Privy Council Appeal No. 32 of 2000

(1) The Bay Hotel and Resort Limited and
(2) Zurich Indemnity Company of Canada *Appellants*

v.

(1) Cavalier Construction Co. Ltd. and
(2) Cavalier Construction Co. Ltd. (a Turks and Caicos Islands Registered Company) *Respondents*

FROM

THE COURT OF APPEAL OF THE TURKS AND CAICOS ISLANDS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th July 2001

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Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Cooke of Thorndon
Lord Clyde
Lord Hutton
Lord Millett

[Delivered by Lord Cooke of Thorndon]

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1. This case from the Turks and Caicos Islands concerns a building contract for the completion of a hotel there. The contract was in a standard form of the American Institute of Architects (AIA) and expressly provided that the law of the contract was the place of the project. An arbitration clause provided for arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association (AAA). An arbitration took place in Miami, Florida, being the location requested by both sides, before a panel of three American arbitrators selected from a list supplied by the AAA. The ultimate award was in favour of the contractor. The owner sought unsuccessfully in the courts of the Turks and Caicos Islands to have the award set aside. By leave granted by the Court of Appeal, the owner now appeals to Her Majesty in

Council, while the contractor cross-appeals on a point about interest.

2. The principal issue on the appeal is whether, in the context of this AAA arbitration, the award was a "reasoned" one, the trial judge having accepted the evidence of an American expert witness that it did answer that description. Another issue is whether the arbitrators were entitled, as they did, to add an additional party to the arbitration on the request of the contractor and against the opposition of the owner; and to make an award to the additional party jointly with the contractor. This issue is linked with a contention on the part of the owner that the contractor itself has suffered no loss and therefore cannot recover damages.

3. The foregoing are the basic facts and issues. Before returning directly to them their Lordships will state in more detail, in paragraphs 4 to 32 of this judgment, the history and circumstances of the case, and the manner in which it has been dealt with in the courts below.

Background

4. The Crown Bay Resort Hotel, Providenciales, had been partly constructed. A bondsman, Zurich Indemnity Company of Canada (Zurich), having been called upon under its bond, elected to complete the work, expecting that the cost of doing so would be less than the full amount of the bond. Zurich formed a company in the Turks and Caicos Islands, The Bay Hotel and Resort Limited (The Bay), to be the employer of the contractor chosen to complete the hotel, an established construction company registered in The Bahamas called Cavalier Construction Company Limited (Cavalier Bahamas). The Bay as owner and Cavalier Bahamas as contractor entered into an elaborate construction contract dated 18th August 1993. On the same date Zurich, in writing, guaranteed payment to Cavalier Bahamas of sums due to the contractor under that contract. The guarantee was limited to US$17 million.

5. The contract, in which an address in Ontario is given as the address of The Bay, was in the form (with amendments) of the 1987 edition of AIA document A111, Standard Form of Agreement between Owner and Contractor. There was a maximum price of US$15,625,000.00; it has not been argued that this limits recoverable damages. By article 13.1.1 the contract is

to be governed by the law of the place where the project is located. Article 4.9.1 provides, so far as relevant -

> "Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and a judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, ..."

Similarly a contractual document following the instruction sheet includes "Is arbitration the desired method of dispute resolution? Is arbitration recognised as a valid method of dispute resolution by the laws of the Turks and Caicos Islands? Disputes shall be resolved according to the laws of Turks and Caicos Islands". The last words "Turks and Caicos Islands" were added in writing. (The reference is A1A 201 CMa-1992; entry opposite G paragraph 4.6.)

6. The applicable rules are the Construction Industry Arbitration Rules of the AAA, revised and in effect on 1st April 1996. The AAA offers "Dispute Resolution Services Worldwide". The rules include provisions for "Large, Complex Case Track" procedures which apply to this case. As to the form of the award, rule 42, which is part of the regular track rules but is not excluded by the special procedures, reads as follows –

> "R. 42. FORM OF AWARD
>
> The award shall be in writing and shall be signed by a majority of the arbitrators. It shall be executed in the manner required by law. The arbitrator shall provide a concise, written breakdown of the award. If requested in writing by all parties prior to the appointment of the arbitrator, or if the arbitrator believes it is appropriate to do so, the arbitrator shall provide a written explanation of the award."

Under R.41 the award is to be made, unless otherwise agreed, within 30 days of the closing of the hearing.

7. By R.11 the parties may mutually agree on the locale where the arbitration is to be held. If one party objects to the locale requested by the other, the AAA has power to determine the locale. As for procedure and the *lex arbitri* generally, the rules contain some provisions recognising that there may be an

applicable law (e.g. R.42 above, and R.25 whereunder the arbitrator shall maintain the privacy of the hearings "unless the law provides to the contrary") but are silent as to what system of law may govern the conduct of the arbitration. Their scheme is, rather, that they constitute a self-contained code on which a national law may impinge or operate as an aid.

8. The concept of a self-contained code is also apparent from R.53 -

> "R.53. INTERPRETATION AND APPLICATION OF RULES
>
> The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA."

9. The contractor's work under the contract was in fact carried out by a company formed by Cavalier Bahamas in the Turks and Caicos Islands. It bears the same name, Cavalier Construction Company Limited, as Cavalier Bahamas and is conveniently referred to as Cavalier TCI. According to The Bay, the existence of Cavalier TCI and the fact that it had done the work were not known to The Bay until discovery of documents in the arbitration shortly before the hearing commenced. As to the relationship between the two Cavalier companies the trial judge, Ground CJ, made the following important findings -

> "Mr. Wilson, the Managing Director of Cavalier Bahamas, explained in his evidence in chief that, although the Construction Contract was with Cavalier Bahamas, a separate company was set up to perform the work. This was Cavalier TCI. He explained that this approach was dictated by currency and other considerations of operating in what was, for him, a foreign jurisdiction. He said that Cavalier TCI was entirely funded by the parent company, who also provided plant, equipment and management. All net profits of Cavalier TCI company were to be remitted to the Bahamas (although it is not said to the Bahamian parent) as were all dividends. Mr. Wilson asserts that Cavalier TCI was never considered to be any more than an extension of the parent, who financed it in its entirety. None of that is

seriously challenged on the evidence before me, and find it to be true."

10. The Chief Justice went on to comment –

> "Against that background , it was part of the Bay's case at the arbitration that as all the work on the project had been performed, and all the financial liabilities incurred by Cavalier TCI, there was no evidence of loss on the part of Cavalier Bahamas. It was therefore argued that the claimants' case in the arbitration must necessarily fail. Whatever the legal force of that argument, it sat ill in the mouth of a party who was counterclaiming against Cavalier Bahamas for delay and defects in the performance of the construction contract, and was not likely to be one to appeal to a panel of construction arbitrators."

Mr Wilson and the Nassau attorney who had been involved in obtaining permission from The Bahamas Central Bank to form Cavalier TCI had apparently given similar evidence to the arbitrators.

11. Work under the contract was late. There were also disputes about the quality of the work. In May 1996 Cavalier Bahamas demanded arbitration under the AAA Rules, claiming US$5,632,311.00 and naming The Bay as respondent. The Bay lodged with the AAA an answering statement, noting that Cavalier Bahamas was claiming both for work under the contract and for delay damages; denying liability; and counterclaiming for rectification expenditure and delay damages US$6,819,303.00.

12. A preliminary hearing took place before the arbitrators in Miami on 14th August 1996. At that stage counsel for Cavalier Bahamas were Bahamian lawyers; counsel for The Bay were Canadian lawyers. The latter continued to represent The Bay throughout the arbitration; at the substantive hearing of the arbitration a Washington DC attorney, Mr. McManus, appeared as leading counsel for Cavalier Bahamas. By agreement of the parties and by order of the arbitrators, various procedural directions were given at the preliminary hearing, as recorded in a report of preliminary hearing and scheduling order signed by the arbitrators and sent to the AAA. Item 7 provided "The form of the award in this proceeding shall be a Reasoned Award".

13. That reference to a "Reasoned Award" reflected the terms of a pro forma instruction form or check list issued by the AAA,

which in paragraph 9 as to the form of the award indicated that one of the following should be circled: (1) Standard award; (2) Reasoned award; (3) Findings of fact and conclusions of law. As has been seen, such a threefold choice did not mirror AAA R.42 whereunder the alternatives were a concise written breakdown of the award and a written explanation of the award. But it has become common ground, accepted in the present court proceedings by the expert witnesses on each side and by the Turks and Caicos courts also, that a reasoned award and a written explanation of the award are expressions with the same meaning. So nothing turns on this difference of language.

14. Pleadings and discovery was exchanged by the parties in the arbitration. At that stage Cavalier Bahamas claimed some US$8.65 million. By counterclaim The Bay sought some US$3.1 million. The hearing was conducted in Miami, with an incidental visit to the site, between 14th July and 10th October 1997. During the hearing The Bay raised the no loss point. At the end of the claimant's case Cavalier Bahamas, pursuant to a notice of motion dated 30th July 1997, sought leave to add Cavalier TCI as a party as both claimant and respondent. The grounds given were that The Bay had alleged that the real party in interest in the dispute was Cavalier TCI: while the claimant disputed that allegation, both the claimant and Cavalier TCI sought the joinder to cure any potential prejudice to The Bay. Thus the application was clearly no more than precautionary. The Bay opposed the application and has consistently maintained that the arbitrators had no jurisdiction to grant it. Nevertheless the arbitrators did grant it, thus occasioning one of the main issues in the subsequent litigation.

15. The motion to add Cavalier TCI in the arbitration disclaimed reliance on any specific AAA rule, saying "There being no Rule of the American Arbitration Association governing this Motion, the panel may permit this Motion to Amend the Pleadings within its sound discretion". It was contended in the courts below, however, and has been contended again before their Lordships, that jurisdiction could be extracted from article 4.9.5 in the general conditions incorporated in the contract –

> **"Limitation on consolidation or Joinder.**
>
> No arbitration arising out of or relating to the Contract Documents shall include, by consolidation or joinder or in any other manner, the Construction Manager, the Architect, or the Construction Manager's or Architect's

employees or consultants, except by written consent containing specific reference to the Agreement and signed by the Construction Manager, Architect, Owner, Contractor and any other person or entity sought to be joined. No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, other Contractors as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. No persons or entities other than the Owner, Contractor, other Contractors as defined in Subparagraph 3.1.2 shall be included as an original third party or additional third party to an arbitration whose interest or responsibility is insubstantial. Consent to arbitration involving an additional person or entity shall not constitute consent to arbitration of a dispute not described therein or with a person or entity not named or described therein. The foregoing agreement to arbitrate and other agreements to arbitrate with an additional person or entity duly consented to by parties to the Agreement shall be specifically enforceable under applicable law in any court having jurisdiction thereof."

The arbitrators were not asked to give and did not give formally their reasons for granting the joinder.

16. The award of the arbitrators, dated 7th November 1997 reads as follows –

"We, the undersigned arbitrators having been designated in accordance with the Arbitration Agreement entered into by the above named parties and having been duly sworn and having duly heard the proofs and allegations of the parties, hereby award as follows:

1. The Motion of the Claimant, CAVALIER CONSTRUCTION COMPANY, LTD. to amend the pleadings herein to add CAVALIER CONSTRUCTION COMPANY, LTD., a Turks and Caicos Company, as a party to these proceedings is hereby granted. Accordingly, the award herein, as it pertains to CAVALIER CONSTRUCTION COMPANY, LTD., shall pertain to CAVALIER CONSTRUCTION COMPANY, LTD., a Bahamas corporation and CAVALIER CONSTRUCTION COMPANY, LTD., a Turks and Caicos Company, jointly and severally.

2. Claimant, CAVALIER CONSTRUCTION COMPANY, LTD.'s Motion to Add Zurich Indemnity Company of Canada as an additional respondent in these proceedings is hereby denied without prejudice as to the merits of any claim which Claimant may have against Zurich Indemnity Company of Canada and without prejudice to Claimant's right to pursue any such claim in any other forum.

3. Upon consideration of the claims and counterclaims of each of the parties against the other asserted herein, including Claimant's revised claim of $8,348,941.00 and Respondent's revised Counterclaim of $2,678,100.39, the Arbitrators award Claimant, the net sum of $4,027,205.00; therefore, Respondent, THE BAY HOTEL AND RESORT, LTD., shall pay Claimant, CAVALIER CONSTRUCTION COMPANY, LTD., the sum of Four Million Twenty Seven Thousand Two Hundred Five Dollars, United States currency ($4,027,205.00).

4. Of the foregoing sum awarded Claimant, but not in addition thereto, the sum of $280,090.00 is allocated to Claimant's subcontractor, John J. Karlin, Inc. and the sum of $148,270.00 is allocated to Claimant's subcontractor, AG Electric Co. Ltd.

5. By agreement of the parties the Arbitrators will separately consider the award of costs and attorneys' fees in accordance with the Protocol With Respect to Costs executed and submitted by the parties and shall thereafter issue a supplemental award with respect thereto."

17. The Bay did not accept that this was a reasoned award as required by the report of preliminary hearing scheduling order, item 7, and requested the AAA that the arbitration panel provide such an award. In the result the arbitrators issued a supplement to their award dated 25th November 1997, reading in full –

"We the undersigned arbitrators, upon consideration of the request the Respondent for a more detailed reasoned award in this matter, issue this Supplement to the Award of the Arbitrators herein dated November 7, 1997:

1. The Arbitrators hereby reaffirm the Award of the Arbitrators dated November 7, 1997 in all respects.

2. The matters set forth in Paragraphs 1, 2, 4 and 5 of the Award of November 7, 1997 are self-evident and warrant no further comment.

3. Paragraph 3 of the Award of November 7, 1997 is hereby supplemented as follows:

a. On the basis of the testimony and evidence of the parties, the Arbitrators find that Respondent breached the Agreement Between Owner and Contractor (the 'Contract') between The Bay Hotel and Resort, Ltd. (hereinafter 'THE BAY'), as Owner, and Cavalier Construction Company, Ltd. ('CAVALIER'), as Contractor, dated August 18, 1993, for construction of the Crown Bay Resort Hotel by unreasonably interfering with and delaying CAVALIER's performance under the Contract, by requiring CAVALIER to perform work beyond the scope of the Contract without compensation, and by failing to make payments as required.

b. On the basis of the testimony and evidence of the parties, the Arbitrators find that the sum of $619,188.00, the Contract balance as adjusted through Change order No. 8, is due CAVALIER.

c. On the basis of the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to an adjustment of the Contract in the sum of $4,566.00 for mutual mistake; more specifically, a mathematical computation error in Attachment 'A' to the Contract.

d. On the basis of the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to no further adjustment for Contractor's Fee for work deleted from the Contract pursuant to Change Orders executed without a reservation of rights.

e. On the basis of the testimony and evidence of the parties, however, the Arbitrators find that CAVALIER is entitled to $59,515.00 for the Contractor's Fee portion of work deleted from the Contract by THE BAY where CAVALIER's rights with respect to such Fee were reserved.

f. On the basis of the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to $536,038.00 for changes and additions to the Work under the Contract not compensated under executed Change Orders.

g. On the basis of the testimony and evidence of the parties, the Arbitrators find that THE BAY is entitled to $85,112.00 for incomplete and/or defective work claimed in its schedules A, B, C and D, of which the sun of $17,147.00 is attributed to the work of John J. Kirlin, Inc. and $924.00 is attributed to the work of AG Electric Co. Ltd.

h. On the basis of the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to $544,381.00 for remedial work performed beyond the scope of the Contract.

i. On the basis of the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to damages for delay and disruption in the amount of $1,516,605.00.

j. On the basis at the testimony and evidence of the parties, the Arbitrators find that CAVALIER is entitled to interest in the amount of $385,590.00 for its own account, interest in the amount of $30,009.00 for the benefit of John J. Kirlin, Inc. and interest in the amount of $15,886.00 for the benefit of AG Electric Co. Inc.

k. On the basis of the testimony and evidence of the parties, the Arbitrators find that the Guaranteed Maximum Price of the Contract should be adjusted for all of the items set forth herein and CAVALIER's reimbursable cost of the Work under the Contract exceeds the adjusted Guaranteed Maximum Price of the Contract.

4. The remaining requested findings of CAVALIER and THE BAY are not supported by the testimony and evidence of the parties and are therefore denied by the Arbitrators."

18. Pursuant to a protocol that had been agreed between the parties, the arbitrators made a supplemental award, dated 1st

December 1997, with respect to costs and fees. It was in favour of the contractor.

19. Various proceedings not now calling for particularisation were brought abortively by one or other of the parties in the courts of Ontario, the Turks and Caicos Islands and Florida. On 3rd December 1997 The Bay as first plaintiff and Zurich as second plaintiff commenced in the Supreme Court of the Turks and Caicos Islands the action out of which the present appeal arises. Zurich has as such taken no active part in the proceedings; separate consideration of its position is not required. Cavalier Bahamas was named as first defendant, Cavalier TCI as second defendant. The action came to trial on re-amended pleadings. The Bay and Zurich claimed a declaration that the award delivered on 7th November 1997 was improperly procured within the meaning of section 16(2) of the Arbitration Ordinance of the Turks and Caicos Islands; and a declaration and order that it be set aside. The Cavalier companies counterclaimed for declarations and orders that the award and the costs award be enforced with leave of the court in the same manner as a judgment to that effect.

20. So far as they have survived to the Privy Council, the grounds of the claims of The Bay and Zurich are in summary that the award was irregular and improperly procured in that Cavalier TCI should not have been joined, nor should any award have been made in its favour; that the evidence before the arbitrators did not demonstrate any loss suffered by Cavalier Bahamas; and that the award did not give reasons, contrary to the scheduling order and the rules of natural justice. Apart from invocation of section 16(2) of the Arbitration Ordinance, there is also alleged to be error of law on the face of the award.

21. In the Turks and Caicos Islands the Arbitration Ordinance (Chapter 47, Ordinance 7 of 1974, as amended) is not in the form of a comprehensive code but contains limited and miscellaneous provisions about arbitration, apparently largely derived from English legislation before the Arbitration Act 1979. As regards references by consent out of court, there is no provision for appeal to the courts on questions of law or for remission of awards to arbitrators. Section 16 reads –

> "16.(1) Where an arbitrator, umpire or referee has misconducted himself, the court may remove him.

(2) Where an arbitrator, umpire or referee has misconducted himself, or the arbitration award or report has been improperly procured, the court may set aside the award or report."

Section 18 provides that any arbitrator or referee may at any stage of the proceedings under a reference, and shall if so directed by the court, state in the form of a special case for the opinion of the court any question of law arising in the course of the reference. No party sought to invoke this procedure in the present arbitration. Section 4 and paragraph 8 of the Schedule make the award, unless set aside under section 16(2), final and binding on the parties and the persons claiming under them.

22. As to the counterclaim, section 10 of the Ordinance provides that any award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect. Article 4.9.7 of the instant construction contract contains a corresponding provision, which it is unnecessary to set out.

The judgments in the Turks and Caicos Islands

23. In his judgment, delivered on 26th March 1999, Ground CJ dealt first with the questions relating to joinder. He considered that article 4.9.5 of the general conditions was the only possible source of jurisdiction in the arbitrators to join Cavalier TCI, and that the construction of the article was a question of Turks and Caicos Islands law: this was, he said, a matter for him on the wording of the document itself. He accepted that, if joinder was permissible, he should not inquire into whether it was appropriate or not in the circumstances of the case. He went on to hold that joinder was permissible. Saying that the true construction of the paragraph was obscured by the order of its components and the way in which it was cast in the negative, he re-ordered it and in some respects rewrote it. In this process he fastened on the words "and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be awarded in arbitration". These words he saw in their context as constituting an agreement to arbitrate with such persons; so that The Bay could be compelled, without its consent and notwithstanding its objection, to arbitrate with Cavalier TCI provided that the latter company consented.

24. On the issue concerning reasons the Chief Justice found that under R.42 the arbitrators were required to provide no more than a concise written breakdown of the award. The scheduling order

was not capable of overriding that, for in terms of the rule it did not constitute a request by the parties prior to the appointment of the arbitrator. Nor was the obligation of the arbitrators increased by anything said or done at later stages of the arbitration when discussions occurred and submissions were made about the form of the award. And in his view the award of 7th November 1997, as supplemented on request by the document of 25th November 1997, did provide a concise written breakdown sufficient to satisfy R.42.

25. In case he was wrong in that view, Ground CJ went on to consider whether the award, so supplemented, was a reasoned award. He accepted that a reasoned award and a written explanation of the award within the meaning of the rule were the same thing. The Bay and Zurich had relied on a proposition of Donaldson LJ in *Bremer Handelsgellschaft v Westzucker* (No. 2) [1981] 2 Lloyd's Rep 130, 132-133 –

> "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. That is all that is meant by a 'reasoned award'."

Ground CJ did not accept the applicability of that proposition, because he concluded that, under English and therefore Turks and Caicos Islands law, there is a strong *prima facie* presumption that the law to be applied to the procedure of an arbitration is that of the place where the arbitration has its seat. Here he found that the agreed seat of the arbitration was Miami. He thought that the Federal Arbitration Act rather than Florida state law applied, but that this made no practical difference as the evidence was that the meaning of reasoned award had not been determined by any American court, state or federal. He found, however, on considering the expert evidence that the award was a reasoned award as that term is understood in the United States of America.

26. That finding is of critical importance in the case. It was based essentially on the evidence of Professor Carl M. Saper, who holds a chair at Harvard University and has had very extensive practical experience in the field of arbitration. So far as there was any dispute between the expert witnesses, Ground CJ said that he much preferred Professor Saper's analysis and expertise to that of the expert called on the other side (The Bay

and Zurich). What was American law was a question of fact, and the Chief Justice said –

> "As I said above, I accept Professor Saper's evidence. Indeed I found him a compelling witness, because of his experience in the field, his academic and other credentials (all of which are set out in his witness statement and which I need not rehearse), and because of what I consider to be the logical integrity of his arguments. It was his opinion that the Award when taken with its supplement constituted a reasoned award.
>
> It was also his evidence that there was no necessity to tell the loser why he lost, and that that was not the purpose of a reasoned award. He did not accept Donaldson LJ's formulation as a definition of a 'reasoned award,' and did not accept it was necessary to go through each schedule of loss separately as they all fell into well known categories of issues and could be disposed of as one. Moreover, he did not consider it was necessary for an arbitrator to go through such schedules item by item. Indeed be felt that that would be very rare in the case of a reasoned award, and not typical. He accepted that the actual Award (taken with the supplement) was a 'lean award,' which could have had a 'richer embellishment', but he said such an award was quite typical in the United States and would not be subject to rebuke or vacation.
>
> I consider that that last observation by Professor Saper holds the key to much of what is in dispute between the parties. Practices and procedures in the United States may have an apparent familiarity to English lawyers, which on closer examination proves to be deceptive. Similarly, procedural terminology may seem similar and mean different things. The different approach to discovery between the two jurisdictions is but one example of this. The defendants say that the plaintiffs' problem is that they have strayed into a difficult legal system which they are trying to make conform to their own. The plaintiffs say that this is a 'through the looking glass' argument. At the end of the day, on the evidence, I prefer the defendants' approach, and if it turns out that the evidence of their expert leads to a different result from that which would have obtained if English law had applied, and which seems wrong to English trained eyes, that is not of itself a ground for rejecting it."

27. Three other points remain to be mentioned briefly regarding the judgment at first instance. The Chief Justice disposed of the natural justice argument on the simple basis that the parties to an arbitration get what they have contracted for - a view which has not subsequently been challenged. He gave leave to the Cavalier companies to enforce the award in the same manner as a judgment to the same effect. Last he declined a belated application for leave to amend the counterclaim to include a claim for interest on the amount awarded from the date of the award (or some subsequent date) until the date of judgment. He said *inter alia* that whether the award carried interest depended on the terms of the contract and had not been in issue before him during the trial of the action.

28. In the Court of Appeal of the Turks and Caicos Islands the case came before Sir James Astwood P and Campbell and Kerr JJA. The judgment of the court was delivered on 9th February 2000 by Kerr JA. After citing the well-known passage in the speech of Lord Mustill in *Channel Tunnel Group Ltd . v Balfour Beatty Construction Ltd.* [1993] AC 334, 357-358, as to how more than one national system of law may bear upon an international arbitration, and also the judgment of Kerr LJ in *Naviera Amazonica Peruana S.A. v Compania Internacional De Seguros Del Peru* [1988] 1 Lloyd's Rep 116, 119, the Court of Appeal upheld the conclusion of Ground CJ that the procedural law in this case was the Federal Act of the United States.

29. The Court of Appeal then turned to the question of joinder. Again they upheld the Chief Justice – but with a major qualification later in their judgment, which will be mentioned again shortly. Their reasoning for accepting a power of joinder was somewhat simpler than that of the Chief Justice. They did not engage in any notional rewriting of article 4.9.5 of the general conditions of contract. Rather they attached importance to the omission of any reference to consent, an omission which they regarded as purposeful and contrasting, in the sentence –

> "No arbitration shall include, by consolidation or joinder or in any other manner, parties other than the Owner, Contractor, other Contractors as described in Article 6 and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration."

The Court of Appeal thought that the satisfaction of these criteria was a matter of fact for the arbitrators and was independent of any consent by the parties.

30. Next the Court of Appeal dealt with the reasoned award issue. They said that it was accepted by counsel for The Bay and Zurich that the Ordinance did not impose any obligation to provide a reasoned award; any obligation arose from the AAA rules and the arbitration agreement. That view of the matter has again not been challenged before their Lordships . As to the effect of the rules and the agreement, the Court of Appeal held that the Chief Justice had been entitled to accept the evidence of Professor Saper "which would be useful for its dictionary effect and as to the meaning of 'Reasoned Award' in the profession of Architects and the expectations of those who use this AAA form of contract".

31. Having affirmed the Chief Justice thus far, the Court of Appeal, in the judgment delivered by Kerr JA, then dealt with a point which they said had not been raised before the arbitrators, nor specifically in the court below. Referring to an unreported judgment of Hobhouse J in the Queen's Bench Division in 1993, they held that Cavalier TCI, although in their view properly joined, had not properly been made a joint awardee. Accordingly the Chief Justice's leave for enforcement could not stand insofar as it related to Cavalier TCI. As they put it, it is beyond dispute that Cavalier Bahamas as the other party to the construction contract had the burden of the obligations and was entitled to the benefits under the contract. To make Cavalier TCI an awardee would confer through arbitration proceedings benefits arising from a contract to which that company was not a party. Accordingly the appeal was allowed to the limited extent of amending the award by deleting Cavalier TCI as a party in favour of whom it was made. It is convenient to interpolate that their Lordships see no reason why such an amendment should not be made if an award is clearly severable.

32. The Court of Appeal dismissed a cross-appeal as to interest, saying that no reasonable ground for the requested amendment had been offered either to the Chief Justice or to the Court of Appeal.

The Governing Code

33. Their Lordships turn to consider the main issues in the case. As already explained, they are whether there was a reasoned

award and whether Cavalier was properly joined in the arbitration (this being linked with the no loss point). To determine these issues, in part procedural and in part jurisdictional, it is necessary to decide what system of law or what rules govern the questions.

34. In English law, and therefore in Turks and Caicos law, it has been settled since at least *James Miller & Partners Ltd. v Whitworth Street Estates (Manchester) Ltd.* [1970] AC 583 that the proper or substantive law of a contract may differ from the procedural or curial law of an arbitration thereunder. In that case there was a difference of opinion in the House of Lords as to the proper law of a construction contract made in a standard R.I.B.A. form. Lord Hodson, Lord Guest and Viscount Dilhorne held that the proper law was that of England. Lord Reid and Lord Wilberforce preferred the view that it was Scottish law. But all five members of the House held that the curial law was that of Scotland, where the project was situated and the arbitration took place. Hence the (Scottish) arbiter could not be required to state a case for the opinion of the English High Court.

35. Two points in the speech of Lord Wilberforce are notable here. First, he said that in the normal case where the contract itself is governed by English law, any arbitration would be held under English procedure. Secondly, he said that the mere fact that the arbitrator was to sit either partly or exclusively in another part of the United Kingdom, or, for that matter, abroad, would not lead to a different result: the place might be chosen for many reasons of convenience or be purely accidental; a choice so made should not affect the parties' rights. The passage in his speech is at page 616 of the report.

36. Especially because of the extent to which it was relied on in this case by the courts of the Turks and Caicos Islands, reference is also appropriate to the speech of Lord Mustill, agreed with by the other members of the House, in *Channel Tunnel Group Ltd. v Balfour Beatty Construction Ltd.*, cited earlier. In that case the proper law of the contract was contractually defined as "the principles common to both English law and French law, and in the absence of such common principles, by such general principles of international trade law as have been applied by national and international tribunals". The arbitration clause explicitly provided "The seat of such arbitration shall be Brussels". In that context it is not surprising that Lord Mustill, in the passage cited in the Turks and Caicos Islands (see [1993] AC at 357-358), found it irresistible that the parties when contracting to arbitrate in a particular place consented to having the arbitral process governed by the law of that place.

37. In the present case the parties did not agree in the construction contract that Miami should be the seat of any arbitration. When the need for arbitration arose they severally requested the hearing to be in Miami for convenience. The courts should not be astute to hold that the curial law of an arbitration is different from the proper law of the contract (see the observations of Lord Wilberforce already quoted); and it is doubtful whether, in the absence of some other weighty factor, the requests of the parties for a Miami hearing would have been enough to justify such a conclusion. As it is, however, there is an overriding factor. This is the addition to the contract of an agreed term that disputes shall be resolved according to the laws of Turks and Caicos Islands. It amounts to an express choice of the same curial law as the proper law, the latter having already been defined in article 13.1.1 of the general conditions of the contract as the law of the place where the project was located. The Board is therefore unable to uphold the view of the courts of the Turks and Caicos Islands that the agreed seat of the arbitration was Miami and the applicable procedural law the federal law of the United States. For both substance and procedure the relevant national law is that of the Turks and Caicos Islands.

38. But identifying the national curial law of the arbitration is not important in the resolution of the present case. The reason has already been indicated. The AAA Construction Industry Arbitration Rules, incorporated in the construction contract, constitute a code which provides answers to both the reasoned award issue and the joinder issue. When contracts specify arbitration under the rules of a particular institution such as the AAA, it is not uncommon that procedural and jurisdictional issues are governed by those rules. A national law may be in the background. It may have an invalidating effect or an auxiliary role. In the present appeal no problem arises under either of those heads. If the award complied with the AAA rules, there can be no doubt that the Supreme Court could give leave to enforce it. Such qualifications aside, the adoption by the parties of an institutional code enables issues to be resolved by application of that code. This is a consequence of party autonomy, which, although spoken of rather disparagingly by one of the counsel who argued before the Board, is generally accepted as a key principle of current arbitration law. In other words, the law of the Turks and Caicos Islands entitled the parties to select the AAA code, so far as it might cover issues arising in an arbitration, to govern the determination of their disputes.

The Reasons Issue

39. It being common ground that under the AAA code "a reasoned award" and "a written explanation of the award" are synonymous, the main issue is whether the award and the supplemental award, read together, answer that description for the purposes of that code.

40. In current English law, section 52(4) of the Arbitration Act 1996 provides that the award shall contain the reasons for the award unless it is an agreed award or the parties have agreed to dispense with reasons. Article 31(2) of the UNCITRAL Model Law on International Commercial Arbitration makes similar provision. In recommending the provision that became section 52(4) of the English Act, the Departmental Advisory Committee on Arbitration Law, chaired by Lord Justice Saville, said in paragraph 247 of their Report of February 1996 –

> "247. To our minds, it is a basic rule of justice that those charged with making a binding decision affecting the rights and obligations of others should (unless those others agree) explain the reasons for making that decision. This was also the view of the majority of those who commented on this."

41. It is to be noted, however, that this basic rule is seen as subject to the contrary agreement of the parties. Consistently, section 69 of the English Act of 1996, which enables in strictly defined circumstances appeals to the court on questions of law, stipulates in subsection (1) that an agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section. There can be no doubt that at common law the parties are free to agree on a form of award which would constitute something less than a reasoned award in the eyes of English common lawyers. Nor does the Arbitration Ordinance of the Turks and Caicos Islands contain anything to restrict that freedom.

42. No doubt, to anyone familiar with the issues in the arbitration the award and the supplemental award would convey more about the reasons of the tribunal than would be apparent to an outsider. Even so, their Lordships accept that the documents fall short of what English common lawyers would regard as a reasoned award. The criteria stated by Donaldson LJ (see paragraph 25 above) would not be satisfied. Nor would the superficially attractive but perhaps simplistic test that the loser should be told not only that he has lost but also why he has lost.

43. Nonetheless, the question is not what English common lawyers would say. It is what reasoned award or written explanation of the award would mean to persons versed in working with the AAA code. This is a question of fact, analogous to a question of trade usage or custom. Ground CJ found Professor Saper's evidence upon it impressive and conclusive. The Court of Appeal affirmed the Chief Justice; they justifiably treated his evidence as not discriminating on this question of interpretation between American law generally and the AAA rules. Their Lordships could not rightly differ. However lean and unembellished, the award with its supplement must be found to have been reasoned within the meaning of the institutional rules. It is not without relevance, albeit not decisive, to add that counsel for The Bay accepted in the Privy Council that, if the arbitration had been governed by United States law, the award and supplement would have to be treated as a reasoned award. Whether or not the curial law of the arbitration, United States law is a major aid in interpreting the AAA rules. And it would be unconvincing to propose that, when those rules apply, the meaning for their purpose of "a written explanation of the award" or "a reasoned award" will vary according to where the arbitration is held. The main attack upon the award must fail.

The Joinder Issue

44. For the common law position as to joinder in England and the Turks and Caicos Islands, it is useful to reproduce some paragraphs in the 1996 Report of the Department Advisory Committee previously mentioned. Headed "Clause 35 Consolidation of Proceedings and Concurrent Hearings", they read –

> "177. This Clause makes clear that the parties may agree to consolidate their arbitration with other arbitral proceedings or to hold concurrent hearings.
>
> 178. During the consultation exercises, the DAC received submissions calling for a provision that would empower either a tribunal or the Court (or indeed both) to order consolidation or concurrent hearings. These were considered extremely carefully by the committee.
>
> 179. The problem arises in cases where a number of parties are involved. For example, in a construction project a main contractor may make a number of sub-contracts each of which contains an arbitration

clause. A dispute arises in which a claim is made against one sub-contractor who seeks to blame another. In Court, of course, there is power to order consolidation or concurrent hearings, as well as procedures for allowing additional parties to be joined. In arbitrations, however, this power does not exist. The reason it does not exist is that this form of dispute resolution depends on the agreement of the contracting parties that their disputes will be arbitrated by a private tribunal, not litigated in the public courts. It follows that unless the parties otherwise agree, only their own disputes arising out of their own agreement can be referred to that agreed tribunal.

180. In our view it would amount to a negation of the principle of party autonomy to give the tribunal or the Court power to order consolidation or concurrent hearings. Indeed it would to our minds go far towards frustrating the agreement of the parties to have their own tribunal for their own disputes. Further difficulties could well arise, such as the disclosure of documents from one arbitration to another. Accordingly we would be opposed to giving the tribunal or the Court this power. However, if the parties agree to invest the tribunal with such a power, then we would have no objection.

181. Having said this, the DAC appreciates the common sense behind the suggestion. We are persuaded, however, that the problem is best solved by obtaining the agreement of the parties. Thus those who are in charge of drafting standard forms of contract, or who offer terms for arbitration services which the parties can incorporate into their agreements, (especially those institutions and associations which are concerned with situations in which there are likely to be numerous contracts and sub-contracts) could include suitable clauses permitting the tribunal to consolidate or order concurrent hearings in appropriate cases. For example, the London Maritime Arbitrators Association Rules have within them a provision along these lines. In order to encourage this, we have made clear in this Clause that with the agreement of the parties, there is nothing wrong with adopting such procedures."

45. With regard to United States law, a collection of decisions, almost all of federal courts, were cited in argument for the respondents, viz. *Thomson-CSF, SA v American Arbitration Association* 64 Fed 3rd 773 (U.S. Court of Appeals, Second Circuit, 1995); *Federated Department Stores Inc v JVB Industries Inc.* 894 F 2nd 862 (United States Court of Appeals, Sixth Circuit, 1990); *Fried, Krupp GmbH v Solidarity Carriers Inc.* 674 F Supp 1022 (United States District Court, S D New York, 1987); 674 F Supp 1022 (United States District Court, S D New York, 1987); *Stamey v Easter* 2000 WL 869577 (Alabama Supreme Court, 2000); *MS Dealer Service Corp. v Franklin* 177 F 3rd 942 (United States Court of Appeals, Eleventh Circuit, 1999); *Morris v Chesapeake & OSS Co.* 125 F 62 (District Court, S D New York, 1903); *Carte Blanche (Singapore) Pte Ltd. v Diners Club International Inc.* 2 F 3rd 24 (United States Court of Appeals, Second Circuit, 1993); and *Moses H Cone Memorial Hospital v Mercury Construction Corporation* 460 US 1, 103 S Ct 927 (Supreme Court of the United States, 1983). Their Lordships have read these cases. Some of them show a readiness in arbitration matters to pierce the corporate veil or apply the concept of a third party beneficiary, but there appears to be no clear instance of a party who has not consented and is not estopped being held bound to arbitrate with a claimant who is not a party to the arbitration agreement. The American authorities are of limited assistance on this issue of jurisdiction. Indeed counsel for the respondents, who argued (without objection) for restoration of the decision of Ground CJ upholding the award to both Cavalier Bahamas and Cavalier TCI, based the argument ultimately on article 4.9.5 of the general conditions of contract.

46. Such a rule of an arbitral institution may of course, by incorporation, amount to express or implied consent to extension of the arbitrators' jurisdiction by their own order. The basic criterion remains consent. This principle was seen at work in the House of Lords case *Lafarge Redland Aggregates Ltd. v Shephard Hill Civil Engineering Ltd.* [2000] 1 WLR 1621. It was a case of separate contracts, each with its own arbitration clause, between employer and main contractor and main contractor and subcontractor. An institutional rule, applying when disputes arising under more than one contract were concerned with the same subject-matter and were to be dealt with by the same arbitrator, empowered the arbitrator to order that they be heard together. The contractor sought to compel the subcontractor to accept and wait for a composite hearing. But the subcontractor's consent to that procedure, contained in the subcontract, was held

to be conditional on the contractor's taking the necessary steps within a reasonable time. It was also accepted that the employer could not be compelled to take part in a joint hearing: the employer was not a party to the subcontract and had not otherwise consented.

47. The question is whether article 4.9.5 constituted consent by The Bay to the vesting in the arbitrators of power to join Cavalier TCI. As has been seen, the courts in the Turks and Caicos Islands, for somewhat differing reasons, thought that it did. They saw it as an empowering clause, which is the argument of Mr Reese QC. The Board is unable to agree. The clause has to be read as a whole. Throughout it is concerned, as its introductory heading indicates, with *limitation* on consolidation or joinder. It is not a source of jurisdiction, but a restriction of jurisdiction. It presupposes relevant agreements to arbitrate, which will be the source of any jurisdiction that does exist, and it imposes conditions on the exercise of any powers of joinder that may otherwise flow from such agreements. The various references to consent and agreement are consistent with this theme. There is a prohibition against including parties other than the owner, contractor, other contractors and other persons substantially involved in a common question of fact or law whose presence is required if complete relief is to be accorded in arbitration. Their Lordships cannot extract from this prohibition the positive conferment of jurisdiction to add a claimant who is not a party to the arbitration agreement and to whose joinder a party to that agreement objects.

48. Nor does the Board find it possible to adopt the half-way house, proposed by the Court of Appeal, of jurisdiction to join Cavalier TCI but not to make an award in its favour. The concept seems self-contradictory. If a party is properly joined as a claimant, it is difficult to see how it can be denied relief as a claimant. There is nothing in the unreported judgment of Hobhouse J in *Phoenican Express SARL v Garware Shipping Corporation Ltd.* (Queen's Bench Division, 22nd November 1983) to support such an illogical course. That case is a straightforward example of the setting aside of an award insofar as it purported to be in favour of a company not a party to the submission to arbitration. There was no separate question about joinder. The judgment is, however, helpful as illustrating severance (although that point was not argued in that case).

49. For these reasons it must be held that the arbitrators lacked jurisdiction, not only to make an award in favour of Cavalier TCI

but even to make it a party to the arbitration. Cavalier TCI should consequently be struck out from the award, which, subject to the no loss point, is to be upheld in favour of Cavalier Bahamas only.

The Issue of Loss

50. It has consistently been contended for The Bay that Cavalier Bahamas suffered no loss and that in making an award to Cavalier Bahamas the arbitrators were guilty of misconduct (in the technical sense) by disregarding that argument. While the appeal to the Privy Council was pending the House of Lords on 27th July 2000 decided *Alfred McAlpine Construction Ltd. v Panatown Ltd.* [2000] 3 WLR 946. The majority speeches in that case are now said to provide further support for the argument.

51. In *Panatown* a group of companies wished to have a building constructed. The land was owned by one company in the group (UIPL) but, for avoidance of value added tax, the building contract was made by another member (Panatown). A collateral deed was entered into between the contractor and UIPL whereby the latter was given a direct remedy against the contractor for failure to exercise reasonable care and skill. The building proved seriously defective, but by a majority of three to two the House of Lords held that Panatown, the only claimant in an arbitration, was entitled to no substantial damages because it had suffered no loss. The collateral deed was a major factor in this decision. For present purposes the speeches, which are naturally elaborate, have been summarised only briefly. A more extensive review is to be found in Professor Brian Coote's article, "The Performance Interest, *Panatown*, and the Problem of Loss" in (2001) 117 LQR 81-95. He brings out some anomalies and says that it would be a great pity if the decision in *Panatown* were taken to be the last word. Given the complexity of the authorities, the Board sees little likelihood of that.

52. *Panatown* did not concern a claim by a building contractor. Neither in *Panatown* or elsewhere can their Lordships find any basis for a theory that a building contractor who completely delegates performance of the work is thereby necessarily debarred from recovering either contractual remuneration or damages for the employer's breach. If the work is in fact performed by an associated company or a subsidiary, the financial arrangements between that company and the contractor may produce the result that any loss falls on the contractor. There was uncontradicted evidence in this case to the effect that such was the position. The

obvious inference from the joinder (without jurisdiction though it was) is that the arbitrators accepted that view of the matter, treating Cavalier TCI as the alter ego of Cavalier Bahamas. (According to the witness statement of leading counsel for The Bay, Mr Scott, they said that to all intents and purposes Cavalier Bahamas and Cavalier TCI were part and parcel of the same company, or were alternatively alter egos.) Questions of law and fact were for the arbitrators. There is no trace of any error of law or fact, let alone of misconduct of any kind, in their award to Cavalier Bahamas. The suggestion that they must have ignored the no loss argument is improbable and unfounded. They were entitled to be unimpressed by it. That award should stand.

The Issue of Interest

53. Although no reason is apparent for denying the contractor interest on the award to the date of leave to enforce it as a judgment, whether to allow a late amendment was a discretionary question on which the Board is unwilling to interfere with the decisions of the courts of the Turks and Caicos Islands. It is open to the contractor to bring separate proceedings for the interest now claimed.

Disposition of the case

54. For these reasons their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed but that the joinder of Cavalier TCI as a party to the arbitration ought to be set aside, leaving standing the award to Cavalier Bahamas and the leave to enforce it as a judgment. The cross-appeal should be dismissed without costs. The appellants should pay Cavalier Bahamas the costs of the appeal.