

THE ARBITRATION AWARD

(a talk for IEM members)

By

IR. DR. WONG FOOK KEONG

*B.Sc. (Civil, Strathclyde), Ph.D.(Civil/Mining & Applied geology, Strathclyde)
P.Eng., C.Eng, F.IEM, F.ICE, F.ASCE, M.ACEM
Dip.EF(ACEA), Dip.Arb.(CEM, Reading), LL.M(Commercial Law, Northumbria)
AM.ABE, F.MI Arb., F.CI Arb.
BEM Accredited Checker for Geotechnical Works [LJM 5 A/C(G)]*

1.0 INTRODUCTION

After the arbitrator has closed the proceedings at the reference he must prepare his award which embodies his decision. He must decide on the issues canvassed before him. He has contracted so to do and he does this in his award.

The word “award” is defined in the *Arbitration Act 2005* as “**a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders**”. (A copy of the Arbitration Act 2005 may be downloaded from www.malaysianbar.org.my and this Act will be referred to hereinafter as “the Act”).

The court in *Jeuro Development Sdn Bhd v Teo Teck Huat (M) Sdn Bhd* [1998] 6 M.L.J. 545 at p. 551 defined an award per Blocks Law Dictionary (1990, 6th ed., West Publication Co.) as:

“The decision or determination rendered by arbitrators or commissioners, or other private or extra-judicial deciders, upon a controversy submitted to them; also the writing or document embodying such decision”.

Thus, an award is a decision/judgment made by an arbitrator on a controversy or a dispute submitted to him. It informs the parties of his decision, and the reasons for it. In order that an award is enforceable under s.38 of the Act, it must be in conformity with the Act, legal principles and that of fairness (i.e. natural justice or due process).

The court in *David Taylor and Son Ltd v Barnett Trading Co* [1953] 1 W.L.R. 562 at p. 568 stated the general rule as:

“The duty of an arbitrator is to decide the questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under all the circumstances”.

The decision must be one that decides on all the issues involved in the controversy. The award is the final product of a great deal of work both by the arbitrator and by the parties and their teams (which may comprise lawyers, technical experts, etc).

The arbitrator is under a duty to proceed with due diligence and reasonable dispatch in making his award. Under s.34 of the Act, the arbitral proceedings shall be terminated by a final award or by an order of the arbitrator. Unless there is an express intention in the arbitration agreement, the Act does not impose any time limit on the arbitrator to make his award. An arbitrator who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award may be removed by the court: see s.16 of the Act. Under s.46 of the Act where the time for making an award is limited by the arbitration agreement, the court may, unless otherwise agreed by the parties, extend that time.

2.0 TYPES OF AWARDS

There are different types of award by reference to the Act:

2.1 INTERIM AWARD

Section 2 of the Act and Article 32(1) of the *IEM Arbitration Rules 2003* (hereinafter referred to as “the IEM Rules”) provide for interim awards. They are often used:

- (a) where disputes can conveniently be divided into stages;
- (b) where the determination of preliminary issues may save the time and cost of a prolonged reference;
- (c) where the arbitrator’s award of costs is dealt with separately from the substantive issues.

An example where an interim award may be suitable arises when there is a question whether or not a claim is time-barred under the Limitation Act 1953. If the claim is time-barred then there is no need to proceed further. Similarly, an interim award may obviate the need for a further pursuit of the claim if a dispute as to the validity in principle of a claim may often be dealt with as a preliminary issue.

While the interim award does not determine all the matters in dispute between the parties but all the matters referred to in an interim award are determined finally therein. The word “interim” does not imply that those matters decided in the interim award are subject to review. For example, an interim award where liability is decided in respect of certain items of the claim but not other items provided a final determination of those issues of liability. Only quantum issues on those items are to be decided in another award.

2.2 PERFORMANCE AWARD

While it is usual for the arbitrator to make his award in monetary terms, he may order specific performance. A party can be ordered to perform certain specified works, or hand over goods or rights, other than the

matters related to land or to any interest in land. For example, a contractor may be required to carry out remedial works in the building to ensure uniformity of the finished work and/or to ensure no question arises as to responsibility for future defects. However, the arbitrator should not make a performance award where a monetary award would resolve the dispute in a satisfactory way. The danger being the manner the work is performed under an order for specific performance may lead to a further dispute.

2.3 FINAL AWARD

Section 36 of the Act provides that unless otherwise stated, an award is deemed to be final and binding on the parties, and it concludes the reference. As soon as the arbitrator has completed and published his award then his work as an arbitrator and his power and duty cease. He becomes *functus officio*, meaning that he has discharged his duty: see *Lloyd & Others v Wright* and *Dawson v Wright* [1983] Q.B. 1065. It follows that thereafter he has no jurisdiction to deal with any question or difficulty that may arise from his award.

There are some exceptions to this:

- (1) where the award is merely an interim award and the arbitrator will have to deal with other matters left to a final award.
- (2) where the award is remitted to the arbitrator by the court for reconsideration under s.37(6) and s.42(4c) of the Act or when a party refers the award to the court on a question of law, the court may order the arbitrator to state the reasons for its award under s.42(3) of the Act.
- (3) Where the arbitrator corrects in an award “any clerical mistake or error arising from any accidental slip or omission” under s.35 of the Act.

2.4 CONSENT AWARD

The consent award under s.32 of the Act incorporates terms of a settlement which the parties have negotiated before it reaches a hearing or an award. The purpose of so doing is to define clearly the matters that have been so settled and to define responsibility for costs. It then enables one party to take enforcement proceedings when the other party fails to comply with the terms of the settlement. The consent award formally brings the arbitration to a conclusion and per s.32(3) of the Act it shall have the same status and effect as an award on the merits of the case.

On the consent award, Article 34(1) of the IEM Rules calls it “*an arbitral award on agreed terms*” and states that “*the arbitral tribunal is not obliged to give reasons for such an award.*”

3.0 FORM OF THE AWARD

Before the award can be drafted, the arbitrator has to decide upon what the important issues in the reference are. He will make his decisions with care, based upon what he had learned from the parties and upon the application of the law which have been canvassed by the parties. Save for the need to comply with the provisions in s.33 of the Act, there is no set form for an award unless the arbitration agreement requires it to be in specific form. The award is a legal document and it must contain enough information to enable the court, if called upon to do so, to enforce it without the need for further inquiry. An award must be prepared with the greatest care and as a matter of practice there are some basic requirements.

3.1 FORMAL REQUIREMENTS OF AN AWARD

There are no particular requirements for the form of an award. However, there are a number of matters that are usually included which could be termed as “formal” per s.33 of the Act.

- The most commonsensical requirement is that the award be in writing and signed by the arbitrator per s.33(1). More often than not, his signature is attested by a witness.
- The award should identify and state precisely who the parties are. This is normally done at the beginning of the award in the recitals.
- Unless otherwise agreed by the parties or if it is a consent award, s.33(3) requires a reasoned award to be made.
- The award should list the date and locate (seat of arbitration) the award per s.33(4). Dating the award is particularly important with regard to the payment of interest on a monetary sum.

Once the arbitrator has signed and published his award he is said to be *functus officio*, having performed his duty. If the agreement provides that the arbitrator shall make and publish the award, it becomes valid upon publication. The agreement may require that the award is ready to be delivered on a fixed day but if it is not actually delivered it is nevertheless valid. If there is condition, however, that it shall be delivered on a fixed day and delivery does not take place it is void.

Three copies of the award are usually made, two of which are signed by the arbitrator. One signed copy is delivered to the party taking it up. Either party can take up the award. The other signed copy will be sent to the other party on request. It is usual for the arbitrator to retain the award until the award has been taken up by the parties. The arbitrator has a lien on his award and he normally only delivers his award upon payment of his fees and expenses or the remainder of his fees and expenses. Section 44(4) of the Act provides that where the arbitrator refuses to deliver his award before the payment of his fees and expenses, the court may order the arbitrator to deliver the award on such conditions as the court thinks fit.

3.2 SUBSTANTIVE REQUIREMENTS

For those from non-legal backgrounds, *substantive law* establishes principles and creates and defines rights limitation under which society is governed; as against *procedural law* which sets the rules and methods employed to obtain one's rights and, in particular, how the courts are conducted.

According to Mustill, M.J. and Boyd, S.C., *The Law and Practice of Commercial Arbitration in England* (2nd ed., at p. 384), the court will not enforce an award unless it is:

- (a) Cogent (*dictionary meaning: powerful or convincing*);
- (b) Complete;
- (c) Certain;
- (d) Final; and
- (e) Enforceable.

The meanings of above-mentioned terms are self-evident. Therefore the terms of an award must be unconditional, non-contradictory, unambiguous and unimpeachable. The arbitrator must be very precise in his adjudication. Drafts must always be checked thoroughly to ensure that they meet all those requirements.

3.2.1 COGENCY

The award must be convincing, persuasive and of consistent reasoning. It is not necessary of the arbitrator to use technical or legalistic expressions. However, it is essential that the award sets out the arbitrator's decision unambiguously. It must not be some expression of hope, expectation or opinion. Plain simple language should be the rule and not the exception. Jargon should be

avoided. Short sentences are invariably better than long sentences. Short words are better than long ones. It should be possible for an outsider to the case to understand the award and how the arbitrator reached his decision. A good award has much in common with a good report.

A non-lawyer arbitrator should, however, be wary about too ready use of legal terms and maxims. He is likely to get the principles correct but can so easily use inappropriate legalistic expressions. Obviously, if the lawyers have argued a legal construction before the arbitrator, he is likely to be forced to use the terms they have used. But the non-lawyer arbitrator is well advised to resist the temptation to import such terms of his own volition.

For example, say a contract requires notice of the matters complained of to be given in writing at the registered office of the other party. Notice was given orally to a senior site manager. The recipient company acted on that notice in the same manner as they would have done had it been given in strict accord with the contract terms. Without here making any point as to the validity of such decision, if the non-lawyer arbitrator of his own volition used terms such as “*constructive notice*”, or “*estoppel*” he might well have got it wrong. Such a pitfall would be more likely to be avoided if that arbitrator said something like “the Respondent Company having acted in a manner which implied to the Claimant that strict compliance with the notice requirements was not necessary, cannot now seek to rely upon the need for such strict compliance”. This example does not express any view on the law, but is simply for illustration purposes.

3.2.2 COMPLETENESS

The award must deal with ALL matters with which it purports to deal – all matters in issue; and no more. A final award must give the arbitrator’s decision on all the matters in dispute submitted to him. If an interim award is being made, it must identify clearly the issues which are being covered and deal with each of them. An arbitrator should, if that is his intention, include in his interim award a statement to the effect that his decisions are final even though the award as a whole is only an interim one.

In general, an award is not complete if it does not deal with costs. An arbitrator must make clear what the position is with respect to costs even if he is simply reserving the position (and publishes his “*final*” award *save as to cost*). It should however be noted that per s.44(c) of the Act, “*each party shall be responsible for its own legal and other expenses and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration.*” Therefore if the arbitrator fails to deal with costs in his award, and unless the arbitration agreement or the arbitration rules require the arbitrator to deal with cost, his award will not be incomplete since s.44(c) of the Act will “kick in”. Article 38 of the IEM Rules, requires the arbitrator to fix the costs in his award.

3.2.3 CERTAINTY

The award must not be in any way ambiguous. For example use, “*I determine and award that the Respondent shall pay the Claimant...*” and not “*I have formed the opinion that the Respondent...*” The objective is to end up with an award which is

not ambiguous. The award must be able to stand alone by itself. It should not require reference to anything else to be sure of its meaning. Certainly also has to be the intention when dealing with costs and interest. The court will not enforce an award which is uncertain.

3.2.4 FINALITY

The award must not leave any opportunity for re-opening the issues covered. The arbitrator is required to dispose of all the issues before him. He should not leave some to be decided by a third party. If he wants to reserve some matters for his future decision, he has to deal with it by means of an interim award which makes clear his intentions.

3.2.5 ENFORCEABILITY

The award must be in a form capable of being enforced. For example, if it is a monetary award, it must be clear as to just what amount is awarded and to be paid. If it is a performance award, it must specify the time by which it is to be performance. If an award relating to a claim for money deals with liability only, there is nothing to enforce. See Mustill, M.J. and Boyd, S.C., *The Law and Practice of Commercial Arbitration in England* (1989, 2nd ed., at pp. 387 and 389)

If the award is cogent, complete, certain and final it can be enforced. A word of caution, however - in order to enforce an award by action, it is necessary to prove affirmatively that it is valid, that is to say, that the contract containing the arbitration agreement was made, that a dispute arose which fell within its terms or was otherwise duly submitted to arbitration, and that the

arbitrator was validly appointed, that he made the award pleaded, and that such award has not been performed.

The legal maxim “*omnia praesumuntur rite esse acta*” (in simple English: *all thing are presumed to have been duly done*) does not apply in arbitration proceedings. Devlin J in *Brown (Christopher) Ltd v Genossenschaft Osterreichischer Waldbesitzer* [1953] 2 All E.R. 1039 explained:

“The principle omnia praesumuntur rite esse acta does not apply to proceedings of arbitration tribunals or, indeed, to the proceedings of inferior tribunals of any sort. There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction, jurisdiction has to be proved affirmatively”.

4.0 REASONS

If one party requires it, a reasoned award should be given, in the absence of exceptional circumstances. If both parties ask that there shall not be a reasoned award, reasons should not be given. These decisions together with the reasons for them are set out in the award. In Malaysia, and under the Arbitration Act 1952, awards can be very brief – three or four pages. It was then the practice to give “protected” reasons in a separate document so as to avoid an error of law appearing on the face of the award for that could result in remission or setting aside of the award. Thus, it is rife that many awards do little more than identify the parties, and their dispute, recite how the arbitrator came to be appointed, and set down terse reasons followed by a bare decision on the substantive matter and costs.

A reasoned award will enable the parties to launch appeals to the court and order their future conduct from getting into the same position again.

Drafting reasons for an award is not a formidable task. Donaldson LJ in *Bremer Handelsgesellschaft GmbH v Westzucker GmbH (No.2)* [1981] Lloyds Rep 130 stated:

**“It is of the greatest importance that trade arbitrators.....
.....should realize that their whole approach should now be
different. At the end of the hearing they will be in a position to
give a decision and the reasons for that decision. They should
do so at the earliest possible moment. The parties will have
made their submissions as to what actually happened and what
is the result in term of their respective rights and liabilities.
All this will be fresh in the arbitrators’ minds and there will be
no need for further written submissions by the parties. No
particular form of award is required. Certainly no one wants a
formal Special Case. All that is necessary is that the
arbitrators should set out what, on their view of the evidence
did or did not happen and should explain succinctly why, in
the light of what happened, they have reached their decision
and what that decision is. This is all that is meant by a
reasoned award”.**

Per s.33(3) of the Arbitration Act 2005, unless the parties have agreed that no reasons are to be given or the award is a consent award, the arbitrator must state the reasons upon which his award is based. Article 32(3) of the IEM Rules requires that *“the arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.”*

5.0 SUGGESTED STRUCTURE OF A SHORT REASONED AWARD

It must be stated that format is an individual matter as long as the substantive requirements of an award are met. The contents of the award ideally should cover

the contract, arbitration clause, what dispute or difference, appointment of arbitration, dispute details, proceeding details, reasoning, decision and summary.

Bernstein, R and Wood, D., in their *Handbook of Arbitration Practice* (Sweet & Maxwell, 1993 at pp. 178-179) have suggested the following structure for a short reasoned award:

- (A) The arbitration agreement: date and parties (usually the parties to the arbitration).
- (B) Date and method of appointment of the arbitrator(s).
- (C) The procedure adopted (documents only; or if hearing, give the dates).
- (D) The issues.
- (E) First issue of fact: find as a fact that... because the evidence of Mr. X was more closely supported by the contemporaneous documents than that of Mr. Y *or* I preferred the evidence of Mr. Z to that of Mr. A *or as appropriate*.
- (F) First issue of law:
 - Argument for Claimant...*
 - Argument for Respondent...*
 - I prefer the case for the... because*
 - (1)...*
 - (2)...*
 - I therefore find for the ... on this issue.*
- (G) Second Issue: (continue as first)
 - I therefore find for the... on this issue.*
- (H) I therefore determine and award... with interest at... percent from... to [the date of this award or as the case may be].
- (I) (i) This award is final as to all matters except costs.
(ii) If either party wishes to make any representations to me to costs, it should send them me, and to the other party, by noon on... If either party wishes to make any representations in answer to the other party's

representations, it should send them to me and to the other party by noon on... Thereafter I will make any final award.

(J) I AWARD AND DETERMINE that the... shall pay to the costs of this arbitration to be taxed (if not agreed) [by me] OR [in the High Court].

Date:

Signature:

There is no need to witness the arbitrator's signature although some arbitrators seem to have their signature witnessed.

Another broad pattern of a reasoned award is something as follows:

1. Heading
2. Type of award
3. Identify the parties
4. Describe how they came to be in this arbitration
5. Outline the nature of the dispute
6. Briefly outline the procedures
7. Summarize the contentions
8. Find the relevant facts and apply the relevant law to those facts
9. Reach a conclusion
10. Consider and decide upon the matters of interest and liability for costs
11. Unequivocally set down your decision, requiring such compliance as is appropriate.

6.0 CORRECTION OF AWARD

By s.36 of the Act, an arbitrator's award is final and binding on the parties and the arbitrator cannot vary, amend, correct, review, add to or revoke an award that he had published with the following exceptions provided for by s.35:

- (a) Within 30 days of the receipt of the award, and upon notice to the other party, a party (i) may request the arbitrator to correct in the award any error in computation of a specific point or part of the award or (ii) with the agreement of the other party, may request the arbitrator to give an interpretation of a specific point or part of an award. If the arbitrator considers the request to be justified, he shall make the correction or give the interpretation within 30 days of the receipt of the request – this shall form part of the award.
- (b) The arbitrator may, on his own initiative, correct any error in computation, any clerical or typographical error or other error of similar nature within 30 days of the date of the award.
- (c) A party may, within 30 days of receipt of the award, and upon notice to the other party, request the arbitrator to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitrator considers the request to be justified, he shall make the additional award within 60 days from the receipt of the request.

7.0 ENFORCEMENT OF AWARD

The objective of arbitration is to produce an award which is just, final and enforceable. If the arbitrator has observed the requirement of conclusiveness and completeness, he should have provided the parties with a determination which either of them can use, defensively to fend off further claims against or positively for enforcement of, his rights acquired under the award.

Where the losing party refuses or fails to honour an award, the party can apply under s.38 of the Act to the High Court for judgment in the terms of the award. The normal procedure is a letter of demand to the unsuccessful party; and an application to the Court, supported by affidavit annexing the submission, the award and the letter of demand. If it is a valid award, judgment will normally be

given. Otherwise, the award will not be one enforceable in the court. The means of enforcement is similar to that of any other judgment of the High Court.

8.0 APPEALS

Under s.8 of the Act, “*unless otherwise provided, no court shall intervene in any of the matters governed by this Act.*” The extent to which the courts could intervene in arbitral proceedings under the Arbitration Act 1952 is now restricted and more clearly defined.

8.1 STAYING OF ARBITRAL PROCEEDINGS

Under the Arbitration Act 1952, the courts have the supervisory powers of revoking the very submission to arbitration and causing a case to be stated under section 22 of the Arbitration Act 1952. Under s.10 of the 2005 Act, the court can only stay arbitral proceedings when it finds that:

- (d) the arbitration agreement is null and void, inoperative or incapable of being performed; or
- (e) there is in fact no dispute between the parties with regards to the matters to be referred.

Under s.10(3) of the 2005 Act, while the issue of staying proceedings is pending before the court, the arbitral proceedings may be commenced or continued, and an award may be made.

8.2 SETTING ASIDE OF AWARD

By s.37 of the Act, the High Court may set aside the award if:

- (a) the party making the application provides proof that:
 - (i) a party to the arbitration agreement was under any incapacity.
 - (ii) the arbitration agreement is not valid under the law.

- (iii) the party making the application was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case.
 - (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration.
 - (v) the award contains decisions on matters beyond the scope of the submission to arbitration, provided that where the decision 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.
 - (vi) 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 the Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Act
- (b) the High Court finds that:
- (i) the subject matter of the dispute is not capable of settlement by arbitration under the law.
 - (ii) the award is in conflict with public policy such as where the making of the award was induced or affected by fraud or corruption, or where a breach of the rules of natural justice occurred during the arbitral proceedings or in connection with the making of the award.

8.3 REFERENCE TO QUESTIONS OF LAW

Any party can refer any question of law arising out of an award to the High Court within 42 days of the publication and receipt of the award.

The High Court may order the arbitrator to state his reasons where his award does not contain his reasons or does not set the reasons out in sufficient detail.

The High Court may, after determining the reference, (i) confirm the award; or (ii) vary the award; or (iii) remit the award in whole or part, together with the High Court's determination on the question of law to the arbitrator for reconsideration; or (iv) set aside the award, in whole or in part.

9.0 SOME PITFALLS TO AVOID IN DRAFTING AN AWARD

In drafting the award we have seen that absolute clarity should be the objective at which the arbitrator aims, and nothing should deter him from that. If it takes many pages, so be it. Above all he should avoid usages which make him look foolish or less than authoritative. Some such pitfalls are:

(i) Jargon

'Ugly sounding or hard to understand'. Any necessary technical terms may, of course, be used, but must be explained for a judge who may read the award.

(ii) Legalese

Unnecessary use of legal sounding expressions which do not mean anything. 'The said', 'hereinbefore', 'hereinafter', 'I do', etc. Some forms such as 'WHEREAS, I MAKE AND PUBLISH' etc are used as known signals to indicate where one can find the various parts of the document and are not to be despised; but in general nothing is added by the use of archaic words.

(iii) Comercialese

This is self-consciously commercial style which is best avoided

(iv) Bad Grammar and Syntax

‘Passive voice’ is a frequent error and split infinitives do not go down well. Remember the difference between ‘and’ and ‘or’ and between them and ‘and/or’ (see *re Diplock* which produced decades of litigation as a result of this mistake).

(v) Gobbledegook

This is an epidemic disease afflicting everyone today. Over-complex constructions, two words where one will do, neologisms, all resulting in a dull opacity of style.

The judicial tradition has always been to attempt a clear, lucid exposition of very complex matters. The arbitrator’s task is much easier for he deals with simple facts and explains why he believes them, or not as the case may be. Not for him the tracing of a delicate path through precedent. All he has to do is write it properly so that, like Chaucer’s Man of Lawe, ‘*no man could pynche atte hys writing*’.

Lord Donaldson MR (as he then was) in *Westzucker* said that ‘much of the art of giving a judgment lay in telling a story logically, coherently and accurately’. That skill was, he said, one which arbitrators should have no difficulty in acquiring. Perhaps he was a little sanguine. My experience in marking student’s awards suggests that some find it very difficult.

If you have no skill in writing simple, clear narratives, you must acquire it. It does not come naturally, nor is it a talent, but it can be achieved with study and practice.

(vi) A Point of Style

I have noticed that some who have perhaps a traditional academic or scientific background slip into the passive voice, avoid using ‘I’, saying ‘*It is considered*’ rather than ‘*I think*’ in their awards. It does not read well and if

that sort of thing is done properly throughout it has an impersonal ring to it which is inappropriate.

It is *your* judgment which has been sought, witnesses have told *you* of their evidence and it is *your* perceptions of the law which have led you to decide as you have. The reasoned award explains why you have done so. It is a record of your thinking process. Whilst that process must be an objective one, your report of it must be your own perceptions of weight of evidence and of legal authorities. It must not be of *your* opinions.

Therefore, '*in my judgment*' is better than '*in my opinion*' and '*claimant's evidence is the more weighty*' is better than '*I prefer claimant's evidence*'.

For discussion purposes, I have included in the Appendices examples of (i) a Final Award; and (ii) a Consent Award.

APPENDIX A

AN EXAMPLE OF A FINAL AWARD

IN THE MATTER OF THE ARBITRATION ACT 1996

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

ABC SEA TRANSPORT COMPANY

Liberia

Claimant

(Owners)

AND

XYZ SHIPPING LTD

China

Respondent

(Charterers)

**M.V. "MEI HUA"
CHARTERPARTY DATED 4TH JANUARY 2001**

=====
FINAL AWARD

=====

WHEREAS:

1. On 4th January 1999, the Claimant (the "Owners") and the Respondent (the "Charterers") entered into a charterparty on the New York Produced Exchange Form (as amended by the parties) whereupon the Owners chartered the "MEI HUA" (the "Vessel") to the Charterers to load a cargo of furnace slag (the "Cargo") on a time-charter-trip from Shanghai to Singapore.
2. The charterparty provided for any dispute to be referred to arbitration and the seat of the arbitration is England.
3. Disputes arose between the parties and on 23rd August 2000, the Owners wrote to appoint me, to act as one of the arbitrators in the reference. On 29th September 2000, the Charterers wrote to agree to appoint me as the sole arbitrator. On 7th October 2000, I wrote to the parties to accept the appointment.

4. The parties had agreed to dispense with oral hearings and a “documents-only” procedure was adopted.
5. The parties have asked me to set out reasons in my award.

NOW I, the said, F.CI Arb, having carefully considered all the submissions of the parties as set out in the documents provided to me, DO HEREBY MAKE AND PUBLISH THIS MY FINAL AWARD.

HISTORY

6. On 17th January 1999 and at 0710 hrs, the Owners delivered the Vessel to the Charterers at Shanghai. The Charterers redelivered the Vessel to the Owners at Singapore on 1st February 1999 at 0600 hrs. The duration of hire was therefore 14.9514 days.
7. The Owners’ final hire statement is for an amount of US\$24,824.75 while that of the Charterers’ is for an amount of US\$3,008.48.
8. The issues are essentially on the following:
 - 8.1. Time of delivery and delays to the voyage.
 - 8.2. The sum of US\$2,000.00 in lieu of redelivery hold cleaning (pursuant to Cl.29 of the charterparty).
 - 8.3. The sum of US\$1,000.00 for stevedore damage.
 - 8.4. The Charterers’ alleged loss of US\$1,291.00 due to the short lift of deadfreight of 300 tons of Cargo.

FINDINGS AND REASONS

9. Although I have only summarized parts of the evidence above, I have read all of the submissions from both parties very carefully and have taken all the evidence into account in reaching my decision.

Time of delivery and delays to the Voyage

10. There are two sub-issues under this head.
 - 10.1. The Charterers counterclaimed that the Owners’ final statement was erroneously based on a delivery time at 1830 hrs on 16th January 1999 and not on the actual time at 1710 hrs on 17th January 1999. I have examined the calculations in the Owners’ final statement and **I FIND** that the calculations were based on a delivery time at 1710 hrs on 17th January 1999. **I DISMISS** this counterclaim.
 - 10.2. The Charterers counterclaimed that there are two items of delay to the voyage.

10.2.1. The first item of the alleged delay is that the Vessel was only able to leave berth at 2100 hrs on 18th January 1999 because the engine required repairing and not because of the tide conditions as alleged by the Owners. The Charterers' support for their counterclaim was their 5 years of experience in managing NanBoi steel's dregs' exportation by sea and their awareness of the condition of the sea-route in the Changjiang River. The Owners supported their case by producing a copy of the log extracts, tide tables and a statement from the engineer that the alleged engine repair was only routine maintenance. After examining the tide table and the Owners' computations of the allowance between the Vessel's bottom and the seabed at each of the material times, **I FIND** that the Vessel had to wait for a higher tide to leave berth and the Vessel would not be able to cross the river passage had it departed earlier. It is therefore not material whether the engine repairs were of routine maintenance or of a major nature that would affect the Vessel's seaworthiness. **I DISMISS** this counterclaim.

10.2.2. The second item of the alleged delay is that the Vessel sailed at a speed that is slower than the charterparty's speed description warranty of 11 knots in laden condition and it took 8.5 days instead of 7 days to reach Singapore. The Charterers supported their counterclaim using "similar fact" evidence that a week ago, they took only 7 days to sail from Shanghai to Bason Port on another vessel sailing at the speed of 10.5 knots (and Bason Port is farther than Singapore). The Owners produced calculations, based on the 'Distance Tables for World Shipping', that with the distance between Shanghai and Singapore being 2,182 nautical miles and at a speed of 11 knots, the voyage should take 8.26 days but since the actual voyage duration was 8.062 days, the Vessel's average speed was faster than 11 knots. The Charterers then complained that the Owners' claim handler, *Claim & Co. Ltd.*, had acted inappropriately at Shanghai and also asserted their belief that the problem lay with the Vessel's condition which had consequently affected its speed and such belief (or suspicion) was based on the Owners denying them their request to board the Vessel to check its condition.

I FIND that:

- i. after I have counterchecked the authenticity of the data produced by the Owners, I am convinced that the Vessel's actual average speed during the voyage exceeded the charterparty's speed description warranty of 11 knots.
- ii. the Charterers' similar fact evidence has no or limited weight as it was neither substantiated with proof nor could the performance of the purported voyage from Shanghai to Bason Port be supported by simple arithmetic.
- iii. there was no impropriety in the Owners' claim handler's alleged act at Shanghai since the evidence showed that he was there to procure tide information and to put forward submissions.
- iv. the Charterers were at liberty to resort to Court procedures to board and inspect the Vessel but their assertion becomes immaterial in

view of my finding in Article 10.2.2 (i) above. In any event, the Charterers had not produced any evidence to support their belief (or suspicion).

I DISMISS this counterclaim.

Redelivery Hold Cleaning

11. The Charterers did not dispute the fact that they redelivered the Vessel without the holds being cleaned. The Owners claimed that pursuant to Cl.47 of the charterparty, an amount of US\$2,000.00 in lieu of hold cleaning is payable by the Charterers. The Charterers defence was that the holds were not cleaned on delivery and they held the opinion that “the Master has agreed to release the fee of cleaning the tank”. There was no evidence that the Master had agreed to it and it is clear that it was only the Charterers’ opinion. Even if the Master had actually agreed to it, he has no such authority to act on this matter on behalf of the Owners. Furthermore, by accepting the Vessel at delivery without the holds being cleaned, the Charterers are estopped from asserting otherwise at a later date. Therefore, **I HOLD** that the Charterers had not been relieved of their contractual obligations under Cl.47 of the charterparty. **I FIND** for the Owners.

Stevedore damage

12. The Vessels’starboard side gangway was damaged at Singapore and the Charterers had agreed to pay US\$1,000.00 to the Owners “subject to the Owners producing the original invoice and the repairing time sheet”. The dispute was that the Charterers contended that the Owners did not repair the Vessel in-situ and as a result, “the condition of claim can’t come into existence”. The Owners’ version was that the Charterers’ condition on the production of the original invoice and the repairing time sheet was actually a request by the Charterers to the Owners to “create and produced a repair invoice” for the Charterers to forward the claim to receivers. The Owners produced documents to show that the Vessel was repaired at Sayonara, Japan on 15th April 1999 at a cost of US\$1,200.00. **I FIND** that the Charterers had admitted liability for the Vessel’s damage and had entered into an agreed settlement of US\$1,000.00 with the Owners. There was no time limit to the Owners complying with the condition of the claim and upon the Owners production of the original repair documents the amount of US\$1,000.00 becomes due immediately. **I HOLD** that the “created” repair documents are not relevant and it is the original repair documents from Japan that are relevant and these had been produced and thereupon, the US\$1,000.00 became due. Therefore, **I FIND** for the Owners.

Short lift of deadfreight

13. The Charterers’ counterclaimed that the loading capacity of the Vessel was only 13,100 tons and not ‘minimum 13,400 mt’ pursuant to the charterparty. The Charterers alleged that after the captain had declared that the loading capacity was 13,100 tons due to the restriction of 8.5 meters draft, ‘the captain asked the dock staff to prepare 300 tons dregs to adjust the draft again when the draft reached 8.5m’. The Charterers further alleged that when the captain later refused to load the 300 tons of dregs, the Charterers had to dump them into the river. As a result there was a shortlift of 300 tons of cargo amounting

to a loss to the Charterers of US\$1,291.00. The Owners showed documentary evidence that the recap fixture terms states the Vessels's 'DWCC as Abt 13,400', and argued that there was no reference to the Vessel being described or agreed as 'minimum DWCC 13,400 mt' as alleged by the Charterers. They countered the Charterers' allegations by seeking the captain's clarification that he did not make the alleged representations to the Charterers. They further argued that 'it is unlikely and too coincidental that a master would make a representation to seek the loading of additional cargoes of 300 mt to the 13,100 mt which he earlier advised was the maximum capacity'. I am persuaded by the Owners' arguments and also that the Charterers were unable to produce any evidence to support their case. **I DISMISS** this counterclaim.

SUMMARY

15. The Owners have fully succeeded in their claim and the Charterers have failed in all their counterclaims.
16. The Charterers have not brought to my notice any offer made to settle the claim against them, or any valid reason why I should not award the Owners their cost under the rule that "*cost follows the event*".

AND ACCORDINGLY I AWARD AND DIRECT THAT:

17. The Charterers shall pay to the Owners the sum of US\$24,824.75 (US Dollars Twenty Four Thousand Eight Hundred & Twenty-four, and Seventy-five cents only) plus interest thereon calculated at the rate of 8% per annum from 8th February 1999 until the said sum is paid.
18. The Charterers shall pay the Owners' costs in the arbitration: such costs shall be assessed by the Court or, if agreed by the Owners, to be determined by me in an Award of Costs.
19. My fee in this arbitration is RM15,000.00 (Malaysian Ringgit Fifteen Thousand Only).

Signed in Malaysia this 15th day of June 2001

MR. XXXX

Arbitrator

APPENDIX B

AN EXAMPLE OF A CONSENT AWARD

IN THE MATTER OF THE ARBITRATION ACT 2005

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

ABC BUILDERS SDN. BHD.

Claimant

AND

XYZ PROPERTY SDN. BHD.

Respondent

=====
ARBITRATOR'S FINAL AWARD (BY CONSENT)
=====

WHEREAS:

- 1.0 By the Claimant's order (N0. C.E. xxx) dated, incorporating the terms of the IEM Form of Contract for Civil Engineering Works, the Respondent undertook to provide all the necessary labour to carry out the works, all described on pages inclusive, of the priced Bill of Quantities, at xxx Main Street, Petaling Jaya.
- 2.0 The above contract included an Arbitration clause.
- 3.0 Disputes having arisen and been notified by a Request for Arbitration, from the Claimant, dated 13 January 2005 to the President of the Institution of Engineers, Malaysia, I was appointed by the said President by an appointment letter dated 21 January 2005.
- 4.0 I informed the Parties of this appointment by letter 22 January 2005 which time I enclosed my terms for signature by the Parties. I subsequently directed, by agreement with the Parties, that a Preliminary Meeting be held on 30 March 2005.
- 5.0 Now I, the said Arbitrator, having been informed by letter dated 17 June 2005 from the Respondent's solicitor and by letter of the same date from the Claimant's solicitor that the dispute had been settled on Terms set out in those letters as set out in 8.0 to 11.0 below.

6.0 And further in the letters informing me of the settlement terms, I was requested to publish a Consent Award.

AND

7.0 **Whereas** I, the said having read the Terms of Settlement, do hereby adopt and deem it appropriate to issue a Final Award disposing of all matters referred to me.

AND ACCORDINGLY BY CONSENT, I HEREBY MAKE AND PUBLISH THIS MY FINAL AWARD AND I AWARD AND DIRECT THAT

8.0 The Claimant's claim is dismissed.

9.0 There shall be no Order for Costs save as to para 10.0 and 11.0 below.

10.0 The Respondents will not enforce the Order for costs in their favour dated 16 May 2005, and granted as a result of proceedings in the High Court, Kuala Lumpur, ref. xxxM No. xxx.

11.0 The Claimant shall bear and pay the costs of this my Award which I hereby determine in the sum of RM18,750.50.

Given under my hand on this thirteenth day of July 2005.

.....
Mr. XXXX
Arbitrator