Quarella SpA
v
Scelta Marble Australia Pty Ltd

[2012] SGHC 166

High Court — Originating Summons No 122 of 2012
Judith Prakash J
27 June 2012

Arbitration — Award – Recourse against Award — Setting Aside

14 August 2012

Judith Prakash J:

Introduction

1 I had before me an application to set aside two arbitration awards made in an international arbitration conducted under the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"). The first award dealt substantively with the dispute whilst the second dealt with costs.

2 The central issue the plaintiff, Quarella SpA ("Quarella"), wanted me to decide was this: Does a purportedly wrong interpretation of the choice of law clause (chosen by the parties to govern their distributorship agreement) by a tribunal justify a setting aside of an award under Articles 34(2)(a)(iii)-34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law")? The basis of the plaintiff's application was

that the tribunal had failed to apply the rules of law that were agreed upon by the parties to govern the merits of the dispute.

3 In its Originating Summons, Quarella had also alleged that the rules of natural justice were breached in connection with the making of the first award and that its rights had been prejudiced thereby. This ground for setting aside the first award was, however, abandoned at the start of the hearing.

4 At the conclusion of the hearing I dismissed the application. I now set out my grounds.

Facts

Parties to the dispute

5 Quarella is a company incorporated in Italy which manufactures and exports composite stone products.

6 The defendant, Scelta Marble Australia Pty Ltd ("Scelta"), is a company incorporated in Australia which supplies composite stone products in Australia.

7 In the proceedings before me, the President of Quarella, Giuseppe Godi ("Mr Godi"), filed two affidavits. The Managing Director of Scelta, Stewart Macciolli ("Mr Macciolli"), filed one affidavit. There was also a legal opinion from Professor Marco Torsello, a professor at the Department of Law of the University of Verona in Italy.

Background to the dispute

8 Quarella and Scelta entered into a distributorship agreement ("the Agreement") dated 27 January 2000 for the distribution of Quarella's products in Australia. The Agreement provided, *inter alia*:

> Clause 25
>
> This Agreement shall be governed by the Uniform Law for International Sales under the United Nations Convention of April 11, 1980 (Vienna) and where not applicable by Italian law.
>
> Clause 26
>
> Any dispute which might arise shall be decided by arbitration to be carried out in Singapore in English according to the rules of the International Chamber of Commerce of Paris.

9 A dispute subsequently arose. Scelta filed a Request for Arbitration dated 19 October 2009 with the Paris Secretariat of the International Chamber of Commerce ("ICC") International Court of Arbitration.

10 On 10 December 2009, Associate Professor Gary F Bell was nominated jointly by Quarella and Scelta to be the sole arbitrator. On 17 February 2010, the Secretary General of the ICC International Court of Arbitration, pursuant to Article 9(2) of the ICC Rules of Arbitration, confirmed Associate Professor Gary Bell as the sole arbitrator ("the Tribunal"). The parties and the Tribunal subsequently agreed on the Terms of Reference.

11 On 11 November 2011, the Tribunal issued a Partial Award on All Substantive Issues in Dispute (Final as to All Matters Except Costs) ("the Award"). The Award was in Scelta's favour and Quarella was ordered to, *inter alia*, pay A$1,075,964.25 to Scelta as damages for Quarella's wrongful

termination and breach of the Agreement. On 22 December 2011, the Tribunal issued a Final Award (on Costs) ("the Costs Award") which awarded Scelta costs fixed at A$824,917.50.

12 As at the date of the hearing before me, Quarella had not made any payment towards settlement of the Award or the Costs Award. Scelta was attempting to enforce the Award in Italy but this attempt was resisted by Quarella on the basis that it was seeking to set aside the Award in Singapore, the supervisory jurisdiction.

The Tribunal's decision on the applicable law

13 The question as to what the law applicable to the arbitration was, did not at first appear to be in doubt. Scelta took the position that Italian law applied rather than the Uniform Law for International Sales ("CISG") under the 1980 UN Vienna Convention and Quarella seemed to agree. In Quarella's Answer to the Request for Arbitration, it stated:

> In fact the [CISG] has a limited application, as it does not govern expressly distributorship agreements, which is a framework agreement, but the sales to which it refers to. In this arbitration therefore we shall mostly refer to (and rely on) Italian law.

14 Scelta pointed out in its submissions that Quarella had, from a very early stage of the arbitration, accepted that Italian law was the law applicable to the merits of the dispute. Scelta argued that it was clear from the excerpt that Quarella considered and accepted that the CISG did not apply to the Agreement, which was described as a "Distributorship Agreement". Scelta also argued that Quarella exclusively referred to and relied on Italian law in its subsequent submissions.

15 But Quarella changed its stand. In a letter dated 15 April 2011, Quarella's Australian solicitors, Baker & McKenzie stated:

> Clause 25 of the Agreement constitutes a direct choice by the parties of CISG as the "rules of law" to determine the dispute between the parties pursuant to Article 28 of the Model Law.
>
> By virtue of that agreement between the parties, relevant provisions of CISG (including Articles 7-8 and Articles 74 and 77) apply consistently with the parties' express choice of CISG as the primary rules of law applicable to the [Agreement].

16 This change of position took place three weeks before the re-scheduled hearing of the arbitration. As a result, Scelta objected to Quarella raising the application of the CISG at such a late stage in the arbitration proceedings.

17 The Tribunal decided three preliminary issues prior to determining the main issue of whether the CISG applied to the Agreement.

18 The first was whether arguments that the CISG applied should be heard at such a late stage. On this, the Tribunal allowed Quarella to raise the new argument on the applicable law and gave Scelta an opportunity to reply.

19 The second preliminary issue was whether the agreement of the parties on the applicable law found in Clause 25 of the Agreement was modified by mutual agreement so that the CISG did not apply. On this, the Tribunal found that there was no modification of Clause 25 to completely exclude the application of the CISG.

20 The third preliminary issue was whether Clause 25 of the Agreement should be interpreted as a direct choice of the substantive rules of the CISG by the parties so that the CISG applied even if the conditions for the application of the CISG stated in the CISG were not met. On this, the Tribunal decided

that the correct interpretation of Clause 25 was that the parties intended the CISG to apply to the extent that the CISG was applicable according to its own rules on applicability, and if it did not apply in part or in whole, then Italian law applied.

21 Having decided the above, the Tribunal then considered the issue of whether the CISG, according to its own internal criteria, applied to the Agreement. On this, the Tribunal decided that the CISG was not applicable because the Agreement did not contain a contract of sale but was a framework agreement.

Quarella's case

22 Quarella's counsel, Mr Ang Wee Tiong ("Mr Ang") submitted that the Tribunal's decision on the applicable law was wrong, and that the Tribunal failed to apply the law chosen by the parties. Quarella's submission on this contained three points. First, Quarella noted that by cl 26 of the Agreement, the parties had agreed that:

> Any dispute which might arise shall be decided by arbitration to be carried out in Singapore in English according to the rules of the International Chamber of Commerce of Paris.

Quarella pointed out that Art 17 of the ICC Rules provides that:

> The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.

23 Quarella then went on to argue that the option given to parties was not limited to the election of a national law, and that parties could also use a different set of rules, including otherwise non-binding principles (such as the

UNIDROIT Principles of International Commercial Contracts), or otherwise non-applicable conventions, such as the CISG in cases where it would not apply on the basis of the rules on its applicability.

24 Second, Quarella submitted that it was a well established principle of contractual interpretation that a construction which entailed that a contract and its performance was lawful and effective was to be preferred, and referred to *Sheng Siong Supermarket Pte Ltd v Carilla Pte Ltd* [2011] 4 SLR 1094 at [40]. Quarella argued that the Tribunal had, in deciding that the CISG was not applicable because the Agreement did not contain a contract of sale but was instead a framework agreement, deprived Clause 25 of any effect.

25 Third, Quarella argued that Italian law was to be used to supplement the CISG when there was a lacuna, and was not intended to replace the CISG.

26 These three arguments appeared to me to be arguments that invited this court to review the merits of the Award and come to a different conclusion from that of the Tribunal. Professor Torsello's instructions, given to him by Quarella, also sought answers that went to the findings of the Tribunal. In his affidavit, Professor Torsello stated:

> I have been asked by the Plaintiff to consider and give my opinion on the following issues:
>
> > (a) Whether the Tribunal's finding on the issue of the applicable law is correct.
> >
> > (b) If the Tribunal's finding is incorrect, what provision(s) of the CISG could and should have been applicable to the Agreement.
> >
> > (c) What difference(s) would it have made to the Partial Award if the provision(s) of the CISG had been applied by the Tribunal instead of Italian law.

27 Assuming Professor Torsello is correct in his opinion (on which I make no comment), and the Tribunal has erred, there can be no right of appeal against such errors, independent of the Act (see, *Sui Southern Gas Company Ltd v Habibullah Coastal Power Company (Pte) Ltd* [2010] 3 SLR 1 at [19]-[22], applying the Court of Appeal's decisions in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") and *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86). Mr Ang, in oral submissions before me, accepted that an error of law was not a ground for setting aside. However, he also submitted that the application of the wrong law was a distinct situation.

Scelta's case

28 Scelta's counsel, Mr Cavinder Bull SC ("Mr Bull"), submitted that the arguments put forward by Quarella were not being advanced with any real seriousness. In addition, Mr Maciolli stated in his affidavit that Quarella was in a precarious financial position (an allegation Mr Godi described as misconceived) and the present application was an attempt to frustrate Scelta's enforcement of the Award.

29 Mr Bull argued that:

(a) The Tribunal applied the correct substantive law;

(b) Even if the Tribunal was wrong to apply Italian law rather than the CISG to the merits of the dispute, this was not a ground for setting aside the Award under Article 34(2)(a)(iv) of the Model Law;

(c) It was not a ground for setting aside the Award under Article 34(2)(a)(iii) of the Model Law to allege that the Tribunal applied the wrong substantive law.

30 I now turn to deal with the parties' arguments as they relate to the relevant Articles of the Model Law.

Should the Award be set aside under Article 34(2)(a)(iv) of the Model Law?

The relevant Article

31 Article 34(2)(a)(iv) of the Model Law states:

> **Article 34. — Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (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:
>
> …
>
> (iv)the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law;
>
> …

Quarella's argument

32 Quarella's argument here was that by failing to apply the CISG and by applying Italian law, the Tribunal had failed to comply with Article 17 of the ICC Rules and therefore the arbitral procedure was not in accordance with the agreement of the parties.

Scelta's argument

33 Scelta submitted that Quarella's argument was wrong. In support, Scelta cited a passage from Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2009) ("*Born*"):

> *Most national courts have rejected arguments that the arbitrators failed to comply with the parties' arbitration agreement by applying the "wrong" substantive law. This includes instances where arbitrators allegedly apply a substantive law other than that chosen by the parties.* Save where an arbitrator *expressly refuses* to give effect to a concededly valid choice-of-law clause, and instead applies some other legal system, an award's disposition of choice-of-law issues fall within the arbitrators' mandate to decide the substance of the parties' dispute and is subject to the same (generally very-limited or non-existent) judicial review that exists for other substantive decisions.
>
> [emphasis added]

Analysis

34 In discussing Article 17 of the ICC Rules, Yves Derains and Eric A. Schwartz in *A Guide to the ICC Rules of Arbitration* (Kluwer Law International, 2nd ed, 2005) ("*Derains and Schwartz*") state:

> **Party agreement**
>
> The freedom of the parties to choose the law to be applied to the merits of the dispute is widely accepted.
>
> …

> Thus, the Arbitral Tribunal does not ordinarily have to assess whether the parties' choice as regards the applicable law is well founded or has any particular connection with the subject matter of the dispute. *It has only to respect it.*
>
> [emphasis added]

35 A footnote to the paragraph excerpted above reads:

> In the event that the Arbitral Tribunal *fails* to apply the law chosen by the parties, there may be a risk, at least in some jurisdictions, that the Award will be set aside. Indeed, this occurred in a non-ICC arbitration in Egypt upon an Egyptian court's finding that the Arbitral Tribunal had failed to apply the law agreed by the parties, as required by Egyptian law (an adapted version of the UNCITRAL Model Law). *See In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices and the Arab Republic of Egypt,* 939 F. Supp. 907 (D.D.C 1996). However, this would not necessarily be the case in other jurisdictions.
>
> …
>
> [emphasis added]

36 The case cited in the footnote was discussed in Craig, Park, Paulsson, *International Chamber of Commerce Arbitration* (Oxford University Press, 3rd ed, 2000) ("*Craig, Park, Paulsson*"):

> Thus, Article 53(1) of Egypt's 1994 Law on Arbitration contains the two following uniquely local grounds for the annulment of awards in addition to those of Article 34 of the Model Law:
>
> > (d) if the arbitral award fails to apply the law agreed by the parties to the subject matter of the dispute;
> >
> > …
> >
> > (g) if nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award.
>
> *This kind of tampering was bound to lead to trouble, and so it did: in the now-infamous Chromalloy case in which the Cairo Court of Appeal set aside an ICC award on the basis of paragraph (d).* To reach this result, the Court first determined that the contract properly fell under the category of

> administrative contracts, and that therefore the contractual reference to "Egypt Law" (sic) should be understood as an acceptance of the exclusive application of Egyptian administrative law. The arbitral tribunal had instead applied the Egyptian Civil Code. *It had thus failed, in the Court's opinion, to apply the law agreed by the parties, and therefore run afoul of Article 53(1)(d).* American and French courts, asked to enforce the award notwithstanding the Egyptian annulment, granted the applications, holding that the Egyptian court judgment did not impair the award for the purposes of the enforcement forum.
>
> …
>
> [emphasis added]

37 Several points can be made from the excerpts cited. First, with respect to the *Chromalloy* case cited in *Derains and Schwartz* and *Craig, Park, Paulsson*, there is no equivalent to Article 53(1)(d) in Singapore's arbitration law. Second, the learned authors of *Born* and *Craig, Park, Paulsson* and *Derains and Schwartz* use the words "fails to apply", "express refusal [to apply]", and "respect [the choice of the applicable law]". The facts of the present case did not take it within the situation referred to by the learned authors where there is a failure to apply the choice of law clause or an express refusal to apply the said clause. The Tribunal in this case respected the choice of law clause chosen by the parties, interpreted the law so chosen and came to the conclusion that the CISG did not apply and Italian law applied. In the Award, the Tribunal took pains to explain the process by which he derived the applicable law. I set out the relevant portions of the Award (at [42] – [53] of the Award):

> **The applicable law**
>
> Article 17 of the ICC Rules states:
>
> "*The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.*"

As mentioned above, the Contract contains the following choice of law clause:

"*25. This Agreement shall be governed by the Uniform Law for International Sales under the United Nations Convention of April 11, 1980 (Vienna) and where not applicable by Italian law.*"

It is not contested by the parties that the full and exact name of the Convention referred to in clause 25 of the Contract is the "*United Nations Convention on Contracts for the International Sale of Goods*" signed in Vienna on 11 April 1980 and commonly known in English as the CISG [hereinafter: the CISG].

On page 3 of its Answer to the Request for Arbitration the Respondent wrote: "In fact the [CISG] has a limited application, as it does not govern expressly distributorship agreements, which is a framework agreement, but the sales to which it refers to [sic]. In this arbitration therefore we shall mostly refer to (and rely on) Italian law."

Both the Claimant and, more importantly, the Respondent then proceeded to argue their case in their Memoranda and Replies on the basis of Italian law without any reference whatsoever to the CISG.

The Respondent even provided an expert witness on Italian law who addressed the issue of good faith, termination, damages and mitigation under Italian law without ever mentioning the same issue under the CISG (which is part of Italian law).

[Witness statement of Franco Vicario, 20 December 2010, Respondent's documents no R-VII]

However, on 15 April 2011, only 24 days before the rescheduled hearing, and well after the hearing originally scheduled for February 2011, counsel for the Respondent informed the Tribunal and the Claimant by letter that they intended to argue that the CISG, and in particular its articles 7, 8, 74 and 77, applied.

This letter therefore came after counsel for the Respondent had based its argument in its Memorandum and its Reply on the fact that Italian law was the governing law and that Italian law governed the issue of good faith (counsel had not argued article 7 of the CISG), the interpretation of contract (counsel had not argued article 8 of the CISG), the issue of damages (counsel had not argued article 74 of the CISG) and of mitigation (counsel had not argued article 77 of the CISG).

> The Claimant objected to the introduction of arguments that the CISG applies at the late stage of the proceedings, first in a letter dated 3 May 2011 and then again on the first day of the hearing.
>
> At the hearing, the Tribunal heard arguments on, and decided three preliminary matters with respect to the possible application of the CISG, namely:
>
> > a. Whether arguments that the CISG applies should even be heard at such a late stage.
> >
> > b. Whether the agreement of the parties on the applicable law found in Clause 25 of the contract was modified by mutual agreement so that the CISG did not apply.
> >
> > c. Whether Clause 25 of the Contract should be interpreted as a direct choice of the substantive rules of the CISG by the parties so that the CISG applies even if the conditions for the application of the CISG stated in the CISG are not met.
>
> After deciding these preliminary issues, the Tribunal heard the parties at the hearing on the main issue of whether the CISG applied to the Contract and reserved its decision.
>
> The Tribunal will first briefly restate its decisions and reasons on the three preliminary issues and will then decide on the main issue.

38 The Tribunal decided the third preliminary issue as such (at [61]-[72],[74]):

> The Respondent suggested that the CISG was applicable "not because it has been incorporated as part of Italian law. Rather, it applies because that is what the parties have explicitly instructed the arbitral Tribunal to apply […]"
>
> [Respondent's Opening Submissions on the Vienna Convention dated 9 May 2011 at paragraph 11]
>
> The Respondent seemed to suggest that the rules on the applicability of the CISG are not relevant because clause 25 should be interpreted as a direct choice of rules; i.e. that the substantive rules of the CISG would be applicable even if the CISG rules on its own applicability would indicate that the CISG does not apply, for example, to distribution agreements generally.

To put it differently, even though article 1(1) of the CISG says that it applies only "to contracts of sale of goods", the Respondent argues that clause 25 of the Contract should be interpreted as a choice by the parties to apply the substantive rules of the CISG even to a contract other than a contract of sale, i.e. a distribution agreement, notwithstanding the rules of application found in the CISG.

There remains however that the clause 25 also states that the Contract is governed by the CISG "***and where not applicable*** *by Italian law*" so we do have to decide when the CISG is applicable and when it is not.

The Respondent suggested that we should not look at the rules on applicability found in the CISG to decide when the CISG applies. The Respondent did not however explain fully what the criteria should be to decide when the CISG does not apply and Italian law applies. In one example, the Respondent suggested that the rules governing the termination of contract found in the CISG "sit too awkwardly with a contract of the kind like the Distribution Agreement".

[Respondent's Opening Submissions on the Vienna Convention dated 9 May 2011 at paragraph 17]

Awkwardness does not seem to be a reliable or workable criterion to decide when the CISG does or does not apply, and the Tribunal does not believe that this was what the parties had in mind when they agreed to clause 25.

In fact, at the opening of the hearing the Respondent contended that articles 7, 8, 74 to 78 of the CISG applied but did not explain why they applied and all the other articles of the CISG did not apply.

[Respondent's Opening Submissions on the Vienna Convention dated 9 May 2011 at paragraph 17]

The Tribunal also notes that beside saying that these particular articles apply, counsel for the Respondent limited their argument to a few general paragraphs in their Opening Submissions on the CISG and did not explain the effect of article 8, 74 to 78 on the facts in dispute. In fact the Respondent argued that "Italian principles of damages law are substantially identical to the principles of damages law embodied in article 74 and 77 of the [CISG]".

[Paragraph 18 of the Respondent's Opening Submissions on The Vienna Convention dated 9 May 2011]

> It therefore seems that the Respondent is of the view that these particular articles made no different on damages.
>
> The only point that the Respondent seems to want to take from the CISG is the fact that according to some authors and decisions, article 7 of the CISG does not contain as liberal a concept of good faith as Italian law does.
>
> Therefore it seems to be the position of the Respondent that articles 8 and 74 to 78 of the CISG apply but that most of them are identical to Italian law, but article 7 of the CISG also applies and it enforces a much more limited concept of good faith than the one found in Italian law.
>
> The Tribunal finds that the Respondent has failed to explain why all the other provisions of the CISG either do not apply or make no difference, except for that one provision of the CISG, article 7, and that provision alone. This selective approach looks like an exercise in cherry picking. No clear explanation was given by the Respondent for when the CISG applies and when it does not apply.
>
> …
>
> At the hearing on 11 May 2011, the Tribunal decided that, as a matter of contractual interpretation, the correct interpretation of clause 25 of the Contract was that the parties had intended the CISG to apply to the extend that the CISG is applicable according to its own rules on applicability, and if it did not apply in part or in whole, then Italian law applied.
>
> [emphasis in original]

39 The Tribunal then went on, in the next 31 paragraphs of the Award, to set out the reason as to why the decision was made that the CISG was not applicable; in the Tribunal's opinion the Agreement did not contain a contract of sale but was a mere framework agreement.

40 Accordingly, the Tribunal did, pursuant to Article 17 of the ICC Rules, *respect* the choice of law clause set out in the contract. Parties did agree on the rules of law to be applied to the dispute, and the Tribunal did apply the chosen rules of law to the dispute. The real point of dispute was that Quarella considered that the Tribunal applied the chosen law wrongly. That dispute was

not one that engaged Article 34(2)(a)(iv) of the Model Law. Accordingly, I declined to set aside the Award under Article 34(2)(a)(iv) of the Model Law.

Should the Award be set aside under Article 34(2)(a)(iii) of the Model Law?

The relevant Article

41 Article 34(2)(a)(iii) of the Model Law states:

> **Article 34. — Application for setting aside as exclusive recourse against arbitral award**
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (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;

Quarella's arguments

42 Quarella's arguments in support of this ground were scant and lacking in substance. It began by setting out the text of Article 34(2)(a)(iii). Following that, Quarella cited a passage from an article entitled *Getting to the Law*

Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong by Linda Silberman and Franco Ferrari ("the Ferrari/Silberman article"), which read:

> We think that the arbitrators have in fact "exceeded their powers" or gone beyond the "scope of submission to arbitration" where an express choice of law has been included by the parties to govern the merits of their dispute and the arbitrators apply another law or fail to apply the law chosen.

43 Quarella acknowledged that the passage was written in the context of Article V(1)(c) of the New York Convention, but asserted that the words used in Article V(1)(c) are *in pari materia* with the words in Article 34(2)(a)(iii) of the Model Law. Accordingly, it submitted, the Tribunal, in applying Italian law (which was not the law expressly chosen by the parties) had gone beyond the scope of submission to arbitration. The entire written submission on this argument was made up of four short and underdeveloped paragraphs.

44 This was not a particularly novel argument. In *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 St. John's L. Rev. 59, Cindy Buys states (at 69-72):

> The contractual nature of arbitration serves to distinguish it from litigation. Unlike judges, who are appointed or elected by law, arbitrators are appointed by the private agreement of the parties, and their allegiance should be to seeing that the terms of that private agreement are carried out. The arbitrator's duty to respect the wishes of the parties as expressed in their written agreement extends to respect for the parties' choice of law in a commercial transaction.
>
> …
>
> Absent overriding public policy considerations, reviewing courts also should respect party autonomy pursuant to two well-established doctrines. First, respecting party autonomy in arbitration furthers the federal policy in favor of arbitration as reflected in the FAA. As stated above, the FAA creates the right to have the arbitration proceed in accordance with the parties'

> wishes. If the parties know that courts will uphold arbitration awards that are made in accordance with the parties' wishes, the parties will be even more likely to resort to arbitration as an alternative means of dispute resolution. Routine respect for the parties' agreement makes the process more certain and predictable, thus allowing business persons to better plan their business and legal dealings and relationships.
>
> Second, respecting the agreement of the parties is consistent with the general policy favoring freedom of contract. When courts are deciding disputes arising out of contractual relationships, the intent of the parties is generally controlling. Likewise, an arbitral tribunal is bound to effectuate the intent of the parties. *These same principles should be applied to require enforcement of contractual provisions reflecting the choice of law made by the parties. Thus, if a court is reviewing an arbitral award where the arbitrators have failed to respect the parties' choice of law, the court should vacate that award because the arbitrators have exceeded their powers.*
>
> [emphasis added]

45 And in a footnote to the last sentence of the excerpt, Buys states:

> The FAA provides that one of the grounds for vacation of an arbitral award is "[w]here the arbitrators exceeded their powers." 9 U.S.C. § 10(a)(4). Despite this language, at least one scholar, Thomas Carbonneau, suggested that arbitrators have certain inherent authority implied by their designation as arbitrators to manage and conduct the proceedings and that this authority may include the power to overrule the parties' choice of law in the "best interests of the process." See Thomas E. Carbonneau, The Ballad of Transborder Arbitration, 56 Miami L. Rev. 773, 814, 820-21 (2002). He argued that in choosing arbitration, the parties bargained for a "workable process" in exchange for placing "enormous authority and trust in the arbitrator." Id. at 815. While it is true that arbitrators are vested with certain inherent authority to manage the arbitral process, this author believes that the arbitrators' inherent authority is limited to matters that the parties have not expressly agreed upon, i.e., to fill in gaps. Where the parties have expressly bargained for and agreed upon a contractual term, the arbitrator lacks the power to *overrule* the parties' agreement.
>
> [emphasis added]

Scelta's arguments

46 Scelta argued that, in reality, what Quarella was saying was that the Tribunal made the wrong decision and fell into error. Scelta also argued that the Tribunal did not decide matters beyond its ambit of reference; the Tribunal was *specifically asked* by Quarella to decide on the applicability of the CISG.

47 Scelta also cited two passages from *Born*, the first of which read:

> … a considerable measure of judicial deference is accorded the arbitrators' interpretation of the scope of their mandate under the parties' submissions.
>
> *Courts are particularly unwilling to accept arguments that, by ignoring or refusing to give effect to the terms of the parties' underlying contract, the tribunal exceeded its authority. It is typically held that such arguments amount to an effort to obtain judicial review of the merits of the tribunal's decision; as such, these efforts do not constitute an excess of authority and instead, at most, involve an allegedly incorrect decision in the exercise of such authority.*
>
> [emphasis added]

48 The paragraph which followed (which was not cited) read:

> This was reflected in a recent decision in *Lesotho Highlands Development Authority v. Impregilo SpA*, where the House of Lords rejected the argument that an arbitral tribunal's application of English law, rather than the terms of the parties' contract, constituted an excess of authority which permitted annulment of its award under s 68 of the Act. Lord Steyn declared that "nowhere in s 68 is there any hint that a failure by the tribunal to arrive at the 'correct decision' could afford a ground for challenge under s 68." While this view is both clearly correct and representative of most decisions, national courts are nonetheless sometimes persuaded – wrongly – to treat arguable errors of law as an excess of authority.

49 The second passage cited by Scelta read:

> *Neither the New York Convention nor most developed arbitration statutes expressly permit non-recognition of an arbitral award because the arbitrators erred in their choice-of-law analysis.* Rather, as noted above, and in the absence of a choice of law agreement, the arbitrators' choice-of-law decisions are subsumed within their rulings on the merits of the parties' dispute, and thus subject to the general presumption in favour of recognition under the Convention and most developed arbitration legislation. *Thus, except where statutory protections or public policy issues are involved, judicial review of the arbitrators' choice-of-law decisions concerning the substantive law applicable to the merits of the parties' dispute is usually minimal in developed national courts, both in common law and civil law jurisdictions.*
>
> [emphasis added]

Analysis

50 I turn to explain why the setting aside application under s 34(2)(a)(iii) was misconceived.

A discussion of Article 34(2)(a)(iii)

51 In *PT Asuransi*, the Court of Appeal said, in discussing Article 34(2)(a)(iii) (at [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]

52 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 ("*Persero*"), the Court of Appeal set out the law relating to Article 34(2)(a)(iii) of the Model Law (at [30]-[33]):

> In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597, this court held (at [44]) that the court had to adopt a two-stage enquiry in assessing whether an arbitral award ought to be set aside under Art 34(2)(a)(iii) of the Model Law. Specifically, it had to determine:
>
> > (a) first, what matters were within the scope of submission to the arbitral tribunal; and
> >
> > (b) second, whether the arbitral award involved such matters, or whether it involved "a new difference ... outside the scope of the submission to arbitration and accordingly ... irrelevant to the issues requiring determination" [emphasis in original] (at [40]).
>
> It is useful, at this juncture, to set out some of the legal principles underlying the application of Art 34(2)(a)(iii) of the Model Law. First, Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. *Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it.* In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it (see Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606-2607 and 2798-2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (see Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("Singapore Arbitration Legislation") at p 117).
>
> Second, it must be noted that a failure by an arbitral tribunal to deal with every issue referred to it will not ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in Redfern and Hunter ([27] supra at para 10.40) correctly summarises the position:
>
> > The significance of the issues that were not dealt with has to be considered in relation to the award as a

> whole. For example, it is not difficult to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. [emphasis added]

> *Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law* (see *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]-[22]). In the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (see s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]-[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under s 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. In a similar vein, Art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (see above at [31]).
>
> [emphasis added]

53 The first and third principles are what I applied to this case. With regard to the first principle, on the facts before me, this was not a case where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. The issue of the applicable law was submitted to the Tribunal; the Award addressed this explicitly (at [48] of the Award). The Tribunal did decide the matters that were submitted to it.

54 With regard to the third principle, besides examining the guidance set out by the Court of Appeal in the excerpts above, Quarella would not have had to venture too far to find literature that would have indicated that the prospects of it succeeding in the setting aside application on this ground were dim. A recently published monograph by Chan Leng Sun, *Singapore Law on Arbitral Awards* (Academy Publishing, 2011) states (at para 6.127):

> An issue that is within the scope of submission to arbitration does not go outside the scope simply because the arbitral tribunal comes to a wrong conclusion on it. Unless the award contained decisions beyond the scope of the arbitration agreement, an error in interpreting the contract does not permit setting aside under Article 34(2)(a)(iii) of the Model Law 1985. *Neither would an argument that the tribunal applied the wrong governing law constitute a ground for setting aside an award.*
>
> [emphasis added]

55 Quarella's attempt to set aside the Award under 34(2)(a)(iii) was based entirely on a disagreement with the interpretation the Tribunal took regarding the choice of law clause. The dispute was not one that engaged Article 34(2)(a)(iii) of the Model Law.

56 Whilst it is not strictly necessary for me to do so, I would like to explain why the Ferrari/Silberman article did not assist Quarella.

57 From a reading of the whole article, it is apparent that the article was making a proposal, as was stated in the heading to the concluding section. The article was not stating the current legal position. It was also conceded by the authors that the suggested position was based less on case law than on policy or views from commentators. Further, the article refers to the *deliberate disregard or the ignoring by the arbitrator* of the choice of law clause agreed on by the parties. It is even made clear on more than one occasion that cases of

that nature *should be distinguished* from situations where the arbitrators applied the applicable law incorrectly.

58 It would appear that the arguments in the Ferrari/Silberman article were similar to those put forward earlier under s 34(2)(a)(iv), albeit under a different subsection of the same Article in the Model Law. In response to the arguments, I found that the Tribunal here did not deliberately disregard or ignore or overrule the parties' choice of law clause. It did not fail to honour (or in the words of Buys, fail to respect) the choice of law clause set out by the parties. Accordingly, Quarella failed to convince me that I should set aside the Award pursuant to Article 34(2)(a)(iii).

59 For completeness, Quarella, having failed to convince me to set aside the Award, also failed to convince me that the Costs Award should be set aside.

Judith Prakash
Judge

Ang Wee Tiong (Chris Chong & CT Ho Partnership) for the plaintiff;
Cavinder Bull SC, Woo Shu Yan and Colin Liew (Drew & Napier LLC) for the defendant.