PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA
[2006] SGCA 41

Case Number : CA 127/2005

Decision Date : 01 December 2006

Tribunal/Court : Court of Appeal

Coram : Belinda Ang Saw Ean J; Chan Sek Keong CJ; Andrew Phang Boon Leong JA

Counsel Name(s) : Prakash Mulani, Alvin Chang, Aftab Ahmad Khan and Bhaskaran Sivasamy (M & A Law Corporation) for the appellant; Karam Singh Parmar, Shankar Ray Shi-Wan and Claudia Poon Ho Yan (Tan Kok Quan Partnership) for the respondent; Lawrence Boo as amicus curiae

Parties : PT Asuransi Jasa Indonesia (Persero) — Dexia Bank SA

Arbitration – Award – Recourse against award – Setting aside – Application to set aside arbitral award – Legal scope for setting aside arbitral award where arbitral award allegedly conflicting with previous award on same issue or dealing with issues beyond scope of submission to arbitration or conflicting with public policy – Section 19B, First Schedule Art 34(2) International Arbitration Act (Cap 143A, 2002 Rev Ed)

Words and Phrases – "Award" – Whether negative ruling on jurisdiction to hear matter by arbitral tribunal amounting to award – Section 2(1) International Arbitration Act (Cap 143A, 2002 Rev Ed)

1 December 2006 *Judgment reserved.*

Chan Sek Keong CJ (delivering the judgment of the court):

1 This is an appeal by PT Asuransi Jasa Indonesia (Persero) ("the appellant") against the decision of Judith Prakash J ("the trial judge") dismissing the application of the appellant for an order to set aside the award dated 5 December 2003 ("the Second Award") of an arbitral tribunal ("the Second Tribunal") in an arbitration in Singapore entitled Case No ARB 005 of 2002 ("the Second Arbitration") involving the appellant, as claimant, and Dexia Bank SA ("the respondent").

2 The Second Arbitration was commenced by the appellant after the conclusion of a preceding arbitration between the same parties ("the First Arbitration") where the respondent, as claimant, obtained an award ("the First Award") from the arbitral tribunal ("the First Tribunal") against, *inter alia*, the appellant for the payment of a sum in excess of US$8.6m as guarantor of a series of US dollar notes ("BI Notes") held by the respondent. Except for one critical fact (as will be highlighted later), the subject matter of the Second Arbitration was the same as that of the First Arbitration.

3 It is common ground that both the First Arbitration and the Second Arbitration are subject to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"), which incorporates the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). This appeal raises difficult and perplexing legal issues concerning the jurisdiction and powers of arbitral tribunals and their relationship with the supervisory powers of the court, and in particular the powers of the court to set aside an arbitral award or arbitral decisions on matters that form part of or constitute the award.

Issue of the BI Notes

4 The appellant is an Indonesian state-owned entity. It is the guarantor of a series of BI Notes issued by Rekasaran BI Ltd ("the Issuer"), a special-purpose vehicle incorporated in the Cayman

Islands under a "Debt Issuance Programme" ("DIP"). The respondent was the holder of certain BI Notes that had remained unpaid since their maturity date in 1999. In 2000, the appellant initiated a scheme ("the Restructuring Scheme") pursuant to the terms and conditions of the DIP to release its payment obligations under the BI Notes by replacing them with a new series of notes to be issued by another company, Mega Caspian Petroleum ("MCP"), and secured by shares owned by MCP in Central Asia Petroleum ("CAP"). The respondent and some other holders of BI Notes ("BI Noteholders") opposed the Restructuring Scheme for various reasons, but it was nonetheless purportedly approved at a BI Noteholders' meeting on 29 February 2000 ("the February 2000 meeting") at which the respondent was absent. On 15 September 2000, some of the other BI Noteholders opposing the Restructuring Scheme obtained an injunction from the High Court restraining the appellant and the Issuer from implementing the Restructuring Scheme.

The First Arbitration

5 On 22 March 2001, the respondent commenced the First Arbitration against the Issuer and the appellant. From the terms of the First Award, it would appear that the following issues were submitted for the determination of the First Tribunal:

(a) whether any obligation arose under the BI Notes to make payment to the respondents;

(b) whether the obligations under the BI Notes were restructured pursuant to the February 2000 meeting; and

(c) whether the appellant was immune from the proceedings pursuant to its purported sovereign immunity.

6 The Issuer and the appellant did not appear and were unrepresented at the First Arbitration. Instead, the Issuer gave notice on 19 April 2001 to the BI Noteholders for a meeting to be held on 18 May 2001 to, *inter alia*, ratify the resolutions passed at the February 2000 meeting. The meeting held on 18 May 2001 did not, however, have a sufficient quorum as only one BI Noteholder, an Indonesian company, was present. It was thus adjourned to 4 June 2001 ("the June 2001 meeting"). At the June 2001 meeting, only the same BI Noteholder, who held about 46% of the nominal value of the BI Notes, was present. However, its attendance at the meeting was sufficient to meet the quorum for an adjourned meeting as stipulated by the terms of the DIP (which only required the presence of one BI Noteholder holding not less than one-third of the nominal value of the BI Notes outstanding). The June 2001 meeting passed the resolutions ratifying the resolutions that had been passed at the February 2000 meeting to restructure the obligations of the Issuer and the appellant under the BI Notes.

Legal effect of a valid restructuring scheme

7 At this juncture, it is necessary that we explain why the Issuer and the appellant decided to hold the June 2001 meeting. Given their conduct subsequent to the commencement of the First Arbitration, it is obvious that the Issuer and the appellant accepted that the February 2000 meeting, and therefore the Restructuring Scheme purportedly approved at that meeting, was invalid, with the consequence that they remained liable as guarantors on the BI Notes. Hence, the June 2001 meeting was necessary to validate the Restructuring Scheme and make it legally effective and binding on all the BI Noteholders in accordance with the terms of the DIP. Subject to any challenge by the respondent as to its validity, the June 2001 meeting would have resulted in the Issuer and appellant successfully restructuring their obligations under the BI Notes, thereby nullifying any such obligations thereunder. We should also mention, although this point has no bearing on the issues to be

determined by this court, that all the BI Noteholders, except the respondent, have accepted the Restructuring Scheme pursuant to either the February 2000 meeting or the June 2001 meeting.

8 We might also add that although the June 2001 meeting was convened to ratify the resolutions passed at the February 2000 meeting, it was not a continuation of the earlier meeting. It was a different and separate meeting capable of producing legal results on its own that are binding on all BI Noteholders. As already stated, the effect of the June 2001 meeting was such that, as a matter of contract between the parties, it would have extinguished the legal rights of the respondent in the BI Notes and replaced them with another bundle of legal rights under the replacement notes with new maturity dates. Up to the day of the June 2001 meeting, the BI Notes remained valid and continued to confer rights of payment against the Issuer and the appellant. After the June 2001 meeting, assuming its validity, the BI Notes ceased to confer any such legal rights on the BI Noteholders.

9 It may be that in principle, although our observations here are strictly *obiter*, if the respondent had obtained the First Award before the June 2001 meeting, thereby crystallising its claim against the Issuer and the appellant into an award under the Act, it would have negated the efficacy of any further restructuring by the Issuer and the appellant of their obligations under the BI Notes. However, the First Award was issued on 18 October 2001, more than four months after the June 2001 meeting. In this connection, we should mention that there does not appear to be any condition in the DIP that limits or qualifies the time or circumstances in which the Issuer's and/or the appellant's right to restructure their obligations under the BI Notes would cease.

10 As is evident from the facts, the issues raised in this appeal are the direct result of a scramble by both the appellant and the respondent to protect their legal positions under the DIP in relation to the BI Notes *vis-à-vis* each other, with the Issuer and the appellant attempting to restructure the BI Notes so as to avoid their liability thereunder, and the respondent attempting to crystallise its claims *via* an arbitral award. We wish to emphasise that in addressing the legal issues in this appeal, we recognise and accept the commercial morality and legitimacy of these moves and countermoves. Both parties were entitled to take such action as they considered necessary to protect their contractual rights under the DIP: the respondent was entitled to enforce the BI Notes; whilst the Issuer and the appellant were entitled to take steps to substitute the BI Notes with another set of equivalent notes.

11 Reverting to the First Arbitration, the First Tribunal heard the matter on 7 June 2001, three days after the June 2001 meeting. It was not aware of the June 2001 meeting at the time of the hearing. Instead, sometime in August 2001, it received from the appellant a copy of a notarised document dated 5 June 2001 containing the minutes of the June 2001 meeting and the resolutions passed at that meeting ("the Minutes"). There was no covering note to explain the intent or purpose of such communication.

12 In the interest of completeness, we should mention that on 25 July 2001, the appellant had applied to the High Court to discharge the injunction (referred to in [4] above). While the High Court dismissed the application, it nonetheless observed that the appellants were entitled to take steps to render the BI Notes void or ineffective provided such steps were in compliance with the terms applicable to the BI Notes.

The First Award

13 The First Tribunal issued the First Award on 18 October 2001, granting the respondent's claim and ordering the Issuer and the appellant to pay a sum in excess of US$8.6m, on the basis of the following findings on the issues submitted for arbitration:

(a) that the Issuer and the appellant were under an obligation to pay under the BI Notes;

(b) that the obligations of the Issuer and the appellant under the BI Notes were not restructured pursuant to the February 2000 meeting; and

(c) that the appellant was not entitled to plead sovereign immunity.

In essence, the First Tribunal found that the Issuer and the appellant had failed to restructure their obligations under the BI Notes in accordance with the terms of the DIP and were therefore liable to pay the respondent the face value of the BI Notes held by it.

14 The detailed findings of the First Tribunal are set out in paras 2.3 to 3.3 of the First Award and read as follows:

2.3 [The Issuer] is not represented and has taken no part in the arbitral proceedings.

2.4 The [appellant] is not represented and has not appeared at the arbitral hearings but, as discussed in more detail below, sent a lengthy letter to the SIAC [the Singapore International Arbitration Centre] and the Chairman on 23 May 2001 ["the sovereign immunity letter"] … The letter expressed the view that the Tribunal ought to refuse to hear the proceedings on the ground of sovereign immunity and also argued that the [appellant] was entitled to the defence of sovereign immunity …

2.5 After the hearing on Thursday 7 June 2001… the Tribunal was forwarded what purported to be a note of the [the Issuer] noteholders' meeting of 4 June 2001 ["the adjourned meeting"] signed and made on 5 June 2001 … *The Tribunal finds that this documentation is irrelevant to the issues requiring determination in this arbitration.*

…

3.1 The claim before the Tribunal arises out of the [Issuer's and appellant's] default under the terms of certain notes issued by [the Issuer] and guaranteed by [the appellant] under the terms of a US $100 million debt issuance program in 1997 (the "Rekasaran BI Notes"). The [Issuer and appellant] have not challenged the actual defaults they are claimed to have committed under the various contracts.

3.2 It appears that the [Issuer's and appellant's] only two possible defences to the claim are first that the default was cured by a purported "exchange offer" for the Rekasaran BI Notes which purportedly would have entailed a release of [the appellant's] guarantee of the Rekasaran BI Notes. It was argued by the [respondent] in SIAC ARB 47/2000 that this "exchange offer" was not approved by the requisite majority of noteholders, was not put to a vote in accordance with the terms and conditions of the Rekasaran BI Notes, and as such is null and void. This "defence" is discussed below. The Tribunal has decided to consider it even though it has not been raised specifically in these proceedings.

3.3 The second possible defence raised in the [sovereign immunity letter] is that [the appellant] is immune from these proceedings pursuant to the United Kingdom State Immunity Act of 1978 ("UKSIA"). The [respondent] has noted that the [appellant] refuses to appear before the Tribunal and defend the claim against it as [it] had agreed to do in the arbitration agreement, yet is attempting nevertheless to assert a defence to the claim. The [respondent] also asserts that in any case, in addition to the procedural infirmity of [the appellant's] assertion of sovereign

immunity, this defence, even if it were properly asserted, is patently inapplicable to the claims before the Tribunal and is completely lacking in merit …

[emphasis added]

The Second Arbitration

15 The appellant commenced the Second Arbitration on 10 January 2002 against the respondent and three other BI Noteholders seeking a declaration that:

(a) the June 2001 meeting was valid and binding on all BI Noteholders, including the respondent; and

(b) the Restructuring Scheme was valid and binding on all BI Noteholders, including the respondent.

The appellant subsequently withdrew its claim against the other three BI Noteholders who by then, it would appear, were willing to accept the terms of the Restructuring Scheme.

16 At the outset, and before filing its statement of defence, the respondent raised certain jurisdictional issues before the Second Tribunal, following which a preliminary meeting was held on 12 November 2002 in which the Second Tribunal gave the following directions:

That the following issues be heard as preliminary jurisdictional issues: -

(a) Whether the tribunal has jurisdiction to entertain the present proceedings in light of the history of the earlier proceedings between the Parties; and

(b) Whether the divestment of MCP's shares in CAP prevent the [appellant] from proceedings [*sic*] in these proceedings…;

Consequential Orders

(c) that the [respondent] be given 1 month from today to file and serve written submissions in respect of the Preliminary Objections. The [appellant] be given 1 month from the date of the service of the [respondent's] written submissions on [it] to file and serve [its] Reply.

(d) that the Oral Submission be fixed for half a day to be conducted by video conferencing on the 11th of February 2003 at 10.00 am.

17 The scheduled oral hearing did not take place as both parties failed to file their submissions before the stipulated time. Instead, on 30 July 2003, the respondent sent the Second Tribunal written submissions raising a third preliminary jurisdictional issue, *ie*, that the respondent had disposed of its BI Notes, thus potentially rendering the proceedings "moot". The Second Tribunal directed the appellant to respond to this issue, and for the parties to file their submissions on the preliminary objections by 17 November 2003. The respondent and the appellant filed their submissions on 23 October 2003 and 17 November 2003 respectively.

The Second Award

18 The Second Tribunal, without holding an oral hearing, issued the Second Award on 5 December 2003 containing the following findings:

(a) that the appellant was entitled to proceed with the arbitration even though the respondent had disposed of the BI Notes and the appellant had divested the MCP shares in CAP; and

(b) that, on the basis of the rule in *Henderson v Henderson* (1843) 3 Hare 100*,* the "action in this proceeding is a misuse of the process of the Court in that the [appellant] could and should have brought the present claims in the [First Arbitration]", and therefore the appellant was estopped from raising the issue of the June 2001 meeting, which they should have properly done at the First Arbitration.

19 Significantly, under para 8.1 of the Second Award, the Second Tribunal concluded that:

As the [appellant] has failed on the third issue, it is the decision of this Tribunal that the [respondent] succeeds on the *preliminary question of jurisdiction* and the [appellant's] action is hereby dismissed. [emphasis added]

It seems clear from these words that the Second Tribunal held that it had no jurisdiction to determine the substantive issues in the submission to arbitration. Indeed, this is confirmed by para 7.10 of the Second Award which reads as follows:

We have not considered the substantive issues of (a) whether there was a [June 2001 meeting], (b) whether there was a breach on the part of the [respondent] in not complying with the terms of the [June 2001 meeting], (c) whether the [appellant was] ready and willing to carry out the terms under the [June 2001 meeting], and (d) whether there was an acceptance of the default of the [respondent] by the [appellant] and/or termination of the agreement between the [appellant] and the [respondent] by the [appellant].

20 The relevant findings of the Second Tribunal on estoppel are set out in paras 7.23, 7.27 and 7.28 of the Second Award as follows:

7.23 … *the [appellant] chose not to participate in the First Arbitration*. The First Tribunal specifically found that the meeting of 29 February 2000 was improperly convened … The [appellant] says that the [June 2001 meeting] was to ratify the resolutions passed at the 29th February 2000 meeting … *Thus the [June 2001 meeting] would have been directly relevant for the First Tribunal to consider*. The Statement of Case in its present form should have been submitted by the [appellant] to the [First] Tribunal. This the [appellant] clearly did not do. This smacks of a collateral attack on the First Award…

…

7.27 We do not agree with the [appellant] that [it] had attempted to raise the issue of the [June 2001 meeting] before the First Arbitration. *In fact, it is clearly stated to the contrary in the First Award, in that the [appellant] did not participate in the First Arbitration for reasons best known to them.*

7.28 On the basis of the law as stated above, we find that *the [appellant is] estopped from raising the issue of the [June 2001 meeting] now which the [appellant] should have properly done in the First Arbitration. This is an issue which might have been and should have been*

brought forward as part of the First Arbitration but was not brought forward by the [appellant].

[emphasis added]

Application to the High Court to set aside the Second Award

2 1 The appellant applied to the High Court for the following orders: (a) that the Second Award ordering that the Second Arbitration be dismissed, on the basis that the Second Tribunal had no jurisdiction to entertain the proceedings, be set aside; (b) that the preliminary issues/objections raised by the respondent (in the Second Arbitration) be dismissed; and (c) that the arbitration be remitted back to the Second Tribunal for hearing. The grounds of the application were as follows:

(a) that the Second Award is in conflict with the public policy of Singapore and thus in breach of Art 34(2)(*b*)(ii) of the Model Law;

(b) that the Second Award deals with disputes or issues not contemplated by, or, alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of Art 34(2)(*a*)(iii) of the Model Law;

(c) that a breach of natural justice under s 24(*b*) of the Act has occurred in connection with the making of the Second Award by which the rights of the appellant have been prejudiced; and

(d) that the appellant had not been given a full opportunity to present its case and/or was otherwise unable to present its case and thus there was a breach of Arts 34(2)(*a*)(ii) and 18 of the Model Law.

22 The trial judge, after hearing counsel, rejected all the grounds and dismissed the application. With respect to ground (c), she held that there was no breach of natural justice or any failure to give the appellant an opportunity of being heard; and with respect to ground (d), she held that parties to arbitral proceedings had no right to an oral hearing. We agree with the trial judge's decision on these two grounds and, for the same reasons, reject the appeal based on these grounds.

The three critical findings

23 With respect to grounds (a) and (b), counsel for the appellant focused his attack on three critical findings ("the three critical findings") in the Second Award that formed the basis of the issue estoppel that led the Second Tribunal to decide that it had no jurisdiction to determine the substantive issues, as set out in para 7.10 of the Second Award (see [19] above). The three critical findings (as reformulated by us) are as follows:

(a) the finding in paras 7.23 and 7.27 that the appellant did not raise the June 2001 meeting at the First Arbitration because it chose not to participate in the First Arbitration ("first critical finding");

(b) the finding in para 7.23 that had the June 2001 meeting been raised, it would have been directly relevant for the First Tribunal to consider ("the second critical finding"); and

(c) the finding in para 7.28 that the appellant was estopped from raising the issue of the June 2001 meeting which it might and should have been brought forward as part of the First

Arbitration but was not brought forward by the appellant ("the third critical finding").

Counsel contended that each of the three critical findings contradicted the findings of the First Tribunal and had thereby contravened the finality principle enacted in s 19B of the Act. Consequently, the critical findings were illegal and contrary to the public policy of Singapore. Further, and in the alternative, the critical findings were also, for the same reason, beyond the scope of the submission to arbitration under Art 34(2)(*a*)(iii) of the Model Law. Accordingly, for those reasons, the appellant argued that the said findings and, consequently, the Second Award, should be set aside.

The trial judge's findings

The first critical finding

24 With respect to the first critical finding, counsel for the appellant contended that it conflicted with a finding of the First Tribunal in that the First Tribunal had considered the appellant's defence of sovereign immunity as set out in a lengthy letter sent to it and had also acknowledged that it had received the Minutes. It was also suggested that the First Tribunal had distinguished the positions taken by the appellant and the Issuer in the First Arbitration in para 2.3 and 2.4 of the First Award (see [14] above). It was submitted that these evidenced some form of participation on the part of the appellant. The trial judge accepted this argument and found that the Second Tribunal erred in finding that the appellant did not participate in the First Arbitration. She held that a party could participate in arbitral proceedings without being present or represented at the hearing. At [38] of her judgment (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197) ("her Judgment"), she explained:

> If the party communicates with the tribunal on any matter relating to the proceedings including the issue of whether the tribunal has jurisdiction to hear the arbitration, such communications would be regarded as participation, albeit limited participation, in the proceedings. In this case, the [First] Tribunal, in para 2.4 of the [First] Award … made clear, that the [appellant] had participated to a limited extent in the [First] Arbitration.

25 The trial judge decided that the Second Tribunal was not entitled to make a finding that was inconsistent with the finding of the First Tribunal as it was final and binding between the parties, and accordingly, that the finding that the appellant did not participate in the First Arbitration (*ie*, the first critical finding) was liable to be set aside. However, based on Art 34(2)(*a*)(iii) of the Model Law, she also held that this did not affect the finding on estoppel (*ie*, the third critical finding) which was not dependent on the finding on non-participation.

26 We agree with the trial judge that, on the basis of her analysis, the first critical finding is irreconcilable with paras 2.3 and 2.4 of the First Award. However, we can see no purpose in setting aside the first critical finding unless it is also a ground for setting aside the First Award under the Act or the Model Law. As such, though we are in agreement with the trial judge's finding at [38] of her Judgment, it is unnecessary for us to comment further since the first critical finding has no effect on the validity of the third critical finding, and therefore no effect on the validity of the First Award.

The second critical finding

27 The argument of counsel for the appellant on the second critical finding was that the finding that the June 2001 meeting "would have been directly relevant for the First Tribunal to consider" was inconsistent with the finding of the First Tribunal that the June 2001 meeting was irrelevant to the issues requiring determination by the First Tribunal. The trial judge rejected this argument, stating in

[40] and [41] of her Judgment as follows:

> [40] … Although [the appellant] sent the [First] Tribunal the [Minutes], the [appellant] did not formally raise the resolutions passed at the June 2001 meeting as an answer to the respondent's contention that the resolutions passed at the February 2000 meeting did not bind it. Accordingly, the issue of the effect of the June 2001 meeting on the earlier meeting was not before the [First] Tribunal for determination and that was all that the [First] Tribunal was saying when it found that the documentation was irrelevant to the issues requiring determination by it. *The* [*First*] *Tribunal was not stating that the issue had been raised nor was it stating that the issue could not have been raised*.
>
> [41] … The [Second] Tribunal did not say that the June 2001 meeting was relevant to the issues before the [First] Tribunal as the same had been formulated by the parties. What the [Second] Tribunal said was that the June 2001 meeting "would have been directly relevant", *ie*, it would have been relevant for the [First] Tribunal's consideration had it been raised by the [appellant] as an issue. The [Second] Tribunal was also saying that by simply sending [the Minutes] of the meeting to the [First] Tribunal without any accompanying submission or representation, the [appellant] had not put the June 2001 meeting in issue. In my judgment, therefore, [the second critical] finding of the [Second] Tribunal did not contradict the finding of the [First] Tribunal …
>
> [emphasis added]

28 In our view, the second critical finding subsumes two separate findings on two different questions, one of fact and the other of law. The first is the finding of fact that the appellants did not raise the June 2001 meeting before the First Tribunal. Such a finding is implicit in the omnibus finding that the June 2001 meeting would have been relevant *if* it had been raised. The second is the finding of law that the June 2001 meeting *would have been relevant* for the First Tribunal to consider had it been raised. As is apparent from the extract above, the trial judge agreed with the Second Tribunal that the June 2001 meeting was not formally raised at the First Tribunal. On the finding of law, however, the trial judge declined to decide whether, as a matter of law, the June 2001 meeting was relevant *to the issues formulated by the parties in the First Arbitration*, *ie*, whether the First Tribunal had jurisdiction or power to consider the legal effect of the June 2001 meeting. Instead, the trial judge avoided the issue by finding that the First Tribunal had not said *that the issue had been raised or that it could not have been raised*. As such, since the Second Tribunal merely found that the June 2001 meeting "would have been relevant for the [First] Tribunal's consideration *had it been raised* by the [appellant] as an issue" [emphasis added], there was no inconsistency between what the Second Tribunal had found and what the First Tribunal had said.

29 In our view, the trial judge's ruling on the question of law implied in the second critical finding gives primacy to form and does not address the substance of the argument. The logic of the finding seems to be that if A did not say X, then it is not inconsistent for B to say X. We should highlight again that what the First Tribunal actually said was that the June 2001 meeting *was irrelevant for its determination*, and what the Second Tribunal said was that if the June 2001 meeting had been raised, *it would have been relevant for the determination* of the First Tribunal. On the face of these two statements, it is evident that they are inconsistent on the issue of relevance. The trial judge herself was not unaware of the problem. Indeed, at [41] of her Judgment, she stated: "The [Second] Tribunal did not say that the June 2001 meeting was relevant to the issues before the [First] Tribunal as the same had been formulated by the parties." In our view, the Second Tribunal could not say that because it would have implied that the June 2001 meeting was relevant to the issues as formulated by the parties for the determination of the First Tribunal. On this basis, it is difficult to understand

how the Second Tribunal was able to conclude that if the June 2001 meeting had been raised, it would have been relevant for the First Tribunal to consider *when it was not relevant to the issues formulated by the parties for the First Tribunal to decide.*

30 Indeed, the trial judge was aware that the First Tribunal might have had no jurisdiction to consider the June 2001 meeting as she raised this question at [41] of her Judgment, though she declined to answer it. There, she observed:

> Whilst it may be argued (though I express no concluded opinion on this) that the [Second] Tribunal was wrong to find that the June 2001 meeting would have been relevant to the considerations of the [First] Tribunal had it been raised because this was, arguably, an issue which was not within the jurisdiction of the [First] Tribunal to determine, such a wrong finding on the part of the [Second] Tribunal would not be a ground for setting aside the [Second] Award. This is not an appeal and, pursuant to the provisions of the Act, errors of law or fact made by the [Second] Tribunal do not entitle the court to set aside the Award. [emphasis added]

31 In our view, this Court would have been greatly assisted if the trial judge had expressed a concluded opinion on the question as this issue is really the crux of the appellant's case, *ie*, that since the June 2001 meeting was not relevant to the issues formulated by the parties in the First Arbitration, it was not within the scope of the submission to arbitration and would have been irrelevant even if it had been raised. We can only surmise from the above passage that the trial judge probably found it unnecessary to express her opinion because, in her view, even if the Second Tribunal's finding were wrong in law, it would not have constituted a ground for setting aside the Second Award under the Act or the Model Law. As it is necessary for us to consider this issue here, we will have to do so without the benefit of the views of the trial judge.

32 We are of the opinion that the only circumstance in which it may be said that there is no inconsistency between the finding of the First Tribunal and that of the Second Tribunal on the relevance of the June 2001 meeting would be if the First Tribunal had expressly stated that the reason it found the June 2001 meeting irrelevant was because it was not raised before it as a defence. However, it is clear that the First Tribunal made no such statement nor could such a statement be implied or logically deduced from the First Tribunal's finding. In our view, the Second Tribunal's finding of the reason for the First Tribunal's finding of irrelevancy is entirely speculative, and, as will be shown later, is, on a balance of probabilities, wrong as well.

33 With respect to whether the fact of the June 2001 meeting had been raised, we agree with the trial judge that the June 2001 meeting had not been *formally* raised before the First Tribunal. This is supported by para 10.4 of the First Award, where it was noted that "the [First] Tribunal [considered] *all possible defences raised* by the [Issuer and the appellant]" [emphasis added]. As the First Award only considered the sovereign immunity and "note exchange" (*ie* the Restructuring Scheme) defences, the necessary implication of such a statement is that the June 2001 meeting was, at the very least, not *formally* raised as a defence.

34 Nonetheless, it is clear to us that a strong argument could be made out that it was raised, albeit *informally*. The appellant had, in an idiosyncratic way, informed the First Tribunal of the June 2001 meeting by sending it the Minutes. We do not believe that the First Tribunal was not alive to the legal implications of the June 2001 meeting, if it were a valid meeting – indeed, as the trial judge rightly highlighted, at [40] of the Judgment, "the Previous Tribunal must have been aware of the contents of the [Minutes]". Given that the trial judge had decided that a party could participate in an arbitration by raising an issue informally, it was rather surprising that she did not consider this aspect of the case in relation to the June 2001 meeting.

35 In this connection, we should point out that the First Tribunal dealt fully with the appellant's defence based on sovereign immunity, although it was raised informally, and furthermore, as is evident from para 3.2 of the First Award (see [14] above), it also dealt with the possible defence of the Restructuring Scheme, in spite of the fact that neither the Issuer nor the appellant raised it formally or informally. This is especially significant given that neither the Issuer nor the appellant contested the invalidity of the February 2000 meeting either formally or informally. Given the First Tribunal's approach on these two issues, it may be pertinent to inquire why it decided to consider them at all. In our opinion, a reasonable explanation would be that the First Tribunal considered them to be relevant to the issues requiring determination by them while at the same time being of the view that the June 2001 meeting was irrelevant to the issues formulated by the parties for determination by them.

Scope of submission to arbitration

36 In our view, the First Tribunal found the June 2001 meeting irrelevant not because it was not formally raised but because it was outside the scope of the submission to arbitration to the First Tribunal. As noted earlier (see [29] above), the trial judge adverted to this in [41] of her Judgment where she said that the Second Tribunal "did not say that the June 2001 meeting was relevant to the issues before the [First] Tribunal *as the same had been formulated* by the parties" [emphasis added]. Simply put then, the June 2001 meeting was not an issue within the jurisdiction of the First Tribunal.

37 The law on the jurisdiction of an arbitral tribunal is well established. Article 34(2)(*a*)(iii) of the Model Law merely reflects the basic principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties. In relation to this matter, we note Lord Halsbury's observations in *London and North Western and Great Western Joint Railway Companies v J H Billington, Limited* [1899] AC 79, where he noted, at 81, as follows:

> I do not think any lawyer could reasonably contend that, when parties are referring differences to arbitration, under whatever authority that reference is made, you could for the first time introduce *a new difference after the order of arbitration was made.* Therefore, upon that question I certainly do give a very strong opinion. [emphasis added]

38 The principle finds support in the decision of *Rederij Lalemant v Transportes Generales Navigacion SA (The Maria Lemos)* [1986] 1 Lloyds' Rep 45. In that case, the *Maria Lemos* was chartered by the plaintiffs to load cargo in Maputo and to discharge it in Turkey. The vessel arrived at the loading port on 25 November 1984 and sailed for Turkey on 20 December 1984. A dispute arose as to whether the vessel was already on demurrage and how much demurrage, if any, would have been payable up to the date she sailed. The defendants appointed their arbitrator on 20 December 1984 and the plaintiffs appointed theirs on 4 January 1985. The vessel arrived at the discharging port on 14 January 1985 and was there until 1 March 1985. The issue then arose as to whether the arbitration tribunal had jurisdiction to hear the dispute about discharging port demurrage, a matter that had not been in issue on 4 January 1985.

39 The court held that the jurisdiction that any arbitral tribunal could exercise was that bestowed by the parties and that the scope would depend on the terms in which the parties had defined it. To this end, the court examined the correspondence between the parties to ascertain their intention when appointing the arbitrator. The court found, at 47, as follows:

> The question, therefore, as it seems to me, is this: whether the appointment on Jan. 3 and 4 gave the arbitrators jurisdiction to determine not only what has been generally agreed called loading port demurrage but also, prospectively, to determine the quantum of discharging port

> demurrage, in so far as discharging port demurrage would flow from a finding by the arbitrators that the charterers were in breach before the vessel left the loading port. It seems to me that on any proper construction of the telex messages [which stated that the arbitration extended to all disputes under the charter] to which I have referred, it must follow that the parties were giving the arbitrators jurisdiction to that extent.

The correspondence showed that they had intended the arbitration to extend to all disputes under the charter.

40 Reverting to the facts of this case, the scope of submission to arbitration for the First Arbitration is summarised in [5] above. The submission covered only three issues, *viz*, (a) whether any obligation arose under the BI Notes to make payment to the respondents; (b) whether the obligations under the BI Notes were restructured pursuant to the February 2000 meeting; and (c) whether the appellant could avail itself of the defence of sovereign immunity. The June 2001 meeting was, in the language of Lord Halsbury, *a new difference* arising after the First Tribunal had been constituted and, therefore, not an issue that was within the original submission to arbitration. Such a new difference would be outside the scope of the submission to arbitration and accordingly would have been *irrelevant to the issues requiring determination* in the First Arbitration. We accordingly find that the First Tribunal found that the Minutes were irrelevant not because of any failure on the part of the appellants to *formally* raise the matter of the June 2001 meeting, but because the June 2001 meeting was an issue that was not formulated by the parties for determination by the First Tribunal. It would therefore follow that the second critical finding was an erroneous finding.

The third critical finding

41 Moving on to the third critical finding, the appellant's contention on this finding is that if the second critical finding is wrong, then there could be no issue estoppel against the appellant raising the issue of the June 2001 meeting for determination by the Second Tribunal. In our view, this argument must be right. If the June 2001 meeting is indeed irrelevant, as a matter of law, to the issues requiring determination by the First Tribunal, then it must surely follow that the omission to raise it would itself have been irrelevant, and therefore no estoppel could operate. Accordingly, we also find that the third critical finding was erroneous.

May the second and third critical findings be set aside under the Act?

42 The next question we have to consider is whether the second and third critical findings may be set aside under the Act. The answer depends on whether they are affected by s 19B(1) of the Act and Art 34(2)(*a*)(iii) of the Model Law. We will consider the latter first.

Article 34(2)(a)(iii) of the Model Law

43 Article 34(1) of the Model Law provides that recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with sub-paras (2) and (3) of Art 34. Article 34(2)(*a*)(iii) of the Model Law goes on to provide that:

> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the

> scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside[.]

44 Counsel for the appellant argued that the second and third critical findings, being inconsistent with the findings of the First Tribunal, could and should be set aside for not being within the scope of submission to arbitration of the Second Tribunal. This argument requires this court to enter into two separate but related enquiries: first, the ascertainment of the matters that were within the scope of submission to the Second Tribunal; and second, whether the second and third critical findings involved such matters. The matters within the scope of arbitration were, as set out in [15] earlier, as follows: (a) whether the June 2001 meeting was valid and binding on all BI Noteholders, including the respondent; and (b) whether the Restructuring Scheme was valid and binding on all BI Noteholders, including the respondent, as a consequence of the June 2001 meeting.

45 It is clear from the Second Award that the Second Tribunal dismissed the appellant's claim on the basis of issue estoppel. As we have noted earlier, this finding is erroneous. However, it does not necessarily follow that such an erroneous finding of law can be set aside. Under Art 16(1) of the Model Law, an arbitral tribunal has the power to rule on its own jurisdiction, and by implication, to rule on the underlying issues of fact or law that are relevant to determining whether it has jurisdiction. However, by its own terms, Art 16(3) of the Model Law provides for an appeal to the court if the arbitral tribunal rules that it has jurisdiction, but not when it rules that it does not have jurisdiction. Accordingly, in the context of this case, we have to determine whether the Second Tribunal's negative finding on jurisdiction is a finding that may be set aside under Art 34(2)(*a*)(iii) of the Model Law.

46 The appellant's argument is essentially that the second and third critical findings are inconsistent with the findings of the First Tribunal and, as a subsequent tribunal, the Second Tribunal is not entitled to make findings on the same issues inconsistent with those made by the previous tribunal (*ie* the First Tribunal) as they are not within the scope of submission. It may be recalled that the trial judge set aside the first critical finding on the ground that it was inconsistent with the First Tribunal's finding on the same issue. Similarly, in relation to the second critical finding, it is argued that it should be set aside on the same basis. At [35] of her Judgment, the trial judge had addressed this argument as follows:

> [T]he [Second] Tribunal had the power to determine its own jurisdiction under the SIAC Rules which in this respect reflect Art 16(1) of the Model Law. The question before me is whether in determining that jurisdiction, the [Second] Tribunal had the power to decide issues that had already been decided by the [First] Tribunal. In my judgment, it did not. If in the course of determining its jurisdiction, the [Second] Tribunal encountered an issue that had already been decided by the [First] Tribunal, it had no authority to determine that issue afresh, but, because the parties themselves were bound by the decision of the [First] Tribunal on that issue, the [Second] Tribunal had also to consider itself bound by that decision and proceed on such basis. The question that next arises is whether in determining that it had no jurisdiction, the [Second] Tribunal in fact re-decided any issue that had already been decided by the [First] Tribunal.

For the reasons given by the trial judge, we are aware of the force of the argument that the Second Tribunal did not have the jurisdiction to make findings inconsistent with those made by the First Tribunal. However, since under Art 16(1) of the Model Law, a tribunal has the power to determine issues that go to its own jurisdiction, there is an equally strong argument that any negative finding on jurisdiction may not be set aside under Art 34(2)(*a*)(iii) of the Model Law even if it is wrong in law as

mandated by the principle of finality applicable to arbitral findings.

47 In any event, as we shall see, even if the second critical finding were set aside, it would not follow that the Second Award must be set aside or that it is automatically rendered void. There are two other obstacles in the way. The first is the third critical finding, a finding of law which we will consider next, and the second is the question of jurisdiction (an issue considered later at [61] to [74] of this judgment).

48 The argument is that if the second critical finding is set aside, then the third critical finding must fall with it, the latter being no more than a derivative legal conclusion of the former. It was, after all, the third critical finding that led the Second Tribunal to find that it had no jurisdiction to decide the substantive issues referred to it for determination. In our view, the third critical finding cannot be said to be *formally* inconsistent with any findings of the First Tribunal. The First Tribunal's finding is that it had no jurisdiction to consider the June 2001 meeting because it was not within the issues formulated by the parties. The Second Tribunal's finding is that it is estopped from considering the June 2001 meeting. Strictly speaking, there is no formal inconsistency between these two findings.

49 That said, it may be objected that such a distinction gives primacy to form over substance, as the true import of the third critical finding must be that it was within the jurisdiction of the First Tribunal to decide on the issue of the June 2001 meeting. This would make it squarely inconsistent with the finding of the First Tribunal (as highlighted earlier) that the issue of the June 2001 meeting was not within its jurisdiction to determine.

50 Nonetheless, in our view, the third critical finding stems from an issue which a tribunal, in determining its own jurisdiction, is entitled to determine. For that reason, the third critical finding that led the Second Tribunal to find that it had no jurisdiction to decide the substantive issues referred to it for determination cannot be set aside under Art 34(2)(*a*)(iii) of the Model Law.

51 There is one final argument in relation to Art 34(2)(*a*)(iii) of the Model Law which has not been canvassed before us by either counsel. It is that the power of the court to set aside any findings on the ancillary or underlying matters on the grounds set out in Art 34(2)(*a*)(iii) of the Model Law is predicated upon the existence of an "award". In the absence of any such "award", Art 34(2)(*a*)(iii) of the Model Law is not engaged and the right to set aside such an "award" does not arise. In the present context, this raises the attendant question of whether the Second Award is an "award" for the purposes of Art 34(2)(*a*)(iii) of the Model Law. This issue is considered at [61] to [74] of this judgment. We will, however, first consider the effect of s 19B(1) of the Act.

Sections 19B(1) and 19B(2) of the Act and Article 34(2)(b)(ii) of the Model Law

52 Sections 19B(1) and 19(B)(2) of the Act provide as follows:

> Effect of award
>
> **19B.**—(1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons 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 Articles 33 and 34 (4) of the Model Law, upon an award being made, including an award made in accordance with section 19A, the arbitral tribunal shall not

vary, amend, correct, review, add to or revoke the award.

53 It may be recalled that the appellant's case is that s 19B of the Act mirrors the public policy of finality in litigation which is a fundamental principle of the justice system. Accordingly, any breach of s 19B of the Act, in itself, is contrary to the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law which reads as follows:

> An arbitral award may be set aside by the court specified in Article 6 only if ... the court finds that … the award is in conflict with the public policy of this State.

In support of this argument before the trial judge, counsel referred to the English Court of Appeal decision in *Smith v Linskills* [1996] 1 WLR 763; [1996] 2 All ER 353, in particular to a passage in the All England Law Reports headnote (at 353) which reads:

> The basis of the rule of public policy that the use of a civil action to mount a collateral attack on a decision of a criminal court of competent jurisdiction was an abuse of process was the importance of finality in litigation, the impossibility in a coherent legal system of having two final but inconsistent decisions of courts of competent jurisdiction and the virtual impossibility of fairly retrying at a later date the issue which had been before the court on the earlier occasion.

54 The trial judge rejected this argument in [29] of her Judgment in the following words:

> Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, *ie*, the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy. If I were to make such a holding, it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal. Further, in the context of this case, whilst it is obviously not desirable to have conflicting arbitral decisions existing on the very same dispute between the same parties, I do not see any public policy implication in such a state of affairs existing between private parties, nor has the [appellant] identified any such implication.

She then made the following observations on the scope of s 19B(1) of the Act, at [30] of her Judgment:

> [T]he purpose of s 19B(1) is to make it clear and beyond dispute that each party to an international arbitration is bound by the award made by the tribunal and cannot challenge it except on the limited grounds set out in the Act and the Model Law. This means that even if the tribunal has made a mistake of fact or of law, there is no recourse against that decision and the parties are bound by it. The finality given to an award by s 19B(1) also ensures that such award would be enforceable by the successful party as, generally speaking, enforcement of judgments or awards can only be carried out when the same are final and not provisional or subject to appeal. The corollary to an award being final and binding on a party is that that party cannot reopen the same issue in further arbitration or court proceedings. The provisions of the Act also provide avenues by which parties may ensure that a binding decision rendered by one arbitral tribunal is not subsequently contradicted by another decision made by a second tribunal. If the same issue is dealt with for a second time in further arbitration proceedings, then the second set of proceedings may be considered to be in breach of s 19B(1). If that is the case, then the remedy for the aggrieved party is either to challenge the jurisdiction of the second tribunal, or to

obtain an injunction against the continuation of the second set of proceedings. If the second tribunal deals with the challenge to its jurisdiction by ruling that it has jurisdiction, then that ruling can be challenged in court under the provisions of Art 16(3) of the Model Law. On the other hand, if the second tribunal rules that it has no jurisdiction because the issue in question had been finally decided by a prior arbitration between the same parties, then the aggrieved party can try to have that ruling set aside on one of the grounds set out in Art 34 of the Model Law (apart from the public policy ground) or in s 24 of the Act.

55 We agree with the trial judge's views on the scope of s 19B(1) of the Act save for her observations in the last sentence of [30] of her Judgment. For the reasons given at [66] to [68] below, we do not agree that a negative ruling on jurisdiction can give rise to any ground to set it aside under Art 34 of the Model Law or s 24 of the Act.

56 Nonetheless, reverting to the arguments in relation to s 19B(1) of the Act, counsel for the appellant has maintained his client's legal position that the ruling of the trial judge is wrong. In support of his contention, he referred to the case of *Oil & Natural Gas Corporation Ltd v SAW Pipes Ltd* AIR 2003 SC 2629 ("*Oil & Natural Gas*"), where the Supreme Court of India held that an arbitral award which was inconsistent with the provisions of the Indian Arbitration and Conciliation Act ("the Indian Act"), and therefore wrong in law, was "patently illegal" and liable to be set aside on the ground that it was in conflict with the public policy of India. In other words, an error of law was contrary to the public policy of India as contemplated by the Indian Act.

57 While we have the greatest respect for the Supreme Court of India, we do not think that the reasoning in that decision is applicable to the legal framework under the Act. In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the Act which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, *per se,* do not engage the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law when they cannot be set aside under Art 34(2)(*a*)(iii) of the Model Law.

58 It may be of interest to note that the Indian Supreme Court decision in *Oil & Natural Gas* ([56] *supra*) has not been accepted in New Zealand. In *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 at [80], the High Court of New Zealand in Wellington, in agreeing with its earlier decision in Christchurch in *Downer Connect Ltd v Pot Hole People Ltd* (CIV 2003-409-002878, 19 May 2004, unreported) ("*Downer Connect*"), quoted the following extract (*Downer Connect* at [136]):

> [T]he Supreme Court of India [in *Oil & Natural Gas*] seems to have taken a somewhat broader view of what may constitute a conflict with public policy for the purposes of Article 34(2)(b)(ii). For myself, however, I would not have regarded any failure by the arbitrator to apply clause 2.2 of the head contract in the present case as even approaching the level required to establish a conflict with the public policy of New Zealand as that phrase is used in Article 34(2)(b)(ii). The enforcement of an award containing an error of that nature *would certainly not shock the*

conscience. Nor would it suggest that the integrity of the courts' processes and powers would be abused should an award containing an error of that nature be upheld (assuming such an error were established). [emphasis added]

59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ([58] *supra*) at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside. [emphasis added]

60 For the above reasons, we agree fully with the observations of the trial judge that the appellant's contention that the Second Award should be set aside for contravening public policy is of no substance.

Was the Second Tribunal's decision an "award" under the Act?

61 One final point, which both parties initially eschewed from canvassing, merits full consideration as it is critical for the disposition of this appeal. During the hearing of this appeal, we asked counsel for the appellant whether the negative ruling on jurisdiction by the Second Tribunal to consider the appellant's claim was an "award" under the Act. His response was that it was. As counsel for the respondent did not contend otherwise, the appeal proceeded on that basis. However, in the course of our deliberations, we formed the view that this was a serious issue that should be fully addressed by counsel. Accordingly, we directed that submissions be made on the question. We also appointed Adjunct Associate Professor Lawrence Boo, the deputy chairman of the Singapore International Arbitration Centre, as *amicus curiae* for this purpose ("the *amicus*"). The question that the *amicus* was asked to address us on was this:

> Whether or not the decision of an arbitral tribunal convened under the auspices of the [Act] that it has no jurisdiction to determine an issue referred to it under an arbitration agreement constitutes an award for the purposes of Section 2(1) of the Act such that it may be set aside by the Court in exercise of its jurisdiction under any of the provisions of the Act, if the circumstances of the case justify.

62 In his written and oral submissions to the court, the *amicus* submitted that the question he was asked to address should be answered in the negative, *ie*, a negative ruling on jurisdiction is not an award under the Act. He referred to s 2(1) of the Act which defines the expression "award" as "a

decision of the arbitral tribunal on the *substance of the dispute* and includes an interim, interlocutory or partial award but excludes any orders or directions under section 12" [emphasis added]. The *amicus* was of the view that an award must deal with the substance or merits of the dispute, failing which it is not an award as defined. Hence, a negative determination on jurisdiction cannot be an award since it does not deal with the substance of the dispute. The *amicus* helpfully traced the drafting history of the definition of an "award" in the Model Law to demonstrate, conclusively in our view, that the original definition was wider in that it included a ruling on jurisdiction as an "award". However, this part of the definition was omitted by the working party after several rounds of discussions. While no definition of an "award" was eventually adopted in the Model Law, it is significant that the Act has adopted the narrower definition of an "award", *ie*, one that does not expressly include a ruling on jurisdiction as an "award".

63 The *amicus* referred us to comparative legislative material to show that different countries have adopted different definitions of "award" in their Model Law statutes. He also referred to the position in some countries, such as Croatia, whose legislation has adopted the narrower definition and whose courts have not accepted that a negative ruling on jurisdiction is an "award".

64 Counsel for the appellant and for the respondent both dispute the opinion of the *amicus*. They are of the view that the definition in the Act is wide enough to include a negative ruling on jurisdiction. In essence, their arguments are as follows:

(a) that the definition of an "award" in s 2(1) of the Act is sufficiently wide to include a negative finding on jurisdiction based on issue estoppel since such a ruling is not merely jurisdictional in nature but is also a decision on substantive issues material to the dispute;

(b) that s 19A(2)(*a*) of the Act has enlarged the meaning of an "award" as defined in s 2(1) of the Act to include any decision "relating to an issue affecting the whole claim", and, as such, given that the Second Award relates to an issue that affects the underlying claim (namely, issue estoppel), it would be an "award" within the meaning of the Act; and

(c) that, in the alternative, the Second Award is "an award on the merits" coupled with a ruling on jurisdiction as contemplated by Art 16(3) of the Model Law as the Second Tribunal not only found that it had no jurisdiction, it also *dismissed* the claim, thereby indicating that it is an award on the merits that is susceptible to judicial review under Art 34 of the Model Law.

65 The *amicus*' response to these submissions is as follows:

(a) that, on its face, the definition of an "award" under s 2(1) of the Act only includes decisions that deal with the "substance of the dispute": a decision of a tribunal on a preliminary question such as jurisdiction would not dispose of the "substance of the dispute", and, hence, would not be an "award" for the purposes of the Act;

(b) that s 19A(2) of the Act was meant to clarify the power of a tribunal to make awards on different matters and at different stages of the arbitration and was never intended to widen the definition in s 2(1) of the Act; and

(c) that Art 16(3) of the Model Law does not admit a pure ruling on the preliminary question of jurisdiction as an "award".

66 We accept the opinion of the *amicus*. In our view, the definition of an "award" in s 2 of the Act is clear. It does not include a negative determination on jurisdiction as it is not a decision on the

substance of the dispute. On the contrary, it is a decision not to determine the substance of the dispute, and therefore cannot be an award for the purposes of Art 34 of the Model Law.

67 The amicus has also pointed out that rulings on jurisdiction are dealt with separately under Art 16(3) of the Model Law. Article 16 of the Model Law provides as follows:

> *Article 16. Competence of arbitral tribunal to rule on its jurisdiction*
>
> (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
>
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

68 The *amicus* opined that Art 16(3) of the Model Law makes it clear that it is only in a case where an arbitral tribunal rules as a preliminary question that it has jurisdiction that an aggrieved party may request the court to decide the matter, which decision is not subject to further appeal. However, where the arbitral tribunal rules that it has no jurisdiction, no appeal is provided for. A negative ruling by a tribunal is thus intended to be a final and binding decision on that issue as regards the parties. Therefore, in such a case, Art 16(3) of the Model Law, read with Art 5, would preclude any recourse to the courts. The *amicus* explained that the reason for not providing recourse to the courts is that it would be inappropriate to compel arbitrators who have made such a ruling to continue with the proceedings.

69 We also agree with the *amicus* that s 19A of the Act is of no assistance to the parties here. It is well known that s 19A was a legislative response to the decision of this court in *Tang Boon Jek Jeffrey v Tan Poh Leng Stanley* [2001] 3 SLR 237 in which it was clarified that an arbitral tribunal should have the power to make awards at different times in the course of arbitration. As such, we are in agreement with the *amicus* that s 19A must still – necessarily – be read subject to the definition of an "award" under s 2(1).

70 The amicus has also submitted, correctly in our opinion, that the mere titling of a document as an award does not make it an award as defined by the Act. It is the substance and not the form that determines the true nature of the ruling of the tribunal: see *Re Arbitration Between Mohamed Ibrahim and Koshi Mohamed* [1963] MLJ 32 at 32. Hence, even where the order is titled as an "Award", as is the case here, but does not relate to the substance of the dispute, it would not be an award under s 2(1) of the Act. We must now consider the substance of the Second Award to see

whether it is a pure negative ruling on jurisdiction or a decision on the substance of the dispute.

The nature of the Second Award

71 In the present case, the Second Tribunal decided the jurisdiction issue as a preliminary issue at the request of the respondent. The Second Tribunal acceded to the request and directed the parties to file written submissions on the issue, which the parties did. The Second Tribunal then proceeded to decide the preliminary issue of jurisdiction on the basis of such written submissions. In delivering its decision, the Second Tribunal took pains to make it clear in para 7.10 of the Second Award that it had not decided the substantive issues: see [19] above. Moreover, the Second Award states expressly in para 8.1 that the respondent succeeds "on the preliminary question of jurisdiction and the [appellant's] action is hereby dismissed" (see [19] above). In this respect, we reject the argument of counsel for the respondent that the use of the phrase "is hereby dismissed" makes the Second Award a decision on the merits of the claim. Accordingly, in both form and substance, the Second Award is a pure negative ruling on jurisdiction and is therefore not an award for the purposes of the Act.

72 Nonetheless, counsel for both parties also sought to argue that the Second Award should be treated, in substance, as a decision on the merits of the claim as the respondent could have pleaded issue estoppel as a defence to the claim rather than a jurisdictional issue. Counsel referred to the analogy of a defence based on limitation. In our view, the legal nature of the two defences is not the same. Where limitation is pleaded as a defence, it assumes that the claimant has a valid claim but that the claim is time-barred. Where issue estoppel is pleaded, it assumes that the issue has been decided against the claimant in a previous proceeding between the parties. In this case, however, it cannot be disputed that the First Tribunal simply did not decide the issue of the June 2001 meeting.

73 Can the Second Award be characterised or restated as an award on the substance of the dispute in some other way? Counsel for the parties have attempted to restate it as a finding that the appellant had no claim under the submission to arbitration before the Second Tribunal. We are of the view that this was not what the Second Tribunal had decided. It cannot be restated as a decision that the appellant was still liable on the BI Notes in spite of the June 2001 meeting, because that was not the decision. It cannot be restated as a decision that the appellant was liable on the BI Notes *simpliciter,* because that was also not the decision. It might be said that the substance of the Second Award is that the appellant had no claim to any rights flowing from the June 2001 meeting (or that the appellant was liable on the BI Notes) because that claim should have been, but was not, referred to the First Tribunal. In our view, however, that is not the same thing as saying that the appellant had no claim as such by reason of such a claim having been determined by the Second Tribunal. In our view, it is plain that the Second Tribunal did not decide the substance of the appellant's claim with respect to the June 2001 meeting. Indeed, as already highlighted earlier (see [19] above), the Second Tribunal expressly disclaimed any such decision.

74 In the result, as there is no "award", as defined by the Act, to be set aside, this appeal has to be dismissed.

Observations

75 In the light of our decision and the circumstances in which it has been arrived at, the parameters in which the First Award was rendered as well as the commercial matrix in which this case has been fought out by the parties in two arbitral proceedings, followed by two sets of court proceedings, we feel that we should put on record our sense of dismay at the outcome of the proceedings between the appellant and the respondent thus far. It is not difficult to say that as a

matter of fairness and justice, the outcome should have been in favour of the appellant to the extent that they had done what they were contractually entitled to do. Yet, through a series of procedural and other mishaps, they have found themselves prevented from having their legal defence (or their contractual rights against the respondent) determined in the two arbitral and two court proceedings. Although it could be said that they might have been partly at fault in not formally raising the issue as a defence before the First Tribunal, this consideration has to be balanced against the fact that there was nothing to prevent the First Tribunal from seeking the consent of the respondent to include the issue of the June 2001 meeting in the submission to arbitration since the First Tribunal must have been aware of the legal consequences of the June 2001 meeting, if validly held. Of course, the respondent might not have consented to that issue being considered at all, and that would have been within its right, but it might then have resulted in a breach of the terms of the DIP in denying the right of the appellant to restructure its obligations as a matter of law.

76 We also note, in this connection, that the outcome of this appeal, though disappointing for the appellant, is not necessarily the end of the road for it as the respondent has yet to enforce the First Award against it. To do so, the respondent has to obtain leave of court under s 19 of the Act, the very process of which, by definition, confers on the court some discretion in the matter: see *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2003 Reissue, 2003) at para 20.134. The question therefore arises as to whether, given the circumstances of this case, there is a legal basis for the court not to exercise its discretion to grant leave to the respondent to enforce the First Award, and in particular whether enforcing the First Award would be contrary to the public policy of Singapore, a question we have dealt with earlier at [59] in connection with erroneous findings of law or fact by an arbitral tribunal.

77 An equally important consideration, one which is not relevant in this appeal, is the legal status of the First Award itself. We have earlier observed at [8] that if the June 2001 meeting had validated the Restructuring Scheme, the BI Notes would have thereupon ceased to confer any legal rights on the BI Noteholders. The question would then have arisen as to whether a court, as a matter of law, could enforce the First Award, or, as a matter of discretion, should enforce the First Award. No doubt these interesting and novel issues would be fully canvassed if and when they arise.

Conclusion

78 In the result, the appeal is dismissed. As regards costs, we order that the parties pay their own costs since the appeal is dismissed in part on a ground that both parties did not initially take up, and when taken up, had argued against. The appellant will be refunded the security deposit for costs. We would also like to record our appreciation to Assoc Prof Boo for his invaluable assistance to us in the appeal.