SINGAPORE INSTITUTE OF ARBITRATORS

NEWSLETTER

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VIEWPOINT

PRESIDENT'S MESSAGE

This will be my last message as President in this newsletter since elections will be held soon for a new council and new President.

I am reminded that our mission statement states: "*the promotion of arbitration and the training and education of arbitrators in Singapore*"

During my two terms as President from 2004 to 2007, the Institute has evolved into an organization with particular focus on training and education. This can be seen from the many courses, seminars, workshops and conferences, which we have organized.

Further, the Institute has finally established our own Panel of Arbitrators with our own Arbitration Rules and Rules on Ethics. This has gone some way in addressing the point that although our mission is the promotion of arbitration, it is equally important to ensure that we have a role in the appointment of arbitrators as well.

Our membership has now increased to a number where we are seen and considered by the authorities as an organisation with significant influence in the development of arbitration in Singapore.

Many of the achievements have been possible only with the help and dedication of all the past and present Council Members and the dedicated Executive Directors and staff.

We have admitted over 200 members into the Institute over the last 3 – 4 years with quite a few new members from overseas. I believe members see value in joining and remaining with the Institute. The challenge now will be to continue to provide value to members and sustain our growth in membership.

There will be challenges ahead and we will have to work and collaborate with our various Memorandum of Co-operation partners such as the Singapore Manufacturers' Federation to fulfill our mission.

Regionally, we have signed Memorandum of Co-operation with the Malaysian Institute of Arbitrators, Hong Kong Institute of Arbitrators, Badan Arbitrase Nasional Indonesia and The Institute of Arbitrators & Mediators, Australia. In the last 3 years we have established ourselves

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as a forward looking, reputable and significant Arbitral Institute in this Region. This is evident from the commitment of support and attendance, which we received from the Presidents of these Arbitral Institutes in the coming Inaugural Regional Arbitral Institutes Conference, hosted by us on 12 and 13 July 2007. The personal contacts, which we have made with these Arbitral Institutes, will serve us well in raising our profile regionally and in collaborating with them on joint projects in the future.

Locally, we have now established a close working relationship with the Singapore International Arbitration Centre ("SIAC") and have held joint seminars and workshops with SIAC. We have worked closely with the NUS Law Faculty and the NUS School of Design and Environment in the last three years to provide recognition of graduates from certain courses for admission as Members and Fellows of our Institute.

Currently, other on going projects such as the scheme arbitration project is progressing steadily. This scheme should be launched by early next year. We are also working with the Singapore Sports Council to introduce Sports Arbitration in Singapore.

As mentioned earlier, our Institute will be hosting the Inaugural Regional Arbitral Institutes Conference in Singapore on 12 and 13 July 2007. This is a significant regional Conference on Arbitration with well-known speakers from six countries taking part. As we took the initiative to host this Inaugural Conference, I would urge all members to show your support to the Institute by attending this Conference.

Finally I would like to personally thank all of you for your support in the last four years as your President.

Raymond Chan
President

Announcements

• NEW MEMBERS •

The Institute extends a warm welcome to the following new members:

Fellows

1 Dag Rommen
2 John Marrin QC
3 Liu Tze Tai
4 Tan Chuan Thye

Members

1 Ghwee Kok Seng Keith
2 Goh Chee Ming David
3 Kow Keng Wee
4 Ruth Elizabeth Cowley

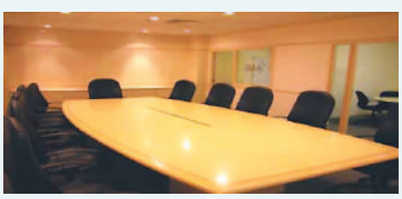
Associates

1 Johanes Bagus Dharmawan
2 Leong Sze Hian
3 Philippe Taverene
4 Senthilnathan Suppiah
5 Sng Yeow Keng, Andy

• UPCOMING EVENTS •

1. "Enforcement of Arbitration Agreements" by Tomas Kennedy-Grant QC and Andrew Chan on **26 June 2007**
2. Inaugural Regional Arbitral Institutes Conference on **12 and 13 July 2007**
3. International Entry Course (IEC) by Richard Tan and Philip Yang (Course Directors) on **18, 19 and 25 August 2007**
4. Fast-Track Fellowship Course by Neil Kaplan QC (Course Director) on **19, 20 and 21 October 2007**

HEARING ROOM FOR HIRE



Please DO consider the Institute if you are looking for a hearing venue. The Institute offers competitive members' rate of S$200 per day/S$100 per half-day inclusive of two breakout rooms and free flow of refreshments. We welcome all enquiries. Please give us a call at 6323-1276 or email us at siarb@siarb.org.sg. You may also log-on to our website at www.siarb.org.sg for more details.

Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd [2007] SGCA 28

Singapore Court of Appeal deals with important questions relating to arbitration proceedings

Goh Phai Cheng, Senior Counsel, Fellow, SIArb, Accredited Mediator and Adjudicator

In ***Soh Beng Tee Co Pte Ltd v Fairmount Development Pte Ltd*** **[2007] SGCA 28** the Singapore Court of Appeal dealt with several important questions relating to the conduct of arbitrations which are set out in paragraph 3 of the Grounds of Decision ("GD") delivered by V K Rajah, JA as follows:

> "3. This appeal has raised several important and largely intertwined questions in relation to the conduct of arbitrations: What are the prerequisites of a fair hearing? What is the extent of an arbitrator's obligation towards the parties? Must he always apprise the parties of his thought processes? Can he rest his decision on an argument that the parties may have raised but omitted to delve into, develop or emphasise? Would it make a difference if an impugned decision was merely an inference or a legal conclusion flowing from facts and arguments already in play?"

After carrying out a comprehensive survey of case law and principles on the requirements imposed on an arbitrator by the rules of natural justice, and in particular, the right to be heard and the extent to which an arbitrator may decide on issues that have not been addressed, the learned Judge of Appeal condensed them as follows (GD, para 65):

> "(a) Parties to arbitration have, in general, a right to be heard effectively on every issue that may be relevant to the resolution of a dispute. The overriding concern, as Goff LJ aptly noted in *The Vimeira* ([45] *supra*), is fairness. The best rule of thumb to adopt is to treat the parties equally and allow them reasonable opportunities to present their cases as well as to respond. An arbitrator should not base his decision(s) on matters not submitted or argued before him. In other words, an arbitrator should not make bricks without straw. Arbitrators who exercise unreasonable initiative without the parties' involvement may attract serious and sustainable challenges.
>
> (b) Fairness, however, is a multidimensional concept and it would also be unfair to the successful party if it were deprived of the fruits of its labour as a result of a dissatisfied party raising a multitude of arid technical challenges after an arbitral award has been made. The courts are not a stage where a dissatisfied party can have a second bite of the cherry.
>
> (c) Indeed, the latter conception of fairness justifies a policy of minimal curial intervention, which has become common as a matter of international practice. To elaborate, minimal curial intervention is underpinned by two principal considerations. First, there is a need to recognise the autonomy of the arbitral process by encouraging finality, so that its advantage as an efficient alternative dispute resolution process is not undermined. Second, having opted for arbitration, parties must be taken to have acknowledged and accepted the attendant risks of having only a very limited right of recourse to the courts. It would be neither appropriate nor consonant for a dissatisfied party to seek the assistance of the court to intervene on the basis that the court is discharging an appellate function, save in the very limited circumstances that have been statutorily condoned. Generally speaking, a court will not intervene merely because it might have resolved the various controversies in play differently.
>
> (d) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice are complied with in the arbitral process is preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that has been expressly acknowledged under the Act and the IAA. In so far as the right to be heard is concerned, the failure of an arbitrator to refer every point for decision to the parties for submissions is not invariably a valid ground for challenge. Only in instances such as where the impugned decision reveals a dramatic departure from the submissions, or involves an arbitrator receiving extraneous evidence, or adopts a view wholly at odds with the established evidence adduced by the parties, or arrives at a conclusion unequivocally rejected by the parties as being trivial or irrelevant, might it be appropriate for a court to intervene. In short, there must be a real basis for alleging that the arbitrator has conducted the arbitral process either irrationally or capriciously. To echo the language employed in *Rotoaira* ([55] *supra*), the overriding burden on the applicant is to show that a reasonable litigant in his shoes could not have foreseen the possibility of reasoning of the type revealed in the award. It is only in these very limited circumstances that the arbitrator's decision might be considered unfair.
>
> (e) It is almost invariably the case that parties propose diametrically opposite solutions to resolve a dispute. They may expect the arbitrator to select one of these alternative positions. The arbitrator, however, is not bound to adopt an either/or approach. He is perfectly entitled to embrace a middle path (even without apprising the parties of his provisional thinking or analysis) so long as it is based on evidence that is before him. Similarly, an arbitrator is entitled – indeed, it is his obligation – to come to his own conclusions or inferences from the primary facts placed before him. In this context, he is not expected to inexorably accept the conclusions being urged upon him by the parties. Neither is he expected to consult the parties on his thinking process before finalising his award unless it involves a dramatic departure from what has been presented to him.
>
> (f) Each case should be decided within its own factual matrix. It must always be borne in mind that it is not the function of the court to assiduously comb an arbitral award microscopically in attempting to determine if there was any blame or fault in the arbitral process; rather, an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied."

In ***Soh Beng Tee's*** case, the Court of Appeal heard and allowed an appeal by the appellant, Soh Beng Tee Co Pte Ltd ("SBT"), against the decision of High Court which held that the arbitrator who published an award in an arbitration proceeding between SBT and Fairmount Development Pte Ltd ("Fairmount") in favour of SBT had acted in breach of the rules of natural justice. The High Court had set aside the award of an arbitrator on the ground the arbitrator had deprived Fairmount of the right to be heard on a critical issue that he had ultimately relied on to resolve the dispute.

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The factual background

SBT (the appellant) was engaged by Fairmount (the respondent), as the main contractor for the construction of a condominium, including mock-up units and a substation, to be completed by 1 February 1999. The commencement date of the Project was 2nd August 1997. The parties had entered into a contract modeled on the standard terms of the Singapore Institute of Architects' Articles and Conditions of Building Contract ("the SIA Articles" and the "SIA Conditions" respectively). One Mr. Tan Cheng Siong of M/s Archurban Architects Planners ("the Architect") was expressly named in Article 3 of the SIA Articles as the project architect, under whose supervision and administrative control the project was to be carried out.

While the construction of the condominium was in progress, SBT submitted numerous applications for extensions of time. One Mr. Daniel Law ("Mr. Law") of M/s Archurban Architects Planners assessed SBT's applications for extension of time and ultimately granted a mere five-day extension that extended the date of completion of the project to 6 February 1999.

Having failed to complete the project by 6 February 1999, SBT was served with a delay certificate in May 1999 in relation to the mock-up units, and again in July 1999 in relation to the main works. These delay certificates, issued by Mr. Law, purportedly entitled Fairmount to claim liquidated damages for the delay pursuant to cl 24(2) of the SIA Conditions.

SBT then submitted to Fairmount and M/s Archurban Architects Planners a revised plan committing to complete the project by 21 December 1999. In spite of this, Mr. Law immediately issued SBT a written notice dated 21 September 1999 declaring that SBT had failed to proceed with due diligence and expedition. A month later, Mr. Law issued a termination certificate dated 21 October 1999 ("the Termination Certificate") pursuant to cl 32(3) of the SIA Conditions.

On 9 November 1999, Fairmount terminated SBT's employment as the main contractor in the Project based on Mr. Law's Termination Certificate, relying on s 32(2) of the SIA Conditions, which states:

> "*Without prejudice to any right of the Employer in an appropriate case to treat the Contract as repudiated by the Contractor under the general law, the Employer may at any time within one month of the receipt of a certificate of the Architect (in this Contract called a "Termination Certificate") give Notice of Termination of employment of the Contractor, which Notice shall take immediate effect.* In such a case the Notice of Termination shall identify any relevant Termination Certificate upon which it is based, and the date of its receipt by the Employer. The reliance on a Termination Certificate in the Notice of Termination may take effect additionally or as an alternative to reliance by the Employer upon any alleged repudiation by the Contractor which is also stated in the Notice, or which is the subject of any other notice or contemporary letter or document passing between the Employer and the Contractor. A Termination Certificate shall be issued to the Employer with a copy to the Contractor, who shall be informed by the Architect in writing of the date of receipt by the Employer." [emphasis added]

Fairmount also relied on an alternative ground was that as SBT was already in repudiatory breach of its agreement to complete the project; Fairmount was entitled to terminate the project.

Thereafter, Fairmount claimed a $1.5m performance bond provided by SBT while simultaneously claiming a further $3,212,113.16 from SBT as damages. SBT rejected such a claim and invoked the arbitration clause in the SIA Conditions, claiming damages for the wrongful repudiation of its employment.

The Arbitration

In the arbitration, the Arbitrator held that the first issue before him was: whether Fairmount had rightfully terminated SBT's employment on the basis of the Termination Certificate. This, in turn, raised three further sub-issues, which the Arbitrator formulated as follows:

(a) whether the Termination Certificate issued by Mr. Law was validly issued;

(b) *if the Termination Certificate was validly issued*, whether SBT had failed to proceed with the project with diligence and due expedition, and following the expiry of one month's written notice on 21 September 1999 from Mr. Law if SBT continued to proceed without due diligence or expedition; and

(c) whether SBT was entitled to extensions of time for the completion of the project; and if so, whether SBT had been properly granted the requisite extension(s) of time and whether this in turn had been taken into account by Mr. Law before he issued the Termination Certificate.

On the issue of the validity of the Termination Certificate, the Arbitrator held that it was invalid because it was issued by Mr. Law and not by Mr. Tan Cheng Siong, who had been expressly named in Article 3 of the SIA Articles as the project architect and, further, that SBT had not waived its right to insist, nor was it estopped from insisting, on the Termination Certificate being issued by Mr. Tan Cheng Siong.

Notwithstanding the determination of the issue of the validity of the Termination Certificate, which could have disposed of the matter before him, the Arbitrator dealt with the other remaining issues and resolved them in favour of SBT. The Arbitrator held that SBT was entitled to the return of its performance bond and damages and awarded SBT a total sum of $2,043,432.27 for work done including interest and costs.

The Application to set aside the Award in the High Court

Fairmount who was dissatisfied with the decision of the arbitrator took out an application in the High Court to set aside the award of the Arbitrator. The application was premised on two grounds: that the Arbitrator had dealt with an issue outside the scope of the submission to arbitration ("the jurisdiction issue"); and, that the Arbitrator had deprived it (*i.e.,* Fairmount) of its right to be heard on a critical issue that he had ultimately relied on to resolve the matter ("the natural justice issue"). These grave oversights by the Arbitrator, Fairmount alleged, were contrary to sections 48(1)(a)(iv) and 48(1)(a)(vii) of the Arbitration Act (Cap 10, 2002 Rev Ed) ("the Act") respectively.

Although Fairmount failed on the jurisdiction issue before the High Court, it succeeded on the natural justice issue. This, the learned trial judge held, was sufficient to set aside the entire award: see *Fairmount Development Pte Ltd v Soh Beng Tee & Co Pte Ltd* [2007] 1 SLR 32. Dissatisfied, SBT appealed against the learned trial judge's decision of setting aside the Award based on the natural justice issue.

Decision of the Court of Appeal

V K Rajah, JA held that natural justice issue was not pivotal to the resolution of the case before the arbitrator and the arbitrator had made it clear in his Award that the crucial issue in the case before him was whether Fairmount was entitled to rely on the Termination Certificate issued by Daniel Law on behalf of Archurban Architects Planners on 21st October 1999. Having held that the Termination Certificate was invalid, it followed that Fairmount was itself in breach of contract when it purported to terminate its relationship with SBT pursuant to cl 32(2) of the SIA Conditions. The Arbitrator's finding on the natural justice issue was only a subsidiary finding and it did not lead to the making of the Award (at paragraph 75 of the GD]. Further, the learned Judge of Appeal held that Fairmount's complaints about the impropriety of the Arbitrator in his determination of the natural justice issue were entirely without merit and that there was no breach of the rules natural justice by the arbitrator (at paragraphs 66 to 72).

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LEGAL DEVELOPMENT AFFECTING ARBITRATION

- By Dr Philip Chan Chuen Fye

In this issue, two Court of Appeal decisions concerning the powers of courts in relation to international arbitrations are examined. In the first case of *Swift Fortune*, the decision of the Court of Appeal was most helpful following what appeared to be two contradictory decisions of the High Court in quick succession. The issue was whether the High Court is empowered to grant a mareva injunction in aid of an international arbitration where the seat is not in Singapore. The Court of Appeal appeared to have accepted both decisions to be correct.

In the second case of *PT Asuransi Jasa Indonesia*, the Court of Appeal had to consider whether an award should be set aside. It had started as a typical application but turned out to be more than what meets the eye when the issue was re-categorised as to whether the court has the jurisdiction to set it aside if the award is in reality an arbitrator's negative decision on his own jurisdiction to which the court answered in the negative.

Mareva injunctions and foreign arbitrations

Swift-Fortune Ltd v Magnifica Marine SA [2006] SGCA 42, [2007] 1 SLR 629 [Court of Appeal - Chan Sek Keong CJ, Andrew Phang Boon Leong JA, Tay Yong Kwang J]

A brief description of the application to the Court of Appeal in this case is found in paragraph 1 of the judgment and is adopted here.

> "1 This is an appeal by Swift-Fortune Ltd ("Swift-Fortune"), a Liberian company, against the decision of Judith Prakash J ("Prakash J") in *Swift-Fortune Ltd v Magnifica Marine SA* [2006] 2 SLR 323 which set aside a Mareva injunction restraining Magnifica Marine SA ("Magnifica"), a Panamanian company, from disposing of or dealing with its assets in Singapore pending arbitration proceedings between the parties in London in accordance with the underlying contract."

By paragraph 2 of the judgment, the legal landscape of the case is succinctly described and is adopted here.

> "2 This appeal raises important issues relating to the power of a Singapore court to grant Mareva interlocutory relief in aid of "international arbitrations". The relevant statutory provisions are: (a) s 12(7) of the International Arbitration Act (incorporating the United Nations Commission on International Trade Law ("UNCITRAL") Model Law ("the Model Law")) (Cap 143A, 2002 Rev Ed) ("IAA"); (b) s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) ("CLA"); and (c) s 18(1) of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA")."

The Court of Appeal noted at paragraph 3 that the learned judge at the hearing held that, "s 12(7) of the IAA conferred powers on the court to grant Mareva interlocutory relief to assist "Singapore international arbitrations", but not "foreign arbitrations", as defined by her. By the expression "foreign arbitration" she meant an arbitration arising out of an international arbitration agreement (as defined in s 5(2) of the IAA), which does not stipulate Singapore as the seat of arbitration. By the expression "Singapore international arbitration", she meant an arbitration where Singapore is stipulated as the seat of arbitration."

The Court of Appeal also noted that another case, *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR 854 had also to decide on the meaning of section 12(7) of the IAA. The Court of Appeal in paragraph 5 said that,

> "5 In *Front Carriers*, Ang J held that under s 12(7) of the IAA the court has the power to grant a free-standing Mareva injunction, *i.e.*, where the plaintiff has not made a substantive claim against the defendant in the court proceedings, in aid of foreign arbitration. Additionally, she held that under s 4(10) of the CLA the court has such power only where it has personal jurisdiction over the defendant and where "there is a recognisable justiciable right between the parties" under Singapore law (at [52]). …"

However, the Court of Appeal took pains to explain at paragraph 93 that this appeal is not an appeal against the decision of the learned judge in *Front Carriers*. Indeed, the Court of Appeal said at paragraph 87 that,

> "87 In our view, the finding in *Front Carriers* that there was a cause of action justiciable in a Singapore court differentiates it from the present case where Swift-Fortune did not have such a justiciable right against Magnifica when it obtained the *ex parte* Mareva injunction, and would never have it at any time. For this reason, the decisions in the present case and in *Front Carriers* and Prakash J's judgment below are not in conflict with each other in their interpretations of s 4(10) of the CLA."

After considering the various issues raised, the Court of Appeal dismissed the appeal and gave a summary of its findings at paragraph 96.

> "96 In summary, our findings are as follows:
> (a) Section 12(7) of the IAA does not apply to foreign arbitrations but applies to Singapore international arbitrations.
> (b) Section 12(7) does not provide an independent source of statutory power for the court to grant the orders and reliefs set out in s 12(1) of the IAA; it draws its power from s 4(10) of the CLA and s 18(1) of the SCJA.
> (c) Section 4(10) of the CLA does not confer any power on the court to grant a Mareva injunction against the assets of a defendant in Singapore unless the plaintiff has an accrued cause of action against the defendant that is justiciable in a Singapore court.
> (d) Where the plaintiff has such a cause of action against the defendant who is subject to the personal jurisdiction of the Singapore court (as, *eg*, where he has assets in Singapore), *Front Carriers* ([4] *supra*) has decided that the court has power under s 4(10) of the CLA to grant a Mareva injunction in aid of the foreign arbitration to which the substantive claim has been referred in accordance with the agreement of the parties, and by implication, where the substantive claim is tried in a foreign court.
> (e) The existence of the court's personal jurisdiction over the defendant in itself does not give power to the court to grant a Mareva injunction in aid of a foreign arbitration."

Other points of interests are set out below.

- "…the duty of the court is to determine what the law is, *i.e.*, the true meaning of s 12(7), and to apply it to the facts of the case. It should not second-guess Parliament on such matters. In this appeal, we will not traverse beyond the duty to ascertain the scope of s 12(7), applying established principles of statutory interpretation to give effect to the intention of Parliament. If the literal interpretation of s 12(7) promotes the legislative object better than a purposive interpretation, then the court is justified in preferring the former to the latter interpretation. Conversely, if the literal interpretation does not promote the legislative object or does not promote it better than the literal interpretation, then it is permissible for the court to ignore the literal meaning and give effect to the purposive interpretation." [see paragraph 16]

- "However, this court is entitled to look at the objective of the IAA to see whether a literal, purposive, or some other kind of interpretation will promote the objective of the statute rather than hinder its fulfilment. As

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we have stated earlier, the objective of the IAA is to promote international arbitration in Singapore. …" [see paragraph 17]

- "The purpose of Art 9 is clear. It is to declare the compatibility between arbitrating the substantive dispute and seeking assistance from the courts for interim protective measures. For this reason, Art 9 can have no bearing on the meaning and effect of a domestic law providing for interim measures, such as s 12(7) of the IAA. It can neither subtract nor add to the meaning and effect of s 12(7), which has to be determined by reference to its own language and structure, as well as any other relevant extrinsic matters. …" [see paragraph 33]

- "In our view, the key to unlocking the true meaning of s 12(7) is to examine the history of why, when and how s 12(7) came to be enacted. …" [see paragraph 35]

- "…it is clear that if a literal interpretation is given to the phrase "an arbitration to which Part II applies" in s 12(7), that phrase would allow the courts to exercise powers that would be contrary to the spirit of international arbitrations. On the other hand, if s 12(7) is read to apply to Singapore international arbitrations only, these difficulties would not arise. This, in our view, is a compelling reason for concluding that Parliament could not have intended s 12(7) to apply s 12(1) to foreign arbitrations." [see paragraph 52]

- "…apart from the intrusive effect that s 12(7) would have were it given a plain meaning, we would still have great difficulty in accepting an argument that implies that Parliament had enacted s 12(7) with the intention of permitting the courts to become universal providers of procedural orders and reliefs to assist all anticipated or ongoing international arbitrations (as defined in s 5(2) of the IAA) in any country in of the world, whether or not they are Model Law states or signatories to the New York Convention." [see paragraph 55]

- "…the court's power under s 12(7) has to be found in another statutory source. In the context of this case, that source can only be s 4(10) of the CLA, read with s 18(1) of the SCJA. This means that for the purposes of s 12(7) of the IAA, we must look to s 4(10) as the source of statutory power for the court to grant interlocutory relief, including Mareva injunctions, in aid of foreign proceedings. If the court has such power with respect to foreign court proceedings, then it has similar power with respect to arbitral proceedings governed by the IAA. …" [see paragraph 62]

Definition of award and a negative decision on jurisdiction

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank S A [2006] SGCA 41, [2007] 1 SLR 602 [Court of Appeal - Andrew Phang Boon Leong JA, Belinda Ang Saw Ean J, Chan Sek Keong CJ]

A brief description of the application to the Court of Appeal in this case is found in paragraph 1 of the judgment and is adopted here.

> "1 This is an appeal by PT Asuransi Jasa Indonesia (Persero) ("the appellant") against the decision of Judith Prakash J ("the trial judge") dismissing the application of the appellant for an order to set aside the award dated 5 December 2003 ("the Second Award") of an arbitral tribunal ("the Second Tribunal") in an arbitration in Singapore entitled Case No ARB 005 of 2002 ("the Second Arbitration") involving the appellant, as claimant, and Dexia Bank SA ("the respondent")."

By paragraph 3 of the judgment, the legal landscape of the case is succinctly described and is adopted here.

> "3 It is common ground that both the First Arbitration and the Second Arbitration are subject to the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the Act"), which incorporates the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). This appeal raises difficult and perplexing legal issues concerning the jurisdiction and powers of arbitral tribunals and their relationship with the supervisory powers of the court, and in particular the powers of the court to set aside an arbitral award or arbitral decisions on matters that form part of or constitute the award."

At the High Court below, the appellant had applied for the following orders:

(a) that the Second Award ordering that the Second Arbitration be dismissed, on the basis that the Second Tribunal had no jurisdiction to entertain the proceedings, be set aside;
(b) that the preliminary issues/objections raised by the respondent (in the Second Arbitration) be dismissed; and
(c) that the arbitration be remitted back to the Second Tribunal for hearing.

As mentioned above, the application was dismissed and the learned judge had rejected all the grounds of appeal relied upon by the appellant. The said grounds are reproduced below as an extract of paragraph 21 of the judgment.

"(a) that the Second Award is in conflict with the public policy of Singapore and thus in breach of Art 34(2)(*b*)(ii) of the Model Law;
(b) that the Second Award deals with disputes or issues not contemplated by, or, alternatively, not falling within the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration, thus leading to a breach of Art 34(2)(*a*)(iii) of the Model Law;
(c) that a breach of natural justice under s 24(*b*) of the Act has occurred in connection with the making of the Second Award by which the rights of the appellant have been prejudiced; and
(d) that the appellant had not been given a full opportunity to present its case and/or was otherwise unable to present its case and thus there was a breach of Arts 34(2)(*a*)(ii) and 18 of the Model Law."

The Court of Appeal started by agreeing with the learned judge at the High Court. The learned Chief Justice who delivered the judgment held at paragraph 22 that the Court of Appeal was in agreement with the trial judge's decision on grounds (c) and (d) for the same reasons and would therefore reject the appeal.

In respect of ground (a), the Court of Appeal held at paragraph 60 that the appellant's contention that the Second Award should be set aside for contravening public policy is of no substance. The appellants had earlier relied on an Indian case, which was described as being authority for the principle that "an error of law was contrary to the public policy of India as contemplated by the Indian Act".

A short reply was given by the Court of Appeal at paragraph 57 and reproduced below.

> "…In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the Act which, in contrast, gives primacy to the autonomy of arbitral proceedings and limits court intervention to only the prescribed situations. …"

The Court of Appeal gave their position on setting aside an award based on public policy ground and held that,

> "…The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. While we accept that an arbitral award is final and binding on the parties under s 19B of the Act, we are of the view that the Act will be internally inconsistent if the public policy provision in Art 34 of the Model Law is construed to enlarge the scope of curial intervention to set aside errors of law or fact. For consistency, such errors may be set aside only if they are outside the scope of the submission to arbitration. In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law when they cannot be set aside under Art 34(2)(*a*)(iii) of the Model Law. …"

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Further, the Court of Appeal considered the concept of public policy in the context of the Model Law at paragraph 59.

> "59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see *Downer Connect* ([58] *supra*) at [136]), or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" (see *Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, *per* Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):
>
> > In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as *corruption, bribery or fraud* and similar serious cases would constitute a ground for setting aside. [emphasis added]"

All this while, there was a question that loomed in the background, which the Court of Appeal raised in paragraph 45 and finally dealt with the matter in paragraphs 61 to 74 inclusive. The question formulated by the Court of Appeal is reproduce below.

> "45 …Accordingly, in the context of this case, we have to determine whether the Second Tribunal's negative finding on jurisdiction is a finding that may be set aside under Art 34(2)(*a*)(iii) of the Model Law. …"

For the purpose of assisting the Court of Appeal, Adjunct Associate Professor Lawrence Boo, the deputy chairman of the Singapore International Arbitration Centre was appointed *amicus curiae*.

The Court of Appeal held as follows:

- "…the definition of an "award" in s 2 of the Act is clear. It does not include a negative determination on jurisdiction as it is not a decision on the substance of the dispute. On the contrary, it is a decision not to determine the substance of the dispute, and therefore cannot be an award for the purposes of Art 34 of the Model Law." [see paragraph 66 of the judgment]
- "…that Art 16(3) of the Model Law makes it clear that it is only in a case where an arbitral tribunal rules as a preliminary question that it has jurisdiction that an aggrieved party may request the court to decide the matter, which decision is not subject to further appeal. However, where the arbitral tribunal rules that it has no jurisdiction, no appeal is provided for. A negative ruling by a tribunal is thus intended to be a final and binding decision on that issue as regards the parties." [see paragraph 68 of the judgment]
- "…that s 19A must still – necessarily – be read subject to the definition of an "award" under s 2(1)." [see paragraph 69 of the judgment]
- "…that the mere titling of a document as an award does not make it an award as defined by the Act. It is the substance and not the form that determines the true nature of the ruling of the tribunal: see *Re Arbitration Between Mohamed Ibrahim and Koshi Mohamed* [1963] MLJ 32 at 32. Hence, even where the order is titled as an "Award", as is the case here, but does not relate to the substance of the dispute, it would not be an award under s 2(1) of the Act. …" [see paragraph 70 of the judgment]

INSTITUTE TO LAUNCH "SCHEME ARBITRATIONS"

The concept of arbitration schemes to resolve disputes involving consumers and businesses was mooted several years ago and this project now looks set to finally take off. A sub-committee was formed to examine the feasibility of the Institute administering such arbitrations and the green light was given at a recent Council meeting to proceed with the project.

In brief, the Institute will offer what is expected to be a cost-effective service for resolving disputes, using tailor-made rules and procedures suited to resolving disputes that commonly arise within certain sectors of business. Scheme arbitrations have been very successful in the UK, particularly those offered by the Chartered Institute of Arbitrators through its Dispute Resolution Services (DRS) arm, which offers dispute resolution services to a wide range of businesses, including travel, leisure, financial, retail, construction, real estate, insurance, motor trade, sports and media industries, just to name a few. The attractions of such scheme arbitrations are many. They will be a boon to consumers as they offer relatively inexpensive methods for consumers to obtain redress of small claims, before neutral arbitrators with specialist abilities and knowledge in that particular field. The existence of such schemes will promote confidence in a particular industry or trade association whose members participate in that scheme since that trade association will not itself be adjudicating the dispute but the dispute will be heard by an independent tribunal and the scheme administered by an independent third party service provider, namely the Institute.

The schemes will primarily involve what is commonly known as a "documents-only" procedure and disputes are therefore capable of a speedy resolution in a matter of a few months if not weeks. Variations of the standard scheme may be available depending on the particular industry's or association's needs or requirements. It may also be possible, if thought necessary, to provide for an appeal or review procedure within the framework of the scheme itself.

The benefits to the Institute and its members are obvious. It will provide an additional revenue stream to the Institute as well as opportunities for its members to act as arbitrators, and thereby develop a larger pool of experienced arbitrators. This will add an additional element to the dispute resolution "ecosystem" and, in the long run, help to enhance Singapore's reputation as an arbitration hub.

The challenge of course is to ensure the quality and integrity of the process and the arbitrators, and this can only be achieved through rigorous training and a systematic selection process.

The Institute is presently in discussions with a number of associations and industry representatives, and hopes to launch the scheme with a few pioneering industry partners in the course of the next few months. Associations and industries, which are interested in learning more of the scheme and how they or their members may benefit, are encouraged to contact the Secretariat.

INAUGURAL REGIONAL ARBITRAL INSTITUTES CONFERENCE

12 - 13 July 2007 (Thursday & Friday)
Taurus Room, Level 1, Marina Mandarin Hotel, Singapore

Hosted By:

Supported By:

Invitation by the Singapore Institute of Arbitrators

Pursuant to Memoranda of Co-operation, fellowship and joint programmes between the Singapore Institute of Arbitrators (SIArb) with corresponding arbitral institutes in the region, namely the Malaysian Institute of Arbitrators (MIArb), Badan Arbitrase Nasional Indonesia (BANI), the Institute of Arbitrators & Mediators Australia (IAMA) and the Hong Kong Institute of Arbitrators (HKIArb), SIArb is pleased to be hosting this INAUGURAL REGIONAL ARBITRAL INSTITUTES CONFERENCE.

The programme features a host of speakers from the participating jurisdictions on current topics relating to arbitration, and will be an important meeting point for arbitration practitioners in the region, as well as anyone interested in the vibrant dispute resolution industry in the region.

We are indeed honoured to have Judge of Appeal Justice VK Rajah, of the Supreme Court of Singapore, grace our occasion as our Keynote Speaker. We very much look forward to seeing you at this Conference in July 2007.

Mr. Raymond Chan
President, Singapore Institute of Arbitrators

Mr. Johnny Tan
Chairman, Conference Organising Committee

Conference Programme

12 JULY 2007 - ARBITRATION UPDATES

MORNING SESSION

Welcome Address
Mr. Raymond Chan - President, Singapore Institute of Arbitrators

Conference Opening Address by Guest of Honour
Judge of Appeal Justice VK Rajah - Supreme Court of Singapore

Conference Opening Ceremony

SESSION 1: LEGISLATIVE FRAMEWORK FOR ARBITRATION

- Opening Remarks by Session Chair
- Issues to be Addressed:
  - Nature and application of legislative framework for arbitration
  - Importance Given to Party Autonomy
  - Relevance of UNCITRAL Model Law and NY Convention
- Panel Discussion and Question & Answer Session moderated by the Session Chair

Session Chair:
Mr. Mohan Pillay - Singapore

Speakers:
- **Prof. Lawrence Boo** - Singapore
- **Dr. H Priyatna** - Indonesia
- **Mr. Samuel Wong** - Hong Kong

AFTERNOON SESSION

SESSION 2: NATURE & ROLE OF THE TRIBUNAL

- Opening Remarks by Session Chair
- Issues to be Addressed:
  - Tribunal s attitude towards expert evidence
  - Appointment and challenge of Tribunal
  - Jurisdiction challenge
  - Importance of seat of Arbitration
- Panel Discussion and Question & Answer Session moderated by the Session Chair

Session Chair:
Mr. Michael Hwang SC - Singapore

Speakers:
- **Mr. Lau Hang Chong** - Brunei
- **Mr. Lok Vi Ming SC** - Singapore
- **Mr. Tay Yu-Jin** - Singapore

SESSION 3: ROLE OF THE COURTS

- Opening Remarks by Session Chair
- Issues to be Addressed:
  - Judicial attitudes, extent and nature of judicial intervention in arbitration
  - Court s role & attitude towards interim measures, tribunal challenges and challenges to awards
  - Anti-suit and anti-arbitration injunctions
  - Trends and directions
- Panel Discussion and Question & Answer Session moderated by the Session Chair

Session Chair:
Mr. Richard Tan - Singapore

Speakers:
- **Dato Cecil Abraham** - Malaysia
- **Prof. Ian Bailey SC** - Australia
- **Mr. Sundaresh Menon** - Singapore

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Who Should Attend:

- Arbitrators
- Consultants
- In-house counsel
- Lawyers
- Law academics
- Other professionals involved in regional and international arbitrations

Conference Speakers & Chairs:

- Dato Cecil Abraham - Malaysia
- Prof. Ian Bailey SC - Australia
- Prof. Lawrence Boo - Singapore
- Dr. Philip Chan - Singapore
- District Judge Leslie Chew - Singapore
- Christopher Chuah - Singapore
- Mohanadass Kanagasabai - Malaysia
- Michael Hwang SC - Singapore
- Justyn Jagger - Singapore
- Lau Hang Chong - Brunei
- Lok Vi Ming SC - Singapore
- Dr. Colin Ong - Brunei
- Naresh Mahtani - Singapore
- Sundaresh Menon - Singapore
- Dr. Anne Netto - Singapore
- Mohan Pillay - Singapore
- Dr. H Priyatna - Indonesia
- Gary Soo - Hong Kong
- Richard Tan - Singapore
- Tay Yu-Jin - Singapore
- Samuel Wong - Hong Kong
- Andre Yeap SC - Singapore

For more details about each Session and what each speaker will cover, please visit our Conference Website at
www.intellitrain.biz/SIArb

13 JULY 2007 - ENFORCEMENT OF AWARDS

SESSION 4: LEGISLATIVE & PROCEDURAL FRAMEWORK FOR ENFORCEMENT

- Opening Remarks by Session Chair
- Issues to be Addressed:
  - Requirements for a valid award
  - Enforcement procedures for domestic/foreign awards
  - Grounds for challenge and consequences
- Panel Discussion and Question & Answer Session moderated by the Session Chair

Session Chair:
Dr. Philip Chan - Singapore

Speakers:
- **Mr. Mohanadass Kanagasabai** - Malaysia
- **Dr. Anne Netto** - Singapore
- **Mr. Gary Soo** - Hong Kong
- **Mr. Andre Yeap SC** - Singapore

SESSION 5: PRACTICAL CONSIDERATIONS TO ASSIST ENFORCEMENT

- Opening Remarks by Session Chair
- Issues to be Addressed:
  - Application of NY Convention
  - Importance of seat of Arbitration
  - Manner in which arbitration conducted
  - Application of Rules of natural justice
  - Failure by 1 party to participate
  - Common problem areas
- Panel Discussion and Question & Answer Session moderated by the Session Chair

Session Chair:
Mr. Naresh Mahtani - Singapore

Speakers:
- **District Judge Leslie Chew** - Singapore
- **Mr. Christopher Chuah** - Singapore
- **Mr. Justyn Jagger** - Singapore
- **Dr. Colin Y. C. Ong** - Brunei

Conference Closing
Mr. Raymond Chan - President, Singapore Institute of Arbitrators
Mr. Johnny Tan - Chairman, Conference Organising Committee

Conference Registration

IMPORTANT:
1. Please complete each section I 2. Please complete a separate form for each delegate I 3. Return this form to: Conference Secretariat, Singapore Institute of Arbitrators, c/o 77A Boat Quay Singapore 049865, Fax to +65 65572751 or by email to SIArb@intellitrain.biz.

	PLS TICK (✓)	REGISTRATION FEES (include Conference Materials and all meals/breaks)
Members of SIArb, BANI, HKIArb, IAMA, MIArb		S$600.00
Non-members		S$750.00
Full-time Students*		S$450.00

*Discounted fees for full time students apply to full time students studying in any country. Limited places are available for such students and will be allocated on a first-come-first-served basis at the discretion of the Conference Organising Committee and subject to production of satisfactory evidence of student status.

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Name (Prof/Dr/Mr/Mrs/Miss/Mdm): _____

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Cheque Payment Details:
Cheque payments should be made payable to "**Singapore Institute of Arbitrators**" & arrive at our office with your completed registration form before the closing date, **Thursday, 28 June 2007**.

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Equivalent substitute delegates (e.g. member for member or non-member for non-member) are welcome at no additional charge, subject to our being informed in writing at least 5 working days in advance of the conference of such substitution.

Cancellation and refunds may be made upon receipt of written notice, less handling fee and bank service charges as follows: notice received on or before 14 June 2007 – 50% refund; notice received after 14 June 2007 – no refund.

DISCLAIMER

The Organising Committee is committed to staging a successful conference; however it reserves the right to cancel or postpone the Conference, change its programme or venue or any of the other details published.

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