

DEFINING THE ROLE OF THE COURT IN MODERN INTERNATIONAL COMMERCIAL ARBITRATION

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INTRODUCTORY REMARKS

This paper addresses two aspects concerning the role of National Courts in international commercial arbitration. First, the impact of the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law), and in particular Article 5, on the relationship between National Courts and Arbitral Tribunals. Secondly, the way in which National Courts have exercised their discretion under Article 34 of the Model Law in deciding whether the Courts should set aside an arbitral award on due process or other grounds.

I INTRODUCTION — THE DEVELOPMENT OF THE MODERN APPROACH TO THE ROLE OF THE COURT

State Courts provide essential support for the arbitral process. As Professor Jan Paulsson has noted, “the great paradox of arbitration is that it seeks the co-operation of the very public authorities from which it wants to free itself”.² Therefore an harmonious relationship between the Courts and the arbitral process is vital.

Lord Mustill explained the matter lucidly in his foreword to the treatise on Indian arbitration law by OP Malhotra SC.³

First, there is the central importance of a harmonious relation between the courts and the arbitral process. This has always involved a delicate balance, since the urge of any judge is to see justice done, and to put right injustice wherever he or she finds it; and if it is found in an arbitration, why then the judge feels the need to intervene. On the other side, those active in the world of arbitration stress its voluntary nature, and urge that it is wrong in principle for the courts to concern themselves with disputes which the parties have formally chosen to withdraw from them, quite apart from the waste of time and

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¹ The added updating passages relating to cases decided after the lecture was given are shown in square brackets.

² J Paulsson “Arbitration in Three Dimensions” (LSE Legal Studies Working Paper No. 1 2.2010 <<http://ssrn.com/abstract=1536093>>) at 2.

³ OP Malhotra SC *The Law and Practice of Arbitration and Conciliation* (New Delhi: LexisNexis, 2002).

expense caused by gratuitous judicial interference. To a degree both views were right, and remain so; the problem has been to give proper weight to each of them. It was an unhappy feature of discourse on arbitration in the century just past that the legitimate arguments which could be advanced in favour of one or another came to be expressed, in some instances at least, with quite unnecessary vigour.

Fortunately, in recent years wiser counsels have prevailed, and it has, I believe, generally come to be recognised on both sides of the procedural divide that the courts must be partners, not superiors or antagonists, in a process which is vital to commerce at home or abroad. ...

Within a working lifetime, international arbitration has become a business, not a calling, often involving very large sums, and bringing in its train substantial monetary earnings for all concerned. Perhaps inevitably, there has been a concurrent decline in the standards of at least some – certainly not all – of those who take part. It is no good wringing hands about this, for it is a fact to be faced, and part of facing them is to recognise that now the influence of peer pressure and indeed of simple honour has waned and some other means must be found of protecting this voluntary process from those who will not act as they have agreed. In the end, like it or not, only the courts can furnish this protection, and even the most enthusiastic proponents of party autonomy are bound to recognise that they must rely on the judicial arm of the state to ensure that the agreement to arbitrate is given at least some degree of effect. It is no good complaining that judges should keep right out of arbitration, for arbitration cannot flourish unless they are ready and waiting at the door, if only rarely allowed into the room.

It is however equally important that the balance is maintained by a recognition by the courts that just as arbitration exists only to serve the interests of the community, so also their own powers are conferred only to support, not supplant, the extra-judicial process which the parties have chosen to adopt. Anyone who has been faced in a judicial capacity with a decision which seems wrong, can sympathise with the impulse to decide the issue again, this time correctly; yet in the field of arbitration it is an impulse which must, at all costs, be resisted, except in those circumstances where the legislature has explicitly created the right of appeal. ...

Precisely the same considerations apply to procedures in the arbitration. The parties have chosen to arbitrate, not litigate. By doing so they have selected the procedures laid down by the relevant legislation or institutional rules. If there are none, then they have deliberately entrusted the choice of procedures to the arbitrator himself. This is another choice which the court must respect. The Judge may think, and think rightly, that the choice is unwise, that a different procedure would better have suited the dispute in hand. Or he may believe, again rightly, that what the arbitrator did was inefficient or even in a degree unjust. But his or her task is not to re-try the case, but simply to ensure that the method of dispute resolution on which the parties agreed is what they have in the event received. Moreover, only where the departure from the agreed method is of a degree which involves real injustice, is the court entitled to intervene, and even then the intervention must be so crafted as to cause the minimum interference with the forward momentum of the process.

Until late in the twentieth century the Courts in many common law countries were empowered by statute and decisional law to exercise a general supervisory

jurisdiction over arbitration. One component of this jurisdiction allowed the losing party to challenge an arbitrator's decision by judicial review of arbitral awards for error of law on the face of the award. For example, until the New Zealand Arbitration Act 1996 (the NZ Act) was enacted, judges were permitted not only to assess the fairness and integrity of the arbitral process, but also to correct alleged mistakes on points of law where a party could point to an arguable error of law on the face of the award.⁴

Times have changed. As the 1996 United Kingdom Departmental Advisory Committee on Arbitration Law (DAC) report stated:⁵

Nowadays the Courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process.

The change to the modern approach governing the relationship between the Courts and arbitration did not occur overnight. Some judicial landmarks along the way may be recalled. Perhaps the first was the 1942 decision of the House of Lords in *Heyman v Darwins*⁶ which rejected the theory that an arbitration clause is terminated by breach of the contract of which it forms part. Neither repudiation nor accepted repudiation entails the determination of the obligation to refer disputes to arbitration.⁷ On the contrary, the injured party can insist on having the consequences of repudiation assessed by arbitration.

By this ruling, the House of Lords created an important legal fiction, namely the doctrine of separability. The thesis which was used to support the doctrine of separability was that the arbitration clause constitutes a self-contained contract collaterally or ancillary to the underlying or matrix contract.⁸ This doctrine of separability enables the arbitration agreement to survive the termination by breach of any contract of which it forms part.

⁴ As to which, see *Manukau City Council v Fletcher Mainline Ltd* [1982] 2 NZLR 142 (CA) at 146.

⁵ UK Departmental Advisory Committee on Arbitration Law "1996 Report on the Arbitration Bill" (1996) reprinted in (1997) 13 Arb Intl 1275 at 280.

⁶ *Heyman v Darwins Ltd* [1942] AC 356; [1942] 1 All ER 337.

⁷ David St John Sutton, Judith Gill and Matthew Gearing *Russell on Arbitration* (23rd ed, Sweet & Maxwell, London, 2007) at 32, n 27.

⁸ *Bremmer Vulcan Schiffbau and Maschinen Fabrik v South India Shipping Corp Ltd* [1981] 1 Lloyds Rep 253 at 259.

As the House of Lords noted in *Lesotho Highlands v Impreglio SpA*⁹ “it is a part of the very alphabet of arbitration law ... and spelt out in s 7 of the Arbitration Act 1996 (UK) that the arbitration agreement is a distinct and separable agreement from the underlying or principal contract”. By this means modern Courts were compelled to refrain from addressing the question of whether the arbitration agreement was valid and left that question, at least in the first instance, to the arbitral tribunal.

Another landmark was the articulation of the concept of “one step” adjudication first enunciated in detail in 1993 by Lord Hoffman in *Harbour Assurance Co (UK) Limited v Kansa General International Assurance Co Limited & Ors* as follows:¹⁰

... [It] is necessary to bear in the mind the powerful commercial reasonings for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. These are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and, secondly, the practical advantage of one-stop adjudication, or in other words the inconvenience of having one issue resolved by the Court and then, contingently on the outcome of that decision, further issues decided by the arbitrator.

Lord Hoffman quoted from the German Federal Supreme Court which had said in 1970:¹¹

There is every reason to presume that reasonable parties will wish to have their relationships created by their contract and the claims arising there from, irrespective of whether their contract is effective, decided by the same Tribunal and not by two different Tribunals ... Experience shows that as soon as a dispute of any kind arises from a contract, objections are very often raised against its validity ...

A final landmark is the decision of the English Court of Appeal in *Fiona Trusts v Privalov*.¹² The Court of Appeal was faced with two principal issues. First, whether the scope of the arbitration clauses was wide enough to cover the question of whether the contract containing the arbitration clause was procured by bribery. Secondly, in light of the doctrine of separability, whether the Court or an arbitral tribunal was to determine whether a party would be bound, by its submission, to arbitration when it alleges that but for the bribery, it would have never entered into the contract containing the arbitration clause. On the first issue, the matter was complicated by inconsistency in the wording of the clause. The main part referred to any dispute arising “under this charter” but one of the sub-clauses referred to a

⁹ *Lesotho Highlands v Impreglio SpA* [2005] UKHL 43, [2005] 3 All ER 789 at [21].

¹⁰ *Harbour Assurance Co (UK) Limited v Kansa General International Assurance Co Limited & Ors* [1993] QB 703 at 724–725.

¹¹ *Judgment of 27 February 1970*, BGHZ 53, 315, (1990) 6 Arb Intl 79 at 85 (German Bundesgerichtshof).

¹² *Fiona Trusts v Privalov* [2007] EWCA Civ 20, [2007] 1 All ER (Comm) 891.

dispute arising “out of the charter”. The owners were able to point to dicta that “arising under” is narrower than “arising out of”. The Court of Appeal was unimpressed with this citation of authority and held that a jurisdiction or arbitration clause in an international commercial contract should be liberally construed.

The Court of Appeal departed from previous case law which had attempted to draw fine distinctions between these alternatively formulated clauses. Instead, the Court called for a ‘fresh start’, asserting that the difference between such phrases was immaterial. It suggested pragmatically, that arbitration clauses, in particular those arising in international commercial contracts, should be subject to a liberal construction. The House of Lords strongly endorsed this approach.¹³

The UNCITRAL Model Law

The most important step of all in the development of the supportive modern approach was the promulgation by UNCITRAL of the Model Law, which has now been adopted in some form or another in over 60 countries. Article 5 of the Model Law significantly limits the occasions for Court intervention in arbitral matters.¹⁴ As is well known Article 5 provides that, “In matters governed by this law, no Court shall intervene except where so provided in this law.”

Recourse to the *travaux preparatoires* on Article 5 is often instructive. As to Article 5, the *UNCITRAL Analytical Commentary on the Draft Model Law* states:¹⁵

Although the provision, due to its categorical wording, may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of the courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision is to be expected seems beneficial to international commercial arbitration. (Emphasis added)

The underlined passage seems to convey that the effect of the Model Law is to prevent Courts invoking their inherent jurisdiction powers in arbitral matters. However, as

¹³ *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40, [2007] 4 All ER 951.

¹⁴ However, the mere adoption of the Model Law does not guarantee that judicial intervention will be limited. The Indian Arbitration & Conciliation Act embodies the Model Law including Article 5 but in *Oil & Natural Gas Limited v Saw Pipes* [2003] 3 Supreme 449: [2003] 2 Arb LR 5 the Supreme Court, in a much criticised judgment, enlarged the scope of challenge to awards to the point where the width of the challenges available were more than what had been available under the previous 1940 Act: see PC Markanda *Law Relating to Arbitration and Conciliation* (5th Edition, Wadhwa and Co, New Delhi, 2003) at 2.

¹⁵ *Analytical Commentary on the Draft Text of a Model Law on International Commercial Arbitration*, XVI UNCITRAL Y.B. 104, 112, Art. 5, 2 (1985) (emphasis added).

discussed below, some Courts have held that the corollary to the limitation expressed by the words “in matters governed by this Law” in Article 5 is that the Courts remain able to intervene where matters of international commercial arbitration procedure are not governed by the Model Law.

It was understandable in 1986, when the modern supportive approach toward arbitration was not clearly established, that the drafters of the Model Law would wish to include a strong provision to prevent unnecessary and inappropriate Court intervention. This sentiment is seen in the legislative history and, in particular, in the above passage from the *travaux*. However, the Courts have been reluctant to relinquish their inherent jurisdiction to prevent abuses of process where, for example, a party is breaching an agreement to arbitrate by pursuing Court proceedings.

The modern approach to the role of the Court

As expounded in many decisions on the Model Law, and similar legislation influenced by the Model Law, notably the 1996 UK Arbitration Act, the Model Law brings reduced judicial involvement in the arbitral process and a consequential increase in the powers of the arbitral tribunal. It has been said that the four themes of the Model Law are party autonomy, reduced judicial involvement, increased powers for the arbitral tribunal and equality of treatment.¹⁶

In New Zealand the modern approach has been expressed most clearly in connection with the interpretation and implementation of arbitral agreements. Thus in *Marnell Corrao Associates Inc v Sensation Yachts Ltd* the High Court referred to:¹⁷

[T]he general principle that Courts should uphold arbitration by striving to give effect to the intention of the parties to submit disputes to arbitration, and not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart that intention”.

The same modern philosophy has been identified in relation to the enforcement of arbitral awards. For example, Bingham J (as he then was) said:¹⁸

... [A]s a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye, endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and

¹⁶ See for example *Pathak Tourism Transport Ltd* [2002] 3 NZLR 681 (HC) at [24] and the discussion in *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 37–43.

¹⁷ *Marnell Corrao Associates Inc v Sensation Yachts Ltd* (2000) 15 PRNZ 608 at [61]–[62].

¹⁸ *Zermatt Holdings v Nu-Life Upholstery Repairs* [1985] 2 EGLR 14 at 15.

commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it.

These observations were echoed in the New Zealand Court of Appeal by Cooke J (as he then was) in two cases before the Model Law came into force. First:¹⁹

[R]easons given by an arbitrator or umpire should be read fairly and as a whole. Awards should not be vitiated by fine points; the modern approach is in favour of sustaining awards where that can fairly be done, rather than destroying them.

Secondly:²⁰

Where parties have agreed to some form of arbitration rather than court proceedings, even when as here this element in their contract has been dictated by the statutory regime applying to such leases, the Court should not in my view allow the finality of the award to be destroyed except for truly compelling reasons.

The most notable comments on the 1996 English Act were made by Lord Steyn in *Lesotho Highlands* (supra).²¹ In explaining the ethos of the Act, he stressed the radical nature of the changes it had brought about and endorsed the observations of Lord Wilberforce, who had said in the parliamentary debates on the Bill that the Court had been given “only those essential powers which ... the Court should have, that is rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors.”²²

Singapore, too, follows the modern approach. The Court of Appeal in *Tjong Very Sumito v Antig Investments* said:²³

Courts should therefore be slow to find reasons to assume jurisdiction over a matter that the parties have agreed to refer to arbitration. It must also be remembered that the whole thrust of the International Arbitration Act was geared to minimising court involvement in matters that the parties have agreed to submit to arbitration. Current arbitration and court proceedings are to be avoided unless it is for the purpose of lending crucial assistance to the arbitral process. Jurisdictional challenges must be dealt with promptly and firmly. If the courts are seen to be too ready to entertain frivolous jurisdictional challenges or to exert a supervisory role over arbitration proceedings, this might encourage parties to stall arbitration proceedings. This would, in turn, slow down arbitrations and increase costs all round. In

¹⁹ *Money v Ven-Lu-Ree Ltd* [1988] 2 NZLR 414 (CA) at 417.

²⁰ *Manukau City Council v Fencible Court Howick Ltd* [1991] 3 NZLR 410 (CA) at 412. Also see Lord Mustill's remarks in *Pupuke Service Station Ltd v Caltex Oil (NZ) Ltd* Appeal No 63/94, 16 November 1995 reported as an appendix to *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at [1].

²¹ *Lesotho Highlands Development Authority v Impregilo SpA*, above n 7.

²² At [18].

²³ *Tjong Very Sumito v Antig Investments* [2009] 4 SLR(R) at [28].

short, the role of the court is now to support and not to displace the arbitral process.

To the same general effect are the comments by Justice VK Rajah, Judge of Appeal of the Supreme Court of Singapore at the Singapore Arbitration Forum in January 2010.²⁴

Notwithstanding the contraction of the role of the Court in the late 20th century, it is still necessary to carefully calibrate the balance between judicial intervention and judicial restraint. As to that Lord Mustill rightly emphasised in the *Ken Ren* case that:

“Whatever view is taken regarding the correct balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the Court may not only be permissible but highly beneficial.”²⁵

II UNCITRAL MODEL LAW ARTICLE 5 AND THE INHERENT JURISDICTION OF THE COURTS

Article 5 of the Model Law was obviously an attempt to curb judicial excesses. Article 5 has created some difficulties of interpretation and application. There is now a considerable body of case law in Model Law jurisdictions on the fundamental question of whether this particular provision means that the inherent jurisdiction of state Courts to curb related procedural abuses of process and to ensure arbitral fairness and efficiency has been removed.

Cases that have come before the Courts in New Zealand, Hong Kong, Singapore and the Court at the Dubai International Financial Centre as well as English cases which have addressed the same question will be considered. For the Model Law countries this is a very important issue.

Courts have consistently upheld Article 5 as a mandatory provision of the Model Law, confirming that it is the basic rule for determining whether Court intervention is permissible under the Model Law in particular cases. Article 5 emphasises that the role of Courts to is limited to such matters as are specifically provided in this Law. The

²⁴ In his keynote address he said:

“The courts, as we have emphasised in our decisions, have a limited role to play, in that they essentially assist rather than subvert the arbitral process. No international arbitration award has been set aside in Singapore in the course of the last decade and we hope this trend will continue. The judiciary will continue to unstintingly support arbitral processes in every way permitted by the laws of Singapore. There need be no concerns whatsoever about our Courts performing a medieval dance in the discharge of their responsibilities in supervising international arbitrations, if and when they are asked to do so.”

²⁵ *Coppee-Lavalin SA/NV Ken-Ren Chemicals and Fertilisers Ltd (in liq)* [1995] 1 AC 38 (HL); see also *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL).

Model Law contemplates Court involvement in the following articles: 8 (arbitration agreement and substantive claim before Court – stay of proceedings), 9 (interim measures), 11 (appointment of arbitrators), 13 (challenge procedure), 14 (failure or impossibility to act), 16 (competence of arbitral tribunal to rule on its jurisdiction), 27 (Court assistance in taking evidence), 34 (setting aside an award) and 35 and 36 (recognition and enforcement of awards).

Singapore Courts have affirmed that Court intervention would only be appropriate to the extent such intervention is expressly sanctioned by the Model Law itself. A good example of the beneficial application of Article 5 in Singapore is found in *Mitsui Engineering & Shipbuilding Co Ltd v Easton Graham Rush*.²⁶ This case serves to illustrate the “supportive rather than interventionist attitude of Singapore Courts when called upon to exercise interventionist powers over arbitrations”.²⁷ The High Court of Singapore held that an application for a stay of the arbitration to prevent a challenged arbitrator from continuing the arbitral proceedings pending a Court review of the challenge was a request for Court intervention barred by Article 5.

Mr Easton had been appointed sole arbitrator in an arbitration between Mitsui and Keppell. He issued a first interim award with which Mitsui was dissatisfied and Mitsui challenged Mr Easton’s position as arbitrator on grounds of lack of independence and impartiality. The next hearing was scheduled to begin on 26 January 2004 and last for three weeks. Mitsui’s position was that there should be no further hearing before Mr Easton pending an intended application to remove him and to set aside the interim award. Mitsui filed an originating summons for an interlocutory injunction to restrain Mr Easton from “continuing or assisting in the prosecution or further prosecuting or taking any further step” in the arbitration; and an ex parte summons-in-chambers for an interim injunction seeking similar relief pending the hearing of the originating summons.

The Court had to decide whether it had any jurisdiction to grant an injunction to prevent an arbitrator from proceeding with the arbitration hearing pending a decision for his removal and whether there was recourse against an interim award. Neither the Model Law nor the International Arbitration Act contained a specific provision to allow the Courts to grant such an injunction. Mitsui suggested the Court retained a residual power to make such an order, and argued that because the law allows the Court to set aside an award on grounds no less serious than the power to remove an

²⁶ *Mitsui Engineering & Shipbuilding Co Ltd v Rush* [2004] 2 SLR 14, [2004] SGHC 26.

²⁷ L. Boo “Arbitration” (2004) 5 SAL Ann Rev 47 at 55.

arbitrator, the Court should therefore have the power to grant an interlocutory injunction under Article 34 of the Model Law and s 24 of the International Arbitration Act, if not under Article 13 of the Model Law. Mitsui argued that if the Court did not have such a power it would “render the Court’s eventual decision on the application to set aside an award nugatory.”²⁸

Woo Bih Li J rejected Mitsui’s argument. It was for the arbitrator and not the Courts to decide whether to stay an arbitral proceeding under the Model Law. The learned judge observed that, if an award were to be set aside, whatever had been done in reliance on the award must also be set aside. If this were the case, then every dissatisfied party would be entitled to seek an interlocutory injunction pending the determination of the setting aside application.²⁹ This would go against the overall scheme of minimal Court intervention in on-going arbitral proceedings under the Model Law. Articles 13 and 16 of the Model Law clearly stipulate that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings irrespective of the fact that the challenge was pending with the Court. Furthermore, Article 13(3) indicates that it for the arbitrator to decide whether arbitral proceedings should be stayed pending the Court’s ruling on the challenge. The matter was therefore, implied governed by Article 5.

An illustration where Article 5 was not allowed to impede judicial intervention comes from Hong Kong. In *China Ocean Shipping*, where it was shown that a party had refused to disclose its place of business to avoid posting security for the costs of the arbitration and where the arbitral tribunal lacked the power to grant orders requiring compliance with such a fundamental requirement, the Court assisted the tribunal by making the appropriate orders. In the Court’s view, Article 5 did not preclude the Court from making such orders because the issue of security for costs was not a matter governed by the Model Law.³⁰

However, in other cases, the correct application of the Article 5 prohibition has occasioned more difficulty. In *Carter Holt Harvey Ltd v Genesis Power Ltd*³¹ the High Court of New Zealand was required to determine whether the Court had jurisdiction to grant a stay of an arbitration. The parties were involved in a contractual dispute relating to the construction and operation of a co-generation plant for Carter Holt

²⁸ *Mitsui Engineering & Shipbuilding Co Ltd v Rush* at [34].

²⁹ *Mitsui Engineering & Shipbuilding Co Ltd v Rush* at [40].

³⁰ *China Ocean Shipping Co., Owners of the M/V Fu Ning Hai v Whistler International Ltd., Charters of the M/V Fu Ning Hai* [1999] HKCFI 693.

³¹ *Carter Holt Harvey Ltd v Genesis Power Ltd* [2006] 3 NZLR 794 (HC).

Harvey Ltd (“Carter Holt”). The predecessor of Genesis Power Ltd (“Genesis”) had entered into a co-generation contract with Kinleith Co-Generation Ltd. The predecessor of Genesis had then entered into a turnkey contract with Rolls-Royce New Zealand Ltd (“RR”), under which RR agreed to design, construct, and commission the plant. The turnkey contract contained an arbitration clause, but the co-generation contract did not.

The co-generation plant allegedly suffered from defects, and Court proceedings were brought as a result. Carter Holt sued both Genesis for breach of the co-generation contract and RR for negligent advice and physical damage allegedly caused by the inadequacies of the plant.

In 2004, because of the slow progress with the High Court proceedings and possible limitation problems, Genesis commenced international arbitral proceedings against RR pursuant to the arbitration clause in the turnkey contract, alleging a failure by RR to design, install, or construct a plant in accordance with the contractual terms. Genesis further claimed an indemnity or contribution from RR for any liability that Genesis might have to Carter Holt in the Court proceedings.

RR claimed that the arbitral proceedings brought by Genesis should be stayed on the grounds of abuse of process, based on the argument that the institution of proceedings by Genesis of a claim against RR amounted to a duplication of the claim by Carter Holt against RR in the High Court. Moreover, this duplication led to the possibility of a double liability on the part of RR, which was oppressive. The sole arbitrator, the Rt Hon. J. S. Henry Q.C., a former Court of Appeal Justice, refused a stay, holding that there was no such duplication because Carter Holt was not a party to the turnkey contract. The arbitrator also noted:

- (1) in the High Court, RR was not facing a claim for breach of its contractual obligations under the turnkey contract. It was possible for one party to be sued in contract and in tort for the same loss and this did not automatically amount to an abuse of process;
- (2) even if the same relief was available in both sets of proceedings, this did not necessarily amount to a duplication; and
- (3) the only way Genesis could seek relief against RR was through the turnkey contract.

The arbitrator thought that RR had overstated the dangers of double recovery. Even if there were ultimately two judgments against RR in Carter Holt’s favour, one would satisfy the other and RR would not be “doubly liable”. He also observed that the High Court had reserve power to prevent abuse of process occurring, which afforded RR

an extra layer of protection, should it need it. Having refused to grant a stay on the grounds of abuse of process, the arbitrator ordered the arbitration to proceed unless and until the point was reached where there might be unfairness in requiring RR to participate in both the High Court and the arbitral proceedings. The arbitrator considered that any problems could be met with “sensible management controls exercised at the appropriate time as and when questions of estoppel could also be determined”.

RR made an interlocutory application to the High Court for directions in relation to its application for an order staying the arbitration. One of the issues which the High Court had to determine was whether the Court had jurisdiction to grant a stay. Genesis contended that, by virtue of Article 5, there was no such jurisdiction.

Randerson J held that the Court retained its inherent jurisdiction to stay arbitral proceedings, despite the Article 5 admonition. He noted that the limitation in Article 5 applied only to matters governed by Schedule 1 of the New Zealand Act which largely replicates the Model Law. Having examined the drafting history of the Model Law, he concluded that the Model Law did not purport to be a comprehensive code on all matters relating to arbitration. Nor did the Model Law embody a complete code of judicial intervention in arbitral proceedings. In particular, he noted that anti-arbitration injunctions were not covered by Schedule 1 (including by Article 19).

Randerson J summarised the pre-1996 NZ Act jurisdiction principles as follows:³²

- a. Unless and until the court intervened, there was no impediment to concurrent proceedings arising out of the same contract by way of Court proceedings and arbitration.
- b. The Court had power to stay the Court proceedings pending arbitration under s 5 of the Arbitration Act 1908. But if a stay were declined, the Court nevertheless had power to restrain the arbitration from proceeding pending the outcome of the litigation.
- c. The power to stay arbitration was exercised sparingly and only where injustice would arise. An application for a stay was required to satisfy the Court that continuance of the arbitration would be vexatious or would otherwise constitute an abuse of the process of the Court.
- d. The rationale for the existence of this jurisdiction included the avoidance of duplication, as well as the risk of conflicting decisions of fact and law with the obvious potential to lead to what Farwell LJ described [in *Doleman & Sons v Ossett Corp* [1912] 3 KB 257 (EWCA)] as “inextricable difficulties” for the court and the parties.

³² *Carter Holt Harvey Ltd v Genesis Power Ltd* at [33].

Randerson J did not accept that an arbitrator's implied power to stay or adjourn arbitral proceedings in the interests of justice under Article 19(2) of the First Schedule to the 1996 NZ Act was a matter "governed" by the First Schedule for the purposes of Article 5. For a matter to be "governed" by the First Schedule one would expect something more than an implied power arising from a provision conferring general powers on an arbitral tribunal to conduct an arbitration in such manner as it considered appropriate. To "govern" a matter implied the existence in the First Schedule of a defined power to regulate and control a specified matter. The general language of Article 19(2) could be contrasted with the more specific and express stay provisions of Article 8.

Randerson J thus held that Article 5 was inapplicable and the Court's inherent jurisdiction was unchanged by the 1996 Act. He concluded by saying:³³

Except to the extent clearly limited by statute, this court has a wide discretion to prevent abuse of its own processes. It is possible to envisage a case where there is such a substantial degree of overlap of factual or legal issues that it would be inappropriate for both court and arbitral proceedings to proceed simultaneously even if the matters in the court proceedings were not the subject of an arbitration agreement in a way that would engage Art 8. While a court might well be reluctant to intervene in such circumstances, I would not wish to preclude the court's jurisdiction to do so in an appropriate case.

The reasoning adopted by Randerson J leaves little doubt that a New Zealand Court would have jurisdiction to issue not only anti-arbitration injunction, but also an anti-suit injunction in aid of arbitration. *Carter Holt* illustrates that in those cases where there is an inevitable conflict between what is to be decided in an arbitral proceeding in which the same questions of law or fact are raised, then there is a need for a residual inherent jurisdiction to enable the Court to intervene and stay either the arbitration or the Court proceeding if procedural unfairness would otherwise occur.³⁴

[For an anti-suit injunction in aid of arbitration, one may refer to the recent New Zealand decision in Danone v Fonterra [2014] NZHC 1681:

³³ At [61].

³⁴ The aftermath of Randerson J's observations and his decision upholding jurisdiction to grant an anti-arbitration injunction was that the parties consented to an order consolidating all relevant claims and bringing them into the single forum of the High Court. The High Court trial ran for 10 months when a settlement was reached. In agreeing to settle, the parties were doubtless influenced by the vast cost of court proceedings. These were exactly the problems of judicial cost, delay and expense which Genesis and RR had sought to avoid in choosing to arbitrate. For a discussion of the High Court trial see T. Weston and S. Foote "Reflections on a Marathon Trial" [2010] NZLJ 213.

In 2011, Danone and Fonterra entered into an agreement pursuant to which Fonterra was to supply certain dairy-derived nutritional products to Danone for use in its baby formula. In late 2013, Danone was forced to recall baby formula that may have been affected by a contaminant discovered at Fonterra's Hautapu plant. On 8 January 2014, Danone commenced international arbitration proceedings against Fonterra under the arbitration clause provided in the supply agreement. The notice of arbitration was followed immediately by an application by Danone to commence proceedings in the High Court against another Fonterra company, Fonterra Co-Operative Group Limited (FCGL) for breaches of the Fair Trading Act, negligent misstatement, and product liability.³⁵ FCGL sought a stay of the High Court proceedings until final determination of the arbitration. A mandatory stay under Article 8(1) of the Arbitration Act 1996 was not available, as FCGL was technically not a party to the supply agreement.

FCGL argued that a stay would be justified (and arbitration would be the appropriate forum to hear the claims) given that (a) the tortious and statutory claims derived from an alleged breach of the supply agreement; (b) the two processes would involve largely the same evidence and witnesses; and (c) there was a risk of inconsistent factual and legal findings without a stay.

Danone argued that the Court's discretion should be exercised only in rare and compelling cases. Danone further argued that it had genuine claims against FCGL, separate to those brought against Fonterra.

Venning J was satisfied that the Court had power to grant a stay under either High Court Rule 15.1(3) or its inherent jurisdiction to grant a stay preserved by High Court Rule 15.1(4). He accepted that in either case the Court's discretion should be exercised sparingly and with due regard to considerations of cost, convenience and the interests of justice (including any unfairness to the applicant if the proceedings were allowed to continue).

In this case, his Honour considered that there was a distinct possibility of issue estoppel arising in view of the close relationship between the parties, as well as a related risk of inconsistent findings on major issues. He also noted (a) the significant overlap between the factual and legal issues in dispute; and (b) the inevitable increase in cost if both processes were continued due to the duplication of the time and expense involved.

³⁵ *Danone v Fonterra* [2014] NZHC 1681.

Venning J held that it would not be in the interests of cost, convenience and justice for the High Court proceedings and the arbitration to progress simultaneously. He ordered that the claims should be heard before the arbitral tribunal first, noting that (a) the parties had agreed to submit their disputes to arbitration; and (b) the central dispute arose as a direct result of Fonterra's alleged quality control failures in breach of the supply agreement. His Honour therefore granted a temporary stay, noting that Danone would be free to pursue litigation against FCGL to the extent that not all the issues were resolved by arbitration.]

A contrary decision is that of the Court of the Dubai International Financial Centre in *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte*,³⁹ Injazat Capital brought a claim before the DIFC Court of first instance against Denton Wilde Sapte for alleged negligence in failing to advise the Claimant in regard to the existence of an option to sell shares that it had acquired under a Share Subscription Agreement. Denton Wilde submitted an application to stay those proceedings since its terms of business attached to an engagement letter sent to Injazat Capital included the following arbitration clause:

“If any claim, dispute or difference of any kind whatsoever (...) arises out of or in connection with those agreements (...), you and we each agree to submit to the exclusive jurisdiction of the Dubai Court. However, we may at our sole option, refer the claim, dispute or difference to LCIA Arbitration in London (...).”

Injazat Capital asserted that the terms of business and the arbitration were not received, and in any event they were not accepted. Denton Wilde's position was that the terms were forwarded by fax and emailed to the Claimant who did not respond to it.

In seeking a stay of the Court proceedings, Denton Wilde pointed to Article 13 in the DIFC Arbitration Law which obliges the Court to grant a stay of proceedings where the subject of those proceedings is a matter governed by a valid arbitration agreement. The Court noted that Denton Wilde's arbitration clause provided for arbitration seated in London, and that Article 7(2) of the DIFC Arbitration Law provides that only Articles 14, 15, Part 4 and the schedule applied to arbitrations seated outside of the DIFC. Hence, the power to order a stay under Article 13 did not apply.

³⁹ *Injazat Capital Limited and Injazat Technology Fund B.S.C. v Denton Wilde Sapte & Co* (CF1 019/2010 – Judgment of 6 March 2012).

Having determined that it had no statutory jurisdiction to grant a stay, the Court then examined whether it possessed any residual jurisdiction. At paragraph [36], Steel J referred to the decision of the English Court of Appeal in *Etri Fans Ltd v NMB (UK) Ltd* as authority for the proposition that where a Court's inherent jurisdiction has been impliedly overridden by a detailed statutory regime, a Court may not exercise its jurisdiction independently of that statutory power.⁴⁰ He cited Lord Woolf:⁴¹

“... because here the area covered by that inherent jurisdiction has been the subject of detailed and precise Parliamentary intervention, the circumstances in which the court will grant a stay under its inherent jurisdiction in situations dealt with by the statutory provisions but where it could or would not do so in exercise of its statutory jurisdiction, will be rare. The jurisdiction is truly a residual one principally confined to dealing with cases not contemplated by the statutory provisions.”

Steel J considered that the power to grant stays in the presence of agreements to arbitrate outside of the DIFC was regulated by the DIFC Arbitration Law, as Article 7, scope of Application of Law provides that the Article 13 obligation to order a stay did not apply to non-DIFC seated arbitrations, and Article 10 provides that “in matters governed by this law, no Court shall intervene except to the extent so provided in this Law”. He concluded that the Court did not possess inherent jurisdiction to stay proceedings in the face of arbitration agreements, and was instead confined to the powers found in the ‘detailed and precise’ DIFC Arbitration Law.

Steel J acknowledged that Article II(3) of the New York Convention, to which the United Arab Emirates is a signatory, compels Courts of signatory states to recognise arbitration agreements regardless of where they are seated, and that holding that the DIFC Court did not have the power to stay proceedings in the presence of non-DIFC seated arbitrations put Dubai in breach of the New York Convention. He also acknowledged that “[t]here is indeed a presumption that legislation is drafted in a manner consistent with treaty obligations.” But he concluded that there was no room for interpreting the DIFC Arbitration Law consistently with the Convention. The terms of Articles 7 and 13 were clear; the DIFC Arbitration Law did not permit the Court to grant a stay.⁴²

⁴⁰ *Etri Fans Ltd v NMB (UK) Ltd* [1987] 1 WLR 1110.

⁴¹ At 114.

⁴² Since this lecture was delivered a contrary decision has been reached in another DIFC case *International Electromechanical Services Co LLC v Al Fattan Engineering LLC* Claim No: CF 004/2012 Judgment 14 October 2012. The case is discussed in Clemmie Spalton “DIFC court sends pro-arbitration message” (23 October 2012) *Global Arbitration Review* <<http://www.globalarbitrationreview.com/news/article/30923/difc-court-sends-pro-arbitration-message/>>.

Not long after Steel J's decision, I was confronted as a DIFC Justice with the same issue in the case of *International Electromechanical Services v Al Fattan Engineering*.⁴³ I respectfully declined to follow Steel J's reasoning. I found that the DIFC court did retain a discretion to stay proceedings due to the court's inherent jurisdiction to stay proceedings which is wide-ranging and fundamental. In my judgment I held that more than an inference from silence was required to oust the court's inherent jurisdiction. I considered that to hold otherwise would be to thwart the promotion of the DIFC as a jurisdiction supportive of arbitration as an expeditious and cost-effective dispute resolution process.

In December 2013, the DIFC issued an amendment to the 2008 Arbitration Law making it clear that article 13 applies where the seat of arbitration is the DIFC, where the seat is not the DIFC, and where no seat is designated.⁴⁴

It is interesting to examine how this situation was dealt with in the English Act. The comparable provision in the English Act, section 1, states that "the Court *should* not intervene" (emphasis added), as opposed to employing the mandatory "shall" of Article 5. Lord Mustill was the original Chairman of the UK Departmental Advisory Committee which wrote the report in 1989 entitled "A New Arbitration Act for the United Kingdom" which examined the question "whether, and, if so, to what extent the provisions of the Model Law should be implemented in England".

As to Article 5 the Mustill report expressed concerns as to the precise scope of the exclusive code created by Article 5, as follows:⁴⁵

Secondly, the precise scope of this exclusive code is uncertain - although the fact that it is in some degree limited cannot be doubted. The shape of the code appears to be as follows:

- (1) It applies only in a circumscribed *field*: namely 'in matters governed by this law'.
- (2) Within the allotted field, judicial intervention can be invoked only in certain *circumstances*; namely (so far as concerns setting aside and remission) the circumstances set out in Article 34(2) and as regards certain other remedies created by Article 11(3) and (4), 13(3), 14(1), 16(3) and 27, the circumstances specifically contemplated by those Articles.
- (3) Within the allotted field, judicial intervention may take place only in certain *manners*: namely in the case of 'recourse to a court against an arbitral award', by means of setting aside or remission, and in respect

⁴³ *International Electromechanical Services v Al Fattan Engineering* CFI 004/2012 (Dubai International Financial Centre Courts, Court of First Instance).

⁴⁴ Arbitration Law Amendment Law, s 7 (DIFC).

⁴⁵ Lord Mustill "A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law" (1990) 6 Arb Intl 3.

of the special circumstances contemplated by the above-mentioned Articles, the procedures referred to in those Articles.

It will thus be seen that, contrary to what might at first sight be assumed - namely that the entire code of intervention by a court is to be found in the Model Law and nowhere else - the Commission envisaged that in the field of international commercial arbitration two wholly distinct regimes of judicial intervention would be in force at the same time. In 'matters governed by this law', the code takes effect, and no relief may be sought in any other circumstances, and no other forms of relief may be granted, besides those set out in the Law. But in matters not governed by the Law, the courts of the enacting state may continue to offer all such remedies in all such circumstances as are available under existing law. Accordingly, in order to ascertain which of the two regimes is applicable in a particular case, it must be determined whether that case is a 'matter governed by' the Law. The problem here arises when the Law is silent on the particular matter in question.

The 1996 DAC Report shared Lord Mustill's concerns and it was therefore decided that the word "shall" in Article 5 should be replaced with the word "should". The difference was considered in *Vale Do Rio Doce Navegacao v Shanghai Bao Steel Ocean Shipping Co*,⁴⁶ where Thomas J accepted that the use of "should as opposed to "shall" showed that an absolute prohibition on intervention by the Court in circumstances other than those specified in Part 1 of the English Act was not intended. He noted the view expressed in the DAC Report that a mandatory prohibition of intervention in terms similar to the Article 5 of the Model Law was inapposite. However, he said it was clear that the general intention was that the Courts should usually not intervene outside the general circumstances specified in Part 1 of the English Act.

In *AES Ust Kamenogorks Hydropower Plant LLP v Ust Kamenogorsk Hydropower Plant JSC*, Rix LJ adopted a similar line of reasoning to Randerson J in *Carter Holt*.⁴⁷ In *AES*, because the power to issue anti-suit injunctions (to protect arbitration) lay outside of the English Act, his Lordship rejected the argument that the English Act "occupies the whole ground", notwithstanding that the Act provides in s 1(c) that "in matters governed by this Part the Court should not intervene except as provided by this part". Rix LJ considered that the words "should not intervene" related to an intervention in an arbitration rather than an intervention in litigation which threatened the conduct of arbitration proceedings or the efficacy of the arbitration agreement. Rix LJ saw no reason in principle "why the Court might not want to intervene where

⁴⁶ *Vale Do Rio Doce Navegacao v Shanghai Bao Steel Ocean Shipping Co* [2000] EWHC 205 (Comm), [2000] 2 All ER (Comm) 70.

⁴⁷ *AES Ust Kamenogorks Hydropower Plant LLP v Ust Kamenogorsk Hydropower Plant JSC* [2011] EWCA Civ 647, [2012] 1 All ER (Comm) 845.

the safety of an arbitration agreement was threatened. In such cases the role of the Court is to support arbitration and not interfere with it.⁴⁸

In *Nomihold Securities INC v Mobile Telesystems Finance SA*, Andrew Smith J found that s 1(c) does not limit the Court's jurisdiction, but provides statutory guidance about when it should be exercised in relation to arbitrations to which Part 1 of the 1996 Act applies.⁴⁹ He noted that the parties to arbitration could not preclude the Court's jurisdiction by an agreement between them any more than they could confer jurisdiction on the Court.

Summary on Article 5

The line between the restriction on Court intervention provided for under Article 5 of the UNCITRAL model, and the residual inherent power of the Court is not always easy to determine. The cases discussed highlight the tension between the need for judicial restraint and the understandable inclination of some judges to intervene to prevent abuses of process. The majority of the cases reveal that the Courts have sought to preserve the inherent jurisdiction to control abuses of process. To retain this power two approaches have been used. Both have involved statutory interpretation. The first is to emphasise the word "govern" in Article 5 as was done in the *Carter Holt* case. The second is to undertake a detailed statutory analysis to ascertain whether the Model law "occupies the whole field", as for example in the AES case and if not, to hold that is legitimate to use the reserve powers flowing from the inherent jurisdiction. The end result of both approaches is that the Courts have retained their reserved power to support and uphold arbitration agreements. Article 5 has been appropriately "read down".

III SETTING ASIDE ARBITRAL AWARDS — THE DISCRETION IN ARTICLE 34(2) OF THE MODEL LAW

Introduction

My second topic considers the exercise of judicial discretion in respect of applications to set aside arbitral awards. The existence of the discretion is undoubted because of the word "may" in the opening words of Article 34(2): "An arbitral award may be set aside ..." even if one of the specified grounds is established it is also supported by the

⁴⁸ At [100].

⁴⁹ *Nomihold Securities INC v Mobile Telesystems Finance SA* [2012] Bus LR 1289 at [26] per Andrew Smith J. See also *Vale do Rio Doce Navegacao SA v Shanghai Bao Steel Ocean Shipping Co Ltd* [2000] All ER (Comm) 70 at 48.

drafting history of Article 34, and specifically the concern of the drafters of the Model Law that awards should not have to be set aside for technical or inconsequential errors.⁵⁰ Use of discretion enables the Court to balance arbitral finality with the need to protect parties against seriously flawed arbitrations. However, the question which arises for discussion is what should be the criteria for the exercise of that discretion. Here I analyse some cases in the Asia-Pacific area (especially the decision of the Hong Kong Court of Appeal in *Pacific China Holdings Ltd (In Liquidation) v Grand Pacific Holdings Ltd*⁵¹) to see what criteria have been employed by the Courts and whether judicial intervention has been consistent with the modern approach in favour of “sustaining Awards where that can fairly be done”. Here is an area where a degree of judicial restraint is desirable.

Arbitration is, by definition, characterised by flexibility and freedom from the rigid procedures of litigation. Nevertheless Courts must maintain a residual supervisory jurisdiction to ensure that the fundamental principles of due process and natural justice are observed. Article 34 authorises National Courts to intervene by setting aside awards in situations where the basic rights of parties have been breached or where an arbitral tribunal has acted beyond its jurisdiction.

The only grounds on which an award may be set aside are those specified in Article 34. Article 34(2)(a)(i) contains two grounds for setting aside, neither of which are often encountered: the incapacity of a party and the lack of a valid arbitration agreement. An award may be set aside under Article 34(2)(a)(ii) if a party “was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party’s case”. The provision for setting aside in Article 34(2)(a)(ii) supports the natural justice requirements expressed in Article 18 — directing that each party be treated equally and be given the full opportunity to present its case — and Article 24 —relating to the conduct of hearings and written proceedings. Article 34(2)(a)(iii) deals with excess of jurisdiction and Article 34(2)(a)(iv) covers defects in the composition of the arbitral tribunal or unauthorised arbitral proceedings.

Wider natural justice protections are recognized in Article 34(2)(b)(ii), which permits setting aside in circumstances where enforcement of an award would conflict with

⁵⁰ H Holtzmann and J Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, The Hague, 1989) at 921–922 and 1057–1058.

⁵¹ *Pacific China Holdings Ltd v Grand Pacific Holdings* [2012] 4 HKLRD 1.

public policy, for example when breach of the rules of natural justice had occurred.⁵² This list is exhaustive cannot be extended by analogy.

The advantages of arbitration are lost where Courts seek to intervene outside these specified areas, or for tenuous reasons within those areas. Overly strict evaluation of awards may mean parties are, in effect, forced to comply with rigid Court procedures rather than flexible arbitral procedures, contrary to their original agreement. Moreover, since the parties to arbitration have agreed to accept the findings of the arbitral tribunal, Courts should not attempt to “second-guess” the tribunal’s procedural rulings. It is for this reason that, when interpreting Article 34, Courts have construed the grounds for setting aside in Article 34(2) narrowly especially in relation to the so-called public policy ground.⁵³

The drafting history of the Model Law in respect of Article 34 supports the principle that arbitral awards will not be set aside for minor or immaterial violations.⁵⁴ On the other hand, the UNCITRAL Commission Report states that a non-material error can give rise to grounds for setting aside the award, but, as was noted during the debates, national Courts have discretion not to set aside the award when such grounds are present.⁵⁵ The drafting history, however, does not and could not address in detail how Courts should approach the exercise of this discretion.

Gary Born summarizes the basic approach of the Model Law to the setting aside of arbitral awards:

The UNCITRAL Model Law sets forth an influential approach to the annulment of international awards in the arbitral seat. Article 34 of the Model Law provides for the presumptive validity of international arbitral awards, subject only to specified exceptions which are substantially identical to Article 36 of the UNCITRAL Model Law (dealing with recognition of foreign awards). These grounds parallel the non-recognition in the New York Convention and are narrowly construed ... It is equally clear that the grounds specified in Article 34(2) of the Model Law are permissive or discretionary, not mandatory. That is, a court may annul an award if one or more of the Article 34(2) grounds are satisfied, but the court is not mandatorily required to annul the award, even where one of these grounds applies. This is made express by Article 34(2), which provides that an “award *may* be set aside by the court ... only if” specified grounds are present ... In many cases, the existence of one of the Article 34(2) grounds will be sufficiently serious that annulment of the award will be virtually automatic; nonetheless, there may be instances where, for example, a procedural error was sufficiently inconsequential that it is held not to affect the award’s validity ...

⁵² See *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 17.5–17.5.3.

⁵³ This is certainly true in New Zealand (see *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 17.5)

⁵⁴ See Howard M Holtzmann and Joseph E Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, The Hague, 1989) at 921–922 and 1057–1058.

⁵⁵ Holtzmann and Neuhaus at 922.

Also preliminarily, it is clear that the burden of proving that one of the exceptions under Article 34 of the Model Law applies is on the party seeking to set an award aside. That is the explicit requirement with regard to the exceptions in Articles 34(2)(a)(i) to (a)(iv), as to which Article 34(2) requires that “the party making the application [to annul] furnish proof” that the exception applies. Judicial authority including in countries that have not adopted the Model Law, is to the same effect.

Article 34(2)(b), which deals with non-arbitrability and public policy, is not prefaced by the foregoing requirement that the party seeking to annul and award must demonstrate that the exception is applicable. This parallels the New York Convention and reflects the power of a national court to raise these issues *sua sponte* or *ex officio*. Nevertheless, it would be wrong to conclude that the burden of proof allocations noted above do not apply to Article 34(2)(b)'s public policy and non-arbitrability exceptions; on the contrary, public policy and non-arbitrability rules are designed in part for the protection of particular parties, and it is entirely appropriate (and necessary) to conclude that the party seeking to annul an award bears the ultimate burden of demonstrating that one of these exceptions applies.

I now identify some examples of the criteria which have been utilised in exercising the discretion to set aside.

Introductory observations based on New Zealand and Singapore cases⁵⁶

To determine the consequences of an error, it is clear that the Court may take into account causation and materiality. The inclusion of a requirement for a causal link between a defect and the award was raised for discussion during the drafting of Article 34 of the Model Law, but was ultimately not included in the final text. The High Court of New Zealand has, however, determined that a breach of natural justice founded on an alleged evidentiary inadequacy must also cause a substantial miscarriage of justice in order for an award to be set aside.⁵⁷

Awards should not have to be set aside for technical or inconsequential errors.⁵⁸ The High Court in New Zealand has approached the discretion under Article 34 in a relatively open way, taking into account causation and materiality considerations when deciding whether to set aside an award once a ground for setting aside has been established. Thus, even if such a ground is present, the Court may consider the magnitude of the defect and the extent to which it had or might have had an

⁵⁶ See *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 17.2.

⁵⁷ *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [103]. See also J Beraudo “Egregious Error of Law as Grounds for Setting Aside an Arbitral Award” (2006) 23 J Int'l Arb 351 at 353. Beraudo argues that an award should not be set aside if the wrong application of a legal principle has no impact on the rights of the losing party.

⁵⁸ H M Holtzmann and J E Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, The Hague, 1989) at 921–922 and 1057–1058.

impact on the outcome of the dispute, and particularly whether the tribunal might have reached a different conclusion had it adopted the correct approach.⁵⁹

Courts are inclined to adopt a restrictive standard of review under Article 34, namely one that preserves the autonomy of the arbitral procedure and minimises judicial intervention.⁶⁰ An arbitral tribunal is free to make its own assessment of evidence and make value judgments between the positions of the parties. However, a tribunal should not normally consider evidence or argument not specifically germane to the hearing or the pleading, without giving the parties further notice and an opportunity to respond.

Arbitrators are not bound to adopt the position of either party. The Courts have made it clear that the arbitral tribunal is under no obligation to discuss the case or its preliminary view of the facts with the parties. Only where the arbitral tribunal intends to deviate from a legal position previously communicated to the parties, or where its decision would, for other reasons, come as a surprise to the parties should the arbitral tribunal inform the parties accordingly.⁶¹ I now discuss some of the leading cases on the discretion including those from which some of the above propositions have been derived.

⁵⁹ For example *Sinke v Remarkable Residential Homes Ltd* (HC Wellington, CP274-98, 6 October 2000, Durie J) at [21]; *Downer Connect Ltd v Pot Hole People Ltd* (HC Christchurch, CIV 2003-409-2878, 19 May 2004, Randerson J) at [111]–[112]; *Caudwell & Ors v Gosling* (HC Auckland, CIV2005-404-84, 9 May 2005, Williams J) at [68]; *Asian Foods West City Ltd v West City Shopping Centre Ltd* (HC Auckland, CIV-2007-404-001215, 11 September 2007, Harrison J) at [18] and [31]. The requirement for a causal link between a defect and the award was raised for discussion during the drafting of art 34 of the Model Law but was ultimately not included in the final text. The New Zealand High Court has however determined that a breach of natural justice founded on evidentiary inadequacy must also cause a substantial miscarriage of justice in order for an award to be set aside: *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (HC) at [103]. Compare the English Act, s68, discussed below, under which an award may be set aside if a serious irregularity in the arbitration will cause substantial injustice to the applicant. See also J Beraudo “Egregious Error of Law as Grounds for Setting Aside an Arbitral Award” (2006) 23 *Journal of International Arbitration* 351 at 353 contending that award should not be set aside if wrong application of a legal principle has no impact on the rights of the losing party.

⁶⁰ *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 3, [2011] 4 SLR 305.

⁶¹ *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC).

Article 34(2)(a)(i): Invalidity of the Arbitration Agreement

There is a recent and controversial New Zealand case involving the operation of this ground. Different conclusions were reached as between the High Court and the Court of Appeal, but the Supreme Court of New Zealand came down in favour of setting aside the Award.

The case is *Carr v Gallaway Cook Allan* [2012] 3 NZLR 97 (HC); [2013] 1 NZLR 826 (CA); and [2014] 1 NZLR 792 (SC). The plaintiffs were parties to an agreement for the purchase of a group of farming and hotel assets. An agreement (referred to in the judgment as the Amended Settlement Agreement “ASA”) contained conditions to be satisfied by a prescribed date and time, time being of the essence. The defendant law firm acted for the plaintiff’s in the transaction. Because of this term of the ASA the vendor cancelled the contract. This resulted in an alleged loss to the plaintiffs in the transaction which they calculated at around \$12 million.

In the course of litigation it was suggested by the Courts that the defendants had been largely responsible for the failure to settle on time. The plaintiffs then pursued a claim in professional negligence against the defendants. Arbitration was agreed because of the speed with which the issues could be determined and the benefits of not having the issues aired in open Court. The procedure was to be determined in accordance with the High Court Rules with the same rights of appeal as if the arbitration had been dealt with by the High Court. The sole arbitrator’s standard Agreement to Arbitrate was amended by agreement to add the following underlined words:

The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to “*questions of law and fact*” (emphasis added).

The italics and the words “emphasis added” formed part of the final version of the agreement which was signed by all parties. The arbitrator subsequently issued a partial award as to liability which determined that although the defendants had been negligent in many respects, that negligence was not ultimately causative of the plaintiff’s loss. This was primarily because even without the negligence, settlement could not have occurred until seven minutes after the settlement date and time specified in the ASA. The plaintiffs filed a notice of appeal alleging errors of fact and

law. However, because the issue was a matter of causation, the notice of appeal did not appear to refer to any obvious, discrete, legal error evident on the pleading.

The defendants raised the issue that, notwithstanding the clear terms of the arbitral agreement, there was no right of appeal on questions of fact under New Zealand law. This is because curial intervention in arbitral matters is expressly and tightly circumscribed by the New Zealand Arbitration Act 1996 (the Act). In particular, Article 5 of Schedule 2 of the Act stipulates that in matters governed by that Schedule, no Court shall intervene except where so provided in this Schedule. In addition, for the purposes of appeals on questions of law there has been, since the 2007 Amendment Act, a statutory definition of “questions of law” which specifically excludes questions of fact.

The plaintiffs then filed an amended appeal combined with an application to set aside the award on the grounds that it was not valid under the law to which the parties had subjected it or otherwise under the law of New Zealand. This was because the parties had agreed to arbitrate on the express basis that there would be right of appeal on questions of fact, which was contrary to statute. They also sought alternative relief pursuant to the Contractual Mistakes Act 1977 on the basis that the agreement had been entered into under a common mistake of law. Both parties’ counsel were in agreement that the inclusion in the agreement of a clause that is contrary to the Act necessarily gives rise to the possibility that the entire contract is void or invalid and that the issue to be determined was whether the offending clause was capable of being severed from the rest of the contract. It was agreed that either the agreement could be saved by the deletion of the words “and fact” or that it must fail in its entirety.⁶²

The High Court considered that there were two issues to be considered where a contract contains an illegal term:

First, whether as a matter of construction the lawful part of the contract can be severed from the unlawful part, thus enabling the plaintiff to sue on a promise unaffected by any illegality; and

Second, whether, despite severability, there is a bar to enforceability arising out of the nature of the illegality.

Ellis J found that no question of any bar to enforceability as a result of the nature of the illegality arose. That is to say, the agreement was not contrary to public policy. However, in relation to the first issue, the plaintiffs had argued that the pre-

⁶² Whether this was a wise concession by the defendants may be doubted.

contractual correspondence showed that the parties would not have agreed to arbitrate at all, if they had not believed that they would have a right of appeal on a question of fact, and therefore the right of appeal was “fundamental” and could not be severed. While a party can waive a clause in a contract that has been induced for its benefit, in this case the Court found that the “benefit” of the appeal provision was potentially of value to both parties. The Court said at [42] and [43]:

But it is fair to say that an analysis that involves the traditional contractual terminology of “benefit” and “detriment is not entirely apt in the present case. In this case the reality is that at the time the agreement was entered the factual appeal right was (objectively) of equal worth to both parties. Once the award was issued, the scales tipped entirely. The right was then only of value to the Carr interests. The ultimate “benefit” bestowed by the right of factual appeal was contingent on the outcome of the arbitration.

In either event, however, it is clear that the offending part of clause 1.2 was not for the exclusive benefit of Gallaways and in my view Gallaways do not therefore have a right unilaterally to waive reliance on the right contained in it. It is therefore permissible and necessary to consider the relative importance of the clause to the parties and whether it can (objectively) be inferred that they would not have entered into the contract without it. If they would not, then it becomes difficult to justify severance.

The Court found the provision concerning the right of appeal as to fact in the arbitration agreement was important to the parties for a number of reasons:

- (i) the use of italics and emphasis in the drafting;
- (ii) had the agreement been silent there would have been a pre-existing right of appeal as to matters of law pursuant to the Arbitration Act (Sch 2, cl 5);
- (iii) the parties knew that the issue of negligence and particularly causation would be “highly fact driven”; and
- (iv) the pre-contractual correspondence supported this view.

Ellis J said at [47] and [48]:

I accept that it would be a simple enough “blue pencil” exercise to excise the words “and fact” from cl 1.2. The agreement would make perfect sense without them. But, for the reasons I have given, I consider that the inclusion of those words formed a fundamental part of the exchange of promises between the parties. As I have said, that conclusion is borne out of the terms of the clause itself. The underlying factual matrix also supports it. While the agreement is, indeed, at its heart an agreement to arbitrate a dispute, it can also reasonably be inferred that there would have been no such agreement at all, had those words not been included. More fundamentally, it would, I think, be wrong in principle (and contrary to the thrust of cases I have discussed) to order severance where that order would not only diminish, but would actively better, the contractual position of the party who seeks it. Justice does not obviously lie in permitting Gallaways to take advantage of a windfall illegality by ordering severance here.

Accordingly Ellis J found that the words “and fact” could not be severed from the clause and that the agreement to arbitrate was thus not valid under New Zealand law. Therefore the award was set aside. The judge dealt only briefly with the discretion. She said at [51]:

In terms of any residual discretion as to setting aside under art 34, I do not discount the time, money and effort expended by both parties on the arbitration process to date. Those matters weighed heavily with me. But ultimately, in my view, unless setting aside is ordered Gallaways will reap the substantial benefit of a mistake for which it was, at least in part, responsible. Without that mistake the arbitration would not, in my view, have taken place at all. Through no fault of the arbitrator, the arbitration misfired from the start.

Several questions arise from this decision.

First, Article 34(2)(a)(i) refers to the arbitration agreement not being valid under the law of New Zealand. Section 4 of the Act defines arbitration agreement as “an agreement ... to submit to arbitration ... disputes ...”. The provision concerning appeals in the Act is in a separate Schedule 2 and specifically in Clause 5. It may be argued that this is not a provision concerning arbitration agreements. It has to do with the optional appeals against awards on questions of law. It may therefore be contended that the arbitration agreement was unaffected by the addition of an inoperative election as to appeals. If so Article 34(2)(a)(i) was not triggered since the arbitration agreement itself was not invalid under New Zealand law and no discretion as to whether to set aside the award arose. The only effect of the misconceived attempt to obtain the right to appeal on questions of fact was to make it impossible to pursue such an appeal since the statute does not allow appeals on questions of fact. In technical terms the High Court would have no jurisdiction to consider and determine such an invalid appeal.

Secondly, in New Zealand there is a legislative policy to encourage the use of arbitration (s 5(1)(a) Arbitration Act 1996) and to facilitate the enforcement of arbitral awards (s 5(1)(e) Arbitration Act 1996) and a corresponding judicial policy involving the general principle that Courts should uphold arbitration by striving to give effect to the intention of the parties to submit disputes to arbitration add not allow any inconsistencies or uncertainties in the wording or operation of the arbitration clause to thwart that intention. Therefore, it might be argued that the Court wrongly exercised its discretion in setting aside the Award, especially since it expressly found that the inclusion of an appeal right contrary to statute did not render the award contrary to public policy.

Thirdly, the Judge also relied upon California authority as follows:

[49] To the extent the view I have reached requires further fortification, I note that in *Crowell v Downey Community Hospital Foundation* the Californian Court of Appeal was faced with a similar issue. That case also involved a provision in an arbitration agreement which was unenforceable because it provided for judicial review of the merits of the award. The Court held that the clause rendered the whole contract illegal and that it could not be severed. It said:

The parties to the contract here agreed to arbitration with judicial review of errors of law and fact. Without that provision, a different arbitration process results.

[50] Accordingly, and for all the above reasons I consider that the words “and fact” cannot be severed from cl 1.2 and that (as the parties have in that event agreed) the arbitration agreement as a whole is therefore not valid under New Zealand law.

Crowell was one of a number of cases in the United States on whether the parties to an arbitration agreement may agree to expand the scope of judicial review under the US Federal Arbitration Act. There were conflicting authorities on the question with some judges upholding expanded review by giving priority to the principle of party autonomy and others rejecting such expansion as impermissible under the Act. The split in authorities was resolved by the United States Supreme Court in *Hall Street Associates v Mattel Inc*⁶³ which held that arbitrating parties may not expand the grounds of review beyond those established by statute. The question arose as to what would be the effects of the illegality. Some cases, like *Crowell*, struck down the offending arbitration agreement where the arbitration was in its early stages but others did not do so when the issue arose after the arbitration had been held.⁶⁴ It might be argued that *Crowell* was distinguishable on this basis.

[*The Court of Appeal*

The Court of Appeal held that the words “and fact” were to be severed from the agreement. There had been agreement to submit the dispute to arbitration, which remained essentially unchanged by severance; the underlying mutual promise to submit to arbitration remained valid; the invalidity arose for a statutory prohibition, not from being contrary to public policy and did not taint the agreement as a whole; the parties had performed their promises and got what they had bargained for; and contractual relationships were to be given effect to wherever possible; all the more so where the parties had substantially performed the agreement and there was no

⁶³ *Hall Street Associates v Mattel Inc* 552 US 576 (2008).

⁶⁴ See for example *Alameda County Coliseum v CC Partners* (2002) 101 Cal. App 4th 635.

suggestion that one party had caused or were even responsible for the common error.

The Court of Appeal, contrary to what was done in the Supreme Court, first analysed the Arbitration Agreement and said:

[43] Against this background, our analysis commences with the arbitration agreement itself. The operative part comprises two elements. The first provides:

1.1 The dispute is submitted to the award and decision of the Honourable Robert Fisher QC as Arbitrator whose award shall be final and binding on the parties (subject to cl 1.2)

The “dispute” is described as differences between the parties arising from a professional negligence claim brought by Mr Carr. Counsel filed detailed particulars of negligence but they were not produced on appeal.

[44] The second operative element is cl 1.2. We repeat its terms here for ease of reference:

The parties undertake to carry out any award without delay subject only to such rights as they may possess under Articles 33 and 34 of the First Schedule to the Arbitration Act 1996 (judicial review), and clause 5 of the Second Schedule (appeals subject to leave) but amended so as to apply to “*questions of law and fact*” (emphasis added). [Italicising, invert commas and “emphasis added” included in the original document.]

The Court of Appeal referred to the statutory definition of the question of law which prohibits appeals on questions of fact and continued as follows:

[47] The parties must have known that only two alternative dispute resolution mechanisms were available to them: they could either issue proceedings in the High Court or go to arbitration. As we shall explain, the parties had committed in principle to the arbitration process many months before the agreement was signed. Both parties are taken to have known that the arbitration process, confirmed by the statutory framework, was directed to achieving finality, as cl 1.1 of the agreement acknowledged. So, even if they had agreed to arbitrate in accordance with the rights of appeal allowed by cl 5 of the Second Schedule, there was no certainty that either party would be able to challenge the award. The introduction of cl 5(1) of the Second Schedule in 2007 further proscribed the nature of the right. [*Emphasis added*].

The Court of Appeal decided that the words “and fact” should be severed.

[53] What was more important, in our judgment, but was not given sufficient weight by the Judge, was that the agreement to arbitrate

was fully performed without the scope of the arbitration being affected by the invalidity in any respect.

When coming to the exercise of discretion under 34 the Court of Appeal then said:

[66] The discretion vested by art 34 is of a wide and apparently unfettered nature. We are satisfied it must be exercised in accordance with the purposes and policy of the Arbitration Act. Two specific purposes are to encourage the use of arbitration as an agreed method of resolving commercial and other disputes; and to facilitate the recognition and enforcement of arbitration and agreement awards. The principles and philosophy behind the statute are party autonomy within its framework, equal treatment, reduced court intervention and increased powers for the arbitral tribunal. Parliament has clearly stated its intention that parties should be bound to accept the arbitral decision where they have chosen that method of resolution. The recognised benefits of arbitration include speed, economy, choice of forum, anonymity and finality, the last by allowing the parties to limit their rights of appeal even though they cannot contract out of art 34.

[67] The statutory principles and philosophy, when considered in the context of this case, plainly favour validation of the agreement. In our judgment it would be inappropriate within the exercise of our statutory discretion to set aside the award. In addition to those factors which support severance, in particular the fact of performance of the agreement, we emphasise that:

(a) The parties made conscious and informed decisions to submit to arbitration in preference to litigation through the High Court and beyond. As noted, they must be taken to have known of the statutory purposes and policy governing this choice. Each party made its decision with the benefit of independent legal advice.

(b) It would be contrary to the legislative intention to allow one party to take what he perceived to be the benefits of following the arbitration course but then to set aside an adverse award, not on its merits but in reliance on an error for which he must bear his own independent responsibility.

[68] Another material factor is our satisfaction that this result does not cause an injustice. The effect of severance is to diminish but not deprive him of his appeal rights. Mr Carr retains his statutory rights of appeal against the partial award according to arts 33 and 34 of the First Schedule at cl 5 of the Second Schedule; they are expressly recognised within the operative clause. In particular he can appeal on questions of law, subject to resolution of the scope of his appeal. That is necessary because, as noted, Mr Carr alternatively sought leave to appeal under cl 5(1)(c) of the Second Schedule on a number of what were described as questions of law.]

[The Supreme Court decision]

There were three issues before the Supreme Court.

The first issue was whether the parties' "arbitration agreement" for the purpose of the Arbitration Act was limited to the contractual term submitting their dispute to arbitration or also included the provision for a right of appeal. The Court decided unanimously that the meaning of "arbitration agreement" in the Act was not limited to a submission clause but also encompasses procedural matters on which the parties agree.

The second question was whether the ineffective words providing for a right of appeal on factual matters could be severed from the remainder of the parties' agreement so as to preserve the agreement's validity. The Court decided unanimously that whether or not a contractual term can be severed is an issue of construction of the contract. It is likely to be permissible to sever an invalid promise which is subsidiary to the main purpose of the contract but severance may not destroy the main purpose of what has been agreed or alter the nature of the contract.

Applying this approach, the Court decided that the italicisation of the words "questions of law and fact" and the notation of "emphasis added" made clear, objectively, that the scope of the right of appeal went to the heart of the parties' agreement to arbitrate. The provision for this right of appeal was so material and important a promise that it could not be severed from the agreement. Therefore, the arbitration agreement was invalid.

It followed that the appellants had established the existence of a ground on which the arbitral award could be set aside under art 34(2)(a)(i) of schedule 1 of the Arbitration Act.]

[Discretion

The third and final issue before the Supreme Court was whether the Court should exercise the discretion to set aside the award. A majority of the Court, comprising Elias CJ, McGrath, William Young and Glazebrook JJ, decided that the award should be set aside. There were no special circumstances that would make it appropriate for the Court to refuse to set aside an award that had been made in the absence of a valid agreement to arbitrate.

Unlike the Court of Appeal the Supreme Court found that the definition of Arbitration Agreement in the Act encompassed ancillary provisions such as those relating to appeals. As we shall see later when discussing the implications of the decision that was the crucial difference between the Court of Appeal and the Supreme Court and I

shall examine the question of whether it was right to construe the definition of Arbitration Agreement in this fashion.

Arnold J dissented on this final issue. He would have refused to set aside the award. In order to understand the dissent of Arnold J who would have refused to set aside the award we need to scrutinise the language of the setting aside provisions of Article 34.

On the matter of discretion Arnold J made several important points.

[91] [...] First, the first of the purposes of the Act set out in s 5 is “to encourage the use of arbitration as an agreed method of resolving commercial and other disputes”. As Williams and Kawharu note, although the law of arbitration derives principally from contract law, it contains an overlay of public law and policy. Modern arbitration law as it applies to both domestic and international arbitrations contains policy elements which make a purely private law contractual approach to arbitrations inappropriate. This is reflected, for example, in the fact that there are standards or processes which must be applied in arbitrations whatever the parties may agree. Examples are the principles of natural justice and the availability of review through the courts on the statutory grounds. The law of arbitration, then, is not simply about party autonomy, important as that undoubtedly is. As Mr Williams QC submitted on behalf of the intervener, the Arbitrators’ and Mediators’ Institute of New Zealand Inc, party autonomy is not determinative of the interaction between the courts and the arbitral process – that is delineated in the Act.

[92] Second, art 5 of sch 1 to the Act provides that in matters covered by the schedule, “no court shall intervene except where so provided in this schedule”. Although it is not a comprehensive code as to judicial intervention, the article is an important affirmation of the principle of limited judicial intervention in arbitral matters. Article 5 of sch 1 is expressly qualified by several provisions in sch 2, including relevantly cl 5 dealing with appeals. The various provisions in the Act and the schedules dealing with the circumstances in which judicial intervention is permissible give effect to one of the purposes of the Act, namely “to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards”.

[93] Third, art 34 of sch 1 sets out the circumstances in which a court may set aside an award. It applies to arbitrations where the seat of arbitration is New Zealand. By contrast, art 36 of sch 1, which sets out the circumstances in which a court may refuse to recognise or enforce an award, applies to all arbitrations, whether the seat of arbitration is New Zealand or elsewhere. As the majority note, sch 1 to the Act is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration. The grounds in arts 34 and 36 of sch 1, which are substantially the same albeit not identical, replicate those

in arts 34 and 36 of the Model Law, which were in turn based on art V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). As I develop later in this judgment, it is not possible to contract out of review under art 34.

Arnold J said at paragraph 95:

[95] The point on which I differ from the majority concerns the relationship between arts 34(2)(a)(i) and (iv). Relevantly, art 34(2)(a)(i) confers a discretion on the court to set aside an award where the arbitration agreement is invalid under New Zealand law and art 34(2)(a)(iv) confers a discretion where the agreed arbitral procedure has not been followed, subject to the caveat that the agreed procedure must not conflict with a provision in sch 1 from which the parties to the arbitration are not free to derogate (a non-derogable provision).

At [96] he made four points about art 34(2)(a)(iv):

(a) First, art 34(2)(a)(iv) does not distinguish between agreed procedures on the basis of their importance or materiality. The agreed procedure that has not been followed may be fundamental or relatively unimportant. It is clear from the travaux préparatoires to the Model Law that the intention was that the relative importance of the procedural failure would be relevant to the exercise of the court's discretion.

(b) Second, the limitation in art 34(2)(a)(iv) that a court may not set aside an award where an agreed procedure has not been followed if that agreed procedure conflicts with a non-derogable provision reflects a deliberate decision to limit party autonomy: where there is a nonderogable provision, the parties will not be entitled to adopt by agreement an alternative procedure and, if they do, they will not be entitled to have the award set aside where the arbitrator does not follow the agreed procedure but rather that in the non-derogable provision. In effect, art 34(2)(a)(iv) treats those who go to arbitration as being bound by that which cannot be derogated from even though they chose some other procedure, whether through mistake or otherwise. [...]

(c) Third, where an arbitration agreement contains an agreed arbitral procedure that is in conflict with a non-derogable provision, the arbitration agreement may well be invalid, on the same basis as the arbitration agreement in the present case is invalid. That is, the agreed procedure may, viewed objectively, be fundamental to the parties' agreement to arbitrate. This raises the question whether it is possible to circumvent the limitation contained in art 34(2)(a)(iv) by invoking instead art 34(2)(a)(i).

(d) Fourth, art 34(2)(a)(iv) refers to an agreement about "arbitral procedure". There is a question whether this language is apt to include an agreement concerning appeals. Further, art 34(2)(a)(iv) refers to a "conflict with a provision of this schedule" (ie, sch 1). In

the present case, the conflict is with the appeal provision in sch 2, namely cl 5. Accordingly there is an issue as to the relevance of art 34(2)(a)(iv) in the present circumstances. In brief, my answer is that, even if art 34(2)(a)(iv) does not apply directly, the principle underlying it is relevant to the exercise of the court's discretion under art 34(2)(a)(i) in the particular circumstances of this case.

After discussing various aspects of these provisions and their counterparts in the New York Convention Arnold J concluded as follows:

“The parties to an arbitration agreement are free to agree their own procedure except in respect of nonderogable provisions. Where the arbitrator does not follow an agreed procedure, that will be a ground on which the court may exercise its discretion to set aside the award, except in relation to processes in non-derogable provisions in sch 1, which the arbitrator must follow in preference to any inconsistent agreed procedure. Where an arbitrator follows a procedure in a non-derogable sch 1 provision in preference to an inconsistent agreed procedure, setting aside is not available under art 34(2)(a)(iv). To this extent, party autonomy is restricted. Given that the drafters of the Model Law on which sch 1 is based contemplated that agreements as to arbitral procedures might deal with matters of real importance to the parties, I think it is inconsistent with the limit in art 34(2)(a)(iv) to permit resort to art 34(2)(a)(i) where art 34(2)(a)(iv) would deny relief.”

He concluded by saying that:

“...the principle behind art 34(2)(a)(iv) is that the parties will not be entitled to have an award set aside for failure to follow an agreed procedure where that agreed procedure is in conflict with a non-derogable provision in sch 1, no matter how important that agreed procedure was to them. In my view, a court should not allow the limitation contained in art 34(2)(a)(iv) to be circumvented where there is an agreement as to arbitral procedure which is contrary to a non-derogable provision in sch 1.113 Although cl 5 is a non-derogable provision in sch 2 rather than sch 1 and the agreement concerned the scope of appeal rights rather than the arbitration itself, I consider that the same principle is relevant to the exercise of the art 34(2) discretion in the present case. In my view, the High Court was wrong to exercise its power to set aside the award under art 34(2)(a)(i) in this case as in doing so, it undermined the principle underlying art 34(2)(a)(iv).”

[What have the commentators said to date?

Professor William Park, a leading expert on arbitration law and the current President of the London Court of International Arbitration, in a forthcoming article to be published by the Chartered Institute of Arbitrators discusses the Supreme Court decision and says that:

“The irony of the New Zealand decision will not escape thoughtful observers. Legislators sought to enhance arbitral finality by precluding appeals on question of fact. In the end, however, the statute led to an award without consequences. In other words the statutory objective of enhancing finality was thwarted by the decision of the Supreme Court and the arbitration either has to be run all over again or the parties have to go back to where they started which was in the High Court in Christchurch.”

There are some other interesting aspects of the case. The strong emphasis which the Supreme Court put on the fact that the words “questions of law and fact” were in italics with inverted commas and parenthesis emphasis added in effect determined the fate of the award. There is reason to believe that those words were inserted in the course of the negotiations to highlight the changes that were being proposed and it was never intended that the italics and inverted commas and parenthesis were never intended to remain in the final version.

Amokura Kawharu, senior lecturer in law at the University of Auckland,⁶⁵ in a forthcoming New Zealand Law Review article says:

In terms of the Arbitration Act, the Court of Appeal emphasised that Parliament’s intention was to limit judicial intervention, and that the law’s policy is to give effect to arbitration wherever possible despite the presence of a vitiating factor. Therefore both parties were taken to have known that their arbitral processes, within its statutory framework, was directed at achieving finality (at [46]-[47], [48](e)). This is a crucial point, as it gives due weight to the specialised nature of arbitration law. The Supreme Court also addressed the purposes of the Act, but as discussed below, it was less influenced by finality than the Court of Appeal when assessing the parties’ objective intentions. Applying these principles, the Court of Appeal held that the parties’ agreement was in substance an agreement to submit a dispute to final and binding arbitration with an ancillary, and severable, right of appeal.

The Supreme Court majority in analysing what was the meaning of the phrase “Arbitration Agreement” did not take into account the precise language of 34. Article 34 deals with the invalidity of the Arbitration Agreement and distinct from this non-compliance with the parties agreement on arbitral procedure which obviously includes appeals on questions of law.

If “Arbitration Agreement” has the broad meaning ascribed to it by the Supreme Court then the language in Article 34(2)(a)(iv) regarding non-derogation would be largely superfluous (because an agreement on a procedure which derogated from Schedule 1 would be invalid under 34(2)(a)(i) and unless severed it would make the rest of the Arbitration Agreement invalid as well. This is unlikely and the alternative view would be that as a general proposition

⁶⁵ And co-author of *Williams and Kawharu on Arbitration* (LexisNexis, Wellington, 2011).

Arbitration Agreement in sub-paragraph (i) relates to the formal and substantive validity of the elementary consent to arbitrate where sub-paragraph (iv) covers matters related to the parties agreement on procedural matters.

The implications of the Court's analysis is that Arbitration Agreements may be invalid and awards may be exposed to the risk of setting aside on the basis of an agreed procedure which is legally ineffective even if the Act's core procedural safeguards have all been complied with.

Carr's argument, as accepted by the Supreme Court, was that cl 1 of the arbitration agreement needed to be read as a whole – the consent in cl 1.1 was conditional on cl 1.2. An alternative possibility, just as a matter of interpretation, is that the parties agreed on rights of appeal only to the extent that those rights were legally available. Extracting the relevant parts from their agreement, in cl 1.1, the parties submitted their dispute to arbitration, "subject to cl 1.2". In cl 1.2, the parties agreed to comply with the award, subject to "such rights as they may possess" under cl 5 of sch 2 to the Act, as amended by the parties. They possessed no rights under the amended cl 5 of sch 2, because the amendment was ineffective.

The Supreme Court's interpretation of "Arbitration Agreement" broadens the possible basis for setting aside an award and narrows the scope of the Article 34 discretion. The result is inconsistent with the objectives of the Arbitration Act.

The undue emphasis by the majority on party autonomy was misplaced as Arnold J pointed out: "While the principle of party autonomy lies at the basis of the law of arbitration there are overriding statutory principle which limit that autonomy. This was not fully understood by the Supreme Court."]

[Conclusion

In my respectful view, the Supreme Court approached the case as if an Arbitration Agreement was just another contract and in exercising its discretion paid insufficient attention to the limits on party autonomy spelt out in the Act. To paraphrase what Professor Park has said in the article I have quoted, although contract principles provide a starting point for analysis, any suggestion that arbitration remains "just" a matter of contract would seem excessive. Arbitration agreements pave the way for something unpredictable. Third parties called arbitrators, strangers to the agreement, make an Award which replaces judicial decision making. States giving effect to the process will want to monitor its legitimacy, to ensure that losers received due process and that the parties and the arbitrator observed the relevant statutory limitations as to arbitral procedure.

The Court of Appeal decision is to be preferred. Legislative amendments may be called for. One possibility is to amend Article 34(2)(a)(iv) so as to apply it to the whole of the relevant law, not just the First Schedule (Model Law) parts. This is what has been done in the NSW Commercial Arbitration Act which has both Model Law and non-Model Law provisions, ie:

... The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties unless such an agreement was in conflict with a provision of this Act from which the parties cannot derogate, or failing such agreement was not in accordance with this Act. [*Emphasis added.*]

Another is to re-word the definition of “arbitration agreement” in Section 2 of the Act by adding the words “but does not include an ancillary agreement concerning matters relating to arbitral procedure”.]

Article 34(2)(b)(ii): Natural Justice

In *Trustees of Rotoaira Forest Trust v Attorney-General*, the New Zealand High Court dismissed an application to set aside an arbitral award for an alleged breach of due process. In a leasehold rental arbitration the plaintiff argued that the arbitrator had denied the parties the opportunity to be heard on the land valuation model used as a basis for its award. Fisher J summarised the general rules of natural justice required for arbitration. His Honour then outlined the principles that a tribunal must apply to ensure that the response rights of the parties are respected. This summary,⁶⁶ has been relied on frequently in subsequent cases.⁶⁷

- (a) Arbitrators must observe the requirements of natural justice and treat each party equally.
- (b) The detailed demands of natural justice turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.
- (c) As a minimum each party must be given the full opportunity to present its case.
- (d) In the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party may be given the reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

⁶⁶ At 463.

⁶⁷ For example, in *Soh Beng Tee v Fairmont* [2007] SGCA 28, [2007] 1 SLR(R) 32 discussed below.

- (e) In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence or argument extraneous to the hearing without giving the parties further notice and the opportunity to respond.
- (f) The last principle extends to the arbitrator's own opinions and ideas if these were not reasonably foreseeable as potential corollaries of those opinions and ideas which were expressly traversed during the hearing.
- (g) On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other. It will usually be no cause for surprise that arbitrators make their own assessments of evidentiary weight and credibility, pick and choose between different aspects of an expert's evidence, reshuffle the way in which different concepts have been combined, make their own value judgments between the extremes presented, and exercise reasonable latitude in drawing their own conclusions from the material presented.
- (h) Nor is an arbitrator under any general obligation to disclose what he is minded to decide so that the parties may have a further opportunity of criticising his mental processes before he finally commits himself.
- (i) It follows from these principles that when it comes to ideas rather than facts, the overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice it might have been possible to persuade the arbitrator to a different result.
- (j) Once it is shown that there was significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.

Accordingly, in order for a party to prove it has been deprived of the opportunity to present its case, it must demonstrate that a reasonable litigant in the applicant's position would not have foreseen the type of reasoning adopted by the arbitral tribunal laid down in the award; and, with adequate notice, it might have been possible to convince the arbitral tribunal to reach a different result.⁶⁸

Not all technical or procedural violations of due process will constitute a breach of this duty. In the first case in my survey where the setting aside of an Award was reversed on appeal, *Soh Beng Tee v Fairmount*,⁶⁹ the Singapore Court of Appeal considered an application to set aside an arbitral award on grounds of breach of natural justice. The plaintiff, Fairmount Development, employed the defendant Soh Beng Tee (SBT) as its main contractor in the development of a condominium housing project under a standard building contract. In the course of construction, SBT made several applications for extension of time on various grounds resulting in the completion date of the project being pushed forward and a delay certificate issued against it. Fairmount terminated the contract with SBT due to its delays and

⁶⁸ *Trustees of Rotoaira Forest Trust* at 463.

⁶⁹ *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, [2007] 1 SLR(R) 32.

appointed another contractor. SBT commenced arbitration on the basis that Fairmount had wrongfully terminated the contract and the arbitrator issued an award in its favour. The plaintiff sought to set aside the award in the High Court. Prakash J set aside the award on the basis of a breach of natural justice in the course of the arbitration proceedings that had prejudiced the plaintiff's rights, namely that the tribunal was found to have decided on the timing issue without the matter having been raised by any of the parties. Thus the arbitral tribunal failed to give each party the opportunity to be heard on all relevant matters relating thereto.

The Court of Appeal reversed the High Court decision, finding that there had not been a breach of natural justice. The Court determined that the respondent, Fairmount, did indeed have every opportunity to be heard: the finding as to timing was not critical to the final decision; there was "no causal nexus between the breach and the award". Even where a complainant can demonstrate a breach of the rules of natural justice, but cannot show that it has suffered prejudice the award would not be set aside from a "technical breach", the award would not be set aside.⁷⁰

Approving of the views of the New Zealand High Court in *Trustees of Rotoaira Forest Trust v Attorney-General*,⁷¹ Rajah JA held that capricious or irrational conduct during the arbitral process would justify the setting aside of an award. The Court accepted that the test was whether a reasonable litigant in the complainant's shoes could not have foreseen the possibility of reasoning of the type revealed in the award. In opting 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."⁷² The Court affirmed the need for minimal curial intervention in arbitral proceedings and ruled that "only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, resulting in actual prejudice to a party, can or should a remedy be made."⁷³

The Court of Appeal then summarised the principles which provide for a fine balance between maintaining the integrity of the arbitral process and protecting rules of natural justice:⁷⁴

⁷⁰ *Soh Beng Tee* at [91].

⁷¹ *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452 (HC).

⁷² *Soh Beng Tee* at [65].

⁷³ At [98].

⁷⁴ At [64].

- (1) Parties to arbitration had, in general, a right to be heard effectively on every issue that might be relevant to the resolution of a dispute. The overriding concern was fairness.
- (2) Fairness, however, was 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 had been made. The courts were not a stage where a dissatisfied party could have a second bite of the cherry.
- (3) The latter conception of fairness justified a policy of minimal curial intervention, which had become common as a matter of international practice.
- (4) The delicate balance between ensuring the integrity of the arbitral process and ensuring that the rules of natural justice were complied with in the arbitral process was preserved by strictly adhering to only the narrow scope and basis for challenging an arbitral award that had been expressly acknowledged under the Act.
- (5) It was almost invariably the case that parties proposed diametrically opposite solutions to resolve a dispute. The arbitrator, however, was not bound to adopt an either/or approach.
- (6) Each case should be decided within its own factual matrix. It had always to be borne in mind that it was not the function of the court to assiduously comb an arbitral award microscopically in an attempt 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.

Although *Soh Beng Tee* concerned a domestic arbitration, the Court of Appeal suggested that the principles were equally applicable to international arbitrations. Courts will therefore not interfere in the arbitral process without good reason.⁷⁵ In exercising its discretion, Courts should seek to support arbitration in order to preserve party autonomy and to promote procedural fairness. The Court affirmed the current legal framework which prescribes that the Court should not interfere in the arbitral process without good reason.

Article 34(2)(a)(ii): Party Unable to Present its Case

The exercise of discretion to set aside an arbitral award for a breach of due process was considered in *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH*.⁷⁶ The Court considered whether the disclosure of certain documents to the Tribunal but not to the applicant had resulted in the applicant being unable to present its case thus amounting to a breach of due process. Dongwoo had entered into an agreement with Mann+Hummel GmbH (“M+H”) to supply Dongwoo with technical information of the manufacture of filtration products. Disputes arose between the parties resulting in

⁷⁵ *Soh Beng Tee* at [59].

⁷⁶ *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] SGHC 67, [2008] 3 SLR(R) 871.

Dongwoo terminating the agreement. The termination was contested by M+H and the dispute was referred to arbitration. The tribunal ruled in favour of M+H, declaring that the purported termination of the agreement by Dongwoo was invalid.

Dongwoo applied to have the award set aside the award on various grounds one of which was that it was unable to present its case under Article 34(2)(a)(ii) of the Model Law or a breach of natural justice under section 24(b) of the IAA because it was not given access to technical drawings that M+H had shown to the tribunal. M+H had refused to show the drawings to Dongwoo, arguing that it was bound by the confidentiality obligations to a third-party. The tribunal declined to draw an adverse inference against M+H for the non-production of the drawings. Chan Seng Onn J rejected Dongwoo's argument that the tribunal had relied on the drawings in its award. The mere fact that the tribunal had ruled against Dongwoo on that question did not mean that Dongwoo was unable to present its case on this issue. Chan Seng Onn J therefore found that Dongwoo was not deprived of an opportunity to present its case, nor was there a breach of natural justice.⁷⁷

Whether a party was or was not able to present its case at the arbitration is very much a question of fact and degree, and it necessarily focuses on the overall conduct of the proceedings with particular attention paid to the conduct of the tribunal and the parties themselves. However, a tribunal's ruling in accordance with the rules of the arbitration on discovery or admissibility of evidence after hearing the parties, which necessarily disadvantages one party, cannot without more, be regarded as evidence which shows that the party was therefore unable to present its case.

In the absence of some flagrant breach of natural justice, the Court will defer to the arbitral tribunal's decisions and exercise of its discretions.

Another decision on Article 34(2)(a)(ii) is that of the Hong Kong Court of Appeal in *Pacific China Holdings Ltd (In Liquidation) ("PCH") v Grand Pacific Holdings Ltd ("GPH")*⁷⁸, another case where a first-instance decision setting aside an award has been overturned on appeal. GPC, the Appellant, initiated arbitration in March 2006 against PCH, the respondent, in respect of an alleged debt under a loan agreement. The arbitration clause provided that any disputes would be subject to arbitration in Hong Kong under the ICC Rules. The applicable substantive law of the Loan Agreement was New York law.

⁷⁷ At [55].

⁷⁸ *Pacific China Holdings Ltd v Grand Pacific Holdings*, above n 47.

The case was keenly contested throughout. At the very beginning PCH sought the removal of GPC's party-appointed arbitrator on the ground of apparent bias.⁷⁹ The allegation was based on the fact that the arbitrator had discussed with his appointor the subject of a possible chairperson and had refused to reveal to the challenging party the content of those discussions. The argument of the opposing party was that there was no obligation to disclose and that such communications that did occur were not substantive and only concerned possible candidates.

The United States arbitrator's written justification of his conduct relied on the relevant US Code of Ethics which states that "in an arbitration in which the two party appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator." Not surprisingly, the Court dismissed the challenge.

In August 2009, the tribunal awarded PCH a sum in excess of US\$55 million with interest. PCH applied to have the award set aside pursuant to Article 34(2) of the Model Law due to alleged violations of due process in the way the arbitration was conducted. PCH argued that it was unable to present its case or, alternatively, that the arbitral procedures were not in accordance with the parties' agreement.

The key argument for PCH in the setting aside proceedings related to a late defence it had raised. After various preliminaries the case was set down for hearing over a period of two weeks beginning 3 December 2007. The position of the parties prior to October 2007 was that PCH contended it had no knowledge of the Loan Agreement and put GPH to proof as to the execution of the Loan Agreement. It also said that the Loan Agreement was unenforceable for want of valid consideration. There was an exchange of expert reports in October 2007. At that stage PCH filed an expert report on Taiwanese law, although at that point, Taiwanese law was not in issue between the parties. The expert expressed the view that the Loan Agreement was illegal under Taiwanese law and that New York Courts would not enforce agreements which were illegal under a foreign law. The Court of Appeal noted in its judgment that under the Tribunal's procedural directions PCH was not entitled to produce the evidence on Taiwanese law unilaterally in that fashion.

⁷⁹ *Pacific China Holdings Ltd v Grand Pacific Holdings Ltd* [2007] HKCFI 715.

PCH then applied for leave to re-amend its pleadings so as to assert that the Loan Agreement was void and unenforceable by reason of the fact that it was illegal as a matter of Taiwanese law.

This led to an application by GPH to strike out the new expert evidence and by PCH for its admission. The Tribunal was therefore in the position that, with a hearing not too far away, it had to decide what procedural ruling was appropriate. The provisional view of the Tribunal was that the legal foundation for the new plea was tenuous in the light of the New York choice of law provision in the Loan Agreement, but it considered that it could not be characterised as unarguable. After noting that the application could have been brought much earlier, it decided to allow the new defence to be included subject to certain fairly stringent conditions. The conditions were objected to by PCH but the Tribunal refused to alter its position. In the setting aside proceedings PCH expressed the view that the directions were unfair especially because they meant that GPH had more time to prepare its expert reply report and, in addition, the directions concerning Taiwanese law had the effect of requiring PCH to disclose its best case on fact and law in advance of GPH being required to do the same.

The trial Judge, Saunders J took the view that it was not an answer to the allegation that PCH had been prejudiced to say that if a party changes its case late in the day it may have to pay some kind of a penalty when a Tribunal attempts to accommodate it without also prejudicing the other party and upsetting the fixed hearing date. He believed that it was difficult to see why, once the Tribunal had allowed the amendment, PCH should now be subject to what he regarded as a penalty that created inherent unfairness. He considered that the Tribunal deviated from the parties' agreed procedural timetable to such an extent that the arbitral proceedings could not be said to be in accordance with the parties' agreement. As a result Saunders J held that PCH was unable to present its case. Since he was not satisfied that, notwithstanding the violation, there could be no possibility of a different outcome, his Honour resolved to set aside the award.

In reversing Saunders J, the Court of Appeal concluded that there had been no violation of due process under Article 34(2) of the Model Law. The Court of Appeal strongly affirmed the principle of limited curial intervention as to arbitral awards in the judgment of Tang VP, with whom Kwan JA and Fok JA agreed. At paragraph 52, it said that whether PCH could be said to have changed its case late in the day was a matter for the decision of the Tribunal. Saunders J should not have questioned the

merits of the Tribunal decision to grant leave to amend and the terms on which leave was granted. The Court said that on the material available to Saunders J, it could see no basis upon which he was entitled to disagree with the decision of the Tribunal. The Tribunal clearly took the view that GPH had been prejudiced by the lateness of the application and hence it was only prepared to give leave to re-amend on terms.

The Court of Appeal noted that Saunders J had acknowledged that if the decision had been made by a Court it would have been upheld. However, Sanders J had held that the procedural arrangements in the original timetable precluded the Tribunal's order. The Court of Appeal disagreed once again and said that it did not believe that the earlier procedural agreement required the Tribunal, in the event of a late amendment, to require sequential filing of submissions as had been earlier directed. It considered that the Tribunal, when faced with a late amendment, was entitled to use procedures that were appropriate in the particular case avoiding unnecessary delay or expense so as to provide a fair means for resolving the dispute, quoting Section 2 GA of the Arbitration Ordinance. The Court of Appeal agreed with the judgment of Lamb J in *Brunswick Bowling Billiards Corp v Shanghai Industrial Co Ltd* where he said:⁸⁰

After hearing submissions from the parties the arbitrators were of the view that the procedure agreed by the parties would result in the breach of Article 18 they should take steps to conduct the arbitration in such manner that could redress the problem instead of being constrained by an unworkable agreement of the parties.

The Court of Appeal then referred to Craig, Park & Paulsson in *International Chamber of Commerce*, 3rd Edition at 1604 when dealing with Article 15(2) of the ICC Rules. Those authors said:

"Except in most egregious cases, the wide discretion of arbitrators and the flexibility of the arbitral process have been confirmed by national courts which quite regularly reject the procedural requirements of disappointed parties."

The Court of Appeal criticised Saunders J for interfering with such a management decision of the Tribunal which decision was entirely a matter for the Tribunal.

The Court also held that there was no contravention of Article 34(2)(a)(ii) or (iv) in relation to the Taiwanese law issue. It also rejected other procedural challenges to the Award.

⁸⁰ *Brunswick Bowling Billiards Corp v Shanghai Industrial Co Ltd* [2011] 1 HKLRD 707 at [88].

Although no ground had been established for setting aside and because the Court had heard extensive arguments as to the discretion under Article 34, it examined at some length what it saw as the relevant discretionary principles where a breach of Article 34(2)(a)(ii) or (iv) was alleged. The Court of Appeal accepted Saunders J's proposition that the "Court may refuse to set aside an award notwithstanding such violation if the Court was satisfied that the outcome could not have been different".⁸¹ Where the breach of due process did not affect award, or where the error was "non-material" minor or trivial, Tang VP, considered Courts would be correct in exercising discretion not to set aside an award.⁸²

After citing from various legal commentaries Tang VP said:⁸³

From the above, I gather that the conduct complained of must be serious, even egregious, before a court could find that a party "was otherwise unable to present his case". It is unnecessary for me to decide, and I do not decide, how serious or egregious the conduct must be for a violation could be established. Nor, do I decide whether "the conduct ... must be sufficiently serious to offend ... basic notions of morality and justice. I am inclined to the view that the conduct complained of must be sufficiently serious or egregious so that one could say a party has been denied due process. In the present case there was no violation, and in any event, the matters complained of were not sufficiently serious or egregious.

Further Tang VP remarked that:⁸⁴

A party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process. Even so, the court may refuse to set aside the award if the court is satisfied that the arbitral tribunal could not have reached a different conclusion. How a court may exercise its discretion in any particular case will depend on the view it takes of the seriousness of the breach. Some breaches may be so egregious that an award would be set aside although the result could not be different.

The Court of Appeal's ruling sets a very high threshold for arbitral proceedings to breach Article 34. An arbitral award will only be set aside in exceptional circumstances. The conduct of the tribunal "must be sufficiently serious or egregious so that one could say that a party has been denied due process."⁸⁵ As a result, the

⁸¹ *Pacific China Holdings Ltd v Grand Pacific Holdings* [2010] SGHC 201 at [90].

⁸² *Pacific China Holdings Ltd v Grand Pacific Holdings*, above n 47, at [104]. This view was expressed in *Brunswick Bowling & Billiard Corporation v Shanghai Zhonglu Industrial Co Ltd* [2009] HKCFI 94.

⁸³ At [94].

⁸⁴ At [105].

⁸⁵ At [96].

Court considered that “a party who has had a reasonable opportunity to present its case would rarely be able to establish that he has been denied due process.”⁸⁶

The case is also notable for what followed when PCH applied to the Court of Appeal for leave to appeal to the Court of Final Appeal.⁸⁷ The application was rejected on 20 June 2012 on the basis that PCH was not entitled to appeal as of right under the Hong Kong Court of Final Appeal Ordinance (Cap 484) and that the Court’s decision did not raise questions of great general or public importance.

In its decision on costs, the Court of Appeal also made clear that where a party has been unsuccessful in setting aside or resisting enforcement of an arbitral award in Hong Kong, in the absence of special circumstances, that party should pay costs on an indemnity basis. The Court agreed with the approach of Reyes J in *A v R*⁸⁸ and its own approach in *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)*⁸⁹ in holding that, given that the parties had agreed to arbitration, applications by a party to set aside an arbitral award or to resist enforcement should be exceptional events. Where a party unsuccessfully makes such an application, the Court states that it is fair that it should expect to pay costs on a higher basis. The fact that PCH’s complaints against the arbitral award were considered by the Court below and other overseas Courts to be reasonably arguable was not a special circumstances in the Court’s view.

In its submissions, PCH had referred to the Australian decision of *IMC Aviation Solutions Pty Limited v Altain Khuder*,⁹⁰ in which the Victorian Court of Appeal declined to adopt the approach of Reyes J in *A v R* and found that there was nothing in the Victorian civil procedure statute or in the nature of enforcement proceeding for arbitral awards which, of itself, calls for costs being awarded against an unsuccessful party on a basis different from that on which they would have been awarded in other civil proceedings. The Hong Kong Court of Appeal carefully considered the reasons of the Victorian Court of Appeal, but remained of the view that in Hong Kong, the Courts can and should order costs on the indemnity basis.

The clear indication that the Hong Kong Courts will, in principle, award indemnity costs against a party that applies unsuccessfully to set aside, or resist enforcement

⁸⁶ At [105].

⁸⁷ CACV 136/211, 23 July 2012.

⁸⁸ *A v R* [2009] 3 HKLRD 389.

⁸⁹ *Gao Haiyan & Anor v Keeneye Holdings Ltd & Anor (No 2)* [2012] 1 HKC 491.

⁹⁰ *IMC Aviation Solutions Pty Limited v Altain Khuder* [2011] VSCA 248.

of, an arbitral award is another example of Hong Kong judiciary's strong support for arbitration.

Article 34(2)(a)(iii): Decisions on issues outside the pleadings — excess of jurisdiction

In *PT Prima International Development v Kempinski Hotels SA*⁹¹ the Court was asked to set aside several arbitral awards on the grounds that the awards dealt with issues not formally pleaded by the parties to the arbitration. This is the third case in my survey where a first instance Judge has set aside an arbitral award but the award has been reinstated on appeal. Prima, an Indonesian company, which owned of a hotel in Indonesia, entered into an Operating and Management Contract with Kempinski, a Swiss company. Prima gave Kempinski written notice of termination of the agreement on the grounds that Kempinski had failed to perform its obligations under the Contract. Kempinski then commenced a SIAC arbitration against Prima on the basis that the termination was wrongful and unjustified. Kempinski filed proceedings in the High Court to set aside three of the Arbitral awards on the basis that they had been made on issues (namely, the effect of the New Contract) that had not been formally pleaded in the arbitration, and were therefore outside the arbitrator's jurisdiction. Prima appealed. The Court of Appeal reversed the decision of the High Court. The Court stated that "any new fact or change in law arising after a submission to arbitration which is ancillary to the dispute submitted and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded."⁹²

The question of whether the *iura novit curia* principle applies in international arbitration raises important issues regarding due process.⁹³ *iura novit curia* is a civil law maxim that authorises the arbiter of a dispute to adopt his or her own legal characterisation of the facts drawn from his or her own legal reasoning and knowledge.⁹⁴ The operation of this procedural maxim necessitates a certain restriction on the right to present one's case. In the context of international arbitration, the maxim presents particular difficulties for due process and the opportunity for each party to present evidence and argument in support of its case.

⁹¹ *PT Prima International Development v Kempinski Hotels SA* [2012] SGCA 35.

⁹² At [47].

⁹³ See generally Simon Greenberg *International Commercial Arbitration: An Asia-Pacific Perspective* (Cambridge University Press, Melbourne, 2011) at 128.

⁹⁴ Doug Jones "The Remedial Armoury of an Arbitral Tribunal: the extent to which tribunal's can look beyond the parties' submissions (2012) Arb 78(2).

Recent developments in case law suggest a consensus is forming in a number of jurisdictions that the *iura novit curia* principle applies to international arbitral tribunals. In *Bank Saint Petersburg PLC v ATA Insaat Sanayi ve Ticaret Ltd*, the Swiss Supreme Court held that an arbitral tribunal was entitled to re-classify a claim for the execution of a guarantee as a claim for damages.⁹⁵ In *Dame Y v Z*, the Swiss Supreme Court again affirmed that the arbitral tribunal was entitled to engage in legal reasoning unrelated to the legal arguments put forward by the parties.⁹⁶ In England, the position also seems to be that the tribunal may vary the legal characterisation of the facts. In *Societe Franco-tunisienne d'Armement-Tunis v the Government of Ceylon*, Morris LJ declared that it would not be in excess of jurisdiction for an arbitrator to come to a particular conclusion, even if it were not pleaded by the parties, so long as the conclusion was a possible view in law.⁹⁷ This position was also reaffirmed in *ABB AG v Hochtief Airport GmbH, Athens International Airport SA*, where Tomlinson J stated that he saw no difficulty in an arbitral tribunal extracting an alternative case from the parties' submissions.⁹⁸

Article 34(2)(a)(iii): Decisions on unpleaded causes of action

The New Zealand High Court in *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* adopted a nuanced approach to the exercise of discretion to set aside an award for wrongfully, excluded submissions. One of the issues in the case was whether a party had been denied the opportunity to present arguments to the tribunal. Shell objected to the arbitrator's findings on fiduciary obligations, in respect of which neither party had made submissions. In view of a specific contractual provision that negated the existence of such obligations, the High Court set aside the challenged part of the award on the ground that it was tainted by a breach of natural justice.⁹⁹ The flow of the High Court's reasoning is that, in complex cases, a relatively minor breach of natural justice may result in an award being set aside, if an overall assessment of the situation(s) of the parties favours that outcome. Conversely if the assessment did not favour setting aside, a minor breach would not extirpate the

⁹⁵ *Bank Saint Petersburg PLC v ATA Insaat Sanayi ve Ticaret Ltd* Unreported March 2, 2001, Supreme Court of Switzerland.

⁹⁶ *Dame Y v Z* [2008] ASA Bulletin 742, 753, 754 (Supreme Court of Switzerland).

⁹⁷ *Societe Franco-tunisienne d'Armement-Tunis v the Government of Ceylon* [1984] 2 Lloyd's Rep 66.

⁹⁸ *ABB AG v Hochtief Airport GmbH, Athens International Airport SA* [2006] 2 Lloyd's Rep 1.

⁹⁹ *Williams & Kawharu on Arbitration* (LexisNexis, Wellington, 2011) at 17.5.4.

award. This makes sense, even if the Court's 'intuitive' basis for approaching the discretion was perhaps cast more broadly than necessary. Dobson J said that:¹⁰⁰

... the relative tenability of an argument that was not addressed at all may have some influence on whether the relevant determination should indeed be set aside. Where it can be demonstrated that an argument, although tenable, is very unlikely to produce any materially different outcome on re-argument, then that is a legitimate factor against granting relief.

In *Todd*, a breach of natural justice was held to be marginal yet the High Court still favoured setting aside. Each party challenged different parts of an interim award, claiming it had been denied the opportunity to present its case in respect of various issues. In relation to Todd's complaint, the High Court accepted that Todd had been denied the opportunity to submit argument. Although the denial was placed at the lower end of natural justice expectations, the affected parts of the award were set aside for two reasons. First, Shell's application was successful, so there would in any event be an intrusion into arbitral finality. Secondly, the Court considered the overall situation of the parties to the arbitration, its nature and complexity, and the position reached by the end of the judgment. These matters were held cumulatively to provide support for the setting aside sought by Todd.¹⁰¹

In some cases however, a defect will violate such a basic right or principle (such as when an applicant for setting aside received no notice at all of the arbitral hearings, the tribunal was bribed by a party, or when the dispute is non-arbitrable), that setting aside should be practically automatic regardless of the level of impact the violation had on the outcome of the dispute.¹⁰²

This case affirms that it is elementary that the tribunal's substantive jurisdiction is limited to deciding only those disputes that the parties have agreed to arbitrate. A party may complain that the tribunal's award relies on reasoning or authorities not presented by either party during the arbitral proceedings, but when an issue is clearly

¹⁰⁰ *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* (HC Wellington, CIV 2008-485-2816, 17 July 2009, Dobson J) at [80].

¹⁰¹ At [60], following the approach adopted in *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531.

¹⁰² See *John v Rees* [1970] Ch 345 at 402 (proceedings of a meeting of a political party called without proper notice held to be invalid); *Dallah Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, [2011] AC 736 at [69] (Lord Mance) and [131] (Lord Collins) (inappropriate to exercise discretion not to set aside where lack of jurisdiction is established).

put before the tribunal there is no excess of authority if the tribunal applies its own view of the law in respect of that issue.¹⁰³

The English Approach: Serious Illegality

Under section 68 of the English Act, an applicant can challenge an arbitration award on the ground of serious irregularity affecting the proceedings, tribunal or award. A successful challenge requires two things. First, the applicant must prove it has suffered a “serious irregularity” as set out in the closed list contained in section 68(2)(a–i), some of which are considered in further detail below. Secondly, the applicant must prove that the serious irregularity has caused or will cause it “substantial injustice” (section 68(3)). If the applicant succeeds in its challenge, the Court may remit the award to the tribunal for reconsideration (section 68(3)(a)). If remission is considered inappropriate, the Court may instead set the award aside or declare it to be of no effect.

The threshold for a challenge under s 68 is high. This is perhaps best summarised in the words of the Departmental Advisory Report of 1996, which described section 68 as “a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected”.¹⁰⁴

The first category of serious irregularity (section 68(2)(a)) is a tribunal’s failure to comply with its obligations under the Act to act fairly and impartially between the parties (section 33). As the Court approaches section 68 challenges with a view to upholding rather than upsetting the award, an applicant must demonstrate that such a breach is serious if it is to stand any chance of succeeding.¹⁰⁵

Under section 68(2)(b), it is a serious irregularity for a tribunal to exceed its powers. Hamblen J summarised the requirements for succeeding under section 68(2)(b) in *Abuja International Hotels Ltd v Meridien SAS*:¹⁰⁶ the applicant must establish that the tribunal has purported to exercise a power it does not have. The erroneous exercise of a power which the tribunal does possess will not involve an excess of power. In particular, section 68 is not engaged if the tribunal merely arrives at a

¹⁰³ *Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd* HC Wellington CIV–2008–485–2816, 17 July 2009 at [41]–[42] (citing *Societe Franco-Tunisienne D’Armement-Tunis v Government of Ceylon* [1959] 1 WLR 787 (EWCA) and *Fidelitas Shipping Co Ltd v V/O Exportchelb* [1966] 1 QB 630 (EWCA)).

¹⁰⁴ UK Departmental Advisory Committee on Arbitration Law “1996 Report on the Arbitration Bill” (1996) reprinted in (1997) 13 Arb Intl 1275 at 280..

¹⁰⁵ *AK Kablo Imalat San ve TIC AS v Intamex SA* [2011] EWHC 2970.

¹⁰⁶ *Abuja International Hotels Ltd v Meridien SAS* [2012] EWHC 87 (Comm).

wrong conclusion of law or fact. A tribunal's failure to consider all the issues that were put to it may qualify as a serious irregularity for the purposes of section 68(2)(d).

The Court will not allow a party to use section 68 to challenge the tribunal's findings of fact.¹⁰⁷ Nor will a challenge be allowed where the tribunal has not given reasons for its decisions or dealt expressly with every point or submission made in front of it.¹⁰⁸ The tribunal would need to fail to deal at all with a fundamental issue in order for there to be a serious irregularity, that is, an issue, the determination of which is essential to a decision on the claims or specific defences raised in the course of the reference.

"Substantial injustice" is not defined, and there is no single test that the English Courts will apply in deciding whether or not it has been proved.¹⁰⁹ This will, again, depend on the facts, although it is clear that a technical irregularity is less likely to result in substantial injustice than the tribunal's failure to consider all the issues put in front of them.¹¹⁰ The Court will need to be satisfied that, but for the irregularity, the applicant would have dealt with the matter differently or the outcome would have been materially different before it finds substantial injustice. In *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS*, the applicants established fraud, but they did not convince the Court that substantial injustice would result from it.¹¹¹ The Court requires cogent supporting evidence to justify a finding of substantial injustice.

Concluding Comments

As to conclusions which may be drawn from my survey I suggest the following. First, as to Article 5 it seems to me that the Courts have displayed sound judgment in deciding whether the Article allowed judicial intervention in the particular cases. Secondly, on the setting aside discretion there appears to be a tendency for some judges at First Instance to set aside awards too readily. The Appellate Courts of Singapore and Hong Kong have taken a much firmer pro-arbitration line, as is shown in the three cases I have mentioned where the lower Courts were held to have inappropriately set aside awards. The strongest affirmation of the principle that the

¹⁰⁷ *Schwebel v Schwebel* [2010] EWHC 3280, 2 All ER (Comm) 1048.

¹⁰⁸ *Isabella Shipowner SA v Shagan Shipping Co Ltd* [2012] EWHC 1077 (Comm).

¹⁰⁹ *Michael Wilson & Partners Ltd v Emmott* [2011] EWHC 1441.

¹¹⁰ *Soeximex SA v Agrocorp International PTE Ltd* [2011] EWHC 2748.

¹¹¹ *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383.

Court should strive to uphold arbitration awards has come from Hong Kong Court of Appeal in the *PCH* case which confirms that arbitrators have a high degree of discretion in their procedural management of arbitral proceedings.

At the Opening Plenary Session, ICCA Conference in Singapore, June 2012 in his masterly paper “International Arbitration: The Coming of a New Age for Asia and Elsewhere”, Justice Sundaresh Menon SC, then Attorney-General for Singapore said:

... the switch from initial judicial scepticism to the establishment of an entire framework built upon supporting international arbitration and its enforcement, has been nothing short of remarkable. We have come along way indeed. However, we cannot afford to rest on our laurels. The worrying trends I have thus far described have coincided with, and may even be the reason for recent signs of tension between the Courts and arbitration.

Justice Menon then went on to identify a few recent troubling developments including certain decisions of the Indian Supreme Court,¹¹² some Australian cases where awards had been set aside for failure to provide adequate reasons, and the first instance decision in the *Kempinski* case in Singapore¹¹³ (later reversed on appeal). He inferred that such cases might mark a tentative start of a return to greater judicial involvement in arbitration.

I have not the time to discuss all of the cases he mentioned. However, since he presented his paper, the Indian Supreme Court has in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*¹¹⁴ has reversed its troublesome earlier decisions in *Bhatia International v Bulk Trading SA*¹¹⁵ and *Venture Global Engineering v Satyam Computer Services Ltd*¹¹⁶ which had controversially extended the application of Part 1 of the Indian Arbitration Act to arbitrations seated outside India unless the parties expressly or impliedly agreed otherwise. Focussing on the plain reading of Part 1 and the original rationale for the Indian Act the Supreme Court in *Bharat Aluminium Co* concluded that Part 1 only applies to Arbitrations seated in India. As several

¹¹² *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, 2002 (2) SCR 411; *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190, 2008 (1) SCR 501.

¹¹³ *PT Prima International Development v Kempinski Hotels SA* [2011] 4 SLR 633.

¹¹⁴ *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc* Civil Appeal No. 7019 of 2005, 6 September 2012.

¹¹⁵ *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105, 2002 (2) SCR 411.

¹¹⁶ *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190, 2008 (1) SCR 501.

commentators have said,¹¹⁷ this decision appears to lay the foundation for less intervention by the Indian Courts.

The troubling Australian decisions¹¹⁸ were founded upon the now repealed State Arbitration Acts.¹¹⁹ Australia has now the Model Law both in its recently updated International Arbitration Act and in the uniform arbitration laws of most states. This new legislative framework should turn the Courts toward the more supportive modern approach. So I do not see any real signs of a return to the “bad old days” of inappropriate and harmful judicial involvement in arbitration.

Professor David A R Williams QC

Singapore, October 2012

(Amended for Dublin International Arbitration Day, 7 November 2014)

¹¹⁷ Priyanka Gandhi and Mustafa Motiwala “The Asia-Pacific Arbitration Review 2013” at Section 3, India; Clemmie Spalton “India’s Supreme Court Reverses Bhatia decision” (6 September 2012) Global Arbitration Review <www.globalarbitrationreview.com/news/article/30803>.

¹¹⁸ *BHP Billiton Ltd v Oil Basins* [2006] VSC 402; *Westport Insurance Corp v Gordian Runoff Ltd* [2011] HCA 37.

¹¹⁹ *BHP Billiton Ltd v Oil Basins Ltd* was decided under the Commercial Arbitration Act 1984 (Vic), s 38(5); *Westport Insurance Corp v Gordian Runoff Ltd* was decided under the Commercial Arbitration Act 1984 (NSW), s 38(5).

APPENDIX

Summary of the various approaches to the Article 34 discretion:

Article 34(2)(b)(ii) – Public Policy/Natural justice

Trustees of Rotoaira Forest Trust v Attorney-General [1999] 2 NZLR 452 (HC).

- At page 463 (i): “The overriding task for the plaintiff is to show that a reasonable litigant in his shoes would not have foreseen the possibility of reasoning of the type revealed in the award, and further that with adequate notice, it might have been possible to persuade the arbitrator to reach a different result.”
- “Once it is shown that there was a significant surprise it will usually be reasonable to assume procedural prejudice in the absence of indications to the contrary.”

Downer-Hill Joint Venture v Government of Fiji [2005] 1 NZLR 554 (HC)

- At [103] A breach of natural justice founded on evidentiary inadequacy must also cause a substantial miscarriage of justice in order for an award to be set aside:

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

- At [71] there must be a “causal nexus” between the breach of natural justice and the award made
- At [91] “an applicant will have to persuade the Court that there has been some actual or real prejudice caused by the alleged breach”
- This is lower than “substantial prejudice” from the UK Arbitration Act 1996 but does not embrace “technical or procedural irregularities that have caused no harm in the final analysis. There must be more than technical unfairness”
- The breach “must have actually altered the final outcome of the arbitral proceeding in some meaningful way.”
- “If 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 regardless, the bare fact that the arbitrator might have inadvertently denied one or both of the parties some technical aspect of a fair hearing would almost invariably be insufficient to set aside the award.”
- At [92] “the Court’s focus should be on the proportionality between the harm caused by the breach and how that can be remedied”

Article 34(2)(a)(ii) – unable to present its case

Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH [2008] 3 SLR 871

- Applied the principles in *Soh Beng Tee*
- At [129] The alleged breach must be “connected to the making of the award”, there must be a “causal nexus”
- Note: applicant also pleaded art 34(2)(b)(ii)

Pacific China Holdings Ltd v Grand Pacific Holdings CA/CV 136/2011, 9 May 2012

- At [105]: the conduct of the tribunal “must be sufficiently serious or egregious so that one could say that a party has been denied due process”
- “The Court may refuse to set aside the award if the Court is satisfied that the arbitral tribunal could not have reached a different conclusion.”
- However, “some breaches may be so egregious that an award would be set aside although the result could not be different”

Where the breach does affect the award or where the error is “non-material” or trivial Courts should not set aside.

Article 34(2)(a)(iii)

PT Prima International Development v Kempinski Hotels SA [2012] SGCA 35

- At [63] an alleged breach must have “caused ... prejudice”

Todd Petroleum Mining Co Ltd v Shell (Petroleum Mining) Co Ltd (HC Wellington, CIV 2008-485-2816, 17 July 2009, Dobson J)

- At [60] “there is scope for intuitive judgment” as to whether to set aside
- At [59] In complex cases a relatively minor breach of natural justice may result in an award being set aside, if an overall assessment of the situation(s) of the parties favours that outcome. Conversely if the assessment did not favour setting aside, a minor breach would not suffice.

UK Arbitration Act 1996

- Section 68(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.
- Section 68(2) states that “serious irregularity means an irregularity of one or more of the following kinds [including a breach of the rules of natural justice] *which the Court considers has caused or will cause substantial injustice to the applicant*”
- The starting point is *Lesotho Highlands*. At [26]-[28] the Lords stated that s 68 is a “high threshold”
- The Court cited with approval the DAC report, which described the section as a “long stop, only available in extreme cases, where the tribunal has gone so wrong in its conduct of the arbitration in one of the respects listed in the section that justice calls out for it to be corrected”¹²⁰

The calibre of the Tribunal and their experience

Thus in *ABB Ag v Hochtief Airport GmbH*¹²¹ there was a challenge under s 68 of the English Act to an award in an international commercial arbitration on the ground of serious procedural irregularity (the broad English equivalent to applications for setting aside under Article 34 schedule 1 to the NZ Act). The three-person tribunal

¹²⁰ UK Departmental Advisory Committee on Arbitration Law “1996 Report on the Arbitration Bill” (1996) reprinted in (1997) 13 Arb Intl 1275 at 280, quoted with approval in *Lesotho Highlands* above n 7.

¹²¹ *ABB Ag v Hochtief Airport GmbH* [2006] EWHC 388 (Comm), [2006] 1 All ER (Comm) 529, [2006] 2 Lloyd’s Rep 1.

comprised very experienced international commercial arbitrators and both parties were represented in the arbitration hearing by senior English counsel. The main ground of challenge was an alleged failure to provide a sufficiently reasoned award. Tomlinson J said:¹²²

“... the nature of the arbitration alone indicates that the Court is operating in territory in which judicial restraint and sensitivity is required.”

Other English cases

The Court in *ABB Ag v Hochtief Airport GmbH* at [63]-[64] provided a summary of judicial pronouncements on “substantial injustice” under s 68 as follows:

Fidelity Management v Myriad International Holdings [2005] 2 All ER (Comm) 312 at 314

Morison J: a “long stop” to deal with “extreme cases where something ... went seriously wrong with the arbitral process.”

Cameroon Airlines v Transet [2004] EWHC 1829 (Comm) at [94]

Langley J: “the test is indeed an extreme case”

The Pamphilos [2002] 2 Lloyds Rep 681 at 687

Colman J: “The substance and nature of the injustice goes well beyond what could reasonably be expected as an ordinary incident of arbitration”

Profilati Italia v PaineWebber [2001] 1 All ER (Comm) 1065 at 1071

Moore-Bick J: “it is intended to operate only in extreme cases”

Egmatra v Marco Trading [1999] 1 Lloyds Rep 862 at 865

Tuckey J: “no soft option clause as an alternative for a failed application for leave to appeal”

While there is no uniformity in the language being used in relation to the discretion all of the phrases used show a strong underlying commitment to seek to uphold arbitration awards.

¹²² At [1].