges; and

(g) Interest, costs and GST.

14 The hearing of the arbitration commenced in March 2007. Further hearings took place in April and May 2007 and oral evidence was completed on 24 May 2007. Thereafter, both parties filed closing submissions and written replies to the same. The Arbitrator subsequently granted the parties leave to make further submissions and the fifth and final set of submissions from ENJV was received on 14 August 2008. On 15 December 2008, the Arbitrator denied ENJV's request to put in a sixth set of submissions and declared the close of the hearing of the arbitration. He issued the Partial Award on 29 December 2008.

15 In January 2009, solicitors for both STEC and ENJV wrote to the Arbitrator to seek clarification and correction on various points of the Partial Award. On 28 January 2009, the Arbitrator issued the Correction Award.

16 Apart from the various claims and counterclaims, the Arbitrator also made determinations on the following:

(a) Submissions on costs for interlocutory applications relating to:

(i) STEC's application for discovery against ENJV which was allowed;

(ii) STEC's application to amend the Statement of Claimant's Case which was allowed; and

(b) ENJV's submission that the scheme of arrangement concerning ECON approved by the court on 27 October 2004 ("the Scheme") had the effect of discharging ENJV from all its liabilities to STEC owing to STEC's failure to file a proof of debt pursuant to the Scheme.

17 The Arbitrator's determinations are summarised in the following table:

Claim	Determination
STEC's claims	
$7,101,036.18 for work done and variations under the Sub-Contract	$6,106,852.14 allowed after setting off amounts admitted by STEC as being due to ENJV
Extension of time of 156 or 112 days or such duration determined by Arbitrator	Substantial completion of Sub-Contract works on 8 March 2005 44 days' extension of time allowed STEC liable for 68 days of delay
$1,347,931 delay-related expenses	$183,186.84 based on 44 days' extension of time
Declaration that DLP commenced on 8 March 2005	DLP commenced on 8 March 2005, 112 days after 16 November 2004
$1,008,648.30 paid under demand guarantee	No jurisdiction on matters relating to the demand guarantee
$166,868.84 paid to SP Services Pte Ltd	Claim allowed
Interest, costs, GST	Interest at 6% per annum from date of Notice of Arbitration (20 May 2005) to payment of sums awarded Costs to be determined separately
ENJV's counterclaims	
$1,000,000 as liquidated damages	Dismissed
$10,682,000 in reimbursement of ENJV's liability to LTA for delay	No order made
$1,778,150.33 prolongation costs	$42,057.11 awarded
$303,408.00 as rectification costs	Dismissed
$52,955.09 as reduction in value of Sub-Contract works	Dismissed because actual value of Sub-Contract works greater than initial sum contracted for
$1,193,143.09 for contra charges	$999,834.68 admitted by STEC and awarded
Interest, costs and GST	Interest at 6% per annum from date of Notice of Arbitration (20 May 2005) to payment of sums awarded Costs to be determined separately

Further submissions on scheme of arrangement	Rejected, disregarded for purposes of Partial Award
Costs awards for interlocutory applications	
Discovery	ENJV to pay STEC costs, fixed at $5,500.00
Amendment of STEC's pleadings	STEC pays ENJV costs fixed at $12,000.00
Clarification request	
STEC made a clarification request on 14 January 2009 for reduction of number of days in delay	The clarification request was made pursuant to s 43(1)(*a*) of the Act

18 The questions of law raised by ENJV relate to the following findings of the Arbitrator:

(a) That substantial completion of the Sub-Contract works was effected on 8 March 2005 because the parties had accepted that the DLP under the terms of the Sub-Contract had commenced on that date;

(b) That in assessing the actual duration of delay in relation to Delaying Event 5 of STEC's claim, there was no legal difference between a "delay" and an "interruption";

(c) That on its true interpretation, cl 17.0 of the LA is not a liquidated damages provision;

(d) That the Scheme of Arrangement dated 15 September 2004 in respect of Econ Piling (the "Scheme") was not properly before him and that issues arising out of the Scheme that may have an impact on the enforcement of the award were outside his purview; and

(e) That STEC's clarification request dated 14 January 2009 was made under s 43(1)(*a*) of the Act and not under s 43(1)(*b*) of the Act.

There were two other questions of law that arose out of omissions rather than findings of the Arbitrator. One of these related to costs orders for which ENJV had applied and the other related to the Arbitrator's dismissal of all the heads of contra charges under Group 9 of ENJV's claim for contra charges when he had found that only one head of claim should be dismissed. The various questions will be discussed in turn.

Questions relating to substantial completion

19 The questions posed by ENJV in relation to the DLP and therefore in relation to substantial completion are:

(a) Whether the Arbitrator erred in law in relying on the commencement of the DLP in determining

the substantial completion of the Sub-Contract works; and

(b) Whether the Arbitrator erred in law in holding that the meaning and effect of the DLP in the Main Contract were the same as the meaning and effect of the DLP in the Sub-Contract.

20 One of the objections to ENJV's appeal that STEC raised in its respondent's case was that the questions posed by ENJV were not questions of law and therefore were not appealable under s 45(1) of the Act. This objection has, in my judgment, no application to the questions set out in [19] above because these questions relate to construction of the contractual terms binding the parties and such issues are accepted as being legal issues.

Contractual provisions

21 The relevant contractual provisions which have to be looked at in relation to these questions are found in the LA, the GTC and the Main Contract. First, Clause 4.0 of the LA provides that the completion date for the Sub-Contract was 31 December 2004. In particular, the installation of the tunnelling works (last segment lining) including first stage concrete was to be completed by 16 November 2004. Clause 5.0 of the LA provided for the DLP as follows:

5.0 Defects Liability Period

The Defects Liability Period for the Domestic Subcontract shall be 24 calendar months from the completion of the installation of the tunnelling works (as described in Item 4.0 above).

22 The GTC provided for completion of the Sub-Contract works as follows in cl 17.0:

When the whole of the Domestic Subcontract works have been substantially completed in accordance with the Domestic Subcontract, the Main Contractor shall issue a Certificate of Substantial Completion to the effect that the Domestic Subcontract Works shall be deemed for all purposes of the Domestic Subcontract to have been completed on the day named in the Certificate. The Main Contractor shall not unreasonably delay or withhold the issue of the Certificate of Substantial Completion. The issue of the Certificate of Substantial Completion for the Domestic Subcontract Works shall be on a "Back-to-Back" basis i.e. it shall be subject to the issue of a similar certificate by the Engineer to the Main Contract unless otherwise provided in the Letter of Award.

…

Any Certificate of Substantial Completion issued shall not relieve the Domestic Subcontractor of his obligations under the Domestic Subcontract for the completion of all of the Domestic Subcontract Works relating to or ancillary to that section or part. The Defects Liability shall commence from the date named in the Certificate of Substantial Completion for the whole of the Main Contract Works and not for any section or part thereof unless otherwise provided in the Letter of Award.

23 In the Main Contract, the DLP is defined in cl 1.1 as follows:

"Defects Liability Period" shall mean the period of maintenance named in the Appendix to the Form of Tender calculated from the date of Substantial Completion of the whole of the Works and not

for any Phase or Section or part thereof certified by the Engineer unless otherwise stated in the Appendix to the Form of Tender; …

24 Substantial completion of the Main Contract works is defined in cl 54.1 of the Main Contract as follows:

When the whole of the Works have been substantially completed in accordance with the Contract, the Engineer shall issue a Certificate of Substantial Completion to that effect and the Works shall be deemed for all purposes of the Contract to have been completed on the day named in the Certificate. The Engineer shall not unreasonably delay or withhold the issue of the Certificate of Substantial Completion.

The Arbitrator's reasoning

25 At para 98 of the Partial Award, the Arbitrator opined that with the parties' acceptance of the commencement of the DLP on 8 March 2005, he "should find that STEC had achieved substantial completion of the Sub-Contract works on 8 March 2005". He had accepted STEC's arguments that (at paras 97-98):

97. … relying on clauses 1.1 and 54.1 of the Main Contract Conditions that as the DLP is calculated from the date of the Substantial Completion of the Works, it must mean that STEC had achieved substantial completion of the Sub-Contract works on 8 March 2005.

98. Although these Main Contract provisions do not directly govern the relationship between the parties, I find no reason to assume that substantial completion of the Sub-Contract works should be different from that for the Main Contract. …

26 In my view, with all due respect to the Arbitrator, he made an error in deciding that the parties' acceptance of commencement of DLP itself determined the date of substantial completion of the Sub-Contract works because he made this decision in reliance on the Main Contract provisions only and without regard to the language of the Sub-Contract itself. No doubt, his interpretation of the Main Contract cannot be faulted. Under cl 1.1 of the Main Contract, "defects liability period" is calculated from the date of substantial completion of the *whole* of the Main Contract works, *and not for any Phase or Section or part thereof certified by the Engineer*. The date of substantial completion is taken, under cl 54.1 of the Main Contract, to be the day named in the Certificate of Substantial Completion. Therefore, under the Main Contract, the DLP for the whole of the Main Contract works would indeed commence on the day named in the Certificate of Substantial Completion. The Arbitrator, however, himself noted that the Main Contract provisions did not directly govern the relationship between STEC and ENJV and therefore his first recourse should have been to the terms of the Sub-Contract.

27 The position under the Sub-Contract is different from that under the Main Contract. It is clear from the wording of the LA and the GTC that the commencement of the DLP and date of completion of the Sub-Contract works were not intended by the parties to coincide. Under cl 5.0 of the LA, the DLP commences upon the "completion of the installation of the tunnelling works" as described in cl 4.0 of the LA. Under cl 4.0 of the LA, STEC was under the obligation to "complete the installation of the tunnelling works (last segment lining) including First Stage Concrete by 16 Nov 04", which is a separate date from the date of completion of the Sub-Contract works, which was stipulated to be 31 December 2004. If the works had progressed as the parties had envisaged under the Sub-Contract, ideally, the DLP should have commenced on 16 November 2004, even though the date of completion of the Sub-Contract, *viz*, 31 December 2004, had not arrived yet.

28 Through no coincidence, 31 December 2004 was also the stipulated date of completion of Phase 3 of the Main Contract. The installation of tunnelling works including First Stage Concrete by STEC was one of the activities to be completed before ENJV and its other sub-contractors could carry out other works to the tunnels to achieve basic structural completion. There were six other items of work to be completed, only two of which (albeit the more substantial) were to be done by STEC. Thus in the Sub-Contract, unlike the Main Contract, commencement of DLP was divorced from substantial completion.

29 Clause 17 of the GTC envisaged that on substantial completion of the Sub-Contract works, ENJV would issue a certificate to this effect. However, it was also contemplated that such certificate would be issued on a back to back basis with the issue of a similar certificate by the Engineer under the Main Contract. In the event, this certificate issued by the Engineer stated that Phase 3 of the Main Contract works (*ie*, the Sub-Contract works) was completed on 2 June 2006. There was, however, evidence that the LTA considered that the B2 tunnels were substantially completed on 16 August 2005. Therefore, it would seem that the Engineer's certificate may not have reflected the actual date of substantial completion of the Sub-Contract works.

30 In my judgment, if the Arbitrator had construed the provisions of the Sub-Contract, he would have found that under the Sub-Contract, unlike the Main Contract, the DLP would not necessarily commence on the date of substantial completion. Accordingly, in order to determine the actual date of substantial completion, he would have looked at the evidence in relation to what STEC had done by 8 March 2005 and found as a fact whether the Sub-Contract works were substantially completed on that date or on 16 August 2005 or on any other date. The Arbitrator misdirected himself by relying on the provisions of the Main Contract and the parties' acceptance that DLP started on 8 March 2005 to determine substantial completion. The questions of law posed in [19] above must be answered in the affirmative.

The legal difference between "delay" and "interruption"

31 The next question of law is whether the Arbitrator erred in law in failing to make a distinction between a delay and an interruption when he assessed the actual duration of delay in relation to Delaying Event 5 of STEC's claim. The point here is whether these two terms have distinct legal meanings.

32 Delaying Event 5 related to STEC's claim that the progress of its works on the Drive B3 SB tunnel was delayed by 34 days as a result of the transfer of the SB Machine transformer to the NB Machine and the subsequent malfunction of a particular transformer. ENJV denied that STEC was entitled to any extension of time for Delaying Event 5.

33 ENJV relied on the testimony of the experts of both parties on time and delays, to wit Jonathan Prudhoe (for STEC) and Thomas Harker (for ENJV), for its contention that the 34-day duration of "delay" stated in the experts' Joint Statement on Time was merely expressing the period between the date of transfer of the transformer and the date of resumption of work, and that this period was merely an "interruption" and not "delay". STEC's expert in particular had confirmed that the 34 days was the period of interruption and not actual delay and that there were only 31 days of delay. Therefore, ENJV submitted, the Arbitrator had erred in finding that (a) there was no difference between a "delay" and an "interruption"; and (b) ENJV was responsible for the 34-day delay which entitled STEC to an extension of time for that duration.

34 From the transcript, it appears that Mr Prudhoe had pointed out that there was a disagreement between the experts on the appropriate terminology; while Mr Prudhoe preferred to use the term

"delay", Mr Harker preferred to use the term "interruption". The Arbitrator addressed this issue in para 87 of the Partial Award where he said:

> 87 First of all, I agree with STEC "that the durations have been agreed regardless of whether one refers to these durations as delay or interruption or period whereby an activity could not proceed or work was not going on." If I focus on the substance rather than the nomenclature, I find some difficulty in seeing the difference between a delay and an "interruption." I am not persuaded that there is a difference and I accordingly hold that the experts have agreed on the durations in the Joint Statement.

35 In Chow Kok Fong, *Construction Contracts Dictionary* (Sweet & Maxwell Asia, 2006), "delay" is defined as (at p 103):

> **delay** *n*. In relation to the progress of construction works, refers to: (a) the period of time by which the works has fallen behind a specified time target; *or* (b) the difference in the time taken for the works to be actually completed against the period allowed for completion.

There is no definition of interruption and ENJV did not put forward any other legal definition or any authority which supported its contention that the two terms had different meanings and consequences in law. The textbooks and the cases do not discuss that difference because, as the Arbitrator recognised, it is merely a matter of semantics, not substance. So long as there has been either a period of time by which the works have fallen behind a specified time target or a difference between the time taken for the works to be actually completed and the duration allowed for completion under the contract, there can be said to have been "delay" caused. The critical question is really which party had caused the delay.

36 If it was the main contractor, or employer, who caused the delay, *ie*, prevented the timely completion of the contract works in any way, the general rule is that he loses the right to claim liquidated damages for non-completion to time for he "cannot insist on a condition if it is his own fault that the condition has not been fulfilled" (*Amalgamated Building Contractors Ltd v Waltham Holy Cross UDC* [1952] 2 All ER 452, at 455): see *Keating on Construction Contracts* (Stephen Furst and Vivian Ramsey, gen ed) (Sweet & Maxwell, 8th Ed, 2006) at para 9-018.

37 In the Partial Award, the Arbitrator made the following findings of fact:

> (a) As a result of Delaying Event 5, STEC could not proceed with the Sub-Contract works for a duration of 34 days (at para 87); and
>
> (b) It was "more likely than not that the insulation material was inherently defective rather than it was damaged by misuse or neglect owing to poor maintenance" (at para 221).

As a result, he found that STEC should not be held responsible for Delaying Event 5 and was thus entitled to 34 days' extension of time in respect of the same. ENJV criticised the award of 34 days' extension of time on the basis that STEC's own expert had calculated the delay as being 31 days. Whether the period of delay was 31 days or 34 days was a question of fact and was for the Arbitrator to determine. Even if he did make a mistake of fact, such mistake is not amenable to appeal. The Arbitrator was well entitled to find as matters of fact what the duration of the delay or interruption was and whose fault caused that delay.

38 The question of law must therefore be answered in the negative and it must be stated that the question posed turned out not to be a question of law at all.

The true construction of clause 17.0 of the LA

39 ENJV has framed the following questions as questions of law arising out of the Arbitrator's findings in relation cl 17.0 of the LA:

(a) Whether the Arbitrator erred in law in holding that he was not *functus officio* and was therefore able to hold that cl 17.0 of the LA is not a liquidated damages provision and that STEC was not estopped by its position at the hearing leading to the Interim Award;

(b) In the alternative, whether the Arbitrator erred in law in his construction that cl 17.0 is not a liquidated damages provision; and

(c) In any event, whether the Arbitrator erred in law in dismissing ENJV's claim for the monies in relation to cl 17.0 and finding that ENJV was entitled to retain the monies under the said clause.

40 These questions of law are based on two positions taken by ENJV. The first was that the Arbitrator had determined in the Interim Award that cl 17.0 of the LA was a liquidated damages clause and as such had rendered himself *functus officio* in relation to these issues and unable to depart from the earlier determination. The second position was that the Arbitrator had wrongly construed cl 17.0 in the Partial Award when he decided it was not a liquidated damages provision.

Summary award

41 On 6 December 2005, STEC applied pursuant to r 27 of the SIAC Domestic Rules for a summary award in its favour in the sum of $5,910,000. The material portions of r 27 state as follows:

Rule 27 Summary Awards

27.1 Upon the expiry of the time limited or allowed for the filing of all the case statements under Rule 9 but not later than 21 days after the expiry, if a party considers that there is no valid defence to its claim or any substantial part of its claim, it may file with the Tribunal and serve on the other party a notice of its intention to apply for a summary award on the claim or that part of the claim. "Claim" in this Rule includes a counterclaim.

…

27.5 The Tribunal hears the application and may:

(a) make a summary award; or

(b) make an order dismissing the application; or

(c) make an order requiring security for the applicant's claim or part of the claim.

42 The sum of $5,910,000 claimed included the sum of $1m deducted by ENJV pursuant to cl 17.0.0 of the LA. In its submissions for the purposes of the summary award, STEC stated that it was on common ground with ENJV that liquidated damages under that clause was capped at the sum of $1m and that these "capped damages" related to the period between 17 November 2004 and 31 December 2004. Beyond 31 December 2004, STEC submitted, no liquidated damages were payable because neither cl 17.0 of the LA nor any other provision of the Sub-Contract incorporated the rates

of liquidated damages from the Main Contract either expressly or on a "back-to-back" basis into the Sub-Contract. STEC accepted that ENJV may be entitled to claim *general damages* of $1m but submitted that this must be proven in evidence at the main hearing.

43 In response, ENJV submitted that in relation to the 16 November 2004 completion date for installation of tunnelling works, the parties had agreed to daily rates of liquidated damages up to a cap of 30 days or $1m under cl 17.0 of the LA. ENJV contended that STEC's failure to meet the 16 November 2004 completion date attracted liability to pay liquidated damages at an increasing rate up to a maximum of $1 million. Therefore, STEC's breach of its contractual obligations to complete the Sub-Contract works on time, as well as to provide non-defective works, gave rise to a bona fide claim for damages (liquidated or otherwise) on the part of ENJV as main contractor and entitled ENJV to deduct such damages from payments due to STEC.

44 It should be noted that as at the date of STEC's application for summary award, *viz*, 6 December 2005, STEC's pleadings in its amended statement of claim dated 17 October 2005 stated that cl 17.0 of the LA had set out a "damages cap" mechanism (at paras 106-107):

> 106. Clause 17.0 of the Letter of Award addresses completion delay and additionally sets out a "damages cap" mechanism to be applicable to the Claimants "…*in the event that* (the Claimants) *delays the completion of the tunnelling works beyond the 16 November 2004…*".
>
> 107. This mechanism is one which, by the Claimants' interpretation, the Claimants agree to progressive deductions or back charges by the Respondents of:-
>
> a) S$20,000.00 per day for the first 10 days of delay; rising to
>
> b) S$30,000.00 per day for the following 10 days; and culminating at
>
> c) S$50,000.00 per day for the next and final tranche of 10 days – thereby limiting the Claimants to a "cap" of S$1,000,000.00 payable *as liquidated damages* ("LD" or "LDs") for a mutually recognised period of 30 days of Sub Contract delay ("the damages cap").
>
> [emphasis added]

When this pleading was amended on 21 February 2006, STEC continued to maintain its case that cl 17.0.0 of the LA was meant as a cap on the liquidated damages payable to ENJV.

45 Given the state of the pleadings and the submissions from both parties, the Arbitrator recorded in the Interim Award dated 3 April 2006 that (at para 81):

> Although clause 17.0 of the Letter of Award appears to be capable of a number of interpretations, *the parties are on common ground* that clause 17.0 is a liquidated damages provision. [emphasis added]

Naturally, he also recorded the fact that (at para 84):

> Either way, whichever meaning of clause 17.0 is adopted, *the parties are in broad agreement* that the Respondents can, in principle, deduct liquidated damages up to a cap of S$1,000,000 under that clause for delay between 17 November 2004 and 31 December 2004. There is, of course, disagreement over whether the circumstances justify such a deduction. [emphasis added]

46 Ultimately, in the Interim Award, in dismissing STEC's application for a summary award, the Arbitrator made "no ruling at this stage"(at para 89) whether STEC was indeed liable for liquidated damages up to the cap of S$1m or at all, as he found that ENJV had a "bona fide and arguable claim" for that sum.

Relevant findings in the Partial Award

47 Subsequently, STEC changed tack. It amended its pleadings before the hearing and in its Final Statement of Claimant's Case (which was dated 15 September 2006) there is no mention that cl 17.0 of the LA was meant as a liquidated damages provision with a cap at $1m. In its amended statement of the claimant's reply and defence to counterclaim dated 27 October 2006, STEC averred at para 166 that cl 17.0 of the LA did not set out any liquidated damages payable by STEC.

48 In response, ENJV contended that the Arbitrator was *functus officio* and could not reopen the issue of whether cl 17.0 of the LA was a liquidated damages provision and that STEC was estopped from contending that cl 17.0 was not a liquidated damages provision since it had agreed in its submissions in relation to the summary award application that cl 17.0 was such a provision.

49 On the *functus officio* point, in the Partial Award, the Arbitrator observed (at para 410):

> Although I note and recorded the common understanding of the parties [that cl 17.0.0 of the LA is a liquidated damages provision], *I did not consider it necessary for me to make any finding or ruling, conclusive or otherwise on the nature of the provision or STEC's liability for liquidated damages*. This was because STEC has to show that there was no viable defence that justifies a full hearing of the evidence, in order to succeed in its application for a summary award. It was enough for me to establish whether ENJV had a "bona fide and arguable claim" for the sum against which a summary award was sought.

The Arbitrator did not consider himself to have been *functus* on the issue relating to cl 17.0.0 of the LA as there had been (at para 414):

> … no final determination (just a determination that there was a bona fide and an arguable case) that ENJV is entitled to this sum, that clause 17.0, LA is a liquidated damages provision or that it has a right to a deduction.

50 The Arbitrator also dismissed ENJV's contention that STEC was estopped from raising the issue of the interpretation of cl 17.0.0 of the LA as that issue had been determined in the Interim Award (see para 416 of the Partial Award). He was not satisfied that the requirements for establishing an issue estoppel were met. In particular, he held that (at paras 420 and 424):

> 420. Even if the Interim Award contains a finding that clause 17.0 of the LA is a liquidated [*sic*] provision (which it does not), *I find there was no ruling that amounted to a declaration or determination of STEC's or ENJV's rights. All that was decided or determined was that ENJV possessed an arguable claim that ought to be allowed to proceed. There is no final and conclusive judgment on the merits*. Consequently, I am not satisfied that the first requirement to establish an issue estoppel is met.
>
> …
>
> 424. Although it is the same issue in the sense that the question is whether clause 17.0 of the LA is a liquidated damages provision, the prior decision [*ie*, the Interim Award] cannot be said to

"traverse the same ground." What was to be determined then was whether ENJV had an arguable claim that was adequate to defeat STEC's application for a summary award. On the other hand, what I have to address in this Award is the final determination of the issue where the parties' rights and obligations are established.

[emphasis added]

51 Construing cl 17.0 of the LA on the merits, the Arbitrator held that that clause, on a plain reading, only enables ENJV to retain money beyond that allowed in the retention clause (*viz*, cl 8.0 of the LA), subject to an upper limit of $1m. He was not persuaded that cl 17.0 was a clause that provided for the payment of liquidated damages on delay. Therefore, he dismissed ENJV's counterclaim for liquidated damages pursuant to cl 17.0 of the LA.

Functus Officio and Res Judicata

52 On appeal, ENJV revisited the arguments it had made before the Arbitrator and which were rejected by him.

53 There is no doubt that the concept of *functus officio* is part of the law of arbitration. Section 44 of the Act states:

Effect of award

44. —(1) An award made by the arbitral tribunal pursuant to an arbitration agreement shall be *final and binding on the parties* and on any person claiming through or under them and may be relied upon by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.

(2) Except as provided in section 43, upon an award being made, including an award made in accordance with section 33, *the arbitral tribunal shall not vary, amend, correct, review, add to or revoke the award*.

[emphasis added]

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

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

55 In the Interim Award, the Arbitrator had dismissed STEC's application for a summary award in its favour. The consequence of dismissal of the application was that the parties continued the action from the position that they were in prior to the application: *Singapore Court Practice 2009* (Jeffrey Pinsler gen ed) (LexisNexis, 2009) ("*Singapore Court Practice 2009*") at para 14/3/5. There was no decision on any substantive matter relating to the disputes being arbitrated. In strict terms therefore, there was no *award* in favour of STEC within the meaning of "award" in s 2(1) of the Act. Accordingly, at the time of the arbitration hearings leading to the issuance of the Partial Award, the parties were proceeding from the position that they were in prior to the application for summary award (not prior to the Interim Award). At that time, the Arbitrator had made no findings in relation to cl 17.0 of the LA which were "final and binding on the parties" under s 44 of the Act.

56 In any event, read in their proper context, the passages that ENJV quoted from the Interim

Award to support its contention that the Arbitrator had made "determinations" to the effect that cl 17.0 of the LA was a liquidated damages clause did not have such effect. The Arbitrator was merely recording the agreement between STEC and ENJV with regard to the interpretation of cl 17.0 as a liquidated damages provision. He did not state definitively that he was in agreement with their interpretation. Indeed, he appeared to have contemplated instead that cl 17.0 "appears to be capable of a number of interpretations" (at para 81 of the Interim Award) and stated that his decision to dismiss STEC's application for summary award would have held "whichever meaning of clause 17 is adopted" (at para 84). In my judgment, therefore, the Arbitrator was not *functus* in this regard.

57 Under r 22.2(a) of the SIAC Domestic Rules, the arbitral tribunal has the power to "allow any party, upon such terms (as to costs or otherwise) as it may determine, to amend any case statements or other documents filed in the arbitration". Exercising this power, the Arbitrator allowed STEC to amend its pleadings such that in the Final Statement of Claimant's Case, its previous contention that cl 17.0 of the LA was a liquidated damages provision was removed and it then advanced its case on the basis that that clause did not provide for liquidated damages.

58 In *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue), the doctrine of *res judicata* as applied to arbitral proceedings is described in the following terms (at para 20.117):

> The doctrine of res judicata which applies to proceedings in court applies similarly to matters referred to arbitration. *Upon the award being made on the matter in dispute, the original cause of action is extinguished*. The rights of the successful party no longer lie in the original cause of action but in the right to enforce the award in its terms. Where, however, the reference to arbitration does not confer upon the arbitrators jurisdiction to resolve all matters in dispute between the parties, then the original cause of action remains in existence as regards those excluded matters. … [emphasis added]

59 In its case, ENJV relies on the case of *Khan v Goleccha International Ltd* [1980] 2 All ER 259 ("*Khan*") for its stand that STEC had conceded that cl 17.0 is a liquidated damages provision and is estopped from changing that position. In *Khan*, a licensed moneylender had agreed to sell a property to a purchaser and to provide finance for the purchase. The purchaser sued and one of the issues which arose for consideration was whether the transaction constituted a moneylending transaction that was subject to the UK Moneylending Act. The purchaser lost at first instance and appealed. At the appeal hearing, counsel for the purchaser conceded on a point of law that the transaction was *not* a moneylending transaction. Thus, the appeal was dismissed by consent. Two years later, the purchaser commenced a second action against the same moneylender and sought to assert that the transaction was actually a moneylending transaction. The English Court of Appeal held that the concession made by the purchaser in the Court of Appeal in the first action founded an issue estoppel preventing him from asserting in the second action that the transaction was a moneylending transaction. Brightman LJ observed that (at 266):

> Looking at the matter broadly, the issue of "lending of money" was raised in the Queen's Bench action [*ie*, the first action]. The judge decided that there *was* a lending of money within the meaning of the Act. The plaintiff appealed. The Court of Appeal gave judgment dismissing the appeal. The judgment was given by consent and the consent was given because the defendant claimed, and the plaintiff accepted, that there was *no* lending of money. *In my view, that admission by the plaintiff, given to the court and founding the judgment by consent, was just as efficacious for the purpose of issue estoppel as a judicial decision by the court after argument founding a similar judgment. The only sensible approach of the law, in my view, is to treat an issue as laid at rest, not only if it is embodied in the terms of the judgment, or implicit in the judgment because it is embodied in the spoken decision, but also if it is embodied in an*

admission made in the face of the court or implicit in a consent order. [emphasis added]

Bridge LJ concurred, noting that (at 268):

> Here the issue loan or no loan was in the first round of litigation between the parties an issue raised in the Court of Appeal which, if the appeal had run its course, would not necessarily have been determined by the court, but might well have been determined by the court, as part of its reasoning in deciding whether or not the appeal should be allowed. *In the event what happened was that Mr Khan, through his counsel, quite specifically and categorically chose to withdraw that issue from the consideration of the court on the basis that, in relation to that issue, he was bound to accept defeat and acknowledge that the case against him was unanswerable. If the selfsame issue were now allowed to be raised and litigated in those proceedings, I ask myself, would it not be a case of the company being vexed a second time in relation to an issue which it was open to Mr Khan to have had determined in the previous proceedings?* To that question, to my mind, there really can only be one answer. [emphasis added]

60 Brightman LJ's observations were relied on by ENJV to contend that on the present facts, the *very fact* that in its application for summary award STEC had accepted that cl 17.0 of the LA was a liquidated damages provision meant that the issue of the proper interpretation of cl 17.0 of the LA should be "laid at rest". I do not agree that this approach should be taken. The court hearing *Khan* was faced with very different facts. As a result of the concession made by counsel for the purchaser on the appeal in the first action, the appeal was dismissed by consent of both parties. That judgment was a final and binding decision on both parties in that the *substance* of the issue in dispute, *ie*, whether the transaction in question was a moneylending transaction, had been definitively and finally determined by the Court of Appeal. That judgment was not a judgment *dismissing* the purchaser's application for *summary judgment*.

61 In my respectful view, it is not possible to quarrel with the Arbitrator's analysis on the issue of whether STEC was estopped from changing its position on the proper interpretation of cl 17.0 of the LA. What he decided in the Interim Award was whether ENJV had a bona fide and arguable counterclaim, not whether cl 17.0 was a liquidated damages provision. That was a provisional decision subject to review after hearing all the evidence and he was not then bound to allow that counterclaim in the Partial Award. A counterclaim that is held to be "arguable" for the purposes of a summary award may not necessarily be allowed in the eventual arbitral award.

62 Furthermore, the dismissal of STEC's application for summary award put the parties in the position they were in *before* the application was made. At that point, there should not be any barrier to STEC's changing of position on the interpretation of cl 17.0 of the LA by amending its case statements to reflect that change. STEC's position in this case is not parallel to the purchaser's position in *Khan*. In that case, the concession by his counsel on appeal in the first action led to the dismissal of the appeal. Therefore, the judgment that was final and binding on him was the first instance judgment which he had appealed against. Here, there was no award which STEC was bound by. In the Interim Award, the Arbitrator had not made any final determination on the substance of the issue of how cl 17.0 should be construed. Therefore, it was open to STEC to amend its case statement and change its position on the proper construction of cl 17.0 of the LA and no estoppel existed.

Construction of clause 17.0 of the LA

63 ENJV's alternative argument was that the proper construction of cl 17.0 of the LA is that it is a liquidated damages provision and that the Arbitrator had erred in finding that it is not. Clause 17.0 is

quoted in full in [6(b)].

64 ENJV contended that the parties to the Sub-Contract were well aware of the significance of the 16 November 2004 deadline for completion of the installation of the tunneling works and the increasing rate of losses that would flow from a breach of that deadline. Thus, ENJV submitted, in drafting cl 17.0 of the LA, the parties had intended to provide for a scheme of liquidated damages to regulate the financial consequences in the event that STEC failed to meet the 16 November 2004 deadline.

65 STEC interpreted cl 17.0 as being an additional retention clause enabling ENJV to retain money beyond the sums allowed under cl 8.0 which states:

> **8.0 Retention**
>
> Retention shall be held as follows:
>
> | | | |
> |---|---|---|
> | 1. | Work Done | 10% |
> | 2. | Materials-on-Site | Nil (Materials on Site shall not be certified) |
> | 3. | Limit of Retention | 5% of Domestic Subcontract Sum plus variations |
>
> Retention shall be released as follows:
>
> | | | |
> |---|---|---|
> | 4. | 1st Moiety | 50% of the Sum Retained upon the completion of the demobilization from the Site |
> | 5. | 2nd Moiety | Remainder of the Sum Retained 24 months after the completion of the installation of the tunneling works (as described in Item 4.0 above).

The Main Contractor shall at its sole discretion, give due consideration should the Domestic Subcontractor propose a banker's bond in lieu of this retention. The decision of the Main Contractor shall be final. |

STEC submitted that cl 17.0 should be read in the light of this retention clause in the LA, and drew particular attention to the part of cl 17.0 which states that ENJV "shall retain the following *additional sums*" [emphasis added], contending that the sum to be retained (maximum of $1m), was *in addition to* the sums retained pursuant to cl 8.0.

66 STEC further submitted that the following references in cl 17.0 of the LA indicate that damages for delay in completion of the Sub-Contract works should be governed by cll 15 – 18 of the GTC, not cl 17.0 of the LA:

> The Domestic Subcontractor is fully aware that liquidated damages for the Basic Structure Completion [*ie*, Phase 3] in the Main Contract is $49,000 per day and Completion of the Whole of the Main Contract Works is $66,000 per day.
>
> …
>
> The Domestic Subcontractor's attention is also directed [*sic*] Clause 15, 16, 17 and 18 of the General Terms and Conditions for Domestic Subcontract Work.

67 Clause 15 of the GTC imposes an obligation on STEC to "carry out and complete" the Sub-Contract works "by the completion date as set out in the Letter of Award", *ie*, 31 December 2004. It

also allows STEC to give notice to ENJV of any delay which, being a "relevant event", may entitle it to an extension of time. Clause 16 of the GTC defines what may qualify as a "relevant event", including in its description "failure of the Main Contractor to give possession of the Site as indicated in the Main Contractor's Programme" and "delay caused by any act or omission of the Main Contractor". Clause 17 of the GTC provides for damages payable by STEC in the event of late completion. The first para thereof reads:

> **17 Completion**
>
> Should the Domestic Subcontractor fail to complete the Domestic Subcontract Works by the completion date or any extended date or dates as may be granted under this Domestic Subcontract and such delay results in delay to the completion of the Main Contract Works, then the Domestic Subcontractor shall pay or allow to the Main Contractor a sum equivalent to any loss or damage suffered or incurred by the Main Contractor which is attributable to the delay caused by the Domestic Subcontract Works. Such sum or sums shall be deducted or recovered by the Main Contractor from monies due or which may become due to the Domestic Subcontractor under this or any other subcontract.

The second para of cl 18 of the GTC which is entitled "Rate of Progress" reproduces the first para of cl 17. Whilst such repetition may appear redundant, it appears to me that this is an emphasis which indicates that parties were intent on providing that the measure of damages for delay on the part of STEC would be "a sum equivalent to any loss or damage suffered or incurred" by ENJV as a result thereof: in effect, an indemnity. There is no mention in either cl 17 or cl 18 of the GTC of liquidated damages. The fact that the Sub-Contract has specifically provided for a particular measure of damages by these clauses would be one reason militating against interpreting cl 17.0 of the LA as providing for a different measure of damages.

68 In Duncan Wallace, *Hudson's Building and Engineering Contracts* vol 2 (Sweet & Maxwell, 11th Ed, 1995) ("*Hudson's*), the author notes that (at para 10·001):

> Contracts often contain provisions for the *payment of sums of money* … in the event of particular specified breaches of the contract. These provisions vary very considerably, but their main objectives are to act as an inducement to due performance of a particular contractual obligation, or to regulate beforehand in an agreed and certain manner the rights of the parties, rather than leave them to the less predictable remedies otherwise available, and in particular the assessment of damages in the event of breach of the obligation in question.
>
> The simplest provisions of this type are provisions stating in round figures what *payments are to be made or what the damages are to be in a certain event*. These are classical liquidated damages or penalties provisions, and are most commonly found in building contracts in relation to the contractor's obligation to complete the work within the specified time.

These comments may seem to suggest that cl 17.0 of the LA can be read as providing for liquidated damages. However, the typical liquidated damages clause provides for *payment* by the party in delay beyond the completion date to the innocent party, in this case, by the sub-contractor to the main contractor. Such is not the effect of cl 17.0. Instead, it provides that up to $1m may be *retained* (in addition to the sums already retained under cl 8.0 of the LA) by ENJV in the event that STEC does not complete the installation of the tunnelling works by 16 November 2004.

69 The interpretation of the clause promoted by STEC is aided by the fact that the date 16 November 2004 was also significant because:

(a) the DLP is stated in cl 5.0 of the LA to be 24 calendar months from "the completion of the installation of the tunnelling works", *ie*, 16 November 2004; and

(b) under cl 8.0 of the LA, the 2nd moiety of release of sum retained is scheduled to be at the end of 24 months after the completion of the installation of the tunnelling works, *ie*, at the end of the DLP.

From this perspective, the additional sum of up to $1m to be retained by ENJV for delay to the completion of the installation of the tunnelling works beyond 16 November 2004 could well have been intended to serve as an additional inducement to STEC to perform its obligations during the DLP satisfactorily as well as a fund from which ENJV could draw in the event that STEC failed to complete the works properly or to rectify defective works.

70 Furthermore, the author of *Hudson's* writes that (at para 10·021):

> … it is desirable to note again that liquidated damages clauses for delay by definition represent a pre-estimate of *all* (not some of) the owner's damages caused by delay in completion.

As stated above, cll 17 and 18 of the GTC make STEC liable to pay ENJV a sum equivalent to the loss incurred by ENJV for delay to the completion of the Main Contract works which resulted from delay to the completion of the Sub-Contract works. Clause 17.0 of the LA notifies STEC that liquidated damages payable by ENJV to LTA for delays to completion beyond the stipulated completion date for "Basic Structure Completion", *ie*, 31 December 2004 (also the date stipulated in cl 4.0 of the LA as the completion date for the Sub-Contract works) are calculated at $49,000 per day. Thus, cl 17.0 of the LA gives STEC notice that in the event that it failed to complete the Sub-Contract works by 31 December 2004, and such delay resulted in delay to the completion of Phase 3 of the Main Contract, it may be liable to pay ENJV $49,000 per day on the basis that this would be the amount of damage per day incurred by ENJV itself. To the extent that delay in the completion of the installation of tunnelling works by 16 November 2004 causes delay to the completion of the Sub-Contract works which in turn results in delay to the completion of the Main Contract works, construing cl 17.0 as a liquidated damages clause instead of a retention clause may end up allowing ENJV double recovery, since it would then be entitled to obtain up to $1m from STEC under cl 17.0 of the LA and additional damages at the rate of $49,000 per day under cl 17 of the GTC for the same delay beyond 31 December 2004.

71 When the parties appeared before me for oral arguments on this appeal, I pointed out that the terms "Retention" and "Liquidated Damages" are both well known and constantly used in the construction industry. The parties here were all active players on the construction scene and must have come across those terms on practically a daily basis. That being the case, if ENJV had wanted cl 17.0 of the LA to be a liquidated damages clause, ENJV would have drafted it to achieve that effect and would not have agreed to the use of the word "retain" in the way it was used in cl 17 without any qualification to indicate that sums retained were to satisfy claims for liquidated damages. The only reference to liquidated damages in the clause is in respect of ENJV's liability to LTA and having made such reference, had the parties intended the retained amount to be applied as liquidated damages payable to ENJV itself, it would have required no extraordinary drafting skill to say so. They did nothing of the kind, however. It appeared to me at the hearing, and it appears to me now, that the parties' intentions as reflected in the wording of cl 17 were that it should be a retention clause to incentivise STEC to perform its work efficiently and not a liquidated damages clause since the

measure of damages was to be, pursuant to cll 17 and 18 of the GTC, the actual loss suffered by ENJV by reason of STEC's default. I can see no error of law in the way that the Arbitrator interpreted cl 17.0 of the LA.

72 As a further alternative, ENJV made the argument that on the Arbitrator's own interpretation of cl 17.0 of the LA as a retention clause, he should have allowed ENJV to retain the $1m since he also found STEC liable for 68 days' of delay. In particular, ENJV contended that the Arbitrator should have directed that the $1m be retained until the completion of the assessment of loss and damages incurred by ENJV. The flaw in this argument is that this was not pleaded before the Arbitrator. In the arbitral proceedings, ENJV's counterclaim for the $1m was premised on its interpretation of cl 17.0 as a liquidated damages clause. In its amended statement of respondent's case and counterclaim, ENJV stated at paras 102 – 104:

> 102. At the stipulated rates, ENJV would be entitled to the maximum sum of liquidated damages of S$1,000,000.00 once the aggregate number of days of non-completion reaches 30 days.
>
> 103. It cannot be denied that the installation of the tunnelling works including First Stage Concrete was not completed within the 30 day period after 16 November 2004.
>
> 104. Accordingly, ENJV claims the maximum *liquidated damages of* **S$1,000,000.00** payable under Clause 17.0 LA.
>
> [emphasis added]

73 ENJV's entitlement to the $1m should depend on its success in establishing its counterclaim. On the present facts, the Arbitrator had dismissed that counterclaim on the basis that cl 17.0 of the LA does not provide for liquidated damages. It does not lie in ENJV's mouth now to claim that even though it had *failed* in establishing its counterclaim, it should nevertheless be entitled to retain the $1m when that was never its stated case before the Arbitrator. Since its claim to the $1m was dismissed, it should not be entitled to retain that sum of money. Further, I have held in OS 226/2009 (see [24] – [40] of that judgment) that the Arbitrator did not render a complete decision when he indicated that although ENJV had failed to establish STEC's liability for its counterclaim, this issue could be deferred to another forum or tribunal. In my judgment there, I stated (at [39]) that the Arbitrator should have dismissed the counterclaim. Once the counterclaim is dismissed in full, there would be no basis at all for any retention of the $1m by ENJV. The Arbitrator had not erred in omitting to direct that STEC was required to pay $1m to ENJV and that therefore ENJV could retain the $1m.

The scheme of arrangement

74 The questions posed by ENJV in relation to the scheme of arrangement are as follows:

> (a) Whether the Arbitrator erred in failing to give effect to the Scheme and in particular to clause 4.1.3 of the Scheme which provides that no creditor shall commence or continue any proceedings against Econ Piling for the adjudication of any claim for recovery of debt or damages by civil action or arbitration without the consent of Econ Piling;
>
> (b) Whether the compromise of the partnership debts and liabilities of Econ Piling under the terms of the Scheme and in particular cl 9.2 thereof also discharged the partners of Econ Piling in respect of those debts and liabilities;
>
> (c) Whether any issues arising out of the Scheme would only affect the enforcement of the

award; and

(d) In any event, whether the Arbitrator misconducted himself in not according to ENJV the opportunity to make oral submissions in respect of ENJV's applications to stay or dismiss the arbitration claim against Econ Piling.

Material facts relating to the Scheme

75 On 15 March 2004, by a court order, Econ Piling was placed under judicial management. On 15 September 2004, the judicial manager proposed the Scheme to the creditors of Econ Piling. Under the Scheme, an investor would purchase all the shares in Econ Piling for $1, and inject a sum of $350,000 into the pool of assets comprising all the assets of the company, which would then be set aside for distribution to the scheme creditors.

76 Under cl 1.2 of the Scheme, "Creditors" are defined as "[a]ll creditors of the Company [*ie* Econ Piling], whether secured, preferential, contingent or unsecured, to whom a liability is owed" by Econ Piling arising out of any transaction entered into, or actor or omission of Econ Piling and/or persons, carried out or which took place before the Fixed Date. The "Fixed Date" is 16 September 2004 (under cl 1.2).

77 Clause 4 of the Scheme provides for a moratorium and extinguishment of all claims. Under cl 4.13, no Creditor shall take any step to commence or continue any proceedings against Econ Piling for the adjudication of any claim or alleged claim including proceedings for the recovery of debt or damages by civil action or arbitration. Pursuant to cl 9.2, any Creditor who fails to lodge a proof of debt within the stipulated time period shall not be entitled to participate in the payment under the Scheme and any claim by such a Creditor shall be extinguished.

78 The Scheme was approved by the court on 25 October 2004.

79 Relying on the Scheme, ENJV submitted that as STEC had not lodged a proof of debt against Econ Piling, STEC had thereby discharged Econ Piling from all its liabilities to STEC since any claim STEC had against Econ Piling had been extinguished pursuant to cl 9.2 of the Scheme for failure to lodge a proof of debt. This argument is premised on the further propositions that Econ Piling and NCCI were jointly and not severally liable to STEC and that discharge of one partner from its liabilities would result in a discharge of the partnership from its liabilities.

STEC's preliminary objection

80 STEC submitted that ENJV was not entitled to raise the questions of law relating to the Scheme in its appeal against the Partial Award. It argued that these contentions had already been determined by the Arbitrator in the Interim Award dated 29 September 2008 ("2nd Interim Award").

81 What had happened was that by a letter dated 28 May 2008 (more than a year after completion of the hearing of the arbitration), ENJV made an application to the Arbitrator for (a) dismissal of the arbitration against Econ Piling and (b) a reference of a point of law to a court for a decision under s 45 of the Act. The Arbitrator dismissed this application by the 2nd Interim Award. His finding in para 63 thereof was that ENJV had failed to satisfy him that there was a question of law on which he should grant permission to ENJV under s 45 of the Act. The Arbitrator was careful to reserve his position to decide the issues. In para 64 he held:

64. Nothing in this interim award should be construed as conclusive findings or rulings of fact or

law in the arbitration or for any future award or the final award, and any findings or rulings herein are confined to and relevant for the application under section 45 of the Arbitration [*sic*] only. I reserve my jurisdiction to make the appropriate findings and rulings in the final award.

82 It is clear that the Arbitrator did not make any finding in the 2nd Interim Award on the substantive questions of law which ENJV now seeks to raise as emanating from the Partial Award. Accordingly, STEC's preliminary objection has no merit.

Material findings in the Partial Award

83 The Arbitrator found that the events and the proceedings relating to the Scheme were extraneous to the arbitration and were only brought to his attention at the stage of closing submissions. Therefore, he rejected ENJV's arguments relating to the Scheme. He was also not persuaded that ENJV's liability should be discharged on the basis of STEC's failure to lodge a proof of debt, concluding that ENJV had failed to demonstrate that its liability to STEC had been discharged.

Extinguishment of STEC's claims against Econ Piling

84 It would be recalled that the Sub-Contract works had commenced in 2003 and were scheduled for completion on 31 December 2004. The events relating to Econ Piling's legal status therefore took place during the course of the Sub-Contract works. However, ENJV did not notify STEC either of the judicial management or of the court approval of the Scheme on 25 October 2005. Instead, the Sub-Contract proceeded as if the Scheme had not been put in place and Econ Piling had not been placed under judicial management.

85 It is important to note that the Scheme was never pleaded nor was any evidence relating to it placed before the Arbitrator. It was also never mentioned at any of the arbitral hearings. The Scheme was in force throughout the arbitration proceedings. Yet, instead of making it clear that STEC's claims against it (or at least against Econ Piling) had been extinguished, ENJV defended the arbitration vigorously and even advanced its own counterclaims against STEC with utmost conviction without any mention of the Scheme. Since ENJV had prosecuted the arbitration without objection, Econ Piling as a partner in the ENJV partnership, must be deemed to have waived any right to rely on cl 4.1.3 of the Scheme which prohibited any creditor of Econ Piling from commencing arbitration proceedings without its consent. It could also be argued that ENJV is estopped from now raising the Scheme at all since its failure to raise the Scheme as a defence caused STEC to conduct its claim in the arbitration and incur expense on the basis that there was no legal impediment to the proceedings whatsoever.

86 In these circumstances, I consider that the Arbitrator had acted entirely correctly in rejecting ENJV's arguments based on the Scheme and instead deciding the claims and counterclaims based on the pleadings and the evidence that had been presented in the arbitration. It is difficult to see what else the Arbitrator could have done when ENJV had not pleaded the Scheme as a defence and, in any case, it was not clear cut from the legal point of view what impact the existence of the Scheme had on either Econ Piling's or NCCI's liability as a member of the joint venture. Since the Sub-Contract work was done both before and after the Scheme came into effect, there was also an issue as to whether ENJV's liabilities to STEC had arisen before the Fixed Date and, if so, to what extent. Indeed, before the Arbitrator STEC had argued that its claims had not crystallised when the Scheme came into force and therefore it was not a "Creditor" within the meaning of that term in the Scheme. These were matters that would have been explored in full detail, both factually and legally, had the necessary pleadings been filed. In their absence, the Arbitrator had no jurisdiction to subsequently consider these points.

87 Even if under the Scheme STEC's claims against Econ Piling were extinguished for failure to lodge a proof of debt, in my judgment, STEC's claims against NCCI, the other joint debtor, were not so extinguished. During oral argument, I expressed my view to counsel that NCCI which was jointly liable with Econ Piling as a partner of ENJV could not benefit from the Scheme *ie*, any release of Econ Piling's liability to STEC arising because of the implementation of the Scheme could not *ipso facto* release NCCI from its joint liability. Subsequent to the hearing, this view of the law was endorsed in another case involving Econ Piling and the Scheme.

88 In *Econ Piling Pte Ltd and another v Sambo E&C Pte Ltd and another matter* [2010] SGHC 120, Steven Chong JC dealt with the question whether NCCI, the partner of Econ Piling at the material time, was also released by compromise under the Scheme if Econ Piling was released by such compromise. Chong JC held that the joint debts and liabilities of Econ Piling as a partner in any joint venture, including ENJV, were compromised or settled in accordance with the terms of the Scheme in the sense that "*no claim can be brought against [Econ Piling] in respect of such joint debts and liabilities*" (at [16]).

89 Chong JC then went on to deal with *NCCI's* liabilities to ENJV's debtors. After examining the authorities, Chong JC observed that:

(a) A scheme of arrangement and its attendant legal consequences owe their efficacy entirely to the order of court that sanctioned it. A scheme of arrangement amounts to a release by operation of law (at [28]); and

(b) The courts had consistently recognised that a release by operation of law did not release the other joint or co-debtors from their liabilities (at [26]).

As there was no express provision under the Scheme that had released NCCI from its joint liabilities to the creditor, the judge held that NCCI was not released from its joint liabilities; such release would mean that NCCI would enjoy an unexpected windfall in being released from its joint liability to ENJV's creditors, a consequence which was neither contemplated nor intended under the Scheme.

90 I entirely agree with the views expressed by Chong JC. Even if STEC's claims (or part thereof) against Econ Piling were extinguished owing to the compromise effected by the Scheme, that did not lead to the extinguishment of STEC's claims against NCCI as that would result in a windfall accruing to NCCI and great injustice and prejudice to STEC.

91 As a result, I hold that the Arbitrator did not err in omitting to give effect to the Scheme in the Partial Award. Following from that, the question whether the Arbitrator erred in law in holding that issues arising in respect of the Scheme would only affect the enforcement of the award must also be answered in the negative. Since the issues arising out of the Scheme were not strictly relevant to the arbitration proceedings, those issues should go towards enforcement of the award. If Econ Piling successfully maintains its current position that STEC has no claim against it in respect of Econ Piling's joint liabilities, then STEC can look to NCCI as the joint debtor for enforcement of the award. It also follows that the Arbitrator did not misconduct himself when he did not accord ENJV the opportunity to make oral submissions in support of its application for the dismissal or stay of the arbitration proceedings due to the existence of the Scheme.

Question relating to costs

92 The question of law posed by ENJV in this regard is whether the Arbitrator erred in law when he, in considering the costs of and occasioned by STEC's amendment to its pleadings, failed to take

into account:

(a) ENJV's costs incurred and thrown away by STEC's abandonment of legal and factual issues; and

(b) ENJV's costs incurred in presenting the application for costs before the Arbitrator.

93 While the parties were in the midst of preparing for the arbitration hearings which were scheduled to commence on 31 July 2006, STEC changed its solicitors. On 13 July 2006, STEC was given leave by the Arbitrator to amend its pleadings and fresh timelines were given for the hearings. On 15 September 2006, STEC filed and served its Final Statement of Claimant's Case which necessitated consequential amendments to both parties' pleadings. Substantial amendments were made by ENJV because STEC had abandoned many issues during the process of reformulating its pleadings. The question of liability for and quantum of costs payable as a result of STEC's amendment of its pleadings were addressed in the parties' closing submissions.

94 ENJV sought costs as follows:

(a) $45,000, being the costs incurred in making consequential amendments to ENJV's pleadings arising out of STEC's amendments to its pleadings;

(b) $60,000, being the costs incurred and thrown away by STEC's abandonment of the factual and legal issues when it reformulated its pleadings; and

(c) $4,000, being the costs incurred in having to present the application for costs before the Arbitrator.

95 The Arbitrator dealt with ENJV's application for costs at paras 564 to 573 of the Partial Award. The more relevant paras for present purposes are:

564. By this application, ENJV seeks the following order:

"That the Claimants pay the Respondents the costs of and occasioned by the amendment of the Claimants' pleadings forthwith and in any event including costs incurred by ENJV in the subsequent consequential amendment of all ENJV's pleadings."

...

568. ENJV also submits [*sic*] the quantum of costs payable at paragraphs 3719 to 3731 of the Respondents' 1st Submission. According to ENJV, a reasonable sum reflecting the volume of work carried out by ENJV's solicitors in having to effect the consequential amendments to ENJV's pleadings arising from STEC's amendments of its pleadings is S$45,000.

...

572. Having considered the parties' submissions, I am incline [*sic*] to agree with ENJV that there were significant amendments to STEC's pleading. I do not accept STEC's contention that STEC's

claims have "remained substantially similar to those contained in the original form." The amended pleading did have the merit of bringing the issues into sharper focus and were probably an improvement over the original pleading. Nonetheless, this takes away nothing from the fact that the amendments entail considerable work as a consequence.

...

573. Overall, while I accept ENJV's point that much work was done by them as a result of the amendments, I do not think but I do not think [*sic*] they are entitled to the S$45,000 but would award and direct that STEC pays ENJV the sum of S$12,000.00 which I hereby tax and fix as the costs payable for the amendments.

96 It would be noted from the above that the Arbitrator did not comment on ENJV's claims for (a) $60,000 for costs thrown away by reason of STEC's abandonment of issues and (b) $4,000 for costs incurred in making the application for costs. ENJV's point before me was that these were separate heads of claim in relation to costs and the Arbitrator erred in not considering them separately. STEC's rebuttal was two-fold. On the one hand, it contended that the issue was clearly one of quantum and not of principle: the Arbitrator had recognised that ENJV was entitled to costs and had fixed those costs at $12,000, thus exercising his discretion in respect of quantum. On the other, STEC argued that at the most the Arbitrator had made an error of law and such an error could not be appealed against.

97 I do not agree with STEC's contention that the Arbitrator's decision was only in relation to quantum and that it should be interpreted as his deciding that for all three heads of costs claimed ENJV should be awarded $12,000. It is plain from the paragraphs of the Partial Award that I have quoted at [95] above that the Arbitrator was dealing only with the costs incurred in relation to the amendments that had to be made by ENJV to meet STEC's reformulated claims. The Arbitrator did not consider the work that had been rendered redundant by reason of the change in the pleadings.

98 As regards the second contention, that whilst there may have been an error of law on the part of the Arbitrator such error did not entitle ENJV to appeal because no question of law arose, I must first consider whether there was such error of law.

99 In Michael O' Reilly, *Costs in Arbitration Proceedings* (LLP Professional Publishing, 2nd Ed, 1997), the author observes (at para 4.4.3):

A party who seeks to amend his case will normally be allowed to do so "on the usual terms", namely that *the costs incurred and thrown away by the amendment and the costs of any consequential amendment are to be the other party's in any event*. In some situations, however, the arbitrator may adjudge that the amendment was made necessary by some action on the part of the opposing party, in which case a different costs order may be made. [emphasis added]

100 In relation to costs "thrown away", the authors of *Singapore Court Practice 2009* state, at para 59/1/4:

'Costs thrown away' refers to the specific situation in which costs have been wasted by a party. …

… The order is also appropriate when costs have been occasioned by an amendment (see *State of Perak v PRALMM Muthukaruppan Chettiar* [1938] MLJ 247) or adjournment. … The important question of exactly what costs are recoverable as costs thrown away by reason of an

adjournment (sometimes referred to as 'costs of the day') was considered in *Choo Ah Kiat v Ang Kim Hock* [1983] 2 MLJ xciv, which concerned the adjournment of a trial at the behest of the plaintiff. The deputy registrar accepted the principle that 'costs thrown away' by an adjournment refer to 'costs that have been incurred and which must be incurred over again', and therefore have been thrown away in consequence of the adjournment (at xcv).

101 In *Lim Hong Seng v East Coast Medicare Centre Pte Ltd* [1994] 3 SLR(R) 680, I ordered costs thrown away in favour of a defendant who had put up a counterclaim that had to be abandoned in the light of the plaintiff's discovery of a certain fact, stating (at [76]):

> In my judgment, the defendants are entitled to the costs of the amendment to para 8 of the statement of claim and the abandonment of their counterclaim. It was not for the defendants to tell the plaintiff how to run his case. He might very well have initially omitted to rely on the express right of way after carefully considering the options open to him. The defendants were not to know that this omission resulted from ignorance rather than a considered strategy. *Once the plaintiff posed his case in a certain manner the defendants were entitled to take all courses open to them to meet it including the formulation of the counterclaim. They then had to drop the counterclaim because of the plaintiff's belated discovery of the true position*. *The costs they had incurred were thrown away by reason of the plaintiff's change in direction. The defendants are entitled to recover those costs*. [emphasis added]

102 From the above discussions on the law, it can be seen that there are at least two types of costs that may be incurred by a party to litigation when the other party thereto amends his case: costs incurred by the amendment and costs thrown away by reason of the amendment. The Arbitrator therefore plainly erred when he only considered the claim for costs incurred by the amendment and did not consider that for costs thrown away. He was also in error when he omitted to consider whether ENJV was entitled to ask separately for costs in respect of its application for costs. The issue here is whether these errors resulted in any question of law that could be appealed on.

103 In *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR(R) 494 ("*Northern Elevator*") the Court of Appeal observed (at [19]):

> [A] "question of law" must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere "error of law" (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

STEC's submission in essence was that the Arbitrator's failure to deal with the other two claims for costs was an error of law which did not entitle ENJV to appeal. It argued that the court cannot set aside an award because there is an error of law on the face of the record. That argument was based on a principle enshrined in earlier versions of the Act. In s 28(1) of the Arbitration Act (Cap 10, 1985 Rev Ed) it was expressly provided that the court did not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the record. The old s 28(1) has no equivalent in the presently prevailing version of the Act. This does not mean, however, that the court can allow an appeal because the Arbitrator has committed an error in respect of established law. *Northern Elevator* is binding on me and it is also in line with current judicial philosophy that the courts should not exercise a tight supervisory power over arbitration proceedings.

104 Accordingly, I agree with STEC's submission that ENJV was not entitled to rely on the Arbitrator's failure to deal with parts of their costs application to formulate questions of law to be considered on appeal. The error of the Arbitrator did not give rise to a right of appeal.

ENJV's claim for contra charges

105 The question of law posed here was whether the Arbitrator had erred in law in dismissing all the heads of contra charges under Group 9 of ENJV's claim for contra charges without dealing with the merits when he had found that only one head of claim should be disallowed.

106 ENJV counterclaimed for costs incurred in respect of various items and services, referred to as "Contra Charges" provided to STEC, which costs should be borne by STEC. Altogether there were 13 groups of Contra Charges. In respect of one group, Group 9, described as "Supply of material and rolling stock", ENJV had claimed the following Contra Charges:

Item	Amount (S$)
Supply of 15 cum Concrete at MPS	1,058.40
Supply 94 cum Grade 35 Concrete to C4	5,625.90
Supply 48 cum Grade 35 Concrete to MPS (S) Crane Foundation	2,872.80
Hydrophilic O-Rings (STEC lost)	3,150.00
Steel Plate Rental	2,080.00
Flatbed Coupling	1,228.50
Supply of 4 No. Braked Flatcars incl Freight	68,155.82
Total	**84,171.42**

107 In its closing submissions, STEC disputed liability for all the claims by ENJV under Group 9 of the Contra Charges. In the Partial Award, the Arbitrator dismissed the entire claim in relation to Group 9, but only gave reasons for dismissing the claims in respect of the flatbed coupling and the braked flatcars. He had omitted to mention his reasons, if any, for dismissing the claims in respect of the other items in Group 9, totalling $14,787.10.

108 Section 50(4) of the Act is relevant to this question. It provides:

> (4) If on an application or appeal it appears to the Court that the award –
>
> (a) does not contain the arbitral tribunal's reasons; or
>
> (b) does not set out the arbitral tribunal's reasons in sufficient detail to enable the Court to properly consider the application or appeal,
>
> the Court may order the arbitral tribunal to state the reasons for its award in sufficient detail for that purpose.

It is impossible for me to know whether the Arbitrator's reasons for dismissing the claims were legal or factual since he did not give his reasons for the same. Therefore I must order the Arbitrator to explain his reasons for his decision before I can decide whether there is any question of law in respect of which an appeal can lie.

The clarification request

109 The question on this issue is whether the Arbitrator erred in law in holding that STEC's clarification request dated 14 January 2009 ("the Clarification Request") was made under s 43(1)(*a*) of the Act and not under s 43(1)(*b*) of the Act.

110 The Partial Award was rendered on 29 December 2008. STEC's solicitors wrote to the Arbitrator on 14 January 2009 seeking "clarification on various points arising from the Partial Award" and inviting the Arbitrator to "correct the Partial Award" on the following points, if necessary:

A. Double-accounting in arriving at "152 days of delay";

B. Interest accruing from 20 May 2005 instead of 2 August 2005;

C. Interest on a compound or simple basis.

111 By a letter dated 16 January 2009, ENJV contended that the Clarification Request was made under s 43(1)(*b*) of the Act and thus required its consent which had not been given. On 19 January 2009, STEC's solicitors wrote to the Arbitrator stating that as the Clarification Request related to computational errors it was made pursuant to s 43(1)(*a*) and thus ENJV's consent was not required.

112 In the Correction Award, the Arbitrator expressly agreed with STEC's position and stated that he published the Correction Award "to correct error [*sic*] in computation and typographical errors in the Partial Award" (at para 8 of the Correction Award), *ie*, pursuant to his power under s 43(1)(*a*), not (*b*).

113 Section 43(1) of the Arbitration Act provides as follows:

> **Correction or interpretation of award and additional award**
>
> **43**. —(1) A party may, within 30 days of the receipt of the award, unless another period of time has been agreed upon by the parties —
>
> (a) upon notice to the other parties, request the arbitral tribunal to correct in the award *any error in computation, any clerical or typographical error, or other error of similar nature*; and
>
> (b) upon notice to the other parties, request the arbitral tribunal to give an interpretation of a specific point or part of the award, *if such request is also agreed to by the other parties*.
>
> [emphasis added]

Relatedly, r 34 of the SIAC Domestic Rules provides for correction of awards as follows:

> **Rule 34 Correction of Awards**
>
> 34.1 A party may, *within 14 days of receipt of the award*, by notice served on the other party and the Tribunal and filed with the Registrar, request the Tribunal to correct in the award any error in computation, any clerical or typographical error or any error of a similar nature. If the Tribunal considers the request to be justified, it makes the correction within 14 days of receipt of the request.

34.2 The Tribunal may correct any error of the type referred to in Rule 34.1 on its own initiative within 28 days of the date of the award.

34.3 Any correction made under Rule 34.1 or 34.2 is to be set out in a separate correction award. The correction award forms, and takes effect as, part of the main award.

[emphasis added]

114 The Clarification Request was mainly aimed at pointing out double-counting of the 84 days of delay in respect of which the Arbitrator had found that STEC had waived its entitlement to claim extension of time.

115 Considering the Clarification Request, the Arbitrator noted that there could have been some confusion arising from STEC's claim for extension of time in the alternative. STEC's main claim for extension of time was 156 days, but it also pleaded 112 days as the alternative claim. At para 16 of the Correction Award, he reasoned that:

> … The 84 days claimed for Delaying Event No 1 [*ie*, late hand over of the launch shaft sites] was a component of the original 156 days claimed (see paragraph 163, Partial Award), not the 112 days' alternative (which was the duration that the experts have agreed to and which I had established as the material duration). However, when STEC waived the 84 days for Delaying Event No 1 by the 2nd SA, the waiver must apply to the 112 days duration established, even though in terms of actual duration, there can only be 68 days remaining after accounting for the 44 days of extension of time granted. Nonetheless, I accept that the problem is essentially computational. No fresh finding or a reversal of any finding of fact is required.

As a result, he found that STEC's liability for delayed completion to the Sub-Contract works should be 68 days. The other uncontroversial error in the Partial Award that he corrected was the date from which interest was to be paid by ENJV. Instead of taking that date as 20 May 2005, the date of STEC's Notice of Intention for Arbitration and Notice to Appoint Arbitrator, he had taken that date to be 2 August 2005, the date on which parties confirmed his appointment as the Arbitrator. In the Correction Award, he replaced references to 2 August 2005 with 20 May 2005.

116 In *The Review of Arbitration Laws – Final Report* (Law Reform and Revision Division, Attorney-General's Chambers, 2001), it is explained that s 43(1) of the Arbitration Act was modelled after Article 33 of the UNCITRAL Model Law on Arbitration. The report also explained the arbitral tribunal's power to correct an award as follows (at paras 2.32.1—2.32.2):

> 2.32.1 … The power to correct an award relates to both clerical mistakes and such other statements or mis-statements made which were never intended by the tribunal. *Such errors would include mistakes arising out of miscalculations, use of wrong data in calculations, omission of data in calculations, and clerical or typographical errors made in the course of typing or drafting the award*. Such mistakes or omissions need not have been directly attributable to the tribunal. However, mistakes or errors of judgment, whether of law or fact cannot be corrected by the invocation of this rule. Corrections may be made on the tribunal's own initiative or at the request made by any of the parties to the tribunal within 30 days of the date of the award.
>
> 2.32.2 Apart from the correction of errors, [section] 43 would also give to the tribunal the power on the application of a party to give an interpretation or clarification of the award or part of the award. The interpretation or clarification when made would form part of the original award. In relation to claims made but omitted from the decisions in the award the tribunal may also make

an additional award on claims presented in the arbitral proceedings but omitted from the award. Again these powers are not intended to permit the tribunal to re-visit issues canvassed and decided or to re-consider any part of the decisions consciously made.

[emphasis added]

117 The comments in the report fortify my decision that the Clarification Request by STEC was a request made under s 43(1)(*a*) as the errors corrected were computational and clerical in nature. The errors that the Arbitrator corrected in the Partial Award arose out of "miscalculations, use of wrong data in calculations, omission of data in calculations". In calculating the total number of days of delay for which STEC should be held liable, he had omitted to factor in the 84 days' waiver by STEC. His use of 2 August 2005 as the date from which interest should be calculated was a "clerical error" as he had mistakenly typed in the date of his confirmation as Arbitrator instead of the date on which STEC had given Notice to Appoint Arbitrator, which was the date he had intended to type. The Correction Award did not provide any interpretation or clarification of his findings in the Partial Award.

118 Accordingly there was no error in the Arbitrator's decision that STEC's clarification request was made under s 43(1)(a) of the Act.

Conclusion

119 In view of the answers given above to the questions posed by ENJV, the Partial Award must be remitted to the Arbitrator for him to reconsider the date of substantial completion of the Sub-Contract works. He must also provide his reasons for dismissing the entire claim encompassed in Group 9 of the contra charges.

120 As ENJV has been only partially successful in its appeal, I will hear the parties on costs.