[2014] SC (Bda) 8 Civ (14 February 2014)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 363

IN THE MATTER OF THE BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

AND IN THE MATTER OF A FINAL AWARD MADE BY THE SINGAPORE INTERNATIONAL ARBITRATION CENTRE DATED 27TH JUNE 2013 AND AN ADDENDUM TO CONSOLIDATED FINAL AWARD DATED 19TH AUGUST 2013

BETWEEN:

(1) HUAWEI TECH INVESTMENT CO. LTD.

(2) HUAWEI INTERNATIONAL PTE LTD.

Applicants

-and-

SAMPOERNA STRATEGIC HOLDINGS LIMITED

Respondent

REASONS FOR DECISION

(in Chambers)

Date of Ruling: January 31, 2014

Date of Reasons: February 14, 2014

Mr. David Kessaram and Ms. Lilla Zuill, Cox Hallett Wilkinson Limited, for the Applicants
Mr. Saul Froomkin QC, Isis Law Ltd., for the Respondent.

Introductory

1. By Summons dated October 4, 2013, the Applicants applied for leave pursuant to section 40(1) of the Bermuda International Conciliation and Arbitration Act 1993 ("the Act") to enter judgment in terms of Consolidated Final Award made against the Respondent on June 27, 2013 and the Addendum made to it on August 19, 2013 in the Singapore International Arbitration Centre ("the Award"). As contemplated by the Act, the application was heard on an ex parte basis and on October 9, 2013, Hellman J granted leave to enter judgment in terms of the Award, subject to the Respondents' right to apply within 14 days of service of the Order to set aside leave. Under the Award, the Respondent was ordered to pay the 1st Applicant nearly US$5million plus costs and the 2nd Applicant approximately US$13.5 million plus costs.

2. By Summons dated November 14, 2013, the Respondent applied to set aside the grant of leave on the following grounds:

   (i) the dispute deals with disputes not contemplated by and not falling within the submission to arbitrate;

   (ii) the Award contains decisions on matters beyond the scope of the submission to arbitrate;

   (iii) the Respondent was unable to present its case;

   (iv) the enforcement of the Award would be contrary to public policy.

3. At the substantive hearing of the Respondent's Summons on January 31, 2014, I dismissed the application and awarded costs to the Applicants. I now give reasons for that decision.

The grounds of the application in their factual context

4. The Respondents sought to challenge the enforceability of the Award on essentially two related grounds. Firstly, it was submitted that the Award dealt with matters beyond the scope of the dispute which was referred to arbitration and secondly, because of this, the proceedings which resulted in the Award were inconsistent with the rules of natural justice so that it would contravene public policy to give effect to the Award.

The arbitration agreement

5. The Award related to claims made by the Applicants pursuant to (a) a letter dated April 8, 2008 attaching a Note issued to the 2nd Applicant and (b) two letters dated September 9, 2008 also attaching Notes, each of which was issued by the Respondent to the 1st Applicant ("the Claimant"). Each letter contained an arbitration agreement and each Note promised payment in respect of goods supplied by the Applicants (the claimants in the arbitrations) under two Product Supply Agreements, dated December 18, 2007 and March 9, 2007 respectively ("the Contracts").

6. No dispute turned on the arbitration agreement itself. It was agreed that the governing law of the contract was Indonesian law although the arbitral forum was Singapore. The Respondent's complaint was not that the Award dealt with matters which fell outside the scope of the arbitration agreement. The scope of submission complaint was, in essence, a pleading point based on the central complaint that the specific provision of the Indonesian Civil Code upon which the Respondent was found to be liable to pay the sums they were ordered to pay under the Award was not relied upon by the Claimants in their Statement of Claim.

7. Nevertheless, for completeness, it is worth mentioning that the Notices of Arbitration by which the Claimants referred the disputes to arbitration sought monies due under the Notes specified therein in respect of goods delivered under certain purchase orders issued pursuant to the Contracts and, *inter alia*, "[a]*ny other reliefs as may be just and expedient.*"

The arbitration pleadings

8. The Claimants' Consolidated Statement of Claim characterised the dispute as being a failure by the Respondent to pay sums which it had admitted were due. It was alleged that under Indonesian law, either:

(a) the Notes were valid under Article 174 of the Indonesian Commercial Code;

(b) if the Notes were defective for failure to specify a maturity date, they were payable immediately under Article 175(2);

(c) if the Notes were deemed to contain conditions, by virtue of Article 1340 of the Indonesian Civil Code, the conditions were deemed not to exist;

(d) if the Notes did not fall within Article 174 of the Indonesian Commercial Code, they were in any event enforceable as promises to pay pursuant to Articles 1313 as read with 1320 and 1314 of the Indonesian Civil Code;

(e) the Respondent's agreement to pay was further enforceable under the general principles (including the *pacta sunt servanda* and good faith principles) enshrined in Article 1338 of the Indonesian Civil Code;

(f) under Indonesian law the Claimant as holder of the Notes in good faith was entitled to protection against any challenge to the Notes;

(g) if the Notes did not fall within Article 174 of the Indonesian Commercial Code, they were in any event enforceable as guarantees and strict compliance with the requirements of Article 1831 of the Indonesian Civil Code had been waived.

9. As Mr. Froomkin was keen to point out, there was clearly no reference in the Claimants' pleading to Article 1316 of the Civil Code upon which ground the Tribunal found the payment obligations underlying the technically defective Notes were nevertheless enforceable.

The arbitration hearing

10. At the arbitration hearing, the Claimants were represented by Mr. Boey of ATMD Bird & Bird LLP and Mr. Kumarasingam of Messrs Lawrence Quahe & Woo LLC. Mr. Kessaram took the Court through the key portions of the transcript with great care. From this review it was evident that:

(a) in Mr. Boey's opening submissions he asserted a desire to rely on Article 1316, implicitly acknowledging that this was not pleaded but submitting that the

Respondent would not be prejudiced because its Indonesian law expert witness had already considered this legal provision in his own report;

(b) Mr. Kumarasingam in his own opening diligently objected to the Claimants' entitlement to rely on the Article 1316 point on the grounds that it was not pleaded. Mr. Boey replied that it was a purely technical objection and that the Tribunal ought not to be restricted in applying Indonesian law to applying only those Code provisions which had been expressly pleaded;

(c) the Chairman implicitly rejected the objection finding (January 9, 2012, page 63): "*...but since you have heard what the claimants have argued...as well as in this morning's submissions, you are free to comment as to that as a rebuttal response*";

(d) two days later Mr. Kumarasingam concluded his opening submissions on Article 1316 which he clarified to the Tribunal had two elements to it. Firstly, Article 1316 did not apply to failed promissory notes at all; secondly that the claim did not meet the requirements of the Article. The Chairman responded: "*Understood*" (January 11, 2011, page 135);

(e) on January 12, 2012, Mr. Kumarasingam questioned the Claimants' expert for approximately 30 minutes on the Article 1316 issue after the Tribunal's intervention. The Tribunal indicated that at the end of the hearing counsel would have sufficient time to tender written submissions on the law.

11. The hearing concluded in January 2012. The Respondent's Consolidated Closing Submissions were filed on or about May 4, 2012, almost four months later. Six pages (paragraphs 112-133) were devoted to the Respondent's case on why Article 1316 could not be relied upon by the Claimants. Only the first five paragraphs dealt with the point that because Article 1316 was not raised in the Claimants' pleading it could not be relied upon. Prejudice was complained of in a single sentence in the following terms:

> "*By only evincing their intention on the first day of the hearing, the Claimants have acted unfairly and have prejudiced the Respondent as the Respondent was not provided with any opportunity to prepare its case in relation to this point.*"

12. This complaint must have rung somewhat hollow, not simply because the record of the arbitration hearing suggests that the Respondent's counsel dealt with the point quite ably both in his opening submissions and in cross-examination of the Claimants' expert. In

addition, the point was actually first canvassed in his own expert's report, undermining any suggestion that the Respondent's expert was taken by surprise. Article 1316 appears to have been one of several Indonesian Civil Code provisions which are designed to avoid substantive justice being defeated by a rigid adherence to highly technical formal rules. The Claimants had expressly relied upon similar statutory provisions, and the additional legal basis for the existing pleaded case involved no new fact evidence whatsoever.

The Award

13. It is admitted that the Award was silent on the objection that Article 1316 had not been pleaded. It is obvious that in deciding that the Claimant's case succeeded on the basis of Article 1316, the Tribunal implicitly rejected again the objection it had already rejected explicitly during opening speeches.

Legal findings: general principles governing the enforcement of foreign arbitral awards

Legal policy favours enforcement

14. It is common ground that the Award qualified for enforcement under domestic law rules giving effect in Bermuda law to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("The New York Convention"). The New York Convention extends to Bermuda and is given effect to in Bermuda domestic law by Part IV of the Bermuda International Conciliation and Arbitration Act 1993 ("the Act"). The Bermudian courts have on many occasions stressed the strong public policy in favour of enforcing foreign arbitral awards which is reflected in this legislative scheme. It must not be forgotten that the leading Bermudian authority on enforcement of awards made in Convention countries is of some 25 years' vintage; the Court of Appeal for Bermuda decision in *Soujuznefteexport v Joc Oil Ltd* [1989] Bda LR 11. The joint judgment of Harvey da Costa JA and Sir Denys Roberts JA (with whom Sir Alastair Blair-Kerr did not dissent on this regard) described the approach the Bermudian courts should take to an enforcement application such as the present one as follows (at pages 28-30):

> "*The American decisions establish that if there has been a Convention award under the New York Convention, there is a presumption that the tribunal acted within its power and that the award is valid and regular. They also indicate that*

the burden of discharging the presumption resting on the defendant is a heavy one.

The American cases further affirm that not only are the defences under the New York Convention exhaustive, but that they must be narrowly construed so as to favour the enforcement of the award. In the Fertilizer Corporation of India case (supra) at p. 959 the Court said:

> *'The standard of review of an arbitration award by an American court is extremely narrow.'*

Again at p. 960, in dealing with Article V(1)(c) of the Convention which allows a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration, the Court observed:

> *'This defence to enforcement of a foreign award, like the others already discussed, should be construed narrowly. Once again a narrow construction would comport with the enforcement-facilitating thrust of the Convention.' (see also the Parsons and Whittenmore Overseas Co. Inc. case supra at p. 976).*

The U.S. decisions moreover establish that the courts will not go into the merits of an award either in law or in fact and that they are reluctant to do so under the guise of examining the scope of the agreement. If the award is "within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties" the court will not "set it aside from error in fact or in law." (see the Fertilizer Corporation of India case supra at pp. 959–960). The Court "acting under the narrow judicial review of arbitral awards granted to American courts, may not substitute its judgment for that of the arbitrators." (ibid. p. 960).

In Werner A. Block K.G. v. the N's Co. Ltd. <u>*(1978) HKLR 281*</u> *the Court of Appeal in Hong Kong was dealing with the enforcement of a "Convention award" under Part IV of its Arbitration Ordinance. Huggins J.A. in delivering the judgment of the Court said at pp. 282–283:*

> *'The application to enforce the award was made under Part IV of the Arbitration Ordinance ... There is no doubt that this was a 'Convention award', i.e. one to which Part IV applied, or that prima facie, enforcement of a Convention award may not be refused. The grounds on which enforcement may be refused are set out in S.44(2) and (3) and the issue before the learned Judge was whether the defendant had proved a sufficient ground for refusal.'*

The courts in England adopt the same approach. Thus in D.S.T. v. Rakoil (1987) 2 LL.Rep. 246*, a case dealing with the enforcement of a Convention award, Sir John Donaldson MR said at pp. 248–249:*

> *'The Geneva award is a 'Convention award' within the meaning of the Arbitration Act, 1975 … It follows that it is enforceable in England either by action or under s. 25 of the Arbitration Act, 1950, and that such enforcement is mandatory, save in the exceptional cases listed in s.5 of the 1975 Act.'*

A court sitting in Bermuda must approach the problem of enforcement of a Convention Award in a similar spirit." [emphasis added]

15. Although this decision pre-dates the enactment of the 1993 Act, the quoted pronouncements on the policy approach to be adopted when dealing with an application for the enforcement of Convention Awards are binding on this Court.

The statutory enforcement provisions

16. In the *Joc Oil Ltd.* case, the burden of proof was described in the following way in the leading judgment (at page 33):

> "*The language of the 1976 Act is clear and deliberate. The claimant under Section 4 is obliged to "produce"; the respondent under Section 5 is required to "prove" certain defences if he desires to resist an award. The contrast in the language of the 1976 Act is also reflected in the distinction in the language of Article IV(1) ("supply") and Article V(1) ("furnishes … proof") of the English text of the New York Convention; a distinction which appears in all five authentic texts of the New York Convention.*
>
> *The distinction is crucial to the central purpose of the New York Convention, namely that it is for the respondent resisting enforcement to discharge the burden of proving a case under Article V of the Convention. The only obligation on an applicant is to comply with Section 4 by producing the required documents or copies; the applicant is however not required to "prove" anything. It was admitted by JOC OIL before the learned Judge that SNE had produced the relevant documentation required by Section 4 of the 1976 Act.*"

17. The current statutory provisions are no different:

“Evidence

41 The party seeking to enforce a Convention award must produce—

(a) the duly authenticated original award or a duly certified copy of it;

(b) the original arbitration agreement or a duly certified copy of it; and

(c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Refusal of enforcement

42 (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves —

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

> *(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."*[emphasis added]

18. The structure of the enforcement provisions in the 1993 Act are, as one might expect, the same as those under previous enactments giving effect to the same provisions of the New York Convention. In the present case, unlike in the *Jock Oil* case, there is no fundamental dispute over the existence of an arbitration agreement. The Respondent assumed the burden of proving that enforcement should be refused because either:

    (a) "*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitrate*" (section 42(2)(d)); or

    (b) That "*it would be contrary to public policy to enforce the award*" (section 42(3)).

<u>Findings: section 42(2)(d) complaint</u>

19. As a matter of first impression, it was difficult to square the matters complained of by the Respondent with either of these two statutory provisions. A straightforward reading of section 42(2)(d) without reference to authority suggests that it is intended to apply to issues which fall outside the scope of the dispute(s) referred to arbitration altogether. This construction is confirmed when one appreciates that the subsection must be read in conjunction with subsection (4), which provides:

    > "*A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration or which can be separated from those on matters not so submitted.*"

20. However, it appears to be settled under Bermuda law that enforcement cannot be refused on the grounds that the award contains matters "*not submitted to arbitration*" when the matters complained of (a) fall within the scope of the arbitration agreement, (b) are adjudicated under the contractually chosen governing law and also (c) fall within the scope of the specific dispute referred to arbitration in question. As Blair-Kerr, P observed in the *Jock Oil* case (at page 176):

"*As it seems to me, having regard to the terms of the arbitration clause, it was not open to Joc Oil to contend that the parties never agreed to have any disputes or differences settled on the basis of the applicable rules of Soviet substantive law, the tribunal being guided, of course, by the provisions of the contract.*

If that is correct, I do not understand how it can be argued that the award contained decisions on matters beyond the scope of the submission to arbitration. True, the arbitrators' reasoning leaves a good deal to be desired…

But it is not the arbitrators' reasoning with which this court is primarily concerned. What we are concerned with is whether it has been proved that the award contains <u>decisions</u> on matters beyond the scope of the submission to arbitration; and, in my view, Joc Oil, on whom the onus rested, has not discharged that onus."

21. These observations were made by the Court of Appeal President in case his primary dissenting holding that no arbitration agreement existed was wrong. On this issue, the President and the majority of the panel were agreed. It is instructive to note that the award in *Joc Oil* was based in this case not on a claim that formed part of the original submission, but (as in the present case) an alternative general legal restitutionary claim after the claimant's contractual claim was rejected by the arbitral tribunal. Apart from the fact that the reasoning in the Award was not subjected to any criticism here, the only distinction between the facts in *Joc Oil* and the present case is that the new point was formally pleaded by way of amendment after the commencement of the proceedings, and not simply raised in submissions. (This distinction is not material, in my judgment, to the merits of the submission point). The relevant analogy is clear from the following passages in the majority's judgment (at pages 91, 112) :

"*It will be recalled that, after the FTAC ruling that the contract of sale was invalid ab initio, SNE perforce abandoned its contractual claim and formulated a new claim under the general provisions of Soviet law for restitution based on Articles 48 and 473 of the Civil Code. FTAC acceded to SNE's claim which was dealt with in two parts. The first related to the value of the oil and the second to the profits deemed to have been earned by JOC OIL from its unjust acquisition. The first part of the claim was calculated by reference to the contract prices and the amount awarded by the arbitrators was almost the same as that set out in the Statement of Claim. The arbitrators rejected SNE's argument that the oil should be valued at market prices current at the time of the arbitration hearing. The second part of the claim succeeded in the sum of US$96,922,873.42. This was awarded expressly by reference to Article 473 of the Civil Code.*

Against that, background the issue joined between the parties is whether "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of

> *the submission to arbitration." (Section 3(1) and 5(2)(d) of the 1976 Act; and Articles II.1 and V.1(e) of the New York Convention)…*
>
> *… The party resisting the enforcement of a Convention award must prove that the arbitrators have exceeded their authority (Section 5(2)d of the 1976 Act: Article V(1)(c) at the New York Convention). Dr. Van den Berg in commenting on this paragraph of Article V writes:*
>
> > *'As far as the interpretation of Article V(1)(c) is concerned, like the other grounds for refusal of enforcement of Article V, Article V(1)(c) is to be construed narrowly. In any case, the question whether an arbitrator has exceeded his authority should not lead to re-examination of the merits of the award" (Van den Berg ubi sup. p. 313).*
>
> *A United States Court of Appeals, in one of the few decisions involving the defence of Article V(1)(c) (to which reference was made above in dealing with the U.S. cases) said:*
>
> > *'In making this defence … Overseas must therefore overcome a powerful presumption that the arbitral body acted within its powers' (Parsons and Whittemore Overseas Inc. v. Rakta (supra at p. 976).*
>
> *Except in clear cases international comity, in my view, requires the courts of one country to honour and enforce awards of duly constituted tribunals of another country. In my opinion JOC OIL has not displaced the powerful presumption that the FTAC Arbitrators acted within the scope of their authority.*" [emphasis added]

22. It was unarguably clear from the Claimant's Notice of Arbitration and the Consolidated Statement of Claim that that matters referred to arbitration were essentially twofold: (1) was the Respondent liable to pay the sums claimed under the Notes as Notes; or (2) was the Respondent liable to pay the same sums on an alternative legal basis under the Civil Code if the Notes were found to be inoperative as such on technical grounds? The Award answered the first question in the negative and the second question in the affirmative. It did not decide any matters which fell outside the scope of the submission properly defined.

23. Mr. Froomkin, unsurprisingly, cited no authority clearly supportive of this limb of his client's Summons[1] which limb I found to be wholly unmeritorious. It is noted in the

[1] The line between the two limbs of the attack on the Award was itself somewhat blurred, as was the line of demarcation between the Claimant's pleaded case and the alternative case advanced before the Tribunal. Some authorities cited could be read as supporting both the scope of submission and public policy points.

Applicants' Skeleton Argument that Article 16(2) of the Singapore International Arbitration Act requires jurisdictional points to be promptly made and that this challenge was never raised as such before the Tribunal. This may explain why the Award has not been challenged on this ground before the Singaporean courts.

Findings: the public policy complaint

24. The public policy complaint was fleshed out and supported by authority. However, the abstract legal principles which were clearly formulated and conceptually sound floated above, quite detached from, the solid factual foundation of the Respondent's case. The points made may be summarised shortly:

    (a) under Singapore procedural law, a party is bound by his pleadings and his case is limited to the issues raised on the pleadings;

    (b) the Award makes no reference to the Respondent's pleading point;

    (c) the rules of natural justice require a person against whom an adverse finding may be made to be given an opportunity to adduce material which might influence the decision-maker;

    (d) the public policy exception embraces both fundamental principles of procedural as well as substantive law.

25. The Applicants submitted (in response to both the submission scope and public policy complaints that:

    (a) under Singaporean procedural law, pleadings points would be rejected unless material prejudice could be shown and law did not have to be pleaded;

    (b) an Award did not have to expressly deal with every point raised;

    (c) the Respondent had an opportunity to deal with the Article 1316 point and dealt with it. It is a normal part of arbitration practice for the parties' legal cases to evolve;

(d) any breach of the rules of natural justice had to be more than merely technical.

26. I extracted the following principles from the cases that were referred to in argument. Firstly, the function of pleadings under Singaporean arbitration law is similar to the corresponding position under Bermudian law as both jurisdictions are Model Law jurisdictions. Mr Kessaram placed the following case before the Court and I found it to be most helpful in confirming my working hypothesis that every conceivable legal basis for seeking relief did not have to be pleaded if the relevant dispute was clearly set out. In *PT Prima International Development-v-Kempinski Hotels SA* [2012] SGCA 35, Chan Sek Keong CJ, delivering the judgment of the Singapore Court of Appeal (which took a very substantive approach to a pleadings point rather than a technical one) explained the purpose of pleadings in this way:

> "*33 The role of pleadings in arbitral proceedings is to provide a convenient way for the parties to define the jurisdiction of the arbitrator by setting out the precise nature and scope of the disputes in respect of which they seek the arbitrator's adjudication. It is for this purpose that Art 23 of the Model Law provides for the compulsory filing of pleadings as follows:*
>
> *STATEMENTS OF CLAIM AND DEFENCE*
>
> *(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.*
>
> *(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.*
>
> *34 Additionally, Rule 18 of the SIAC Rules (1997 Ed) also provides for pleadings to be filed by the parties. Accordingly, in order to determine whether an arbitral tribunal has the jurisdiction to adjudicate on and make an award in respect of a particular dispute, it is necessary to refer to the*

pleaded case of each party to the arbitration and the issues of law or fact that are raised in the pleadings to see whether they encompass that dispute.

35 Pleadings play a similar role in litigation. A useful summary of the function of pleadings in litigation is provided by Sir Jack Jacob and Iain S Goldrein, Pleadings: Principles and Practice (Sweet & Maxwell, 1990) at pp 2–4 as follows:

> *Pleadings — their dual object in summary*
>
> *Pleadings serve a two-fold purpose:*
>
> *(a) … To inform each party what is the case of the opposite party which he will have to meet before and at the trial; and*
>
> *(b) … Concurrently to apprise the court [of] what are the issues. The identity of the issues is crucial, not only for the purposes of trial, but also for the purposes of all the pre-trial interlocutory proceedings.*

The object of pleadings — in detail

> *(a) … To define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court. …*
>
> *(b) … To require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial. …*
>
> *(c) … To inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment properly made. …*
>
> *(d) … To provide a brief summary of the case of each party, which is readily available for reference, and from which the nature of the claim and [the] defence may be easily apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants or those privy to them.*

36 Although there is an important difference between arbitration and litigation in the sense that arbitration is consensual in nature whereas

litigation is not, the basic principles applicable to determine the jurisdiction of the arbitrator or the court to decide a dispute raised by the parties are generally the same…

38 The established principles in this area of the law are clear. As Lord Normand succinctly stated in Esso Petroleum Co Ltd v Southport Corporation [1956] AC 218 at 238–239:

> *The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. ...*
>
> *...*
>
> *... To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.*

Similarly, in Loveridge, Loveridge v Healey [2004] EWCA Civ 173, Lord Phillips of Worth Matravers MR commented at [23]:

> *It is on the basis of the pleadings that the parties decide what evidence they will need to place before the court and what preparations are necessary before the trial. Where one party advances a case that is inconsistent with his pleadings, it often happens that the other party takes no point on this. Where the departure from the pleadings causes no prejudice, or where for some other reason it is obvious that the court, if asked, will give permission to amend the pleading, the other party may be sensible to take no pleading point. Where, however, departure from a pleading will cause prejudice, it is in the interests of justice that the other party should be entitled to insist that this is not permitted unless the pleading is appropriately amended. That then introduces, in its proper context, the issue of whether or not the party in question should be permitted to advance a case which has not hitherto been pleaded.*

27. Mr. Kessaram submitted that the Singaporean authorities placed before the Court read with the arbitration hearing transcript revealed that the Tribunal properly took the view that the need to plead new facts was more significant than the need to plead a mere point of law. This submission appeared to me in the course of the hearing to be sound, particularly as Singapore is a common law jurisdiction with a broadly similar procedural

framework to Bermuda's. However the validity of the submission is further confirmed by the explicit analysis of a leading Singaporean Practitioner's text, '*Evidence, Advocacy and the Litigation Process*', 2nd edition (LexisNexis: Singapore/Malaysia/Hong Kong, 2003), which was not referred to in argument. At page 345, Professor Jeffrey Pinsler opines as follows:

> "*The advocate need not offer his conclusion of law on the basis of the facts which he has pleaded. However, if he does so, he is not limited to the legal result set down in his pleading, and the court may still come to a different determination on the law. Hence, in Drane v Evangelou*[2]*, the court awarded the plaintiff the damages on the basis of its finding that the defendant had committed a trespass even though this legal conclusion was not specified in the plaintiff's claim. The court's approach was justified because the facts justifying this legal conclusion had been pleaded.*"

28. Mr. Froomkin referred the Court to two insightful *dicta* in cases dealing with the public policy exception and the rules of natural justice as potential instance of a public policy ground for refusing enforcement. In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597; [2006] SGCA 41, Chan Sek Keong CJ, again delivering the judgment of the Singapore Court of Appeal, opined as follows:

> "*59 Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses a narrow scope. In our view, it should only operate in instances where the upholding of an arbitral award would "shock the conscience" (see Downer Connect ([58] supra) at [136]), or is "clearly injurious to the public good or ... wholly offensive to the ordinary reasonable and fully informed member of the public" (see Deutsche Schachbau v Shell International Petroleum Co Ltd [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or where it violates the forum's most basic notion of morality and justice: see Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA) 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report*

[2] [1978] 1 WLR 455.

(A/40/17), at para 297 (referred to in A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

> *In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.*"

29. The latter *dictum* was cited with approval by the Federal Court of Australia (Murphy J) in *Castel Electronics Pty Ltd.-v-TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214. Murphy J provided the following practical guide to the elements of natural justice the breach of which might constitute grounds for refusing to enforce an arbitration award on public policy grounds[3]:

> "*163. In the New Zealand High Court decision of Rotoaira Forest Trust, Fisher J considered the hearing rule in the context of an application to set aside an arbitral award on the grounds of breach of natural justice. His Honour usefully summarised the principles at 463, and I respectfully agree with his approach. His Honour said:*
>
> > *The principles which need to be applied in the present case therefore appear to be the following:*
> >
> > > *(a) Arbitrators must observe the requirements of natural justice and treat each party equally.*
> > >
> > > *(b) The detailed demands of natural justice in a given case 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.*

[3] The award in this case was a domestic award so the heightened pro-enforcement policy considerations arising from the New York Convention were not engaged.

(c) As a minimum each party must be given 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 be given a 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.

(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 judgements 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 it 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."

30. Applying these principles to the highly technical complaints advanced by the Respondent about the arbitration proceeding and the Award, it was clear that the Respondent had not raised any seriously arguable foundation for declining to enforce the Award on public policy grounds. And it was again perhaps unsurprising that the Respondent did not have the temerity to seek to pursue this ground of challenge to the decision of the Singaporean Tribunal before the Singaporean courts.

Conclusion

31. For the above reasons on January 31, 2014 I dismissed the Respondent's application to set aside the Order of Hellman J dated October 9, 2013 granting the Applicants leave to enter judgment in terms of the Award.

Dated this 14th day of February 2014 ________________________

IAN R.C. KAWALEY