Progen Engineering Pte Ltd v Chua Aik Kia (trading as Uni Sanitary Electrical Construction) [2006] SGHC 159

Case Number : OM 23/2005

Decision Date : 07 September 2006

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Philip Fong (Harry Elias Partnership) and Lim Khoon (Lim Hua Yong & Co) for the applicant; Gregory Vijayendran and Gandhi (Wong Partnership) for the respondent

Parties : Progen Engineering Pte Ltd — Chua Aik Kia (trading as Uni Sanitary Electrical Construction)

Arbitration – Award – Recourse against award – Appeal under Arbitration Act – Whether application for leave to appeal against arbitral award on questions of law under s 28(2) Arbitration Act should be granted – Section 28 Arbitration Act (Cap 10, 1985 Rev Ed)

Arbitration – Award – Recourse against award – Misconduct under Arbitration Act – Whether arbitrator misconducting himself or proceedings under s 17(2) Arbitration Act – Whether arbitrator's actions or omissions motivated by bias or error of law or fact – Whether grounds existing for setting aside of arbitral award made by arbitrator – Section 17(2) Arbitration Act (Cap 10, 1985 Rev Ed)

7 September 2006

Belinda Ang Saw Ean J:

1 This amended originating motion was brought by Progen Engineering Pte Ltd ("Progen") to set aside an arbitration award dated 25 May 2005 ("the Award") for misconduct of the arbitrator or, alternatively, for leave to appeal against the Award on questions of law. At the conclusion of the hearing, I dismissed the application with costs, being of the view that Progen had not made out its case either under s 17(2) or s 28 of the Arbitration Act (Cap 10, 1985 Rev Ed) ("the Act"). Progen appealed against my decision on 31 March 2006.

Background facts

2 The nominated subcontractor of the Tuas Checkpoint Project, Toyoko Riken Co Ltd ("TRC"), engaged Progen as its direct subcontractor for the air-conditioning and mechanical ventilation installation works ("ACMV works"). Progen in turn engaged as its subcontractor, Chua Aik Kia trading as Uni Sanitary Electrical Construction ("USEC"), for the following scope of ACMV works:

(a) to supply labour and materials, namely, fittings for all pipe works pursuant to USEC's quotation No QU/301/96 dated 5 October 1996 and Progen Purchase Order No PEPL/022/96 dated 7 October 1996 at a contract sum of $772,000 (hereafter referred to as the "Pipe Works" or "Pipe Works Agreement");

(b) to supply labour and materials to paint all air-conditioning pipes pursuant to USEC's quotation No QU/303/96 dated 9 October 1996 at a contract sum of $73,000 (hereafter referred to as the "Paint Works" or the "Paint Works Agreement"); and

(c) to supply labour and insulation for pre-insulation works pursuant to USEC's quotation No QU/327/97 dated 3 May 1997 at a contract sum of $290,000 (hereafter referred to as the "Pre-Insulation Works" or "Pre-Insulation Works Agreement").

3 The Pipe Works Agreement, Paint Works Agreement and Pre-Insulation Works Agreement were, in the Award, collectively referred to as "the Agreements". Again, in the Award, the Pipe Works, Paint Works and Pre-Insulation Works were referred to collectively as "the Works". The same definitions are used in this decision.

4 The Works were commenced in October 1996. Towards the last quarter of 1997, there were problems relating to late or non-delivery of essential materials. This led to USEC sending a series of letters to Progen pressing for delivery of materials to the construction site. There were also problems with drawings and other documents which were either not furnished, or, if made available, were said to be inaccurate. The site was seemingly left without proper supervision. At a meeting between the two parties on 17 January 1998, USEC served written notice to terminate its services with effect from 21 January 1998.

5 By this termination letter of 17 January 1998, USEC cited Progen's failure to fulfil its contractual obligations as a reason for the termination. This led to the appointment of another contractor to complete the Works and to rectify existing defects. Progen maintained that the termination was wrongful. It also accused USEC of bad workmanship.

6 The disputes between the parties were referred to the arbitrator, Chan Han Chong, a registered professional engineer. USEC, as the claimant in the arbitration, sought payment for work done with Progen defending and submitting a counterclaim against USEC. The hearing of the arbitration took place over nine days in the period between 30 August and 14 October 2004. In May 2005, the arbitrator ruled substantially in favour of USEC. Progen's counterclaim was dismissed. The Award was for $628,791.75 with interest. A breakdown of the Award of $628,791.75 is as follows:

S/N	**Nature of Claim**	**Amount $**
1	Payment of overtime	120,150.35
2	Variation works	236,682.20
3	Balance payable for Works done less materials	250,604.10
4	Interest on $250,604.10 at 6% pa from 5.2.98 to14.5.98, *ie*, 98 days x $41.20 per day	4,037.60
5	Loss of profits	17,317.50
	Total Award	**628,791.75**

7 As stated, Progen applied for (a) an order setting aside the Award on the grounds that the arbitrator had misconducted himself or the proceedings and (b) for leave to appeal against the Award on questions of law. By way of clarification, the 1985 revised edition of the Arbitration Act is applicable as the arbitration proceedings were commenced prior to 1 March 2002. The complaints

against the arbitrator were significantly cut down after the originating motion with many overlapping issues was first amended with leave of the court on 3 February 2006. This came about after the first adjourned hearing on 19 September 2005. Even with the amendments, this motion, counting the 19 September 2005 sitting, was heard over a number of days. Counsel for USEC, Mr Gregory Vijayendran, relying on the comments of Judge Thornton QC in *Norwest Holst Construction Ltd v Co-Operative Wholesale Society Ltd* [1997] EWHC Technology 356 (2 December 1997) (Technology and Construction Court, England and Wales High Court) at [39], had earlier observed that Progen was attempting to hedge its bets by raising complaints which were both misconduct and an application for leave in the hope that of the several volleys, one would find the target. As Judge Thorton QC remarked, "A party must decide the precise nature of the complaint in advance and then only pursue the remedy appropriate to that complaint." Whilst the court will intervene in a proper case, there is equal concern that allegations of misconduct must not be allowed as a back door means of appeal on questions of fact or law (see Lloyd J in *Mabanaft GmbH v Consentino Shipping Co SA (The "Achillet")* [1984] 2 Lloyd's Rep 191 at 192).

Leave to appeal on questions of law under section 28 of the Act

8 As a matter of convenience and, perhaps, logically as well, I consider the proper course is to first deal with the application for leave to appeal under s 28(3)(*b*) of the Act. Section 28 of the Act provides as follows:

> (1) Without prejudice to the right of appeal conferred by subsection (2), the court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.
>
> (2) Subject to subsection (3), an appeal shall lie to the court on any question of law arising out of an award made on an arbitration agreement; and on the determination of such an appeal the court may order —
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> (*a*) confirm, vary or set aside the award; or
>
> (*b*) remit the award to the arbitrator or umpire for reconsideration together with the court's opinion on the question of law which was the subject of the appeal,
>
> and where the award is remitted under paragraph (*b*) the arbitrator or umpire shall, unless the order otherwise directs, make his award within 3 months of the date of the order.
>
> (3) An appeal under this section may be brought by any of the parties to the reference —
>
> …
>
> (*b*) subject to section 30, with the leave of the court.
>
> (4) The court shall not grant leave under subsection (3) (*b*) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties to the arbitration agreement; and the court may grant any leave subject to such conditions as it considers appropriate.
>
> …

9 This leads me to two considerations. The first consideration centres on the question: "How

should the court identify any questions of law arising out of the Award?" In relation to this question, the Court of Appeal has made it clear in *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494 ("*Northern Elevator*") that (a) an error of law does not give rise to an appeal under s 28(2) of the Act and (b) a wrong application of the law constitutes a mere error of law. As a matter of Singapore law, a question of law under s 28(2) involves a finding of a point of law by the arbitrator which the guidance of the court is required to resolve. Choo Han Teck J (delivering the judgment of the court) said (at [17]–[18]):

> Section 28 of the Act confers upon the High Court a power to grant leave to appeal against an arbitration award if there is a "question of law", arising from the award, to be determined. As a preliminary point, it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not.
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> An opportunity arose for comment in *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [2000] 1 SLR 749. In that case, G P Selvam JC (as he then was) stated at [7]:
>
> > A question of law means a *point of law in controversy* which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. … If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. [emphasis in original]

10 Moreover, the point of law must be one that substantially affects the rights of at least one of the parties (see s 28(4) of the Act). As discussed in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 (*The Nema*), there are two types of questions of law that can arise from an arbitration award. They have been concisely summarised by Prakash J in *Permasteelisa Pacific Holdings Ltd v Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR 270 at [10]–[11]:

> As discussed in *The Nema*, there are two types of questions of law that can arise from an arbitration award. The first is a question relating to the proper construction of a contract, because English law (and thus Singapore law too) regards the interpretation of a written document as being a question of law rather than a question of fact. When such a question arises, how the court approaches it depends on whether the contract is a "one-off" contract or a standard-form contract. In the first case, leave to appeal will only be given if it is apparent upon a perusal of the reasoned award that the meaning ascribed to the clause by the arbitrator is obviously wrong. In the other case, leave will be given only if the judge considers that first, the resolution of the question of construction would add significantly to the clarity, certainty and comprehensiveness of Singapore commercial law, and second, that a strong *prima facie* case has been made out that the arbitrator has been wrong in his construction. However, even in this latter situation, when the events to which the standard clause falls to be applied are themselves "one-off" events, stricter criteria must be applied along the same line as those appropriate to "one-off" clauses: see Lord Diplock in *The Nema* at 742–743.
>
> The other type of question of law that may arise is the kind that requires the arbitrator to determine whether the facts proved in evidence before him lead to a particular legal conclusion. It can be a pure question of law or a mixed question of fact and law. An example of this type of question of law arose in *The Nema* itself, where the arbitrator had to decide whether the charterparty between the parties had been frustrated. As Lord Diplock stated (at 738), the question of frustration is never a pure question of fact, but involves a conclusion of law as to

whether the frustrating event or series of events has made the performance of the contract a thing that is radically different from that which was undertaken by the contract. Lord Diplock went on to hold (at 744) that where the second type of question of law arises, the judge deciding whether to give leave to appeal against the arbitrator's decision should not ask himself whether he agrees with the decision reached by the arbitrator, but rather, whether it appears upon perusal of the award either that the arbitrator misdirected himself in law or that his decision was such that no reasonable arbitrator could reach. This will be the normal approach, and only if there is a situation where the events involved are not "one-off" events but events of a general character that affect similar transactions between many other parties engaged in the same kind of commercial activity, will the judge be justified in taking a different approach.

11 The second consideration is: "What evidence can the court receive in an application for leave?" It is clear from *The Nema* that the court is expected to peruse the award to come to a decision. This may not be so definitive where the award was issued by a lay arbitrator whose native language is not English. Thus, on an application for leave under s 28, the award as the principal document should be put before the court, supplemented possibly by the documents referred to in the award which the court may need to read in order to determine a question of law arising out of the award (see *per* Jackson J in *Kershaw Mechanical Services Ltd v Kendrick Construction Ltd* [2006] 2 All ER (Comm) 81 at [45]). Even aided by documents referred to in the award (and it is for the judge to decide if he needs to look at these documents), it must be remembered that the application is for leave to appeal and it is not the function of the court to hear the putative appeal before deciding whether or not to grant leave (as to which see Lord Donaldson of Lymington MR in *Ipswich Borough Council v Fisons plc* [1990] 1 Ch 709 at 722). Similarly, Yong Pung How CJ in *American Home Assurance Co v Hong Lam Marine Pte Ltd* [1999] 3 SLR 682 at [18] clarified that a "provisional assessment by the judge of the correctness or otherwise of the decision of the arbitrator" was all that is required for the determination of an application for leave and concluded with this observation at [20]:

> *In the final analysis, the important question is whether an error can be demonstrated quickly and easily*: if hours of legal arguments are required, the applicant will not have succeeded in satisfying the court that the award is 'obviously wrong'. [emphasis added]

Finally, so long as the arbitrator might have been right, leave should be refused. Yong CJ at [20] citing *Marrealeza Compania Naviera SA v Tradax Export SA (The "Nichos A")* [1982] 1 Lloyd's Rep 52 at 54 clarified:

> If, on the other hand, the judge is satisfied that the view taken by the arbitrator is obviously or clearly right, or is probably right, or is likely to be right or might or may be right, or there is a fifty-fifty chance that the arbitrator is right …, then leave to appeal should not be given.

12 Of the classes of situations identified by Yong CJ in his judgment, of immediate relevance to this present case is the nature of the question of law in issue. With these principles in mind, I now turn to the various issues before me.

Deductions issue

13 The question of law raised by Progen is as follows:

> Whether on a true construction of the Agreement, [Progen] had a right to make the deductions for the costs of materials that [Progen] supplied to [USEC] from [USEC's] progress payments.

14 Progen made various deductions from the progress payments due to USEC. The deductions were for retention moneys (10%), materials supplied, storage charges and labour supplied. The leave application was confined to deductions for materials supplied. It was common ground that the Agreements were "one-off" contracts and the established authorities required Progen to show that the arbitrator was obviously wrong.

15 I was of the view that it was wrong for Progen to now attempt to raise, by the back door disguised as a question of law, equitable set-off as a defence to challenge the arbitrator's findings. In its defence, the set-off was pleaded as a contractual right being either an express or implied term of the Agreements, which is distinct from equitable set-off which counsel for Progen, Mr Philip Fong, sought to introduce in the question of law as framed. As Mr Vijayendran explained, not only was equitable set-off not pleaded as a defence, it was not raised at the arbitration. As such, the arbitrator was never required to decide on this defence in the light of the implied terms pleaded by Progen and, separately, by USEC. USEC pleaded that it was an implied term that consent had to be sought before making deductions from the progress claims for materials supplied. The arbitrator accepted the implied term pleaded by USEC as the materials were supplied under a separate and different contract.

16 Furthermore, the question of law as formulated would have impinged on the arbitrator's findings of fact. It is settled law that the arbitrator is the master of the facts. This means that the arbitrator's findings of fact are conclusive; it is irrelevant whether the court considers those findings of fact to be right or wrong. The upshot of this is that on an application for leave to appeal, the court must decide any question of law arising from an award on the basis of an unqualified acceptance of the findings of fact of the arbitrator as the court has no jurisdiction to set aside an award on the ground of errors of fact on the face of the award (see s 28(1) of the Act). Briefly, by way of illustration, the arbitrator had noted and accepted that Progen had "reversed" the various deductions made from the progress claims for the materials supplied by issuing credit note(s) to USEC. By the same token, some signed payment vouchers, which purportedly showed that deductions were made for materials supplied, were not accepted by the arbitrator as evidence of conduct signifying acceptance of the deductions for materials supplied.

Drawings issue

17 The question of law formulated by Progen is as follows:

> Whether the Arbitrator was wrong in awarding costs to [USEC] based on the inaccuracy of the drawings notwithstanding that he had found that [Progen] was not in breach of the Agreement on this issue.

18 Mr Fong argued that there was no legal basis for the arbitrator to come to the legal conclusion that USEC was entitled to the costs of variation works, abortive works and loss of time and labour. This contradicted the arbitrator's finding that Progen did not prepare the drawings and was thus not responsible for inaccuracies in the drawings issued to Progen.

19 In order to understand Progen's contention, it is necessary to reproduce the arbitrator's award on this issue in its entirety. The Award at para 5.1.4(a) reads:

> To determine whether [Progen] were in breach of the Agreement, for delayed and/or failure to provide [USEC] with all necessary and accurate drawings (including-co-ordination drawings) concerning the Project, in order for [USEC] to carry out and complete his works.

> I find on the evidence that, the drawings issued from [Progen] to [USEC] were tender drawings and part-prints with PWD instructions marked under "SOI". There is no evidence to show that co-ordination drawings were prepared by [Progen] and issued to [USEC].
>
> The Agreements are based on tender drawings, there is no provision of conditions in the Agreements that [USEC] shall [carry out] works based on co-ordination drawings.
>
> I find and hold that there is no breach in Agreements by [Progen] on this issue. However, [USEC] is entitled to claim costs incurred on the variation works, abortive works and loss of time / labour already carried out on site, due to the inaccuracy in drawings or PWD's instructions (SOI) issued.

20 I agreed with Mr Vijayendran that no leave to appeal should be granted, as the underlying findings of fact were being challenged in the alleged question of law framed by Progen. The arbitrator had made a finding that there was no proper co-ordination on the part of Progen so that earlier instructions given for work done to be carried out based on the drawings issued to USEC as well as on the instructions of the Public Works Department ("PWD"), as employer of the Tuas Checkpoint Project, were affected thereby leading to abortive works, variation works, loss of time and labour. The arbitrator found that USEC was entitled to claim those costs which arose from improper co-ordination (see [22] below). If anything, the error of law, on Mr Fong's reading of the Award, was in the application of the law rather than in the formulation of legal principles. For these reasons I refused leave to appeal.

Documents issue

21 The question of law raised by Progen is as follows:

> Whether based on the evidence adduced and on [USEC's] own admission that weekly site meetings were held when work schedules [were] handed to [USEC], the Arbitrator could come to the legal conclusion that [Progen] had breached [its] duty under the Agreement to supply detailed work schedules and the Master Construction Programme to [USEC].

22 The arbitrator found that Progen's staff carried out the first site meeting before or around 21 October 1996 and recorded the following decision in the minutes of the meeting under the heading "Site Meeting for work schedule":

> There will be a weekly meeting on every Thursday 3:00pm to discuss work schedules for the following week; Next Meeting: Thursday 24/10/1996 3:00pm

The arbitrator held that this "contractual administration intention" was not implemented at all by Progen. This failure led to the chain reactions on site conditions which were, as he put it, "disorganised thereby resulting in high abortive works, high wastage of manpower, all of which were attributed to [Progen]". The arbitrator had earlier explained that in the absence of evidence to the contrary, by industry practice, Progen was required to supervise and manage the Works in accordance with the work schedules in the Master Construction Programme. Progen should have but did not identify and extract the schedules relating to the Works from the Master Construction Programme, break down the Works into details and make out a detailed weekly work schedule for USEC to follow. Progen's site staff was required to monitor the progress and co-ordinate with other trades or subcontractors and adjust the detailed schedules to meet the critical-path of the Master Construction Programme.

23 Progen maintained that the arbitrator was wrong to reach such a conclusion in the face of

admission by USEC that the Master Construction Programme was put up on site and USEC could have referred to it. Furthermore, weekly site meetings were held and weekly work schedules were given out. Mr Vijayendran pointed out that the alleged admission could hardly qualify as an admission since Chua Aik Kia's testimony was different and the arbitrator accepted it. The arbitrator had made findings of fact that weekly site meetings were not held and weekly work schedules were not given to USEC. Mr Vijayendran submitted that although couched as a question of law, Progen was effectively challenging the arbitrator's findings of fact.

24 In my view, the alleged question of law was really a question of fact. In effect, Progen was complaining that the arbitrator was wrong for coming to a conclusion on an award based on facts that were wrongly found. Once the arbitrator found as a fact that weekly site meetings were not held and weekly work schedules were not given to USEC, the conclusion was inevitable.

Overtime issue

25 The question of law formulated by Progen is as follows:

> Whether [Progen's] breaches in failing to supply [USEC] with the necessary materials on time (the Materials Issue), failing to provide [USEC] with necessary and accurate drawings, detailed work schedules, the Master Construction Programme (the Drawings and Documents Issue) as well as [Progen's] failure to hold site meetings, directly caused [USEC's] workers to work overtime and therefore entitled them to claim for overtime payment.

26 Mr Fong submitted that there was no evidence of any causal link between the breaches and the claims set out in USEC's invoices for overtime work. He criticised the arbitrator for awarding overtime costs to USEC based solely on the workers' time record cards. He argued that all the workers should have been called to testify rather than limiting the workers to just two. An assertion was that overtime work could easily have been caused by some other reasons such as untrained or inadequate number of workers on site. The arbitrator was wrong to have made Progen liable for a loss that it was not responsible for and, in context, this was in relation to the arbitrator's conclusion that Progen had not breached its obligation to provide drawings.

27 Mr Vijayendran's objection was simple. The formulation was not a question of law. The arbitrator found as a fact that overtime had been done by USEC's workers in the light of Progen's various breaches of the Agreements. The challenge was directed at the arbitrator's findings of fact and as such was an attempt to supplant the arbitrator's findings of facts with the court's own views.

28 It is clear from the Award that the arbitrator, having found against Progen on those specific issues, went on to evaluate the state of the evidence in support of the overtime claim. The arbitrator noted in the Award that USEC was able to provide overtime records of the workers. The overtime records were marked with the handwriting of supervisors and signatures of workers and so on. Discrepancies in the overtime records were accepted and duly excluded by USEC in its overtime claim. The arbitrator rejected, for lack of evidence, Progen's case that materials were stocked in the site storage area or that there were sufficient materials on site waiting for the Works to be carried out. The arbitrator accepted USEC's evidence and found that the waiting time of the workers for the materials to be delivered on site directly contributed to the wastage of manpower. The arbitrator finally concluded that he was convinced that overtime work was carried out by USEC and was satisfied with the computation submitted by USEC for its overtime claim.

29 As stated earlier, the court will not interfere in the arbitrator's findings of fact arrived at after an assessment and evaluation of the evidence. Admissibility of evidence, weight of the evidence and

the inferences from it are essentially matters for the arbitrator (as to which see *GKN Centrax Gears Ltd v Matbro Ltd* [1976] 2 Lloyd's Rep 555 at 575). The alleged question of law was an attempt to circumvent the rule that the arbitrator's findings of fact are conclusive. Even inconsistency in the arbitrator's findings of fact is not a valid ground for an attack on an award as it is no more than an error of law or fact or of both (see s 28(1) of the Act). For all these reasons, the application for leave to appeal on the overtime issue was untenable.

Repudiatory breach or wrongful termination

30 The question of law formulated by Progen is as follows:

> [W]hether [Progen's] alleged breaches of the Agreement in respect of the following were serious enough to amount to a repudiatory breach of the Agreement:
>
> a) [Progen's] deductions for the costs of materials supplied, … (i.e. the Deductions Issue)
>
> b) the alleged failure of [Progen] to pay [USEC's] progress claims 10 to 14 (i.e. the Non-Payment Issue)
>
> c) [Progen's] alleged delay in supplying [USEC] with the necessary materials (i.e. the Materials Issue)
>
> d) [Progen's] alleged failure to provide [USEC] the necessary and accurate drawings (i.e. the Drawings Issue)
>
> (e) [Progen's] alleged failure to provide [USEC] with detailed work schedules, the Master Construction Programme and failure to hold site meetings (i.e. the Documents Issue)

31 The arbitrator found Progen in repudiatory breach of the Agreements. USEC accepted Progen's repudiatory breaches thereby putting an end to the Agreements. Mr Fong submitted that the legal conclusion of the arbitrator was wrong. In particular, USEC had not established that the work set out in progress claims 10 to 14 were done by USEC. Progen's contention was also predicated on the arbitrator being wrong on the deductions issue, the materials issue, drawings issue and the documents issue. USEC argued that the question as phrased was not a question of law arising out of the Award. The arbitrator had earlier noted in the Award that between the month of October and December 1997, USEC had written a letter to Progen chasing for delivery of materials on site for the Pipe Works. In a letter dated 15 December 1997 to Roland Tan, general manager of Progen, USEC stated that "We will pull out our [manpower] in two [days'] time if the materials are not delivered on site." One month later, USEC terminated its services under the Agreements.

32 The arbitrator stated at para 5.1.7(a) of the Award:

> The Claimant's Counsel submitted the Authorities on the laws on Breach by Repudiation as set out in Halsbury's Laws of Singapore, Volume 2, (2003 Reissue), paragraph 30.302.
>
> *Thus I find that the submission by Counsel for the Claimant* [USEC] *on the "Repudiation by Employer" in support of the Respondent's* [Progen] *breach by repudiation was persuasive and I accept it accordingly*.
>
> [emphasis added]

33 The arbitrator had seemingly considered the various illustrations in *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue) at para 30.302, one of which concerned the arbitrary conduct of a main contractor regarding progress claims resulting not only in a delay in payment but also in underpaying its subcontractor and such conduct was held to be oppressive and repudiatory. Based on the facts as found by the arbitrator, his decision was consistent with a correct application of the law on repudiatory breach, in the same way the arbitrator in *Northern Elevator* ([9] *supra*) applied the principle of compensation for breach of contract. In the present case, there were no legal controversies which would require the attention of the High Court. Progen's application failed at the threshold.

Progen's counterclaim for supply of labour and costs of engaging a third-party contractor to complete Phase 1 works

> a) Whether the Arbitrator erred in law by ignoring the invoices in support of [Progen's claim] just because the invoices were dated before the date of termination.
>
> b) Whether based on all the evidence adduced in the Arbitration, the Arbitrator could come to the legal conclusion that [USEC] was not liable to [Progen] for the costs of supplying labour to [USEC] and for the costs of engaging 3rd party contractors to complete [UESC's] work for phrase 1.

Progen's counterclaim for costs of engaging third-party contractor to complete Phase 2 works after termination

> a) Whether on the basis of the evidence adduced in the Arbitration, the Arbitrator could come to the legal conclusion that [USEC] was *not* wrong in terminating the Agreement which would have a direct bearing on this aspect of [Progen's] counterclaim.
>
> b) Whether the Arbitrator had erred in law by excluding [evidence such as] the invoices and documents of the 3rd party contractor on the basis of hearsay.
>
> [emphasis in original]

34 I will deal with both of Progen's counterclaims set out above together. Each complaint was grounded on USEC's wrongful termination of the Agreements. However, in view of the arbitrator's decision that it was Progen who had repudiated the Agreements, the counterclaims were rightly dismissed and, consequently, there is no need to consider the questions set out above. In any case, the questions formulated above are not questions of law arising out of the Award. The challenge was against the arbitrator's findings of fact. As stated earlier, the court will not interfere in the arbitrator's findings of fact arrived at after an assessment and evaluation of the evidence. Admissibility of evidence, weight of the evidence and the inferences from it are essentially matters for the arbitrator. This is borne out by the following matters. Mr Fong contended that the arbitrator had misdirected himself in that, on the one hand, he excluded invoices from Tat Sin Air-con Engineering Works ("Tat Sin") (*ie*, the third-party contractor) for Phase 2 on the basis of hearsay whilst, on the other hand, he allowed USEC's overtime claim solely based on overtime cards without calling any of USEC's workers to give evidence. Mr Vijayendran pointed out that Chua Aik Kia and two of his workers, Chang Kok Sang and Obaidu Islam, testified on the overtime claim whereas as regards Tat Sin's invoices, the arbitrator noted that Progen had not called witnesses to "verify and substantiate the content of the documents in relevancy with the Works in the Agreements". In addition, the arbitrator held that the contract was not between Progen and Tat Sin, contrary to the pleaded case. The contract was in fact between TRC and Tat Sin.

Misconduct under section 17(2) of the Act

35 Section 17(2) of the Act reads as follows:

> Where an arbitrator or umpire has misconducted himself or the proceedings, the court may remove him.

36 Section 17(2) encapsulates what is sometimes termed "technical misconduct" which denotes some irregularity rather than moral turpitude. Irregularity encompasses (see *Halsbury's Laws of Singapore* vol 2 (Butterworths Asia, 1998) at para 20.127) the following matters:

> Procedural mishaps such as where an arbitrator who had, despite agreement of the parties to make an award based on documents only, questioned a party and based part of the award on the answers given, or having been requested by one party for oral hearing proceeded on documents only; or an arbitrator who had visited and inspected the site and talked to one party in the absence of or previous notice to the other; or examining one party in the absence of the other; or *failing to consider all the issues*, have been held as 'misconduct' and the awards set aside. However even if the arbitrator made a wrong procedural decision such as withholding copies of his notes of evidence, but had applied the same rule to both parties, he had not misconducted himself to justify setting aside. *Not all procedural irregularity warrants a finding of misconduct – the failure must have caused a miscarriage of justice*. [emphasis added]

37 Broadly, two types of misconduct were alleged: (a) failure to consider and/or weigh the evidence and (b) acting unfairly in the arbitration and/or showing a clear bias against Progen. The first type of misconduct (a) was raised in respect of the following issues: (i) non-payment issue; (ii) variations issue and (iii) USEC's claim for value of work done. The second type of misconduct (b) was raised in respect of the variations issue.

38 Mr Vijayendran submitted that the motion to set aside under s 17(2) failed *in limine* without any consideration of the merits of the points taken. As to the principles on which the court judges alleged misconduct, I agreed with counsel that type (a) misconduct as framed touched on errors of law or fact or of both and they do not constitute misconduct under s 17(2). The decision of the English Court of Appeal in *Moran v Lloyd's* [1983] QB 542 is the clearest authority for the proposition that an error of law or fact cannot by itself amount to misconduct. Similarly, an error over admissibility of evidence could not by itself amount to misconduct by an arbitrator (as to which see Steyn J in *K/S A/S Bill Biakh and K/S A/S Bill Biali v Hyundai Corporation* [1988] 1 Lloyd's Rep 187 at 189). Similarly, any inconsistency in the treatment of the evidence would not constitute or evidence misconduct on the part of the arbitrator. It seemed to me that Progen was raising misconduct as a back door method of circumventing the threshold test in s 28(2) of the Act.

39 On the very same factual allegations raised in the variations issue, Progen claimed without more that the arbitrator acted unfairly or was biased against it in failing to take into account certain testimony favourable to Progen or was wrong to accept USEC's evidence. This is misconduct (b). Mistakes by the arbitrator are not of themselves proof of biasness. Also, the arbitrator is entitled to prefer one party's evidence over the other's where the merits of the case warrant such a preference. Progen's attempt to characterise findings of fact by the arbitrator as biasness and, so, misconduct, fails.

40 As regards the specific issues raised in respect of misconduct (a), my comments are as follows.

Non-payment issue

The misconduct alleged in the amended originating motion is as follows:

a) The Arbitrator failed and/or refused to consider that [USEC] had adduced no evidence whatsoever to show that progress claims 10 to 14 were submitted to [Progen];

b) The Arbitrator took into account irrelevant facts, for instance, there was no contractual procedure [l]aid down for the submission of progress claims when he concluded that [Progen] was in breach of [its] payment obligations;

c) The Arbitrator failed and/or refused to consider that the burden of proof was on [USEC] to show that progress claims 10 to 14 were submitted; and

d) Since [USEC] had already stopped work in August 1997, the Arbitrator failed and/or refused to consider that [USEC] could not have submitted progress claims.

41 Progen argued that USEC did not submit progress claims 10 to 14 for assessment and payment. It could not have submitted those progress claims since it did not do the work. Had the arbitrator considered all the evidence before him, he would have appreciated that another contractor was engaged by Progen and the main contractor from September 1997 to take over USEC's scope of the Works as the latter was incapable of completing the Works on time due to labour and manpower shortage. As such, Progen was not in breach of its contractual obligations.

42 In his submissions, Mr Fong maintained that the arbitrator did not make any finding that progress claims 10 to 14 were submitted for payment without which the arbitrator's omission was a shortcoming within the scope of s 17(2) of the Act. Similarly, there was no finding that USEC had actually done the Works. Mr Fong regarded both shortcomings as a failure to consider the issues and that failure constituted misconduct.

43 Although the parties had used the term "progress claims", the arbitrator noted that according to the "terms of payment" in the contract, Progen was required to pay as follows: "14 days upon receipt of [USEC's] invoice". It was in this context the arbitrator's finding that there was no contractual procedure to submit progress claims had to be understood. The arbitrator also noted that the invoices were not paid within 14 days of receipt of invoice but were paid as "advance" or "partial" payment. It was again in this context that the arbitrator's finding that there were no payments in October, November, December 1997 and January 1998 had to be understood. He stated at para 5.1.2 of the Award:

The Respondents [Progen] claimed that the Claimant [USEC] never submitted 10th to 14th progress claims to the Respondents for payment. However, in re-examining the evidence on the progress claims, I find that there was no contractual procedure lay [*sic*] down in respect of Claimant's progress claims.

It is evident that the Respondents did not rely on or verify the progress claims submitted by the Claimant from progress claim No. PJC-08 to No. PJC-10 by [*sic*] simply paid a sum or sums termed "Advance" or "partial" payments. The most obvious confusion occurred when "advanced" payment was made by Respondents to Claimant for progress claim No. PJC-10 but both parties could not produce evidence on PJC-10 to show.

The Respondents claim that the Claimant never submitted 10th to 14th progress claims to the

Respondents is not persuasive. The facts remained that there was no payment from the Respondents to the Claimant for the months of October, November, December 1997 & January 1998.

With such clarity on the evidence in respect of interim progress payment claims and receipt of payments by the Claimant from the Respondents including unilateral/unauthorised deductions, the situation in regards to the balance amounts due to the Claimant remained unpaid by the Respondents.

44 Mr Fong conceded in his submissions that the arbitrator was faced with two different versions of events. USEC said that it had done the work submitted under progress claims 10 to 14 whereas Progen maintained that the works were completed by another contractor, Tat Sin. Mr Vijayendran characterised Mr Fong's complaint as a dispute on the evidence. The arbitrator believed USEC and its witnesses that they carried out the Works and that invariably meant that he disbelieved Progen.

45 Mr Vijayendran explained that the arbitrator did make a finding, implicitly, that progress claims 10 to 14 were submitted. This was evident from the Award wherein the arbitrator stated that Progen's contention that USEC never submitted progress claims 10 to 14 was "not persuasive". Furthermore, the Award showed that the arbitrator went into the "basic facts" for an "understanding [of] each and every [term] in the progress claim" and noted that the 14th progress claim "supersedes all previous progress claims" so much so that the 14th progress claim being the latest progress claim showed "the statement of account for the Agreements as of the dated date" and was regarded as the final claim amount as stated in the pleadings. He then found that there were no payments to USEC in the months of October, November, December 1997 and January 1998.

46 I agreed with Mr Vijayendran that, in the final analysis, the complaint was with the arbitrator rejecting Progen's evidence and that was something well within the purview of the arbitrator and therefore could not constitute misconduct.

Variations issue

47 Mr Fong complained that the arbitrator accepted the quantities and description of works in USEC's invoices as variation works without making any finding as to how the claims set out in USEC's invoices amounted to variations as there was no cogent evidence that actual variation works were carried out by USEC. The amount invoiced was accepted as the value of the variation works without any verification of the quantities and unit rates. There was no proper breakdown of the total amount claimed.

48 In the amended originating motion, Progen contended that the arbitrator misconducted himself and/or acted unfairly in the arbitration and/or has shown a clear bias in the following respects:

a) The Arbitrator failed to take into account that [USEC] had admitted that the claim for variation includes omissions;

b) Although there is no evidence that [USEC] had actually carried out any variation works, the Arbitrator accepted that [USEC] had carried out variation works found in the finalization of costs of SOIs [the Superintending Officer's Instructions] … ;

c) The Arbitrator had failed to appreciate that the invoices submitted by [USEC] for variations do not constitute evidence of the value of the variations and awarded the sum of $236,682.20 to [USEC] for variation works which were not done; and

d) The Arbitrator erred in accepting [USEC's] invoices and not the finalized SOIs prepared by [Progen] that were complete with unit rates and detailed breakdown and accepted by both TRC and PWD as evidence of the variation works done and the value of such works, since the invoices do not amount to evidence that variation works had been carried out. The Arbitrator should have considered the SOIs, since the finalised SOIs are evidence of the variation works that have been done and the value of the works carried out.

49 Mr Vijayendran went through the complaints in (a) to (d). There was no evidence of biasness as alleged. The arbitrator clearly appreciated the distinction between omissions and work done. USEC's claim was for the value of work actually done thereby leaving out omissions. This position on the claim was taken on board by the arbitrator who held that "[his] understanding of [USEC's] detailed explanation is that, the value of [USEC's] invoices are nett values on additional works, omission works if any has been accounted for". Earlier, "[USEC] had explained and clarified in detail the type of works and the sequences [of] carrying out the type of works during the hearings and at the special meeting on 6th September 2004". There was no finding that USEC had "admitted" that it had overclaimed in that the arbitrator had accepted USEC's testimony. As for complaints (b) and (c), they were matters touching on evidence and evidence is something within the remit of the arbitrator.

50 Mr Vijayendran explained that the unit rates and prices were not applicable to the subcontract between Progen and USEC. The arbitrator did not find them very useful considering that they were negotiated much higher in the contractual chain between PWD and TRC or the main contractors. The arbitrator found that it was thus not possible to transpose the prices and unit rates agreed in relation to a different contract onto the Agreements entered into between Progen and USEC as the prices and unit rates applied by TRC might be different. As the arbitrator said, Progen's method of computation did not reflect the actual value on variation works carried out on site by USEC.

51 In the circumstances, I agreed with Mr Vijayendran that it was for Progen to establish that what the arbitrator did or did not do was due to biasness and not the result of an error of law or fact. On complaint (d), the arbitrator was entitled to prefer USEC's evidence. This was a matter of assessment of the evidence and the court would not interfere with the arbitrator's assessment of the evidence. If the arbitrator had wrongly accepted the evidence of a particular witness or found for the other party on an erroneous appreciation of the weight of the evidence generally, the courts would still not intervene. It is not misconduct to make an erroneous finding of law or fact (see *Moran v Lloyd's* ([38] *supra*) at 549 *per* Sir John Donaldson MR). At para 5.1.6 of the Award, the arbitrator gave his reasons for preferring the respondent's version of events:

> I find that, the invoices submitted by the Claimant were very clear in terms of quantities, description of works and locations. Claimant, Chua Aik Kia (CW1), was able to explain clearly and adequately the basis on how he derived the variation works which are from the working drawings & part prints of the SOI & instructions from PWD and TRC respectively and also instructions from the Respondents, during the hearings and at the clarification session in the special meeting held … together with the Respondents, Lee Eng (RW1)…
>
> The Respondents' perception has been that the Claimant failed to take into account the omission works in valuing certain variation works. The Claimant had explained and clarified in detail the type of works and the sequences on carrying out the type of works during the hearings and at the special meeting on 6th September 2004. My understanding of the Claimaint's detailed explanation is that, the value of the invoices are nett values on additional works, omission works if any has been accounted for.

52 The arbitrator then went on to explain Progen's method of computation, and continued:

> My understanding of this computation by the Respondents is that it is very academic and not practical nor is it applicable to this case. It merely uses whatever datas available and applies the arithmetical rules with methods on elimination, estimation and obtain a balance figure with the Respondents termed it as "Balance of Probabilities". Therefore the balance figure is the amount of omission to the contract sum. This method of computation does not reflect the actual value on variation works carried out at site by the Claimant. The values (data) used by the [Respondents] … most of them were extracted from third parties contract under the Main Contract/ Nominated sub-contract … which are not applicable in this instance.
>
> Based on the above findings of fact and there is no evidence adduced by the Respondents to support their contention that the variation works were not carried out in accordance with the PWD specifications and requirements, I am persuaded to believe that the Claimant has justified his claims on the variation works …

53 It is abundantly clear from the above extract that the arbitrator considered both sides of the argument and rejected one in favour of the other. The arbitrator reviewed Progen's calculations and was of the view that the figure of $80,816.80 used by Progen to arrive at the omission sum of $48,490.08 was "very academic" and "not practical" nor "applicable in this case". He was of the view that the method of computation did not reflect the actual value of variation works carried out at the site by USEC. He went on to hold that Progen had not adduced evidence to support its contention that the variation works were not carried out in accordance with PWD specification and requirements and was "persuaded to believe [USEC]" who has justified its claims for variation works for the amount of $236,682.20.

USEC's claim for value of work done

54 Progen's contention is that the arbitrator misconducted the proceedings when he awarded USEC profit at 15% when there was no evidence from USEC that its profit margin was 15% nor was there any evidence that a 15% profit margin was widely accepted in the building industry. Mr Fong submitted that the arbitrator had misdirected himself in accepting that the total amount of work done by USEC up to the date of termination of services was $1,019,550. That was the figure invoiced in the 14th progress claim but USEC had not justified this figure. As Mr Vijayendran submitted, this allegation of misconduct was without merit as it was referable to the arbitrator's assessment of the evidence. It is not misconduct to come to a wrong conclusion of fact. No authority was cited for the proposition that the award of an arbitrator could be set aside on the ground of misconduct merely because the award was one which appeared to be so high that no reasonable arbitrator acting properly could have awarded it.

Result

55 For all these reasons, I dismissed the amended originating motion with costs.