

# The risks of lists in international arbitration

Lists of issues are a common project management tool in international arbitration. They help a tribunal to organise and assess the parties' arguments. However, there is also the risk that a list may overtake the parties' pleadings, particularly where the pleadings are not clear in the first place, as **Ben Giaretta** and **Akshay Kishore** explain.

## Good project management

Lists of issues serve a useful function in international arbitration. They help a tribunal to:

- **rule on document requests:** when deciding whether or not to grant a document request, a tribunal can assess its relevance by referring to a list of issues;
- **organise a hearing:** a hearing is usually time-constrained, and a list of issues can help the tribunal and the parties organise the time effectively; and
- **draft the award:** the New York Convention requires that an award only deals with matters that fall within the scope of submission to arbitration.<sup>1</sup> Best practice also requires arbitrators to cover every issue expressly, and arbitral institutions such as the ICC look for this, in particular, when they scrutinise an award. With a list, a tribunal can check off each issue as it is addressed.

## The risks of lists

On the other hand, there is the potential for lists of issues to mislead. A tribunal which is too reliant on a list, in which the parties' arguments are abbreviated, may lose sight of the details of a case. There is the danger that the tribunal may focus on the list rather than on the parties' pleadings or other written submissions.

A party may also distance a tribunal further from its arguments by serving a list that compounds problems in its pleadings. Where pleadings are complex or unclear, a list of issues that oversimplifies, or is itself obscure, can give a false impression of the case.

This was illustrated in a case that came before the Singapore Court of Appeal recently, *BLC and others - v- BLB and another*.<sup>2</sup> The parties' names were removed in the judgment, but a statutory filing by one of the parties in Malaysia has identified the Appellants as companies in the Schulz Group (Schulz) and the Respondents as companies in the Sapura Industrial Group (Sapura).<sup>3</sup>

## *BLC -v- BLB*

### Facts

The case concerned a joint venture between Schulz and Sapura involving a factory that manufactured pipe components. The factory supplied piping to Schulz.

The relationship soured and Schulz started an SIAC arbitration in Singapore. A sole arbitrator was appointed. Among various claims, Schulz argued that certain goods (later called the "Group A Goods" in the Singapore High Court), delivered by Sapura to Schulz, were defective. Sapura counterclaimed that Schulz had not paid for certain other goods (called the "Group B Goods" in the High Court). Schulz had refused to pay for the Group B Goods in order to recover the cost of rectifying the Group A Goods.

After the hearing, the arbitrator asked the parties to file a list of issues. The parties could not agree on a single list, so they submitted separate lists. The award broadly adopted Schulz's list. The arbitrator ruled in favour of Schulz, awarding damages for the defective goods. He also rejected Sapura's counterclaim.

However, there was an apparent confusion in the list of issues in the award. It seemed to conflate the Group A Goods and Group B Goods, identifying both as defective goods. This meant that even though the Group B Goods were not defective, the arbitrator decided Schulz did not have to pay for them. As a result, Schulz both received damages for the defective Group A Goods, and also avoided paying RMB 5.8m (about US\$1.8m) for the Group B Goods.

### The Singapore court judgments

Sapura challenged the award in the Singapore High Court. It argued that the adoption by the tribunal of Schulz's list of issues led the arbitrator to overlook Sapura's counterclaim for the unpaid cost of the Group B Goods. Sapura said this was a breach of natural justice (a ground to challenge an award under the Singapore International Arbitration Act). It also argued the tribunal had failed to exercise its authority.

The High Court agreed with Sapura, and set aside the award insofar as it related to the Group B Goods and Sapura's counterclaim. The High Court remitted that part of the case to a new tribunal.

Schulz appealed the judgment. The Court of Appeal traced the parties' arguments in the case back through the arbitration, and found that neither Schulz nor Sapura had properly distinguished between the Group A Goods and the Group B Goods in their pleadings. Sapura had also been unclear about this in its list of issues: its Counsel, who had not appeared in the arbitration, admitted that Sapura's list had been "poorly drafted" on this point.

The Court of Appeal also noted that the arbitrator had adopted some of the wording of Sapura's list of issues, and had therefore not relied exclusively on Schulz's list. Overall, the Court concluded that the arbitrator had dealt with Sapura's counterclaim as it had been presented to him. There may have been an error of law or fact, but that was not a ground for challenging the award. The Court of Appeal reversed the High Court's judgment, and restored the award.

### Comment

The confusion in this case seems to have stemmed from the parties' pleadings. But this was compounded in the parties' lists of issues, and in the final list adopted by the arbitrator. In the end, it was the list that formed the basis of the award and led to the flawed outcome.

### Practical tips

Parties in an arbitration should be aware that a tribunal may ask them at some point to prepare a list of issues. With this in mind:

- **prepare a list of issues before drafting your pleadings:** this should be part of your case preparation. Although the list will develop as the case proceeds, starting it at an early stage will help ensure the final list and the pleadings are aligned;
- **use headings in pleadings and written submissions that match your list of issues as closely as possible:** again, this will keep the list aligned with the pleadings and other submissions. It will also help the tribunal identify where each issue is dealt with; and
- **check the list and pleadings against each other:** in draft pleadings, mark in the margin against each paragraph which issue is being addressed; and when preparing the list of issues for the tribunal, identify where in the pleadings the issues are dealt with. This will ensure each issue is covered in the pleadings, and also that the list of issues that is served properly reflects the pleadings.

### Notes

- 1 Article V(1)(c) of the New York Convention.
- 2 Civil Appeal No. 135 of 2013.
- 3 First reported in *Global Arbitration Review*, 19 August 2014.

## Further information

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