CITATION: Consolidated v. Ambatovy, 2016 ONSC 7171
COURT FILE NO.: CV-11386-00CL
DATE: 20161128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Consolidated Contractors Group S.A.L. (Offshore)	)	John Keefe and Brad Halfin for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
Ambatovy Minerals S.A.	)	
	)	Duncan Glaholt and Michael Valo for the Respondent
Respondent		
	)	
	)	**HEARD:** October 25 and 26, 2016

PENNY J.

[1] This is an application to set aside an arbitration award under the *International Commercial Arbitration Act*, RSO 1990, c I9. The arbitration arose out of disputes over the construction of a pipeline in Madagascar.

[2] The applicable provisions of Article 34 of the UNCITRAL Model Law provide that a court may set aside an arbitral award only if:

(a) a party was not given proper notice of the proceedings "or was otherwise unable to present his case;"

(b) the award deals with a dispute not falling within the terms of the submission to arbitration or "contains decisions on matters beyond the scope of the submission;"

(c) the arbitral procedure was not in accordance with the agreement of the parties; or

(d) the award is in conflict with the public policy of Canada.

[3] In this case, the applicant (CCG) argues that the Tribunal assumed jurisdiction over claims which were not properly before it, failed to exercise jurisdiction over claims which were before it, developed novel theories of liability not argued by the parties (thus depriving CCG of the opportunity to be heard on those theories), relied on certain submissions of the respondent

(AMSA) made contrary to the Tribunal's prior procedural order, ignored numerous submissions made by CCG and made findings contrary to the public policy of Ontario.

[4] Specifically, it is alleged that the Tribunal:

(a) incorrectly determined it had jurisdiction to hear AMSA's counterclaims for hydroseeding, erosion control and rice field repairs in breach of the terms of the parties' arbitration agreement;

(b) awarded AMSA a total of $7.64[1] million in respect of its hydroseeding counterclaim based on the Tribunal's own reasoning, without giving CCG the opportunity to respond;

(c) found that CCG was entitled to an extension of 18 days for delays caused by AMSA on the project, but made no findings as to CCG's claimed entitlement to the prolongation costs associated with that delay, thereby failing to adjudicate on an aspect of CCG's claim;

(d) awarded CCG payment of retention monies for an amount of $10.882 million but denied CCG immediate entitlement to these monies and interest based on reasoning developed by the Tribunal and on arguments submitted by AMSA in breach of the Tribunal's procedural ruling, thereby denying CCG an opportunity to respond;

(e) awarded AMSA 3.75% interest per annum on the amounts owed by CCG to AMSA, thereby ignoring CCG's submissions on the rate of interest applicable to AMSA's claims and denied CCG's claim for compound interest;

(f) awarded costs of the arbitration to AMSA in the amount of US$10.416 million contrary to AMSA's submissions as to how costs should be allocated and based on an unfair perception of the parties respective success; and

(g) awarded AMSA $13.8 million in liquidated damages and found that CCG forfeited its right to certain tranche payments under the fixed lump sum contract price in the amount of $9 million, thereby awarding AMSA a double recovery in breach of the substantive public policy of Ontario.

[5] Thus, the applicants allege that the Tribunal, contrary to Article 34:

(1) incorrectly assumed, or failed to exercise, jurisdiction;

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[1] All amounts are cited in U.S. dollars.

(2) denied CCG the right to present its case; and

(3) made findings that were contrary to Ontario public policy.

[6] The language of Article 34 states that a court "may" set aside an arbitral award. This permissive language raises a fourth issue: to what extent does the court have discretion to refuse to set aside the award even if one of the grounds for doing so under Article 34 has been established?

Background

[7] This arbitration arose out of AMSA's $5 billion construction of a nickel mine in Madagascar. CCG was responsible for the construction of a 220 km "slurry" pipeline meant to move the raw ore from the open pit mine in the mountains of Madagascar down to the coast. This was a $300 million project. The parties' rights and obligations were subject to the Slurry Pipeline Construction Contract, which contained an arbitration clause (this contract, together with all the amendments, will be referred to as the Agreement).

[8] The initial contracts were executed in March 2008. As a result of some problems, the contracts were amended in June and again in November 2008. Following the financial crisis of 2008, the owners announced a 'revised execution strategy' for the mine, suspending CCG's work for a period of time. By April 2009, there was a further amendment to the contract. This is referred to as the Memorandum of Understanding 2 (MOU2). Under the MOU2, the pricing formula was replaced with a lump sum payment and completion dates were extended. Construction completion was extended to December 31, 2009. Mechanical completion was extended to March 31, 2010.

[9] Disputes arose between CCG and AMSA during the construction of the pipeline. They were submitted to arbitration.

[10] CCG and AMSA's nominations of Mr. Eric Schwartz and Mr. Humphrey J. Lloyd were confirmed, following which Mr. Michael Lee was confirmed as president of the Tribunal. It is not in dispute that this was a tribunal with expertise in international commercial arbitration and mega-project construction disputes.

[11] The arbitration, as required by the Agreement, took place in Toronto, in English, and under Ontario law. Subject to any mandatory rules of Ontario law and any relevant provisions of the ICC Rules, the procedural rules to be followed were as determined by the Arbitral Tribunal, in its discretion, after consultation with the parties.

[12] The arbitration commenced on April 3, 2012 and ended when the unanimous final award was issued on September 30, 2015. Over that 3½ year period, the parties exchanged pleadings, documents, witness statements, expert reports, participated in a 14 day evidentiary hearing and submitted post-hearing briefs exceeding 6,000 written pages. The Tribunal's decision is lengthy

– 203 pages long. Each party incurred over $20 million dollars in fees associated with this arbitration.

Jurisdiction: Article 34(2)(a)(iii)

[13] It is common ground that the jurisdiction of the court to set aside an arbitral award is strictly limited to those instances provided in Article 34 which allow very limited opportunities for the court to provide any recourse against an award: *United Mexican States v. Karpa*, [2003] OTC 1070, 2003 CarswellOnt 4929 (SCJ) at para 57.

[14] The applicant argues, however, that the jurisdiction of an arbitral tribunal over disputes depends on the consent of the parties and is therefore limited to what they have agreed will be submitted to arbitration. Arbitral awards may be set aside where the tribunal improperly assumes jurisdiction over matters outside the scope of the parties agreement to arbitrate: *Desputeaux c. Editions Chouette (1987) Inc.*, 2003 SCC 17 at para 22. On questions of true jurisdiction, the standard of review is correctness: *United Mexican States v. Cargill Inc.*, 2011 ONCA 622 at paras 40-42.

[15] CCG argues that the Award "contains decisions on matters beyond the scope of the submission" and fails to consider matters properly within the scope of the submission. Thus, it alleges that the Tribunal committed two errors of jurisdiction in this case:

(1) the Tribunal incorrectly assumed jurisdiction to decide AMSA's environmental counterclaims; and

(2) the Tribunal failed to address CCG's claim for prolongation costs.

AMSA's Environmental Counterclaims

CCG's Argument

[16] The dispute resolution provisions in the Agreement required the parties to complete pre-arbitration steps before a claim could be submitted to arbitration. The pre-arbitration steps required:

(a) determination of claims by the supervising engineer;

(b) referral of disputes to adjudication by a dispute adjudication board (if the parties agreed to one), or by a sole adjudicator (failing agreement to establish a board);

(c) provision of a notice of dissatisfaction and attempts at amicable settlement (if a board has been established), or notice of intention to refer a dispute to arbitration, (if a sole adjudicator has been appointed), followed by;

(d) referral of remaining disputes to international arbitration under the rules of the International Chamber of Commerce.

[17] In accordance with the pre-arbitration steps, CCG submitted its claims to the supervising engineer for determination. CCG then disputed the engineer's determinations and sought to refer the resulting disputes to adjudication. However, AMSA indicated that it did not believe an adjudication would be useful for CCG's claims and preferred that CCG's claims proceed directly to arbitration. CCG accepted AMSA's proposal to waive adjudication of CCG's claims and proceeded directly to arbitration.

[18] In contrast, none of AMSA's environmental counterclaims proceeded through any of the pre-arbitration steps, and no express agreement was reached permitting disputes arising from AMSA's environmental counterclaims to proceed to arbitration.

[19] CCG did agree that AMSA's claim for liquidated damages could proceed to arbitration without it having passed through the pre-arbitration steps. This was because a determination of CCG's claim for an extension of time would necessarily determine AMSA's liquidated damages claim. By contrast, CCG objected to the Tribunal considering AMSA's environmental counterclaims because they had not passed through the mandatory pre-arbitration steps. CCG's position was that the Tribunal did not have jurisdiction to hear AMSA's environmental counterclaims. CCG took the position that AMSA's environmental counterclaims were not "necessarily determined" by any decision that would be issued on any of CCG's claims.

[20] AMSA argued that CCG's agreement with respect to AMSA's liquidated damages claim also applied to AMSA's environmental counterclaims and thus gave the Tribunal the authority to decide the environmental counterclaims. The Tribunal rejected this argument:

> The Tribunal considers that CCG was right to make the concession that it did on Day 1 of the arbitration of the hearing. It could hardly have done otherwise in the light of the correspondence and what was said at the CMC (Case Management Conference) and the exclusion of the claim for liquidated damages from Procedural Order No. 2. However, that concession was confined to the counterclaim for liquidated damages (and not to backcharges, even though they are also contractually authorised set-offs). The concession thus in itself does not authorise the Tribunal to decide other counterclaims that have not been submitted for adjudication under PC 11.

[21] Alternatively, AMSA argued that its environmental counterclaims "mirrored" CCG's claims, in that the Tribunal could not make a decision on one claim without making a corresponding decision on the other. The Tribunal did not find that any of AMSA's environmental counterclaims were necessarily determined by its findings on any of CCG's claims. It found AMSA's "mirrored" argument "imprecise."

[22] Instead, CCG argues that the Tribunal developed its own theory to determine that it had jurisdiction over AMSA's environmental counterclaims. The Tribunal's theory was that it had jurisdiction to decide claims that had not passed through the pre-arbitration steps if they were so connected to claims of the other party that they *should* be decided at the same time:

> Nonetheless the Tribunal considers that the parties were in agreement that it would not be necessary for one party to submit to prior adjudication a claim that was so connected to a claim of the other party that the two claims should be decided at the same time (the Tribunal believes that "mirrored" is imprecise).

[23] The Tribunal thus developed its own theory that the parties' agreement to waive the mandatory pre-arbitration steps for CCG's claims implicitly meant that the parties' intended to waive these steps for all claims between the parties if there was a sufficient degree of connection between the disputes for them to be dealt with efficiently:

> The Tribunal considers the parties' agreement of 2010 must be read as fulfilling a common agreement implicit in or underlying their amendments to GC 20.6 that disputes should be resolved in an efficient manner. That clearly includes, as CCG later said, disputes being dealt with at the same time before the same Tribunal. That is common sense. Bearing in mind the history of the project and AMSA's many complaints about CCG's performance of the Contract, it is inconceivable that the agreement related only to CCG's claims. AMSA is not altruistic or short-sighted. In any event it would require a clear expression of contrary intention to exclude claims that would naturally be decided at the same time by the same Tribunal. The agreement was reciprocal and would if necessary extend to AMSA's claims or counterclaims. Indeed AMSA specifically referred to its claim for liquidated damages in its letter of 13 October 2011. Obviously there would have to be a sufficient degree of connection between the disputes for them to be dealt with efficiently.

[24] CCG argues that this finding is inconsistent with the words of the Agreement. This finding is also inconsistent with the Tribunal's own finding that CCG *did not agree* to waive the pre-arbitration steps for AMSA's environmental counterclaims. It is also inconsistent with the parties' common assumption based on their pleaded positions. Accordingly, for these reasons, CCG argues the Award must be set aside pursuant to Article 34(2)(a)(iii) of the Model Law.

[25] CCG relies on several authorities outside the arbitration context where a resort to a civil suit in the courts is conditioned by an agreement between the parties requiring them to participate in pre-litigation dispute resolution procedures. The applicant also relies on several decisions of the Swiss Federal Tribunal on appeal under the Federal Statute on Private Law, which appear to hold that compliance with contractual pre-arbitration procedures is a precondition to the exercise of jurisdiction by an arbitral tribunal.

Analysis

[26] I start my analysis on this issue by observing that there is no evidence to suggest there was any reasonable prospect that the result would have been any different had the environmental counterclaims been addressed through pre-arbitration steps.

[27] I also observe that CCG has advanced a natural justice argument (dealt with below) about *how* the Tribunal reached the conclusion that the claims and counterclaims were so closely connected that they had to be heard together. Apart from that, however, there is no suggestion that CCG did not have full knowledge of the substance of AMSA's counterclaims and exercise its right to advance a full and comprehensive defence to those claims on the merits.

[28] Reference must also be had to the Terms of Reference for the arbitration which were agreed-upon and signed by the parties and the arbitrators in November 2012. Paragraph 89 of the Terms of Reference deals with "Issues To Be Determined By The Arbitral Panel." The issues to be determined are defined to include the issues arising from the pleadings and any questions of fact or law that the Tribunal, in its discretion, deemed necessary to decide those issues:

> The issues to be determined by the Arbitral Panel shall be those arising from the submissions, statements, pleadings, and applications of the parties, provided that these are made in accordance with the directions of the Arbitral Tribunal, and include any questions of fact or law that the Arbitral Tribunal may deem necessary to decide, in its own discretion, in order to determine such issues and rule on the Parties' respective requests for relief.

[29] I am not persuaded by CCG's arguments that the Tribunal exceeded its jurisdiction by considering the environmental counterclaims before they had been subject to the pre-arbitration steps. I come to this conclusion for two reasons. First, the cases CCG relies upon are distinguishable. None of those cases deal with the circumstance where pre-arbitration steps have been waived with respect to some counterclaims but have not been waived with respect to others. They also do not concern circumstances where a finding has been made by the tribunal that the counterclaims were "so connected" to the claim of the other party (in respect of which the tribunal has clear substantive and procedural jurisdiction) that the two claims must be decided at the same time.

[30] Here, unlike the cases relied on by CCG, there is no question that:

(a) the counterclaims fall within the substantive jurisdiction of the Tribunal under the submission to arbitrate;

(b) the pre-arbitration steps with respect to CCG's claims and AMSA's liquidated damages claims were unambiguously waived;

(c) AMSA's counterclaims are closely connected to the claims proceeding to arbitration and represent setoffs against the applicant's claims; and

(d) the Tribunal made a finding that the Agreement did not require pre-arbitration steps for counterclaims that were so connected to the CCG claims that the two claims should be heard together.

[31] CCG argues that failure to follow the pre-arbitration steps with respect to the counterclaims deprived it of the opportunity to settle those claims or, perhaps, to conduct a separate arbitration. That issue was addressed squarely by the Tribunal. It decided that two arbitrations, one on CCG's claims and some of AMSA's counterclaims, and another on AMSA's remaining counterclaims, would have made no sense and could not reasonably have been in the contemplation of the parties.

[32] The Tribunal's mandate included everything closely connected to the matters subject to arbitration: *Desputeaux c. Editions Chouette (1987) Inc.*, *supra*, at para 35. There was also ample evidence upon which the Tribunal could reasonably reach the conclusion it did. This evidence is referred to in the Award at paras 232-235.

[33] The second reason for rejecting the applicant's argument is that the pre-arbitration steps were not true conditions precedent to the jurisdiction of the Tribunal. It is accepted that the environmental counterclaims were always going to be arbitrated under the Agreement; the only issue was when.

[34] In the international arbitration context, courts have been warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert international arbitration tribunals. Courts must be circumspect in their approach to determining whether a jurisdictional error is a "true" question of jurisdiction. And, when it does identify such an issue, the court must ensure that it does not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal: *United Mexican States v. Cargill*, *supra*, at paras 45-47.

[35] Here, the satisfaction of pre-arbitration steps in connection with the respondent's environmental counterclaims is not a matter of true jurisdiction. It determines when the contractual right to arbitrate arises, not whether there is a right to arbitrate at all. Procedural issues relating to the conduct of the arbitration are preeminently matters for the arbitrators to decide and the court must view that determination with deference: *BG Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 2014 WL 838424 at pp. 2, 8.

[36] For these reasons, I do not think the argument that, by considering and deciding AMSA's environmental counterclaims before AMSA had subjected those counterclaims to the pre-arbitration steps, the Tribunal acted without jurisdiction, can be sustained. I therefore decline to set aside the award on the basis of this argument.

CCG's Claim for Prolongation Costs

CCG's Argument

[37] CCG claimed for a 36-day extension of time and associated prolongation costs (totaling US$482,480) in respect of delays caused by AMSA's alleged failure to deliver required (materials, namely pipe spools and fittings, required for CCG to complete work on the Pipeline) and to drill anode wells for cathodic protection of the Pipeline.

[38] CCG submitted expert evidence quantifying the prolongation costs to which CCG was entitled, including a *per diem* calculation of damages.

[39] The Tribunal granted CCG an 18 day extension of time for these delays:

> The Tribunal considers that in the circumstances it would be fair to grant CCG an extension of time of 18 days for the delay in providing free issue materials and drilling the anode wells for the cathodic protection works.

[40] However, the Tribunal failed to make a determination as to CCG's entitlement to the prolongation costs associated with that delay.

[41] CCG argues that when an arbitral tribunal fails to decide a claim that was put before it, the award must be set aside pursuant to Articles 34(2)(a)(iii)(failure to exercise jurisdiction) and 34(2)(a)(ii) (a party was unable to present its case).

[42] In support of this argument, CCG cites a decision of the English High Court in *Margulead Ltd. v. Exide Technologies,* [2004] EWHC 1019, involving England's Arbitration Act, and a decision of the Federal Supreme Court of Switzerland, Swiss Fed. Court, 26 May 2010, 4A-433/2009, a decision under the Swiss Federal Statute on International Private Law.

Analysis

[43] I am unable to agree with CCG's argument. The Tribunal dealt with the prolongation costs claim. Although agreeing that CCG was entitled to an 18 (as opposed to 36) day extension, it awarded nothing for any associated costs. Although the Tribunal's *reasoning* is not explicit, it may reasonably be inferred that it did so on the basis that such costs had not been proved.

[44] Beginning at para 592 of the Award, the Tribunal reviewed CCG's argument on this issue. At para 613, the Tribunal summarized the position:

> It is common ground that Mechanical Completion was achieved on 19 January 2011. CCG claims an extension of time of not less than 36 days by reason of AMSA's failure to timely provide free issue materials for the Valve and Terminal Stations and the late drilling of wells for the deep anodes. It also claims compensation.

[45] There were two aspects to CCG's free issue materials claim: valve and terminal stations and cathodic protection. The Tribunal found that AMSA's admitted late delivery of material for the valve and terminal stations did not cause critical delay to Mechanical Completion.

[46] However, with respect to the cathodic protection, the Tribunal found some basis to warrant a brief extension. It concluded at para 625:

> …the issue was whether CCG had to install the materials for which it was waiting. Since AMSA did not regard the installation as essential to completion, and having regard to the volume of work involved in the probability that CCG would have done it swiftly to avoid further culpable delay, the Tribunal, doing the best it can, and favouring CCG, assesses the time required to be three working days so that the notional period of delay would start on 1 January 2011 and finish on 19 January 2011, a period of 18 days. The Tribunal considers that in the circumstances it would be fair to grant CCG an extension of time of 18 days for the delay in providing free issue materials and drilling the anode wells for the cathodic protection works.

[47] That finding resulted in a significant benefit to CCG by reducing the liquidated damages CCG was otherwise found liable to pay. This is clear from the Tribunal's conclusion, when dealing with the AMSA counterclaim for liquidated damages, at para 834:

> The Tribunal has already determined that CCG is only entitled to an extension of time of 18 days for HOC 17. That decision will affect AMSA's claim for liquidated damages since it will reduce the period of delay from 294 days to 276 days.[2]

[48] At para 880, the Tribunal summarized its disposition of the primary financial claims of both parties, contrasting what was claimed with what was actually awarded. With respect to prolongation costs (HOC 1, 6 and 17), the Tribunal noted that CCG had claimed $19,507,781 but that it was awarded "NIL."

[49] In *Schreter v. Gasmac Inc.*, 1992 CarswellOnt 137 at para. 46, Feldman J., in Divisional Court, refused to deny enforcement of an international commercial arbitration award. It was argued that the arbitrator had failed to give reasons for the decision in issue. Feldman J. held that, under the Model Law "the failure to give reasons, although less helpful to the parties, is not on its own a ground for refusing to enforce" an award.

[50] Both authorities relied upon by CCG in support of its argument that the failure of a tribunal to deal with a claim is an error of jurisdiction and/or a failure of natural justice were

[2] AMSA had claimed $24,637,754.40 but was awarded $13,800,000.

decided under legislative rules for review which differ materially from Article 34 of the Model Law. In this case, the distinction is material because the legislation in issue in England and Switzerland afforded grounds for setting aside arbitral awards that are not available under the Model Law (i.e., failure to deal with an issue). That said, I do not think these cases are applicable to the present circumstances in any event. I say this because both the English High Court and the Swiss Federal Court make a clear distinction between a failure to deal with a claim and an omission to give reasons for the tribunal's conclusion in respect of that claim. Both decisions conclude that it is only in those cases in which the award expresses no conclusion as to the claim that the award can be said to have "failed to deal with" that issue.

[51] In *Margulead Ltd. v. Exide Technologies, supra,* Colman J relied on another High Court decision, *Hussman (Europe) Ltd v Al Ameen Development & Trade Co*, [2002] 2 Lloyd's Rep 83, [2000] CLC 1243 at para 56, where Thomas J held:

> I do not consider that s. 68(2)(d) [of the English Arbitration Act] requires a tribunal to set out each step by which they reach their conclusion or deal with each point made by a party in an arbitration. Any failure by the arbitrators in that respect is not a failure to deal with an issue that was put to it. It may amount to a criticism of the reasoning, but it is no more than that.

[52] The Swiss Federal Court said, in a similar vein, at para 2.1:

> …the right to be heard in contradictory proceedings does not require an international arbitral award to be reasoned. However, a minimum duty for the authority to examine and deal with pertinent issues has also been deducted from the right to be heard.
>
> …
>
> However, there is a violation of the right to be heard only to the extent that the authority does not comply with its minimum duty to examine pertinent issues. Thus, the arbitrators do not have any obligation to discuss all the arguments raised by the parties, so that they could not be blamed for a violation of the right to be heard in contradictory proceedings if they do not address, even implicitly, an argument which is objectively devoid of any pertinence.

[53] Before the Tribunal, AMSA vigorously opposed any award of costs in respect of CCG's prolongation argument. It pointed out that CCG had offered no evidence of the actual cost that it incurred during any specific period of delay. Rather, it relied on a *per diem* rate based on costs incurred during the entire period for which it sought to offset AMSA's liquidated damages claims with its own prolongation claims. In its written argument, AMSA submitted that CCG had simply failed to meet its burden of proof:

> The Tribunal is entitled to be provided by CCG with a tool to determine CCG's prolongation costs incurred as a result of the alleged delaying events, however

> Mr. Holder has merely provided the Tribunal with CCG's total time-dependent site-running costs for the full 294 days of alleged delay. Mr. Holder's approach provides the Tribunal no mechanism with which to distinguish CCG's legitimate prolongation costs from those costs related to other events or contract work.
>
> Furthermore, the monthly time-dependent site-running costs that Mr. Holder relies on [are] theoretical, derived figures that that do not reflect CCG's actual monthly time-dependent site-running costs. Mr. Holder had access to actual costs. He did not need to create theoretical, derived figures. Even in Mr. Holder's third report, he still relied upon ratios built on assumptions that are theoretical and ultimately unreliable by this Tribunal.

[54] It is certainly true that the Tribunal did not make explicit reference to this argument in the Award. However, it is clear that the Tribunal did, in the Award, deny CCG any compensation for the 18 days of delay it found were caused specifically by AMSA's failure to deliver free issue material for completion of the cathodic protection project. And there was evidence, and argument joined, before the Tribunal to support that conclusion.

[55] For these reasons, I dismiss the application to set aside the Award on the basis of the alleged failure to deal with CCG's prolongation costs.

"Unable to Present His Case": Article 34(2)(a)(ii)

[56] As noted by the Court in *Corporacion Transnacional de Inversiones S.A. v. STET International S.p.A.*, 45 OR (3d) 183 (SCJ), aff'd 49 OR (3d) 414 (CA), Article 34(2)(a)(ii) embodies well settled concepts of fairness and natural justice. Article 34(2)(a)(ii) must be interpreted to include procedural as well as substantive justice. The threshold, however, remains a high one: to justify setting aside an award for a violation of Articles 34(2)(a)(ii), the conduct of the tribunal must be sufficiently serious to offend our most basic notions of morality and justice (at para. 33).

[57] A party might be said to have been "unable" to present his or her case when:

(a) the award is based on a theory of liability that either or both of the parties were not given an opportunity to address, or based on a theory of the case not argued for by either of the parties;

(b) a party was not given an opportunity to respond to arguments made by an opposing party; or

(c) the tribunal ignored or failed to take the evidence or submissions of the parties into account.

[58] An example of the application of these principles can be found in the reasoning of the Supreme Court of Queensland in *Sugar Australia PTY Ltd. v. MacKay Sugar Ltd.,* [2012] QSC

38 at para 32. In *Sugar*, the Queensland court annulled an arbitration award because the arbitrators based their reasoning on a construction of the case that had not been advocated by any of the parties, even though the tribunal's decision was based on evidence and facts called by the parties:

> There is plain authority that for arbitrators so to decide a case, without giving a party any warning that the point is one which they have in mind and so giving the party no opportunity of dealing with it, amounts to technical misconduct and renders the award liable to be set aside or remitted… In truth, we are simply talking about fairness. It is not fair to decide a case against a party on an issue which has never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts or the law to the tribunal…

[59] CCG argues that it was unable to present its case and was therefore denied the right to be heard in five instances where the Tribunal is alleged to have decided an issue on the basis of its "own reasoning" or having ignored CCG's submissions. The Tribunal is said to have:

(a) developed its own reasoning to assume jurisdiction over AMSA's environmental counterclaims (thereby failing to give CCG an opportunity to respond) and failed to rule on CCG's distinct claim for prolongation costs;

(b) developed its own reasoning to deny CCG payment of retention monies in accordance with the Agreement and failed to give CCG an opportunity to respond;

(c) developed its own reasoning to award AMSA US$7.640M in respect of its hydroseeding counterclaim without giving CCG an opportunity to respond;

(d) ignored CCG's submissions on the proper rate of interest applicable to both CCG and AMSA's claims; and

(e) awarded AMSA costs of the arbitration contrary to AMSA's submission as to how costs should be allocated and based on an unfair misconception of the parties' respective success.

Environmental Counterclaims

[60] There was a significant procedural history to this issue which the Tribunal reviewed in some detail. In essence, as noted above, the parties agreed that CCG's claims did not need to proceed through the pre-arbitration steps. CCG conceded that AMSA's liquidated damages claims would necessarily be decided in the context of CCG's claims for an extension of time. CCG objected, however, to the Tribunal hearing AMSA's environmental counterclaims because they had not proceeded through pre-arbitration steps. The claims, however, were pleaded, subject to evidence at the hearing and full argument following the hearing. That argument

included the threshold question of whether the Tribunal should decide AMSA's counterclaims at all. On this issue, the Tribunal held that the parties intended, when entering into the Agreement, that it would not be necessary for one party to submit to pre-arbitration steps a claim that was "so connected" to a claim of the other party that the two claims "should be decided" at the same time.

[61] CCG argues, in the alternative to the position discussed in paras 16 to 25 above, that CCG did not have an opportunity to make submissions on the Tribunal's "novel theory" of jurisdiction and was thus denied an opportunity to present its case.

Analysis

[62] CCG relies on a number of domestic law decisions concerning the scope of a judge's duty not to stray from the submissions of the parties. Unlike domestic litigation, however, it is well established in international arbitration that the fact that arbitrators may have based their decision on allegations or arguments which were not put forward by the parties does not amount to a failure to comply with their brief. Only an award granting more to a party than what the party has asked for can be annulled, E. Gaillard, J. Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, cited in G. Born, *International Commercial Arbitration*, Vol. 2 (Alphen aan den Rijn: Wolters Kluwer, 2009) at 2608, footnote 292.

[63] The circumstances contemplated by Article 34(2)(a)(ii) of the Model Law are described by Mustill and Boyd, "The Law and Practice of Commercial Arbitration in England" (2nd) Butterworth's 1989, at 550 as "such a mishandling of the arbitration as to likely amount to some substantial miscarriage of justice."

[64] Another leading text on the enforcement of international arbitration awards suggests that arbitrators are entitled to conduct their own research and substitute their legal characterization of the facts of the case for that of the parties. As a general rule, the arbitrators may not be held to have exceeded the limits of their mandate if they award what was claimed on the basis of a legal ground different from the one invoked by the claiming party: M. Azeredo da Silveira and L. Levy, "Transgression of the Arbitrators' Authority: Article V(1)(c) of the New York Convention," in E. Gaillard and D. Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (London: Cameron May, 2008), at pp. 653-654; see also *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.* 29 F. Supp. 2d 1168 (S.D. Cal. 1998) at para 6.

[65] I make the observation that adjudicated decisions frequently do not simply adopt one side's or the other's argument. More often than not, there is some blending of approaches, such that the analysis is not precisely as one side or the other framed it and the result is not precisely what one side or the other was asking for. The fact that the resulting decision does not precisely track the arguments or the requests of one of the parties does not mean that there has been a failure of natural justice or that a party has been prevented from presenting its case. This reality

of adjudication was expressly acknowledged by these parties and the arbitrators in their Terms of Reference for this very arbitration. CCG agreed that the Tribunal would have the jurisdiction to determine "any questions of fact or law that the Arbitral Tribunal may deem necessary to decide, in its own discretion, in order to determine such issues and rule on the Parties' respective requests for relief."

[66] Importantly, in setting out the arguments of the parties, the Tribunal wrote (at paras 221 and 222 of the Award):

> AMSA's case is that its counterclaims are "mirrored claims" and that, in any event, CCG agreed that all disputes might be arbitrated without prior reference to adjudication. CCG says that the claims are not "mirrored" and there was no such agreement. AMSA also says: "Judicial economy, fairness and justice require that AMSA's claims be admissible". CCG in effect says that that proposition is only verbiage.
>
> Both parties in this arbitration have been prone to dangling intriguing propositions but then shirking their substantiation, as would be expected if they were sound.

[67] CCG's argument turns on the proposition that the Tribunal's reasoning was "novel" and that it developed its "own theory" for why the environmental counterclaims should be dealt with in the arbitration before them rather than referred back to pre-arbitration steps. Even if that were the legal test for denial of natural justice, it is clear, reading the Tribunal's decision on this issue as a whole, that while the Tribunal found AMSA's terminology of "mirrored claims" imprecise, it essentially adopted AMSA's approach to the problem.

[68] AMSA's position was that because its environmental counterclaims constituted permissible setoffs against CCG's claims under the Agreement, it made no sense to punt those claims to a different process. AMSA clearly asserted that it was relying on the parties' "agreement" that its setoff-type counterclaims should not have to go through pre-arbitration steps based on the principles of "judicial economy, fairness and justice." As stated by the Tribunal, CCG chose to brush off those arguments as mere "verbiage." Whether CCG chose to substantiate that position with detailed argument was its choice at the time. I do not think it can be said, however, that CCG was caught by surprise or blindsided in the sense necessary to conclude that it was denied the right to present its case. It is overly technical to suggest that the Tribunal was off on a frolic of its own merely because it did not accept AMSA's "mirrored claims" terminology.

[69] AMSA's pleadings put its setoff claims squarely in issue in the arbitration. It is clear that CCG had the full opportunity to present its defence to AMSA's environmental counterclaims on the merits. Conspicuously absent from CCG submissions on the technical admissibility point was any explanation of what it might have said or done differently if the Tribunal's precise reasoning on this technical point had been more prominently highlighted at the time.

[70] CCG had the opportunity to make its arguments. While quibbling with terminology, the Tribunal agreed with AMSA's essential point. I do not think this falls into the category of deciding on a basis that was, as the cases say, a "mishandling" of the arbitration so as to amount to a "substantial miscarriage of justice," "contrary to the assumption of the parties," "extraneous to the hearing" or that CCG had "no opportunity" to deal with the point.

[71] For these reasons, I dismiss the application to set aside the Award on the basis that CCG was prohibited from presenting its case on whether AMSA's environmental counterclaims ought not to have been dealt with in the arbitration.

Retention Monies

[72] AMSA was permitted by the Agreement to withhold a small percentage of the regular monthly progress payments paid to CCG. The Agreement provided a mechanism for the payment of these "retention monies" in two stages: the first half following the issue of a "taking over certificate" and the second half within a year of certain "defect notification periods."

[73] CCG argues that it repeatedly asserted its claim for the retention monies in its Request for Arbitration, Statement of Claim, Statement of Reply, during the Arbitration hearing, and in it post-hearing arguments. AMSA, it says, did not respond to CCG's pleadings on this issue and did not lead specific evidence disputing the factual basis for CCG's entitlement to the retention monies at the hearing.

[74] Following the hearing, the parties were directed by the Tribunal to submit post-hearing memorials. These memorials were required to be comprehensive final statements of each party's case. CCG repeated its entitlement to the retention monies in its post-hearing memorial. AMSA's post-hearing memorial, CCG says, remained silent on this claim.

[75] The Tribunal also provided for limited reply submissions to deal with arguments that could not reasonably have been anticipated in the parties post-hearing memorials. The Tribunal noted that reply submissions that would and should have been made in the parties' post-hearing memorials would be ignored by the Tribunal.

[76] CCG argues that AMSA raised a substantive defence to CCG's entitlement to the retention monies for the first time in its post-hearing reply submission. AMSA argued that GC 14.9 entitled the engineer to withhold certification of the retention monies in an amount equal to the cost of any defect in CCG's work, until such defect was cured.

[77] CCG objected to AMSA's use of its post-hearing reply submission to raise this defence. CCG asked the Tribunal to disregard this section of AMSA's post-hearing reply submission.

[78] In the Award, the Tribunal rejected CCG's claim to immediate payment of the retention monies, holding that CCG was only entitled to receive payment of the retention monies after it satisfied its debts to AMSA on the environmental counterclaims.

[79] CCG argues that the Tribunal imported its own theory as to why AMSA ought not to have issued the taking over certificate. Given AMSA's nearly continuous silence on this issue, there was no evidence or other basis in the arbitral record for the Tribunal's findings. CCG learned of this line of reasoning for the first time in the Award and was not given an opportunity to respond.

[80] Thus, CCG argues that in denying CCG payment of the retention monies, the Tribunal:

(a) relied upon submissions made by AMSA in breach of the procedure the Tribunal had set out for reply submissions;

(b) failed to give CCG an opportunity to respond to AMSA's submission; and

(c) developed its own theories, which were not supported by the submissions and evidence, without giving CCG an opportunity to respond to these theories.

[81] This issue highlights the difficulty of isolating a single alleged procedural defect in the treatment of one out of many issues in a complex and lengthy arbitration. I say this because the issue of retention monies, and the timing of AMSA's liability to pay the retention monies, is inextricably bound up, in substance, in GC 14.9 and in the Tribunal's reasoning, with the issue of AMSA's environmental counterclaims for the remediation of defective work.

[82] It is important to note that the issue of retention monies is concerned only with the timing of, not CCG's ultimate entitlement to, payment of the retention monies. CCG took the position that it met the conditions precedent for payment of the retention monies in 2011 and 2012. AMSA took the position that, due to its outstanding defect claims, it was not obliged to pay the retention monies until CCG had discharged its obligations to make good on all liabilities for defective work.

[83] GC 14.9 of the Agreement provides that the first half of the retention monies (about $5 million) was to be certified by the project engineer when the "taking over certificate" had been issued. That certificate was issued in 2011. The second half of the retention monies (another $5 million) was to be certified after the latest expiry date of the "defect notification periods;" that, arguably, happened in 2012. Both these provisions, however, are subject to a proviso. The proviso is that, if anything remains to be done by CCG under its obligation to repair or pay for the repair of defective work, the engineer is entitled to withhold certification of payment of the retention monies until the remedial work is done.

[84] The Tribunal found that CCG was aware of substantial remedial work (exceeding $10 million) for which AMSA held CCG responsible. The Tribunal, in fact, ultimately found CCG liable for defect repairs for hydroseeding, erosion control and rice field remediation in excess of $10 million. The Tribunal concluded that, by virtue of the proviso in GC 14.9, the engineer was entitled to refuse to certify payment of the retention monies. The Tribunal concluded that CCG was entitled to payment of the retention monies within 21 days of CCG paying AMSA the cost of remedying its defective work.

[85] I have great difficulty understanding how CCG's concerns rendered it "unable to present" its case on the retention monies issue.

[86] I do not accept that AMSA advanced no evidence on this issue. As the Tribunal found, the evidence on CCG's liability for AMSA's counterclaims spoke directly to, and formed the basis of, the Tribunal's disposition of this issue. The issue, in effect, turns on the interpretation of GC 14.9.

[87] CCG was well aware of the provisions of GC 14.9 and addressed those provisions in its submissions to the Tribunal. I do not think the Tribunal's reasons on the taking over certificate, as alleged by CCG, constitute a finding that AMSA made a mistake when that certificate was issued. I read the Tribunal's reasons on this point as finding, on the plain language of GC 14.9, that even though the taking over certificate had issued, the engineer could still refuse to certify payment of the retention monies if there were unsatisfied defect claims (which the Tribunal found, as a fact, there were).

[88] CCG had, as recounted in its own submissions, repeated opportunities to present its arguments to the Tribunal. And it claims it did so repeatedly before, during and after the hearing. The Tribunal was not required to ignore its findings (or the evidence it reviewed) on the environmental counterclaims when addressing the retention monies issue. To the contrary, the Tribunal was entitled to rely on all the evidence in the record when addressing any issue.

[89] CCG's arguments, it seems to me, are in substance less concerned with procedural fairness and more with the fact that CCG disagrees with the outcome. I view CCG's arguments on this issue as an attempt to reargue the point on the merits.

[90] Again, this is not a case of the Tribunal "mishandling" the arbitration so as to amount to a "substantial miscarriage of justice," proceeding on a basis that was materially "contrary to the assumption of the parties," or taking into account matters "extraneous to the hearing." The Tribunal assessed CCG's arguments in the context of its findings on other matters and applied the plain words of GC 14.9 to the facts, as found. In the circumstances, I do not think CCG was deprived of any material opportunity to present its position on this issue.

[91] For this reason I dismiss CCG's application to set aside the award on the basis that it was unable to present its case on the issue of retention monies.

Hydroseeding

[92] As part of its work, CCG was required to spread topsoil and manually seed parts of the pipeline right of way using seeds and other materials supplied by AMSA. AMSA instructed an alternate contractor ("Hydromulch") to seed over CCG's prior seeding work, allegedly to correct defects, using a process called hydroseeding. AMSA then backcharged CCG for the costs of Hydromulch's work in the amount of $7.640M.

[93] Under GC 7.6 of the Agreement, AMSA was required to notify CCG of any alleged defects associated with the quality of CCG's work and to provide CCG with a reasonable opportunity to investigate and remedy the alleged defect within a reasonable time before taking any remedial steps.

[94] It was CCG's position throughout the arbitration that AMSA retained Hydromulch to seed over CCG's work without providing notice to CCG as required under the Agreement. Thus, issue was joined in the arbitration on the factual issue of whether AMSA did, or did not, provide notice to CCG about defects in the performance of seeding on the pipeline right of way and AMSA's intention to hire Hydromulch to cure them.

[95] It is alleged that AMSA argued, for the first time in its post-hearing reply submission, that it provided contractual notification to CCG by way of a letter dated April 14, 2010.

[96] The Tribunal found that AMSA had not responded to CCG's arguments on this point and "did not make clear the legal basis for its [counter]claim." However, according to CCG, the Tribunal nevertheless relied on the April 14, 2010 letter and developed its own reasoning to find in favour of AMSA. CCG says it was not given an opportunity to respond to the Tribunal's theory or to AMSA's procedurally non-compliant submissions concerning the April 14, 2010 letter.

[97] CCG cites the Tribunal's reasoning that, at a meeting on November 24, 2009, AMSA notified CCG that its seeding work was unsatisfactory and that Hydromulch would be rectifying improperly seeded areas:

> AMSA did not make clear the legal basis for its claim. CCG maintained that AMSA had not complied with GC 7.6. AMSA did not reply on that point. Nevertheless it is clear that at the meeting of 24 November 2009 CCG was told its work continued to be unsatisfactory and that in consequence AMSA would use its own contractor Hydromulch to rectify areas that had not been properly seeded by CCG and would back charge CCG: Award, para. 434

[98] CCG, in its submissions, goes on to argue the merits of the Tribunal's finding, on the basis that they were "in error." Tellingly, CCG concludes its written submissions to the court on this point by saying:

> The Tribunal, however, *ignored CCG's submissions* and failed to refer to this meeting, and the parties' clear agreement, in the Final Award.
>
> CCG was thus deprived of an opportunity to present its case and was not treated fairly and equally.

[99] CCG's argument seems to me to be an undiluted attempt to re-argue this issue on the merits. The parties filed extensive evidence on the relevant meetings and documents. CCG's selective quoting from the Award ignores the depth, detail and nuance of the analysis undertaken

by the Tribunal. For example, the Tribunal found (in para 434 in a passage *not* quoted by CCG in its factum) that:

> …although AMSA did not observe contractual niceties, the evidence and the documents (including weekly progress meetings) shows that CCG did not take exception and evidently accepted and almost acquiesced in the course that AMSA took, i.e., using Hydomulch to redo work that CCG had done…. Although neither party followed contractual procedures to the letter so the circumstances are not entirely clear, the Tribunal is satisfied that AMSA is entitled to recover its costs under GC 7.6 as the documents establish sufficiently that CCG had been warned about its work, had been requested to do better and had not done so. Equally, because the documents show that [the engineer] told CCG what it intended to do if CCG did not rectify its defaults, CCG's case that it did not have an opportunity to put right its defaults is rejected, as is its consequential contention that AMSA's claim should be evaluated on the basis of what it might have cost CCG, not least since it is clear that to do seeding properly would have required techniques such as that used by Hydromulch so the costs to CCG would not have differed materially from AMSA's costs.

[100] Once again, CCG's own submission emphasizes the fact that CCG's position throughout the arbitration was that AMSA retained Hydromulch to seed over CCG's work *without providing notice to CCG as required under the Agreement*. Issue was joined; CCG presented its evidence and arguments. There was no failure to afford CCG the opportunity to put its case before the Tribunal. Indeed, CCG admits that it did so. CCG's argument boils down to the assertion that the Tribunal got it wrong on the facts. That is not an argument falling within the purview of Article 34 of the Model Law.

[101] CCG's application to set aside the Award because it was unable to present its case on the issue of hydroseeding backcharges is therefore dismissed.

Interest

[102] CCG takes issue with two aspects of the Tribunal's disposition of interest:

(1) The Tribunal granted AMSA the same rate of interest as CCG was entitled to under the Agreement; and

(2) The Tribunal declined to grant CCG the compound interest to which it was entitled under the Agreement.

AMSA's 3.75%

[103] Interest is contractually due and owing under the Agreement on amounts owed by AMSA to CCG at a rate of 3.75% compounded monthly. There is no contractual provision for interest

on amounts owed from CCG to AMSA. AMSA argued, nevertheless, that it should also receive interest at 3.75%.

[104] CCG objected to the rate of 3.75% being applicable to AMSA's counterclaims. CCG argued that AMSA's counterclaims should instead be based on the applicable rate of interest under the *Courts of Justice Act*, which is much lower.

[105] However, the Tribunal found that the interest rate of 3.75% should apply to amounts owing from CCG to AMSA on its counterclaims. CCG argues that the Tribunal based its decision on a finding that CCG "did not dispute" that the rate of interest of 3.75% also applied to amounts owing from CCG to AMSA. CCG says it unequivocally disputed AMSA's asserted entitlement to interest at the rate of 3.75% at the hearing and in its closing argument.

[106] CCG argues that the Tribunal was, therefore, in error when it stated that CCG "does not dispute" a 3.75% rate of interest applicable to AMSA's claims. The purported "undisputed" nature of AMSA's claim for interest at 3.75% per annum was, CCG argues, *the* basis of the Tribunal's decision to award that rate. CCG says this error means the Tribunal "ignored" CCG's submission (to the effect that AMSA should not receive the higher, contractual rate of interest to which only CCG was entitled under the Agreement) and that the Tribunal, therefore, denied CCG the right to be heard on this point.

[107] CCG relies on a decision of the Swiss Federal Court (31 January 2012) 4A-360/2011 at para 5.2.3.2. The arguments and reasoning in this case (at least, in the English translation) are very difficult to understand. It appears the arbitrator accepted the respondent's evidence that he had not been late in paying for certain products purchased from the appellant. The arbitrator seems to have done so, in part, on the basis that the appellant "did not express a view" on the issue. In fact, the appellant had filed written argument referring to four witness statements which contradicted the respondent and provided evidence that the respondent was late to pay. The Swiss Federal Court agreed that the arbitrator failed to deal with the appellant's arguments and pertinent evidence, thereby disregarding the appellant's right to be heard.

[108] I am not satisfied that the decision of the Swiss Federal Court has any persuasive value in this case. The relevant legislation in Switzerland is the Federal Statute on International Private Law of December 18, 1987 Chapter 12 "International Arbitration." Article 190 includes, as a ground for "annulling" an arbitral award, "the arbitral tribunal…failed to decide one of the items of the claim" (this is referred to in international arbitration circles as *infra petita*).

[109] Failure to decide one of the items in the claim (or, *infra petita*) is not an enumerated ground for setting aside an arbitral award under the Model Law: A.J. van den berg, *The New York Arbitration Convention* (Alphen aan den Rhijn: Kluwer International law, 1981 at p. 320). Further, the Supreme Court of Canada has held that a decision is not "unreasonable" for purposes of judicial intervention merely because the decision-maker has not "referred to all the arguments, provisions or jurisprudence or made specific findings on each constituent element": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para 75.

[110] Finally, it is also clear from the reasons of the Swiss Federal Court in 4A-360/2011, that the issue of whether the respondent had been late to pay was a critical factor in the resolution of *the* central issue in the arbitration under review. Thus, the arbitrator's belief that the appellant expressed no view on whether the respondent was late in paying was highly material to the central issue in dispute.

[111] While it appears that the Tribunal was incorrect when it said CCG did not oppose the 3.75% rate of interest for AMSA's claims (it would have been more accurate to say CCG did not oppose *some* interest on AMSA's claims), I do not think it is correct to conclude, as CCG argues, that this was the *sole basis* for the Tribunal's decision to award that rate. What interest, if any, should apply to AMSA's claims was discretionary to the Tribunal. The non-opposition of a party to a particular rate of interest is a relevant, but not dispositive factor. Particularly in the absence of a contractual rate of interest for AMSA's claims, the job of the Tribunal was to arrive at a reasonable rate of interest for AMSA's claims.

[112] The Tribunal considered the reasonableness of the interest rate in para 863 of the Award:

> Although GC 14.8 refers only to delay payments due to the Contractor, AMSA has argued that the rates to be applied to both CCG's claims and its claims should be 3.75%. CCG does not dispute that this rate should be applied to AMSA's claims *and the Tribunal agrees that it is reasonable*. [emphasis added]

Thus, the Tribunal made an independent finding that 3.75% was a reasonable rate of interest and, in doing so, "agreed" with CCG.

[113] I do not regard the Tribunal's error as material. Nor do I think this error resulted in the denial of CCG's right to be heard. For these reasons the application to set aside the Award on the basis of the Tribunal's disposition of the rate of interest applicable to AMSA's claims is dismissed.

Compound Interest

[114] GC 14.8 of the Agreement entitled CCG to receive compound interest on amounts owing by AMSA to CCG. GC 14.8 does not provide AMSA with the same entitlement on amounts owed by CCG to AMSA.

[115] The Tribunal found that the provisions of the Ontario *Courts of Justice Act* applied to the arbitration.

[116] Subsections 128(4) and 129(5) of the CJA provide that interest may be set at a rate other than the pre-judgment or post-judgment interest rate where interest is "payable by a right other than under this section."

[117] In 2002, the Supreme Court of Canada found that both equity and common law rights in contract to be awarded damages constitute a basis to set interest at a rate other than the pre- and

post-judgment simple interest rates: *Bank of America v. Mutual Trust Co*., 2002 SCC 43. It further held that subsections 128(4) and 129(5) of the CJA provide the Court with an equitable power to award compound post-judgment interest.

[118] Before the Tribunal, CCG argued that, based on GC 14.8 and based on the Supreme Court of Canada's decision in *Bank of America*, CCG was entitled to compound interest on amounts owing to it.

[119] AMSA argued that only simple interest should apply. AMSA relied on the Supreme Court's decision in *British Columbia v. Teal Cedar Products Ltd*., 2013 SCC 51. In *Teal Cedar*, the court found that British Columbia's *Commercial Arbitration Ac*t and *Court Order Interest Act* operated to prevent compound interest from being applied to an arbitral award.

[120] As CCG pointed out in its arguments to the Tribunal, this was because these statutes collectively provide that an arbitral award is a pecuniary judgment and a pecuniary judgment bears simple interest. The Court in *Teal Cedar* noted that its conclusion was based on *the statutory regime in British Columbia* and not other provinces, which may have different statutory provisions.

[121] Despite CCG's arguments, the Tribunal accepted AMSA's submission that *Teal Cedar* applied to limit the interest otherwise available to CCG. The Tribunal held, at para 864:

> As to whether interest should be compounded the Tribunal is persuaded that the Supreme Court of Canada's decision in *British Columbia (Forest) v. Teal Cedar Products Limited* operates to restrict interest on the monetary awards in this case to simple interest. Whilst the legislation reviewed by the Supreme Court of Canada was the legislation of British Columbia the Tribunal accepts AMSA's contention that it should be treated as binding upon arbitrators in arbitrations seated in Ontario since the Ontario legislation is essentially to the same effect.

[122] CCG argues that the Tribunal made no mention of its submissions on why *Teal Cedar* should be distinguished from the situation in Ontario and on the applicability of *Bank of America*. The Tribunal's failure to consider CCG's submissions with respect to the applicability of *Teal Cedar* in Ontario, CCG says, denied CCG the right to present its case.

[123] In my view, CCG's argument on the issue of compound interest is entirely a re-argument of submissions made to the Tribunal on the merits. In essence, CCG says the Tribunal committed an "error of law on the face of the record" by not appreciating the distinction between the statutes governing compound interest in British Columbia and in Ontario. "Error of law," however, is not a ground upon which the court can set aside an international commercial arbitration under the Model Law.

[124] The fact that explicit reference was not made to CCG's submission on why the *Teal Cedar* case should be distinguished under the law of Ontario does not mean that its submission was "ignored." Reviewing courts have stated repeatedly that the arbitral tribunal is not required

to mention every argument. In any event, the reasons of the Tribunal in para 864 of the Award make it clear that the Tribunal was alive to the distinction between the statutory regimes in British Columbia and Ontario. That was exactly CCG's argument. Rightly or wrongly, the Tribunal accepted AMSA's contention that *Teal Cedar*, although decided under British Columbia law, should be considered binding on arbitrations in Ontario because the "Ontario legislation is essentially to the same effect."

[125] CCG was not denied due process. It presented its case on this issue. The Tribunal found against CCG. It is not relevant, under the Model Law, whether the Tribunal's finding might have been wrong under Ontario law, subject only to article 34(2)(b)(ii). CCG has not taken the position that the Tribunal's award of simple interest violates the public policy of Ontario.

[126] For these reasons, the application to set aside the award on the basis that CCG was not able to present its case on compound interest is dismissed.

Costs

[127] AMSA submitted that CCG ought to reimburse AMSA for all of its costs of the arbitration if it were to prevail on all of its counterclaims and defences. AMSA also submitted that, in the event that each party were to succeed on some claims and fail on others, AMSA and CCG should both receive costs "as a proportion of the amount recovered in the Award to the amount originally claimed in the Arbitration." The Tribunal initially agreed with this approach and set out a chart in the Award reflecting the parties' respective success.

[128] CCG argues that this chart unfairly misapprehended the parties' respective success. Specifically, the Tribunal failed to take the retention monies, ultimately awarded to CCG, into consideration in the total of claims awarded to CCG. Instead, AMSA was considered the successful party on this issue, thus unjustly inflating AMSA's respective success on the arbitration.

[129] CCG also argues that, notwithstanding the Tribunal's attempt to determine the respective successes of the parties and AMSA's position that costs should be awarded based on a proportion of each party's respective success, the Tribunal ultimately determined that "AMSA is to be regarded as the prevailing party and that, in principle, AMSA is entitled to be allocated and to recover the costs of the arbitration."

[130] On this basis, the Tribunal dismissed CCG's claim for costs in its entirety, without giving any credit to CCG's "successes", and awarded AMSA the amount of $9,826,457.13 for AMSA's "legal and other costs" and $590,000 for the AMSA's share of the costs of the ICC administrative expenses and of the Arbitrator's fees and expenses for the arbitration.

[131] Thus, CCG argues, the Tribunal made findings inconsistent with its own approach and with AMSA's own position on costs in order to grant AMSA effectively more than what it had claimed. In doing so, the Tribunal violated principles of procedural public policy, contrary to

Article 34(2)(b)(ii) of the Model Law, and deprived CCG of a fair and equal opportunity to present its case, contrary to Article 34(2)(a)(ii) of the Model Law.

[132] CCG has not explained how the Tribunal's disposition of costs in this matter "fundamentally offends the most basic and explicit principles of justice and fairness in Ontario" or displays "intolerable ignorance or corruption on the part of the Tribunal." If what CCG means is that the Tribunal awarded AMSA more than it asked for, I am unable to agree.

[133] The Tribunal's chart reflects the fact that CCG claimed almost $91 million and was awarded a little over $7 million; $6 million of that concerned CCG's HOC2 Backcharge claim. This was an issue, as found by the Tribunal, that was a "very short issue of law."

[134] Moreover, the Tribunal found that the overwhelming expenditure on both sides was incurred in relation to CCG's main claims (i.e., not CCG's HOC2 Backcharge claim), in respect of which CCG was essentially unsuccessful, and AMSA's corresponding counterclaims, in respect of which AMSA was largely successful.

[135] Further, I am unable to agree with CCG's argument that the Tribunal improperly treated CCG's retention monies claim as a CCG "loss." As noted above, the issue was never *whether* CCG was entitled to this money. The issue was only *when* AMSA's obligation to pay the retention monies crystallized. CCG's claim that the retention monies were payable in 2010 and 2011 was dismissed by the Tribunal. The Tribunal held that these funds are not payable until CCG pays AMSA the damages awarded in the arbitration. The Tribunal, therefore, had ample reason to exclude this item from the list of CCG's "wins."

[136] Thus, the Tribunal's conclusion that AMSA is "to be regarded as the prevailing or winning party and that, in principle, AMSA is entitled to be allocated, and to recover, the costs of the arbitration," did not result in AMSA getting more than it asked for.

[137] For essentially the same reasons, I cannot agree that the Tribunal's disposition of costs deprived CCG of the opportunity to present its case.

[138] For these reasons, the application to set aside the Award on the basis that CCG was deprived of the opportunity to present its case on costs is dismissed.

Public Policy of Ontario: Article 34(2)(b)(ii)

[139] Amendments to the Agreement in 2009 (MOU2) converted the Agreement into a fixed price, lump sum contract of $258 million based on the contract design, specifications and circumstances in existence as of June 23, 2009. The parties agreed that CCG would receive payment of the lump sum amount of $258 million in three stages, subject to certain conditions:

(i) $249 million would be the amount on which all regular progress payments were based;

(ii) a tranche payment of $5 million would be paid upon achieving construction completion by December 31, 2009, failing which CCG would forfeit this payment; and

(iii) a tranche payment of $4 million would be paid upon achieving mechanical completion by March 31, 2010, failing which CCG would forfeit this payment.

[140] The MOU2 also provided that if mechanical completion was not achieved prior to March 31, 2010, AMSA was entitled to assess liquidated damages under the Agreement from April 1, 2010.

[141] Construction completion was not achieved by December 31, 2009. Thus, the Tribunal found that CCG forfeited the first tranche payment of $5 million.

[142] Mechanical completion was achieved on January 19, 2011, 294 days after April 1, 2010. Thus, the Tribunal found that CCG forfeited the second tranche payment of $4 million.

[143] The Tribunal also found that AMSA was entitled to 276 days of liquidated damages (after subtracting the 18 day extension awarded to CCG) at a rate of $50,000 per day. The Tribunal found that the tranche payments were unearned bonus payments and therefore had no bearing on liquidated damages for delay.

[144] CCG takes the position that the Tribunal's Award compensated AMSA twice for CCG's failure to achieve the milestone dates in MOU2 by awarding AMSA liquidated damages and also requiring CCG to forfeit the tranche payments. This, CCG argues, constitutes a double recovery which is inconsistent with the public policy of Ontario: *Lambert Re*, [2001] OTC 514, [2001] OJ No 2776 (SCJ), aff'd 60 OR (3d) 787, [2002] OJ No 3163 (CA); *Subway Franchise Systems of Canada Ltd. v. Laich*, 2011 SKQB 249; *Indian Farmers Fertiliser Cooperative Limited v. Joseph Isaac Gutnick, et al*., [2015] VSC 724 at paras 99 – 107.

[145] This was an argument made explicitly to the Tribunal as a reason to reduce the liquidated damages awarded to AMSA by the amount of CCG's forfeited tranche payments. It is worth considering the Tribunal's reasons on this issue at some length:

> 658. It is not disputed that these milestone dates were not met.
>
> 659. MOU2 does not describe the tranche payments as being bonuses but the Tribunal notes that they are described as such in some of CCG's own internal reports. Furthermore it is clear that the total lump sum price of US$258m is made up as to US$249m which is described as the "base lump sum" payable by way of monthly interim payments plus the two single tranche payments.
>
> 660. The Tribunal considers that these payments are in the nature of bonus payments, payable upon Construction Completion on or before 31 December

> 2009 (in respect of US$5,000,000) and upon Mechanical Pre-Commissioning Completion on or before 31 March 2010 (in respect of US$4,000,000.)
>
> 661. Resolution 3(b) of MOU2 expressly provides that these payments would be forfeited, i.e. would not be paid, if the milestones were not met.
>
> 662. The provisions were clearly intended to incentivise CCG into meeting these milestones and on a plain reading of the Resolution any delay in achieving these milestones (whatever the reason) would relieve AMSA from the obligation of making these payments.
>
> 663. The Tribunal does not accept CCG's arguments in relation to unjust enrichment and penalties. In relation to unjust enrichment AMSA's right to withhold payment of these sums is expressly provided for in MOU2, and is a contractual right which it is fully entitled to exercise; there is nothing unconscionable about the exercise of that right.
>
> 664. The law relating to penalties applies to amounts due for a breach of contract. These provisions in MOU2 do not set amounts for breach of contract but for compliance with the Contract, as amended by MOU2. The law relating to penalties is therefore irrelevant.
>
> 665. The Tribunal finds that CCG's claim in respect of tranche payments fails and is dismissed.

[146] For an arbitral award to be set aside as being contrary to public policy, it must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario or evidence intolerable ignorance or corruption on the part of the arbitral tribunal. There is, therefore, a question whether, even if the Tribunal's Award on this issue constituted double recovery, such an award would meet the judicial test for setting aside an arbitral award based on public policy.

[147] The issue engaged in this case is less one of law or principle but more one of fact: does the combined effect of the award of liquidated damages and the denial of the tranche or "bonus" payments for timely completion constitute double recovery? In my view, it does not.

[148] I essentially agree with the Tribunal's analysis of this issue. The tranche payments are not damages for breach of contract. They are incentive payments to promote timely completion. Failure to meet the milestones relieves AMSA of the obligation to pay the two tranche payments. By contrast, liquidated damages for failure to complete the project by March 31, 2010 are a pre-assessment of AMSA's damages for CCG's breach of contract.

[149] The liquidated damages provisions and the forfeiture of the tranche payments provisions of the Agreement are meant to achieve separate ends and perform different functions in the

Agreement. The mere fact that both are triggered by the same, or a similar, event does not mean that they represent "double recovery."

[150] If there is no double recovery, there cannot possibly be any breach of Ontario's public policy. Accordingly, there being no double recovery, the application to set aside to the Award on the basis that it offends Ontario public policy is dismissed.

An Award "May" Be Set Aside: Article 34(2)

[151] Article 34(2) begins with the phrase "an arbitral award may be set aside by the Court… only if…" AMSA argues that, even if the court were to find that one or more of the three grounds relied on to set aside the award (jurisdiction, due process and public policy) had been met, it remains within the court's discretion to uphold the Award. This is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.

[152] CCG, while acknowledging that there is some discretion, argues that the exercise of this discretion is limited to "exceptional circumstances." CCG relies on the decision of the UK Supreme Court in *Dallah Real Estate and Tourism Holding Co v. Ministry of religious Affairs of the Government of Pakistan,* [2011] 1 AC 763. The Supreme Court held, at para 79, that the discretion not to set aside, even if grounds to do so are established, is a narrow one "to enable the court to consider other circumstances, which might on some recognizable legal principle effect the *prima facie* right to have an award set aside" under the applicable statutory grounds. As will be discussed in more detail below, it is relevant to note that *Dallah* involved a question of "true jurisdiction" in the sense that the party seeking to set the award aside was not a party to, and had never submitted to, the arbitration agreement in issue.

[153] The governing case in Ontario is the decision of the Court of Appeal for Ontario in *Popack v. Lipszyc*, 2016 ONCA 857. The court found that there was no "bright line rule" in the cases addressing the nature of the discretion in Article 34(2). The scope of the discretion is significantly affected by the specific ground upon which the award *could* be set aside. For example, the court thought it was self-evident that if a party established that there were was no valid arbitration agreement (as in *Dallah, supra*), a judge would have considerably less discretion to uphold the award than if the error lay in the tribunal's failure to comply with a specific procedural provision in the course of an otherwise proper arbitration *Popack, supra*, at (para 30).

[154] It would be inconsistent with the intention of the legislature and the current jurisprudential trend in favour of maintaining arbitral awards to treat every breach of applicable procedure, however minor or inconsequential, as requiring the court to refuse to set aside an award if so requested. It is necessary to balance the nature of the breach in the context of the arbitral process, determine whether the breaches are of such a nature as to undermine the integrity of the process and assess the extent to which the breach had any bearing on the award itself *Popack, supra* at (para 31).

[155] The Court of Appeal relied on a decision of the New Zealand Court of Appeal in *Kyburn Investments Limited v. Beca Corporate Holdings Limited*, [2015] NZCZ 290. In *Kyburn*, the court said that the discretion under Article 34 must be exercised in accordance with the purposes and policy of the Act which emphasize the finality of arbitral awards and reduce the scope for curial intervention in accordance with the intentions of the parties.

[156] The NZCA held that no single factor is decisive. Sometimes the breach will be sufficiently serious as to speak for itself but in other cases the court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Another factor relevant to the exercise of the discretion is the likely cost of holding a rehearing.

[157] The Federal Court of Australia has also taken an approach that balances a broad array of factors in deciding whether to set aside an arbitration award on account of procedural errors. That court identified the purpose of the discretion in Article 34(2) as the prevention of "real unfairness" and "real practical injustice" flowing from the failure to conduct the proceedings in accordance with the proper procedure: *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty. Ltd.*, [2014] FCAFC 83

[158] In *Popack,* the Court of Appeal ultimately approved four factors considered by the application judge (whom they upheld) in deciding to exercise her discretion and not set the award aside even though there had been a breach of natural justice contrary to Ontario public policy. These were:

(1) the nature of the ground upon which the award might be set aside (jurisdiction, procedural fairness, public policy etc.);

(2) the seriousness of the breach;

(3) the potential impact of that breach on the result; and

(4) potential prejudice flowing from the need to redo the arbitration if the award is set aside.

[159] In this case, jurisdiction, procedural fairness and public policy have all been engaged. I have concluded that, in each instance, the applicant has not furnished sufficient proof to establish that the Tribunal had no jurisdiction, denied CCG the opportunity to present its case or made an award that is contrary to Ontario public policy.

[160] However, even if I had been prepared to agree with the applicant that sufficient grounds had been established on any of these grounds, I would have exercised my discretion under Article 34(2) and declined to set the Award aside, with one possible exception.

[161] Any excess of jurisdiction concerning AMSA's environmental counterclaims arose from a procedural condition precedent. The applicant had a full opportunity to present its defence to

these claims. Further, there is no evidence that this technical jurisdictional issue had any prospect of affecting the ultimate outcome in the circumstances.

[162] Any failure of procedural fairness was, in my view, also somewhat narrow and technical in nature. In the context of this arbitration as a whole, the alleged procedural shortcomings were simply not that serious. Again, there also seems to be little likelihood that these relatively minor procedural matters, even if they met the test under Article 34(2), would have affected the outcome.

[163] Given the cost to the parties of the lengthy arbitration they conducted, weighed against the value of the points truly in issue, it would also be highly prejudicial to both sides to set aside the Award.

[164] The one possible exception is the alleged double recovery/public policy issue. Had I agreed with the applicant: a) that there was double recovery; and b) that the double recovery met the necessary threshold to be found contrary to Ontario public policy, I would have wanted to explore with the parties whether Article 34(2) permitted the court to set aside only that part of the award: see UNCITRAL 2012 Digest of Case Law on the Model Law of International Commercial Arbitration, United Nations, New York, 2012, at p 141, para 31.

Costs

[165] Both parties submitted Bills of Costs following argument of the application. CCG sought $293,000 if it was successful. AMSA sought $136,000 if it was successful. Because the application was dismissed, AMSA is entitled to its costs. I find the partial indemnity amount of $136,000 to be in keeping with the factors outlined in Rule 57, and that amount is so awarded.

Penny J.

Released: November 28, 2016

CITATION: Consolidated v. Ambatovy, 2016 ONSC 7171
COURT FILE NO.: CV-11386-00CL
DATE: 20161128

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Consolidated Contractors Group S.A.L. (Offshore)

Applicant

– and –

Ambatovy Minerals S.A.

Respondent

REASONS FOR JUDGMENT

Penny J.

Released: November 28, 2016