

CHALLENGING ARBITRATION AWARDS FOR BREACH OF THE RULES OF NATURAL JUSTICE

1 Singapore has adopted the UNCITRAL Model Law on International Commercial Arbitration as the cornerstone of its arbitration law for international commercial arbitrations. The Model Law provides six grounds for setting aside awards. Breach of the rules of natural justice as such is not one of them, though it may be argued that Art 34(2)(a) encompasses the procedural fairness element of the rules. But, natural justice is an integral part of Singapore's common law heritage. Thus, when it came to enacting the Model Law Parliament also enacted s 24(b) of the International Arbitration Act which expressly provides that an award may be set aside if there has been a breach of the rules of natural justice in connection with the making of the award by which the rights of any party have been prejudiced. The same position is secured for domestic arbitrations by s 48(1)(a)(vii) of the Arbitration Act.

2 The concept of natural justice is often distilled into two broad rules: the rule that the adjudicator must be disinterested and unbiased; and the rule that the parties must be given adequate notice and opportunity to be heard.¹ The leading decision in Singapore on this topic is the Court of Appeal's decision in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*.² That case firmly established that a party challenging an arbitral award as having

¹ *Gas & Fuel Corporation of Victoria v Wood Hall Ltd & Leonard Pipeline Contractors Ltd* [1978] VR 385 at 396.

² [2007] 3 SLR(R) 86.

contravened the rules of natural justice must establish four requirements:³ (a) which rule of natural justice has been breached; (b) how it was breached; (c) in what way the breach was connected to the making of the award; and (d) how the breach prejudiced the rights of the challenger. As regards the fourth requirement, the Court of Appeal emphasised that the prejudice suffered had to be actual or real. There has to be more than technical unfairness that caused no harm in the final analysis.

3 As a judge who hears applications to set aside awards, I have found parties frequently take a creative approach to natural justice. They are increasingly fitting all sorts of arguments which do not fall under the other grounds for setting aside under the umbrella of natural justice. Some of these complaints are legitimate; most, however, are errors of law or fact in disguise. Under Singapore law, errors of law and fact *per se* are not grounds for curial intervention. Frequently, as long as the arbitrator has relied on a point that was not explicitly made by either party; or characterised an issue in a way which neither party had thought of, or used an authority which was not referred to by either party to support his conclusion, the arbitrator is attacked for having been in breach of the rules of natural justice. I think that that cannot be right. Arbitration is intended to be a *real* alternative to the court system. Masking such challenges under the guise of natural justice not only protracts the final

³ *Soh Beng Tee* at [29].

resolution of the dispute, but it calls into question the efficacy of the final product, *viz*, the award, and accordingly undermines confidence in the arbitral system. The law should develop in a way which enables such cases to be filtered out quickly. Courts can afford to take a more robust stance so that parties who are dissatisfied with the merits of the outcome will be discouraged from going to the courts for a second bite at the cherry.

4 In this respect, consistently with their support for the arbitral process, the Singapore courts have taken a rather pragmatic approach. In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK*, the Court of Appeal observed:⁴

... the appointed arbitrator will usually be an expert in the field of law and/or trade that is the subject of the dispute, and the parties intend to rely on his expertise to obtain a sound and expeditious decision. *The courts, therefore, must not blindly and/or mechanically apply the rules of natural justice so as to require every conclusion that the arbitrator intends to make to be put to or raised with the parties.* ... [emphasis added]

Similarly, in *ABB AG v Hochtief Airport GmbH*,⁵ the English High Court, in upholding the arbitrator's decision, noted:

⁴ [2011] 4 SLR 305 at [36].

⁵ [2006] 2 Lloyd's Rep 1.

In my judgment the tribunal has extracted an alternative case from the parties' submissions in a manner foreshadowed by the chairman's question to Professor Spyridakis which I have set out in para 70. I do not consider that the duty to act fairly required the tribunal to refer back to the parties its analysis of the material and the additional conclusion which it derived from the resolution of arguments as to the essential issues which were already squarely before it.

Hochtief was cited with approval by the Court of Appeal in *Soh Beng Tee*.⁶

5 Thus, pragmatism is an important factor, and should not be seen as coming at the expense of justice or fairness. The tribunal, in arriving at its decision, must be given a certain amount of latitude to deviate from the arguments and submissions put forward by the parties. Singapore law recognises that if the tribunal has to seek further submissions for *every* argument, line of reasoning, or authority, which was not been submitted on but is necessary from the tribunal's perspective for the resolution of the dispute, arbitral proceedings would be extremely protracted and costly. Indeed, the attractiveness of arbitration as an alternative dispute resolution mechanism would be endangered by a rule which requires extensive to-ing and fro-ing.

⁶ *Soh Beng Tee* at [58].

6 At the same time, the rules of natural justice insist that tribunals must not disregard the parties' submissions and arguments in coming to their decision. The tribunal must at the very least demonstrate that it has attempted to understand and had considered whatever had been said.⁷ This was articulated by the High Court in *Front Row Investment Holdings (Singapore) Pte Ltd v Daimler South East Asia Pte Ltd* ("*Front Row*").⁸ In that case, Front Row, the respondent in the arbitration, had counterclaimed for misrepresentation, relying on three misrepresentations which it said had been made by Daimler, the claimant. The arbitrator found that by the close of its case, Front Row had narrowed its case down to just one representation which the arbitrator then held was not false. Front Row's counterclaim was therefore dismissed. After going through the pleadings and submissions, Justice Andrew Ang agreed with Front Row that the latter had not narrowed its misrepresentation claim to only that one representation considered by the arbitrator. He therefore held that the arbitrator's failure to consider Front Row's submissions relating to another specific representation amounted to a breach of natural justice.

7 The court in *Front Row* referred to a line of Australian cases concerning adjudicators' decisions which I find interesting. The first case is

⁷ *Front Row* at [31].

⁸ [2010] SGHC 80.

Timwin Construction v Façade Innovations (“*Timwin*”),⁹ a decision of the New South Wales Supreme Court concerning an adjudicator’s decision. The adjudicator had stated that one of the plaintiff’s reasons for resisting the other side’s case did not “make sense” without making reference to the defendant’s rebuttal of that reason. The court held that if the adjudicator was seeking to understand the plaintiff’s reason, he would have at least referred to the defendant’s rebuttal. The fact that he did not suggested that he did not attempt to understand the plaintiff’s case. That amounted to a breach of natural justice.

8 In coming to its decision, the court in *Timwin* cited with approval the following passage in *Brodyn v Davenport* (“*Brodyn*”), a decision of the New South Wales Court of Appeal:¹⁰

... What was intended to be essential was compliance with the basic requirements ... *a bona fide attempt by the adjudicator to exercise the relevant power* ... If the basic requirements are not complied with, or if a purported determination is *not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice*, then in my opinion a purported determination will be void ... [emphasis added]

⁹ [2005] NSWSC 548.

¹⁰ [2004] NSWCA 394 at [55].

9 As I observed in *SEF Construction Pte Ltd v Skoy Connected Pte Ltd* (“*SEF*”),¹¹ a case involving an attempt to set aside an adjudicator’s determination, there is more than a superficial attractiveness about the test of a *bona fide* or good faith attempt at understanding the parties’ submissions. First, it requires the tribunal to make a *positive* and observable effort. This is beneficial not just for the parties, but also for the tribunal. At the very least, it would be clear to the tribunal that a mere statement that a submission does not make sense is insufficient evidence that the tribunal had attempted to understand the submission. Second, a *bona fide* attempt test would ensure that errors of law or fact by the tribunal *in the course of understanding* the submission would not be construed as a failure to even attempt to understand the submission. That was precisely the case in *Lanskey v Noxequin* (“*Lanskey*”),¹² another of the Australian decisions referred to in *Front Row*.

10 There, the adjudicator had incorrectly characterised the plaintiff’s defences as set-offs when in fact some of those defences operated to negative work which the defendant claimed it had done. This mischaracterisation was material because the claim by the defendant in the adjudication was for payment for work done by it. The court held that because the adjudicator had characterised the defences as set-offs, he avoided having to consider the

¹¹ [2009] SGHC 257 at [58].

¹² [2005] NSWSC 963 (“*Lanskey*”).

question of incomplete work which plainly on the face of the documents was a real question to be answered. On this basis, the court held that the adjudicator did not consider the plaintiff's submissions and had not accorded the plaintiff natural justice.¹³

11 If the test of *bona fide* attempt had been applied in *Lanskey*, one wonders whether the court could have come to the same conclusion so easily. After all, unless it was so plainly clear that the defences could not possibly be characterised as set-offs, it is at least arguable that the adjudicator simply fell into error of law in mischaracterising the defences. In the context of arbitration, that would not be a ground for setting aside the award.

12 In this regard, I would repeat what I said in *SEF*:¹⁴

The fact that [the adjudicator] did not feel it necessary to discuss his reasoning and explicitly state his conclusions in relation to the third and fourth jurisdictional issues, though unfortunate in that it gave rise to fears on the part of SEF that its points were not thought about, cannot mean that he did not have regard to those submissions at all. *It may have been an accidental omission on his part to indicate expressly why he was rejecting the submissions* since [he] took care to explain the reasons for his other determinations and even indicated matters on which he was not making a determination. *Alternatively, he may have found the points so unconvincing that he thought it was not necessary to explicitly state his findings ...* [emphasis added]

¹³ *Lanskey* at [15].

¹⁴ *SEF* at [60].

13 There will, of course, be cases where the submissions overlooked were of such major consequence and at the forefront of the parties' case that no tribunal attempting in good faith to address the issues could conceivably have left them out.¹⁵ These cases should not be difficult to identify and it should be apparent from the face of the award that the tribunal had failed to attempt to understand the issues or submissions.

14 Admittedly, the line between permissible and impermissible decision-making is a fine one. I am sceptical that a one-size-fits-all test can be fashioned to address the multitude of cases concerning natural justice. In most cases, whether the arbitrator had applied his mind to the parties' submissions is a question the answer to which will never be adequately reflected in the award. It is in many respects "essentially an intuitive judgment", to borrow the words of Lord Mustill speaking about fairness of the case in *R v Secretary of State for the Home Department Ex p Doody*.¹⁶ Nevertheless, before I leave this area, I would like to draw attention to *Soh Beng Tee* which suggests that the inquiry should be on whether the party alleging breach of natural justice can reasonably claim to be "surprised".¹⁷ In my view, a focus on the extent of "surprise" is practical yet flexible. It is a conceptually clear basis to focus on.

¹⁵ *Brookhollow Pty Ltd v R&R Consultants* [1006] NSWSC 1, cited with approval in *SEF* at [59].

¹⁶ [1994] 1 AC 531 at 560.

¹⁷ *Soh Beng Tee* at [96].

Although there may be some initial uncertainty over the contours of “surprise”, guideposts to determine whether a party can be said to have been taken by surprise can come later through case law.

15 In conclusion, as stated in *Soh Beng Tee*, the Singapore court’s approach to challenges founded on a breach of natural justice is governed by two broad objectives of the arbitration regime: party autonomy and procedural fairness. Therefore, arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced. It is only where the alleged breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to a party, that a remedy can or should be made available.¹⁸

Speech delivered by Justice Judith Prakash on 24th August 2013 at CIArb 2013 International Arbitration Conference in Penang, Malaysia.

¹⁸ *Soh Beng Tee* at [98].