

## RECENT DEVELOPMENTS IN SINGAPORE ON INTERNATIONAL COMMERCIAL ARBITRATION

by WARREN B. CHIK\*

This report is the third installment in a series of yearly updates that began in 2005 to track and follow the developments in arbitration law in Singapore. Several prominent cases that dealt with important issues in arbitration law arose for consideration in the High Court and Court of Appeal in 2006-7. There was the case of *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd*<sup>1</sup> that further reinforces the strong policy recognition and enforcement of international arbitration awards by keeping the interpretation of the public policy exception to enforcement under section 31(4)(b) of the IAA narrow. There was also the interesting and ostensibly conflicting High Court decision in *Swift-Fortune Ltd v. Magnifica Marine SA*<sup>2</sup> by Justice Judith Prakash and the subsequent case of *Front Carriers Ltd v. Atlantic & Orient Shipping Corp* decided by Justice Belinda Ang<sup>3</sup> on the power of the court to grant a Mareva injunction in relation to foreign arbitration,<sup>4</sup> which was eventually clarified and reconciled by the Court of Appeal in the appeal decision to the former case.<sup>5</sup>

### I. INTRODUCTION

Several important decisions on arbitration law were made in 2006-7 that adds to the corpus of Singapore law on arbitration. In the meantime, demonstrating yet another approach to raising Singapore's prominence in the international arbitration scene, Singapore hosted and co-hosted several events locally relating to arbitration. The country played host to the 16th International Congress of Maritime Arbitrators from 26 February 2007 to 1 March 2007. The Singapore International Arbitration Centre (SIAC) co-hosted the Asian-European Business Disputes Conference—Arbitration in Switzerland at the Grand Plaza Park Hotel City Hall on 4 May 2007 with the Swiss Arbitration Association (ASA) and the Hong Kong International Arbitration Centre (HKIAC). The SIAC also organized California's Second Annual Programme on Key Issues in International Arbitration with the International Law Section of the California State Bar and the International Centre for Dispute Resolution, with SIAC Deputy Chairman, Professor Lawrence Boo, delivering the Keynote Address for the event.

The Singapore Institute of Arbitrators held the Inaugural Regional Arbitral Institutes Conference from 12 to 13 July 2007 pursuant to a Memoranda of Co-operation with arbitral institutes in the region, namely the Malaysian Institute of Arbitrators (MIArb), Badan

\* LL.B. (NUS); LL.M. (Lond.); LL.M. (Tulane); Advocate & Solicitor (Singapore); Attorney and Counsellor-at-Law (New York); Solicitor (England & Wales). The author is an Assistant Professor of Law at the Singapore Management University School of Law.

<sup>1</sup> [2006] 3 Sing.L.R. 174, [2006] SGHC 78.

<sup>2</sup> [2006] 2 Sing.L.R. 323, [2006] SGHC 36 [*Swift-Fortune*].

<sup>3</sup> [2006] 3 Sing.L.R. 854, [2006] SGHC 127 [*Front Carriers*].

<sup>4</sup> On the interpretation and scope of section 4(10) of the Civil Law Act (CAP 43 Rev Ed 1999).

<sup>5</sup> *Swift-Fortune Ltd v. Magnifica Marine SA*, [2007] 1 Sing.L.R. 629, [2006] SGCA 42. However, the court had not taken the opportunity to decide on the extension of the scope of section 4(10) of the CLA to foreign arbitrations.

Arbitrase Nasional Indonesia (BANI), the Institute of Arbitrators & Mediators Australia (IAMA), the Hong Kong Institute of Arbitrators (HKIARb), the Arbitration Association of Brunei Darussalam (AABD) and the SIAC.<sup>6</sup> The Singapore Supreme Court Judge of Appeal Justice V.K. Rajah served as Keynote Speaker.

In cyberspace, the SIAC and SMC are also beginning to play an increasingly relevant and important role. They already jointly operate the Singapore Domain Name Dispute Resolution Service Secretariat, which manages the dispute resolution mechanism under the Singapore Domain Name Dispute Resolution Policy (SDRP). The SDRP provides a framework for resolving domain name disputes over the use of the ‘.sg’ country coded top level domain (ccTLD). The SDRP was adopted by the Singapore Network Information Centre (SGNIC) Private Limited, the registration authority for the ‘.sg’ domain names, and the alternative dispute resolution mechanism offers a speedier and less costly process and method to resolving ‘.sg’ domain name disputes although litigation in the courts remains an option under the SDRP. Thus far, 10 panel decisions have been submitted and concluded under the auspices of the SDRP.<sup>7</sup>

Meanwhile, arbitration remains the preferred choice for alternative dispute resolution, with international law firms keen to expand their arbitration practice and business in Singapore and in the region.<sup>8</sup> Several law firms are also reportedly looking to set up an arbitration panel or office to deal with sports disputes to cater to the growing sports industry.<sup>9</sup> Singapore is also trying to get the Court of Arbitration for Sport (CAS), the highest sports tribunal, to establish a presence in Singapore to cater to the Asia-Pacific market.<sup>10</sup>

## II. THE CASES

Only cases dealing with significant statements and clarification on the law of arbitration will be considered.

### A. *Whether Section 12 of the International Arbitration Act (IAA) has Extra-Territorial Effect and the Extent of the Court’s Power to Grant a Mareva Injunction in Aid of Foreign Arbitration under Section 12(7) of the IAA and Section 4(10) of the Civil Law Act (CLA)*

In the *Swift-Fortune* case,<sup>11</sup> the defendant, a Panamanian company, had entered into a memorandum of agreement (MOA) with the plaintiff, a Liberian company, to sell it a vessel, with delivery fixed at a certain date. Under the MOA terms of payment, the plaintiff was required to deposit a sum of money with a bank in Singapore to be held under the

<sup>6</sup> The Conference program featured a host of speakers from the participating jurisdictions speaking on current topics relating to arbitration. It was organized as an important meeting point for regional arbitration practitioners and parties interested in the dispute resolution industry in the region.

<sup>7</sup> For the list of proceedings under the Singapore Domain Name Dispute Resolution Policy, see the Dispute manager website at: [http://www.disputemanager.com.sg/SDRP/Proceedings\\_info.htm](http://www.disputemanager.com.sg/SDRP/Proceedings_info.htm). The SDRP, the SDRP Rules and SDRP Supplementary Rules are available at: <http://www.disputemanager.com.sg/SDRP/what.htm>.

<sup>8</sup> E.g., see Malar Velaigam “CC Pushes Arbitration Business in Asia” *The Lawyer* (7 June 2007) online: *The Lawyer* <[.](http://www.thelawyer.com/cgi-bin/item.cgi?id=126364&cd=122&ch=24&cf=46)

<sup>9</sup> May Wong “Singapore Keen to Set Up Arbitral Panel for Sports: Lawyers” *Channel NewsAsia* (5 April 2007) online: <<http://www.channelnewsasia.com/stories/singaporelocalnews/view/268732/1.html>>.

<sup>10</sup> Loh Chee Kong “Singapore Could Become Asia’s Sports Umpire: Republic Among the Favourites to Host Sports Arbitration Court’s Regional Base” *Today Paper* (6 April 2007) online: *TODAYonline* <<http://www.todayonline.com/articles/181806.asp>>.

<sup>11</sup> See Note 2.

joint names of the plaintiff and the defendant. The MOA also provided that in the event of any dispute arising out of it, that dispute would be referred to arbitration in London. The defendant made several extensions on the date of delivery of the vessel which were acceded to buy the plaintiff without prejudice to the latter's rights to claim for compensation for late delivery. On the day before the final delivery, the plaintiff successfully applied to the Singapore High Court for relief including a Mareva injunction restraining the defendant from removing or in any way disposing of or dealing with or diminishing the value of its assets in Singapore up to a certain amount. The defendant sought to set aside the injunction.

Justice Prakash granted its application and in the course of her judgment stated that, based on section 12 of the IAA, the High Court had no power to make orders to assist a foreign international arbitration except in limited situations covered by sections 6(3) and 7(1) of the same Act. That would be the case where an action could be started within the jurisdiction because the defendant or vessel concerned was amenable to the court's jurisdiction. Due to the territorial effect of its legislation, the legislature had no power to make rules relating to foreign international arbitrations and subject to foreign law, which was not ordinarily subject to Singapore law.

In the subsequent *Front Carriers* case,<sup>12</sup> a former employee of the defendant, the West Indies company, negotiated with the plaintiff, a Liberian company, the charter of a vessel. It was later discovered that the former employee had no authority to fix the charter. The former employee later joined a Singapore company as its executive director. The plaintiff took the position that the correspondence between its representatives and the defendant's former employee resulted in the perfection of the time charter and applied for a Mareva injunction against the defendant while it simultaneously commenced arbitration against the defendant in London for the breach of the time charter. The defendant applied to set aside the injunction.

In her decision, Justice Belinda Ang disagreed with the ruling of her fellow judge in the *Swift-Fortune* case and held that the Court had the power under the IAA to assist, by way of interim measures, international arbitration both in Singapore as well as those held abroad. She explained that section 12(1) of the IAA spells out in detail the interim measures of protection which an arbitral tribunal may make, which are remedies aimed at assisting in the just and proper conduct of arbitration. Orders from arbitral tribunals are given coercive effect with the High Court's leave under section 12(6) of the Act. Section 12(7) of the Act gives effect to Article 9 of the UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law),<sup>13</sup> and it forms the basis upon which the High Court may order interim measures by applying its own domestic law. Under the first part of this Article, a request for interim protection is not incompatible with an arbitration agreement and the request can be made to a court in a country which is different from the seat of arbitration. Interim measures are not contrary to the intentions of the parties to an arbitration agreement since they support and promote the outcome of arbitration. Having established its jurisdiction, however, the injunction was set aside due to the lack of merits on the plaintiff's part.

On 1 December 2006, in the appeal on the former case, the Singapore Court of Appeal clarified the scope of section 12(7) of the IAA in relation to the question of whether a Singapore court can grant a Mareva injunction as an interim relief in aid of a foreign arbitration that was instituted based upon an international arbitration agreement that did not stipulate Singapore as the seat of the arbitration.<sup>14</sup> By doing so, the CA resolved the

<sup>12</sup> See Note 3.

<sup>13</sup> In the same way that Order 69A Rules 3(1)(c) and 4(1) of the Rules of Court give effect procedurally to Article 9.

<sup>14</sup> See Note 5. *Swift-Fortune Ltd v. Magnifica Marine SA*, [2007] 1 Sing.L.R. 629, [2006] SGCA 42.

conflict on this point between two earlier High Court decisions by Justice Prakash in the *Swift-Fortune* case<sup>15</sup> and Justice Belinda Ang's decision in the *Front Carriers* case.<sup>16</sup>

To reiterate, in this case, the plaintiff sought to obtain a Mareva injunction against the defendant as interlocutory relief in aid of a foreign arbitration not held in Singapore on the basis of section 12(7)(1) of the IAA, pending the outcome of the actual arbitration proceedings in London. The injunction was set aside by the judge of first instance but the plaintiffs appealed. The CA heard but dismissed the appeal. Chief Justice Chan Sek Keong, delivering the grounds of decision, summarised the court's findings as follows: First, section 12(7) of the IAA does not apply to foreign arbitrations, but it applies to an international arbitration where Singapore is stipulated as the seat of arbitration.<sup>17</sup> Second, section 12(7) of the IAA does not provide an independent source of statutory power for the court to grant the reliefs under section 12(1) of the IAA.<sup>18</sup> Third, the power is drawn from section 4(10) of the CLA,<sup>19</sup> which the court noted was the source of its power to grant interim injunctions in court proceedings, but it stated that that provision does not confer power upon the court to grant a Mareva injunction against a defendant's assets in Singapore *unless* the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court,<sup>20</sup> which was not the case on the facts in *Swift-Fortune* case.

The court made the observation that *Front Carriers* had further ruled that the court had power to grant a Mareva injunction under section 4(10) of the CLA in aid of foreign arbitral proceedings if two preconditions were met, namely, if it had personal jurisdiction over the defendant and there was a pre-existing substantive cause of action subject to Singapore law. However, as it found that the issue did not arise on facts of the case before it, since the plaintiff in *Swift-Fortune* had no justiciable right against the defendant in Singapore, it did not give an answer to the question as to whether the *Front Carriers* position on the scope of section 4(10) of the CLA was correct, although it did raise some preliminary doubts on the issue.<sup>21</sup> It was noted that a separate appeal against the *Front Carriers* decision has been filed, and perhaps in the next issue this question would be categorically resolved.<sup>22</sup>

<sup>15</sup> See Note 2. Court of first instance.

<sup>16</sup> See Note 3. Where the judge gave a more generous interpretation of section 12(7) of the IAA, recognizing in the court the power to grant a 'free-standing' Mareva injunction even in cases where the plaintiff has no substantive claim against the defendant in the court proceedings, thereby effectively aiding foreign arbitrations.

<sup>17</sup> See paras 40 to 58, in particular 48, 51 to 55. This has the effect of encouraging arbitrations to be held in Singapore if court assistance, in this case in the form of a Mareva interlocutory relief, is anticipated or required. It may have an impact on tactical or strategic considerations for parties negotiating future arbitration agreements with foresight as to where assets and evidence may be situated.

<sup>18</sup> Section 12(1) of the IAA lists the powers of an arbitral tribunal including the power to make interim injunctions. Section 12(7) of the IAA provides that in relation to these powers the High Court has the same powers in respect of arbitration as to a court action. The court agreed with Justice Prakash here that it was unlikely that Parliament intended section 12(7) to apply to foreign arbitrations when it did not confer such power to grant Mareva injunctions in aid of foreign court proceedings unless there were clear and expressed words to that effect. Hence, the court took the view that section 12(7) does not provide an independent source of statutory power for it to grant orders and reliefs set out under section 12(1) of the Act.

<sup>19</sup> And section 18(1) of the Supreme Court of Judicature Act (SCJA).

<sup>20</sup> Citing the cases of *Karaha Bodas Co LLC v. Pertamina Energy Trading Ltd*, [2006] 1 Sing.L.R. 112 and *Siskina v. Distos Compania Naviera SA*, [1979] AC 210, a Singapore court has no power to grant Mareva relief in respect of Singapore assets of a foreign defendant if the only purpose of such relief is to support foreign court proceedings.

<sup>21</sup> For arguments for and against restricting or widening the interpretation of section 4(10) in relation to granting Mareva interlocutory relief, see paras 92 to 93. In the *Front Carriers* case there was a substantive claim recognizable by a Singapore court.

<sup>22</sup> It is to be noted that the court distinguished the two cases on the basis that there was a justiciable cause of action in the Singapore courts in the *Front Carriers* case but not in the *Swift-Fortune* case and hence the cases were not in conflict with each other in their interpretations of section 4(1) of the CLA. Other than that, the cases were substantially the same on the material facts.

It is interesting to note the conflicting policy interests that underlie the question of whether to extend court assistance in granting interim relief such as Mareva injunctions and the concomitant supervision and enforcement of such orders. On the one hand, not extending it to arbitration held overseas may encourage arbitrations to be held in Singapore and for arbitration agreements to provide as such. On the other hand, this position may contradict the policy to be pro-arbitration irrespective of the venue and law and for Singapore to set an example in this regard.

The courts should abide by the general policy towards the support of arbitration but not be seen to be interfering with the rights of the parties and to intrude into the powers of arbitral tribunals. The distinction between assistance and interference can sometimes be a fine one. The issues of extra-territoriality and sovereignty also figures in considering whether these are powers that justify the extra-ordinary effects of extra-territorial application with all its implications. In the end, the court was guided by the law and legislative history (i.e. parliamentary intent, or the lack thereof) of the IAA which was primarily concerned with encouraging and assisting international arbitration proceedings in Singapore and that did not purport to apply extra-territorially.

#### *B. The Scope of the Public Policy Ground to Refuse the Enforcement of an Arbitral Award Under Section 31(4)(b) of the IAA*

Since the second installment where the case of *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*<sup>23</sup> was considered in relation to the scope of the public policy ground for setting aside of an arbitral award amongst other grounds, its appeal has been heard and decided in the Court of Appeals and another case was also heard before Justice Prakash in the High Court that considered the scope of the public policy exception.

In the *PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*,<sup>24</sup> the Court of Appeal upheld the earlier decision. The court agreed that the public policy exception under the IAA “encompasses a narrow scope” and referred to the preparatory materials to the UNCITRAL Model Law and established case precedents. It agreed fully with the trial judge’s observations and decision on this issue and refused to set aside the award on this ground.<sup>25</sup>

The subsequent High Court case of *Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd*<sup>26</sup> soon followed, which also considered the issue but in relation to a different fact scenario that bears consideration. Aloe Vera entered into an agreement with Asianic Food, which was signed on the latter’s behalf by Steven Chiew, its manager who was active in the running of the business. The agreement was to be governed by the law of Arizona, USA and disputes were to be arbitrated in Arizona. Following termination of the agreement, Aloe Vera started arbitration proceedings in Arizona which included Chiew as a party. Chiew asserted that the arbitrator lacked jurisdiction on the basis that he was not a party to the arbitration agreement. However, the arbitrator made a preliminary ruling that Chiew was a party to the agreement, basing their decision on the wide wording of the arbitration clause. The arbitrator also held that Chiew was the alter ego of Asianic Food. Chiew refused to take part in the proceedings and an award was eventually made in favour of Aloe Vera.

Aloe Vera then brought the award to Singapore and obtained leave from the domestic court to enforce the award against Chiew and Asianic Food pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention) to which Singapore is a party. At this point in time, Chiew applied to set

<sup>23</sup> [2006] 1 Sing.L.R. 197; [2005] SGHC 197. See Warren Chik, “Recent Developments in Singapore on International Commercial Arbitration” (2006)10 SYBIL 363, 367-369.

<sup>24</sup> [2007] 1 Sing.L.R. 597; [2006] SGCA 41.

<sup>25</sup> See Note 24 at paras. 59-60.

<sup>26</sup> See Note 1.

aside the order on the same basis as before and alternatively on the public policy grounds set out in section 31(2) or section 31(4) of the IAA. His application was dismissed by the Assistant Registrar and his appeal was also dismissed.

In the judgment on appeal, Justice Prakash stated that although a party seeking to challenge an award under the New York Convention has two opportunities to seek the setting aside of an award,<sup>27</sup> challenges at the enforcement stage will be dealt with ‘mechanistically’ (i.e. the enforcement process would be a ‘mechanistic’ one). Once Aloe Vera had proven that Chiew was mentioned in the arbitration agreement and that the arbitrator had made a finding that he was a party to the arbitration, the court could not refuse enforcement unless one of the grounds in sections 31(2) or 31(4) was established. Chiew did not do anything to resist enforcement under section 31(2)(b). He did not adduce expert evidence to show that the arbitrator’s finding was wrong under Arizona law, or show that the award went beyond the scope of the submission to arbitration (based on its scope of application). He also failed to prove that the subject matter in dispute was incapable of settlement by arbitration, such that section 31(4)(a) applied. Finally, he failed to show that enforcement would offend Singapore’s basic notions of justice and morality so as to satisfy the public policy exception. Thus the appeal was dismissed.

Once again, an unsuccessful party to an arbitration attempted to set aside the leave that the other party obtained in the High Court to enforce an arbitral award made in a foreign jurisdiction and once again the court was conservative, even ‘mechanistic’,<sup>28</sup> in its approach to the issue, preferring restraint from refusal to enforce and the narrow interpretation of the public policy exception.. Even if the arbitrator had been wrong in law to pierce the corporate veil to implicate Chiew, that was not enough ground for refusal to enforce.

This case raises interesting questions about the power of an arbitrator to determine whether a person who is not, on the face of an arbitration agreement, a party to the agreement, is actually a party to the agreement and its authority to arbitrate disputes. Should Chiew, when he was faced with a preliminary ruling by the arbitrator that he was a party to the agreement, have gone to the Arizona courts to determine the question of whether the arbitrator could make such a ruling under his terms of reference? If one bears in mind that an arbitrator’s jurisdiction and power to determine disputes arises, ultimately, from the decision of two parties to refer their disputes for resolution by arbitration, it seems doubtful that an arbitrator can be said to have any jurisdiction or power to resolve a dispute between two parties, one of whom has not (at least on the face of it) agreed to arbitration. One wonders what direction the arbitration would have taken if the Arizona courts had declared that Chiew was not the alter ego of Asianic Food under the law of Arizona.

The lesson here for a person or entity alleged to have been a party to an arbitration agreement is to be proactive and seriously consider dealing with the issue even at the point of time of arbitration rather than leave it to the enforcement stage to raise an issue as to the existence or justiciability of the dispute between that party and another. It would be leaving it too late for a person or entity against whom an arbitration award had been made to raise issues as to the existence of the arbitration agreement or justiciability of the dispute between that party and another before the court enforcing an international arbitration award. Where the veil of incorporation has been lifted in arbitration proceedings, it appears that attempting

<sup>27</sup> I.e. He could apply to the supervising court to set aside the award and he could also apply to the enforcement court to set aside any leave granted to the other party to enforce the award.

<sup>28</sup> I.e. not delving into the merits of the case, thereby placing a degree of trust on properly constituted arbitral tribunals. Thus, for instance, it is accepted that even if an arbitrator made an error of law, a court should not intervene unless one of the grounds under section 31 of the IAA is satisfied. See Note 24 at paras. 57 and 59, where the court stated that “[e]rrors of law or fact, *per se*, did not engage the public policy of Singapore...[and t]he reason was that the Act gave primacy to the autonomy of arbitral proceedings and allowed court intervention in only the prescribed situations. The general consensus of judicial and expert opinion was that public policy under the Act encompassed a narrow scope”. Sentences are in different order from the paragraphs they are quoted from, not sure if this is acceptable.

to close it when the eventual award is sought to be enforced would be in vain. Similarly where an express ruling has been made by the arbitrator on the existence of an arbitration agreement between parties, attempting to argue again that an arbitration agreement did not exist would also be futile.

Also, as the courts of the jurisdiction where the arbitration is held and where the award is sought to be enforced may provide different solutions for an objecting party (depending on the local laws and policy), where the remedies overlap, the party must make a tactical and strategic decision, based on its understanding of the arbitration laws of the jurisdictions concerned, on when and where to raise an objection and whether it makes sense to raise it only once or at both stages of the process (i.e. at the pre- and post-award stage).

### C. *Natural Justice and the Severability Principle*

Another recognized basis for setting aside an arbitral award is breach of natural justice and there have been two cases on the subject that are of interest since one dealt with the issue under section 48 of the domestic Arbitration Act (AA) while the other fell under the purview of section 24 of the International Arbitration Act (IAA).

In the case relating to an application to dismiss under section 48 of the Arbitration Act (AA), the High Court set aside the arbitral award due to a breach of natural justice. In *Fairmount Development Pte Ltd v. Soh Beng Tee & Co Pte Ltd*,<sup>29</sup> the plaintiff, Fairmount Development, employed the defendant Soh Bee Tee (SBT) as their main contractor in the development of a condominium housing project and they entered into a building contract incorporating the standard form of the Singapore Institute of Architects' Articles and Conditions of Building Contract (Measurement Contract (5th edition)). In the course of construction, SBT made several applications for extension of time on various grounds under the contract and they were granted five extensions resulting in the completion date of the project being pushed forward and a delay certificate issued against it. Fairmount Development subsequently terminated the contract with SBT due to its delays and appointed another contractor. SBT commenced arbitration on the basis that Fairmount Development had wrongfully terminated the contract and the arbitrator issued an award in its favour. The plaintiff sought the award to be set aside in the High Court.

Justice Prakash set aside the award on the basis of a breach of natural justice in the course of the arbitration proceedings that have prejudiced the plaintiff's rights. This was on the basis that the tribunal was found to have decided on the issue relating to timing without the matter having been raised by any of the parties and thus failed to give each party the opportunity to be heard on all relevant matters relating thereto. This was an issue involving the need to give the parties to a dispute notice, due process and the right to be heard. The defendants appealed to the Court of Appeal.

The Appeal Court's decision was handed down on 9 May 2007,<sup>30</sup> where the judges of appeal addressed what they considered to be important and intertwined issues relating to the conduct of arbitrations.<sup>31</sup> The court allowed the appeal and reversed the trial judge's decision, finding that there has not been a breach of natural justice. They did so clearly guided by the judicial philosophy of minimal interference in the arbitrator's conduct in

<sup>29</sup> [2007] 1 Sing.L.R. 32, [2006] SGHC 189. In the judgment, it was clearly stated that for the ground of breach of natural justice to succeed, the applicant must establish which rule of natural justice was implicated, how it was breached, how it was connected to the making of the arbitral award and how it prejudiced the plaintiff. This should offer guidance to any party that may wish to apply for the setting aside of an arbitral award on this ground.

<sup>30</sup> *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd*, [2007] SGCA 28.

<sup>31</sup> The court extensively examined relevant case law on the imposed on an arbitrator by the rules of natural justice. See Note 30 at paras 42-58.

relation to all sorts of challenges to the recognition and enforcement of arbitral awards including challenges based on the allegation of breach of natural justice.<sup>32</sup>

The court determined that the respondent, Fairmount Development, *did* have every opportunity to be heard and it was also decided that the finding as to timing was not critical to the final decision (i.e. “no causal nexus between the breach and the [a]ward”) and hence did not prejudice the respondent necessitating the setting aside of the award.<sup>33</sup> It was decided that that even if there had been a breach of the rules of natural justice, if the complainant was not able to show that it has suffered prejudice aside from a ‘technical breach’, then the award would not be set aside. The court stated that: [I]n Singapore, an applicant will have to persuade the court that there has been some actual or real prejudice caused by the alleged breach. While this is obviously a lower hurdle than substantial prejudice, it certainly does not embrace technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness”.<sup>34</sup>

This case reinforces the strong policy interest in “minimal curial intervention” in the absence of manifest breach of natural justice resulting in actual prejudice and reaffirms the trust placed in the arbitration regime. The policy favouring arbitration appear even to trump ‘technical’ adherence to the fundamental principle of natural justice such that “actual or real prejudice” must also be proven by a complainant seeking to set aside an award. This is strong endorsement of arbitration indeed. It is ironic though, that to finally decide that it should not interfere with the arbitral tribunal’s conduct, in fact the conduct itself had to come under some detail of scrutiny before the courts. That may be yet another reason supporting minimal interference, which is to discourage such applications for setting aside except on strong grounds, and hence to discourage revisiting a case that was meant to be determined without court intervention and in the speediest manner.

Meanwhile, in *Government of the Republic of the Philippines v. Philippine International Air Terminals Co, Inc*,<sup>35</sup> the court was unwilling to set aside the arbitral award of an international arbitral tribunal in the absence of strong evidence of manifest breach of the rules of natural justice. In this case, the Philippine government applied for the setting aside of the award under section 24 of the IAA made in favour of the Philippine International Air Terminals (PIAT) over a dispute involving the construction of a third terminal building at the Ninoy Aquino International Airport in Manila. The government had engaged PIAT for the project under several concession agreements in 1998. In contrast to the previous

<sup>32</sup> See Note 30 at paras 59-72. First, to support arbitration as an alternative to litigation, and second, to respect and recognize party autonomy in their selection of arbitrators. See also, *ibid.* at para 98, where the court concluded by stating that: “As a matter of both principle and policy, the courts will seek to support rather than frustrate or subvert the arbitration process in order to promote the two primary objectives of the Act; namely, seeking to respect and preserve party autonomy and to ensure procedural fairness. Fairness includes the right to be heard and mandates equality of treatment. Arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced. It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should be made available”.

<sup>33</sup> Section 48(1)(a)(vii) of the AA requires the rights of any party to have been prejudiced. It also requires that the breach complained of must occur “in connection with the making of the award” such that even if there had been a breach of the rules of natural justice, a causal nexus must be established between the breach and the award made.

<sup>34</sup> See Note 30 at para 91. The court went on to state that: “It is neither desirable nor possible to predict the infinite range of factual permutations or imponderables that may confront the courts in the future. What we can say is that to attract curial intervention it must be established that the breach of the rules of natural justice must, at the very least, have actually altered the final outcome of the arbitral proceedings in some meaningful way. If, on the other hand, the same result could or would ultimately have been attained, or if it can be shown that the complainant could not have presented any ground-breaking evidence and/or submissions regardless, the bare fact that the arbitrator might have inadvertently denied one or both parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award”. See also Note 30 at para 94.

<sup>35</sup> [2007] 1 Sing.L.R. 278, [2006] SGHC 206.

case, PIAT constructed the terminal in accordance with the agreements but the government subsequently claimed that the agreements were null and void *ab initio* (due to allegations of Constitutional and statutory violations and on public policy grounds) and filed petitions with the Philippine Supreme Court to enjoin enforcement of the agreements, which it did in 2003. PIAT thereby commenced arbitration proceedings with the International Chamber of Commerce International Court of Arbitration (ICC) in accordance with an arbitration clause under one of the concession agreements.

Unsurprisingly the Philippine government attacked the arbitration as having no jurisdiction but the tribunal decided otherwise and issued an award in 2004 determining, based on the *kompetenz-kompetenz* principle, that it did have jurisdiction and that Singapore law governed both the agreement and the proceedings.<sup>36</sup> The tribunal also applied the severability principle to the arbitration clause before determining the law applicable to the agreement itself, which it determined to be Singapore law under an implied choice. The government then sought to set aside the arbitral award in the Singapore High Court on the basis of the severability issue and the argument that Singapore was chosen as a neutral place for the dispute to be resolved.

On the former, it argued that if the concession agreements, which the arbitration clause was a part of, were null and void as determined by its courts, then it could not be severed from the agreements. It also sought to argue that the principle was dealt with without the parties being given notice (at the preliminary conference stage) and was a premature determination by the tribunal. Conversely, PIAT contended that the severing was proper and that the principle was but a part of the process for determining jurisdiction and proper law. The High Court agreed with PIAT and stated that the arbitration clause could be severed despite the alleged nullity of the concession agreements and also in the contention that severability as an issue was clearly a part of the determination on governing law. It was a 'legal necessity' to consider severability and to sever the arbitration clause from the rest of the agreement before the tribunal could proceed with the substantive hearing in jurisdiction. Hence it was within the scope of the matters submitted for arbitration and the government had full opportunity to consider and address it in its submissions, so there was no breach of natural justice meriting a setting aside of the award.<sup>37</sup>

On the latter, the Philippine government argued that there was no opportunity for it to be heard on the issue of neutrality as the tribunal did not give notice that it was going to make such a determination and that such a finding was prejudicial as it amounted to a pre-determination of its jurisdictional objections at the next part of the proceedings. On this, the High Court refused to strike down the award on the basis that errors of law or fact were not a basis to do so and that it would not reconsider the merits of the decision, which it understood this to be the case. The court also found a lack of evidence of the tribunal's alleged impropriety and that the tribunal had in fact acted reasonably under the facts and circumstances of the case.<sup>38</sup>

This case illustrates that, especially in international arbitration proceedings and relating to such awards, the Singapore courts are unwilling to set aside awards if there are legitimate and reasonable grounds for the actions of the tribunal that will detract from an allegation of breach of natural justice.

<sup>36</sup> The arbitration clause stated that: "All disputes, controversies or claims arising from or relating to the construction of the Terminal and/or Terminal Complex or in general relating to the prosecution of the Works shall be finally settled by arbitration in the Republic of the Philippines following the Philippine Arbitration Law or other relevant procedures. All disputes, controversies or claims arising in connection with this Agreement except as indicated above shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by three (3) arbitrators appointed in accordance with the said Rules. The place of arbitration shall be Singapore and the language of the arbitration shall be English".

<sup>37</sup> See Note 35 at paras. 30-34.

<sup>38</sup> See Note 35 at paras. 38-41.

#### D. Other Cases of Interest

In *Anwar Siraj and Another v. Teo Hee Lai Building Construction Pte Ltd*,<sup>39</sup> Judge Andrew Ang affirmed that under the law of arbitration, once the arbitrator has published his award, the arbitration proceedings are concluded and he becomes *functus officio*. An award is made and published when the arbitrator gives notice to the parties that the award is ready for collection and not when they have notice of the actual contents of the award (*Hong Huat Development Co (Pte) Ltd v. Hiap Hong & Co Pte Ltd*).<sup>40</sup> Thereafter the arbitrator is *functus officio*.

In *Ng Chin Siau and Others v. How Kim Chuan*<sup>41</sup> Justice Prakash took the view that in an arbitration governed by rules of procedure that provided for each party to set out its case in a statement of case, in the same way as parties to litigation set out their cases in their pleadings, the arbitrator would be bound to decide the case in accordance with the parties' pleadings. These are its "points of reference" and the arbitrator is not be entitled to go beyond the pleadings and decide on points on which the parties had not given evidence and had not made submissions upon. If an arbitrator considers that the parties have not framed their cases correctly and that certain points need to be addressed then he must indicate his concerns to the parties and allow them to make the necessary amendments to their pleadings and to adduce such the evidence necessary for it to deal with them. In other words, he cannot make a decision on points that have not been addressed by the parties. The reason given for this strict adherence to points of reference is due to the fact that in arbitration proceedings, the right of appeal is severely restricted. Thus, if the rule is necessary and important in litigation, it is even more important to maintain the integrity of the arbitration process.

In *Lian Teck Construction Pte Ltd v. Woh Hup (Pte) Ltd and Others*<sup>42</sup> Judge Andrew Ang considered the issues of stay and summary judgment in relation to arbitration. It was held that before the amendment of Order 14 rule 1 of the Rules of Court, the practice was to hear an Order 14 application and a stay application together. In such cases, the court could give judgment for a sum indisputably due under summary judgement while simultaneously ordering a stay of the rest of the claim for arbitration.<sup>43</sup> Under the amended Order 14 rule 1, it is no longer possible to apply for summary judgment before a defence is filed. Therefore, a plaintiff cannot apply for a summary judgment while a stay application is pending simply because a defendant applying for a stay in favour of arbitration would not yet have filed a defence to the plaintiff's claim to avoid prejudicing his stay application by taking a "step in the proceedings". Similarly, the reasoning will apply to an application for interim payment under Order 29 rule 10 of the Rules of Court.<sup>44</sup>

In *Econ Piling Pte Ltd v. NCC International AB*<sup>45</sup> where there were two closely related agreements ("in substance a composite agreement"<sup>46</sup>) involving the same parties and concerning the same subject matter, JC Sundaresh Menon considered it counterintuitive that such agreements have to be read consistent with one another in respect of the dispute

<sup>39</sup> [2007] SGHC 29.

<sup>40</sup> [2000] 2 Sing.L.R. 609, [2000] SGHC 14.

<sup>41</sup> [2007] 2 Sing.L.R. 789, [2007] SGHC 31.

<sup>42</sup> [2006] 4 Sing.L.R. 1, [2006] SGHC 118.

<sup>43</sup> See Note 42 at paras 9-10.

<sup>44</sup> This is because the considerations for an application for interim payment are the same as one for summary judgment and requires a consideration of the merits. Similarly a defendant will hesitate to take a step in the proceedings to avoid compromising its stance that the court has no jurisdiction and its contractual right to arbitrate the matter. See Note 42 at paras 13, 16 and 19.

<sup>45</sup> [2007] SGHC 17.

<sup>46</sup> See Note 45 at para 17.

resolution regime. This is the practical commercial position to take.<sup>47</sup> This is an almost irresistible conclusion if, as in this case, there are linkages between the agreements such as one agreement varying the other and that many potential disputes can implicate the terms of both agreements.

<sup>47</sup> He cited in agreement the decision of Tay Yong Kwang J in *Mancon (BVI) Investment Holding v. Heng Holdings SEA*, [2000] 3 Sing.L.R. 220 where the judge there noted that if the two contractual documents had to be read together, it would be illogical to have an arbitration clause contained in one not apply to the other in the absence of an expressed agreement otherwise.

